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Public Procurement

Public Procurement Consultations

Consultations

- **Consultations**
- **Green Papers**

Consultations

13.09.2004	How Europe can make the most of electronic procurement
14.04.2004	Consultation with the contracting authorities prior to revision of the "remedies" Directives in the field of public procurement
11.03.2004	Directives on review procedures: results of the consultations
04.02.2003	Commission extends the on-line consultation on the operation of remedies in the area of public procurement until 29 February 2004
27.10.2003	Commission consults on how rejected bidders can challenge decisions
24.02.1999	Commission launches consultation round on concessions (24.02.1999) - Draft interpretative communication - Press release

Green Papers

23.09.2004	Defence Procurement	COM(2004)608
04.05.2004	Public Private Partnerships	COM(2004)327
21.05.2003	Services of General Interest	COM(2003)270
27.11.1996	Public procurement in the European Union - Exploring the Way Forward	es da de el en fr it nl pt fi sv
	11.03.1998 Communication from the Commission	[3.3 MB] en

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Public Procurement

⇢ Public Procurement ⇢ Electronic Procurement

Electronic Public Procurement

- **Introduction**
- **Action Plan**
- **Explanatory Document**
- **Report on Functional Requirements for conducting e-procurement under the EU framework**
- **New Standard forms for the publication of procurement notices**
- **Extended Impact Assessment - Commission Staff Working Document**
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  - Country reviews
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  - Baseline Scenario - Consultant report vol. 2
- **Commission e-Procurement Business Survey**
- **State of the Art report - External study for the Commission**
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Introduction

Public procurement is a key sector of the EU economy accounting for about 16% of GDP. Modernising and opening up procurement markets across borders – including through the expansion of electronic procurement - is crucial to Europe's competitiveness and for creating new opportunities for EU businesses.

Using information technology appropriately can contribute to reducing costs, improving efficiency and removing barriers to trade, which will ultimately result in savings for taxpayers. The Directives adopted in March 2004 as part of the public procurement legislative package provide a legal framework aimed at boosting the development and use of electronic procurement.

The Commission has issued an Action Plan in order to help Member States implement the Directives correctly, so as to release the full potential of electronic public procurement. Read the press release.

Communication - Action Plan for e-procurement

Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the

13.12.2004 Regions: Action plan for the implementation of the legal framework for electronic public procurement

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Explanatory Document on the requirements for electronic public procurement - Commission Staff Working Document

15.07.2005 Press release

Requirements for conducting public procurement using electronic means under the new public procurement Directives 2004/18/EC and 2004/17/EC en

Report on Functional Requirements for conducting e-procurement under the EU framework - external study for the Commission (IDABC programme)

Functional requirements for e-procurement – consultant report Vol. I (main requirements) en

Functional requirements for e-procurement – consultant report Vol. II (additional details) en

New Standard forms for the publication of procurement notices

11.10.2005 Press Release

Commission Regulation (EC) No 1564/2005 of 7 September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council

cs da de et el en es fr it lv lt hu mt nl pl pt sk sl fi sv

Commission Directive 2005/51/EC of 7 September 2005 amending Annex XX to Directive 2004/17/EC and Annex VIII to Directive 2004/18/EC of the European Parliament and the Council on public procurement

cs da de et el en es fr it lv lt hu mt nl pl pt sk sl fi sv

The forms will be available in all EU languages by the end of October at the SIMAP website at: www.simap.eu.int.

Extended Impact Assessment - Commission Staff Working Document

13.12.2004 Commission Staff Working Document:
Impact Assessment of the Commission on an Action Plan on electronic public procurement en

Extended Impact Assessment - External study for the Commission

December 2004	Country reviews (extract from Extended Impact Assessment - Baseline Analysis)	en
December 2004	Baseline Analysis - Consultant Report Vol. 1	en [1.2 MB]
December 2004	Baseline Scenario - Consultant Report Vol. 2	en

Commission e-Procurement Business Survey

13.09.2004 Public Consultation by the Commission - Press release
17.01.2005 Results of the consultation de en fr

State of the Art report - external study for the Commission

Case studies on European electronic public procurement projects – consultant report Vol. I	Not yet available
Case studies on European electronic public procurement projects – consultant report Vol. II	Not yet available

Other information

- IDABC - eProcurement
  - Learning demonstrators
  - Data models (XML)
  - Other
- IDA's eProcurement workshop "Paving the way for European Interoperability", 11th May 2004, Brussels
- Multilateral Development Banks - Electronic Government Procurement Website es

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Last update on 17-10-2005

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 13.12.2004

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

Action plan for the implementation of the legal framework for electronic public procurement

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1. INTRODUCTION

This Communication proposes an Action Plan for the implementation of the new legal framework for electronic public procurement adopted in April 2004 as part of the legislative package of Procurement Directives, 2004/18/EC and 2004/17/EC. These provide a coherent framework for conducting procurement electronically in an open, transparent and non-discriminatory way, establish rules for tendering electronically and fix the conditions for modern purchasing techniques based on electronic means of communication.

If online procurement is generalised, it can save governments up to 5% on expenditure and up to 50-80% on transaction costs for both buyers and suppliers. While it is difficult to quantify competition and efficiency benefits for the EU as a whole, greater competition and efficiency in public procurement markets can impact - directly and indirectly - on the whole economy and play an important role in achieving the Lisbon objectives.

However, the inappropriate introduction of e-procurement carries high risks of market fragmentation. The legal, technical and organisational barriers that may result from procurement online are one of the greatest challenges for policy makers.

The consultations as part of the impact assessment conducted by the Commission[1] confirm the need for an Action Plan. Member States, candidate countries and businesses are ready to participate in it. Building upon existing efforts to modernise European public procurement markets and to make these more open and competitive, the Commission proposes measures along three axes:

- *Ensure a well functioning Internal Market when public procurement is conducted electronically;*

- *Achieve greater efficiency in procurement and improve governance;*

- *Work towards an international framework for electronic public procurement.*

2. OBJECTIVES AND ACTION

2.1. Ensure a well functioning Internal Market in electronic public procurement

2.1.1. Implement the legal framework correctly and on time

Member States are required to implement the new legal framework by 31 January 2006, but slippages cannot be excluded. Early adoption of the new e-procurement provisions is essential to avoid barriers to and distortion of competition. It is also very important for the rapid development and the effective use of e-procurement by economic operators. Member States should deploy all efforts to comply with the Directives' deadline.

Erroneous or divergent interpretation of the new rules can create barriers to cross-border trade and ultimately fragment the market. The Commission will monitor transposition closely and encourage appropriate exchanges with the Member States at the draft stage in order to facilitate understanding of the legal framework. It will issue an interpretative document on the

[1] SEC (2004)1639, Extended Impact Assessment for an Action Plan on electronic public procurement, Commission staff working document

legal requirements for e-procurement. At the same, time training demonstrators simulating the new electronic environment will be available to support initiation of administrations and businesses.

- **1st quarter 2005** The Commission issues an interpretative document on the new rules on electronic public procurement
- **1st quarter 2005** The Commission makes online training demonstrators available, allowing contracting authorities and economic operators to familiarise with the new e-procurement provisions and tools
- **2005** The Commission provides appropriate assistance to Member States in transposing the new legal provisions

2.1.2. Complete the legal framework by the appropriate basic tools

Of all notices sent for publication on TED[2], 90 % are still in paper form. The standard forms established by Directive 2001/78/EC have slightly improved the situation. Their processing however still implicates high costs, delaying publication and increasing risks of errors.

The new Directives do not provide for an all electronic notification system; this would not be feasible in the short run given the different levels of development and penetration of electronic means in the Member States. Instead, a phased approach has been chosen. The Commission will adopt in early 2005 a Regulation on standard forms adjusting the existing forms to the elements introduced by the new Directives, e.g. e-auctions, dynamic purchasing systems and buyer profiles. By the end of 2006, the Commission will propose a new generation of structured electronic standard forms to allow for the electronic collection, processing and dissemination of all procurement notices covered by the Directives. This new generation should facilitate the automatic production of summaries in all official EU languages, and should be easy to integrate into all operational e-procurement systems. The establishment of an electronic directory of EU public purchasers should also be considered.

The new Directives make the use of the Common Procurement Vocabulary (CPV), introduced by Regulation 2195/2002/EC, mandatory. Electronic public procurement creates new possibilities for using the CPV, e.g. structuring and analysing procurement expenditure, or the compilation of statistics. Revision of the CPV is under way to adjust it for use in a fully electronic environment. To this end, a study was launched to which Member States and interested parties will be invited to actively contribute. If successfully completed it should lead to a world class international classification model for public procurement contracts.

- **In early 2005** The Commission adopts new Standard Forms taking account of new procedures and the use of electronic means of communication.
- **By early 2006** The Commission presents proposals for revising the Common Procurement Vocabulary based on the results of the review study currently under way
- **By end 2006** the Commission presents a blueprint for a fully electronic system for the collection and publication of procurement notices on TED
- **By end 2007** Member States implement fully electronic systems at national level including appropriate tools for automated collection and publishing in TED

[2] 'Tenders Electronic Daily', the EU official website which publishes all notices covered by the Procurement Directives.

2.1.3. Remove / prevent barriers in carrying public procurement procedures electronically

Barriers businesses fear most in cross-border tendering are inappropriate design of tendering systems and incompatible IT standards. Diversity and incompatibility of technical solutions can render suppliers' access to e-procurement systems impossible or discourage their participation because of additional difficulties or increased costs. Barriers may exist in terms of functional as well as technical characteristics.

In moving procurement online Member States should at all stages be guided by the basic concept that means of communication and tools used in electronic public procurement systems be non-discriminatory, generally available and interoperable and by no means restrict economic operators' access to the tendering procedure.

To prevent the emergence of e-barriers, Member States should use the results of the Commission's functional requirements analysis undertaken by IDA[3] when drafting legislation and designing e-procurement systems. The results of the project will be validated by the Commission and the Member States in light of the interpretative document to be issued by the Commission in 2005.

To build up confidence in e-procurement, the development of compliance verification schemes should be promoted. The Commission strongly recommends that Member States, in accordance with the Directives, introduce or maintain voluntary accreditation schemes to ascertain that e-procurement systems conform to the requirements of the Directives. A European scheme which would build on and integrate national schemes would seem desirable to ensure the smooth functioning of the Internal Market. The Commission and Member States should examine through a feasibility study the development of such a *TRUST* (*T*ransparent *R*eliable *U*nhindered *S*ecure *T*endering) scheme based on the functional requirements.

Some horizontal problems also threaten to negatively affect the functioning of the Internal Market and the initiation of e-procurement. Potential difficulties relate to the use of advanced electronic signatures, in particular signatures based on a qualified certificate and which are created by a secure-signature-creation device (hereafter 'qualified signatures').

The new Directives do not define which type of e-signature should be used in electronic tendering. Thus Member States - who have different legal signature concepts – may choose the level they require in conformity with the e-signatures Directive 1999/93/EC. However, the Directives oblige any public purchaser in the EU to effectively recognize, receive and process tenders submitted, if required, with a qualified signature and their accompanying certificates, regardless of their origin within the EU or their technical characteristics, and even when they contain documents of different origins (i.e., from a consortium of suppliers) and possibly bear signatures of different levels from different sources (i.e., from different national authorities).

This makes e-procurement the first sector in which businesses use qualified signatures in transactions with public authorities in a Member State other than their home country. The existing significant differences between qualified signatures as required by some Member States should therefore be reason for great concern. The interoperability problems detected

[3] 'Interchange of data between administrations' programme

despite the existence of standards[4], and the absence of a mature European market for this type of signatures pose a real and possibly persistent obstacle to cross-border e-procurement[5].

A project called Bridge/Gateway CA was launched under the IDA programme in 2002 to address the issue of recognition and trust of electronic certificates issued by different Certification Authorities (CAs) in the framework of exchanging secure e-mails and signatures between different national administrations. The results of the Bridge/Gateway CA Pilot, including recommendations on technical, organisational and operational aspects of such operational schemes, should be available by mid-2005. Although addressing some issues related to e-procurement, it would not, however, be enough to resolve the problems described above before the 2006 deadline. Building on the current efforts, Member States and the Commission, hearing industry's views, should work together on an operational project to rapidly find a solution based on the mutual recognition principle. At this stage, the Commission would favour a solution to test and promote solutions enabling cross-border use of qualified signatures. Any solution identified should be easy to generalise also in other fields of activity. In the meantime, the Commission recommends that Member States examine any appropriate transitional measures, e.g., confirmation in paper form for tenderers whose electronic signature does not correspond to the required one.

Lack of generalised and interoperable e-ordering and e-invoicing tools across the Internal Market also creates obstacles to the equal participation of suppliers in cross-border procurement. At present, these types of transactions are little used in practice and on an optional basis only. The Commission will continue monitoring the situation while solutions are being sought in the framework of standardisation activities undertaken by the EU.

- **In 2005** Member States and the Commission test, refine and validate the results of the IDA common functional requirements for e-procurement systems, based on the 2004 IDA study on common functional requirements
- **Early 2006** Member States review whether all operational e-procurement systems have been adjusted to the requirements of the Directives
- **By mid-2005** Member States introduce national accreditation schemes to verify compliance of electronic tendering systems with the legal framework
- **By end 2005** Member States and Commission consider through a feasibility study whether to introduce a European compliance verification scheme
- **In 2005-2006** The Commission proposes an action under the IDABC programme to help Member States coordinate implementing the use of advanced qualified signatures to resolve interoperability problems[6]
- **By 31 January 2006** Member States apply, if required by national law, interoperable qualified electronic signatures

[4] Pursuant to Directive 1999/93/EC, technical standards have been promulgated within ETSI ESI and CEN/ISSS e-Sign Workshop.

[5] For a detailed analysis see "The legal and market aspects of electronic signatures", Study for the European Commission, Interdisciplinary Centre for Law and Information Technology, CUL, Leuven, Oct. 2003.

[6] The European Parliament and the Council formally adopted on 21 April 2004 Decision 2004/387/EC establishing the new IDABC Programme. Building on the achievements of the preceding IDA programme its aim is to identify, support and promote the development of interoperable pan-European e-Government services as of 2005.

2.1.4. Detect and address interoperability problems over time

In light of the above, it is clear that interoperability problems are persisting or may still emerge. Some have already been detected and appropriate actions have already been induced; others should be discovered through the gap analysis on interoperability needs in e-procurement currently carried out by CEN/ISSS[7]. However, interoperability should remain a constant concern. Technical and operational developments make it necessary to continuously revise and improve existing systems covering all stages of the purchasing cycle. Standards in the area are market-driven. Relevant input from RTD projects in the area of e-government should also be considered. Governments must follow and work on interoperable solutions through dialogue between the different parties involved either at national or European level and trail developments in business-to-business (B2B) electronic commerce in order to avoid driving a wedge between private and public procurement markets.

The Commission will continue to monitor the situation with respect to the emergence of interoperability problems in the Internal Market and in international trade and, if appropriate, consider issuing standardisation mandates. It would be desirable to continue current work in the IDA e-Procurement workshop and to continue monitoring developments so as to share information on specifications and good practices.

- **By 1st quarter of 2005** CEN/ISSS completes gap analysis on interoperability needs for effective electronic public procurement
- **2005-2007** The Commission proposes to continue activities on electronic public procurement under the IDABC programme for exchange and discussion on interoperability issues and monitoring of Member States developments
- **2005-2007** The Commission and Member States promote standardisation activities at European level and liaise with international standardisation bodies

2.2. Achieve greater efficiency in procurement, improve governance and competitiveness

2.2.1. Increase efficiency of public procurement and improve governance

Moving public sector procurement online requires legal, institutional and organisational changes at many levels. Member States will have to decide on the type and scope of purchases to computerise, the policies to implement, the systems and tools to use and the level of administrations involved. The risks of failure are not negligible. It is therefore essential to plan and monitor these efforts.

Greater efficiency will depend on the degree of automation in the field of public procurement as a whole, although a phased development of e-procurement is most likely to maximise benefits for both the public and the private sector. The Commission invites all Member States to transpose into national law all aspects of the legislative package in a comprehensive manner. Governments should, however, be able to modulate and adjust implementation of the new electronic tools and techniques over time. In particular, they should pay attention to potential excessive or abusive centralisation of purchases, inappropriate use of electronic auctions and preferences for closed purchasing systems (e.g. framework agreements) over open systems. Such practices may cancel out the benefits from increased efficiency.

To optimise benefits, Member States should establish national plans to be complemented by individual plans especially for their most powerful buyers. Setting uniform targets and ways

[7] Centre Européen de Normalisation/Workshop on Information Society Standardisation Systems

for generalising e-procurement would not be expedient, as conditions in each Member State vary considerably. The Commission should assist Member States in this exercise where appropriate and facilitate the dissemination and sharing out of information. It will also monitor developments through appropriate indicators using data from the TED database. The Public Procurement Network established in Copenhagen in January 2003 could provide a forum for the exchange between Member States.

Increased efficiency depends also on the automation of certain types of transactions such as invoices, orders and payments. Today at an early stage, their development is likely to pick-up driven by standardisation and automation of financial and budget systems. Following a mandate from the Commission, CEN/ISSS has assessed standards requirements and is finalising detailed guidance material on the implementation of Directive 115/EC/2001 on electronic invoices. In addition, IDA is running a project for developing XML schemas for e-procurement, including e-invoicing and e-ordering. Efforts in this area should be pursued in view of achieving interoperable solutions.

National policies can hardly be developed in the appropriate quality without a detailed picture of procurement markets. Existing statistical information is mostly incomplete and data collection mechanisms are poorly organised. E-procurement presents the opportunity to remedy this situation. The Commission will mobilise the Advisory Committee on Public Contracts (ACPC) and the Working Group on Statistical Information to fully exploit the introduction of e-procurement new technologies.

- **By end 2005** Each Member State prepares a national plan for introducing electronic public procurement setting measurable performance targets, taking account of the specific national needs
- **By end 2005** Each Member State encourages preparation of similar plans by individual national buyers and to coordinate and monitor their implementation
- **In 2005-2006** The Commission continues monitoring work on e-invoices by CEN/ISSS and proposes the continuation of XML activities undertaken in 2003-2004 on e-invoices and e-ordering under IDABC
- **By end 2006** Member States set up efficient electronic systems for the collection and processing of statistical procurement data

2.2.2. *Increase competitiveness of public procurement markets across the EU*

The Commission’s online consultation of businesses identified transparency as a major aspect of computerisation of public procurement, together with confidence in the fairness of awarding procedures. Electronic means offer more transparency as they allow for easy and timely dissemination of contract information and reduce opportunities and incentives for fraud. They can also improve the quality of government procurement management, including monitoring and decision-making. Practices for disseminating contract related information may differ among Member State as well as requirements for traceability and auditing of e-procurement operations. The Public Procurement Network could play an active role in exchanging information and practices on those issues. The Commission could support a benchmarking exercise with a view to compare and measure performances.

The majority of businesses consider that online procurement should require less effort than traditional procedures. National administrative provisions and guidelines regulating procurement procedures have been conceived with a view to the handling of operations in paper form. Electronic means offer new opportunities to streamline procedures and save suppliers time and money. Success depends on the degree of transformation of off-line practices to fully fledged online services. This requires re-thinking the service provided and re-engineering the different processes.

To generalise e-procurement, it is important that all steps are taken to reduce the regulatory burden. Standardising and restructuring business documents as well as more uniform tendering documents should help automating certain purchase routines and allow both sides to concentrate on the substance of the purchase.

A typical example of red tape concerns the numerous certificates and business documents required. These are rarely available in electronic form. Additionally, they need to be usable and acceptable across borders. The Commission and Member States should analyse and compare results achieved in this area at national level in the framework of the ACPC with a view to agreeing in early 2006 on a common set of electronic certificates, at least for some of those most frequently required. E-procurement would be an excellent test base for the development of such e-government services. The Commission will propose this line of action to Member States.

The use of e-catalogues is another major issue. Their deployment is important in particular for involving small and medium-sized enterprises (SMEs) in public procurement. Current applications make it possible for enterprises to present their products and services to contracting entities at reasonable cost, time and effort. Lack of uniform specifications and standards for e-catalogues means that there is a risk of IT applications on the market not meeting requirements of the public sector. Work to prepare framework standards for cataloguing is under way in a specific CEN/ISSS workshop. Building upon the IDA functional requirements project, the use of e-catalogues in dynamic purchasing systems and e-procurement framework agreements could be further studied and tested.

Finally, businesses expect e-procurement to increase contract opportunities, facilitate cross-border market access and make procurement procedures faster and cheaper. Public e-procurement represents a great potential for SMEs. In order to encourage those SMEs interested in public contracts, Member States have every interest to promote standard e-procurement systems based on existing and simple technologies and to tailor contract opportunities so as to not exclude SMEs.

- **2nd half 2005** The Commission considers proposing services for the electronic supply of business information and certificates in public procurement for implementation under the IDABC programme
- **In 2005-2006** Member States and the Commission agree on a common set of frequently required electronic certificates for use in e-procurement procedures
- **In 2005** The Commission proposes launching a study on e-catalogues in dynamic purchasing systems and electronic framework agreements using work by CEN/ISSS under the IDABC programme
- **In 2005** The Public Procurement Network launches a benchmark exercise on transparency, auditing and traceability of e-procurement systems
- **In 2006** The Public Procurement Network organises workshops to promote exchanges on tender document standardisation
- **2005-2007** Member States launch and support specific awareness campaigns and training programmes targeted at SMEs at national and regional level

2.3. Work towards an international framework for electronic public procurement

While e-procurement develops worldwide, the existing international agreements do not regulate its use. Legal and technical choices in e-procurement systems may reduce procurement opportunities for EU businesses in third countries, as well as restrict access of third country suppliers to the EU market. The Commission will monitor developments to ensure that implementation of the new EU procurement regime fully respects the international obligations of the Union, while accordingly taking initiatives to adapt international disciplines. It will also follow attentively current and future international standardisation initiatives.

The Commission will also consider any adjustments necessary and the feasibility of e-procurement in the context of the EU's external aid instruments. It already cooperates closely with international bodies such as the World Bank to ensure that execution of purchases financed by these in third countries does not hinder EU suppliers. Finally, it will take all appropriate measures aimed at sharing EU experiences and achievements with developing countries.

- **In 2005** The Commission pursues negotiations on the review of the Government Procurement Agreement (GPA)
- **In 2007** The Commission takes initiatives in the GPA to progress towards utilisation of a single common nomenclature for the classification of procurement goods and services
- **In 2005-2007** The Commission promotes the activities of and liaises with international standardisation bodies and fora to avoid emergence of technological interoperability barriers at international level
- **In 2005-2007** The Commission cooperates with the Multilateral Development Banks (MDBs) network in view of co-ordinating technical assistance to third countries supporting re-organising and computerising their public procurement regimes
- **In 2005** The Commission considers any adjustments necessary and the feasibility of e-procurement in the context of the EU's external aid instruments

3. IMPLEMENTATION OF E-PROCUREMENT ACTION PLAN AND MONITORING

In the long run, computerising public procurement practices will impact on the way in which national public purchasing practices are organised. Successful implementation of e-procurement may require changing administrative practices, not only those directly linked to the procurement process, but also indirectly, such as budgetary reviews. The sooner such reforms are implemented, the better for Europe’s citizens and businesses. The Commission considers that the Action Plan measures provide the best possible blend in order to fully exploit the potential benefits from moving public procurement online while minimising risks. Candidate countries will be closely associated with the implementation of the Action Plan.

The Commission assisted by the Advisory Committee for Public Contracts will monitor overall progress. By end of 2007, the Commission will review the situation and report on the results achieved; it will propose at any time, if need be, corrective action or additional measures.

IP/05/66

Brussels, 19 January 2005

Public procurement – Commission sets out Action Plan to move public purchasing in Europe online

The European Commission has published an Action Plan on electronic public procurement to assist Member States in implementing the new Procurement Directives adopted in 2004. The objective is to enable any business with a PC and an internet connection to bid for public contracts electronically anywhere in the EU, based on clear conditions and procedures and with all the necessary security. The Directives provide for the first time a coherent EU framework for the transparent and non-discriminatory use of electronic means in public procurement, which will help make procurement more competitive and efficient. As public procurement accounts for over 16% of the EU economy (see IP/04/149), opening up procurement markets can significantly boost competitiveness and reduce government spending.

Single Market Commissioner Charlie McCreevy said: "Electronic procurement means real benefits for buyers, suppliers and, most importantly, for the taxpayers who ultimately fund public purchases. We already have the necessary legal framework but it needs to be implemented correctly if new barriers are to be avoided. This Action Plan is an excellent roadmap to make e-procurement work in practice and to reap the full benefits of an enlarged Single Market".

Moving public procurement online promises substantial savings on expenditure and transaction costs for buyers and suppliers. However, it is a complex operation and experience of e-procurement is limited. Inconsistent implementation, with different rules and incompatible systems in different Member States, could hinder its uptake. There is a risk of new 'e-barriers' in cross-border trade or in government-to-business and business-to-business procurement.

The Action Plan, prepared in close association with Member States and businesses, sets out how the Commission and Member States can best implement the e-procurement aspects of the new Directives. For this the Action Plan sets an ambitious timetable for 2005 – 2007.

As a first step, the Commission will issue an interpretative document and a list of functional requirements, to ensure e-procurement systems in all Member States comply with the same basic legal and technical rules and are compatible with each other. Member States are invited to set up comprehensive national plans for a rapid adoption of the Directives and a tailored transition to e-procurement, including measurable performance targets.

Further steps include the development of a new generation of online standard forms for the publication of notices and an improved product classification (CPV) compatible with e-procurement. The development of interoperable technical standards, such as for advanced electronic signatures, will be promoted.

To make life easier for suppliers, there will be specific measures to cut red tape, for example by agreeing on electronic certificates that every public purchaser usually requires and on standards for electronic catalogues.

The Action Plan aims to modernise the general procurement environment and encourages Member States to automate steps in all phases of the procurement cycle. It does not take a 'one-size-fits-all' approach but supports Member States in designing e-procurement solutions adapted to their needs, in line with the Directives.

View full Action Plan at:

http://www.europa.eu.int/comm/internal_market/publicprocurement/e-procurement_en.htm

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 8.7.2005
SEC(2005) 959

COMMISSION STAFF WORKING DOCUMENT

Requirements for conducting public procurement using electronic means under the new public procurement Directives 2004/18/EC and 2004/17/EC

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1. INTRODUCTION

The introduction of electronic means in the public procurement process raises a number of legal questions. However, few of these are new or specific to the use of electronic means: most deal with the issue of how to organise electronically procedures initially designed for paper. Electronic public procurement (hereafter e-procurement) is therefore firmly rooted in a well understood legal framework which provides the principles and rules which regulate the awarding process. The basic guiding principle is that in the absence of specific provisions to the contrary the use of electronic means does not change any of the steps of the relevant procedure.

The *rationale* for the legal provisions specifically devoted to e-procurement in the new public procurement Directives (Directive 2004/18/EC[1] and 2004/17/EC[2]), is that each and every economic operator across the Union should be able to participate, with simple and commonly used equipment and basic technical know-how, in a public procurement process which takes place partially or entirely by electronic means.

The aim of this document is to present the rules and principles governing e-procurement under the new public procurement Directives. First, the general rules and principles and the features that are relevant to all communications in an e-procurement process will be examined. Second, the rules governing notices and access to contract documents will be presented. Third, the rules related to the reception of requests to participate and tenders will be analysed in relation to both, individual "one-off" purchases and to repetitive purchases under framework agreements and dynamic purchasing systems. Finally, the new purchasing technique of electronic auctions will be examined more closely, followed by a consideration of the main features of the electronic dynamic systems.

This analysis will cover those aspects of a procurement procedure that are regulated by the Directives, i.e. from the publication of the contract notice to the receipt of tenders, and the re-opening of competition.[3] Other aspects of the procurement cycle that may also impact on e-procurement (i.e. electronic invoicing, electronic payments etc.) are addressed by other relevant Community policies and legislation and discussed in the Commission Action Plan on e-procurement (COM 2004/841/EC).

As electronic procurement processes and methods are under constant development, the Directives do not pretend to regulate in detail the use of all such methods. Other electronic purchasing techniques may be used, "providing such use complies with the

[1] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures fro the award of public works contracts, public supply contracts and public service contracts, L 134, 30.4.2004, p.114.

[2] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30.4.2004, p. 1.

[3] A project was initiated under the Commission's IDA programme and is currently continued under the new IDABC programme translating the legal framework into functional requirements, so as to facilitate technical implementation of operational systems for conducting electronic public procurement (http://europa.eu.int/idabc/eprocurement).

rules drawn up under this Directive and the principles of equal treatment, non-discrimination and transparency" (cf. recitals 12 and 20).

2. RULES APPLICABLE TO COMMUNICATIONS

2.1. Electronic means of communication and their use in the procurement process

2.1.1. Electronic means of communication

The new public procurement Directives define electronic means as those using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means (Article 1(13) of Directive 2004/18/EC and Article 1(12) of Directive 2004/17/EC).

Electronic means of communication typically rely upon a network which is able to handle and transmit digital signals. According to Articles 42(2) and 48(2)[4] the chosen means must be generally available and thus not restrict access to the tendering procedure. This means that the network in question must be open and everybody must be able to connect to it.

Today such generally available electronic means of communication would include Internet and e-mail. However technology is constantly and rapidly evolving. In order to define generally available means, it is preferable therefore not to interpret the provision restrictively in terms of a specific standard but rather to try to identify the relevant criteria.

These are most obviously the geographic coverage, the terminal equipment and the formalities/procedures needed for connection to the network, the level of ICT literacy required and the costs involved. If a means of communication implies a connection to a network which is not available everywhere and to everybody and/or the use of equipment which is not in common use (i.e. satellite communication today) and/or the costs of which are unreasonably high for the use to which it is destined, the means cannot be deemed to satisfy the requirement of general availability.

Therefore, only a pragmatic approach focusing on the obligation not to restrict the operators' access to the tendering procedures will help contracting authorities to determine if the chosen means of communication is indeed generally available and thus satisfies the first requirement of the Directives.

Freely available and reliable access to the contracting authority's connection to an open network is another important factor needed to guarantee that access to the tendering procedure is not restricted and to ensure equal treatment and effective competition.

[4] The reference is hereunder always made first to the relevant article of Directive 2004/18/EC immediately followed by the reference to the corresponding relevant article of Directive 2004/17/EC, unless otherwise indicated.

Since the Internet is available 24 hours a day, the access to most operations (browsing, registration, downloading of documents, submission of requests to participate or tenders) should in principle be available round the clock. Reasonable access limitations can be envisaged, mainly for maintenance reasons; however they should never extend into normal business hours. In contrast, those operations that require interaction (i.e. e-auctions) may only be accessible during normal business hours. Only if tenders are to be collected in real time, as in some e-auctions, might it be necessary to modify opening hours in order to allow all tenderers to participate. To avoid any ambiguity the deadline for submitting offers should be clearly specified, i.e. with reference to Coordinated Universal Time (UTC) or by adding "local time".

The contracting authority's system should also be set up so as to provide adequate protection against unauthorised actions aimed at disrupting its normal operation and so as to provide a reasonable level of protection and guarantee of security to economic operators.

Technical problems within the contracting authority's network, service disruptions and system failures may impede access to contract documents, or may disrupt the procurement process at a critical moment (e.g. during the transmission of requests for clarification or the corresponding answers, during receipt of tenders or requests to participate, or during auctions). Problems within the public or open network and problems specific to the device or the platform of the contracting authority should be distinguished: only in the latter case must the contracting authority remedy the failure by, for example extending the deadlines and providing the relevant information to all interested parties. The contracting authority is not responsible for the open network failure and is not obliged to take any remedial actions, even though it may do so where this seems appropriate (respective disclaimers may be included in an appropriate location).

The new provisions on e-procurement do not address the issue of charges for accessing the contracting authority's system. It is reasonable to envisage that each party covers its own costs. Economic operators would bear the communication costs to access the procurement system or the costs of obtaining a digital signature. Contracting authorities would bear the cost of the system for receiving tenders and for making available the contract documents. Depending on the services offered by the system (alert mechanisms, database management etc.) certain fees could be charged to economic operators, except where dynamic purchasing systems are involved, provided that such fees are justified, proportionate and do not discriminate or restrict access to the procurement procedure.

2.1.2. *The use of electronic means in the procurement process*

Electronic means are for the first time put on par with traditional means of communication (Recitals 35 and 46; Articles 1(12) and 1(11)).

Contracting authorities may decide that all communications and exchanges of information with economic operators will be performed exclusively by electronic means (Articles 42(1) and 48(1)) or by a combination of electronic means and paper. If a combination is chosen it may continue in parallel at every stage of the procedure, or in successive stages in which only one or the other is used (e.g. only electronic means for the request of contract documents and only traditional means for the submission of tenders). Contracting authorities can also leave the choice of means up to economic operators.

The right of contracting authorities to choose the means of communication is nonetheless limited by the Directives:

- The receipt of documents, certificates and declarations that do not exist in electronic format must be organised following the traditional procedures on paper (Articles 42(5)(d) and 48(5)(d))[5];
- Some procuring methods/instruments such as auctions and dynamic purchasing systems (hereafter DPS) may only be conducted by electronic means (Articles 1(7) second indent and 1(6));
- When there are reasons to believe that, due to the volume and/or complexity of the data to be submitted, the communication, exchange and storage of it cannot be properly handled by electronic means, and therefore the requirements of Articles 42(3) and 48(3) are not satisfied, they should be handled by traditional means of communication. In such cases data shall be exchanged on physical supports like paper or generally used supports for electronic storage of data such as floppy disks, CD-ROMs or memory sticks.

2.2. Tools for communicating by electronic means

Articles 42(4) and 48(4) provide that the tools for communicating by electronic means, as well as their technical characteristics, *must be non-discriminatory, generally available and interoperable with the information and communication technology products in general use*.

2.2.1. General availability and non discrimination

The pragmatic approach described above for determining the general availability of the chosen means of communication also applies to the tools to be used for communicating by electronic means.

In contrast to electronic means, electronic tools do not imply the presence of a network. The term refers to products, mainly software products, which are used by contracting authorities and economic operators in order to communicate effectively. The requirement for electronic tools to be generally available is therefore slightly different. Bearing in mind that the guiding principle is always that whoever can have access to the Internet via a normal computer with standard applications and programs shall be able to participate in the public procurement procedure, two different cases may occur.

The tool for communicating has to be owned by the economic operator: in this scenario the necessary tool must be off-the shelf software which is easy to buy (available everywhere at a cost which is proportionate to the use to which it is

[5] It must be noted that economic operators shall in any case respect the time limits set by the contracting authority and submit the certificates that exist only on paper before the expiry of the deadline.

destined), easy to install if need be, and reasonably easy to use. The general principle of proportionality can be used to assess the level of technical knowledge the tool requires (i.e. when procuring computer services or products, the contracting authority may probably require a higher level of ICT literacy from potential suppliers).

The tool is made available by the contracting authority to the interested economic operators: this is mainly where the chosen tool would not be "easy to buy" for economic operators. However, this apart, the same requirements of general availability and non-discrimination will apply as for a tool owned by economic operators. This is also the case where the requirement of interoperability is more important.

The level of ICT literacy required for using the tool should be considered. If the contracting authority can choose between two families of software for presenting drawings and plans, the exclusive choice of one of them could benefit some operators to the detriment of others. In such cases, in order to comply with the requirement of non-discrimination, if the contracting authority really cannot accept both tools it should consider providing longer time limits to allow economic operators to get acquainted with the tool.

Finally, and without prejudice to the right of the contracting authority to require tenders to be drafted in its own language (Annexes VII A (12)(d) and XIII A (10)(c)), the issue of the language of the tool should be taken into account by the contracting authority. Software in or at least the presence of some minimum indications in another language may be advisable to facilitate the installation and use of the tool made available by the contracting authority, to facilitate access to contract documents or uploading of tenders especially when complex instructions are needed.

2.2.2. *Interoperability of the tools for communicating by electronic means*

'Interoperability' is used here to refer to the capability of ICT systems (and of the business processes they support) to exchange information or services directly and satisfactorily between them and/or their users, so as to operate effectively together. This requires the capability to provide interchange of electronic data among, e.g. different signal formats, transmission media, applications or performance levels.

Interoperable tools permit unhindered communication between different and distinct systems, bringing together heterogeneous technologies and software. This is the case, i.e. when suppliers connect to a contracting authority's system, electronically access tender documents from a mainframe, or upload an offer by connecting to a different application written in a different programming language.

Different and incompatible technical solutions – lack of interoperability - can render suppliers' access to e-procurement systems impossible or discourage their participation because of additional difficulties or increased costs. Barriers may arise in terms of either functional or technical characteristics, or both, of the systems and tools used. These barriers should be addressed on a case by case basis.

For the purposes of the legal framework, the requirement of interoperable electronic tools is that the chosen tool must be able to function and to interact with commonly used equipment and applications, i.e. allowing the main functionalities for communicating and exchanging data with basic office tools. It does not mean that it must be interoperable which each single specific application of economic operators' electronic equipment.

The legal framework is technology-neutral and does not distinguish between open source and commercial products as long as they are interoperable with information and communication technology products in general use.

2.3. Integrity and security of data

Articles 42(3) and 48(3) determine the conditions to be fulfilled by the chosen means of communication during the communication, exchange and storage of information. These conditions have to guarantee the data-integrity and confidentiality of tenders or requests to participate, and ensure that they are kept securely locked away until the deadline set for their opening.

These are not typically conditions specific to electronic means, because they also apply traditionally to paper based communication, exchange and storage of information. *Ad hoc* solutions may be required, however, in order to meet these conditions in an electronic environment.

In particular, neither signatures nor encryption should be used by economic operators unless they are invited to do so by the contracting authority. Member States may regulate the level of electronic signature required and restrict the choice of contracting authorities to qualified signatures (Articles 42(5)(b) and 48(5)(b) and Annexes X and XXIV). In any case the provisions of Article 5 of Directive 1999/93, in particular its Para. 2[6] apply.

Secure channels (https, SSL) and/or encryption may be used to preserve the data-integrity and the confidentiality of tenders and requests to participate, although encryption may require higher levels of ICT literacy from economic operators. In any case in order to comply with the general principles of non discrimination, general availability and transparency as well as Articles 42(5)(a) and 48(5)(a), information about encryption must be made available to interested parties together with all necessary information regarding the specifications for the electronic submission of tenders and of requests to participate.

[6] "Article 5 Legal effects of electronic signatures

1. Member States shall ensure that advanced electronic signatures which are based on a qualified certificate and which are created by a secure-signature-creation device:

(a) satisfy the legal requirements of a signature in relation to data in electronic form in the same manner as a handwritten signature satisfies those requirements in relation to paper-based data; and

(b) are admissible as evidence in legal proceedings.

2. Member States shall ensure that an electronic signature is not denied legal effectiveness and admissibility as evidence in legal proceedings solely on the grounds that it is:

- in electronic form, or
- not based upon a qualified certificate, or
- not based upon a qualified certificate issued by an accredited certification-service-provider, or
- not created by a secure signature-creation device."

Contracting authorities may refuse to accept messages which could harm their system or their reception devices and they can take appropriate steps to this end[7]. Information on the antivirus mechanism should preferably be specified on the website and in the contract documents. Antivirus checks are normally operated upon receipt of the message. However, concerning a message that is a tender (or a request to participate) the antivirus check shall be conducted in a way that guarantees the confidentiality and the inaccessibility of the tender before its formal opening as required by Articles 42(3) and 48(3) and annexes X and XXIV. When this is not possible, the antivirus check shall be conducted upon the formal opening of tenders.

Whatever the solution, the senders of messages which are rejected because they are infected by a virus should be instantaneously informed in order to allow them, where possible, to re-submit the message within any deadlines that may be in force. No re-submission after the expiry of a deadline shall be allowed.

These requirements are further developed in section 4.1.2 with specific reference to the devices for receiving tenders, requests for participation, and plans and projects in design contests.

2.4. Traceability

Contracting authorities shall take appropriate steps to document the progress of award procedures conducted by electronic means (Art. 43, second indent and 50(1) last indent).

This requirement of traceability must be understood as referring to each stage of the procurement process conducted electronically, including the stage at which contract documents are made available.

There should be equipment and functionalities in place to maintain the original version of all documents and a true and faithful record of all exchanges with economic operators in order to provide any of the evidence which might be needed in case of litigation.

For the secure locking of tenders until the expiry of the deadline for the submission and the protection of data against unauthorised access, the traceability of operations, including the exact time and date of receipt of data is very important.

Traceability should make it possible to verify what message/data has been transmitted or made available, by whom, to whom, and when, including the duration of the communication. It should also be possible to reconstitute the sequence of events including any automatic data processing or automated calculations.

While it is not mandatory to record who visited or accessed contract documents over the open network, this may well be advisable. Contracting authorities generally welcome functionality capable of identifying who has accessed the contract documents and provided such identification is kept to a minimum, this is admissible.

[7] A document infected by a virus could also be sent by the contracting authority or hosted in its website. In case this occurs, the correspondent stage of the procedure should be cancelled and reinitiated.

The traceability of operations should also make it possible to establish whether the site hosting the procurement process has been compromised or tampered with.

3. NOTICES AND ELECTRONIC ACCESS TO CONTRACT DOCUMENTS

Providing for the electronic submission of notices to the Office for Official Publications of the European Communities and the electronic access to tender documents allows contracting authorities to significantly save time in the procurement process; in both cases, time-limits can be reduced for the procedure as a whole.

3.1. Electronic submission of notices to the Commission

If sent electronically to the Publications Office, procurement notices are published on TED[8] within five days of being sent, instead of the current twelve days (Art. 36(3) and 44(3)). The time limits for the receipt of tenders and for the receipt of requests to participate can consequently be shortened by seven days (Art. 38(5) and 45(3)). This applies to all procedures, including the competitive dialogue.

To effectively achieve publication in such a short time, the notices have to be sent in the format required by the Directives, using the standard forms available for this purpose (Art. 35(1), 36(2), Annex VIII points 1, 3 and Art. 41(1), 44(2), Annex XX points 1, 3)[9]. Currently, this refers to the standard forms contained in Directive 2001/78/EC. These will be replaced by a new set of forms in the forthcoming Regulation on Standard Forms, to be adopted as an Implementing Measure of the Commission. The templates for these standard forms are made available online in the SIMAP website (http://www.simap.eu.int) as well as technical documentation for sending notices in structured electronic format (XML).

In order to correctly identify in the standard forms the goods or services to be purchased, the Directives make mandatory the use of the Common Procurement Vocabulary (CPV) (Art. 1(14), 35 (1)(a) and Art. 1(13), 41(1)).

In addition, contracting authorities are encouraged to have and maintain an Internet website, the so called "buyer profile", where they may publish prior information notices (in this case, a notice of the publication on the buyer's profile shall be sent electronically to the Publications Office), and other notices also published by the Publications Office, as well as specifications and additional documents (Art. 35(1), Annex VIII points 1, 2 and Art. 41(1), 44(5), Annex XX points 1, 2). The buyer profile may also include information on ongoing invitations to tender, scheduled purchases, contracts concluded, procedures cancelled and any useful general information, such as the contact details of the contracting authority (Annexes VIII and XX point 2(b)).

[8] Tenders Electronic Daily, the EU electronic publication board (http://ted.publications.eu.int).

[9] The standard forms in the most frequently used electronic formats are available on the website. The Commission envisages organising soon the electronic submission of notices only in a structured XML format.

3.2. Electronic access to tender documents by economic operators

Tender documents can be either made available to, or sent to, economic operators by electronic means. In both cases all the rules on electronic communications apply.

The choice between these two possibilities belongs to the contracting authority except in dynamic purchasing systems, for which it is mandatory to offer unrestricted and full direct electronic access from the date the notice setting up the system is published until the expiry of the DPS (Art. 33(3)(c) and 15(3)(c)).

3.2.1. Unrestricted and full direct access to tender documents by electronic means

Electronic availability of tender documents can be provided in various ways, which must be indicated in the notice.[10] However, only the provision of *unrestricted and full direct access by electronic means* entitles contracting authorities to shorten the time limits as prescribed by Articles 38(6) and 45(6).

To achieve unrestricted and full direct access to the contract documents *all* relevant documents must be accessible round the clock, from the date of publication of the notice until the expiry of the deadline for submitting tenders (or the expiry of the DPS) at the website indicated in the notice itself, without any intermediary stage. This means i.e. that if an access fee has to be paid then payment can take place instantaneously (i.e. at present by accepting all common international payment cards). No other way of making available the tender documents electronically (i.e. by automatic response email or by sending electronic documents on physical supports like CD-ROMs or others) permits the deadlines for submitting tenders to be reduced.

The possibility to browse contract documents without previous registration should ideally be provided. Contracting authorities may want to ask interested economic operators to register before downloading documents. To this effect a simple user ID and password, a valid e-mail account and the use of properly dated e-mail accompanied by the automatic acknowledgement of receipt are the most appropriate tools. However, the requirement to use a qualified signature at this stage is not justified and constitutes a hindrance to the access of documents. Contracting authorities may also want to ask interested economic operators to accept the conditions of operation of their site upon registration.

3.2.2. The reduction of deadlines for submitting tenders

Deadlines can be reduced provided that the above requirements are satisfied, regardless of the means chosen for the other stages of the procurement process. According to Articles 38(6) and 45(6), the deadlines for the receipt of tenders in open and restricted procedures may be shortened by five days.[11]

[10] When inviting the selected candidates to submit their tenders or to negotiate or to take part in the competitive dialogue, contracting authorities shall make sure the invitation includes the reference to accessing the specifications and the other documents (Articles 40 and 47).

[11] In the Utilities Directive (2004/17/2004), such reduction of the deadline for the submission of tenders is also possible in respect of negotiated procedures, cf. Art. 45(6) provided the cumulative effect of reductions does not result in a time limit for the receipt of tenders of less than 10 days (Art. 45(8)(2)).

In open procedures[12] it is possible to cumulate the two possibilities of reduction, the one for electronic transmission of the notice and the one for the unrestricted and full direct access to tender documents, leading to a total reduction of the deadline for submitting tenders of twelve days.

4. ELECTRONIC DEVICE FOR THE RECEIPT OF TENDERS, REQUESTS TO PARTICIPATE AND PLANS AND PROJECTS IN CONTESTS

4.1. The electronic receipt of tenders and requests to participate in one-off purchases

Further into the procurement process, electronic means can be used to transmit and receive tenders and requests to participate, as well as plans and projects in design contests. Articles 42(5) and 48(5) determine the key rules and refer to Annexes X and XXIV for the specific minimum requirements for the security and confidentiality of electronic reception devices. Thus all requirements previously mentioned relating to the definition and use of electronic means and tools equally apply to the device, together with the specific requirements explained below.

Contracting authorities are free to choose the appropriate means of communication and are responsible for organising the electronic receipt of tenders and requests to participate with respect to the legal requirements set out in the Directives discussed above. Economic operators shall comply with the specifications of the reception device in order to present a valid tender or request to participate.

4.1.1. Access to the reception device

To guarantee access to the device, the first requirement is that the necessary specifications, including encryption, are made available to interested parties (Articles 42(5)(a) and 48(5)(a)). These specifications should be indicated in the contract notice or in the contract documents, including the type of formats to be used. Contracting authorities may require a specific format and that tenders be structured in a specific way.

4.1.2. Security of data

4.1.2.1. Identity of tenderers and electronic signatures

The device for the electronic receipt of tenders and requests to participate must guarantee that the electronic signatures used are in conformity with the national provisions adopted pursuant to Directive 1999/93/EC on electronic signatures (Annex X(a) and Annex XXIV(a)).

[12] In respect of the other procedures, the reduction of deadlines in case of electronic transmission of notices applies to the deadline for the presentation of requests to participate. That is why it is not possible to cumulate the two grounds for a reduction of deadlines in order to shorten the sole deadline for the presentation of tenders; for restricted procedures it possible to cumulate in the sense of applying both reductions the one for the deadline for submitting requests to participate and the one for submitting tenders within the same award procedure, cf. Art. 38(6)(2) of Directive 2004/18/EC and Art. 45(6) and 45(8)(2) of Directive 2004/17/EC.

Member States are free to set the level of the type of signature required; in particular they can ask for the tenders and/or requests to participate to be accompanied by advanced qualified electronic signatures (Art. (42(5)(b) and 48(5)(b)).

The Directives require contracting authorities to accept any signature that was legally produced in any other Member State. Therefore, whilst the device should be organised with reference to the required level of signature it should also be equipped to receive and handle other signatures in conformity with Article 5 of Directive 1999/93/EC. In any case the device should be able to deal with extremely complex tenders (e.g. tenders emanating from *consortia* that combine different signatures, i.e. from public administrations and economic operators, of different level and origin from different Member States). In practice, this may lead to problems of interoperability of the different signatures, both at a technical level (effective receipt and processing of the foreign signatures) and at organisational level (definition and mutual recognition of specific types and levels of foreign signatures).

Until a solution to the interoperability issue is found, it seems that a viable provisional alternative would consist in organising a submission on paper in parallel to the electronic one or to accept simple electronic signatures, possibly followed by confirmation on paper.

If the national legislation requires that anonymity be preserved until the opening of tenders, the device should guarantee that sender-related information is inaccessible as well as the content of the tender.

4.1.2.2. Time stamping

The device shall guarantee the exact time stamping of the receipt (Annexes X (b) and XXIV (b)). This means that data should be automatically time stamped and locked. Irrefutable time stamping can be performed by an independent third party; however, other solutions providing a reasonable level of certainty are also acceptable. A time stamp should be made at the beginning and end of reception. The time zone should be part of the time stamp as where they are stored documents could depend on the location of the provider of the tendering platform service.

In practice transmission of data could take some time. The specification should indicate at which moment events will be taken into account. In the absence of any specific indication it shall be considered that the transmission must be completed before the expiry of the deadline.

An acknowledgement of the successful receipt of the tender should ideally be automatically issued by the device and sent to the tenderer's electronic address.

The device shall provide appropriate information to tenderers if the uploading or submission of the tender did not succeed particularly in cases where a virus is detected. In this case it shall be considered that no submission was made and re-submission should be possible provided the deadline is still running.

4.1.2.3. Access to the data transmitted

According to Annex X (c) and (d) and Annex XXIV (c) and (d), the device shall guarantee the locking of the data transmitted, including detection any unauthorised access.

This means that data transmitted should be received and stored automatically without anyone being able to tamper with it until the relevant deadline for opening it has passed. It is technically possible to document each server access. The system logs and any operation performed on the data should be recorded and safely stored to ensure the traceability of operations. Before the data is opened the system should confirm that no unauthorised access has been detected.

According to Annex X (e) and XXIV (e), the device shall guarantee that only authorised persons can set or change the dates for opening data received. It might be necessary, in fact, to delay the opening of some parts of the tenders. The device shall allow this without compromising the security for the unopened parts and in general it must guarantee that the modification of dates does not have any untoward consequences for the confidentiality of tenders.

Internal security measures based on the "four eyes" principle must be implemented. This means that at least two persons should by simultaneous action perform opening of tenders.

According to Annex X (f), (g), and (h) and XXIV (f),(g) and (h), the device shall guarantee that access to the data submitted is only possible through simultaneous action by authorised persons, only after the prescribed date has expired, and lastly, that data once received and opened remain accessible only to persons authorised to acquaint themselves therewith.

It can be assumed that the opening of data is an on-line function. *Simultaneous action,* in this context, means that the designated authorised persons within a time span of some few minutes, shall produce logs of what components have been opened and when.

The security features of the device may render the practice of opening tenders in public difficult to organise. However an on-line public opening can always be envisaged, at least insofar as the information normally disclosed during the public opening could be made immediately available electronically. Physical presence of the opening board in a specific location should not be a requirement unless paper documents exist as complete, separate tenders or as components of tenders.

Each authorised person would need an individualised key. Codes may be distributed in advance but preferably after the expiry of the deadline for submitting tenders. On the date and time fixed for the opening of tenders and requests to participate the authorised persons should proceed to the simultaneous unlocking of data for read-only access. Electronic signatures should be verified and the integrity of data should be confirmed. The timely submission of data should be checked as well. Paper copies could be distributed but only the electronic version shall be considered original. As long as documents are kept within the system they could be checked against master files.

Whatever modalities for the antivirus check have been adopted, the device shall ensure that the confidentiality and the inaccessibility of the tender or of the request to participate to anybody before the formal opening of offers, and to unauthorised persons afterwards, are in any circumstance fully respected, as well as the requirement for traceability of all operations.

If national law requires the tender to be presented in separate parts (e.g. as separate technical and economic offers) the device should allow the deferred opening of the separate files in the required sequence in the same way as with sealed envelopes. National law will also regulate which parts of the tender need to be signed and by whom.

In case data is encrypted and the key is owned by the tenderer, the latter must ensure that the key reaches the contracting authority before date set for the opening of tenders.

4.2. The electronic receipt of tenders in the re-opening of competition under multi-suppliers framework agreements and dynamic purchasing systems – the use of electronic catalogues

4.2.1. The electronic receipt of tenders in repetitive procedures and electronic catalogues

Everything said above on the receipt of tenders for one-off purchases applies to repetitive purchases.

The only difference is that in framework agreements and DPS, at the stage of the re-opening of competition, the contracting authority and the participants operate in a closed circuit, where all the actors are already known.

As a consequence, unless forbidden by the national legislation, the level of signature required by the contracting authority can be lowered even if the general rule is the qualified signature.

The stage of re-opening of competition in particular allows for the use of electronic catalogues (e-catalogues). Electronic catalogues are electronic documents established by the suppliers which describe products and prices which may, under certain conditions, constitute a tender; these are either transmitted or uploaded to the contracting authority website or made available in the suppliers' website.

Economic operators may use e-catalogues to present their tenders provided they comply with the above mentioned requirements for electronic communication tools as well as with possible requirements set by the contracting authority (i.e. the use of a specific format). In such cases appropriate indications following Articles 42(5)(a) and 48(5)(a) shall be provided.

In theory, e-catalogues can also be used to present the tender in a one-off procedure or the initial tender in a repetitive procedure. However, it is precisely when the supplier and products have already been admitted that e-catalogues may easily be used to update the indicative tender for a DPS or to submit a new tender.

In running framework agreements and DPSs, e-catalogues shall refer to the tender/product for which the supplier has been selected and shall not contain substantial amendments to the terms laid down in the framework agreement (Article 32(2)). At the stage of setting up the multi-supplier framework agreement or of setting up or joining the DPS, e-catalogues can only be submitted in a ‘frozen’ or “snapshot’ format under the conditions specified in Articles 42 and 48 and Annexes X and XXIV, because the public purchaser operates in an open environment to which anyone must have access.

4.2.2. The active collection of tenders

Traditionally, the contracting authority passively receives the tenders submitted by suppliers.

The situation is different at the stage of the re-opening of competition when the contracting authority operates in a closed circuit where all possible suppliers (even the newcomers in a DPS) are already known. In a closed circuit it does not make any difference from a technical point of view whether the updated tender is transmitted by the supplier or retrieved from the supplier’s website by the contracting authority. All the requirements and procedural stages related to the submission of tenders including the invitation the time-limits and the locking of tenders shall be valid; the only thing that changes is the way the tender arrives.

In particular, in this scenario the contracting authority must take care to inform all suppliers in due time when and how the tender data – updated indicative offers or new offers – will be retrieved by it.

Provided the catalogues are in conformity with the requirements of the contracting authority (in terms of their content, presentation, format, and tools), and that all the requirements of Annexes X and XXIV are satisfied, the contracting authority may decide to have exclusive access to the catalogue on a dedicated platform or, if the supplier agrees, to have access to it via the supplier’s website.

5. ELECTRONIC AUCTIONS

Electronic auctions are reiterative processes involving an electronic device that allows tenderers to present new prices, and/or new values for some or all elements of their tenders (Articles 1(7) and 1(6)). Electronic auctions constitute a particular step of the awarding stage of the procurement procedure and as such they shall always be preceded by the full evaluation of the tenders received, which will result in a score (notation) that enables the contracting authority to rank the tenders using automatic evaluation methods.

Member States may regulate and limit the resort to e-auctions (Art. 54(1) and 56(1)) but if they are allowed, they must be organised in strict conformity with the requirements of the Directives.

5.1. Conditions for the use of electronic auctions

Electronic auctions can be used under most procedures[13] but because they include automatic evaluation, they cannot be used for certain service contracts and certain works contracts having as their subject-matter intellectual performances, such as the design of works, (Art. 1(7) second indent and 1(6)).

The e-auction can be based either solely on prices (whether award criteria is the lowest price or the most advantageous tender) or on prices and/or new values for other features that are indicated in the specification. The features have to be quantifiable and expressed in figures. "2nd price" auctions, where the auction is won by the lowest price bidder but at the price of the second lowest one, are not allowed.

The e-auction must be based on the award criteria published in the contract notice or tender documents. What can be offered in the auction are new technical characteristics in terms of values referring to features that can be expressed in figures or percentages, and/or new prices. The criteria and their relative weighting stay the same; before the start of the auction any range must be reduced to a specific value.

Contracting authorities have to announce their intention to hold e-auctions in the contract notice (Art. 54(3) and 56(3)). Once the e-auction has been announced it becomes mandatory to hold it, unless only one valid tender is received.

5.2. Information to be provided in the specifications

The specification shall indicate those features, whose values will be the subject of the auction, information about the electronic equipment used and the arrangements and technical specifications for connection (Art. 54(3) and 56(3)).

It shall also contain the main rules of the auction, in particular:

- whether there are any limits on the new values which may be submitted, (limitations are inherent to the technical characteristics indicated in the specification which cannot be modified);

- what information will be made available to the tenderers in the course of the auction, and the relevant timetable, (the minimum requirement should be to ensure equal treatment by providing the same information to all participants at the same time);

- relevant information on the process,

- the bidding conditions (in particular the minimum amount by which a bid must be higher or lower to qualify as a new bid).

[13] In open, restricted, negotiated procedures with prior publication of a contract notice justified by the presence of irregular or unacceptable tenders in the case of Article 30(1)(a), on the reopening of competition among the parties of a framework agreement and on the opening of competition under a DPS if it is possible to establish the contract specifications with precision (Art. 54(2) of Directive 2004/18/EC); in open, restricted or negotiated procedures with a prior call for competition and on the opening for competition of contracts to be awarded under a DPS (Article 56(2) of Directive 2004/17/EC).

Finally the specification should also indicate how the invitations to auction will be sent.

5.3. Information to be provided in the invitation to submit new prices/values

A full evaluation of the tenders based on the award criteria published in the notice or in the specification and their relative weighting must precede the auction. At the end of the full initial evaluation, all tenderers who have submitted admissible tenders shall be invited simultaneously to submit new prices and/or values (Art. 54(4) and 56(4)). Rejected tenderers shall be informed in conformity with Articles 41(2) and 49(2).

Invitations shall be sent individually by electronic means to each admissible tenderer. The use of e-mail with acknowledgement of receipt and compliance with the requirement of traceability can provide the necessary certainty. In comparison, the posting of the invitation on an internet site is not sufficient.

The invitation shall indicate the result of the full initial evaluation (Art. 54(5) and 56(5)) by communicating the notation (i.e. the number of points allocated to the individual tenderer). There is no obligation to communicate at this stage the precise ranking (i.e. the relative position of the individual tenderer compared to the other participants) so long as this is done when the auction starts.

The invitation shall also provide the mathematical formula (if it has not already been announced in the specifications) which will be used to determine new rankings on the basis of new values submitted. The formula shall incorporate the weighting of all the criteria used to determine the most advantageous tender. To this purpose any ranges must be reduced to a specified value beforehand and a separate formula provided for each variant. Making the formula available to interested parties constitutes the minimal safeguard against potential distortions in the application of the award criteria.

The invitation shall also contain all the details of the auction:

- the date and time of the start of the auction (no sooner than 2 working days after the date the invitations are sent) (Art. 54(4) and 56(4));

- how and when the auction will close(Art. 54(7) and 56(4));

- the timetable for each phase of the auction (Art. 54(7) and 56(7))

Finally the invitation shall indicate all relevant information concerning individual connection to the electronic equipment being used (Art. 54(4) and 56(4)).

Thus, while the specification indicates the general rules for the auction, the invitation should state practical details that could not be or were not fixed beforehand. For example, if the specification indicates the general number and duration of rounds to be completed before the end of the auction, the invitation should indicate the exact time and date for each round.

5.4. Auction device and running of the auction

Contracting authorities shall communicate instantaneously to all tenderers sufficient information to enable them to ascertain their relative ranking at any moment (Articles 54(6) and 56(6)). The ranking shall be provided at least as from the beginning of the auction but the contracting authority may also communicate this information before it starts.

Contracting authorities shall not disclose the identities of the tenderers at any point in the auction.

Apart from these mandatory requirements contracting authorities may choose to communicate other information provided this was stated in the specification, i.e. the number of participants, prices or values provided by all other participants or only by some of them, their relative ranking.

The rules of the auction can change if this possibility has been announced and precisely specified in the specifications.

If the device for running the auction is technically incapable of dealing with the number of admissible tenders, the auction must be postponed and participants must be informed. If the device runs out of capacity during the auction, it must be cancelled and postponed as well. In case of system failure it is the responsibility of the contracting authority to decide if either the entire auction or one of its phases must be postponed to a later date; only if it is possible to provide timely and appropriate information to each participant, can extension of deadlines and re-submission of bids be envisaged.

Secure transmission of data, confidentiality of communication, authentification and identification of participants, as well as traceability of communications and of processing/calculations must all be ensured appropriately.

The contracting authority could in theory require advanced signatures for each bid where this is technically feasible; however at this stage, the process takes place in a closed environment and this appears to be neither required nor necessary.

Incorrect or unacceptable entries should be registered for reasons of traceability but not taken into account and appropriate feedback provided to the participants.

If everything has been correctly organised there is no need to foresee any communications during the auction other than the submission of prices/values. In any case no human intervention by the contracting authority side should be allowed during the running of the auction.[14] In case of errors, violations of the rules of the game or abnormal behaviour[15], traceability shall ensure that events can be re-constituted.

[14] A contact point external to the device for urgent communications concerning possible technical problems may be offered to participants.

[15] National legislation on the behaviour in auctions, if any, is applicable provided it does not conflict with the rules and principles of the Directives. The Commission services have launched a “Legal study on unfair commercial practices within B2B e-markets” in order to assess the need for further action.

Contracting authorities must organise the closure of the auction by choosing one of the options given by Articles 54(7) and 56(7) or by combining them: on the date and time fixed in the invitation; when no more new prices/values are received after the time indicated in the invitation has elapsed; or when the number of phases fixed in the invitation has been completed.

The contracting authority must award the contract to the best tender following the auction, according to the criteria of the specification. This does not impede the application of Articles 55 and 57 on abnormally low tenders. Contracting authorities may not have improper recourse to e-auctions nor may they use them to prevent, restrict or distort competition or to change the subject-matter of the contract as indicated in the contract notice and in the specification (Article 54(7) and 56(9).

6. DYNAMIC PURCHASING SYSTEMS

By deciding to resort to a dynamic purchasing system (DPS), contracting authorities place themselves and the purchasing process in an entirely electronic context. This means contracting authorities shall use solely electronic means to set up the DPS and to award the contracts, according to Articles 33 and 15.

Member States may regulate and limit the resort to DPSs (Art. 33(1) and 15(1)) but if they are allowed, they must be organised in strict conformity with the requirements of the Directives.

Contracting authorities may decide to set up a DPS in order to purchase over several years (maximum 4, except in duly justified cases) commonly used goods or services which are generally available on the market (i.e. off-the shelf products for which the evaluation can be quick).

The DPS is an open electronic multi-supplier system, which allows for repetitive purchases while granting tenderers the possibility to join throughout its duration. To join the DPS, economic operators shall satisfy the selection criteria and submit an indicative tender which is evaluated for compliance with the specification. Based on their indicative tender, which may be renewed at any time during the DPS life cycle, admitted economic operators can then submit tenders for the specific contracts advertised in a simplified procedure.

No charges may be billed to the interested economic operators or to parties to the DPS (Articles 33(7) and 15(7))) and the rules of the open procedures must be followed during all steps necessary to set up, to manage, and to award each single contract under the DPS (Articles 33(2) and 15(2)).

6.1. Admission to the DPS

To set up the DPS contracting authorities have to publish a contract notice that must indicate that a DPS is involved, how long it will last and the Internet address at which the specification and any additional documents may be consulted. Direct and full access to the specification and any additional documents shall be made available on publication of the notice and remain available as long as the DPS lasts. Award criteria have to be indicated already at this stage even if they can be formulated more precisely later in the invitation to tender. The possible use of electronic auctions shall also be indicated at this stage.

The specification must describe the nature of the purchases envisaged as well as the necessary information concerning the DPS, the electronic equipment and the technical connection arrangements and specifications used.

To be admitted to the DPS tenderers shall satisfy the selection criteria and submit an indicative tender which complies with the specification. At any time during the entire period of validity of the DPS indicative tenders can be submitted and be evaluated within a maximum of 15 days. (The period for evaluation can be extended in which case no invitation to tender may be issued in the meantime).

Upon setting up of the DPS, the time limit for submitting the indicative tenders is that of the open procedure (which may be shortened because of the electronic transmission of the contract notice accompanied by the unrestricted and full and direct access to the specification). However, as the evaluation of indicative tenders is continuous against the selection criteria and the specification of the DPS, they can be opened progressively as they arrive. In this case therefore the device for the receipt of indicative tenders does not need to comply with the requirements of Annex X and XX related to the date for opening tenders.

6.2. Opening for competition of contracts to be awarded under the DPS

Each time contracting authorities want to award a contract under the DPS, they must publish a simplified contract notice inviting all interested economic operators (both those which are already part of the DPS and those who are not) to submit an indicative tender. The time limit for this may not be less than 15 days from the date the simplified notice is sent, to allow new tenderers to join the DPS.

All indicative tenders received by that deadline, either received in response to the simplified contract notice, or previously submitted, shall be evaluated before issuing the invitations to tender.

After evaluating all indicative tenders, contracting authorities send the invitation to tender to all the admitted tenderers (both those already in the DPS as well as those newcomers who satisfy the selection criteria and have submitted indicative tenders which comply with the specification) and set an appropriate deadline for the submission of tenders. At this stage, the award criteria which were already stated in the contract notice setting up the DPS may be formulated more precisely.

After full evaluation of the tenders received, contracting authorities have two possibilities to proceed: either they award the contract to the tenderer who submitted the best tender on the basis of the criteria set out in the contract notice setting up the DPS or the more precisely formulated ones indicated in the invitation to tender; alternatively, if they had announced in the contract notice setting up the DPS that they would run an auction, they determine the admissible tenders and proceed with the auction by sending the invitations to auction according to Article 54(4). All the rules related to electronic auctions are applicable to auctions held in the context of a DPS. c. .

The result of the award of the contracts based on the DPS shall be published. To this end, contracting authorities either send each contract award notice to the Publications Office within 48 days from the award of each contract, or they group such notices on a quarterly basis and send them within 48 days of the end of each quarter.

IP/05/948

Brussels, 15 July 2005

Public procurement: Commission provides assistance on implementation of new “e-procurement” rules

The European Commission has published a document that explains and interprets the rules on electronic public procurement (“e-procurement”) that are part of the new public procurement Directives (2004/18/EC and 2004/17/EC). The aim is to assist Member States in writing the rules into national law and contracting authorities in implementing them. The document is available at the following address: http://europa.eu.int/comm/internal_market/publicprocurement/e-procurement_en.htm

Internal Market and Services Commissioner Charlie McCreevy said: *"e-procurement will enable public authorities to make better purchases and get better value for money. It will also increase competition and by cutting red tape make it much easier for companies to apply for public contracts. Of course, it is vital that these new rules are implemented on time and correctly without technical or organisational barriers between Member States. That is why we have published this document explaining and interpreting the rules in greater detail. I encourage everyone involved to make use of it."*

The new public procurement Directives aim to computerise traditional procedures for the award of contracts and to introduce both new purchase techniques and new instruments made possible by the advances in technology and the Internet.

Member States have to write the Directives into national law by the end of January 2006. The interpretative document aims to facilitate this task by providing clear replies to questions on the legal aspects of e-procurement. It also explains terminology to purchasers who will be required to computerise their orders.

The document analyses the rules applicable to online communications from a practical and pragmatic point of view. It covers all stages of the contract award procedure that can be computerised, as well as the new instruments and purchase techniques.

The publication of this document is one of the actions envisaged by the “Action Plan for the implementation of the legal framework for electronic public procurement”, adopted by the Commission in December 2004. This Action Plan aims to take all necessary steps over a three-year period to ensure that electronic public procurement in Europe is implemented as well as possible.

FUNCTIONAL REQUIREMENTS FOR CONDUCTING ELECTRONIC PUBLIC PROCUREMENT UNDER THE EU FRAMEWORK

VOLUME I

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EXECUTIVE SUMMARY

The new public procurement directives set the legislative framework for public eProcurement in Europe, which should be adopted by all Member States by 31 of January 2006. To assist public administrations in building eProcurement systems in compliance with the new directives, a public eProcurement project was launched in 2003, under the Interchange of Data between Administrations programme (IDA) with a twofold objective:

- to develop functional requirements and suggest technical solutions for the implementation of electronic public procurement systems in compliance with the new legislative framework
- to create eLearning demonstrators simulating the public eProcurement functionalities described by the new directives, allowing administrations and suppliers to familiarise themselves and to experiment with it

The development of guidelines and demonstrators followed an iterative approach, starting with a conceptual design of an eProcurement system and then the elaboration of static and dynamic models for individual contracts, dynamic purchasing systems, framework agreement systems and electronic auctions. In this respect, the present Functional Requirements report has gone through a number of validation cycles, incorporating feedback received by the European Commission and Member States, ensuring that all information included is accurate.

This report analyses procedural aspects of the eProcurement procedures described by the new directives and includes functional and non-functional requirements for implementing them electronically. In addition it provides technical solutions for their implementation, enriched with good practices resulting from the two deliverables of the "analysis phase" of the project:

- State of the Art case studies on European electronic public procurement projects
- Description of electronic public procurement systems in non-European countries.

An overview of possible technical specifications is also presented in the current report, comprising the proposed conceptual model for an eProcurement system supporting all required procedures and a Use Case analysis. Functioning as a mechanism for further projects, the report also incorporates a section documenting several "open issues" related to Public eProcurement, as discussed in various IDA workshops where the current report was presented.

The report is structured in two volumes.

- **Volume I:** the current document, presenting information and activity flows for all eProcurement procedures, functional requirements, non-functional requirements, an overview of technical specifications with a conceptual model and high-level Use Cases, and open issues related to eProcurement
- **Volume II:** presenting an in-depth technical analysis (Use Case analysis) for the main actors and functionalities of an eProcurement system supporting all eProcurement procedures. It also provides scenarios for interested parties to experiment with the dynamic demonstrators, developed in the context of the current project, so as to further understand the concepts described in the Functional Requirements report.

Abbreviations / Acronyms

Abbreviation or Acronym	Term
API	Application Program(ming) Interface
CA	Certification Authority
COTS	Commercial Off-The-Shelf
CPV	Common Procurement Vocabulary (European Community)
CSV	Comma Separated Values
DMZ	Demilitarised Zone
DPS	Dynamic Purchasing Systems
DTD	Document Type Definition (markup languages)
ERP	Enterprise Resource Planning
EU	European Union
FA	Framework Agreement
FAQ	Frequently Asked Questions
FReq	Functional Requirements
FTP	File Transfer Protocol
GUI	Graphical User Interface
HTML	Hyper Text Markup Language
HTTP	Hyper Text Transfer Protocol
HTTPS	Hyper Text Transfer Protocol Secure
J2EE	Java 2 Enterprise Edition
LDAP	Lightweight Directory Access Protocol
MEAT	Most Economically Advantageous Tender
MS	Member States
OJEU	Official Journal of the European Union
OSS	Open Source Software
PC	Personal Computer
PDF	Portable Document Format
PIN	Prior Information Notice
PINB	Prior Information Notice (Buyer Profile)
PKI	Public Key Infrastructure
RDBMS	Relational Database Management System
RTF	Rich Text Format
RUP	Rational Unified Process
SLA	Service Level Agreement
SMIME	Secure Multipurpose Internet Mail Extensions
SMS	Short Message Service
SPSC	Standard Products and Services Codes
SSL	Secure Sockets Layer
TED	Tenders Electronic Daily
TSA	Time Stamping Authority
TXT	Text
UCEC	Universal Content Extended Classification
UTF	Unicode Transformation Format
XML	eXtensible Markup Language
XSL	eXtensible Stylesheet Language
XSLT	Extensible Stylesheet Language Transformations

GLOSSARY

Term	Description
Authentication	Proving a user’s identity. To be able to access a Website or resource, a user must provide authentication via a password or some combination of tokens, biometrics and passwords.
Authorisation	The act of granting approval. Authorisation to resources or information within an application can be based on simple or complex access control methods.
Browser Based	This term describes software that does not require any client software to be installed or configured on users' systems, except of the commercially supported Web-browsers (IE, NS, Mozilla, Opera, etc). Unlike a browser plug-in, browser based applications do not require manual download and execution of an installation program prior to Web site access; Unlike an ActiveX control or some Java applets, browser based applications do not force the user to agree to potentially confusing security warning dialogs. Unlike other client applications, browser based applications do not have a noticeable download time. In fact, download is transparent to the end-user.
Call	Call for Tenders
Certificate	An electronic "passport", typically contain a user's name and public key. A CA authorises certificates by signing the contents using its CA signing private key.
Certificate validation	The process of checking the trustworthiness of a certificate. Certificate validation involves checking that the certificate has not been tampered with, has not expired, is not revoked and was issued by a CA you trust.
Certification Authority (CA)	The system responsible for issuing secure electronic identities to users in the form of certificates.
Electronic signature	Data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication
Encryption / Decryption	To encrypt a file is to apply a mathematical function that transforms character(s) in the file into some other character(s). Encryption renders the file unreadable. This means no one, including the actor, can read the file until it is decrypted. Only authorised recipients can decrypt the file.
Identification	see Authentication
Private key	The portion of a key pair that is kept secret by the owner of the key pair. Private keys sign or decrypt data.
Public key	The portion of a key pair that is available publicly.
Public Key Infrastructure (PKI)	A system that provides the basis for establishing and maintaining a trustworthy networking environment through the generation and distribution of keys and certificates. This is also the foundation technology for providing enhanced Internet security.
Secure Sockets Layer (SSL)	A secure session protocol used to maintain data confidentiality only between Web-browsers and Web servers. This is a fundamental component of basic Internet security.
Time Stamping	The validity of storing the official date and time a business transaction has occurred.
Web Portal	A Web portal is a single doorway for employees, customers and partners to access an organisation's content, data and services online. Also known as Enterprise portals, Web portals make it possible to establish online relationships by providing personalised content to different individuals and entities. Organisations are building portals not only to increase loyalty, but also to create competitive advantage, strengthen relationships, speed access to services and satisfy regulatory requirements. Portals also make it possible to increase revenue, efficiencies and cost savings by moving business processes online.
XML	XML is the standard messaging format for business communication, allowing companies to connect their business systems with those of customers and partners using the existing Internet infrastructure. Similar to HTML, XML uses tags (words bracketed by '<' and '>') and attributes (of the form name="value") to help place structured data into text files. XML is different from HTML in that it is a meta-language (a language for describing languages) and, therefore, does not define specific tags and attributes.

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1 INTRODUCTION

This report may concern anyone who is interested or involved in implementing systems for electronic public procurement in the EU. It was commissioned by the European Commission and seeks to assist interested parties to avoid problems and prevent the emergence of "e-barriers" by clarifying the functional and non-functional requirements for public eProcurement systems, as they result from the specific provisions of the new European public procurement directives.

The new public procurement directives set the legislative framework for public eProcurement in Europe, which should be adopted by all Member States by 31 of January 2006. To assist public administrations in building eProcurement systems in compliance with the new directives, a public eProcurement project was launched in 2003, under the Interchange of Data between Administrations programme (IDA) with a twofold objective:

- to develop functional requirements and technical solutions for the implementation of electronic public procurement systems, in compliance with the new legislative framework
- to create eLearning demonstrators, simulating the public eProcurement functionalities described by the new directives, allowing administrations and suppliers to familiarise themselves and to experiment with them

The development of guidelines and demonstrators followed an iterative approach, starting with a conceptual design of an eProcurement system and then the elaboration of static and dynamic models for individual contracts, dynamic purchasing systems, framework agreement systems and electronic auctions.

In a first phase, the project focused on the analysis and assessment of existing European and international eProcurement systems and the deduction of interesting eProcurement practices that could enhance the operation of new eProcurement systems. These findings are presented in detail within the:

- state of the Art case studies on European electronic public procurement projects
- description of electronic public procurement systems in non-European countries

Based on the new public procurement directives, and taking into account the findings of the reports above, the functional requirements to be respected by fully integrated eProcurement systems were identified. This should provide a conceptual framework for the technical implementation of electronic public procurement systems in compliance with the new legislative framework.

The report describes the functional system requirements and pre-requisites derived from the legal framework and presents the different actors participating in eProcurement systems, as well as information and activity flow diagrams for all eProcurement procedures. In addition, a technical overview for the creation of such system and some non-functional requirements are also presented.

Some of the functional requirements identified are direct legal requirements, while others are functional prerequisites for implementing those legal requirements in a fully integrated eProcurement system. The report should be understood as a set of indicative guidelines aimed at assisting Member States in transposing the EU framework and in setting up and managing eProcurement systems that are compliant with EU public procurement legislation. Its purpose is to serve as a reference for designing new eProcurement systems or for adapting existing ones, as well as for guiding standardisation activities at all levels.

The report has undergone several review cycles, improving the earlier versions and incorporating additional information about public eProcurement. The reviews were performed by European Commission services, as well as, the IDA eProcurement expert group bringing together delegates from all Members States of the European Union and other countries participating in the IDA programme.

1.1 Structure of the report

The report is split into two volumes. The structure of the report is described below:

- **Volume I:**
    - **Section 1:** introduction
    - **Section 2**: analyses the eProcurement procedures regulated under the new directives, namely individual contracts (open and restricted) and repetitive contracts (DPS, framework agreement). Furthermore, extensions for both individual contracts and repetitive procedures are analysed (eAuction). This section includes eProcurement information flows, outlining the different steps involved in each procedure, and activity diagrams, clearly showing all different tasks, subtasks, branches, etc, that are related to the eNotification, eTendering, and eAwarding phases of each procedure
    - **Section 3**: provides potential technical solutions for the implementation of a fully integrated eProcurement system capable of supporting the procedures required by the new directives
    - **Section 4**: details non-functional requirements of an eProcurement system, as they emerge from the new EU eProcurement legislation, categorised into five main areas: usability, reliability, interoperability, scalability and security
    - **Section 5**: provides an overview of technical specifications, through a conceptual model and high-level Use Cases for eProcurement systems supporting individual contracts, repetitive procedures and electronic auctions
    - **Section 6**: documents "open issues" related to eProcurement, as they have been discussed in several fora
    - **Section 7:** outlines main conclusions

- **Volume II:**
    - **Section 1:** Provides an in-depth Use Case analysis for all main actors and functionalities of an eProcurement system supporting *individual contracts*
    - **Section 2:** Provides an in-depth Use Case analysis for all main actors and functionalities of an eProcurement system supporting *Dynamic Purchasing Systems*
    - **Section 3:** Provides an in-depth Use Case analysis for all main actors and functionalities of an eProcurement system supporting *Framework Agreements*
    - **Section 4:** Provides an in-depth Use Case analysis for all main actors and functionality of an eProcurement system supporting *eAuctions*
    - **Section 5:** Provides scenarios for interested parties to experiment with the dynamic demonstrators, which were elaborated in the context of the current project, so as to gain further understanding of the concepts discussed in the report

1.2 Business framework

The analysis performed for all eProcurement procedures is based on the EU public procurement Directive 2004/18/EC on the coordination of procedures for award of public works contracts, public supply contracts and public service contracts. All functional requirements and activity flow diagrams presented are independent from the technical implementation of an eProcurement system.

The modelling of these procedures was based on the following assumptions.

- One or more contracting authorities offer online eProcurement services, using a commonly accessible electronic platform. This platform operates as a single access point for users (e.g. procurement officers, economic operators, etc). For instance, such a platform might be a web-portal, openly accessible via the Internet.
- It is assumed that contracting authorities already make use of a number of existing information systems (e.g. back-office, legacy, etc.). The integration of the eProcurement platform with such systems can further assist contracting authorities to efficiently perform eProcurement. Whenever in the current document such an integration with existing information systems is discussed, it is assumed that the communication channel between these systems and the eProcurement platform is technically feasible, secure and reliable.
- Notices concerning Calls for Tenders are officially published on the Tender Electronic Daily (TED) website of the EU. This is a service offered by the EC Publications Office, which receives on a daily basis notices for all contracts covered by the Directives and provides facilities for the online searching, retrieval, visualisation, and downloading of notices.
- The functional analysis carried out for this document is based on requirements deriving from the EC public procurement Directive 2004/18/EC. It does not cover other aspects of the procurement cycle that contracting authorities may choose to implement electronically, in order to enhance their systems, such as electronic ordering or invoicing.
- Finally, it is also assumed that contracting authorities may have to adhere to national, regional and/or local legal requirements, depending on the field of their operation.
- The analysis presented in this report does not consider the negotiated procedure, as well as, competitive dialogues.

2 DESCRIPTION OF EPROCUREMENT PROCEDURES

This chapter presents an analysis of the procurement procedures described in the new EU directives. The procurement procedures for awarding public contracts are classified according to the following contract types:

- ***Individual contracts***
  - ***Open procedure***: whereby any interested Economic Operator may submit a Tender
  - ***Restricted procedure***: whereby any Economic Operator may request to participate. Only those Economic Operators invited by the contracting authority may submit a Tender
- ***Repetitive contracts***
  - ***Dynamic Purchasing System (DPS)***: constitutes a fully electronic process for contracting authorities for making commonly used purchases, which are generally available on the market and meet the requirements of the contracting authority. The duration of a DPS should not exceed 4 years and should be open throughout its validity to any Economic Operator satisfying the selection criteria and having submitted an indicative Tender compliant with the specification
  - ***Framework Agreement***: is an agreement between one or more contracting authorities and one or more Economic Operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged
- ***Extensions***
  - ***Electronic auctions***: are repetitive processes involving the use of an electronic device for the presentation by tenderers of improved offers for a specific Call for Tenders (i.e. the submission of new prices revised downwards, and/or new values concerning certain elements of tenders, thus allowing the use of automatic evaluation methods). This occurs after an initial full evaluation of the Tenders. eAuctions can be used with contracts for works, supplies or services for which the specifications can be determined/quantified with precision. This excludes non-quantifiable elements of a tender, as well as, certain service and work contracts having as their subject-matter intellectual performances. Electronic auctions can be utilised as an extension to the awarding phase of a tendering procedure. They do not constitute a complete eProcurement procedure for awarding contracts.

2.1 Individual Contracts

This section considers the procedural aspects of the procurement processes that Contracting Authorities need to follow for procuring electronically under individual contracts. Individual contracts can be procured following any of the three public procurement procedures, namely: open, restricted and negotiated (with and without advertisement). In the subsequent sections, only the two main procedures, e.g. the open and the restricted procedures are analysed. The report describes the exact flows of events that need to be followed, and deduces functional requirements for the realisation of a fully integrated eProcurement system that would be compliant with the new EU public procurement legislation.

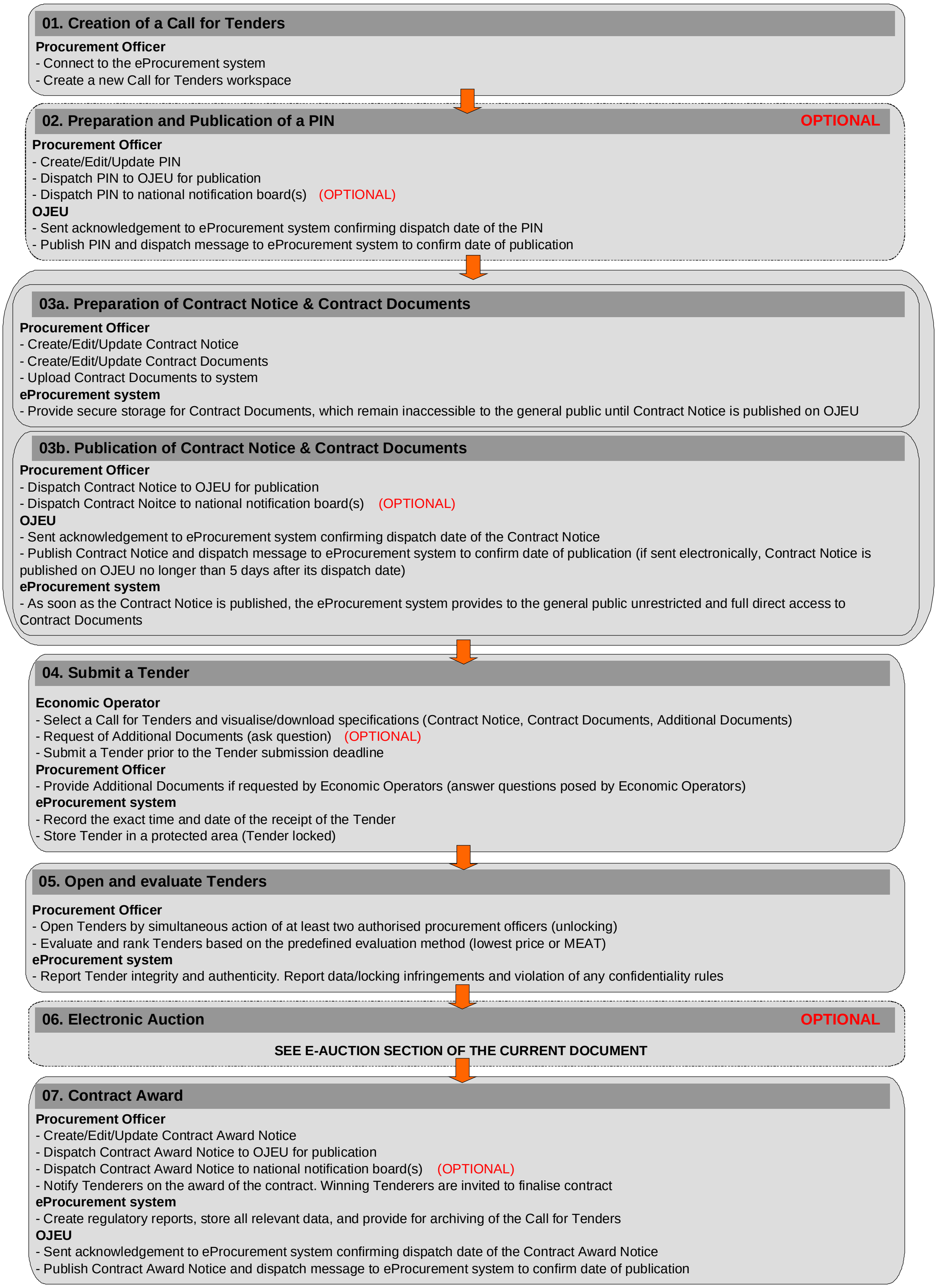
2.1.1 Open Procedure

The open procedure is a procedure whereby any interested Economic Operator may submit a Tender in response to a call for tender. It is the only procedure for the procurement of individual contracts in which any interested Economic Operator can participate by submitting a Tender, without the Contracting Authority performing a prior selection and/or dispatching an invitation.

2.1.1.1 Information Flow Diagram

Figure 2-1 depicts the different steps of the open procedure, focusing on the actions performed by all parties involved.

Figure 2-1: Information Flow Diagram for the Open Procedure



01. Creation of a Call for Tenders

Procurement Officer
- Connect to the eProcurement system
- Create a new Call for Tenders workspace

02. Preparation and Publication of a PIN OPTIONAL

Procurement Officer
- Create/Edit/Update PIN
- Dispatch PIN to OJEU for publication
- Dispatch PIN to national notification board(s) (OPTIONAL)

OJEU
- Sent acknowledgement to eProcurement system confirming dispatch date of the PIN
- Publish PIN and dispatch message to eProcurement system to confirm date of publication

03a. Preparation of Contract Notice & Contract Documents

Procurement Officer
- Create/Edit/Update Contract Notice
- Create/Edit/Update Contract Documents
- Upload Contract Documents to system

eProcurement system
- Provide secure storage for Contract Documents, which remain inaccessible to the general public until Contract Notice is published on OJEU

03b. Publication of Contract Notice & Contract Documents

Procurement Officer
- Dispatch Contract Notice to OJEU for publication
- Dispatch Contract Noitce to national notification board(s) (OPTIONAL)

OJEU
- Sent acknowledgement to eProcurement system confirming dispatch date of the Contract Notice
- Publish Contract Notice and dispatch message to eProcurement system to confirm date of publication (if sent electronically, Contract Notice is published on OJEU no longer than 5 days after its dispatch date)

eProcurement system
- As soon as the Contract Notice is published, the eProcurement system provides to the general public unrestricted and full direct access to Contract Documents

04. Submit a Tender

Economic Operator
- Select a Call for Tenders and visualise/download specifications (Contract Notice, Contract Documents, Additional Documents)
- Request of Additional Documents (ask question) (OPTIONAL)
- Submit a Tender prior to the Tender submission deadline

Procurement Officer
- Provide Additional Documents if requested by Economic Operators (answer questions posed by Economic Operators)

eProcurement system
- Record the exact time and date of the receipt of the Tender
- Store Tender in a protected area (Tender locked)

05. Open and evaluate Tenders

Procurement Officer
- Open Tenders by simultaneous action of at least two authorised procurement officers (unlocking)
- Evaluate and rank Tenders based on the predefined evaluation method (lowest price or MEAT)

eProcurement system
- Report Tender integrity and authenticity. Report data/locking infringements and violation of any confidentiality rules

06. Electronic Auction OPTIONAL

SEE E-AUCTION SECTION OF THE CURRENT DOCUMENT

07. Contract Award

Procurement Officer
- Create/Edit/Update Contract Award Notice
- Dispatch Contract Award Notice to OJEU for publication
- Dispatch Contract Award Notice to national notification board(s) (OPTIONAL)
- Notify Tenderers on the award of the contract. Winning Tenderers are invited to finalise contract

eProcurement system
- Create regulatory reports, store all relevant data, and provide for archiving of the Call for Tenders

OJEU
- Sent acknowledgement to eProcurement system confirming dispatch date of the Contract Award Notice
- Publish Contract Award Notice and dispatch message to eProcurement system to confirm date of publication

2.1.1.2 Functional requirements for the Open Procedure

This section presents the functional requirements emerging from the legislation for the realisation of eProcurement systems capable to support the open procedure. All functional requirements are associated with one or more steps of Figure 2-1.

Step 01. Creation of a Call for Tenders

This step refers to the preparation of a virtual workspace in an eProcurement system where all information related to a specific call for tenders can be stored. In order to create and manage a Call for Tenders in an integrated eProcurement system, an isolated storage area is necessary where Notices, Contract Documents, Additional Documents, Tenders, etc. are safely kept. Furthermore, other information about the Call, like the associated persons involved, name of the specific Call for tenders, description, opening/closing dates, etc. are also stored in the Call for Tenders workspace.

The functional requirements identified for this step comprise:

Functional Req. 1. User registration

This functional requirement allows for the user registration of new Procurement Officers and Tenderers/Economic Operators to the eProcurement system. The registration process must ensure the confidential transfer and storage of all personal information of users. Furthermore, mechanisms may be put in place for the validation of the information provided by new users of the system. Hence, the registration process may be performed in two phases. One phase can allow new users to apply for registration to the system, and another phase can allow authorised personnel to validate the submitted information and approve or reject a registration application.

Functional Req. 2. User profiling

This functional requirement relates to the ability of the eProcurement system to store personal information of its registered users. Users can update their personal information if required. This personal information can be used for several other functionalities of the system, including reporting, automated notifications, etc. Also, each user is associated to a unique identifier, which can be used by the audit trailing facility of the system, in order to record all user activities, and to identify the initiator/actor of each activity.

Moreover, user profiling can allow users to setup their preferences when using the system, in terms of how data is searched, displayed, etc.

Functional Req. 3. User authentication

This functional requirement allows users to identify themselves to the eProcurement system. This is necessary for the system to display the appropriate data to users, as well as, to make available the appropriate activities to be executed according to a user’s role in the system.

Functional Req. 4. User authorisation

Each user in the system is commonly associated with a certain role. As presented in more detail in section 5.2, users can undertake and perform different roles, like Call administrators, Tender opening staff, Tender evaluating staff, etc. User authorisation can enable the eProcurement system to be aware of the role of a user. Depending on the user rights for each user, the system can control which activities a user can perform, as well as, what data a user should have access to.

Functional Req. 5. Tender workspace creation

When creating a Call for Tenders, the eProcurement system can make available to the Procurement Officers a virtual workspace for storing all Call-related information. This virtual workspace allows authorised users to provide core information about the Call, like its name, description, estimated value, etc., and provides the functionality for uploading documents, like Notices, Contract Documents, Additional Documents, etc.

Moreover, the Tender workspace can be used as the area for storing Tenders submitted by Tenderers, and all logically related data of a Call.

A Tender workspace needs to be well integrated with the User authorisation of the system (**Functional Req. 4: "User authorisation"**), as information stored in a Tender workspace should be accessed and/or manipulated by authorised users only. Furthermore, some activities should only be possible when certain events have already taken place (e.g. accessing the details of a Tender should only be possible for authorised personnel after Tenders are securely opened, following the four-eye principle).

Step 02. Preparation and Publication of a Prior Information Notice (PIN)

This step comprises the preparation of a Prior Information Notice (PIN). Contracting authorities should prepare and publish a PIN as early as possible, at the beginning of their budgetary year covering the awarding of the envisaged supplies and services contracts during the subsequent 12 months. For works contracts, a PIN may be published at any time. The use of a PIN is at the discretion of a contracting authority. Its use can shorten the time-limit for receipt of tenders to 36 days.

The functional requirements identified for this step comprise:

Functional Req. 6. Preparation of a Prior Information Notice

Procurement Officers may be assisted in creating a PIN by using an application for the preparation of the Notice to be published in the Official Journal. Such an application, commonly known as "Form Filling Tool", can be a part of the eProcurement system itself, or an external application integrated to the eProcurement system.

Document templates or electronic standard forms shall be used to prepare a PIN.

Procurement Officers can be further assisted in preparing a PIN by automatically utilising Call information already provided to the system within the Tender workspace, during STEP 1 of the procedure. The Form Filling Tool may obtain all pre-defined Call information from the eProcurement system, and automatically pre-fill as many fields in the PIN template as possible.

Functional Req. 7. Use of the Common Procurement Vocabulary (CPV) classification standard

The new Public Procurement Directives require contracting authorities to use the CPV to advertise their procurement needs. The CPV constitutes a European classification standard specifically tailored to describe goods, services or works purchased by public authorities by numerical codes. The CPV exists in the 20 official languages of the EU. Thanks to this classification, Economic Operators can easily identify the goods/services/works a contracting authority wishes to procure, irrespective of the language of the PIN and to perform specific searches on the TED database.

An eProcurement system can prompt Procurement Officers to make use of the CPV classification standard when creating a PIN.

Functional Req. 8. Publication of a Prior Information Notice

Once the PIN is created, Procurement Officers can be assisted to dispatch an appropriate electronic message to the OJEU, containing all information of the PIN, to request for its publication. The eProcurement system should be in position to store the dispatch date of the PIN to the OJEU.

Step 03a. Preparation of a Contract Notice & Contract Documents

This step comprises the preparation of the Contract Notice and Contract Documents for a specific Call for Tenders. The objective of the Contract Notice is to openly advertise to the general public the intention of the contracting authority to procure, as well as, to provide the core requirements for the contract. Contract Documents define more precisely the requirements/specifications of the contracting authority for the goods/services/works to be procured.

The main activities for the preparation of the Contract Notice are the same as those for the preparation of the PIN, the only difference being the content of the corresponding form. Hence, the basic functional requirements for the preparation of the Contract Notice are the same as those for the preparation of the PIN (**Functional Req. 6: “Preparation of a Prior Information Notice”** and **Functional Req. 8: "Publication of a Prior Information Notice”**). In addition, the preparation of a Contract Notice imposes some additional requirements.

Functional Req. 9. Nomenclature of Territorial Units for Statistics (NUTS) classification standard

The Contract Notice may specify the NUTS codes for the contract to be procured. NUTS is a classification standard for geographic regions, which uses numerical codes to define the location of the goods/services/works to be procured. Similarly to the CPV, the inclusion of NUTS codes in a Contract Notice allows Economic Operators to easily identify the locations to which they will be required to deliver the goods/services/works of the contract irrespective of the language of the Contract Notice.

An eProcurement system can prompt Procurement Officers to make use of the NUTS classification standard when creating a Contract Notice. This functional requirement is not legislated by the EU public procurement legal framework, nevertheless can significantly increase the services that can be offered by an eProcurement system (e.g, searching, reporting, system integration, etc.)

Functional Req. 10. Tender Evaluation Mechanism

Contracting authorities shall conclude a competition by performing the full evaluation of Tenders received, and the awarding of a contract. The evaluation of Tenders is based on one of the following two Tender evaluation models: either lowest price or Most Economically Advantageous Tender (MEAT). In both cases, the evaluation model to be used must be specified in the Contract Notice or the Contract Documents. In the latter case, this fact must be stated in the Contract notice. If the evaluation is based on the Most Economically Advantageous Tender, contracting authorities are required to define the exact evaluation criteria to be used, as well as to indicate their weightings either in the Contract Notice or in the Contract Documents. In the latter case this reference to the Contract Documents must be stated in the Contract Notice. In duly justified cases where the weighting cannot be established, contracting authorities must be able to give reasons, and indicate the descending order of importance of all criteria.

When the evaluation parameters of a Call based on MEAT can be established with precision, a contracting authority may decide that the award of the contract shall be preceded by an electronic auction. The intention of using an electronic auction as part of the awarding procedure needs to be mentioned in the Contract Notice of the Call.

To accommodate the above, an eProcurement system can prompt Procurement Officers to define the evaluation mechanism to be used, as well as automatically include the details of the evaluation mechanism in the Contract Notice and/or Contract Documents.

Step 03b. Publication of Contract Notice & Contract Documents

This step comprises the publication of the Contract Notice and Contract Documents of a Call for Tenders. This operation involves the dispatch of the electronic message of the Contract Notice to the OJEU, as well as, the publication of the Contract Documents to the general public.

The functional requirements identified for this step comprise:

Functional Req. 11. Interface with the OJEU

Once the Contract Notice of a Call for Tenders is completed, it needs to be made publicly available. For contracts above the EU thresholds, as defined in the EU public procurement directives, the Contract Notice needs to be published to the Official Journal of the European Union (OJEU).

The EU Publications Office, responsible for the daily publication of the Official Journal, offers several methods by which a notice can be published on the OJEU. An eProcurement system can offer the functionality for automating or semi-automating the publication of notices in the OJEU. This does not only simplify the processes a Procurement Officer needs to follow, but also allows to shorten the time-limit for the submission of Tenders.

Functional Req. 12. Publication of Contract Documents

The preparation of Contract Documents involves an “approval” lifecycle for documents (and possible notices), comprising their creation, validation, approval and publication. The “approval” lifecycle depends on the internal procedures of the contracting authority, and may involve multiple Procurement Officers. An eProcurement system can provide a functionality for modelling these internal workflows which can assist Procurement Officers to comply with the internal workflows of their contracting authority in a more efficient and time-effective manner. While a document is in “not-published” state, it is accessible only to the Procurement Officers associated with it.

The finalised Contract Documents approved by the contracting authority shall not be made publicly available until the Contract Notice is dispatched to the OJEU for publication. Once the Contract Notice has been published by the OJEU, it may also be published at the national level, and all interested parties should be given unrestricted and full access to the Contract Documents.

Once a Contract Document is made publicly available, it should not be possible for anyone to remove and/or modify this document.

Step 04. Submit a Tender

This step constitutes the eProcurement phase for the submission of Tenders by Economic Operators, commonly referred to as eTendering. During this phase, Economic Operators gain access to all publicly available information of a Call, may request Additional Documents, and submit their Tenders.

The functional requirements identified for this step comprise:

Functional Req. 13. Search Calls mechanism

At this step, the Call for Tender is considered “open”, as it is publicly available. An eProcurement system may provide a search Calls mechanism to any interested party, so that it can search through all publicly “open” Calls and locate interesting ones, for which s/he might wish to participate.

Functional Req. 14. Visualise/Download Call for Tenders specifications

Any interested party should be provided with the functionality to access all publicly available information of a Call, comprising PIN, Contract Notice, Contract Documents, Additional Documents, etc. An eProcurement system may require interested parties to provide some personal information, so that they are notified if and when new information about the Call is published (Additional Documents, new Contract Documents, etc.)

The eProcurement system should ensure that full and unrestricted access to all publicly available information is provided equally to all interested parties.

Functional Req. 15. Request for Additional Documents

Any interested party may be provided with the possibility to request Additional Documents about a Call (i.e. ask a question to the awarding authority). This may be provided only within a predefined time period (i.e. accept questions posted before a certain date). All requests for Additional Documents and the Additional Documents themselves need to be made publicly available to all interested parties, and in due time before the end of the time-limit for submission to ensure non-discrimination and equal treatment of Economic Operators. The identities of Economic Operators posting requests for Additional Documents should not be disclosed, neither to the general public nor to other Economic Operators.

Functional Req. 16. Automated Notifications

An eProcurement system may support an automated notification mechanism, which can automatically notify its users of interesting events. For instance, Economic Operators that requested an Additional Document (i.e. posted a question) may be automatically notified when an Additional Document is published by the contracting authority (i.e. the contracting authority has provided an answer to the posted question). As described in Functional Requirement 15, such a notification mechanism must ensure equal treatment of all Economic Operators and operate within the time-limit for submission of tenders.

Functional Req. 17. Submission of Tenders

Economic Operators interested in a Call shall have the possibility to submit electronically the Tenders that they have prepared through generally available, non-discriminatory, and interoperable means of communication. Contracting authorities examine whether the Tenders received are compliant with the requirements defined in the Tender specifications.

Economic Operators that have submitted a Tender should be provided with the possibility to update their Tender until the Tender submission deadline.

The eProcurement system must ensure that all Tenders for a Call are stored in a secure environment and cannot be accessed until authorised Procurement Officers authorise their opening following the four-eye principle. If access prohibition is infringed, it should be reasonably ensured that the infringement is clearly detectable.

Official time-stamping facility can ensure the exact submission date and time of a Tender is recorded, guaranteeing there are no misconceptions about the submission time of a Tender (see relevant non-functional requirement in section 4.3.3.2).

Security arrangements for all data transmitted to/from the eProcurement system and stored in the eProcurement system should ensure the integrity of the Tenders, as well as, the authenticity of the Economic Operators that have submitted them (see relevant non-functional requirements in section 4.5).

Step 05. Open and evaluate Tenders

This step refers to the opening and evaluation of electronic Tenders. Opening and evaluation take place once the Tender submission period has ended (i.e. eSubmission is complete). The secure opening of Tenders must involve at least two authorised procurement officers who proceed to open the Tenders received through simultaneous action following the so-called four-eye principle. Following this operation authorised procurement officers perform the evaluation of Tenders based on the pre-defined Tender evaluation mechanism and establish the ranking of Tenders.

Functional Req. 18. Four-eye Principle

An eProcurement system needs to ensure that access to Tenders cannot be obtained by anyone, until authorised procurement officers proceed to the opening of Tenders following the four-eye principle. To "open" or "unlock" Tenders, two or more authorised procurement officers need to perform simultaneous actions.

The opening of Tenders shall only be performed after the Tender submission deadline.

It is considered as best practice for the opening of Tenders to be performed in phases. Hence, for instance, proof documents are opened first, followed by the opening of technical document, and lastly the opening of financial offers. In all Tender opening phases, the Four-eye Principle can be applied.

Functional Req. 19. Tender Confidentiality

Once Tenders are opened, they can only be accessed by authorised personnel, ensuring that the confidentiality of Tenders is not violated.

Functional Req. 20. Tender Evaluation

An eProcurement system may assist procurement officers to perform the evaluation of Tenders, either in an automated or semi-automated manner. Initially, all Tenders should be evaluated in order to ensure that participating Tenderers satisfy the Conditions for Participation stated in the Contract Notice or Contract Documents of the Call.

This is followed by the full Tender evaluation according to the pre-defined evaluation mechanism stated in the Contract Notice or Contract Documents of the Call.

Step 06. Electronic Auctions

If the specifications of a Tender can be defined with precision, the contracting authority may choose to award the contract using an electronic auction. In this case, tenderers are given the opportunity to improve aspects of their Tenders through a repetitive bidding mechanism, increasing their possibility to win the competition. The evaluation of auction Bids is performed according to some or all of the evaluation criteria mentioned in step 3.

Electronic auctions can be used in an eProcurement competition only if this is clearly stated in the Contract Notice of the Call. The details regarding the steps involved in the execution of electronic auctions, as well as, related functional requirements are discussed in section 2.3.

Step 07. Contract Award

Once the awarding procedure is complete, the contract is awarded to the tenderer having submitted the lowest price or the Most Economically Advantageous Tender, as concluded by applying the evaluation methodology (defined in step 3). The contracting authorities are required to publish a Contract Award Notice, which informs all interested parties of the results of the competition. The procedure for creating and publishing a Contract Award Notice is the same as that for creating a PIN and a Contract Notice. Hence, **Functional Req. 6: "Preparation of a Prior Information Notice"**, **Functional Req. 8: "Publication of a Prior Information Notice"** and **Functional Req. 11: "Interface with the OJEU"** are also necessary for creating/publishing a Contract Award Notice.

In addition, contracting authorities shall contact the participating tenderers to inform them of the award decision. Upon request of the tenderer, the contracting authority should usually give the reasons for rejection. . An eProcurement system may assist in this process by automatically or semi-automatically preparing appropriate notification messages, which can inform tenderers accordingly. **Functional Req. 16: "Automated Notifications"** can assist in this process.

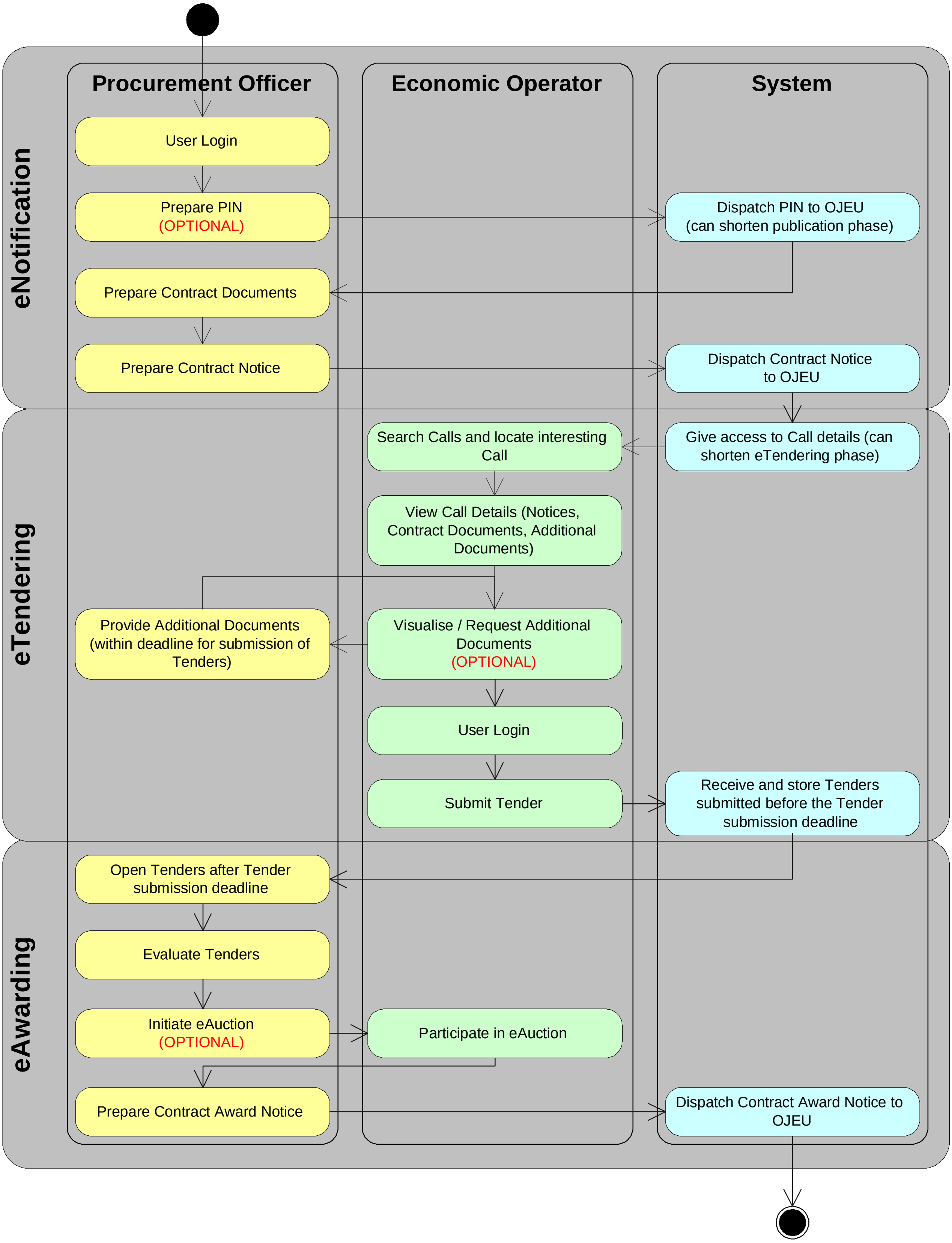
Functional Req. 21. Creation of Mandatory Reports regulated by the legislation

Another requirement of the legislation is related to the capability of the contracting authority to prepare regulatory reports, which provide information on all aspects of the competition. Such reports include information about the tenderers that participated in the competition, the successful tenderer(s), the reasons for their selection, etc. The contracting authority may be assisted in this process by an eProcurement system which, utilising all information created/stored in it during the competition, can automatically or semi-automatically produce such reports.

2.1.1.3 Open Procedure Activity Diagram

Figure 2-2 presents at granular level the open procedure, clearly displaying all activities that are being performed by the main actors (procurement officers, economic operators and an eProcurement system) in the different eProcurement phases: eNotification, eTendering, and eAwarding. The activity diagram groups in phases and serialises all activities that need to be performed in the whole procurement process. Some tasks are subject to legislated time-constraints that need to be respected by Contracting Authorities. Thus, the whole procurement process for a contract following the open procedure may require significant time.

Figure 2-2: Activity diagram for the open procedure


eNotification
eTendering
eAwarding
Procurement Officer
Economic Operator
System
User Login
Prepare PIN
(OPTIONAL)
Dispatch PIN to OJEU
(can shorten publication phase)
Prepare Contract Documents
Prepare Contract Notice
Dispatch Contract Notice
to OJEU
Search Calls and locate interesting Call
Give access to Call details (can shorten eTendering phase)
View Call Details (Notices, Contract Documents, Additional Documents)
Provide Additional Documents (within deadline for submission of Tenders)
Visualise / Request Additional Documents
(OPTIONAL)
User Login
Submit Tender
Receive and store Tenders submitted before the Tender submission deadline
Open Tenders after Tender submission deadline
Evaluate Tenders
Initiate eAuction
(OPTIONAL)
Participate in eAuction
Prepare Contract Award Notice
Dispatch Contract Award Notice to OJEU

2.1.2 Restricted Procedure

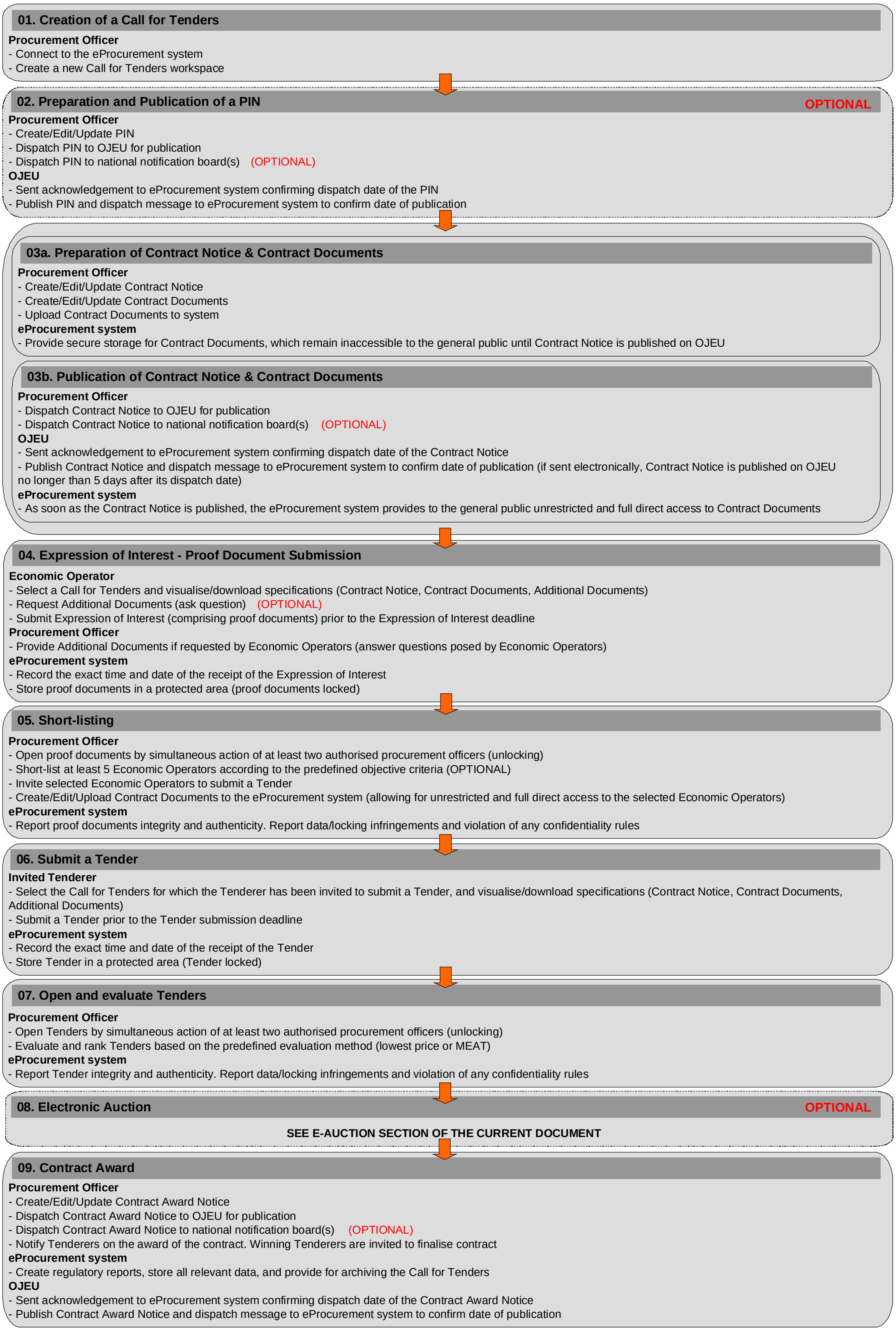
A Restricted procedure is a procedure in which any Economic Operator may request to participate and whereby only those Economic Operators invited by the contracting authority may submit a Tender. Following this procedure, contracting authorities issue a Contract Notice for advertising the contract. Any Economic Operator may express interest to participate by submitting an appropriate request for participation to the contracting authority.

The contracting authority may restrict the number of tenderers that will be invited to tender to a minimum of at least five. In this case, the contracting authority must state the objective criteria it will apply for short-listing in the Contract Notice, and only the candidates that are short-listed according to those criteria are subsequently invited to submit a tender. In the absence of such a restriction there is no short-listing. The contracting authority invites all Economic Operators that comply with the minimum capabilities required in the Contract notice to submit a tender.

2.1.2.1 Information Flow Diagram

Figure 2-3 depicts the different steps of the restricted procedure, focusing on the actions performed by all parties involved.

Figure 2-3: Information Flow Diagram for the Restricted Procedure



01. Creation of a Call for Tenders

Procurement Officer
- Connect to the eProcurement system
- Create a new Call for Tenders workspace

02. Preparation and Publication of a PIN OPTIONAL

Procurement Officer
- Create/Edit/Update PIN
- Dispatch PIN to OJEU for publication
- Dispatch PIN to national notification board(s) (OPTIONAL)

OJEU
- Sent acknowledgement to eProcurement system confirming dispatch date of the PIN
- Publish PIN and dispatch message to eProcurement system to confirm date of publication

03a. Preparation of Contract Notice & Contract Documents

Procurement Officer
- Create/Edit/Update Contract Notice
- Create/Edit/Update Contract Documents
- Upload Contract Documents to system

eProcurement system
- Provide secure storage for Contract Documents, which remain inaccessible to the general public until Contract Notice is published on OJEU

03b. Publication of Contract Notice & Contract Documents

Procurement Officer
- Dispatch Contract Notice to OJEU for publication
- Dispatch Contract Notice to national notification board(s) (OPTIONAL)

OJEU
- Sent acknowledgement to eProcurement system confirming dispatch date of the Contract Notice
- Publish Contract Notice and dispatch message to eProcurement system to confirm date of publication (if sent electronically, Contract Notice is published on OJEU no longer than 5 days after its dispatch date)

eProcurement system
- As soon as the Contract Notice is published, the eProcurement system provides to the general public unrestricted and full direct access to Contract Documents

04. Expression of Interest - Proof Document Submission

Economic Operator
- Select a Call for Tenders and visualise/download specifications (Contract Notice, Contract Documents, Additional Documents)
- Request Additional Documents (ask question) (OPTIONAL)
- Submit Expression of Interest (comprising proof documents) prior to the Expression of Interest deadline

Procurement Officer
- Provide Additional Documents if requested by Economic Operators (answer questions posed by Economic Operators)

eProcurement system
- Record the exact time and date of the receipt of the Expression of Interest
- Store proof documents in a protected area (proof documents locked)

05. Short-listing

Procurement Officer
- Open proof documents by simultaneous action of at least two authorised procurement officers (unlocking)
- Short-list at least 5 Economic Operators according to the predefined objective criteria (OPTIONAL)
- Invite selected Economic Operators to submit a Tender
- Create/Edit/Upload Contract Documents to the eProcurement system (allowing for unrestricted and full direct access to the selected Economic Operators)

eProcurement system
- Report proof documents integrity and authenticity. Report data/locking infringements and violation of any confidentiality rules

06. Submit a Tender

Invited Tenderer
- Select the Call for Tenders for which the Tenderer has been invited to submit a Tender, and visualise/download specifications (Contract Notice, Contract Documents, Additional Documents)
- Submit a Tender prior to the Tender submission deadline

eProcurement system
- Record the exact time and date of the receipt of the Tender
- Store Tender in a protected area (Tender locked)

07. Open and evaluate Tenders

Procurement Officer
- Open Tenders by simultaneous action of at least two authorised procurement officers (unlocking)
- Evaluate and rank Tenders based on the predefined evaluation method (lowest price or MEAT)

eProcurement system
- Report Tender integrity and authenticity. Report data/locking infringements and violation of any confidentiality rules

08. Electronic Auction OPTIONAL

SEE E-AUCTION SECTION OF THE CURRENT DOCUMENT

09. Contract Award

Procurement Officer
- Create/Edit/Update Contract Award Notice
- Dispatch Contract Award Notice to OJEU for publication
- Dispatch Contract Award Notice to national notification board(s) (OPTIONAL)
- Notify Tenderers on the award of the contract. Winning Tenderers are invited to finalise contract

eProcurement system
- Create regulatory reports, store all relevant data, and provide for archiving the Call for Tenders

OJEU
- Sent acknowledgement to eProcurement system confirming dispatch date of the Contract Award Notice
- Publish Contract Award Notice and dispatch message to eProcurement system to confirm date of publication

2.1.2.2 Functional requirements for the Restricted Procedure

The current section presents the functional requirements emerging from the legislation for the realisation of eProcurement systems capable to support the restricted procedure. Certain steps of the restricted procedure are identical to steps for the open procedure, discussed in section 2.1.1. Hence, only new steps, specific to the restricted procedure, are presented in this section. These new steps are Step 04. "Expression of Interest" and Step 05. "Short-listing".

Step 04. Expression of Interest – Proof Documents Submission

During this step Economic Operators express their interest to participate in a restricted procedure competition. This process is also commonly referred to as "request to participate".

Following the visualisation of the Call details, in the form of Contract Notice, Contract Documents and/or Additional Documents, Economic Operators may express their interest to participate in the Call, by submitting the necessary proof documents. The proof documents, comprising legal, technical and financial information, are subsequently used by the contracting authority to either invite an Economic Operator to submit a Tender, or reject the tenderer from the subsequent steps of the competition.

An eProcurement system may assist contracting authorities in this process, by providing the opportunity to Economic Operators to express their interest electronically. All functional requirements of Step 04 of the open procedure are also applicable in this step:

- **Functional Req. 13: Search Calls mechanism**
- **Functional Req. 14: Visualise/Download Call for Tenders specifications**
- **Functional Req. 15: Request for Additional Documents**
- **Functional Req. 16: Automated Notifications**
- **Functional Req. 17: Submission of Tenders**

Step 05. Short-listing (Optional)

If a contracting authority has announced in the Contract Notice its intention to limit the number of candidates that will be invited to submit a tender, it proceeds to a short-listing based on the expressions of interest it has received. To this end, it evaluates the received proof documents according to the selection criteria, as defined in step 03a and identifies a minimum number of five candidates to be invited.

All functional requirements of step 05 (Open and Evaluate Tenders) of the open procedure are also applicable in this instance:

- **Functional Req. 18: Four-eye Principle**
- **Functional Req. 19: Tender Confidentiality**
- **Functional Req. 20: Tender Evaluation**

Another activity of the contracting authority during this step is the preparation and publication of Contract Documents. Under the open procedure, Contract Documents need to be prepared and published when the Contract Notice is dispatched to the OJEU..

Functional Req. 22. Invitation to Tender

Once all proof documents have been examined and, where applicable, candidates have been short-listed based on the objective criteria stated in the Contract Notice, the contracting authority invites all or some Economic Operators to submit their Tenders until a defined submission deadline. Rejected Economic Operators should be notified that they will not be invited.

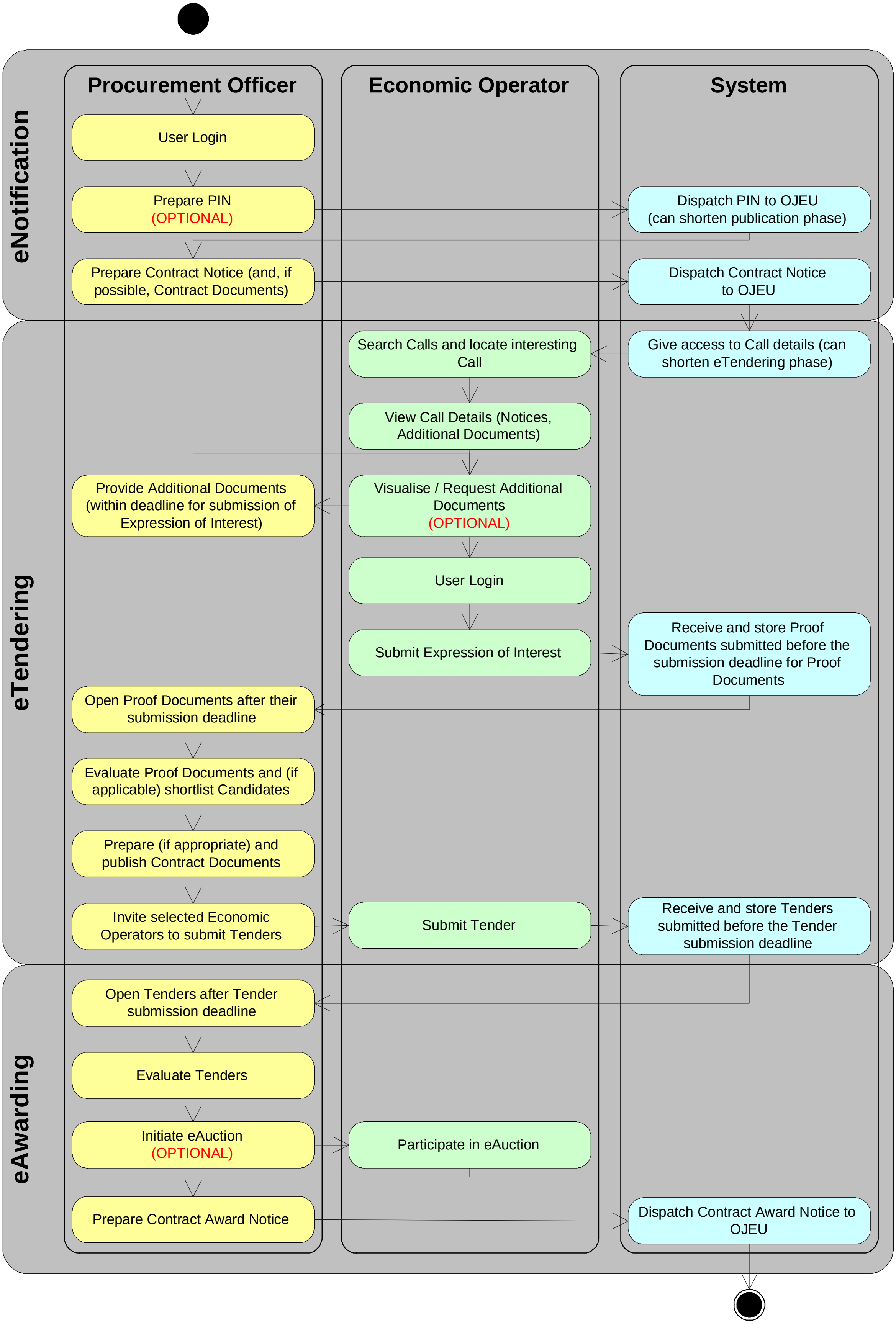
This process can be simplified for contracting authorities by an eProcurement system which can automatically or semi-automatically calculate the deadline for submitting Tenders, as well as, prepare appropriate messages to all Economic Operators involved. The identity of all Economic Operators involved must remain confidential.

From this point onward, all Call related information (comprising Contract Documents and Additional Documents) can be disclosed only to the economic operators selected to submit a Tender.

2.1.2.3 Restricted Procedure Activity Diagram

Figure 2-4 presents at granular level the restricted procedure, clearly displaying all activities that are performed by the main actors (procurement officers, economic operators and an eProcurement system) related to the different eProcurement phases: eNotification, eTendering, and eAwarding. The activity diagram groups in phases and serialises all activities that need to be performed in the whole procurement process. Some tasks are subject to legislated time-constraints that need to be respected by Contracting Authorities. Thus, the whole procurement process for a contract following the restricted procedure may require significant time.

Figure 2-4 : Activity diagram for the restricted procedure


eNotification
eTendering
eAwarding
Procurement Officer
Economic Operator
System
User Login
Prepare PIN
(OPTIONAL)
Dispatch PIN to OJEU
(can shorten publication phase)
Prepare Contract Notice (and, if possible, Contract Documents)
Dispatch Contract Notice to OJEU
Search Calls and locate interesting Call
Give access to Call details (can shorten eTendering phase)
View Call Details (Notices, Additional Documents)
Provide Additional Documents (within deadline for submission of Expression of Interest)
Visualise / Request Additional Documents
(OPTIONAL)
User Login
Submit Expression of Interest
Receive and store Proof Documents submitted before the submission deadline for Proof Documents
Open Proof Documents after their submission deadline
Evaluate Proof Documents and (if applicable) shortlist Candidates
Prepare (if appropriate) and publish Contract Documents
Invite selected Economic Operators to submit Tenders
Submit Tender
Receive and store Tenders submitted before the Tender submission deadline
Open Tenders after Tender submission deadline
Evaluate Tenders
Initiate eAuction
(OPTIONAL)
Participate in eAuction
Prepare Contract Award Notice
Dispatch Contract Award Notice to OJEU

2.2 Repetitive contracts

The EU public procurement legislation introduces two instruments to carry out repetitive purchases electronically, so-called Dynamic Purchasing Systems (DPS) and Framework Agreements. Both procedures aim to establish the terms governing contracts to be awarded over a given period of validity of up to four years, thus allowing contracting authorities to reduce the costs of organising recurrent purchases of standard goods and services.

Framework Agreements establish closed systems, under which contracts are awarded only to those economic operators who have been admitted to the agreement following an initial tendering procedure.

A Dynamic Purchasing System (DPS) provides a fully electronic tendering procedure which remains open to all economic operators throughout its entire period of validity.

In both cases, specific contracts advertised must comply with the terms set out in the Contract Notice or Contract Documents establishing the Framework Agreement or DPS.

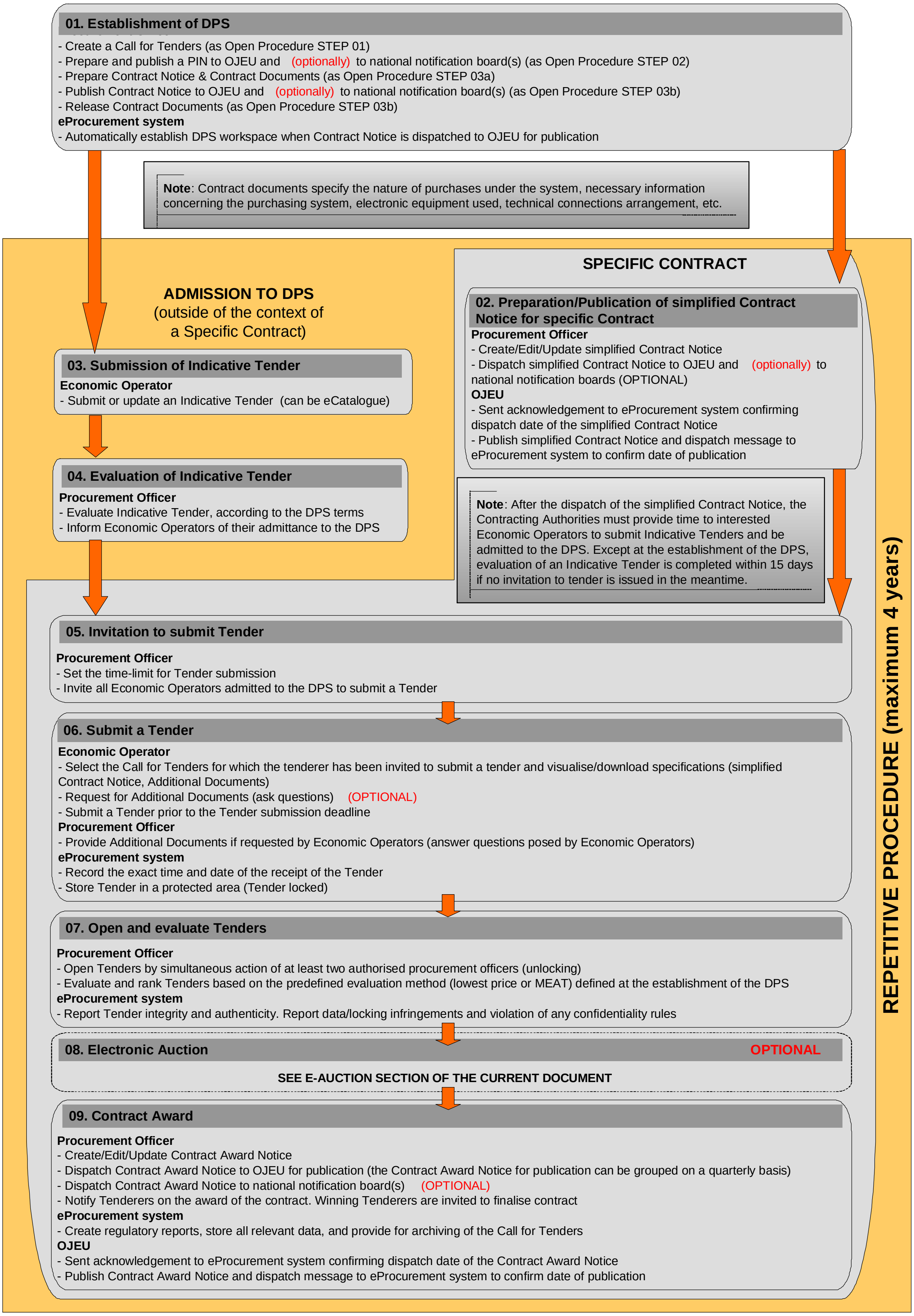
2.2.1 Dynamic Purchasing System (DPS)

The Dynamic Purchasing System (DPS) is a fully electronic process for contracting authorities to make commonly used purchases. A DPS is limited in duration (maximum of 4 years) and open throughout its validity to any Economic Operator satisfying the selection criteria and having submitted an indicative Tender compliant with the specifications for the DPS.

2.2.1.1 Information Flow Diagram

Figure 2-5 depicts the different steps for the establishment of a DPS, as well as, for the procurement of a specific contract under a DPS, focusing on the actions performed by all parties involved.

Figure 2-5: Information Flow Diagram for Dynamic Purchasing System



01. Establishment of DPS

- Create a Call for Tenders (as Open Procedure STEP 01)
- Prepare and publish a PIN to OJEU and (optionally) to national notification board(s) (as Open Procedure STEP 02)
- Prepare Contract Notice & Contract Documents (as Open Procedure STEP 03a)
- Publish Contract Notice to OJEU and (optionally) to national notification board(s) (as Open Procedure STEP 03b)
- Release Contract Documents (as Open Procedure STEP 03b)

eProcurement system

- Automatically establish DPS workspace when Contract Notice is dispatched to OJEU for publication

Note: Contract documents specify the nature of purchases under the system, necessary information concerning the purchasing system, electronic equipment used, technical connections arrangement, etc.

ADMISSION TO DPS
(outside of the context of a Specific Contract)

03. Submission of Indicative Tender

Economic Operator

- Submit or update an Indicative Tender (can be eCatalogue)

04. Evaluation of Indicative Tender

Procurement Officer

- Evaluate Indicative Tender, according to the DPS terms
- Inform Economic Operators of their admittance to the DPS

SPECIFIC CONTRACT

02. Preparation/Publication of simplified Contract Notice for specific Contract

Procurement Officer

- Create/Edit/Update simplified Contract Notice
- Dispatch simplified Contract Notice to OJEU and (optionally) to national notification boards (OPTIONAL)

OJEU

- Sent acknowledgement to eProcurement system confirming dispatch date of the simplified Contract Notice
- Publish simplified Contract Notice and dispatch message to eProcurement system to confirm date of publication

Note: After the dispatch of the simplified Contract Notice, the Contracting Authorities must provide time to interested Economic Operators to submit Indicative Tenders and be admitted to the DPS. Except at the establishment of the DPS, evaluation of an Indicative Tender is completed within 15 days if no invitation to tender is issued in the meantime.

05. Invitation to submit Tender

Procurement Officer

- Set the time-limit for Tender submission
- Invite all Economic Operators admitted to the DPS to submit a Tender

06. Submit a Tender

Economic Operator

- Select the Call for Tenders for which the tenderer has been invited to submit a tender and visualise/download specifications (simplified Contract Notice, Additional Documents)
- Request for Additional Documents (ask questions) (OPTIONAL)
- Submit a Tender prior to the Tender submission deadline

Procurement Officer

- Provide Additional Documents if requested by Economic Operators (answer questions posed by Economic Operators)

eProcurement system

- Record the exact time and date of the receipt of the Tender
- Store Tender in a protected area (Tender locked)

07. Open and evaluate Tenders

Procurement Officer

- Open Tenders by simultaneous action of at least two authorised procurement officers (unlocking)
- Evaluate and rank Tenders based on the predefined evaluation method (lowest price or MEAT) defined at the establishment of the DPS

eProcurement system

- Report Tender integrity and authenticity. Report data/locking infringements and violation of any confidentiality rules

08. Electronic Auction OPTIONAL

SEE E-AUCTION SECTION OF THE CURRENT DOCUMENT

09. Contract Award

Procurement Officer

- Create/Edit/Update Contract Award Notice
- Dispatch Contract Award Notice to OJEU for publication (the Contract Award Notice for publication can be grouped on a quarterly basis)
- Dispatch Contract Award Notice to national notification board(s) (OPTIONAL)
- Notify Tenderers on the award of the contract. Winning Tenderers are invited to finalise contract

eProcurement system

- Create regulatory reports, store all relevant data, and provide for archiving of the Call for Tenders

OJEU

- Sent acknowledgement to eProcurement system confirming dispatch date of the Contract Award Notice
- Publish Contract Award Notice and dispatch message to eProcurement system to confirm date of publication

2.2.1.2 Functional requirements for a DPS

The section presents the functional requirements emerging from the legislation for the realisation of eProcurement systems capable to support a DPS.

Step 01. Establishment of DPS

This step comprises the creation of a suitable workspace for the whole "life" of the DPS. All functional requirements for the creation of a Tender workspace of the open procedure are also applicable to the DPS.

- **Functional Req. 1: User registration**
- **Functional Req. 2: User profiling**
- **Functional Req. 3: User authentication**
- **Functional Req. 4: User authorisation**
- **Functional Req. 5: Tender workspace creation**

Furthermore, an eProcurement system supporting DPS needs to be in a position to automatically or semi-automatically generate reports for the DPS

Functional Req. 23. DPS reporting

The DPS workspace effectively constitutes an "umbrella" for the procurement of specific contracts within it. Hence, authorised Procurement Officers may be provided with the possibility to produce DPS reports, not only reporting details of its establishment (i.e. when it was established, who created it, information of the Contract Notice, etc.), but also information about specific contracts procured within it (i.e. the list of tenderers admitted to the DPS, number of specific contracts procured through the DPS, etc.)

Step 02. Preparation/Publication of a simplified Contract Notice for specific contract

This step comprises the creation of a suitable workspace for the procurement of a specific contract within a DPS. In this step, the contracting authority needs to create and publish a simplified Contract Notice, making publicly available its intention to procure a contract under an established DPS.

The procedure for creating and publishing a simplified Contract Notice through the DPS is identical to the one for creating/publishing a PIN and/or Contract Notice. Hence, **Functional Req. 8: "Publication of a Prior Information Notice"** and **Functional Req. 11: "Interface with the OJEU"** are also applicable here.

The simplified contract notice for the procurement of a specific contract must detail the time-limit for the receipt of Indicative Tenders for admittance to the DPS. This time-limit can not be less than 15 days from the date on which the simplified Contract Notice is sent. Contracting authorities should not proceed with inviting tenderers to submit Tenders for the specific contract, until all Indicative Tenders received by that deadline are evaluated. This process must allow sufficient time for new Economic Operators to be admitted in the DPS and participate in the competition for the specific contract within DPS.

An eProcurement system supporting DPS needs to permit authorised Procurement Officers to create specific contract workspaces for storing necessary information about a specific contract, similar to the open procedure.

Functional Req. 24. Creation of specific contract workspaces within DPS workspace

An eProcurement system can allow the creation of as many specific contract workspaces within the DPS workspace as required by the contracting authority. When creating a specific contract, certain properties of the specific contract must be pre-set as defined in the DPS workspace (like Contract Documents and Tender evaluation methodology). A workspace for a specific contract within the DPS may function in a similar way to the workspace of the open procedure (**Functional Req. 5: "Tender workspace creation"**). It can permit Procurement Officers to store all contract specific information within the workspace, while all Tenders submitted for the specific contract can also be securely stored in this virtual area. Furthermore, an eProcurement system supporting DPS must ensure the confidentiality of all information stored within a specific contract workspace, for example with regard to authorised users of another specific contract workspace of the same DPS.

Step 03. Submission of Indicative Tender

During this step, Economic Operators can submit an Indicative Tender, in order to be admitted to the DPS. All public information about the DPS, comprising the Contract Notice and Contract Documents, are made available to all interested parties to obtain access to. Any Economic Operator may submit a Tender without prior invitation by the contracting authority.

Furthermore, Economic Operators already admitted to the DPS may update their Indicative Tenders.

An Indicative Tender may take the form of an eCatalogue.

Functional Req. 25. Indicative Tenders in the form of electronic catalogues (eCatalogues)

An Indicative Tender may take the form of an eCatalogue. The contracting authority may define the format an eCatalogue should have.

An eProcurement system may assist contracting authorities in defining the format of an electronic catalogue. Furthermore, the system may provide the necessary support for allowing Economic Operators to create their Indicative Tenders in the required format, and/or allow Procurement Officers to visualise eCatalogues in a user-friendly format. Advanced search capabilities, multimedia support (e.g. images, sounds, etc.) and/or tools for comparing eCatalogues from different Economic Operators may also be offered. An eCatalogue is possible to also be used for forming a Tender for an Individual Contract competition. Nevertheless, the eCatalogue needs to confirm to the specifications of the Call for Tender.

Other functional requirements which can assist in the process and are already described in previous eProcurement procedures comprise:

- **Functional Req. 14: Visualise/Download Call for Tenders specifications**
- **Functional Req. 15: Request for Additional Documents**
- **Functional Req. 16: Automated Notifications**
- **Functional Req. 17: Submission of Tenders**
- **Functional Req. 19: Tender Confidentiality**

Step 04. Evaluation of Indicative Tender

During this step, Procurement Officers open Indicative Tenders and evaluate them according to the awarding criteria (price or MEAT) set out in the terms of the DPS. The contracting authority evaluates which of the Indicative Tenders meet the pre-defined criteria for admittance in the DPS, and which do not. New Economic Operators that meet the admittance criteria are admitted to the DPS.

Contracting authorities may be assisted in evaluating Indicative Tenders by an eProcurement system, according to the functional requirements for evaluation under the open procedure.

- **Functional Req. 19: Tender Confidentiality**
- **Functional Req. 20: Tender Evaluation**
- **Functional Req. 25: Indicative Tenders in the form of electronic catalogues (eCatalogues)**

Step 05. Invitation to submit Tender

Once the Invitation to Tender date is reached, as defined in Step 02, Procurement Officers prepare and send "Invitations to Tender" to all Tenderers admitted in the DPS. The invitation defines the time-limit for receiving Tenders, the format of eCatalogues, as well as the evaluation criteria to be used for the evaluation of Tenders. Where applicable, these criteria may be formulated more precisely, in line with the specifications set out for the DPS. Procurement Officers may be assisted in this process by an eProcurement system satisfying the following functional requirements:

- **Functional Req. 12: Publication of Contract Documents**
- **Functional Req. 22: Invitation to Tender**

Step 06. Submit a Tender

All Tenderers admitted in the DPS are invited to provide a Tender for a specific contract. Tenderers interested to participate in the specific contract submit a Tender (based on their initial Indicative Tender or a revised Indicative Tender) before the Tender submission deadline, as defined by the contracting authority in the previous step.

An eProcurement system may assist in the process by satisfying functional requirements described in previous eProcurement procedures:

- **Functional Req. 14: Visualise/Download Call for Tenders specifications**
- **Functional Req. 15: Request for Additional Documents**
- **Functional Req. 16: Automated Notifications**
- **Functional Req. 17: Submission of Tenders**
- **Functional Req. 18: Four-eye Principle**
- **Functional Req. 19: Tender Confidentiality**
- **Functional Req. 25: Indicative Tenders in the form of electronic catalogues (eCatalogues)**

Step 07. Open and evaluate Tenders

All Tenders received for the specific contract are opened and evaluated according to the criteria laid out in the Contract Notice for the establishment of the DPS. An eProcurement system may assist in the process by satisfying functional requirements described in previous eProcurement procedures:

- **Functional Req. 18: Four-eye Principle**
- **Functional Req. 19: Tender Confidentiality**
- **Functional Req. 20: Tender Evaluation**

Step 08. Electronic Auctions

In case the specifications of the DPS, defined during its establishment, state the use of eAuction as an evaluation mechanism, a contracting authority may choose to conduct an electronic auction prior to awarding the specific contract. The eAuction shall be conducted according to the terms defined for the establishment of the DPS. In this case, tenderers are given the opportunity to improve aspects of their Tenders through a repetitive bidding mechanism, increasing their chances of winning the competition.

The details regarding the steps involved in the execution of electronic auctions, as well as, related functional requirements are discussed in section 2.3.

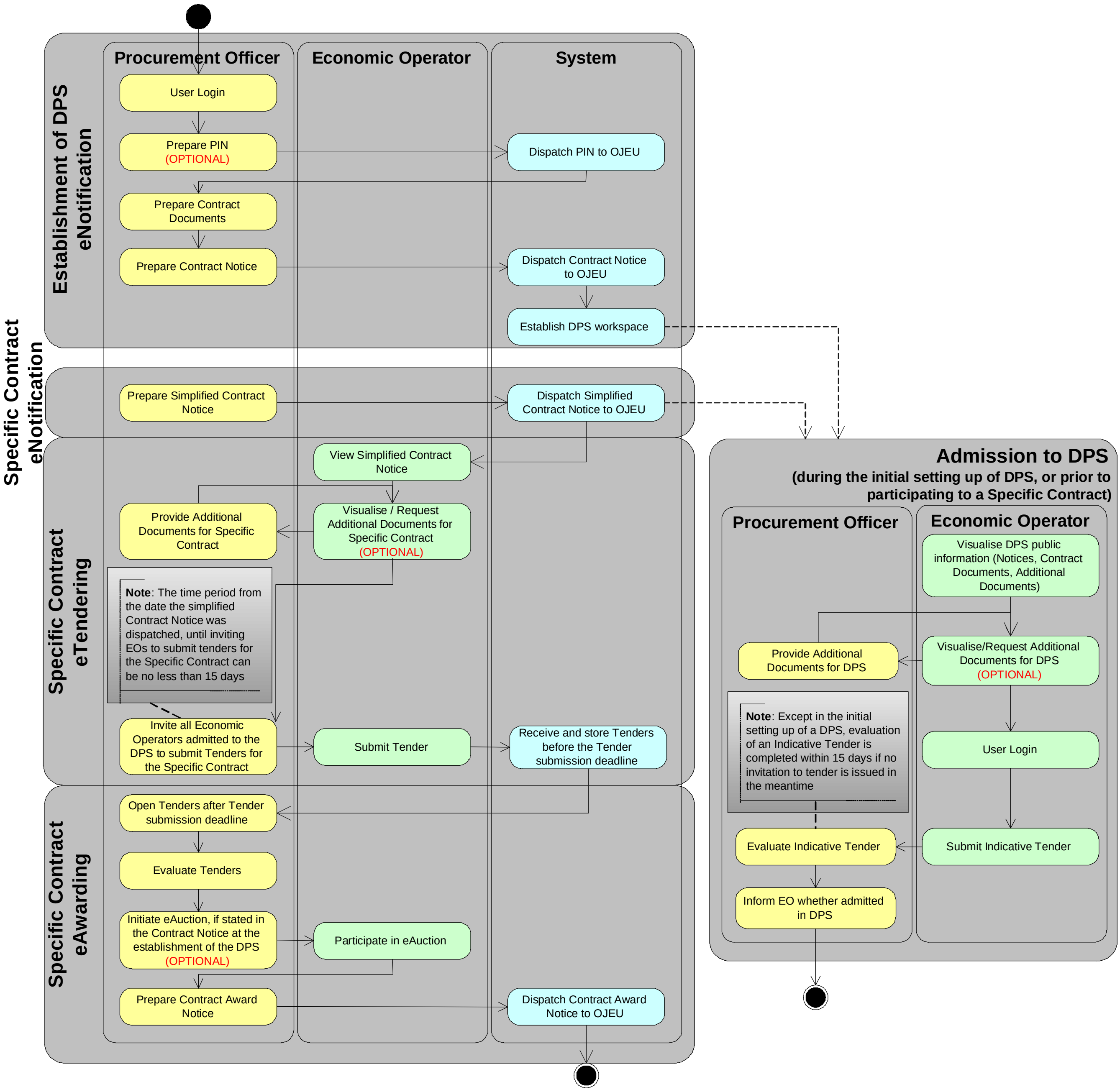
Step 09. Contract Award

Following the steps necessary for concluding a specific contract within a DPS, a contracting authority shall create and publish a Contract Award Notice. The Contract Award Notices for specific contracts under a DPS may be grouped and published on a quarterly basis. In addition, the contracting authority needs to create regulatory reports. An eProcurement system may assist contracting authorities in preparing Contract Award Notices, especially grouped notices, as well as in preparing the required regulatory reports (similar to **Functional Req. 6: "Preparation of a Prior Information Notice"**) and **Functional Req. 21: "Creation of Mandatory Reports"**.

2.2.1.3 Dynamic Purchasing System Activity Diagram

Figure 2-6 presents at granular level the establishment of a DPS, the admission of Economic Operators in the DPS, as well as, the procurement of a specific contract under the DPS. The figure clearly displays all activities that are performed by the main actors (procurement officers, economic operators and an eProcurement system) in the different eProcurement phases: eNotification, eTendering, and eAwarding. The activity diagram groups in phases and serialises all activities that need to be performed in the whole procurement process. Some tasks are subject to legislated time-constraints that need to be respected by Contracting Authorities. Thus, the whole procurement process for the establishment of a DPS and/or a specific contract within a DPS may require significant time.

Figure 2-6: Activity diagram for a Dynamic Purchasing System


Establishment of DPS eNotification
Specific Contract eNotification
Specific Contract eTendering
Specific Contract eAwarding
Procurement Officer
Economic Operator
System
User Login
Prepare PIN (OPTIONAL)
Dispatch PIN to OJEU
Prepare Contract Documents
Prepare Contract Notice
Dispatch Contract Notice to OJEU
Establish DPS workspace
Prepare Simplified Contract Notice
Dispatch Simplified Contract Notice to OJEU
View Simplified Contract Notice
Provide Additional Documents for Specific Contract
Visualise / Request Additional Documents for Specific Contract (OPTIONAL)
Note: The time period from the date the simplified Contract Notice was dispatched, until inviting EOs to submit tenders for the Specific Contract can be no less than 15 days
Invite all Economic Operators admitted to the DPS to submit Tenders for the Specific Contract
Submit Tender
Receive and store Tenders before the Tender submission deadline
Open Tenders after Tender submission deadline
Evaluate Tenders
Initiate eAuction, if stated in the Contract Notice at the establishment of the DPS (OPTIONAL)
Participate in eAuction
Prepare Contract Award Notice
Dispatch Contract Award Notice to OJEU
Admission to DPS
(during the initial setting up of DPS, or prior to participating to a Specific Contract)
Procurement Officer
Economic Operator
Visualise DPS public information (Notices, Contract Documents, Additional Documents)
Provide Additional Documents for DPS
Visualise/Request Additional Documents for DPS (OPTIONAL)
Note: Except in the initial setting up of a DPS, evaluation of an Indicative Tender is completed within 15 days if no invitation to tender is issued in the meantime
User Login
Evaluate Indicative Tender
Submit Indicative Tender
Inform EO whether admitted in DPS

2.2.2 Framework Agreements

A framework agreement is an agreement between one or more contracting authorities and one or more Economic Operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

For the purpose of concluding a framework agreement, contracting authorities shall follow the rules for procuring an individual contract for all phases up to the awarding of contracts. The parties to the framework agreement shall be chosen by applying the award criteria set in the Contract Notice or Contract Documents of the Call for Tenders.

The term of a framework agreement may not exceed four years, save in exceptional and duly justified cases.

Contracts awarded under a framework agreement shall comply with the terms set out for that framework agreement.

2.2.2.1 Information Flow Diagram

Figure 2-7 depicts the different steps involved in the establishment of a framework agreement, as well as, in the procurement of an individual contract within a framework agreement, focusing on the actions performed by all parties involved.

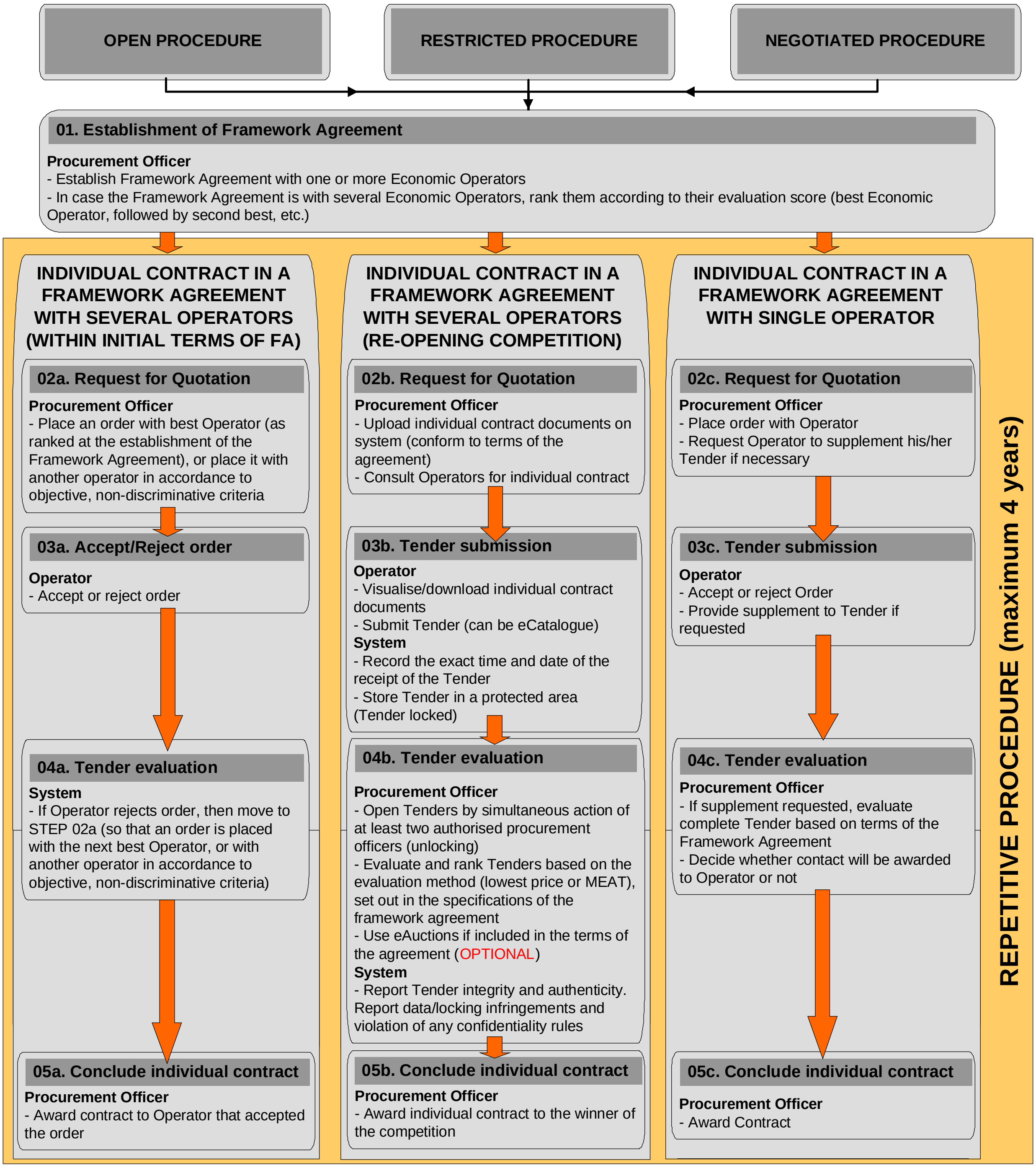
As mentioned above, a framework agreement may be concluded with one or more Economic Operators. In the former case, individual contracts procured within a framework agreement shall be awarded within the limits of the terms laid down in the framework agreement. In the latter case, the Economic Operators must be at least three in number. Individual contracts procured within a framework agreement with three or more economic operators shall be awarded either by application of the terms laid down in the framework agreement, or by re-opening competition.

A re-opening of competition shall be conducted on the basis of the terms laid down in the framework agreement or, where appropriate, more precisely formulated terms. Such terms shall be in accordance with the new EU public procurement legislation.

Figure 2-7 demonstrates the information flow diagrams for the establishment and use of framework agreements for:

- Framework agreement with more than one operator (without a re-opening of competition)
- Framework agreement with more than one operator (with a re-opening competition)
- Framework agreement with one operator

Figure 2-7: Information Flow Diagram of the Framework Agreement



OPEN PROCEDURE

RESTRICTED PROCEDURE

NEGOTIATED PROCEDURE

01. Establishment of Framework Agreement

Procurement Officer
- Establish Framework Agreement with one or more Economic Operators
- In case the Framework Agreement is with several Economic Operators, rank them according to their evaluation score (best Economic Operator, followed by second best, etc.)

REPETITIVE PROCEDURE (maximum 4 years)

INDIVIDUAL CONTRACT IN A FRAMEWORK AGREEMENT WITH SEVERAL OPERATORS (WITHIN INITIAL TERMS OF FA)

02a. Request for Quotation

Procurement Officer
- Place an order with best Operator (as ranked at the establishment of the Framework Agreement), or place it with another operator in accordance to objective, non-discriminative criteria

03a. Accept/Reject order

Operator
- Accept or reject order

04a. Tender evaluation

System
- If Operator rejects order, then move to STEP 02a (so that an order is placed with the next best Operator, or with another operator in accordance to objective, non-discriminative criteria)

05a. Conclude individual contract

Procurement Officer
- Award contract to Operator that accepted the order

INDIVIDUAL CONTRACT IN A FRAMEWORK AGREEMENT WITH SEVERAL OPERATORS (RE-OPENING COMPETITION)

02b. Request for Quotation

Procurement Officer
- Upload individual contract documents on system (conform to terms of the agreement)
- Consult Operators for individual contract

03b. Tender submission

Operator
- Visualise/download individual contract documents
- Submit Tender (can be eCatalogue)

System
- Record the exact time and date of the receipt of the Tender
- Store Tender in a protected area (Tender locked)

04b. Tender evaluation

Procurement Officer
- Open Tenders by simultaneous action of at least two authorised procurement officers (unlocking)
- Evaluate and rank Tenders based on the evaluation method (lowest price or MEAT), set out in the specifications of the framework agreement
- Use eAuctions if included in the terms of the agreement (OPTIONAL)

System
- Report Tender integrity and authenticity. Report data/locking infringements and violation of any confidentiality rules

05b. Conclude individual contract

Procurement Officer
- Award individual contract to the winner of the competition

INDIVIDUAL CONTRACT IN A FRAMEWORK AGREEMENT WITH SINGLE OPERATOR

02c. Request for Quotation

Procurement Officer
- Place order with Operator
- Request Operator to supplement his/her Tender if necessary

03c. Tender submission

Operator
- Accept or reject Order
- Provide supplement to Tender if requested

04c. Tender evaluation

Procurement Officer
- If supplement requested, evaluate complete Tender based on terms of the Framework Agreement
- Decide whether contact will be awarded to Operator or not

05c. Conclude individual contract

Procurement Officer
- Award Contract

Framework Agreements with a single Economic Operator are not further analysed in the current document, as their operation is similar to Framework Agreements with several Economic Operators (within Terms).

2.2.2.2 Functional requirements for a Framework Agreement system

The current section presents the functional requirements for the realisation of eProcurement systems capable to support framework agreements.

Step 01. Establishment of Framework Agreement

A framework agreement can be established between the contracting authority and one or more operators, following an open, restricted or, where available, negotiated procedure. Therefore, there are no new functional requirements for this step.

*Several Operators, Individual Contract is **WITHIN TERMS** of Framework Agreement*

Step 02a. Request for Quotation

If the contracting authority wishes to award an individual contract without re-opening competition, it may either place an order with the best placed operator within the framework agreement, as ranked at the establishment of the framework agreement ('cascade') or chose the operator best suited for this individual contract. The requirements for this step can be fulfilled by **Functional Req. 22: "Invitation to Tender"**.

Step 03b. Accept/Reject Order

This step involves the operator accepting or rejecting the order. The requirements for this step can be fulfilled by **Functional Req. 17: "Submission of Tenders"**.

Step 04a. Tender Evaluation

If the operator accepts the order, the contracting authority proceeds to the next step and concludes the individual contract. If the operator rejects the order, the contracting authority may select the next best operator (based on the ranking of Tenders at the establishment of the framework agreement), and place the order with him/her. Following this the contracting authority may continue the process in Step 02a, inviting the new operator to accept or reject the order.

Step 05a. Conclude Individual Contract

In this step the contracting authority concludes the individual contract with the operator who accepted the order. After publishing a Contract Award Notice for the initial conclusion of the framework agreement, there is no need to publish Contract Award Notices for individual contracts within the framework agreement. The requirements for this step can be fulfilled by **Functional Req. 16: "Automated Notifications"** for informing the operator of the results of the evaluation, and **Functional Req. 21: "Creation of Mandatory Reports"** for automatically or semi-automatically creating the necessary reports.

*Several Operators, Individual Contract awarded by **RE-OPENING COMPETITION***

Step 02b. Request for Quotation

This step involves a re-opening of competition for all operators within the framework agreement. The contracting authority creates the Contract Documents for the individual contract to be procured. These shall conform to the terms of the agreement. An Invitation to Tender shall then be sent to all operators within the agreement. The requirements for this step can be fulfilled by **Functional Req. 12: "Publication of Contract Documents"** and **Functional Req. 22: "Invitation to Tender"**.

Step 03b. Tender Submission

The operators to the framework agreement submit a Tender for the re-opened competition. The requirements for this step can be fulfilled by the functional requirements of Step 04 of the open procedure, comprising:

- **Functional Req. 14: Visualise/Download Call for Tenders specifications**
- **Functional Req. 15: Request for Additional Documents**
- **Functional Req. 16: Automated Notifications**
- **Functional Req. 17: Submission of Tenders**

Step 04b. Tender Evaluation

The contracting authority evaluates the Tenders submitted in response to the re-opened competition. The evaluation of Tenders is based on the evaluation mechanism defined at the establishment of the framework agreement. The requirements for this step can be fulfilled by the functional requirements of Step 05 of the open procedure, comprising:

- **Functional Req. 18: Four-eye Principle**
- **Functional Req. 19: Tender Confidentiality**
- **Functional Req. 20: Tender Evaluation**

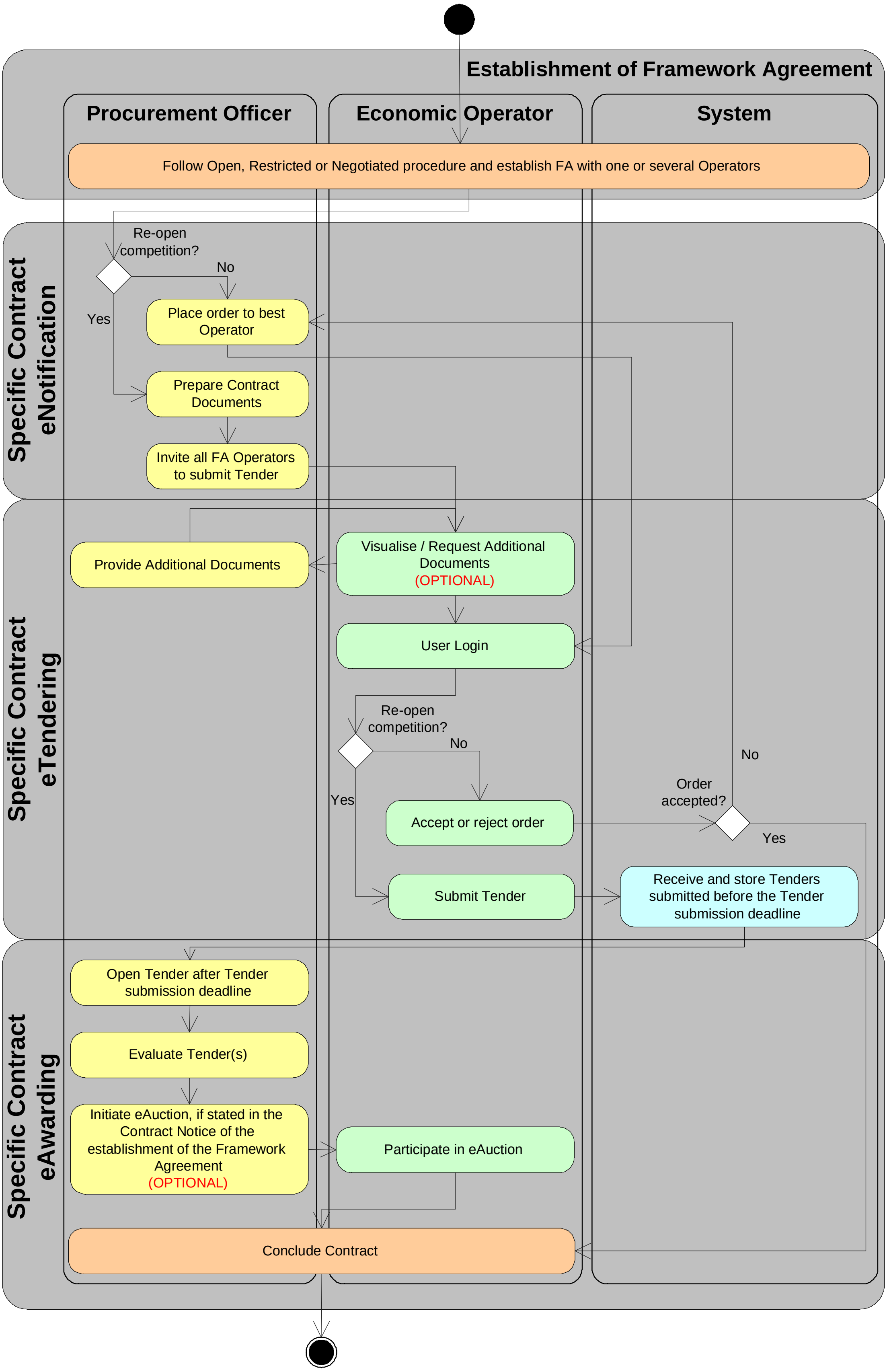
Step 05b. Conclude Individual Contract

The contracting authority concludes the individual contract with the winner of the re-opened competition. After publishing a Contract Award Notice for the initial conclusion of the framework agreement, there is no need to publish Contract Award Notices for the individual contracts awarded within a framework agreement. The requirements for this step can be fulfilled by **Functional Req. 16: "Automated Notifications"** for informing participating operators of the results of the evaluation, and **Functional Req. 21: "Creation of Mandatory Reports"** for automatically or semi-automatically creating the necessary reports.

2.2.2.3 Framework Agreement Activity Diagram

Figure 2-6 presents at granular level the establishment of a framework agreement, as well as, the procurement of an individual contract within the framework agreement. The figure clearly displays all activities that are performed by the main actors (procurement officers, economic operators and an eProcurement system) in the different eProcurement phases: eNotification, eTendering, and eAwarding. The activity diagram groups in phases and serialises all activities that need to be performed in the whole procurement process. Some tasks are subject to legislated time-constraints that need to be respected by Contracting Authorities. Thus, the whole procurement process for the establishment of a Framework Agreement and/or a specific contract within a Framework Agreement may require significant time.

Figure 2-8: Activity diagram for the procurement of an individual contract within a framework agreement


Establishment of Framework Agreement
Procurement Officer
Economic Operator
System
Follow Open, Restricted or Negotiated procedure and establish FA with one or several Operators
Specific Contract eNotification
Re-open competition?
No
Yes
Place order to best Operator
Prepare Contract Documents
Invite all FA Operators to submit Tender
Specific Contract eTendering
Provide Additional Documents
Visualise / Request Additional Documents (OPTIONAL)
User Login
Re-open competition?
No
Yes
Accept or reject order
Submit Tender
No
Order accepted?
Yes
Receive and store Tenders submitted before the Tender submission deadline
Specific Contract eAwarding
Open Tender after Tender submission deadline
Evaluate Tender(s)
Initiate eAuction, if stated in the Contract Notice of the establishment of the Framework Agreement (OPTIONAL)
Participate in eAuction
Conclude Contract

2.3 Extensions

2.3.1 Electronic Auctions

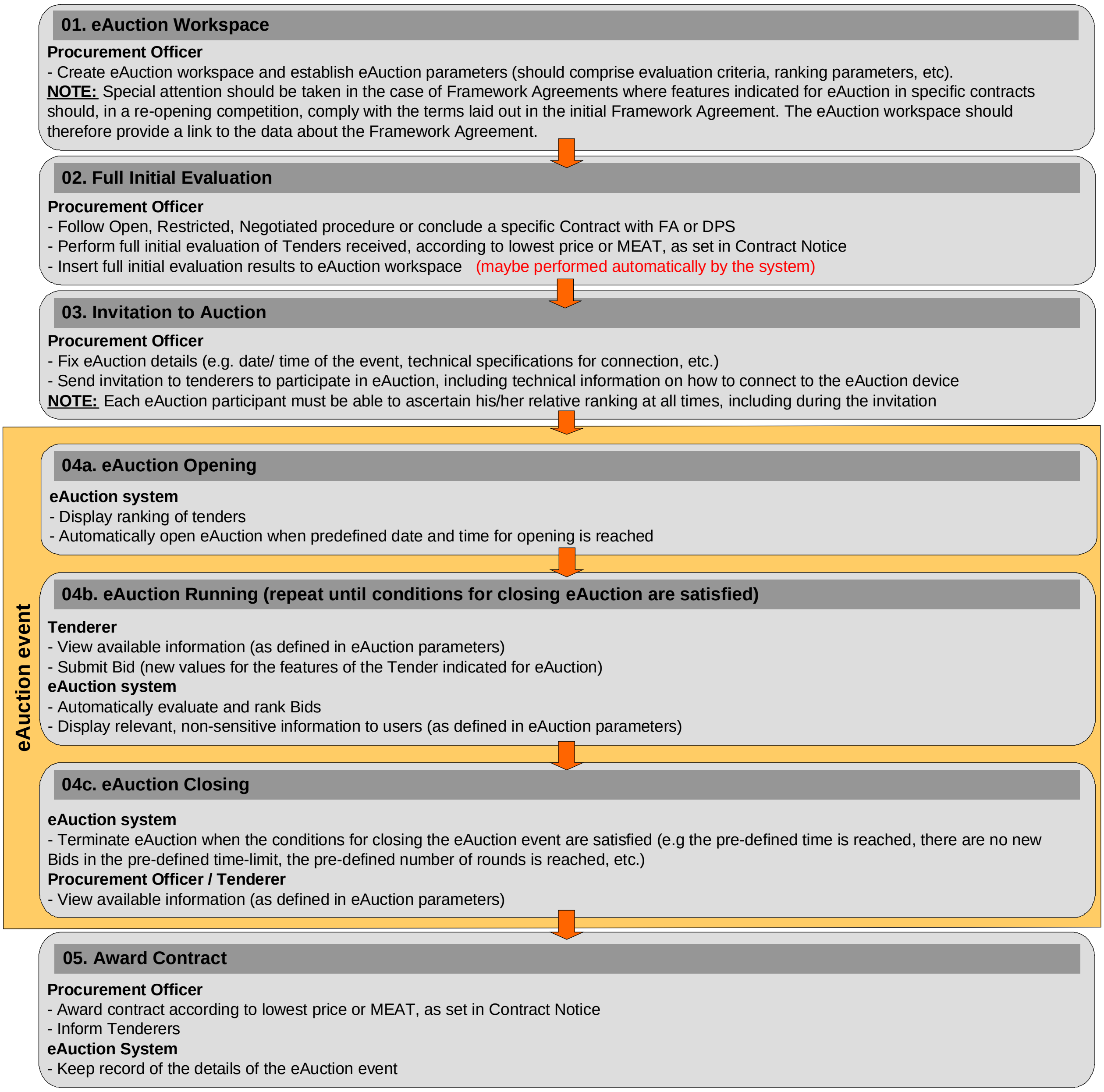
An electronic auction is a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of Tenders. This process occurs after an initial full evaluation of Tenders of a particular Call, enabling them to be ranked using automatic evaluation methods. Electronic auctions are part of the awarding phase of a competition, and do not constitute on their own a full eProcurement procedure for awarding contracts.

Each time the parameters for evaluating a Call for Tenders can be defined with precision, the contracting authority has the possibility to award a public contract through an electronic auction. This fact must be stated in the Contract Notice for the Call for Tenders. eAuctions cannot be used in works or services contracts having intellectual performances for their subject-matter.

2.3.1.1 Information Flow Diagram

Figure 2-9 depicts the different steps of an eAuction procedure, focusing on the actions performed by all parties involved.

Figure 2-9: Information Flow Diagram for Electronic Auctions



01. eAuction Workspace

Procurement Officer

- Create eAuction workspace and establish eAuction parameters (should comprise evaluation criteria, ranking parameters, etc).

NOTE: Special attention should be taken in the case of Framework Agreements where features indicated for eAuction in specific contracts should, in a re-opening competition, comply with the terms laid out in the initial Framework Agreement. The eAuction workspace should therefore provide a link to the data about the Framework Agreement.

02. Full Initial Evaluation

Procurement Officer

- Follow Open, Restricted, Negotiated procedure or conclude a specific Contract with FA or DPS
- Perform full initial evaluation of Tenders received, according to lowest price or MEAT, as set in Contract Notice
- Insert full initial evaluation results to eAuction workspace (maybe performed automatically by the system)

03. Invitation to Auction

Procurement Officer

- Fix eAuction details (e.g. date/ time of the event, technical specifications for connection, etc.)
- Send invitation to tenderers to participate in eAuction, including technical information on how to connect to the eAuction device

NOTE: Each eAuction participant must be able to ascertain his/her relative ranking at all times, including during the invitation

eAuction event

04a. eAuction Opening

eAuction system

- Display ranking of tenders
- Automatically open eAuction when predefined date and time for opening is reached

04b. eAuction Running (repeat until conditions for closing eAuction are satisfied)

Tenderer

- View available information (as defined in eAuction parameters)
- Submit Bid (new values for the features of the Tender indicated for eAuction)

eAuction system

- Automatically evaluate and rank Bids
- Display relevant, non-sensitive information to users (as defined in eAuction parameters)

04c. eAuction Closing

eAuction system

- Terminate eAuction when the conditions for closing the eAuction event are satisfied (e.g the pre-defined time is reached, there are no new Bids in the pre-defined time-limit, the pre-defined number of rounds is reached, etc.)

Procurement Officer / Tenderer

- View available information (as defined in eAuction parameters)

05. Award Contract

Procurement Officer

- Award contract according to lowest price or MEAT, as set in Contract Notice
- Inform Tenderers

eAuction System

- Keep record of the details of the eAuction event

2.3.1.2 Functional requirements for Electronic Auctions

This section presents the functional requirements emerging from the legislation for the realisation of eProcurement systems capable to support eAuctions. All functional requirements are associated with one or more steps of **Figure 2-9**.

Step 01. eAuction workspace

In this step, Procurement Officers fix the parameters of running the eAuction, including the definition of the evaluation mechanism as discussed in **Functional Req. 10: "Tender Evaluation Mechanism"**. Specific functional requirements relate to the establishment of an eAuction workspace and preparing and communicating to Tenderers the parameters and, at a later stage, the details of the eAuction.

Functional Req. 26. Creation of eAuction workspace and establishing eAuction parameters

This functional requirement covers the creation of a virtual workspace, where all eAuction related information can be stored. This virtual workspace should only be accessible to authorised users; eAuction parameters should be established and fixed within it. Subsequent eAuction activities, such as tenderers' placing of Bids and displaying of the ranking of Tenders may be performed within this virtual eAuction workspace or using the services of an external eAuction provider.

eAuction parameters comprise the bidding fields, the eAuction opening and closing conditions, the type of the eAuction, etc. The parameters for the full initial evaluation and the features for auction and their evaluation mechanism should be defined prior to launching the procedure and be published in the eAuction specifications alongside with the Contract Notice.

Step 02. Full Initial Evaluation

The full initial evaluation is performed according to the procurement procedure chosen by the contracting authority. Hence, for an individual contract the contracting authority may perform the full initial evaluation following the open, restricted or, where available, negotiated procedure. For an individual contract within a DPS or framework agreement, the contracting authority shall follow the rules of a DPS or FA, as discussed in previous sections.

The use of an eAuction is allowed only if the technical specifications to be evaluated can be established with precision. The auction itself can only be on some or all of those features established with precision, therefore these must be quantifiable (otherwise the auction cannot be run obviously). The Award criteria must be given a precise weighting. This means that the initial evaluation must attribute a specific value to a feature, not a range of values, to make these suitable for auction.

Also, in this step the eAuction device is provided with information on the tenderers which will compete in the auction event. This task may be performed automatically by the eProcurement system and eAuction device, or manually by Procurement Officers. Under any circumstance, the data must remain fully confidential.

Step 03. Invitation to Auction

Once the definition of the eAuction details (such as time and date of the auction, information about connection to the auction device) is complete, Procurement Officers dispatch invitations to tenderers, in order to invite them to participate in the auction event. This requirement can be fulfilled by **Functional Req. 16: "Automated Notifications"**. The invitation for each participating Tenderer shall be accompanied by the outcome of the full initial evaluation of his/her offer.

Step 04a. eAuction opening

At this step, tenderers connect to the eAuction device. Adding to or displaying the invitation for the auction, the device can provide tenderers with information about their relative ranking, as concluded by the full initial evaluation. This information must be kept fully confidential. Also, tenderers may access details of the auction event, including specifications on how the event will be run, which and how the Bid evaluation mechanism will be used, when the auction will be closed etc.

The aforementioned requirements can be fulfilled by minor modifications of **Functional Req. 12: "Publication of Contract Documents"**.

Step 04b. eAuction running

In this step, tenderers participate in the eAuction event by submitting successive improved Bids. The eAuction device, based on the defined evaluation mechanism, automatically calculates the relative ranking of all tenderers. The requirements related to submission of Bids can be satisfied by **Functional Req. 17: "Submission of Tenders"**. Also, the eAuction device constantly checks whether the conditions for closing the eAuction event are satisfied or not.

If the pre-defined conditions for closing the auction are satisfied, the eAuction device concludes the eAuction event, automatically progressing to the next step. The conditions for closing an eAuction event can be stored in an eAuction workspace, as discussed in **Functional Req. 26: "Creation of eAuction workspace and establishing eAuction "**.

Step 04c. eAuction closing

Once the eAuction event is concluded, the eAuction device performs a final ranking of all Bids according to the pre-defined evaluation mechanism. The aforementioned functional requirements of eAuctions can also satisfy requirements for this step.

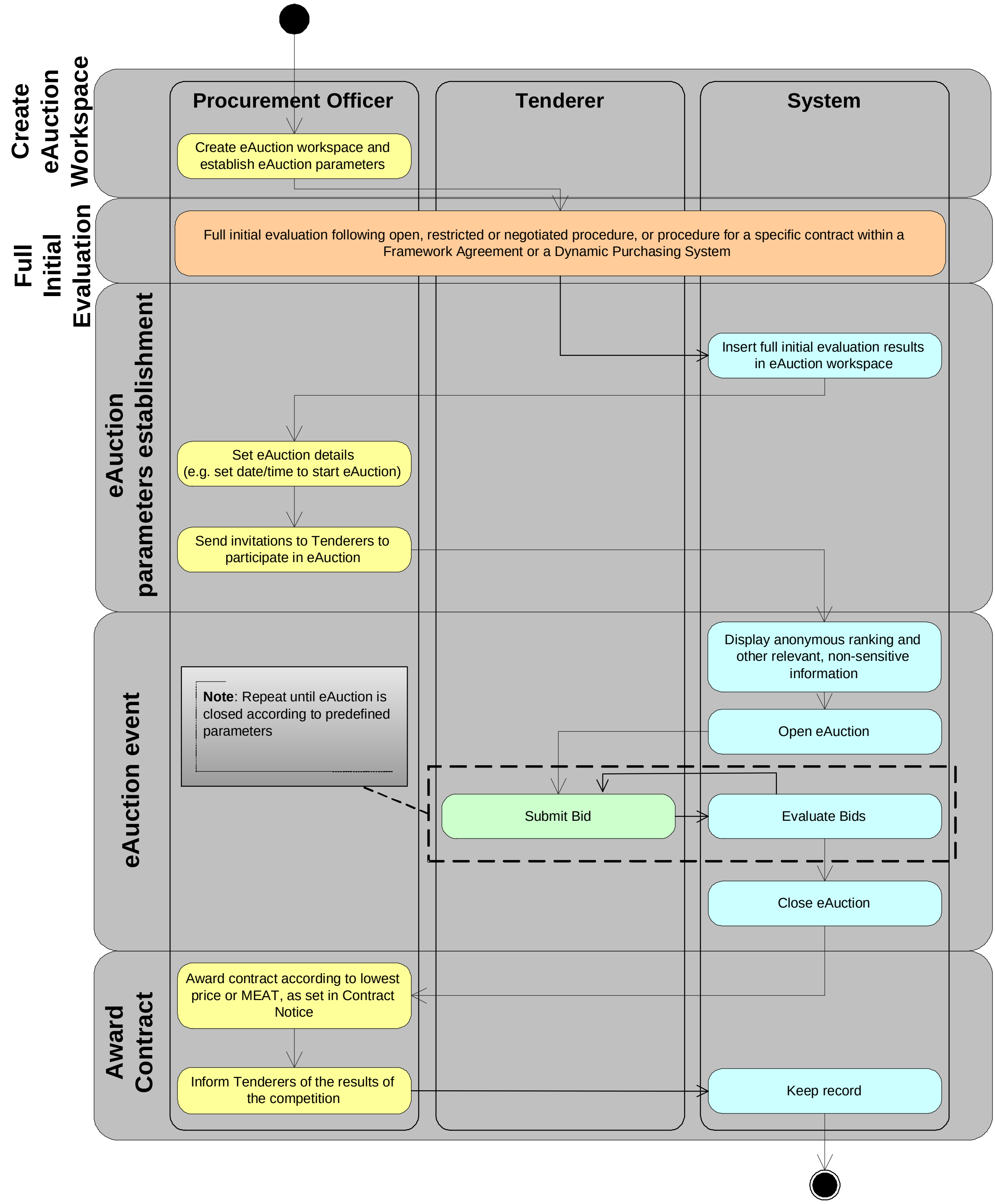
Step 04. Award Contract

Following the conclusion of an eAuction event, contracting authorities identify the winner(s) and award the contract according to the terms of the competition and the full initial evaluation procedure.

2.3.1.3 Electronic Auctions Activity Diagram

Figure 2-10 presents at granular level the various activities of an eAuction. The figure clearly displays all activities that are performed by the main actors (procurement officers, economic operators and an eProcurement system) in the different eAuction phases. The activity diagram groups in phases and serialises all activities that need to be performed in the whole procurement process. Some tasks are subject to legislated time-constraints that need to be respected by Contracting Authorities. Thus, the whole procurement process for a contract and/or a specific contract with eAuction may require some time.

Figure 2-10: Activity Diagram for eAuction


Create eAuction Workspace
Full Initial Evaluation
eAuction parameters establishment
eAuction event
Award Contract
Procurement Officer
Tenderer
System
Create eAuction workspace and establish eAuction parameters
Full initial evaluation following open, restricted or negotiated procedure, or procedure for a specific contract within a Framework Agreement or a Dynamic Purchasing System
Insert full initial evaluation results in eAuction workspace
Set eAuction details (e.g. set date/time to start eAuction)
Send invitations to Tenderers to participate in eAuction
Display anonymous ranking and other relevant, non-sensitive information
Note: Repeat until eAuction is closed according to predefined parameters
Open eAuction
Submit Bid
Evaluate Bids
Close eAuction
Award contract according to lowest price or MEAT, as set in Contract Notice
Inform Tenderers of the results of the competition
Keep record

2.4 Summary of Functional Requirements

The following table summarises the Functional Requirements presented in this chapter.

Table 1 – List of Functional Requirements

#	Functional Requirement	Prerequisites
1	User Registration	None
2	User Profiling	#1
3	User Authentication	#1
4	User Authorisation	#2
5	Tender workspace creation	#2
6	Preparation of a Prior Information Notice	#4, #5
7	Use of the Common Procurement Vocabulary (CPV) classification standard	#4, #5, #6
8	Publication of a Prior Information Notice	#4, #5
9	Nomenclature of Territorial Units for Statistics (NUTS) classification standard	#4, #5, #6
10	Tender Evaluation Mechanism	#4, #5
11	Interface with the OJEU	#4, #5, #8
12	Publication of Contract Documents	#4, #5
13	Search Calls mechanism	None
14	Visualise/Download Call for Tenders specifications	#5
15	Request for Additional Documents	#5
16	Automated Notifications	#1
17	Submission of Tenders	#4, #5
18	Four-eye Principle	#4, #5
19	Tender Confidentiality	#4, #5
20	Tender Evaluation	#4, #5, #10
21	Creation of Mandatory Reports regulated by the legislation	#4, #5
22	Invitation to Tender	#4, #5
23	DPS reporting	#4, #5
24	Creation of specific contract workspaces within DPS workspace	#4, #5
25	Indicative Tenders in the form of electronic catalogues (eCatalogues)	#4, #5
26	Creation of eAuction workspace and establishing eAuction details	#4

3 TECHNICAL GUIDELINES FOR IMPLEMENTING EPROCUREMENT PROCEDURES

This chapter provides technical guidelines that can be employed for the implementation of an eProcurement system for supporting the different procedures described by the new directives. All functional requirements identified in the previous chapter are considered for further analysis. For each functional requirement, various technical solutions are elaborated, also providing information on issues related to their implementations.

3.1 Technical Solutions for Functional Req. 1 – User registration and Functional Req. 3 – User authentication

These two functional requirements are related to the process for registering users to the eProcurement system, as well as for identifying users when they access the eProcurement system. The technical implementation followed for these two functional requirements are closely related.

1. *User credentials*: when users access the system, they must authenticate themselves using a combination of email, username, password, and/or other personal information (i.e. Personal Identification Number, etc.).

   Additionally, the use of a secret ID number may be requested by the system for validating the identity of a user, every time the user performs a "sensitive" activity (create a Call for Tenders, submit a Tender, etc.). The submission of user credentials is completed using a secure SSL connection via HTTPS.

   Users can be logged out when they explicitly request this activity by the system or when they close the application on their personal workstations (e.g. the web-browser). Furthermore, for security purposes, a user can be automatically logged out when there are no user activities on the system for a certain period of time.

   ⚠ *The use of User Credentials is the simplest technical implementation for user authentication in terms of effort and cost. It forms the basis for ensuring security, interoperability, and transparency. However, it does not satisfy advanced security requirements, which may be desirable in an eProcurement system. Also, depending on the area an eProcurement system may operate in, national, regional or local legislation may require more advanced security provisions than User Credentials.*

2. _Digital certificate (software)_**:** an eProcurement system may require the use of digital certificates in order for users to be authenticated. Digital certificates are issued by an official Certification Authority (CA), and may be issued to a person. Effectively, the CA guarantees to third-parties (and as such to an eProcurement system) that the user is indeed who he/she claims to be. The digital certificate, also called “software authentication solution”, refers to a file issued by a CA that is stored locally in a user’s workstation, and can be used for proving his/her identity.

   For a user to be authenticated via this method, the eProcurement system must “trust” the CA that issued the digital certificate of that user. In this case, the CA effectively verifies the authenticity of the certificate. Otherwise, the user cannot log in to the system.

   > ⚠ *This solution offers a higher level of security compared to User Credentials; it involves, however, a compromise regarding the interoperability aspects of the system.*
   >
   > *An eProcurement system usually “trusts” a limited number of CAs. The trusted CAs are commonly within the borders of the country the system operates in. Furthermore, the issuing of user digital certificates usually requires the physical presence of the user to the CA offices, and may take some time in order for the CA to perform identification / validity checks. Hence, although the use of digital certificates increases the security level of a system, it can significantly reduce its cross-border interoperability.*

3. _PKI infrastructure (hardware)_**:** this solution, similar to software digital certificates, also involves digital certificates. However, in this instance user digital certificates are stored in smart cards. A smart card requires a device (reader) for reading the certificate stored on the card. The smart card needs to be issued by a CA, in a similar way to the software digital certificates described above.

   > ⚠ *The use of smart cards is considered even more secure, in comparison to the software solution, as digital certificates are stored in safer medium (i.e. smart card), and not on a workstation which can be more vulnerable. However, it introduces additional limitations, as a smart card reader becomes an additional hardware requirement for participating in competitions. Furthermore, the cross-border interoperability limitations, as described in the software digital signatures, also apply to this implementation.*

3.2 Technical Solutions for Functional Req. 2 – User profiling and Functional Req. 4 – User authorisation

This functional requirement is related to providing the ability to users to store necessary personal information in the system, as well as, potentially storing their preferences when using the system. Also, when a user accesses the system, the system needs to be in a position to identify what data the user may have access to, and also what activities may be performed by that user.

User profiling and authorisation involves the management of user profiles. The former is related to a secure storage area of user personal details, while the later models the different roles a user can undertake within an eProcurement system. Each role may be constructed by a set of access rights. For each user activity, a specific user right is assigned by the application. In this way, the application can determine the activities that each user can perform within the system.

The technical solutions for implementing these two functional requirements comprise:

1. *Relational Database*: User profiles can be stored in a relational database. All users are associated with records in database tables, which define the access rights the user has been assigned for the various modules and services of an eProcurement system. An efficient and maintainable solution comprises a Users table to be related to User Roles table, which in turn is related to Access Rights table. Furthermore, the Users table needs to be related to an Access Rights table, in order to enable the overwriting of the default user roles and rights. Regarding personal information, the User table may incorporate all necessary database fields for storing such information.

   ⚠ *This solution is recommended for an easy to maintain user authentication mechanism, which is relatively simple to model and to implement.*

2. *LDAP server*: User profiles may be stored and managed via an LDAP server. The hierarchy of users and users profile rights is contained within the LDAP directory, under a structure similar to the one for relational databases.

   ⚠ *This solution is recommended for best performance. Additional licensing and maintenance costs may be related to the installation/operation of an LDAP server.*

3.3 Technical Solutions for Functional Req. 5 – Tender workspace creation

This functional requirement is related to the creation of a virtual workspace, where all Call related information (data, users, documents, etc) is stored. The technical solutions for creating a tender workspace comprise:

1. *Collaborative environment:* A collaborative environment can offer significant benefits to users of an eProcurement system. The eNotification phase necessitates the preparation of documents, usually created/updated/approved/published by different users. Through a collaborative environment, an eProcurement system can assist procurement officers in the Call for Tenders preparation process, offering document templates, automated document versioning, multilingual support, document approval workflows, etc. The subsequent eProcurement phases require multi-user coordination, which can be achieved through customisable workflows

This solution can improve efficiency, as tasks are coordinated by the system, exploiting the benefits of online preparation and management of documents. This solution may require a significant investment by contracting authorities, but is considered as the implementation model easiest to maintain.

2. *File system:* Call related documents are prepared offline, and stored in a structured file system. Permissions and access right configurations are set up at the operating system level, in order to ensure security.

Data/document management is performed by authorised users, who are also required to maintain document versioning and control. Security settings need to be set up by computer literate personnel, while the full eProcurement implementation is most probably conditioned by specific operating systems, file systems, etc. This solution can offer a low implementation cost, but high maintenance cost.

3.4 Technical Solutions for Functional Req. 6 – Preparation of a Prior Information Notice

This functional requirement is related to the creation of a Prior Information Notice (PIN). A good technical implementation allows for the creation of any official Notice supported by the Official Journal of the European Union (OJEU). Apart for the technical solutions available below for online preparation of a PIN, contracting authorities can create PINs using offline (PDF) forms, available at the EU Publications Office website. Technical solutions for the creation of Notices comprise:

1. *Internal form filling tool for creating Notices*:* Procurement Officers can complete Notices entirely online, using web based forms. The eProcurement system and the internal form filling tool are integrated, so that one may pass information to the other. For instance, when creating a Contract Notice, the form filling tool can obtain already pre-defined information from the Call workspace, including its name of the Call, its description, its estimated value, etc. A tool for supporting the online preparation of Notices may provide functionalities for:

    a. Creation of notices

    b. Visualisation and printing options of the Notices, either in Microsoft Word or Adobe Acrobat PDF format

    c. Visualisation and validation of a Notice prior to its submission to OJEU (all fields can be checked against pre-defined values defined by the legislation)

    d. Use of CPV codes

    e. Use of UTF-8 character encoding to support multilingualism

    f. Temporary storage of Notices for further editing

    g. Electronic submission of a Notice to OJEU

    h. Electronic confirmation of dispatch and of publication from OJEU

This solution offers a user friendly mechanism for Procurement Officers to create Notices. It is integrated to the eProcurement system, so that information can be passed back and forth between the two applications. Automated validity checks, together with advanced utilities for guiding users on preparing Notices can be provided to increase efficiency.

This implementation requires some investment by contracting authorities.

2. *External form filling tool for creating Notices*: Establish an interface with compliant external services that provide the complete functionality for the online creation of notices. A mechanism may be implemented in order to pass information between the eProcurement system and the external form filling tool.

> ⚠ *A good implementation of this solution may benefit from the realisation/maintenance of an internal form filling tool. Appropriate messages (probably in the form of XML), complying with the API of the external tool, can achieve such communication.*
>
> *Such implementation may initially avoid large implementation costs by a contracting authority. However, subscription fees for utilising such external service may be required.*

3. *Offline form filling tool for creating Notices*: Procurement officers use an offline application installed in their local environment. The offline tool supports all the aforementioned functionalities and creates the necessary file(s) for officially publishing Notices. The offline tool can be implemented in such way that information can automatically or semi-automatically be obtained by the eProcurement system.

> ⚠ *This solution offers flexibility, as this offline tool can operate as an autonomous application or be integrated with the eProcurement system. The downside is that Procurement Officers may need to obtain and install such tool in their workstation, while specific software may be required for the application to become operational. Tool versioning and upgrades may be difficult to maintain.*

3.5 Technical Solutions for Functional Req. 7 – Use of the Common Procurement Vocabulary (CPV) classification standard and Functional Req. 9 – Nomenclature of Territorial Units for Statistics (NUTS) classification standard

This functional requirement is related to the use of the CPV and NUTS codes in Notices. Both CPV codes and NUTS codes are updated and made available by the Publications Office.

In the creation of Tender workspace phase, an eProcurement system may prompt Procurement Officers to specify the CPV codes of the goods/services/works to be procured, as well as, the location of the contract in the form of NUTS codes. Two plain text boxes can prompt Procurement Officer to fill the required CPV and NUTS codes. A more advanced solution can be provided in the form of a look-up table, where users can perform a textual search through the CPV or NUTS codes, and select the ones applicable for the contract. When Notices are created, the mechanism used for the creation of Notices can automatically utilise the CPV and NUTS information provided by Procurement Officers during the Tender workspace creation.

> ⚠ *The inclusion of CPV and NUTS codes in the details of a Call are simple to implement and can significantly assist Economic Operators in locating interesting Calls for Tender.*

3.6 Technical Solutions for Functional Req. 8 – Publication of a Prior Information Notice

This functional requirement is related to the publication of a PIN, and other types of Notices. The technical solutions for this requirement are discussed in section 3.8.

3.7 Technical Solutions for Functional Req. 10 – Tender Evaluation Mechanism

This functional requirement is related to the establishment of an evaluation mechanism for Tenders of a Call. Contracting authorities shall establish the evaluation mechanism they will use for evaluating Tenders prior to the publication of the Contract Notice, and detail this mechanism either in the Contract Notice or Contract Documents. The information on the evaluation mechanism shall include conditions for participation, as well as the criteria to be used (either in weighted form or in descending order of importance if the Tender evaluation is based on MEAT).

The list of conditions for participation and awarding criteria can be made available for display in a commonly acceptable format (e.g. TXT, RTF, PDF, WORD, EXCEL, XML, JPEG, etc.) to all interested parties. The tool used for generating the list of awarding criteria can provide an expert utility, which supports any of the above formats. The technical solutions for defining the conditions for participation and awarding criteria comprise:

1. _Application based_**:** The use of forms enables the definition and visualisation of the awarding criteria in a hierarchical structure (i.e. levels and sub-levels of criteria). The awarding criteria can be stored in the file system as XML files, or in a relational database. If weighted criteria are used, an evaluation mechanism can be used for automatically or semi-automatically calculating the final score for each Tender. If criteria are stated in descending order of importance, contracting authorities shall define the exact algorithm to follow for concluding the winner of the competition.

   > ⚠ *This solution offers flexibility and allows for the automated or semi-automated evaluation of Tenders, both with regard to the conditions for participation, and for the awarding criteria. In a system that supports the restricted and/or negotiated procedures, the definition of objective selection criteria may also be supported.*

2. *Back office system*: Procurement Officers can use the functionalities provided by a back-office system (e.g. ERP), in order to create a form that contains all contract awarding criteria (including the necessary hierarchical structure).When Tenders are evaluated, Procurement Officers can manually complete the defined forms for each tenderer, in order to enable the automated or semi-automated evaluation of Tenders.

> ⚠ *This solution can be very effective for organisations that already operate a back-office system, and use such functionality. Also, the creation of contracts between the contracting authority and the winner(s) of a competition can be simplified by automatically or semi-automatically passing on information to the back-office system.*

3.8 Technical Solutions for Functional Req. 11 – Interface with the OJEU

This functional requirement is related to the establishment of an interface with the OJEU for the automated publication of Notices. An interface can be established between the eProcurement system or form filling tool (section 3.4) and the OJEU, for submitting notices, as well as, for receiving confirmation of publication. The technical solutions for interfacing with the OJEU comprise:

1. *OJEU communication protocol*: The communication with OJEU (send notice/receive confirmations) can be established via XML documents, using the specifications described under DTD version 1.4 of the Publications Office. An asynchronous API must be established between the eProcurement system or form filling tool and OJEU, in order to exchange XML messages

> ⚠ *This solution requires the development of a communication interface between an eProcurement system or form filling system and the OJEU. All Notices can be established in the required XML format.*
>
> *The communication can accommodate three types of messages:*
>
> - *Message from eProcurement system or form filling tool to OJEU, containing the details of the Notice to be published*
> - *Confirmation message from OJEU to eProcurement system or form filling tool, confirming the dispatch date of a Notice, as well as, whether it is accepted by the OJEU or whether it is incomplete*
> - *Confirmation message from OJEU to eProcurement system or form filling tool, confirming the publication date of a Notice*

3.9 Technical Solutions for Functional Req. 12 – Publication of Contract Documents

This functional requirement is related to the creation and publication of Contract Documents. A Contract Document to be created and published probably needs to go through an approval workflow, which depends on the internal procedures of a contracting authority. This process can be modelled by a collaborative environment, as discussed in section 3.3. The technical solutions for creating and publishing a Contract Document, and any other official document of a Call, comprise:

1. *Offline preparation:* Contract Documents should be available in a commonly acceptable format (e.g. TXT, RTF, PDF, WORD, EXCEL, XML, etc). Procurement Officers can prepare Contract Documents offline, using tools they are familiar with. When the Contract Documents are completed, Procurement Officers can upload them onto the eProcurement system. In case a document is uploaded in XML format, it must be associated with an appropriate XSL/XSLT template, for correct visualisation.

> ⚠ *This solution offers flexibility, as users are not bound by specific applications for generating documents. However, this solution may introduce interoperability limitations to users, as interested parties are required to have the necessary software for accessing/reading a specific document.*

2. *Online forms:* Procurement Officers complete several web forms online, which contain all necessary information about the Contract Documents. The system may allow users to upload several types of files (e.g. image, chart, diagram, etc.). The eProcurement system can be flexible in order to allow Procurement Officers to define the Contract Documents, as they would normally do in an offline approach. Web forms need to be highly customisable, as Contract Documents may vary for different Calls for Tenders, depending on the goods/services/works procured and other parameters of the competition

> ⚠ *This solution offers high interoperability, as customisable forms may provide the best medium for all users to access/read Contract Documents and other types of official documents. This implementation can integrate with a collaborative environment, automatically catering for document versioning, approval workflows, multilingual support, etc.*
>
> *It can also allow for the automated or semi-automated creation of Contract Documents, obtaining information from the eProcurement system. Also, data verification, correct formatting of images, paragraphs, sections, titles, etc. can be accommodated.*
>
> *The creation of appropriate online forms can however be difficult to achieve, and potentially involves high costs of implementation and maintenance.*

3.10 Technical Solutions for Functional Req. 13 – Search Calls mechanism

This functional requirement is related to the provision of an end-user service facilitating the searching of Calls for Tenders. An eProcurement system can host large number of Calls and there can be a mechanism allowing users to search through those Calls in a timely, accurate and simple manner. The technical solutions for performing Call searches comprise:

1. *Internal search engine*: An internal search mechanism can allow users to search for interesting Calls for Tenders through searching meta-data, as well as its content. This search functionality may comprise the following options:
   a. Simple search forms*:* Users can use these forms for conducting a simple text-based search for specific Calls of interest to them. This kind of search is likely to produce a bulky result list
   b. Advanced search forms: Users can use these forms for conducting more advanced searches for Calls of interest to them by providing additional information

regarding the Call(s) they are interested in, narrowing down the results returned by the system to the most relevant ones

c. Query By Example (QBE): Users can construct custom terms, based on a predefined list of supported attributes (list needs to be supplied) where logical or arithmetic operations apply, and link them together with AND, NOT and OR

> *This solution is simple to adopt and can provide adequate functionality to users to locate interesting Calls. The search mechanism can be adopted accordingly to be used for other data searches, like users, authorities, etc.*
>
> *It requires relatively low implementation cost.*

2. *External search mechanism*: Alternatively, the system may utilise an external search engine so as to take advantage of the features offered by a specialised search engine, such as support for UTF-8 character encoding, content-based search, support for searching content stored within several types of documents (doc, xls, pdf, plain text, etc.), etc.

> *This solution most probably comes at additional cost because of the effort required to integrate the external search engine with the eProcurement application. Additionally, licensing fees may be required.*

3.11 Technical Solutions for Functional Req. 14 – Visualise/Download Call for Tenders specifications

This functional requirement is related to the provision provided to users of an eProcurement system for viewing and downloading the specifications of the Call for Tenders. The specifications may comprise many documents of various types. The technical solution for allowing the viewing and downloading of Call for Tender specifications comprise:

1. *Web-pages*: The eProcurement system may allow users to access and download documents comprising the specifications of a Call via an Internet web-site. The HTTP (HyperText Transfer Protocol) protocol may enable users to transfer files across the Internet. Where security provisions are necessary, the HTTPS protocol (HTTP Secure) may instead be utilised.

> *This solution is simple to implement and can satisfy this functional requirement in an efficient manner. It requires an HTTP client program for users (an Internet web-browser), and an HTTP server for the eProcurement system (a web server). Users may easily and at no cost obtain an HTTP client program, while some licensing/maintenance costs may be required on behalf of a contracting authority for operating an HTTP server.*

2. *e-mail/secure e-mail*: e-mail, using simple SMTP (Simple Mail Protocol) or secure e-mail, using protocols such as Microsoft's SMIME (Secure Multipurpose Internet Mail Extensions) as a more secure method, can be used in order to accommodate this requirement.

> This solution can be easily employed, however it should not introduce unequal treatment for Economic Operators. Economic Operators should be provided with an easy and accessible mechanism (preferable electronic) for requesting such e-mails to be sent to them, in a prompt and reliable manner.

3. *Internet download site (FTP/SFTP)*: Apart from HTTP/HTTPS discussed above, FTP (File Transmission Protocol), the commonly used Internet protocol for exchanging files on top of TCP/IP, or SFTP (Secure FTP), can be used in order to allow users to download documents comprising the specifications of a Call for Tenders.

> ⚠ *Similarly to the first technical solution, this solution is simple to implement and can efficiently provide the necessary functionality to users to download Call specifications. It requires an FTP client program for users, and an FTP server for the eProcurement system. Users may easily and at no cost obtain an FTP client program, while some licensing/maintenance costs may be required on behalf of a contracting authority for operating an FTP server.*

3.12 Technical Solutions for Functional Req. 15 – Request for Additional Documents

This functional requirement is related to the functionality offered by an eProcurement system to users for submitting requests for additional documents. Once the Contract Notice for a Call is published, Economic Operators are usually provided with the opportunity to request additional documents (i.e. ask questions) about the Call. Contracting authorities shall provide such additional documents (i.e. provide answers) to all interested parties, preserving the “equal treatment” principle of the legislation. This phase is commonly referred to as the “Question & Answers session” The technical solutions for requesting additional documents comprise:

1. *Online form*: An appropriate online form may be offered by the system to users for submitting online their requests for additional documents. The technical implementation of online forms is discussed in Section 3.9
2. *e-mail*: Users may send their requests for additional documents via e-mail. This technical solution is discussed in section 3.13
3. *SMS*: Short Messaging Service (SMS) can be supported by the system, allowing users to submit their requests to the system via their mobile phones. Section 3.13 provide information regarding this technical implementation

> ⚠ *The technical solution provided for this functional requirement is primarily dependant on technical solutions employed for **Functional Req. 12:*** "**Publication of Contract Documents”** *and **Functional Req. 16:*** **“Automated Notifications”**

3.13 Technical Solutions for Functional Req. 16 – Automated Notifications

This functional requirement is related to the provision of user notifications in an automated or semi-automated manner. After significant user interactions with the system, an automated response may inform users of the current status of their activities (e.g. user registration, uploaded documents, etc). Furthermore, notifications may be triggered by time events (e.g. tender submission period expired). The technical solutions for automated notifications comprise:

1. _e-mail:_ Users receive automated notification via email. These messages can inform users both for activity-driven events (e.g. publications of an Additional Document), as well as, time-driven events (e.g. notification that the opening of Tenders following the four-eye principle will commence on a specific date and time).

   > ⚠ *This solution may be used both for activity-driven and time-driven notifications. Nevertheless, e-mail is an insecure method of communication with users; therefore e-mails may not include confidential information. The delivery of e-mails is not guaranteed, so an eProcurement system may facilitate other means of notifications, provided the principle of equal treatment of all Economic Operators is maintained.*

2. _Secure e-mail:_ Another option is the implementation of secure e-mail. An automated notification mechanism employing protocols like Microsoft SMIME may be implemented, in order to provide for more secure user notification environment in contrast to SMPT (i.e. simple e-mail protocol). However this technical solution will introduce software prerequisites for receiving automated notifications, thus reducing the interoperability of the system.

   > ⚠ *Just like the previous technical solution, this solution may be used both for activity-driven and time-driven notifications. Through this solution, the security of e-mails is increased; however the interoperability of the system is reduced, as users will require prerequisite software in order to receive notifications.*

3. _SMS messages:_ Short Messaging Service (SMS) is a mobile phone service widely offered by service/network mobile providers. An eProcurement system may take advantage of this service to notify users of activities taking place in the system. The technical implementation for utilising this service is relatively simple, as numerous SMS providers offer tools for automated notifications.

   > ⚠ *Similar to e-mail, SMS can be used for notifying users of activity-driven or time-driven events taking place in the system. Additional costs may be related to the use of such service. SMS is not secure and the delivery of such notifications is not guaranteed, however users can be notified for events even when not using their workstations (where they would normally access either the eProcurement system or their email)*

4. _Application confirmation pages:_ When a user completes a significant activity (e.g. uploading a document, submitting a Tender, creating a Call for Tenders workspace), the eProcurement system may inform the user of the results of his/her actions. Through this mechanism users can be notified whether their activities have been performed, or whether there were any errors/problems which might have caused their activities to be aborted. Application confirmation pages may also be used for activities which take significant time to complete, for instance when a user uploads a large document in the system.

   > ⚠ *Application confirmation pages can be used for informing users of the results of their activities. Such pages can be easily created in any application, without significant implementation effort.*

3.14 Technical Solutions for Functional Req. 17 – Submission of Tenders

This functional requirement is related to the activities of Economic Operators for the preparation and submission of Tenders for a Call. The technical solutions for the preparation and updating of tender responses by tenderers comprise:

1. *Offline preparation*: An offline preparation tool can be used for creating and submitting Tenders. This tool can be technically implemented as described in section 3.9

2. *Online preparation*: An online preparation tool can be used for creating and submitting Tenders. This tool can be technically implemented as described in section 3.9

3. *Tender preparation tool*: Economic Operators can be provided with a specific tool for the preparation and submission of Tenders. The Tender preparation tool presents a number of offline electronic forms, which are completed by Economic Operators. Tenders can be validated by the Tender preparation tool before being submitted to the eProcurement system, guaranteeing that a Tender is compliant with the Tender specifications. Such validation checks may validate the correctness of specific fields, number of documents attached to the Tender, etc. Once the validation check of a Tender is performed successfully, an Economic Operator may submit his/her Tender to the eProcurement system. Therefore, Economic Operators can only upload Tenders that conform to the Call for Tenders specifications. The tool can also foresee printer friendly utilities, so that the tenderer can view and validate a Tender prior to its submission.

> ⚠ *A tender preparation tool allows Economic Operators to prepare their Tenders offline, through the completion of forms specific to the Call for Tenders. Such a tool can support advanced validation facilities, allowing for the validation of Tenders before their submission, also guaranteeing that all Tenders submitted are compliant with the Call specifications. Also, guidance can be provided to Economic Operators on how to prepare their Tender.*
>
> *Such mechanism can increase the control a contracting authority is given in terms of specifying how a Tender should be constructed. However, there can be significant implementation costs with such a tool to make it customisable, depending on the details of each Call for Tenders.*

4. *Tender XML schema:* Economic Operators are provided with the opportunity to download a Tender XML schema, functioning as an XML template on how Tenders should be constructed. Such a schema may contain the exact structure of a Tender, allowing for the easy insertion of Tenders to a back-office system (e.g. ERP). Contracting authorities are provided with tools to re-define the Tender XML schema depending on the details of a particular Call for Tenders.

> ⚠ *This solution offers flexibility, as the Tender XML schema can be easily created by Procurement Officers to reflect the Call for Tenders specifications, before being distributed to Economic Operators.*
>
> *This solution requires however significant design and implementation costs, as a tool for creating the XML template must be realised, assisting Procurement Officers in defining Tender XML schemas. Also, such a tool may need to be distributed to Economic Operators, assisting them in preparing their Tenders.*

3.15 Technical Solutions for Functional Req. 18 – Four-eye Principle

This functional requirement is related to the secure storage of Tenders until their pre-defined opening time, as well as, to the implementation of the four-eye principle, requiring at least two Procurement Officers to perform simultaneous action for unlocking Tenders.

The storage of tender responses must be secure-proof, for all system users (Procurement Officers, Economic Operators, etc.), as well as, administrators of the eProcurement system.

The technical solutions for the secure storage of uploaded Tenders comprise:

1. *Data encryption and fragmentation of encryption keys:* encryption of Tenders can be performed by the tenderer, based on cryptographic keys communicated by the contracting authority prior to the Tender submission, or by the system upon Tender submission. The same keys may be used by Procurement Officers for the decryption of Tenders. Keys can be automatically fragmented and distributed to various Procurement Officers. Only at the designated opening time, Procurement Officers may combine their respective keys in order to re-construct the initial key for the decryption of a Tender.

> ⚠
>
> *This solution can fully satisfy the four-eye principle, as only the simultaneous action of at least two Procurement Officers can unlock Tenders.*
>
> *Contracting authorities may consider additional "procedural" requirements for further enforcing the four-eye principle, for instance the procedure followed if Tenders are not unlocked at the designated opening time, if Procurement Officers provide wrong decryption keys, etc.*

2. *Tender file fragmentation:* Tenders are constructed by Tender files. On submission, such files can be automatically fragmented and different parts be distributed to different designated Procurement Officers. To enhance security, the parts of the fragmented files can also be encrypted, as described above. Only at the designated opening time, Procurement Offices can decrypt their relative parts and re-combine them in the eProcurement system, for reconstructing the original Tender files.

> ⚠
>
> *This solution, similarly to the previous technical solution, can satisfy the four-eye principle.*
>
> *This mechanism requires more significant design and implementation effort in relation to the fragmentation of encryption keys. However, it offers an even more advanced implementation of the four-eye principle, as Tenders apart from being fragmented, their various parts are further encrypted by the encryption keys of different Procurement Officers.*

3.16 Technical Solutions for Functional Req. 19 – Tender Confidentiality

This functional requirement is related to preserving the confidentiality of Tenders after their opening. Tenders should be securely opened following the four-eye principle. After their opening, Tenders remain confidential data, and should be accessible only to authorised users. This functional requirement can be satisfied by user authorisation issues, discussed in section 3.2.

3.17 Technical Solutions for Functional Req. 20 – Tender Evaluation

This functional requirement is related to the automated or semi-automated evaluation of Tenders. Contracting authorities should evaluate Tenders according to the Tender evaluation mechanism, discussed in section 3.7. This process is internal to the Contracting Authority.

The technical solutions for evaluating Tenders comprise:

1. *Online Evaluation*: Tenders are evaluated according to the evaluation criteria (as pre-stated in the Contract Notice), and ranked according to their score. For Calls for Tenders where the evaluation mechanism is "lowest price", ranking is based on the price values of the Tenders. On the other hand, for Calls for Tenders that the evaluation mechanism is based on MEAT, ranking is performed according to the scores of each Tender, based on the pre-stated MEAT criteria and evaluation function. The online evaluation may allow the automated or semi-automated evaluation of Tenders. It primarily depends on how the Tenders are constructed and submitted by tenderers (discussed in section 3.14). For instance, if a Tender preparation tool is used, certain aspects of the Tender are completed in specific fields and can be used for a fully-automated evaluation.

   > ⚠
   >
   > *This mechanism can offer a very efficient and transparent mechanism for automatically or semi-automatically evaluating Tenders. However, the exact technical details can be established only after a contracting authority has decided the mechanism for the submission of Tenders. Depending on that mechanism, Tenders may be evaluated automatically or semi-automatically.*
   >
   > *In the first case, all significant aspects of the Tender are completed in a form that the eProcurement system can automatically receive and process (e.g. the model, quantity and product price for a Tender are given within specific fields of an electronic form).*
   >
   > *In the second case, Procurement Officers may be provided with electronic evaluation forms. Through these forms, Procurement Officers are given the functionality to store information about the Tenders linked to a specific Call for Tenders. Based on that information, the eProcurement system can calculate the final ranking.*

2. *Offline Evaluation*: The evaluation of Tenders is performed manually outside the context of the eProcurement system. The eProcurement system offers functionality for Procurement Officers to input the final ranking of the Tenders, as concluded by the offline evaluation. This functionality can be offered so that the system registers the final results and uses these for subsequent steps (e.g. the creation of the Contract Award Notice), as well as, audit trailing purposes.

   > ⚠
   >
   > *Offline evaluation is obviously less transparent in comparison to the online evaluation. However, as contracting authorities may need to invest significant effort for implementing an efficient and flexible online evaluation mechanism, the offline evaluation may be appropriate as an initial step towards building a system which can support all procedures and phases of eProcurement.*

3.18 Technical Solutions for Functional Req. 21 – Creation of Mandatory Reports

This functional requirement is related to the various types of reports an eProcurement system should be in position to generate. The EU public procurement legislation requires for contracting authorities to be able to provide reports, detailing the different aspects of an eProcurement competition. As such, an eProcurement system may assist contracting authorities by providing a flexible reporting mechanism, allowing the automated or semi-automated generation of various reports.

Additionally, the system may also provide the capability to procurement officers to create customised reports, not only for regulated reporting, but also for statistical analysis and other internal activities of the contracting authority.

To accommodate this requirement, a system needs to be capable to obtain and store the necessary data for the production of reports. The technical solutions for the creation of reports comprise:

1. *Internal statistical/reporting tool*: A statistical tool of the eProcurement system can automatically produce reports satisfying the requirements of the legislation. For this reason the statistical module can store and retrieve data, and dynamically perform computations to generate the reports.

> ⚠ *This solution is flexible, as adding/modifying a statistical capability to the statistical tool, in order to satisfy new reporting requirements, simply consists of relatively minor modifications to the existing tool. The adoption of this technical solution may introduce some maintenance costs.*

2. *Integration with back-office statistical tool*: Functionality offered by a back-office statistical tool (e.g. SPSS, SAS) can be utilised by the eProcurement system for the purpose of creating reports.

> ⚠ *This solution can be very effective for organisations that already operate a back-office statistical tool, and can utilise such functionality. The integration of the eProcurement system with the back-office system, for the exchange of information between the two, will require some implementation effort, however a contracting authority can then benefit from the use of only one system for reporting purposes, avoiding additional training for its personnel.*

3. *External reporting tool*: An external reporting tool such as Seagate's Crystal Reports and Sybase® InfoMaker® may also be used. The reporting tool should be capable of directly accessing the data of the eProcurement system. This will probably be the fastest and most convenient method for creating various types of reports. However, unless there is a third party reporting tool capable of directly accessing the data stored in the eProcurement system, it will be required to export the data from the system into files and then import it on the external reporting tool. This process can be automated or semi-automated, depending on the exact requirements of a contracting authority.

⚠ *This solution can take advantage of the sophisticated reports an external reporting tool can generate, without necessitating implementation costs. Customised reports can be easily created by end-user, while the generation of reports can also be scheduled and initiated automatically.*

Some licensing costs may be required, while the transfer of data from the eProcurement system to the external reporting tool may prove difficult to establish, depending on the technical infrastructure of the contracting authority.

3.19 Technical Solutions for Functional Req. 22 – Invitation to Tender

This functional requirement is related to sending invitations to Tender following the selection of tenderers in the restricted or negotiated procedure. However, such functionality may be used for other similar activities, like placing an order within a framework agreement, inviting all tenderers admitted to a DPS to submit a Tender for a specific contract, etc. The technical solution for this step can be implemented similarly to solutions for automated notifications, discussed in section 3.13. Obviously, the technical solution "Confirmation Application pages" described in the aforementioned section is not applicable in this instance, as only asynchronous notification mechanisms (user not required to be logged in the system) are necessary for this functional requirement.

3.20 Technical Solutions for Functional Req. 23 – DPS reporting

This functional requirement is similar to **Functional Req. 21: "Creation of Mandatory Reports"** as discussed in section 3.18. However, an eProcurement system may cater for advanced reports concerning a Dynamic Purchasing System (DPS). The reporting functionality of the system may also allow for reports concerting specific contracts within a DPS. Hence, reports may concern information of Tenderers admitted to a DPS, number of specific contract procured, total cost of specific contracts procured within a DPS, etc.

The technical solutions discussed for **Functional Req. 21: "Creation of Mandatory Reports"** are also applicable for this requirement.

3.21 Technical Solutions for Functional Req. 24 – Creation of specific contract workspaces within DPS workspace

This functional requirement refers to the creation of workspaces for specific contracts within a Dynamic Purchasing System (DPS). Each specific contract workspace must be associated with a DPS workspace, so that one workspace functions as the "parent" workspace (DPS workspace) and the others as "child" workspaces (specific contract workspaces within a DPS). The technical solutions for the creation of a specific contract workspace within DPS can be achieved by the technical solutions discussed for **Functional Req. 5: "Tender workspace creation"**. The only difference is that one workspace may have a logical or physical link to another workspace, permitting the "parent-child" relationship of workspaces to be achieved.

3.22 Technical Solutions for Functional Req. 25 – Indicative Tenders in the form of electronic catalogues (eCatalogues)

Where the submission of Tenders takes the form of electronic catalogues, the contracting authority may define eCatalogue specifications (i.e. XML schema, commodity attributes, acceptable formats, etc.) and templates to be used by Economic Operators for creating and submitting eCatalogues. These should be stated at the latest in the Contract Notice and possibly be made available to Economic Operators to ensure non-discrimination and wide participation. The templates should be capable to validate the data provided by Economic Operators, and need to be in a generally available and commonly acceptable format. The technical solutions for accepting a Tender in the form of eCatalogues comprise:

1. *Spreadsheets*: Economic Operators complete their Tenders based on spreadsheet eCatalogues. The Contracting Authority may specify the Tender attributes to be completed by Economic Operators (i.e. fields of the spreadsheet) in the eCatalogue. Economic Operators can use widely available applications (e.g. MS Excel, Lotus Quattro Pro) for completing their Tenders and save them in files, which can be submitted to the eProcurement system. Pre-defined spreadsheet templates can be made available to Economic Operators, which may include all required fields, guidelines for completion, and validation rules.

   ⚠ *A simple solution for creating Tenders in an eCatalogue format is by utilising spreadsheets. Contracting authorities may define templates for the eCatalogues to be completed. Also, if contracting authorities specify an application to be used by Economic Operators in order to design their eCatalogues, it needs to be generally available.*

   More sophisticated tools of the contracting authority may involve tools for verifying whether an eCatalogue submitted complies with the required format, and/or support for the uploading of an eCatalogue to the eProcurement system, permitting Procurement Officers to visualise it.

2. *Portable databases*: Economic Operators may be asked to complete their eCatalogues in portable database format, using generally available portable database applications (e.g. MS Access, Paradox, etc). Such database applications can create files containing both the database structure and data, which can subsequently be easily uploaded by Economic Operators onto the eProcurement system. Similar to the previous solution, contracting authorities can make available pre-defined database templates, which can guide Economic Operators into creating their eCatalogues utilising validation rules. This solution can offer more flexibility in comparison to the previous one, as database applications provide advanced functionality and data control. Furthermore, this solution can allow the use of images and other multimedia features, further enhancing the usability and efficiency of eCatalogues.

> ⚠ *A relatively advanced solution for creating Tenders in an eCatalogue format is by utilising portable database files. Such files contain not only the structure of a database, but also its data. Contracting authorities may define the desired structure of an eCatalogue for a particular Tender. Subsequently, Economic Operators may fill the database with their product details and upload onto the eProcurement system.*
>
> *This approach is slightly more advanced in comparison to spreadsheets. Advanced tools can also be provided for validating an eCatalogue. Also, better visualisation and functionality for comparing eCatalogues can be provided.*

3. *Text-based eCatalogues*: eCatalogues can be created in flat text files, separating each commodity attribute (i.e. product field) by a pre-defined special character (i.e. comma character, tab, etc.), or fixed length. This is the more simplistic method for constructing eCatalogues, which offer high interoperability, as almost any system can read/write text files. The creation of text-based eCatalogues can however be cumbersome, unless a supplier uses appropriate tools, which can automatically export data to the pre-defined structure. Text-based eCatalogues cannot support advanced features, as the previous two solutions do.

> ⚠ *Text-based eCatalogues are very interoperable, as they do not depend on the operating system, application and/or version of the application the Economic Operators is using. Tools may be made available to Procurement Officers to upload a text-based eCatalogue in an application, where advanced searching and user-friendly visualisation can be achieved.*

4. *XML-based eCatalogues*: The structure of an electronic catalogue can be represented by an XML schema that is used by Economic Operators, in order to exchange data about products and services. XML files can be based on:

   a. Existing commercial XML vocabularies (e.g. Electronic Business XML - ebXML, Commerce XML - cXML), which describe the structure and semantics for exchanging data about commodities. Such vocabularies are not yet fully standardised, thus posing a limit to the interoperability capabilities that an XML schema should normally offer

   b. Customised XML schemas defined by contracting authorities to model their specific needs

> ⚠ *XML-based eCatalogues may be used for the automated communication between Economic Operators systems and an eProcurement system. This implementation requires minimum effort by both Economic Operators and Procurement Officers in order for an eCatalogue to be imported into the eProcurement system. However, contracting authorities shall ensure non-discrimination of smaller Economic Operators by making this the only way to provide eCatalogues.*
>
> *For an Economic Operator to produce an eCatalogue of this sort, it usually prerequisites some IT expertise, as well as, the existence of a back-office system. This can limi for the participation of a large number of Economic Operators, and particularly of SMEs*

3.23 Technical Solutions for Functional Req. 26 – Creation of eAuction workspace and establishing eAuction

This functional requirement is related to the creation of a virtual workspace where all eAuction related data can be stored. An eAuction workspace should support all requirements of a Tender workspace, as discussed in section 3.3.

4 NON-FUNCTIONAL REQUIREMENTS

The new EU public procurement directives, in addition to describing the functional requirements (as conceptualised in section 2 and analysed in section 3), impose also a set of non-functional requirements. These requirements are primarily concerned with usability and security aspects, for ensuring accessibility, transparency, equal treatment, security, and other principles of the EU legislation. Furthermore, a number of non-functional requirements that are not required by the legislation are presented in this chapter. While these are of a more implicit nature, they can significantly assist contracting authorities in establishing effective Public eProcurement systems.

The analysis and presentation of non-functional requirements for eProcurement systems is based on the IBM Rational Unified Process. RUP is a process platform for software development that supports a wide range of project types, ranging from custom business applications to commercial-off-the-shelf (COTS) program implementations.

RUP captures functional requirements as “use cases” and ties non-functional requirements to use cases wherever possible. RUP considers requirements which cannot be tied to use cases or domain concepts as general requirements and lists them as supplementary requirements. Non-functional requirements originate from system properties, such as environmental or implementation constraints (e.g. remote access should be provided, software must run on various operating systems) and qualities of the system, such as the ones analysed in this section:

- Usability
- Reliability
- Interoperability
- Scalability
- Security

In the current chapter, a limited number of specific products/technologies are mentioned as examples for better describing concepts of non-functional requirements. As described in page 2 of the current report, any reference to specific products, technologies, processes and/or services does not constitute or imply its endorsement, recommendation or favouring by the European Commission.

4.1 Usability

4.1.1 User Support Requirements

One of the primary objectives of the new EU public procurement legislation is to support suppliers to successfully participate in public procurement competitions. Advanced eProcurement systems, built according to the highest GUI standards, significantly assist users, and in particular suppliers, to understand the eProcurement process, thus reducing the need for user support. However, Contracting Authorities may also envisage user support operations providing adequate support to users if and when required. Table 2 demonstrates a number of methods to achieve the desired user support.

Table 2 - Methods for supporting users

Type	Details
Help Desk	Provide support to users through the use of a Help Desk, facilitating: • **Application support and problem reporting:** allows users to report all system errors and application defects to the Contracting Authority. This operation involves the investigation and resolution of incidents and problems. The Help Desk must be in a position to assess the criticality of a system error, and either provide information to users as to how to resolve the error by themselves, or transmit the issue to the corresponding IT department for resolution • **System Monitoring:** monitors the operation of the eProcurement system, identifying potential problems caused by increased user activity and assist in the necessary monitoring for the identification of potentially illegal activities • **User Assistance:** allows users to communicate directly with an employee of the Contracting Authority and obtain answers to questions regarding system functionality. Problems of a general nature should be communicated to all users • **Feedback/comments collection centre:** allows users to provide feedback and comments to the Contracting Authority about the system, regarding current functionality, or functionality which should be made available through the system. This allows the Contracting Authority not only to identify areas of the system that need potential modifications, but also define the scope of future development phases for the system
User education and training	Offer user training sessions to help procurement officers and suppliers to fulfil their roles when using functions and services of the system. eLearning demonstrators and testing environments (simulating the operation of the real system) can assist users to better understand the complete functionality of the eProcurement system
Documentation & technical authoring	Provide documentation to assist users to understand the details of eProcurement, as well as the exact functionality of the system. eProcurement guides, user manuals, walkthrough/training manuals, system online help, in-context help, are types of means which can effectively offer the desired user support

4.1.2 Application Graphical User Interface (GUI)

eProcurement systems are not in principle used on an “everyday” basis. Procurement Officers of a Contracting Authority utilise such systems only when creating a Call for Tenders, or when managing their existing Calls. Depending on the size/type of a Contracting Authority, and the frequency of its purchases, the utilisation of the system can be as rare as a few times every year, while Economic Operators use such systems only when participating in a particular Call for Tenders, which may also occur very rarely.

A public eProcurement system should therefore be widely accessible and based on generally available means. The user interface of such a system needs to be operational in all geographic regions, while technical prerequisites for their accessibility shall not impose significant limitations to suppliers. Additionally, functionality made available to users, is recommended to be implemented in a self-explanatory manner and assistance should be offered at all times, helping to understand the steps they need to follow, taking advantage at the same time of all functionality offered by the system.

The current section elaborates on the GUI requirements of a Public eProcurement system.

4.1.2.1 Graphical User Interface (GUI) Interoperability

The technology used for GUI implementation of an eProcurement system needs to be chosen primarily based on a single criterion; the level of accessibility. In the last few years, several state-of-the-art GUI implementation techniques have emerged, allowing system developers to implement GUIs in a simpler and/or more efficient way. Nevertheless, not all new technologies have set standards, or may not be supported in exactly the same way by Web-browsers, Operating systems, etc. This obviously is an undesired effect, which substantially reduces the level of accessibility.

It is therefore recommended that the GUI of eProcurement systems is based on widely accepted technologies. For instance, all commonly used Web-browsers support the HTML 4.01 standard. Therefore, a GUI of an eProcurement system constructed in HTML 4.01, reduces accessibility considerations to other, non-functional issues (“Security” in section 4.5 and “Availability” in section 4.4.1).

In particular for Web-based solutions, the EC is utilising “10 golden rules” for any Web-based applications implemented in the Europa Web-site (http://europa.eu.int/). These guidelines can also be utilised for the implementation of the GUI of an eProcurement system (http://europa.eu.int/comm/ipg/).

4.1.2.2 Search functions

Advanced search facilities should be provided to all users of a public eProcurement system. They should allow all users (including anonymous, non-logged-in users) to use the search functionality for all available Calls for Tenders, and to identify the potentially interesting ones.

A predefined set of the most important data in a Call for Tenders, (including its name, CPV codes, NUTS codes, etc.) can be made available as search criteria, as well as the option for end users to combine these criteria. Advanced Boolean logic operations (AND, OR, and their precedence) may also be provided, allowing users to execute refined searches.

The system can allow users to define the fields used for displaying the results of a search and the sorting parameters used. Furthermore, users can be given the possibility to select a particular Call from the search results, and view its details. Depending on the details and status of a particular call, Economic Operators can be presented with the appropriate activities to perform. Table 3 presents the set of activities per procurement type, as they result from the Use Case analysis presented in section 5.2.

Table 3 - Economic Operator activities on a particular Call for Tenders

Type	**Status**	Activities
All	eNotification (prior to Tender submission)	• View Call Details • View Contract Notice (if published) • View Contract Documents (if published)
Open	eTendering (submission of Tenders)	• View Call Details • View Contract Notice • View Contract Documents • View/Request Additional Documents • Submit a Tender
Restricted	eTendering (submission of Tenders)	• View Call Details • View Contract Notice • View Contract Documents • View Additional Documents • View/Request Additional Documents • Submit Expression of Interest • Submit a Tender (if invited)
All	eAwarding (evaluation of Tenders)	• View Call Details • View Contract Notice • View Additional Documents
All	Archived	• View Call Details • View Contract Notice • View Additional Documents • View Contract Award Notice

Apart from presenting search results on screen, advanced features comprise the following functionality in relation to results:

- printing results
- storing results as HTML, Excel, PDF, etc. files
- displaying and/or storing results as structured files (e.g. XML, CSV, etc.)

4.1.2.3 Online help

eProcurement systems are not used on an everyday basis, and therefore their GUIs need to be as simple and self-explanatory as possible. Advanced online help can be offered, providing assistance at any time to users performing activities in the system. "In-context" sensitive help, user manuals, wizards, walkthroughs, and online demonstrators can significantly assist users to understand the functionalities of the services offered by the system. Online help documentation, glossary, and FAQ (Frequently Asked Questions) can provide fast and easy access to clear definitions for all the fields used (what they represent, what they measure, etc.). User guides can explain in detail the GUI of the eProcurement, for example using screen-shots and detailed textual descriptions. The FAQ can provide answers to questions that are expected to be most commonly asked by the users of the system.

A successful eProcurement process depends heavily on the correctness of the data submitted by users of the system. The validity of all data submitted by users through completed Web forms can therefore be checked. This can be done at both the server and the client sides:

- **Server side**: when the validity of data provided by a user is verified on the server side and the values are invalid in any way, users can be prompted to access the same entry form again, with descriptive warning messages next to the field(s) improperly completed.
- **Client side**: when the validity of data provided by the user is verified on the client side, the browser uses business logic in order to locate and explain the errors to the user. This check does not add more load on the server. With this check, error messages need to be shown to the users. In Web-based technologies, this implementation may however create interoperability issues, as JavaScript or other client-based scripting languages will need to be enabled.

eProcurement systems may also inform users performing "significant" activities (i.e. create a Call, submit a Tender, etc.) using informative/confirmation pages and automated notification mechanisms.

All online help facilities can be made available in all languages supported by the system, as discussed in section 4.3.1.1.

4.2 Reliability

The degree of reliability of a system can be assessed in relation to the reliability of its components, allowing reliability requirements to be expressed at the component/unit level, rather than entire system level. Reliability requirements are related to the quality of a system, and are usually defined quantitatively. Typical requirements comprise values for:

- Mean time between failures (MTBF): measure of the average time between failures. As an example, if there are 8,760 hours per year (365 days x 24 hours per day) then the MTBF of the system can be divided by 8,760 to identify how long the system will run in years. A system with a rating of 30,000 MTBF, would on average run 3.42 years without a failure.
- Mean time to repair (MTTR): measure of the average time required to perform corrective maintenance on a system in the event of a system failure. As the value for MTTR approaches zero, the availability of the system increases to 100%.
- Probability of failure on demand (POFOD): measure of the likelihood that the system will fail when a service request is made. As an example, if POFOD equals 0.01, this means that 1 out of every 100 service requests results in a failure. This is relevant for eProcurement systems operating non-stop.
- Rate of fault occurrence (ROCOF): refers to the frequency of occurrence of unexpected behaviour. As an example, a ROCOF value of 0.02 means that 2 failures are possible every 100 operational time units.

Because some functionalities of an eProcurement system are more critical than others, reliability requirements may be restricted to the most important ones. For example, the reliability of Tender submission and Tender locking modules should typically be higher than the module used for creating a Contract Award Notice.

When defining the metrics for the reliability requirements, the Contracting Authority needs to specify the exact system conditions. For instance, the reliability of any IT system usually depends on the user request load, and may decrease when the number of simultaneous transactions/requests increases. Therefore, reliability and scalability (section 4.4) are closely related.

The new EU public procurement directives do not specify the exact reliability requirements of an eProcurement system. Nevertheless, an eProcurement system needs to be easily accessible, guaranteeing minimum disruptions to eProcurement competitions, not compromise confidentiality of data and security at any time and ensure transparency and non-discrimination at all times. These requirements can only be fulfilled by a highly reliable eProcurement system.

Contracting Authorities need to specify the exact reliability requirements according to their national, regional and/or local laws and estimated usage of the system. During the development phases, a wide range of testing techniques (including unit testing, integration testing, factory testing, stress testing, etc.), may be employed to ensure the good quality of the programming code. Moreover, apart from realising as highly-reliable systems as possible, Contracting Authorities are recommended to establish mechanisms for handling potential system disruptions, in the form of Business Continuity Plans and Disaster Recovery Plans.

4.3 Interoperability

Interoperability is one of the main principles imposed by the new EU public procurement legislation. The European Interoperability Framework distinguishes between organisational, semantic and technical aspects of interoperability. In the following, non-functional interoperability requirements are analysed according to these three levels.

The European Interoperability Framework document, can be obtained on the IDA web-pages http://europa.eu.int/ida/servlets/Doc?id=18063.

4.3.1 Organisational Interoperability

At the organisational level, interoperability issues refer to defining business goals and modelling business processes. The goal is to allow the collaboration between administrations that wish to exchange information but do not have a homogeneous internal organisation and structure. The requirements for pan-European eGovernment services should be determined by all participating administrations and then prioritised according to citizen demand. If pan-European eGovernment services are set up to cover life-event (situations involving human beings that trigger public services) and business episodes (situations involving companies and self-employed citizens that trigger public services or interactions with public authorities), public administrations responsible for implementing them should consider the business process and actors involved and agree on the necessary Business Interoperability Interfaces (BII). Through the BII, their business process can operate at a European level. If the provision of such services requires contributions from several public administrations across Europe, then a Service Level Agreement (SLA) should be formed and should at least consider the BII concerned, as well as agree on a common security policy.

4.3.1.1 Linguistic/Multi-lingual Requirements

An eProcurement system of a Member State should ideally be available in the official language(s) of the Member State, as well as, an additional European language, similarly to pan-European services “Your Europe” Portal (http://europa.eu.int/youreurope). Users may then be provided with the functionality to select their preferred language for the Graphical User Interface (GUI), from the supported languages, as well as, to easily switch from one language to another.

With regards to the User Interface and the language used, all descriptions should best be placed in an easily customisable and parameterised format (e.g. property file or database table), so that they can be translated if there is future need to export the User Interface to another language. Additionally, the fonts used in the application should use all the glyphs for all the official EU languages (20).

Apart from the GUI language however, data stored in the system may be in any of the EU official languages. A Contracting Authority may create the Contract Notice and Contract Documents of a Call for Tenders in any EU language, or possibly create the aforementioned documents in more than one language. Users can therefore be provided with the functionality to access the available documents in their preferred language. Through the provision of functionality for multi-lingual support a system conforms to aspects of the equal treatment principle.

In principle, two parts of the eProcurement system localisation should be considered:

- **Language:** the User Interface needs to be capable to display data in any of the EU languages supported by the system (if more than one language is provided) allowing users to set their preferred language from a user profile screen.
- **System character encoding:** system character encoding is the method for encoding text entered in any input fields. UTF-8 (Unicode) character encoding can be supported for non-Latin characters. The database might also need configuration for UTF-8 to work. For instance, previous versions of MySQL™ did not support Unicode, it was however possible to configure a JDBC driver to use Unicode when handling texts.

4.3.1.2 Collaboration Requirements

Throughout the stages of an electronic public procurement procedure, Contracting Authorities internally exchange documents, reports and messages. These processes are considered as an integral part of the whole electronic procurement functionality on the administration side. Automating these processes can considerably reduce administrative costs and use of resources. The bottlenecks introduced by common manual processes can be eliminated and the continuous automation flow can result in a more efficient procurement process.

To provide automation of processes within the administration, a collaboration tool can be adjusted and used. Integration of such a tool may be defined in several cases, such as the drafting/publication of documents, the circulation of participation requests within the administration, the opening and evaluation of documents, the exchange of internal reports, the application of hierarchical structure and multiple authorisations, etc.

A collaborative environment provides services like document management, knowledge management, advanced communication/collaboration tools and workflow services, which apart from capturing the internal processes of Contracting Authorities, can also provide for their improvement. Existing collaborative platforms which may be considered for enhancing eProcurement are CIRCA, Lotus Notes™, Microsoft Exchange®, Microsoft Sharepoint Server™, Livelink™, as well as, open source community tools such as the MERMIG tool (www.mermig.com). Web-based collaborative environment platforms provide on-line services for workgroups and committees, facilitating the effective and secure sharing of resources and documents, and modelling the processes internal to the administration into system workflows, enhancing internal collaboration and communication.

Typical services of a collaborative platform are:

- **Document Manager:** provides a multi-function repository, storing documents organised in a folder tree structure, supporting multi-lingual and multi-versioned documents (*can be used for the uploading of contract documents and Tenders by suppliers*)
- **Group Manager:** incorporates tools for the management of user accounts, and maintenance of personal information of members (*can be used for the definition of users and user roles*)
- **Calendar:** manages the meetings and events schedule of a workgroup through the preparation, announcement and administration of meetings and events. Synchronous communication mechanisms allow online meetings to take place (*can be used for time-relevant activities, like the opening of Tenders*)
- **Forum:** supplies the virtual area for discussions among members on various subjects of interest. Users can read and/or participate in discussions, while support for moderated forums usually requires all information that is displayed to be "approved" by an appointed member before it is made public (*can be used for an FAQ and Q&A section*)
- **Email & SMS:** offers access to email and the ability to send SMS messages (*can be used for automated notification*)

- **Workflow:** boosts team-working and cooperation between members of a workgroup, by supporting the execution of workflows, thus automating complicated procedures performed by team members, ensuring better communication and control of the team. Advanced features may encompass delivery of tasks in user email, and use of task deadlines (*can be used for following the Contracting Authority procedures for the preparation of documents, evaluation of Tenders, etc.*)
- **Workflow designer:** supports design of business processes and their dissemination
- **Search:** allows for searching through the workgroup data
- **On-line help:** presents detailed information for the activities supported by each service

4.3.2 Semantic Interoperability

Semantic interoperability is concerned with the integration of resources which were developed using different vocabularies and possibly different data perspectives. Systems are semantically interoperable when they are capable of exchanging data in a way which makes the precise meaning of the data readily accessible. This means any eProcurement system should be able to translate the data into a form it understands. All data elements exchanged through Contracting Authorities and Economic Operators operating on a pan-European level should be interoperable. Subsequently, some requirements need to be satisfied by the administrations responsible:

- publish information about the data elements involved in the exchange
- draft proposals for and agreement on the data and related data dictionaries required on a pan-European level
- draft proposals for and agreement on tables with multilateral mappings between national and pan-European data elements

For semantic interoperability to be meaningful, the linguistic equivalence in approved directives and regulations needs to be taken into account when these are used in the delivery of e-Government services. XML vocabularies may be developed taking into account agreed e-Government data elements. Semantic interoperability is an area which affects eProcurement and is currently addressed by IDA through the XML Study project and other initiatives.

4.3.3 Technical Interoperability

On the technical level, interoperability refers to the technical issues involved in linking computer systems and services (open interfaces, interconnection services, data integration and middleware, security services, etc.). Technical interoperability of pan-European networks, applications and services requires that Member States administrations, EU institutions and/or agencies develop and use common guidelines. These guidelines should follow the IDA guidelines and be updated regularly, also taking into account results and guidelines from technological research and development programs as well as Community programs such as IST, eTen and eContent. They should be based on open standards.

Multilingualism adds technical interoperability requirements if citizens shall be provided with mechanisms allowing them to submit requests and to obtain information in more than one language. This requires the use of machine translation software that will enable users to understand requests in other languages and respond accordingly.

4.3.3.1 Application Interfaces

In light of the importance of technical interoperability aspects in an eProcurement environment, it is recommended that an eProcurement system should have appropriate open application interfaces to support the interaction between various operational systems, as well as systems and applications under development. An eProcurement system can be realised in a way which enables interoperability with existing legacy systems, allowing the re-use of existing systems and minimising the costs for public administrations.

The European Interoperability Framework emphasises that the interoperability of eGovernment services on a pan-European level is very beneficial. eProcurement systems can enable their integration with existing Enterprise Information Systems (EIS). To address the interoperability requirements, eProcurement systems may employ several strategies:

- **Service Oriented Architecture (SOA):** SOA is concerned with the independent construction of services which can be combined into meaningful, higher level business processes within the context of an organisation. SOA describes several aspects of services existing within an organisation:
  - The detail ('granularity') and types of services (granularity refers to the size or extent of a functionality in a given interaction).
  - How services are constructed
  - How services are combined together
  - How services communicate on a technical level
  - How services interoperate on a semantic level.

  By applying the SOA paradigm to the design of the core components, system implementers can ensure a significant improvement in system flexibility, while at the same time business components are re-used. This consideration needs to be taken into account during the system design phase.

- **XML based communication protocols (SOAP and XML-RPC):** XML-based communication protocols can be utilised when cross-platform interaction is required. Furthermore, SOAP and XML-RPC are standard components of almost all environments, constituting two protocols to enable remote cross-platform communication in a standardised and convenient way

- **Integration capabilities depending on the specific development framework used:** depending on the development framework used, Contracting Authorities may design their applications so that future interoperability capabilities are enhanced through the adoption of the appropriate standards. The J2EE Connector Architecture (JCA) for the J2EE framework for instance, can assist in establishing an environment for secure system interoperability. JCA defines and enables a standard way for connecting J2EE based applications to heterogeneous EIS. EIS systems comprise Enterprise Resource Planning (ERP) systems, database systems and various legacy applications. Furthermore, JCA offers a set of scalable, secure, and transactional mechanisms to enable connectivity to EIS and there is a huge marketplace of JCA adapters to simplify integration of enterprise applications.

Widely used architectural methods for solving interoperability issues comprise:

- **Java/J2EE based applications:** depending on the deployment architecture of the existing application, two means of accessing services, objects, and servers in a platform-independent manner are available; Simple Object Access Protocol (SOAP), and the Remote Method Invocation (RMI). SOAP protocol uses an HTTP connection, and can thus be used to access applications behind a firewall, or having other security provisions preventing usage of other protocols. RMI provides a slightly more advanced solution (in terms of performance), and can be used for accessing existing applications in a pure J2EE manner (getting objects references via JNDI). However, this solution cannot be easily used for accessing applications that are behind firewalls (to get across firewalls, RMI makes use of HTTP tunnelling by encapsulating RMI class, within an HTTP POST request).
- **Microsoft-based applications (C++, ASP, .NET, etc):** applications based on Microsoft technologies can be accessed through SOAP. The .NET framework, as well as, other Microsoft technologies have strong SOAP support and are capable of exchanging SOAP messages with various systems. .NET SOAP capabilities allow components on other platforms to exchange data messages with .NET components. However, .NET is proprietary and while some of its elements, such as SOAP and its discovery and lookup protocols are provided as public specifications, the core components of the framework (IL runtime environment, ASP+ internals, Win Forms, etc.) are not disclosed by Microsoft. Hence, Microsoft is the only provider of complete .NET development and runtime environments.
- **Mail servers:** mail servers (Microsoft Exchange, sendmail, etc.) provide access through standardised POP3 and SMTP protocols
- **Python:** Python-based applications provide a large set of functionalities and can usually be easily connected with other applications. Some of the existing functionalities supply SOAP access, while for others it is feasible through extensions developed in Python or another programming language (e.g. Java)
- **Perl:** there are Perl-based applications and extensions providing SOAP interface which can easily be plugged into existing applications
- **Mainframes with APIs:** existing mainframes may provide a connection API. Such APIs usually provide a SOAP-enabled interface that can be used for data exchange
- **Mainframes without APIs:** if the mainframe application vendor does not provide connection APIs, it might still be possible to access some part or parts of the system (most likely permanent storage – database system) through ODBC/JDBC drivers. However, if this possibility is not available, the connection can most probably not be established
- **Relational database systems:** most of the existing Relational Database Management Systems come with vendor supplied connection drivers, which can be used by an application to directly access data stored in the RDBMS. An ODBC/JDBC connection is not the only way to access such systems. If it is architecturally possible and justified, the system can also be accessed through the EJB (Enterprise Java Bean) layer or via DLLs. If the server is located behind a firewall, SOAP access (with vendor supplied or in-house developed components enabling SOAP) can be used

4.3.3.2 Time-stamping

A secure and reliable time-proofing mechanism can be used for dealing with issues such as whether a Tender was submitted before the Tender submission deadline, etc. An eProcurement system needs to be in a position to record the exact time for all activities taking place and also to obtain that time from an official source.

Time can be obtained using the Time-Stamp Protocol (TSP) and a Time-Stamping Authority (TSA) issuing time-stamps associating a unique date and time with any action in the eProcurement system. The digital time-stamp can be used to prove that an electronic document was transmitted properly to the procurement server at the time stated on its time-stamp. eProcurement servers of a system can continuously synchronise with a TSA, through the reception of broadcasted time signals. Through this mechanism the audit trailing module of an eProcurement system can use an accurate time-stamp to record all activities performed.

All documents can be time-stamped on the server side immediately after the completion of their transmission from the client site. Electronically signed documents can be associated with a strong cryptographic time-stamp, if sent to the TSA, which stamps documents with a (legally) valid date and time.

All eProcurement servers, apart from time synchronisation capabilities, can also be equipped with an internal clock and a sequence of security functions capable of providing high accuracy, even in cases when the time signal fails or is tampered with.

4.3.3.3 Synchronous Communication

Synchronous communication methods allow two-way communication to take place in various forms in ‘real-time’. This type of communication removes geographical barriers and allows Contracting Authorities to inform Economic Operators about important events, activities, etc. and to provide clarifications regarding Calls for Tenders in a more efficient manner. An eProcurement system can incorporate functionalities allowing synchronous communication between the Contracting Authorities and Economic Operators to take place, making the eProcurement process more efficient.

For instance, synchronous communications utilising “real-time chat”, through commonly used Internet chatting facilities, can allow the real-time exchange of messages facilitating the Questions and Answers sessions of a Call for Tenders. Through this facility, a contracting authority can publish connection details for a “live” Questions and Answers session, to which Economic Operators can openly connect to and participate in. The contracting authority must however ensure that all tenderers are being informed equally and at the same time.

4.3.3.4 Asynchronous Communication

Asynchronous communication does not take place in real-time, meaning that parties can communicate outside a specific time window. This is important when eProcurement takes place on a European scale where Public Administrations and Economic Operators from different time-zones and locations need to interact. E-mail and electronic bulletin boards are examples of asynchronous communication. Asynchronous communication methods remove temporal barriers and can be employed for notifying users that are not logged-in to the system of events, activities, information, etc. The following asynchronous communication functionality can be considered when implementing an eProcurement system:

- **Threaded discussion forums**: refers to the functionality for capturing the exchange of messages over time, sometimes over a period of days, weeks, or even months. Threaded discussion forums are organised into categories so that messages and responses exchanged are grouped together and are easy to find. This functionality is well suited to support Questions and Answers sessions.
- **Internal e-mail**: refers to the functionality for supporting electronic mail that can be read or sent from within the system. This functionality enables messages to be sent or read exclusively within the system; alternatively, the tools provided enable links to external email addresses of those using the system so that contacting users is facilitated. Internal email may include an address book and some address books are searchable. This functionality makes the eProcurement system more secure as messages will be sent and read exclusively within the system. Also, it can also be used for online notifications.

4.4 Scalability

Software systems should be designed to meet significantly larger transactional load than what is estimated prior to their development. The efficiency in which this can be done, in terms of cost, time, quality, etc., can determine the scalability of a system. Good scalability for a system can be achieved through effective software architecture and/or adequate hardware components. In this section, two aspects of scalability are considered: system availability and system performance.

4.4.1 Availability Requirements

During the eProcurement lifecycle, there are a number of critical events, which are strictly regulated by the new EU public procurement legislation. It is therefore essential for Contracting Authorities to establish systems which remain constantly available, in order to guarantee the support for these and all other types of events.

Probably the most critical event is during the closing stages of Tender submission for a Call for Tenders (the eTendering phase). Before the end of eTendering, Economic Operators are required to access the system to submit their Tenders. However, it is common practice for Economic Operators to submit their Tenders towards the end of the Tender submission deadline. Additionally, depending on a specific Call, a Tender may be composed of several files. This in turn can result in megabytes of data that need to be transferred from the IT environment of the Economic Operator to the eProcurement system, and stored in the appropriate secure servers. The combination of these parameters signifies that the eTendering closing period for each Call can potentially cause failures due to volume capacity problems.

Furthermore, an eProcurement system may be harmed by disruptive events, including internet connection failures, malicious attacks, power failures, system software/hardware failures, etc. System implementers must ensure that their systems can handle all failures they can possibly envisage, while plans must be in place for handling critical failures, in the form of Business Continuity and Disaster Recovery Plans.

For establishing the exact availability requirements for an eProcurement system, future users of the system could be interviewed, in order to determine their real needs and expectations. This interview can form the basis of a Service Level Agreement (SLA) between the technology provider of the service and contracting authorities.

The availability of an eProcurement system can be improved through identification of the system components. If one component is prone to failure, the entire system will be prone to failure too. An eProcurement system is usually composed of three elements:

- One or more servers, where most of the data is processed and stored.
- A client, making requests to the server
- The network, which allows for the communication between the client and the server

All three elements can be broken down into components, such as hardware, software, processes, procedures, etc. All these components need to be checked for their reliability, in order to guarantee the availability of the system.

More specifically, the hardware making up the system includes, among others, the following components that need to be checked:

- Central Processing Unit
- Storage devices
- Input devices (keyboards, serial ports, mice, etc.)
- Output devices (monitors, printers, etc.)
- Cables

The software running in the system generally includes the following components, all of which need to be reliable:

- Firmware embedded in the hardware (BIOS) to allow it to communicate with the operating system
- Operating systems, such as Windows™, Linux, etc.
- Programs used by administrators or maintenance stuff for performing control functions and data housekeeping
- Applications performing specific tasks or operations depending on the user
- Middleware programs supporting communication or data exchange

The processes needed to run the system will typically include:

- Power-up and system initialisation
- Network management and operation
- System monitoring
- Backup/restore and archiving
- User managements, including security
- System shutdown

When all relevant system components are identified, the following approaches can reduce the risks associated with critical components, i.e. those that are a single-point of failure for the system:

- Reduce frequency the system is not operational by looking for ways to prevent outage from happening to critical components
- Minimise the duration the system is not operational by trying to prevent outage from happening to critical components and reducing the number of critical components that may be affected by an outage
- Reduce the parts of the system that are potentially affected by an outage

System developers can quantitatively measure availability, by following certain approaches and at regular intervals calculating values for the degree of availability achieved, in order to set targets for improving the availability values.

An indicative calculation for quantitatively measuring availability is provided below:

- **Hours the system should be available in a month:** 24 hours per day x 7 days x 4.33 weeks per month (on average) ≈ 720 hours / month
- **Hours the system was down in a month:** Consider 5 hours due to corrective maintenance (e.g. correction of software defect), 3 hours due to perfective maintenance (e.g. hardware upgrade), 1 hour due to hard disk failure, totalling 9 hours of unavailability
- **Net availability:** ((720 – 9) / 720) * 100% = 98.75%
- **High availability:** 3 out of the 9 hours were due to perfective maintenance activities and only 6 hours (5 + 1) were due to failures. Therefore, high availability is ((720-6)/720)*100% = 99.16%

4.4.2 Performance Requirements

A system that can handle and respond promptly to any user request, can not only accelerate the eProcurement activities, but also assist users to better understand the different functionalities offered by the system.

Naturally, there may be activities which inevitably require significant time (e.g. uploading of documents). In such cases, system implementers need to ensure that users are informed of the progress of their requests, avoiding events such as users cancelling their activities or being unsure of the status of their actions.

Obviously the performance requirements of an eProcurement system are dependant on the envisaged number of users and Calls. System implementers need to plan for software/hardware scalability and establish systems which can achieve the predefined performance goals.

The following definitions are commonly used for measuring performance:

- **Simple Query:** a query accessing a single database table or a join of two tables
- **Complex Query:** a join of three or more database tables
- **Report:** a report ready to be printed, produced by PDF generation on the server, reporting tool plug-in or any other technology applicable
- **Document Management:** uploading, downloading and opening of a document to/from the document library of the system to the client workstation
- **Active User:** a user of the application performing constantly typical operations
- **Response Time:** the period of time from the moment the user initiates an action (e.g. by clicking on a button or a link) until the moment a Web-page with the requested information or update confirmation message is completely downloaded and displayed on the screen of the user. Response times can be effected by Internet latency, therefore response time is commonly tested in a Local Area Network (LAN) environment.

Example performance goals can be:

- 50 concurrent active users with maximum response time
- Up to 200 concurrent active users with 10% increase in maximum response time
- Maximum response times that return up to 200 result rows is X. For every additional 100 results, the maximum response time may increase for up to X seconds.

Maximum response times (in a LAN environment) can be:

(1) 90% of simple queries to have a maximum response time of 2 seconds.
(2) 99% of simple queries to have a maximum response time of 5 seconds.

(3) 95% of complex queries to have a maximum response time of 5 seconds
(4) 99% of complex queries to have a maximum response time of 10 seconds

(5) 95% of reports to be generated in less than 6 seconds.
(6) 99% of reports to be generated in less than 15 seconds.

(7) 95% of document management activities to have a maximum response time of 5 seconds
(8) 99% of document management activities to have a maximum response time of 8 seconds.

The response times for testing the performance of an eProcurement system must be measured in a database that has pre-loaded a considerable amount of data, simulating the performance of the system in real conditions. In addition, actual use of the system will have to be simulated including concurrent data uploads and downloads.

4.5 Security

Security mechanisms provide a secure communication interface, mainly for the exchange of documents between procurement authorities and Economic Operators. Standards constituting adequate and acceptable security need to be provided for the implementation of services during each stage of the procurement process. The required specifications need to be provided for ensuring adequate authentication, digital signature, non-repudiation, data integrity and encryption. Distribution and management of digital certificates, either directly from the different Contracting Authorities, or indirectly through outsourcing to accredited Certification Authorities need to be analysed and presented. The resulting analysis will provide the different Member States with the required certification standards, as well as, identify the PKI technology standards that all the public procurement components must comply with. This should ensure that public procurement components are PKI “enabled”, promoting interoperability.

The main objectives considered for the creation of a secure environment are the following:

- **Authentication**: guarantees that the service is only accessible to users with a verified identity.
- **Authorisation**: guarantees that authenticated users can only access services or data matching their role and access rights.
- **Confidentiality**: guarantees that the data exchanged between the person requesting it and the provider cannot be intercepted or accessed by a third non-authorised party.
- **Integrity**: guarantees that data exchanged between the person requesting it and the provider has not been modified or tampered with by a third non-authorised party.
- **Non-repudiation**: guarantees that the sender of the message cannot deny, at a later point in time, that s/he sent it.

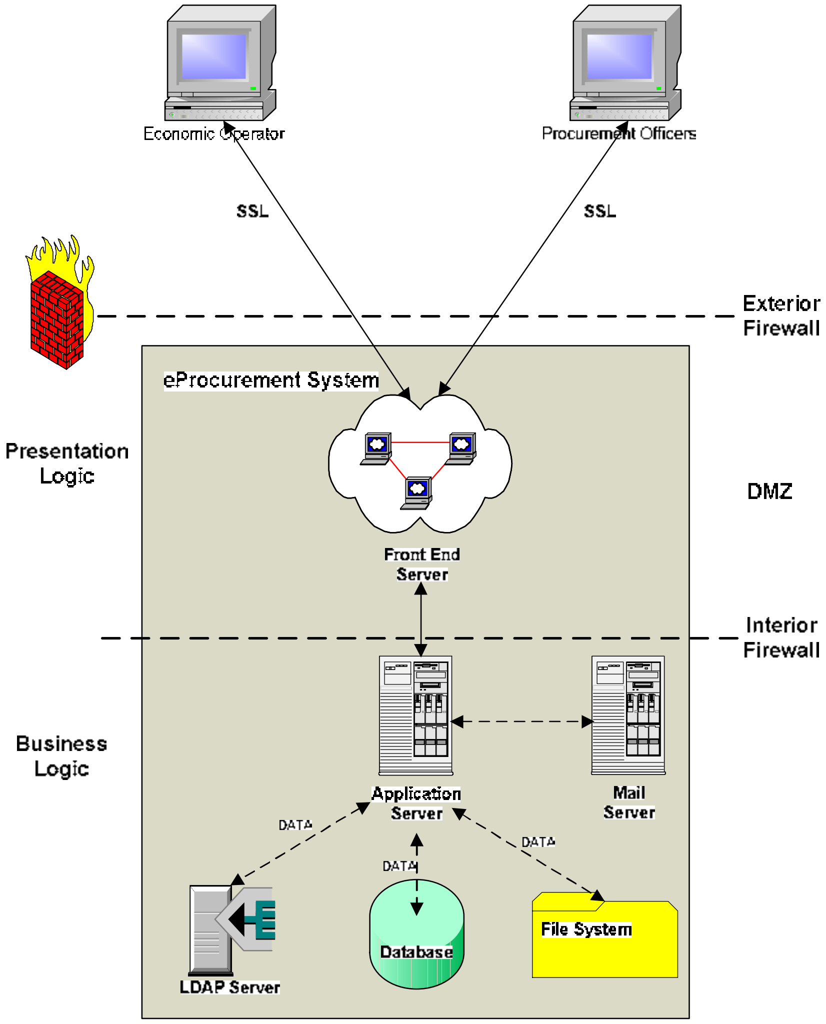
These objectives can be achieved through:

- **Audit trailing facility**: allows system managers to monitor activities on the network of the eProcurement system. These include all activities performed by users, either successful of unsuccessful (such as attempted but failed logons). Audit trails need to be archived indefinitely in case security incidents or disputes need to be investigated (thus providing for non-repudiation).
- **Firewalls:** used as a hardware line of defence when connecting trusted networks to non-trusted networks, such as the LAN/Intranet of an organisation to the Internet. Firewalls are highly configurable. They can be set to allow or deny access to certain machines, IP addresses, network services, servers, protocols and port numbers in either direction.
- **Secure communication (data transfer) with the client (user or third party system/application):** as a Web-based application, one of the most vulnerable parts is the communication with its users or clients. The eProcurement system can provide a high level of security, such as HTTPS, avoiding any unauthorised access to sensitive information.
- **Encoding stored data:** since the eProcurement system deals with sensitive information, it is recommended to encrypt stored data in its various modules (database, LDAP or file system) via proven encryption algorithms (TripleDES, AES, BLOW FISH, etc.). Such a feature increases system security and protects data even in case that an unauthorised person has physical access to the hosting server(s). By applying this solution, it is not possible to read data that is stored on the eProcurement system without applying the appropriate decoding algorithms.
- **Digitally signed documents:** for the management of documents, the eProcurement system can consider all material that is transferred through the system. In this respect, e-mail messages, SMS messages, and Chat transcripts can be considered as documents. By incorporating a Certification Authority functionality, allowing the CA to operate as part of a Public Key Infrastructure (PKI), it is ensured that the user identity is certified, thus guaranteeing at the same time the non-repudiation of the documents.

4.5.1 Communication

A security framework based on the general principles (confidentiality, non-discrimination, non-repudiation, etc) supported by the PKI infrastructure can be implemented to support the needs of an eProcurement system. This security framework enables the management of Public Key certificates for identifying the user and for securing the communication between the users of the application and the servers that host the application environment (Web Server) and the corresponding business logic (Application Server) as shown in **Figure 4-1**.

Figure 4-1: A security communication framework for an eProcurement system


Economic Operator
Procurement Officers
SSL
SSL
Exterior Firewall
eProcurement System
Presentation Logic
DMZ
Front End Server
Interior Firewall
Business Logic
Application Server
Mail Server
DATA
DATA
DATA
LDAP Server
Database
File System

In **Figure 4-1**, Economic Operators and Procurement Officers communicate with the Web-server of the eProcurement system through the firewall. More specifically, "server certificates" can be used for supporting secure communication over an encrypted SSL session, between internet users (Economic Operators and Procurement Officers) and the Web Server of the eProcurement system. This certificate can either be obtained from a commercial certification service provider, or issued by an internal Certification Server of the PKI. The security provided can be based on server authentication and encryption of the documents exchanged over an SSL session. In addition, authenticated e-mails can be transmitted by the e-mail server to Procurement Officers and Economic Operators of the eProcurement system.

The Demilitarised Zone (DMZ) in **Figure 4-1** refers to the part of the network situated between two networks (the internal network and the Internet). It is neither part of the internal network nor directly part of the Internet.

In principal, the security framework implemented for supporting eProcurement can incorporate authentication mechanisms, user authorisation to restricted application services and resources (user roles and distinct access rights) and the security of the system on the storage level may be based on the local implementation of time–stamping operations, in order to implement a type of non-repudiation service.

4.5.2 Storage

During the analysis of the modules and services required for the provision of an adequate level of security, the following fundamental requirement was established:

For to ensure secure storage of documents and bids uploaded to the system, the documents shall not be accessible in a usable form until the start of the eAwarding phase.

Cryptographic keys (not including public keys) generated by the security module should not be stored in clear-text on the same host as the bid documents, in order to prevent unauthorised decryption by individuals with local access.

4.5.3 The “4-eyes Principle”

The new EU public procurement directives prescribe the application of the 4-eyes principle during the opening of Tenders, in order to ensure that the opening of Tenders is the result of the simultaneous actions of multiple users. The legislation does not impose a specific Tender opening procedure. Therefore, Contracting Authorities may model the four-eyes principles as it is deemed most appropriate according to their local legal requirements and internal administrative procedures.

When creating a new Call for Tenders, a number of procurement officers may be associated with the Call, and be responsible for opening the Tenders when the pre-specified time is reached. It should be possible to authorise the opening of Tenders only after the Tender opening time is reached (as specified at the creation of the Call), and only after the simultaneous action of two or more procurement officers.

4.5.4 Reporting, Logging and Monitoring

Monitoring of the entire electronic procurement procedure needs to be performed by the administrative personnel. This can be accomplished by analysing the system logs and statistics that the platform provides on a regular basis. All stages that are not currently traced and logged by the system, such as tender key administration and final awarding can be logged manually, in order to provide an integrated trace-log for the complete procedure. Moreover, reports and statistics can be generated based on these logs to be used for internal or external auditing.

Log files need to be generated throughout the user interaction with the eProcurement services and all log files should be viewed and examined only by authorised administrators. It should be possible to retrieve the log files by applying several search criteria, such as date ranges, number of log entries, etc.

It should be possible to use all criteria to automatically query the system log file entries (stored on the server) and to extract information on all actions performed by users. The auditing service needs to be enhanced during the eTendering implementation in order to comply with the legal requirements of the current EU legislation. Extensive auditing can be provided for every electronic procurement activity performed through the system (e.g. track tender uploading/downloading, versioning, approvals). Inspection of auditing logs can provide information to effectively detect attempts of intrusion, for example tampering with the tender documents by an authorised user after the submission deadline.

4.5.5 User profiling

An eProcurement system allows users to execute several different actions and to obtain access to various data. Due to the highly confidential nature of the data stored in such systems, all users need to have a unique user account, associated with a specific user role. User roles can form the required medium, mapping user accounts to access rights, defining which users can access what data, and what actions they can perform on that data. Through this method, system administrators are not required to define specific access rights for each user account. Instead, they can define the user roles of the system (i.e. Call for Tender administrators, Tender Opening Staff, Tender Evaluating Staff, etc.), with pre-defined access rights, and associate users to these roles.

The exact user roles defined in an eProcurement system depend on the complexity of the system, the size of the Contracting Authority, the number of system users, etc.

5 OVERVIEW OF TECHNICAL SPECIFICATIONS

The current section provides an overview of proposed technical specifications for the design of an eProcurement system capable of supporting the core functionalities required by the new legislation. It comprises a conceptual model and an associated schema and description, as well as, high-level Use Cases.

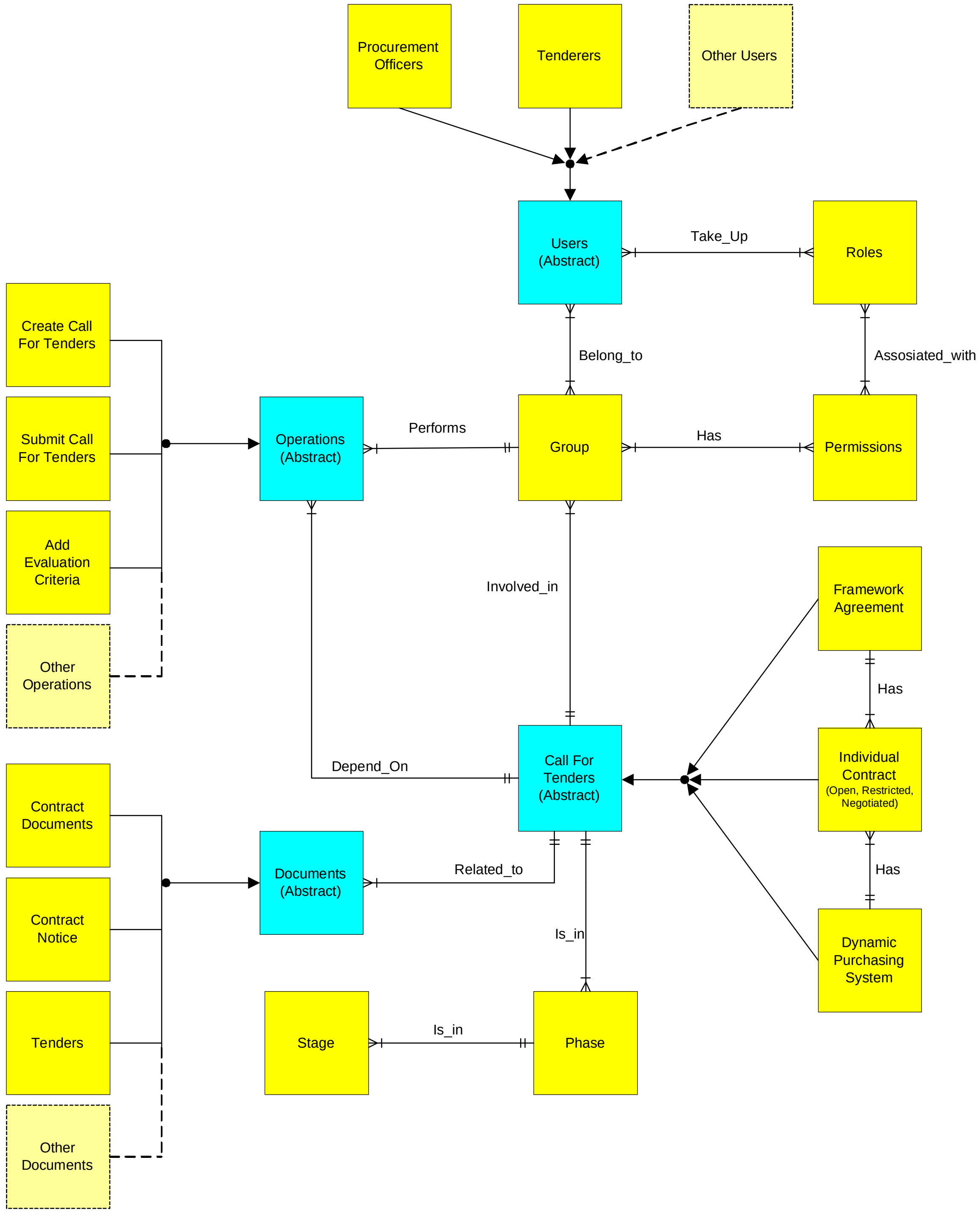
The conceptual model constitutes a set of abstract objects (i.e. concepts) and their relationships according to a technology-independent method, which can be used for modelling a system. The conceptual description, apart from offering further details for all conceptualised objects, also demonstrates the hierarchy of objects in an Object-Oriented implementation approach.

The high-level Use Case analysis presents the main actors of an eProcurement system, while the main functionalities for each actor are identified. In-depth analysis of the Use Cases presented is provided in the second volume of the report (FReq Volume II).

5.1 Conceptual Model

The conceptual model presented in **Figure 5-1** focuses on a possible implementation of the core business context of an eProcurement system. This model should not be considered as complete from a technical point of view, as new entities can be added to satisfy all specific functional requirements of an eProcurement system. It attempts to propose to interested parties software components/objects that can be defined, as well as, their static relationships, for implementing a fully integrated eProcurement system, capable to support all procedures/instruments discussed in chapter 2 of the current document.

Figure 5-1: Conceptual Model


Procurement Officers
Tenderers
Other Users
Users (Abstract)
Take_Up
Roles
Belong_to
Assosiated_with
Create Call For Tenders
Submit Call For Tenders
Add Evaluation Criteria
Other Operations
Operations (Abstract)
Performs
Group
Has
Permissions
Involved_in
Framework Agreement
Has
Depend_On
Call For Tenders (Abstract)
Individual Contract (Open, Restricted, Negotiated)
Has
Contract Documents
Contract Notice
Tenders
Other Documents
Documents (Abstract)
Related_to
Is_in
Dynamic Purchasing System
Stage
Is_in
Phase

The conceptual schema of **Figure 5-1** is described below in terms of the entities it comprises and the existing associations between these entities.

Table 4 - Description of Conceptual Schema Entities

Entity	Description
Economic Operator /Tenderer	A specialisation of a **User**
Procurement Officer	A specialisation of a **User**
Users	A generalisation of a **Procurement Officer** or Economic Operator/**Tenderer** (or other types of users). A **User** can take up certain **Roles** and belongs to a **Group** of Users with a common interest (e.g. Tenderers associated with a particular Call For Tenders)
Role	A **Role** is associated with one or more **Permissions** to perform **Operations** in the system (e.g. evaluating staff for received Tenders)
Permissions	A **Permission** is a collection of rights given to a particular **Group**, which alllows each group member to perform certain activities
Group	A certain number of **Users** with a common interest (e.g. Economic Operators/ Tenderers interested in a particular Call for Tenders) that have the same **Permissions** allowing them to perform certain **Operations** in the system (e.g. Evaluating Staff of a particular Call for Tenders can access/download Tenders received)
Call For Tenders	A virtual workspace for **Call for Tenders**
Individual Contract	A specialisation of a **Call for Tenders**
Framework Agreement	A specialisation of a **Call for Tenders** that also groups individual contracts and serves as a specification and container for those.
Dynamic Purchasing System	A specialisation of a **Call for Tenders** that also groups specific contracts and serves as a specification and container for those.
Phase	The different procedural phases associated with a **Call for Tenders** (e.g. eNotification)
Stage	The **different stages** of an eProcurement **Phase** (e.g. technical evaluation of Tenders within eAwarding **Phase**)
Documents	Any **Document(s)** related to a **Call For Tenders**
Operations	Any **Operation(s)** that can be performed by a **Group** of **Users**, involved in a particular **Call for Tenders** (e.g. unlock Tenders can be performed by Opening Staff of a particular Call for Tenders)

Main Associations:

- A ***User*** can take up one or more ***Roles***
- ***Roles*** are associated with certain ***Permissions***
- ***Users*** belong to a ***Group*** of Users with a common interest (e.g. Procurement Officers, Economic Operators/Tenderers)
- A ***Group*** has certain ***Permissions***
- A ***Group*** of Users with common interest (e.g. Procurement Officers, Economic Operators/Tenderers) performs certain ***Operations*** (e.g. Create a Call for Tenders, Submit a Call for Tenders)
- An ***Operation*** depends on the particular ***Call for Tenders*** (Phase and Stage of the Call for Tenders)
- A ***Call for Tenders*** is in/goes through a ***Phase*** of the procurement cycle (e.g. eNotification, eAwarding, etc.)
- An **Individual Contract** is considered a **Call for Tenders**
- A **Framework Agreement** is considered a **Call for Tenders**
- A **Dynamic Purchasing System** is considered a **Call for Tenders**
- A **Framework Agreement** includes **Individual Contracts**
- A **Dynamic Purchasing System** includes **Individual Contracts** (i.e. specific contracts)
- A ***Document*** (e.g. Contract Notice, Contract Documents) is related to a ***Call for Tenders***

5.2 High level Use Case model

This section provides a so-called “high-level Use Case Model” analysis, summarising the in-depth Use Case analysis presented in the Functional Requirements - Volume II. The purpose of this section is to present the main actors of the system, and the main functionality made available for each actor.

Use cases are a technique for capturing the functional requirements of a system, and describe the typical interaction between users and the system, or between system components, providing a narrative of how a system is used. The main actors of a Public eProcurement system are:

Table 5 - Main actors of a Public eProcurement system

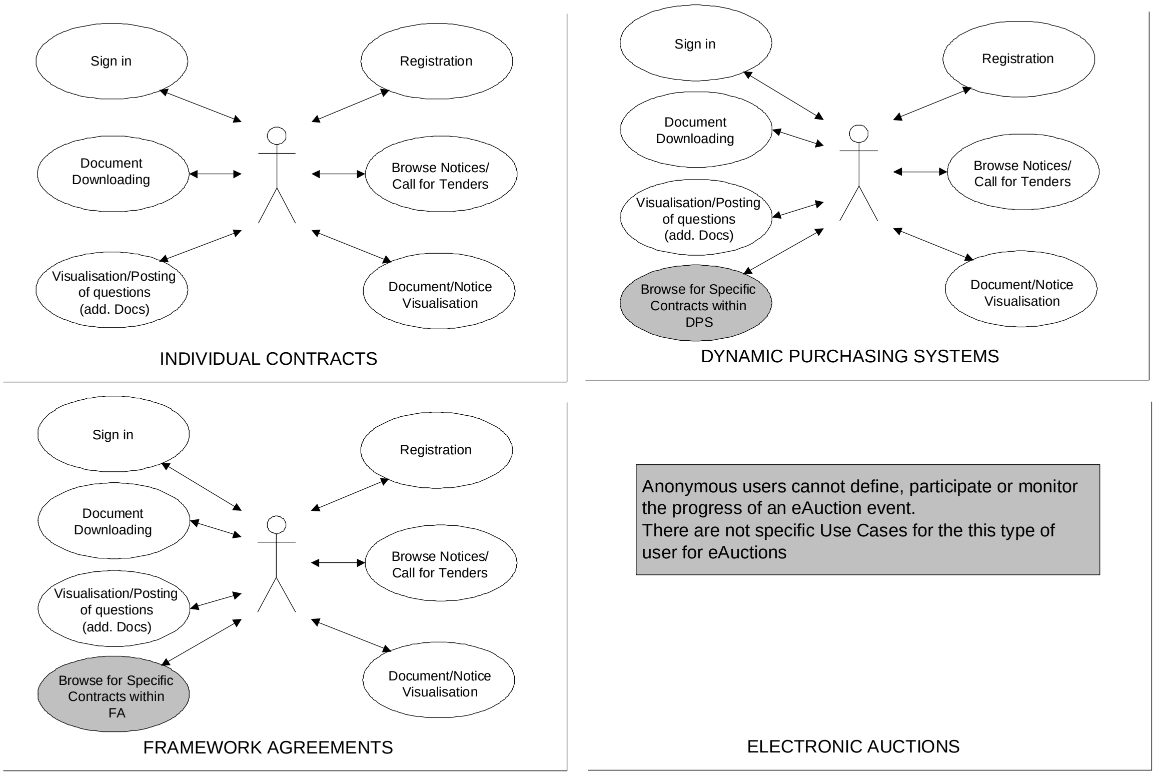
Actor Type	Actor	Notes
Guest	Anonymous	The three types of anonymous users can perform the same actions in a Public eProcurement system. The functions of the “Economic Operator (not logged in)” and the “Procurement Officer (not logged in)” are identical to the Anonymous role
	Procurement Officers (not logged in)	
	Economic Operators (not logged in)	
Procurement Officers	Administrative staff	The main responsibilities of “Administrative staff” are: § creation/management of Calls for Tenders § establishment of DPS and FA § creation/management of specific contracts within DPS and FA § definition of eAuction parameters
	Opening staff	The Procurement Officers who perform the role of “Opening staff” are responsible for the opening (or unlocking) of Tenders for a Call or of a specific contract within a DPS or FA
	Evaluating staff	The main responsibilities of “Evaluating staff” are: § evaluation of Tenders for a Call § evaluation of Indicative Tender for a DPS § evaluation of Tenders for specific contracts in a DPS or FA § admitting Tenderers to a DPS § inviting tenderers to participate in eAuction § concluding Calls or specific contracts
Economic Operators/Tenderers	Economic Operators (logged in)	The main responsibilities of “Tenderers” are: § creating and submitting Tenders § creating and submitting Indicative Tenders § participating in eAuctions
System	System	The eProcurement system occasionally needs to automatically perform certain actions, triggered either by user activities, or by the system on a certain date/time

5.2.1 Guest

The *Guest* role is taken up by any non-authenticated user of the system. If a user does not have a user account with the system, or is not signed into the system, s/he is only given access to publicly available information. Furthermore, s/he is provided with limited functionalities which allow for searching running or past Calls for Tenders, as well as, the functionality to sign in or create a user account. The main functionality available to the *Guest* user of an eProcurement system should be:

- **Registration:** allows users to provide their personal information to the system and create a new user account
- **Sign in:** allows users that have user accounts with the system to provide their username and password and authenticate themselves, in order to use additional specific functionalities of the system depending on the user rights
- **Browse Notices/Call for Tenders:** allows users to provide search criteria, and view Notices/Calls for Tenders that match these criteria
- **Document/Notice Visualisation:** allows users to view the details of a document or Notice
- **Visualisation and posting of request for Additional Documents:** allows users to view the Additional Documents (questions and answers) for a particular Call for Tenders, or post requests for new Additional Documents (post a question)
- **Document Downloading:** allows users to download one or more documents
- **Browse for Specific Contracts within DPS/Simplified Contract Notices:** allows user to search through the specific contract within a DPS
- **Browse for Specific Contracts within FA:** allows users to search through the specific contract within a Framework Agreement

Figure 5-2: Use Cases for the *Guest User*


Sign in
Registration
Document Downloading
Browse Notices/ Call for Tenders
Visualisation/Posting of questions (add. Docs)
Document/Notice Visualisation
INDIVIDUAL CONTRACTS
Sign in
Registration
Document Downloading
Browse Notices/ Call for Tenders
Visualisation/Posting of questions (add. Docs)
Browse for Specific Contracts within DPS
Document/Notice Visualisation
DYNAMIC PURCHASING SYSTEMS
Sign in
Registration
Document Downloading
Browse Notices/ Call for Tenders
Visualisation/Posting of questions (add. Docs)
Browse for Specific Contracts within FA
Document/Notice Visualisation
FRAMEWORK AGREEMENTS
ELECTRONIC AUCTIONS

Anonymous users cannot define, participate or monitor the progress of an eAuction event.
There are not specific Use Cases for the this type of user for eAuctions

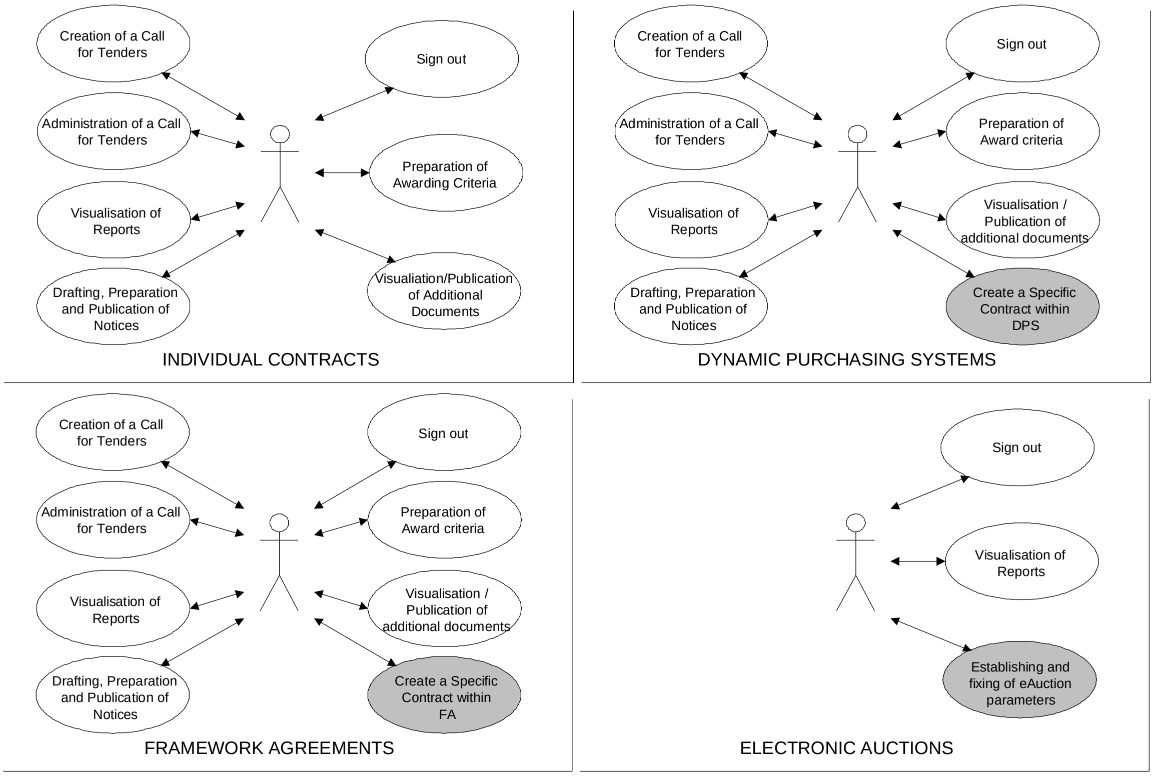
5.2.2 Procurement Officer - Administrative Staff

Users performing the role of *Procurement Officer Administrative staff* are responsible for the creation and management of Calls for Tenders. All their actions should be traceable in the system. The main functionalities available to the *Procurement Officer Administrative staff* user of an eProcurement system should be:

- **Sign out:** allows users authenticated by the system (i.e. signed in), to sign out of the system. This operation is usually invoked by users after completion of their actions (e.g. create a Call for Tenders, or change the details of a Call) and prompts users to inform the system that they no longer need to act as authenticated users (i.e. return to the access rights of a Guest User). This operation can also be automatically performed when the user closes his/her browser or when the user session is timed-out
- **Creation of a new Call for Tenders:** allows the user to create a new Call for Tenders
- **Administration of an existing Call for Tenders:** allows users to view the details of an existing Call for Tenders and to modify its details. It should not be possible to modify certain details of a Call, depending on the exact phase of the Call for Tenders and user access rights. For instance, when a Call is in the Tender Evaluation phase, the system does not allow users to modify the details of the Contract Documents
- **Preparation of the Awarding Criteria:** allows users to define the awarding criteria for the Call for Tenders. These criteria are used in the Tender Evaluation phase, when all received Tenders are evaluated

- **Drafting/Preparation/Publication of Notices:** allows users to create and publish a Prior Information Notice, Contract Notice or Contract Award Notice
- **Visualisation and Publication of Additional Documents:** allows users to view all published Additional Documents for a Call (i.e. questions and answers), as well as, to view new requests for Additional Documents. In addition, this functionality allows users to provide Additional Documents (i.e. give answers to posted questions)
- **Visualisation of Reports:** allows users to view reports related to a Call
- **Create a Specific Contract within a DPS:** allows users to create specific contracts within a DPS
- **Create a Specific Contract within a FA:** allows users to create specific contracts within a Framework Agreement
- **Establishing and fixing eAuction parameters:** allows users to parameterise and specify the exact operation of the eAuction device for an eAuction event

Figure 5-3: Use Cases for the *Procurement Officer Administrative* User

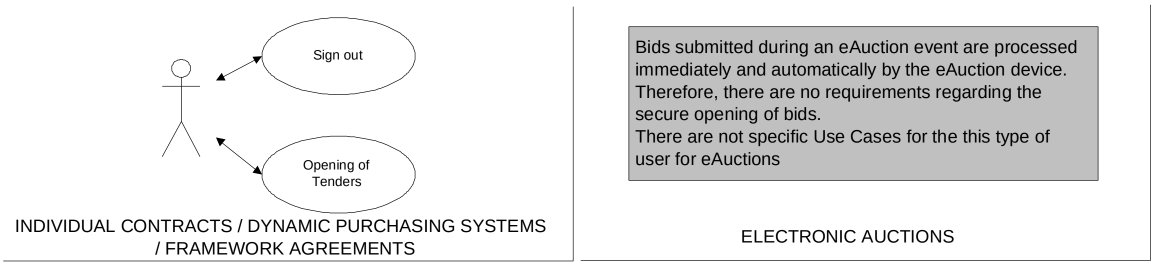

Creation of a Call for Tenders
Administration of a Call for Tenders
Visualisation of Reports
Drafting, Preparation and Publication of Notices
Sign out
Preparation of Awarding Criteria
Visualiation/Publication of Additional Documents
INDIVIDUAL CONTRACTS
Creation of a Call for Tenders
Administration of a Call for Tenders
Visualisation of Reports
Drafting, Preparation and Publication of Notices
Sign out
Preparation of Award criteria
Visualisation / Publication of additional documents
Create a Specific Contract within DPS
DYNAMIC PURCHASING SYSTEMS
Creation of a Call for Tenders
Administration of a Call for Tenders
Visualisation of Reports
Drafting, Preparation and Publication of Notices
Sign out
Preparation of Award criteria
Visualisation / Publication of additional documents
Create a Specific Contract within FA
FRAMEWORK AGREEMENTS
Sign out
Visualisation of Reports
Establishing and fixing of eAuction parameters
ELECTRONIC AUCTIONS

5.2.3 Procurement Officer - Opening Staff

Users performing the role of *Procurement Officer Opening staff* are responsible for the opening (or unlocking) of Tenders for a Call. The main functionalities available to the *Procurement Officer Opening staff* user could be:

- **Sign out:** allows users authenticated by the system (i.e. signed in), to sign out of the system. This operation is usually performed by users after completion of their actions (e.g. accessing confidential details of a Call, or authorising the opening of Tenders) and prompts users to inform the system that they no longer need to act as authenticated users (i.e. return to the access rights of a Guest User). This operation can also be performed automatically when the user closes his/her browser or when the user session is timed-out
- **Opening of Tenders:** allows users to authorise the opening of Tenders for a particular Call for Tenders, and to proceed to the opening of the tenders themselves These activities can only be performed once the pre-defined Tender opening time has been reached

Figure 5-4: Use Cases for the *Procurement Officer Opening Staff* User


Sign out
Opening of Tenders
INDIVIDUAL CONTRACTS / DYNAMIC PURCHASING SYSTEMS / FRAMEWORK AGREEMENTS
ELECTRONIC AUCTIONS

Bids submitted during an eAuction event are processed immediately and automatically by the eAuction device. Therefore, there are no requirements regarding the secure opening of bids.
There are not specific Use Cases for the this type of user for eAuctions

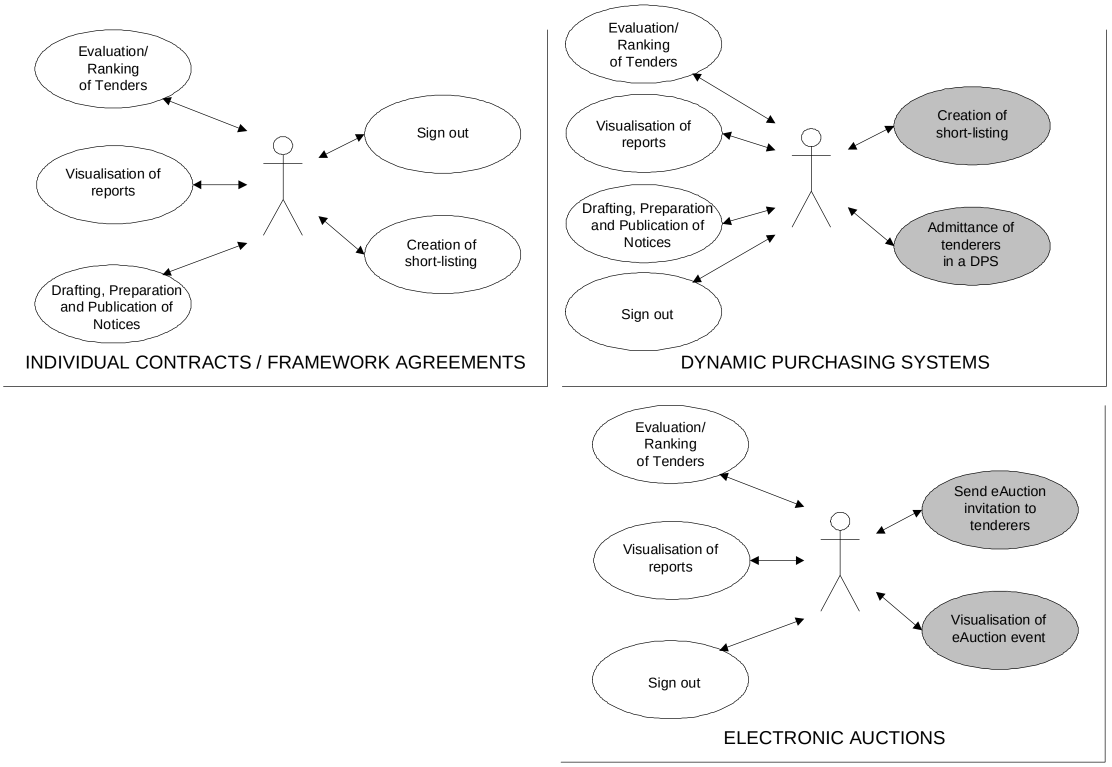
5.2.4 Procurement Officer - Evaluating Staff

Users performing the role of *Procurement Officer Evaluating staff* are responsible for the evaluation of Tenders for a Call, as well as, the conclusion of a competition by selection of the winner(s) and publication of the Contract Award Notice. The main functionalities available to the *Procurement Officer Evaluating staff* user of an eProcurement system should be:

- **Sign out:** allows users authenticated by the system (i.e. signed in), to sign out of the system. This operation is usually performed by users after completion of their actions (e.g. accessing confidential details of a Call, or evaluating a particular Tender for a Call) and necessitates users to inform the system that they no longer require to act as authenticated users (i.e. return to the access rights of a Guest User). This operation can also be performed automatically when the user closes his/her browser or when the user session is timed-out
- **Creation of short-listing:** allows users to select and invite Tenderers to participate in a particular Call for Tenders. This functionality is available only in the restricted procedure. Once the Expression of Interest submission period is complete, Procurement Officers access the supporting documentation of all Tenderers (i.e. proof documents), and evaluate their compliance with the Conditions for Participation. Following the evaluation, Procurement Officers create Tenderers short-listing, and conclude on the tenderers invited to submit a Tender. For the restricted procedure at least 5 Economic Operators must be selected

- **Evaluation and ranking of Tenders:** allows users to evaluate the Tenders received for a particular Call for Tenders, and to create Tender rankings. This functionality can only be performed once all Tenders are accessible to authorised officers. Users are required to provide scores for all evaluation criteria, before ranking the Tenders according to the pre-defined evaluation function
- **Drafting/Preparation/Publication of Notices:** allows users to create and publish a Prior Information Notice, Contract Notice or Contract Award Notice
- **Visualisation of Reports:** allows users to view reports related to a Call for Tenders
- **Admittance of Tenderers in a DPS:** allows users to admit into the DPS Tenderers that have submitted qualifying Indicative Tenders
- **Send eAuction invitation to tenderers:** allows users to specify the exact date/time for an eAuction event to start, to select the tenderers to invite to the event and to create an appropriate notification for the invitation to auction
- **Visualisation of eAuction event:** allows users to visualise the eAuction event, ensuring they can monitor the good operation of the eAuction device

Figure 5-5: Use Cases for the *Procurement Officer Evaluating Staff* User

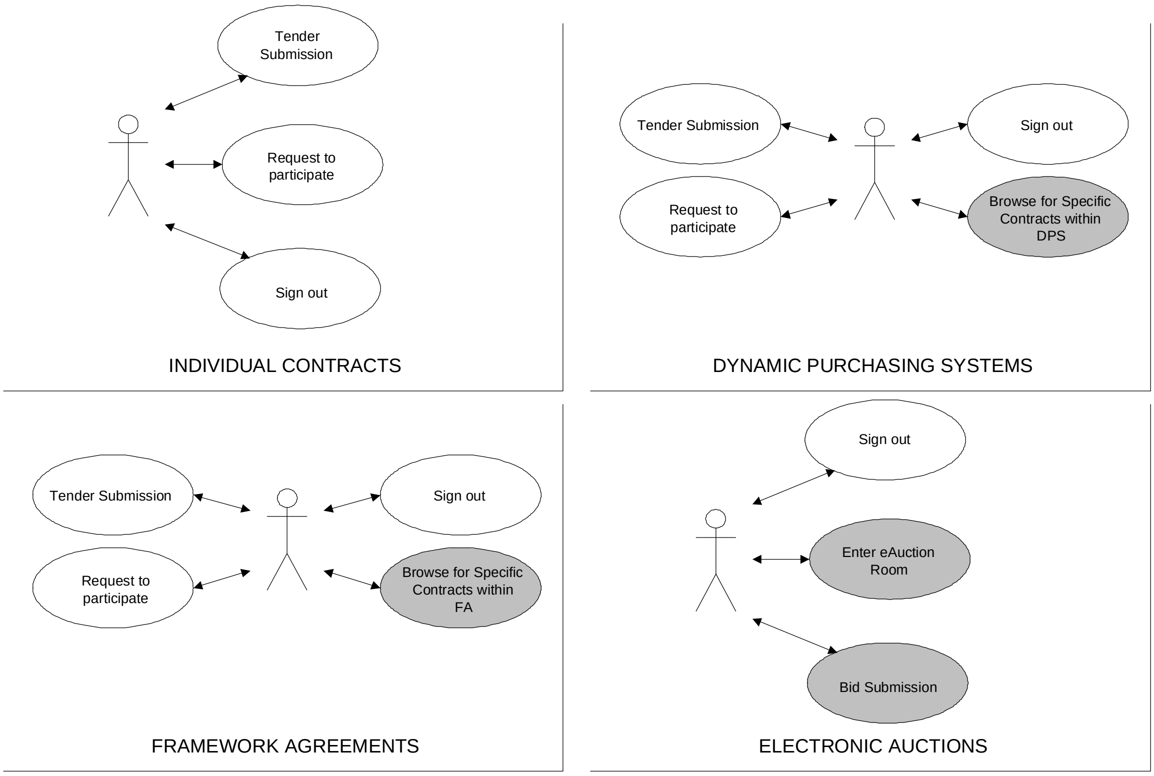

Evaluation/ Ranking of Tenders
Visualisation of reports
Drafting, Preparation and Publication of Notices
Sign out
Creation of short-listing
INDIVIDUAL CONTRACTS / FRAMEWORK AGREEMENTS
Evaluation/ Ranking of Tenders
Visualisation of reports
Drafting, Preparation and Publication of Notices
Sign out
Creation of short-listing
Admittance of tenderers in a DPS
DYNAMIC PURCHASING SYSTEMS
Evaluation/ Ranking of Tenders
Visualisation of reports
Sign out
Send eAuction invitation to tenderers
Visualisation of eAuction event
ELECTRONIC AUCTIONS

5.2.5 Tenderer

The main functionalities available to the *Economic Operator or Tenderer* of an eProcurement system should be:

- **Sign out:** allows users authenticated by the system (i.e. signed in), to sign out of the system. This operation is usually invoked by users after completion of their actions (e.g. submit a Tender for a Call, or view the details of an existing Tender) and necessitates users to signify to the system that they no longer require to act as authenticated users (i.e. return to the access rights of a Guest User). This operation can also be automatically invoked when the user closes his/her browser or when the user session is timed-out
- **Request to Participate:** allows users to express their interest to participate in a Call for Tenders. This functionality is only available for Calls running under the restricted or negotiated procedure
- **Tender submission:** allows users to create and submit a Tender for a particular Call for Tenders. For Calls running under the open procedure, this functionality is available as soon as the Contract Notice is published, and until the Tender submission deadline (also referred to as Tender closing time). For Calls running under the restricted procedure, Tenders can be submitted by Economic Operators which have been invited by the Contracting Authority to submit a Tender (i.e. Economic Operators first need to submit an expression of interested, and only if they are invited by the Contracting Authority, they can submit a Tender)
- **Browse for Specific Contracts within DPS:** allows users to search specific contracts within a DPS
- **Browse for Specific Contracts within DPS:** allows users to search specific contracts within a FA
- **Enter eAuction room:** allows user to access the relevant virtual eAuction room in order to visualise and participate to the eAuction event
- **Bid submission:** allows users to create and submit a bid during an eAuction event

Figure 5-6: Use Cases for the *Tenderer*


Tender Submission
Request to participate
Sign out
INDIVIDUAL CONTRACTS
Tender Submission
Sign out
Request to participate
Browse for Specific Contracts within DPS
DYNAMIC PURCHASING SYSTEMS
Tender Submission
Sign out
Request to participate
Browse for Specific Contracts within FA
FRAMEWORK AGREEMENTS
Sign out
Enter eAuction Room
Bid Submission
ELECTRONIC AUCTIONS

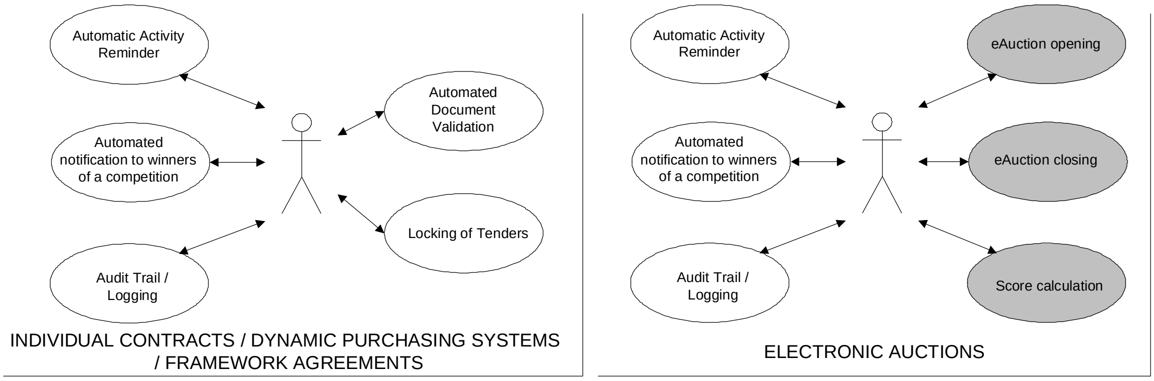
5.2.6 System

The eProcurement system occasionally needs to automatically perform certain actions, either triggered by user activities, or by the system on a certain date/time. The main functionalities performed by the *System* should be:

- **Audit Trailing/Logging:** all user activities and system events must be logged (i.e. recorded) to designated secure areas, which can assist in the regulatory reporting requirements of the legislation, as well as, the identification of infringements
- **Automatic Document Validation:** when Tenders submit a document, the system must perform certain validation checks, in order to ensure the documents compliance with the system specifications. For instance, if a system requires documents to be signed electronically before submitted, the document validation mechanism must ensure that all documents are signed, as well as, that the electronic signature of a document is valid
- **Locking of Tenders:** when Tenders are received for a given Call, the system must ensure that they remain locked and inaccessible until authorised personnel (opening staff) proceed to their opening, which can only be performed after the pre-defined Tender opening time
- **Automatic Activity Reminder (i.e. notification based on time events):** when time events take place (i.e. the time for unlocking Tenders for a Call is reached), the system must automatically inform the associated users
- **Automatic Notification of winners of a competition (i.e. notification based on user events):** when user events take place (i.e. conclusion of a Call for Tenders), the system must automatically or semi-automatically inform the associated users

- **eAuction opening:** when the pre-defined date/time is reached, the system must automatically open the eAuction event, inform the related users, and allow tenderers to submit bids
- **eAuction closing:** when the pre-defined conditions are met, the system must automatically close the eAuction event, inform the related users, and not allow tenderers to submit new bids
- **Score calculation:** when a new valid bid is submitted, the system must automatically apply the pre-defined score calculation formula, in order to calculate the score of the submitted bid, and subsequently rank all received bids accordingly

Figure 5-7: Use Cases for the *System*


Automatic Activity Reminder
Automated notification to winners of a competition
Audit Trail / Logging
Automated Document Validation
Locking of Tenders
INDIVIDUAL CONTRACTS / DYNAMIC PURCHASING SYSTEMS / FRAMEWORK AGREEMENTS
Automatic Activity Reminder
Automated notification to winners of a competition
Audit Trail / Logging
eAuction opening
eAuction closing
Score calculation
ELECTRONIC AUCTIONS

6 OPEN ISSUES RELATED TO PUBLIC EPROCUREMENT

In discussions that took place in several fora amongst Commission services, Member State IDA experts, public administrations, private companies and the contractor, several questions where identified regarding the EU public procurement legislation and the technical solutions possible for being used. Some of the questions raised constitute "open issues" that need to be further discussed, analysed, and/or researched, in order to provide state-of-the-art solutions to real problems encountered in implementing public eProcurement systems. The solution to some of these issues will depend on the implementation method chosen by national authorities.

This chapter summarises such "open issues" related to public eProcurement to stimulate discussion. They are classified under the following categories:

- Legislative aspects
- Technical aspects
- Business development aspects

6.1 Legislative aspects

"Open issues" related to legislative aspects of Public eProcurement comprise:

- Individual Contracts
  - How can appeal procedures be incorporated in the workflow? What are the legal requirements for appeals?
- Repetitive Purchases
  - What products/services/works can a contracting authority buy through a DPS? Can a CA establish a DPS covering a broad range of products/services/works or shall DPS be restricted to specific products/services/works?
  - How can a contracting authority better define the terms of a specific contract within a DPS or FA? Shall a Contracting Authority foresee all terms which will govern specific contracts when establishing the DPS or FA? DPS or FAs can last up to 4 years. What happens if during the creation of a specific contract inside a DPS or FA, the CA needs to update the initial terms, for instance due to technological developments.
  - How can a Contracting Authority establish evaluation criteria for a DPS or FA, which are also used for specific contracts within the DPS and FA?
- Electronic Auctions
  - What should happen in an eAuction event, when a tenderer submits a wrong bid (e.g. negative prices, abnormally low prices, etc.)? Can Contracting Authorities restrict the possible admitted values for a bid or it is the Tenderer's responsibility to submit correct bids?
  - What should happen in an eAuction event conducted in rounds, in case a bidder does not place a bid in one round?
  - Who is the winner of a competition if at the end of an eAuction event two or more bidders have placed the same bid?

6.2 Technical aspects

This section describes “Open issues” that are related to technical aspects for realising eProcurement systems compliant with the EU public procurement legislation. These comprise:

- Global issues related to all eProcurement procedures
  - What security architecture should Member States adopt, in order to ensure high security without violating the principle of interoperability? Are there minimum requirements guaranteeing the secure operation of an eProcurement system fully compliant with the EU legislation?
  - What systems can an eProcurement system be integrated with, and what benefits such integration can offer? Are there any workflows or is there a standard procedure to follow in order to perform eInvoicing?
  - How can an accreditation methodology/system be established, allowing existing eProcurement systems to be evaluated against the EU eProcurement legislation?
  - What XML standards should be adopted in order to ensure interoperability?
  - What exception procedures need to be followed by an eProcurement system and/or a Contracting Authority in case of system failures, document viruses, document illegible formats, unknown certification authorities, etc?
- Repetitive Purchases
  - How should eCatalogues be constructed and used? What is the definition of an eCatalogue? What standard for eCatalogues should be followed?
  - How can integration with supplier systems be achieved, preserving the equal treatment principle? SMEs may be disadvantaged if such an integration will be decided by a Contracting Authority. What is the acceptable investment an SME should be required to make for performing such integration?
- Electronic Auctions
  - What should happen if, during an eAuction event, a bidder loses his/her connection to the eAuction device? What are the recovery procedures that must be put in place and how the eAuction event is affected?
  - Should eAuction bids be signed before accepted by the eAuction device?
  - How can MEAT evaluation for eAuctions be performed? What are the rules for placing bids containing more than one field?

6.3 Business development aspects

“Open issues” related to the business development of eProcurement comprise:

- Economic Operators
  - How can suppliers be sensitised to and trained in the new Public eProcurement rules?
  - How can supplier adoption be achieved, preserving the equal treatment principle?
- Contracting Authorities
  - How can national-level systems be created/maintained at low cost, allowing a great number of different Contracting Authorities in a Member State to utilise them?

7 CONCLUSIONS

Adopted on 30 April 2004, the new EU public procurement directives should be transposed into national law by Member States by 31 of January 2006 at the latest. In this context, the present report identifies the different steps required to implement a fully integrated electronic Public Procurement system that would be compliant with the legal framework. It provides an analysis of the eProcurement procedures at different levels:

- transcription of the new directives into a comprehensive conceptual view
- detailed description of the main eProcurement procedures and phases in the form of information and activity flow diagrams
- deduction of functional requirements
- identification of potential technical implementations for the deduced functional requirements
- deduction of non-functional requirements
- description of a technical conceptual model, capable to support core eProcurement functionalities
- identification of main actors
- conclusion of Use Case analysis
- documentation of "open issues" related to Public eProcurement, as discussed in several public expert fora

The eProcurement analysis carried out in the present report is based exclusively on the regulatory framework established by the EU public procurement directives. Depending on national, regional and/or local legislation, a contracting authority may be required to consider additional functional and non-functional requirements for an eProcurement system.

The above analysis provides the ground for identifying alternative technical solutions available for the various eProcurement procedures, phases and steps. Description of these technical solutions is carried out at a functional level, while the advantages and disadvantages of each technical solution are also presented where appropriate.

The non-functional requirements discussed in the current report comprise requirements for usability, reliability, interoperability, scalability and security. The new EU procurement directives do not impose specific non-functional requirements, hence the non-functional requirements presented in this document should only be considered as guidelines.

The work carried out has revealed a number of critical decision points and alternative technical implementation scenarios, which contracting authorities should decide upon before implementing an eProcurement system. Such decisions may have an impact on several functional and non-functional aspects of a new eProcurement system. Some of these decision points, especially with regard to security and interoperability, are already being analysed at European level.

To further assist contracting authorities, standardisation bodies, and any other interested party to fully understand the new EU public eProcurement legislation, this report is further complemented by static and dynamic demonstrators, developed in the context of the same project, in order to simulate a fully functional eProcurement system, compliant with the EU legislation. Volume II of the report contains details for interested parties to access and experiment with these demonstrators. More information about the demonstrators can be found at the Internet address **http://europa.eu.int/idabc/eprocurement**. The demonstrators are also accessible at **http://delos.eurodyn.com/idaeproc/**.

These demonstrators cover the required functionality for individual contracts, framework agreements, DPS, and eAuctions. They aim to:

- provide a medium for experimentation and review of the required eProcurement workflows
- trigger discussion on the directions and technical approaches to follow for the implementation of eProcurement systems, in line with underlying eProcurement legislative aspects
- train procurement officers and economic operators on the functionalities required by the current directives

The analysis presented in the current report can provide the basis for administrations or vendors developing eProcurement systems, in full compliance with the new directives. It is envisaged that this analysis should result in a more focused development of software and, possibly, savings for administrations, since they will be in position to describe more accurately to contractors the desired functionality, rather than being forced to accept and customise generic solutions offered by existing commercial eProcurement systems.

On the technical implementation level, the analysis has shown that technology is not a restrictive factor, as a wide selection of alternative technical solutions is available for the implementation of different functional requirements. Therefore, the key aspect for administrations is to model appropriately the eProcurement procedures they need to automate and make decisions on the technical solutions to implement, by applying their specific requirements. This will allow administrations to select solutions more appropriate to their existing infrastructure, available budget, specifications, and the scope of their eProcurement project.

Most eProcurement procedures can been viewed as extensions or minor alterations to the open procedure as many steps of different eProcurement procedures can be implemented through the same mechanisms (e.g. implementation of official publication, submission of tenders, opening of tenders, etc.). This can result in considerable cost savings via re-utilisation of software modules.

FUNCTIONAL REQUIREMENTS FOR CONDUCTING ELECTRONIC PUBLIC PROCUREMENT UNDER THE EU FRAMEWORK

VOLUME II

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Abbreviations / Acronyms

Abbreviation or Acronym	**Term**
CPV	Common Procurement Vocabulary (European Community)
DPS	Dynamic Purchasing Systems
FA	Framework Agreement
FReq	Functional Requirements
MEAT	Most Economically Advantageous Tender
OJEU	Official Journal of the European Union
PIN	Prior Information Notice
XML	eXtensible Markup Language

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1 INTRODUCTION

This document constitutes Volume II of the Functional Requirements (FReq) report, discussing technical aspects related to the design and implementation of eProcurement systems. The current document includes information deduced from the conclusions of all three development iterations of the IDA Public eProcurement project, encompassing the completion of all static and dynamic Demonstrators for Individual Contracts, Repetitive Purchases and eAuctions.

The following chapters present a Use Case analysis for an eProcurement system supporting the procurement of Individual Contracts and Repetitive Purchases, as well as, eAuctions as an extension to other procedures. Furthermore, the last chapter presents detailed steps interested parties may follow in order to experiment with the Dynamic Demonstrators, developed in the context of the current project.

2 USE CASE ANALYSIS FOR INDIVIDUAL CONTRACTS

This section presents the main actors and functionality of an eProcurement system supporting the procurement of Individual Contracts.

The main actors of a Public eProcurement system supporting Individual Contracts are:

Table 2-1 - Main actors of a Public eProcurement system

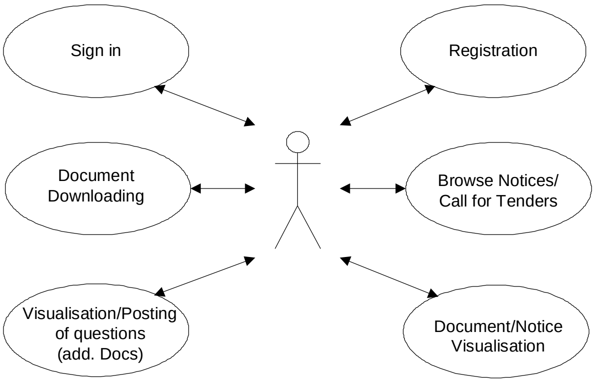
Actor Type	Actor	Notes
Guest	Anonymous	The three types of guest users can perform the same actions in a Public eProcurement system. Therefore, the functions of the "Economic Operator (not logged in)" and the "Procurement Officer (not logged in)" are identical to the Anonymous role
	Procurement Officers (not logged in)	
	Economic Operators (not logged in)	
Procurement Officers	Administrative staff	Procurement Officers which perform the role of "Administrative staff" are responsible for the creation and management of Calls for Tenders
	Opening staff	Procurement Officers which perform the role of "Opening staff" are responsible for the opening (or unlocking) of Tenders for a Call
	Evaluating staff	Procurement Officers which perform the role of "Evaluating staff" are responsible for the evaluation of Tenders for a Call, as well as, the conclusion of a competition by selecting the winner(s) and publication of the Contract Award Notice
Tenderers	Economic Operators (logged in)	For a Call for Tenders under the open procedure, the Tenderer can create and submit a Tender. For a restricted or negotiated procedure competition, the Tenderer must first submit his/her Expression of Interest and following invitation form the Contracting Authority, he/she can submit a Tender
System	System	The eProcurement system occasionally needs to automatically perform certain actions either triggered by user activities, or by the system on certain date/time

2.1 Guest

The role *Guest* is assumed by any non-authenticated user of the system. If a user does not have a user account with the system, or is not signed in the system, he/she is only given access to publicly available information. Furthermore, he/she is provided with limited functionality which allows for searching existing or concluded Calls for Tenders, as well as, the functionality to sign in or create a user account. The main functionality available to the *Guest* user of an eProcurement system should be:

- **Registration:** allows users to provide their personal information to the system and create a new user account
- **Sign in:** allows users that have user accounts with the system to provide their username and password and authenticate, in order to use functionality of the system depending on the user rights
- **Browse Notices/Call for Tenders:** allows users to provide search criteria, and view Notices/Call for Tenders that match these criteria
- **Document/Notice Visualisation:** allows users to view the details of a document or Notice for a Call for Tenders
- **Visualisation and posting of request for Additional Documents:** allows users to view the Additional Documents (questions and answers) for a particular Call for Tenders, or post requests for new Additional Documents (post a question)
- **Document Downloading:** allows user to download one or more documents

Figure 2-1: Use Cases for the *Guest User* for a system supporting Individual Contracts


Sign in
Registration
Document Downloading
Browse Notices/ Call for Tenders
Visualisation/Posting of questions (add. Docs)
Document/Notice Visualisation

2.1.1 Registration

REGISTRATION	
Version:	1
Context:	Allows user to register to the system and create a user account
Priority:	High
Frequency:	Often
Primary Actor:	Guest
Preconditions:	User does not have a user account with the system
Basic Flow:	1. User visits the registration page of the application and supplies all requested information 2. System validates the supplied information (email, mandatory fields, existence of same username), records the action in the audit trail, automatically signs in the user and displays an appropriate confirmation message
Alternative Flow:	2a. If not all mandatory fields are completed: 2a1. System redirects to the registration page 2a2. System highlights all registration fields that have not been filled in correctly 2b. If the requested username is already used: 2b1. System redirects to the registration page 2b2. System informs user of the failure through an appropriate message, and proposes alternative usernames
Special Requirements:	All communication in this Use Case should be carried-out in encrypted mode. Furthermore, the system should guarantee the integrity of the data as well as the identity of both the client and the server. This shall take place outside the application (SSL-based with both client and server certificates).
Unresolved Issues:	None

2.1.2 Sign in

SIGN IN	
Version:	1
Context:	Allows user to identify himself to the system
Priority:	High
Frequency:	Very Often
Primary Actor:	Guest
Preconditions:	User has not authenticated with the system
Basic Flow:	1. User visits the login page of the application and supplies his credentials (username and password) 2. System validates user credentials, records the action in the audit trail, and displays the an appropriate confirmation message or allows user to perform activities that only a signed in user can (based on his user access rights)
Alternative Flow:	2a. If a non-authenticated user attempts to directly access an application page, for instance by clicking on a URL embedded in an email communication: 2a1. System redirects to the login page 2a2. User fills in the username and password 2a3. Upon validation of credentials system redirects to the original requested URL 2b. If user credentials are wrong: 2b1. System re-displays the login page with the appropriate error message requesting the user to supply again his credentials
Special Requirements:	All communication in this Use Case should be carried-out in encrypted mode. Furthermore, the system should guarantee the integrity of the data as well as the identity of both the client and the server. This shall take place outside the application (SSL-based with both client and server certificates).
Unresolved Issues:	None

2.1.3 Browse Notices/Call for Tenders

BROWSE NOTICES/CALL FOR TENDERS	
Version:	1
Context:	Allows user to search through published Calls for Tenders
Priority:	High
Frequency:	Very Often
Primary Actor:	Guest
Preconditions:	None
Basic Flow:	1. User visits the search page of the application and supplies his preferred search criteria 2. System executes a database query, based on user’s search criteria, and displays the results of the query
Alternative Flow:	2a. If the query does return any records that match user’s search criteria: 2a1. An appropriate message is displayed to the user 2b. If the query returns too many records: 2b1. User is requested to provide more “tight” criteria
Special Requirements:	None
Unresolved Issues:	None

2.1.4 Document/Notice Visualisation

DOCUMENT/NOTICE VISUALISATION	
Version:	1
Context:	Allows user to view the Contract Documents and Contract Notice of a Call
Priority:	High
Frequency:	Very Often
Primary Actor:	Guest
Preconditions:	None
Basic Flow:	1. User visits the details page of a Call, and requests to view the Contract Documents and/or Contract Notice of the Call 2. System displays requested documents
Alternative Flow:	2a. If the Contract Documents and/or Contract Notice are in the form of files: 2a1. System displays all files which comprise the Contract Documents and/or Contract Notice 2a2. User selects the files to download (and visualise on his desktop) 2b. If the system does not support the creation of Contract Notices (i.e. takes place in an external form filling system): 2b1. System provides link to user in order to interconnect with OJEU and visualise the Contract Notice on that system
Special Requirements:	None
Unresolved Issues:	None

2.1.5 Visualisation and posting of request for Additional Documents (i.e. posting questions)

VISUALISATION AND POSTING OF REQUEST OF ADDITIONAL DOCUMENTS	
Version:	1
Context:	Allows user to view the Additional Documents of a Call (i.e. questions and answers). Also user can post his own requests for Additional Documents (i.e. post a question)
Priority:	High
Frequency:	Very Often
Primary Actor:	Guest
Preconditions:	None
Basic Flow:	1. User visits the details page of a Call, and requests to view the Additional Documents 2. User accesses the page for submitting a request for Additional Documents 3. User signs in or supplies a minimum number of personal details (i.e. email, name, company) and submits a request for Additional Documents
Alternative Flow:	3a. If user sign in fails: 3a1. section 2.1.2 3b. If the validation of minimum number of personal details fails (i.e. email already exists in system, or is not a valid address): 3b1. User is redirected on previous page, where an appropriate error message informs him of the reason for the failure of the request
Special Requirements:	All communication in this Use Case should be carried-out in encrypted mode. Furthermore, the system should guarantee the integrity of the data as well as the identity of both the client and the server. This shall take place outside the application (SSL-based with both client and server certificates).
Unresolved Issues:	None

2.1.6 Document Downloading

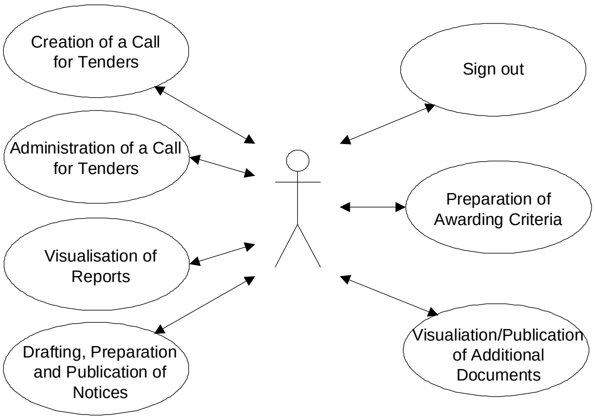
DOCUMENT DOWNLOADING	
Version:	1
Context:	Allows user to download documents (i.e. Contract Documents, Contract Notices, Additional Documents, etc.)
Priority:	High
Frequency:	Very Often
Primary Actor:	Guest
Preconditions:	None
Basic Flow:	1. User views a list of files comprising the documents of a Call 2. User selects one or more documents and requests to download them 3. System initiates the downloading process and informs user on progress
Alternative Flow:	3a. If user interrupts downloading process before completion: 3a1. System cancels the downloading request
Special Requirements:	All communication in this Use Case should be carried-out in encrypted mode. Furthermore, the system should guarantee the integrity of the data as well as the identity of both the client and the server. This shall take place outside the application (SSL-based with both client and server certificates).
Unresolved Issues:	None

2.2 Procurement Officer – Administrative Staff

Users performing the role of *Procurement Officer Administrative staff* are responsible for the creation and management of Calls for Tenders. The main functionality available to the *Procurement Officer Administrative staff* user of an eProcurement system should be:

- **Sign out:** allows users that are authenticated by the system (i.e. signed in), to sign out of the system. This operation is usually invoked by users when they have completed all actions they wished to, which necessitate for the user to be authenticated (like create a Call for Tenders, or change the details of a Call) and want to signify to the system that they no longer need to act as authenticated users (i.e. return to the access rights of a Guest User). This operation can also be automatically invoked when user closes his/her browser or when the user session is timed-out
- **Creation of a new Call for Tenders:** allows user to create a new Call for Tenders
- **Administration of an existing Call for Tenders:** allows user to view the details of an existing Call for Tenders and modify its details. Some Call details should not be possible to be modified, according to the exact phase of the Call. For instance, when a Call is in the Tender Evaluation phase, the system does not allow users to modify the awarding criteria
- **Preparation of the Awarding Criteria:** allows users to define the awarding criteria for the Call for Tenders. These criteria are used in the Tender Evaluation phase, when all received Tenders are evaluated according to the pre-stated criteria
- **Drafting/Preparation/Publication of Notices:** allows users to create and publish a Prior Information Notice, Contract Notice, Contract Award Notice, etc
- **Visualisation and Publication of Additional Documents:** allows users to view all published Additional Documents for a Call (i.e. questions and answers), as well as, view new requests for Additional Documents. Also, this functionality allows users to provide Additional Documents (i.e. give answers to posted questions)
- **Visualisation of Reports:** allows users to view reports related to a Call

Figure 2-2: Use Cases for the *Procurement Officer Administrative User* for a system supporting Individual Contracts


Creation of a Call for Tenders
Sign out
Administration of a Call for Tenders
Preparation of Awarding Criteria
Visualisation of Reports
Drafting, Preparation and Publication of Notices
Visualiation/Publication of Additional Documents

2.2.1 Sign out

SIGN OUT	
Version:	1
Context:	Allows user to sign out of the system
Priority:	High
Frequency:	Very Often
Primary Actor:	Procurement Officer – Administrative Staff
Preconditions:	User is signed in the system
Basic Flow:	1. User initiates the sign out process 2. System signs out user, and displays an appropriate message or displays the homepage of the *Guest* user
Alternative Flow:	2a. If user closes Web browser or does not perform any activities on the system for a certain period of time: 2a1. System uses a time limit of inactivity. If the session of a certain user is idle for longer than the predefined time limit, system automatically signs the user out.
Special Requirements:	All communication in this Use Case should be carried-out in encrypted mode. Furthermore, the system should guarantee the integrity of the data as well as the identity of both the client and the server. This shall take place outside the application (SSL-based with both client and server certificates).
Unresolved Issues:	None

2.2.2 Creation of a new Call for Tenders

CREATION OF A NEW CALL FOR TENDERS	
Version:	1
Context:	Allows user to create the necessary workspace and provide all information for a new Call for Tenders
Priority:	High
Frequency:	Often
Primary Actor:	Procurement Officer – Administrative Staff
Preconditions:	User is signed in the system
Basic Flow:	1. User requests the creation of the necessary workspace for a new Call for Tenders 2. User supplies the basic information for the creation of the Call (i.e. title, CPV/NUTS codes, type of contract, estimated value, procedure type, opening/closing dates, etc.) 3. User submits request 4. System validates all supplied information and on acceptance creates the Call
Alternative Flow:	4a. If user does not provide valid information for all mandatory fields: 4a1. System redirects to the Call creation page 4a2. System highlights all mandatory fields that have not been filled in correctly
Special Requirements:	All communication in this Use Case should be carried-out in encrypted mode. Furthermore, the system should guarantee the integrity of the data as well as the identity of both the client and the server. This shall take place outside the application (SSL-based with both client and server certificates).
Unresolved Issues:	None

2.2.3 Administration of an existing Call for Tenders

ADMINISTRATION OF AN EXISTING CALL FOR TENDERS	
Version:	1
Context:	Allows the User to administer an existing Call for Tenders
Priority:	High
Frequency:	Very Often
Primary Actor:	Procurement Officer – Administrative Staff
Preconditions:	User is signed in the system
Basic Flow:	1. User updates the basic information of a Call of Tenders 2. User performs various Call administrative activities like associating Procurement Officers to a Call, uploading Contract Documents, providing Additional Documents, etc. 3. User submits updates 4. System validates all supplier information and on acceptance updates the Call
Alternative Flow:	4a. If user does not provide valid information to all mandatory fields: 4a1. System redirects to the page for updating the Call 4a2. System highlights all mandatory fields that have not been filled in correctly
Special Requirements:	All communication in this Use Case should be carried-out in encrypted mode. Furthermore, the system should guarantee the integrity of the data as well as the identity of both the client and the server. This shall take place outside the application (SSL-based with both client and server certificates).
Unresolved Issues:	None

2.2.4 Preparation of the Awarding Criteria

PREPARATION OF THE AWARDING CRITERIA	
Version:	1
Context:	Allows user to define all parameters for automatically ranking all Tenders (when the evaluation of Tenders phase will take place)
Priority:	High
Frequency:	Often
Primary Actor:	Procurement Officer – Administrative Staff
Preconditions:	User is signed in the system
Basic Flow:	1. User accesses the page for defining the evaluation method 2. User defines the Conditions for Participation 3. User defines the Selection Criteria (only in case of restricted or negotiated procedure) 4. User specifies whether contract is to be awarded to the lowest price or MEAT 5. In case of MEAT, user specifies whether weighted criteria will be used, or whether the criteria will be defined in descending order of importance 6. In case of weighted criteria, user defines the criteria and their weights 7. User submits the evaluation method and system validates all information
Alternative Flow:	7a. When using weighted criteria, system must ensure that the sum of all criteria weights is 100. If the sum is different to 100: 7a1. System redirects to the user to the criteria and weights definition page, and displays an appropriate message to the user
Special Requirements:	All communication in this Use Case should be carried-out in encrypted mode. Furthermore, the system should guarantee the integrity of the data as well as the identity of both the client and the server. This shall take place outside the application (SSL-based with both client and server certificates).
Unresolved Issues:	None

2.2.5 Drafting/Preparation/Publication of Notices

DRAFTING/PREPARATION/PUBLICATION OF NOTICES	
Version:	1
Context:	Allows user to create notices
Priority:	High
Frequency:	Often
Primary Actor:	Procurement Officer – Administrative Staff
Preconditions:	User is signed in the system
Basic Flow:	1. User accesses page which allows the creation of Notices (can be PIN, Contract Notice, Contract Award Notice) 2. User supplies all necessary information and submits it to OJEU 3. System generates appropriate XML message, which is securely sent to OJEU 4. System receives confirmation or rejection from OJEU
Alternative Flow:	1a. The eProcurement system can integrate to an external form filling system, which can be used for creating and publishing Notices on OJEU. If that is the case: 1a1. On request, eProcurement system automatically redirects user to the external form filling system 1a2. eProcurement system sends to the external form filling system all already defined information related to the Call 1a3. User is provided with the functionality to fill in the empty fields of the forms displayed by the form filling system, and submit the Notice to OJEU 4a. If OJEU rejects a Notice: 4a1. System displays appropriate message to user 4a2. System allows user to access the page for creating Notices, for correcting the incorrect information
Special Requirements:	All communication in this Use Case should be carried-out in encrypted mode. Furthermore, the system should guarantee the integrity of the data as well as the identity of both the client and the server. This shall take place outside the application (SSL-based with both client and server certificates).
Unresolved Issues:	None

2.2.6 Visualisation and Publication of Additional Documents (i.e. answering to questions)

VISUALISATION AND PUBLICATION OF ADDITION DOCUMENTS	
Version:	1
Context:	Allows user to view existing Additional Documents (i.e. existing questions and answers), as well as, provide new Additional Documents based on submitted requests (i.e. provide new answers)
Priority:	High
Frequency:	Very Often
Primary Actor:	Procurement Officer – Administrative Staff
Preconditions:	User is signed in the system
Basic Flow:	1. User accesses the Additional Documents of a Call (i.e. accesses the questions and answers section of a Call) 2. User accesses the details of an Additional Document (i.e. view the details of a question) 3. User views the requests for new Additional Documents (i.e. view new questions) 4. User supplies the new Additional Documents based on existing requests (i.e. provide an answer to a new question)
Alternative Flow:	None
Special Requirements:	All communication in this Use Case should be carried-out in encrypted mode. Furthermore, the system should guarantee the integrity of the data as well as the identity of both the client and the server. This shall take place outside the application (SSL-based with both client and server certificates).
Unresolved Issues:	None

2.2.7 Visualisation of reports

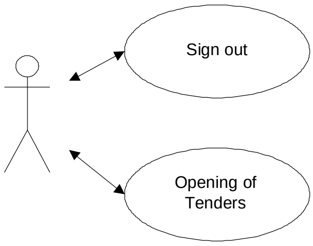
VISUALISATION OF REPORTS	
Version:	1
Context:	Allows user to view the reports of a competition
Priority:	High
Frequency:	Often
Primary Actor:	Procurement Officer – Administrative Staff
Preconditions:	User is signed in the system
Basic Flow:	1. User requests from system to create a report (i.e. contract award report, score justification report, winner report, etc.) 2. System generates a report
Alternative Flow:	None
Special Requirements:	All communication in this Use Case should be carried-out in encrypted mode. Furthermore, the system should guarantee the integrity of the data as well as the identity of both the client and the server. This shall take place outside the application (SSL-based with both client and server certificates).
Unresolved Issues:	None

2.3 Procurement Officer – Opening Staff

Users performing the role of *Procurement Officer Opening staff* are responsible for the opening (or unlocking) of Tenders for a Call. The main functionality available to the *Procurement Officer Opening staff* user of an eProcurement system should be:

- **Sign out:** allows users that are authenticated by the system (i.e. signed in), to sign out of the system. This operation is usually invoked by users when they have completed all actions they wished to, which necessitate for the user to be authenticated (like access confidential details of a Call, or authorise the opening of Tenders for a Call) and want to signify to the system that they no longer need to act as authenticated users (i.e. return to the access rights of a Guest User). This operation can also be automatically invoked when user closes his/her browser or when the user session is timed-out
- **Opening of Tenders:** allows users to authorise the opening of Tenders for a particular Call. This activity can only be performed once the pre-defined Tender opening time has been reached

Figure 2-3: Use Cases for the *Procurement Officer Opening Staff User* for a system supporting Individual Contracts



2.3.1 Sign out

The Use Case of this action of the current user is similar to the Use Case presented in section 2.2.1.

2.3.2 Opening of Tenders

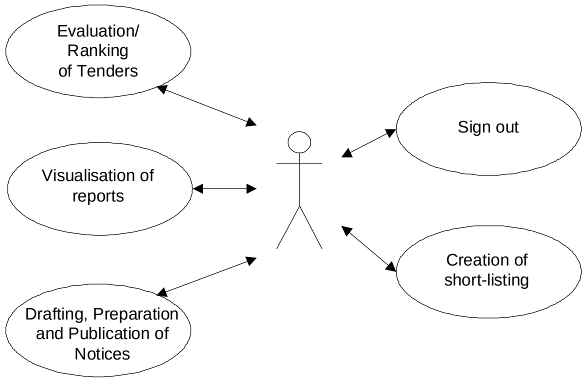
	OPENING OF TENDERS
Version:	1
Context:	Allows user to authorise the opening (unlocking) of Tenders
Priority:	High
Frequency:	Very Often
Primary Actor:	Procurement Officer – Opening Staff
Preconditions:	User is signed in the system.
Basic Flow:	1. User accesses the page which allows user to authorise the opening of Tenders within a pre-specific time limit 2. User submits his approval for opening Tenders 3. System checks whether the minimum number of Opening Staff users have authorised the opening of Tenders. If the minimum number is reached, the Tenders are unlocked, otherwise they remain locked 4. System displays a confirmation page to the user
Alternative Flow:	1a. If the minimum number of Officers has already authorised the opening of Tenders before the user submits his approval: 1a1. System simply displays that Tenders are already unlocked 1b. If the user has already approved the opening of Tenders: 1b1. System does not allow user to re-approve the opening of Tenders 1c. If the pre-specified time limit is expired: 1c1. System does not allow the opening of Tenders 1c2. Tender Administrative staff must access the Call and schedule another time for such activity (reports and other administrative activities may need to take place first)
Special Requirements:	None
Unresolved Issues:	None

2.4 Procurement Officer – Evaluating Staff

Users performing the role of *Procurement Officer Evaluating staff* are responsible for the evaluation of Tenders for a Call, as well as, the conclusion of a competition by selecting the winner(s) and publication of the Contract Award Notice. The main functionality available to the *Procurement Officer Evaluating staff* user of an eProcurement system should be:

- **Sign out:** allows users that are authenticated by the system (i.e. signed in), to sign out of the system. This operation is usually invoked by users when they have completed all actions they wished to, which necessitate for the user to be authenticated (like access confidential details of a Call, or evaluate a particular Tender for a Call) and want to signify to the system that they no longer need to act as authenticated users (i.e. return to the access rights of a Guest User). This operation can also be automatically invoked when user closes his/her browser or when the user session is timed-out
- **Creation of short-listing:** allows users to select Tenderers to invite for participating in a particular Call for Tenders. This functionality is available only in the restricted and negotiated procedures. Once the Expression of Interest submission period is complete, Procurement Officers access the supporting documentation of all Tenderers (i.e. proof documents), and evaluate their compliance with the Conditions for Participation. Following the evaluation, Procurement Officers create Tenderers short-listing, and conclude on the tenderers to be invited to submit a Tender. For the restricted procedure at least 5 Economic Operators must be selected, while for the negotiated procedure at least 3 Economic Operators are required
- **Evaluation and ranking of Tenders:** allows users to evaluate the received Tenders for a particular Call, and create Tender rankings. This functionality can only be performed once all Tenders are made accessible by authorised officers. Users are required to provide scores to all evaluation criteria, before ranking the Tenders according to the evaluation function
- **Drafting/Preparation/Publication of Notices:** allows users to create and publish a Prior Information Notice, Contract Notice, Contract Award Notice, etc
- **Visualisation of Reports:** allows users to view reports related to a Call

Figure 2-4: Use Cases for the *Procurement Officer Evaluating Staff User* for a system supporting Individual Contracts



2.4.1 Sign out

The Use Case of this action of the current user is similar to the Use Case presented in section 2.2.1.

2.4.2 Creation of Short-listing

Creation of Short-listing	
Version:	1
Context:	Allows user to short-list Tenderers (only applicable for the restricted and negotiated procedures)
Priority:	High
Frequency:	Often
Primary Actor:	Procurement Officer – Evaluating Staff
Preconditions:	User is signed in the system.
Basic Flow:	1. User accesses the proof documents and is given the opportunity to evaluate all Tenderers according to the Conditions for Participation and Selection criteria (see Use Case 2.2.4) 2. System ensures that there is a value for each criterion for all Tenderers 3. System automatically disqualifies candidates that do not meet the Conditions for Participation 4. System automatically ranks candidates according to the selection criteria
Alternative Flow:	None
Special Requirements:	None
Unresolved Issues:	None

2.4.3 Evaluation and ranking of Tenders

EVALUATION AND RANKING OF TENDERS	
Version:	1
Context:	Allows user to evaluate and rank all Tenders
Priority:	High
Frequency:	Very Often
Primary Actor:	Procurement Officer – Evaluating Staff
Preconditions:	User is signed in the system.
Basic Flow:	1. User accesses the technical offers of all Tenders and is given the opportunity to evaluate them according to the technical criteria (see Use Case 2.2.4) 2. System ensure that there is a value for each technical criterion for all Tenderers 3. User accesses the financial offers of all Tenders and is given the opportunity to evaluate them according to the financial criteria (see Use Case 2.2.4) 4. System ensure that there is a value for each financial criterion for all Tenderers 5. System automatically ranks Tenders according to the evaluation function of criteria scores and weights (C1xW1 + C2xW2 + … + CnxWn)
Alternative Flow:	1a. If the evaluation of Tenders is based on the lowest price 1a1. User provides the price of each Tender 1a2. System sorts Tenders in ascending order of their price 5a. If the evaluation of Tenders is based on MEAT with criteria stated on descending order of importance: 5a1. System compares the most important criterion of all Tenders 5a2. If there is a Tender with the higher score than the others, that Tender is ranked first 5a3. If two or more Tenders have the same score, the next more important criterion is compared, to conclude which Tender is ranked higher
Special Requirements:	None
Unresolved Issues:	None

2.4.4 Drafting/Preparation/Publication of Notices

The Use Case of this action of the current user is similar to the Use Case presented in section 2.2.5.

2.4.5 Visualisation of Reports

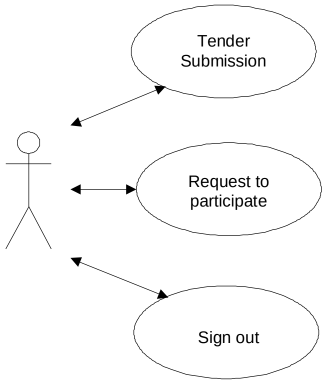
The Use Case of this action of the current user is similar to the Use Case presented in section 2.2.7.

2.5 Tenderer

For Calls for Tenders under the Open Procedure, *Tenderers* or *Economic Operators* are responsible for creating and submitting a Tender. For a Restricted or Negotiated Procedure competition, the *Tenderers* or *Economic Operators* first submit their Expression of Interest and following invitation by the Contracting Authority, they can submit a Tender. The main functionality available to the *Economic Operator* or *Tenderer* of an eProcurement system should be:

- **Sign out:** allows users that are authenticated by the system (i.e. signed in), to sign out of the system. This operation is usually invoked by users when they have completed all actions they wished to, which necessitate for the user to be authenticated (like submit a Tender for a Call, or view the details of an existing Tender) and want to signify to the system that they no longer need to act as authenticated users (i.e. return to the access rights of a Guest User). This operation can also be automatically invoked when user closes his/her browser or when the user session is timed-out
- **Request to Participate:** allows users to express their interest to participate to a Call for Tenders. This functionality is only available for Calls running under the restricted or negotiated procedure
- **Tender submission:** allows users to create and submit a Tender for a particular Call. For Calls running under the open procedure, this functionality is available as soon as the Contract Notice is dispatched to the OJEU, and until the Tender submission deadline (also referred to as Tender closing time). For Calls running under the restricted or negotiated procedure, Tenders can be submitted only be Economic Operators which have been invited by the Contracting Authority to submit a Tender (i.e. Economic Operators first need to submit expression of interested, and only once they are invited by the Contracting Authority, they can submit a Tender)

Figure 2-5: Use Cases for the *Tenderer* for a system supporting Individual Contracts



2.5.1 Sign out

The Use Case of the Sign out action of the current user, is similar to the Use Case presented in section 2.2.1.

2.5.2 Request to participate

	REQUEST TO PARTICIPATE
Version:	1
Context:	Allows user to express interest to a Call (only for the restricted and negotiated procedure)
Priority:	High
Frequency:	Often
Primary Actor:	Tenderer
Preconditions:	User is signed in the system.
Basic Flow:	1. User accesses the details of a Call 2. User uploads all required proof documents (i.e. comprise documents for meeting the Conditions for Participation and for Pre-Qualification selection) 3. Tenderer digitally signs proof documents (optional) 4. User submits his expression of interest
Alternative Flow:	None
Special Requirements:	All communication in this Use Case should be carried-out in encrypted mode. Furthermore, the system should guarantee the integrity of the data as well as the identity of both the client and the server. This shall take place outside the application (SSL-based with both client and server certificates). When uploading documents, a document validation mechanism checks the validity of the Tender (see section 2.6.2)
Unresolved Issues:	None

2.5.3 Tender submission

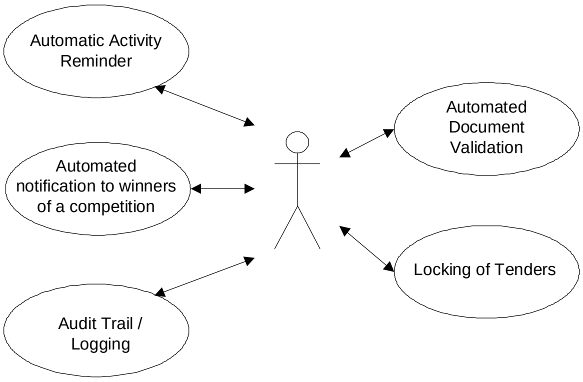
TENDER SUBMISSION	
Version:	1
Context:	Allows user to submit a Tender
Priority:	High
Frequency:	Very Often
Primary Actor:	Tenderer
Preconditions:	User is signed in the system. In case of restricted and negotiated procedures, Tenderer must be invited to submit a Tender
Basic Flow:	1. User accesses the details of a Call 2. User uploads his Tender comprised by his technical and financial offer 3. Tenderer digitally signs Tender documents (optional) 4. User submits his Tender
Alternative Flow:	None
Special Requirements:	All communication in this Use Case should be carried-out in encrypted mode. Furthermore, the system should guarantee the integrity of the data as well as the identity of both the client and the server. This shall take place outside the application (SSL-based with both client and server certificates). When uploading documents, a document validation mechanism checks the validity of the Tender (see section 2.6.2)
Unresolved Issues:	None

2.6 System

The eProcurement system occasionally needs to automatically perform certain actions, either triggered by user activities or by the system on certain date/time. The main functionality performed by the *System* should be:

- **Audit Trailing/Logging:** all user activities and system events must be logged (i.e. recorded) to designated secure areas, which can assist in the regulatory reporting requirements of the legislation, as well as, the identification of infringements
- **Automatic Document Validation:** when Tenders submit a document, the system must perform certain validation checks, in order to ensure the documents compliance with the system specifications. For instance, if a system requires documents to be signed electronically before submitted, the document validation mechanism must ensure that all documents are signed, as well as, the electronic signature of a document is valid
- **Locking of Tenders:** when Tenders for a Call are received, the system must ensure that they remained locked and inaccessible until appointed personnel (opening staff) authorise their opening, which can only be performed after the pre-defined Tender opening time
- **Automatic Activity Reminder (i.e. notification based on time events):** when time events take place (i.e. the time for unlocking Tenders for a Call is reached), the system must automatically inform the associated users
- **Automatic Notification to winners of a competition (i.e. notification based on user events):** when user evens take place (i.e. conclusion of a Call for Tenders), the system must automatically inform the associated users

Figure 2-6: Use Cases for the *System* for a system supporting Individual Contracts


Automatic Activity Reminder
Automated Document Validation
Automated notification to winners of a competition
Locking of Tenders
Audit Trail / Logging

2.6.1 Audit Trailing/Logging

AUDIT TRAILING/LOGGING	
Version:	1
Context:	Records every user and system activity
Priority:	High
Frequency:	Very Often
Primary Actor:	System
Preconditions:	None
Basic Flow:	1. System tracks every user events, and every system events triggered by time 2. System records all activities in secure system logs
Alternative Flow:	None
Special Requirements:	System logs are accessible only by authorised personnel, who can create activity reports and produce statistical analysis based on the logs
Unresolved Issues:	None

2.6.2 Automatic Document Validation

AUTOMATIC DOCUMENT VALIDATION	
Version:	1
Context:	Verifies the validity of submitted documents, comprising the proof documents or Tender of a Tenderer
Priority:	High
Frequency:	Very Often
Primary Actor:	System
Preconditions:	None
Basic Flow:	1. System performs documents virus check 2. System performs document corruption check 3. System checks that document is digitally signed (if digital signatures are used) 4. System verifies the validity of the digital signature of the Tenderer against the Certificate Authority' revocation list (if digital signatures are used) 5. System encrypts document
Alternative Flow:	5a. If the document validation fails: 5a1. System automatically sends appropriate notification to user 5a2. System displays appropriate error message to user 5a3. System rejects the document submission of the Tenderer
Special Requirements:	All communication in this Use Case should be carried-out in encrypted mode. Furthermore, the system should guarantee the integrity of the data as well as the identity of both the client and the server. This shall take place outside the application (SSL-based with both client and server certificates).
Unresolved Issues:	The system implementers must realise an interoperable method for the document validation mechanism, especially when performing the digital signature verification (step 4). A non-interoperable method may unjustifiably reject valid Tenders.

2.6.3 Locking of Tenders

LOCKING OF TENDERS	
Version:	1
Context:	Locks received Tenders until their pre-specified opening time is reached, and the Opening Staff authorise their opening
Priority:	High
Frequency:	Often
Primary Actor:	System
Preconditions:	None
Basic Flow:	1. As soon as a Tender is received, it is encoded and stored in a safe area of the system. No user can gain access to the Tender 2. Unlock Tender according to Use Case of section 2.3.2
Alternative Flow:	None
Special Requirements:	None
Unresolved Issues:	None

2.6.4 Automatic Activity Reminder

AUTOMATIC ACTIVITY REMINDER	
Version:	1
Context:	System automatically sends notifications to users for pending critical events they need to perform, when certain deadlines are reached
Priority:	High
Frequency:	Very Often
Primary Actor:	System
Preconditions:	None
Basic Flow:	1. System automatically creates deadline for sending notifications to users (i.e. set deadline of when notifications need to be sent for reminding users to unlock Tenders within a pre-specified time frame) 2. When deadline is reached, system sends notifications to interested users
Alternative Flow:	None
Special Requirements:	All communications for notifications are based on asynchronous means (i.e. email, SMS, etc.). Security considerations needs to be taken into account when realising the automated notifications systems
Unresolved Issues:	None

2.6.5 Notification to winners of a competition

NOTIFICATION TO WINNERS OF A COMPETITION	
Version:	1
Context:	System automatically or semi-automatically sends notifications to winners of a competition
Priority:	High
Frequency:	Very Often
Primary Actor:	System
Preconditions:	None
Basic Flow:	1. System sends notifications to interested users
Alternative Flow:	None
Special Requirements:	All communications for notifications are based on asynchronous means (i.e. email, SMS, etc.). Security considerations needs to be taken into account when realising the notifications systems
Unresolved Issues:	None

3 USE CASE ANALYSIS FOR DYNAMIC PURCHASING SYSTEMS

This section presents the Use Cases for an eProcurement system capable to support Dynamic Purchasing Systems (DPS). Such a system can be viewed as an extension to an eProcurement system supporting Individual Contracts; hence the Use Cases presented in this section are complementary to the ones presented for Individual Contracts.

The main actors of a Public eProcurement system supporting a DPS are:

Table 3-1 - Main actors of a Public eProcurement system

Actor Type	Actor	Notes
Guest	Anonymous Procurement Officers (not logged in) Economic Operators (not logged in)	The three types of guest users can perform the same actions in a Public eProcurement system. Therefore, the functions of the "Economic Operator (not logged in)" and the "Procurement Officer (not logged in)" are identical to the Anonymous role
Procurement Officers	Administrative staff	Procurement Officers which perform the role of "Administrative staff" are responsible for the creation and management of a DPS and specific contracts within it
	Opening staff	Procurement Officers which perform the role of "Opening staff" are responsible for the opening (or unlocking) of Indicative Tenders for a DPS and Tenders for Specific Contracts within a DPS
	Evaluating staff	Procurement Officers which perform the role of "Evaluating staff" are responsible for the evaluation of Indicative Tenders and Tenders. They are also responsible for admitting tenderers in a DPS, rejecting tenderers from a DPS, and conclude specific contracts within it
Tenderers	Economic Operators (logged in)	To establish a DPS, the Tenderer is responsible to create and submit an Indicative Tender. For a specific contract within the DPS, the Tenderer can create and submit a Tender.
System	System	The eProcurement system occasionally needs to automatically perform certain actions either triggered by user activities, or by the system on certain date/time

3.1 Guest

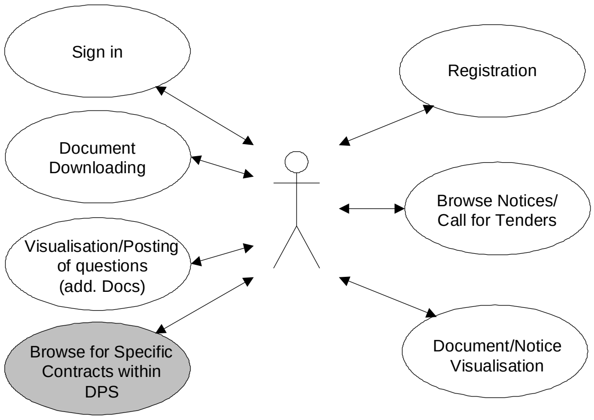
The role *Guest* is assumed by any non-authenticated user of the system. The following Use Cases detailed in the Individual Contracts section are also applicable for DPS:

- Register
- Sign-in
- Browse Notices/Call for Tenders (i.e. Calls for DPS)
- Visualise Documents/Notices
- Visualise of / request for Additional Documents
- Download documents

The following Use Case is also required for DPS:

- Browse for Specific Contract within DPS/Simplified Contract Notice

Figure 3-1: Use Cases for *Guest User* for a system supporting DPS


Sign in
Registration
Document Downloading
Browse Notices/ Call for Tenders
Visualisation/Posting of questions (add. Docs)
Browse for Specific Contracts within DPS
Document/Notice Visualisation

3.1.1 Browse for Specific Contracts within DPS/Simplified Contract Notices

BROWSE FOR SPECIFIC CONTRACT WITHIN DPS/SIMPLIFIED CONTRACT NOTICE	
Version:	1
Context:	Allows user to search through published Specific Contract within a DPS
Priority:	High
Frequency:	Very Often
Primary Actor:	Guest
Preconditions:	None
Basic Flow:	1. User visits the search page of the application and enters preferred search criteria 2. System executes a database query, based on user’s search criteria, and displays the results of the query, including the details of Specific Contracts within the DPS defined in the system
Alternative Flow:	2a. If the query does return any records that match user’s search criteria: 2a1. An appropriate message is displayed to the user 2b. If the query returns too many records: 2b1. User is requested to provide more “narrow” criteria
Special Requirements:	None
Unresolved Issues:	None

3.2 Procurement Officer – Administrative Staff

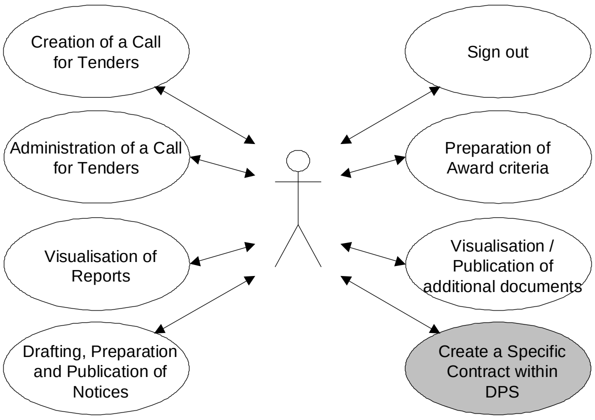
Users performing the role of *Procurement Officer Administrative staff* are responsible for the creation and management of Calls for Tenders (i.e. establishing DPS), as well as, Specific Contracts within DPS. Similarly to the Individual Contracts, the following Use cases are applicable for *Procurement Officer Administrative staff* for a DPS system:

- Sign-out
- Create new Call for Tenders (for establishing a DPS)
- Administer an existing Call for Tenders (for establishing a DPS)
- Prepare Awarding Criteria (for the DPS and its Specific Contracts)
- Draft/Prepare/Publish Notices (for establishing a DPS)
- Visualise and publish Additional Documents (for the DPS)
- Visualise reports (for the DPS)

Additionally, the following Use Case is also required for DPS:

- Create a Specific Contract within a DPS

Figure 3-2: Use Cases for the *Procurement Officer Administrative User* for a system supporting DPS


Creation of a Call for Tenders
Sign out
Administration of a Call for Tenders
Preparation of Award criteria
Visualisation of Reports
Visualisation / Publication of additional documents
Drafting, Preparation and Publication of Notices
Create a Specific Contract within DPS

3.2.1 Create a Specific Contract within a DPS

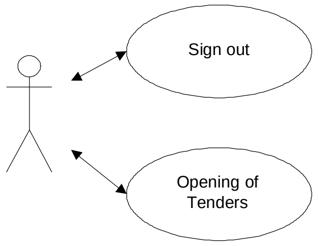
CREATE SPECIFIC CONTRACT WITHIN A DPS	
Version:	1
Context:	Allows user to create a Specific Contract within a DPS
Priority:	High
Frequency:	Very Often
Primary Actor:	Procurement Officer – Administrative Staff
Preconditions:	User is signed in the system There is at least one published DPS
Basic Flow:	1. User accesses the details of an existing published DPS 2. User specifies the information for the Specific Contract (i.e. title, CPV/NUTS codes, estimated value, opening/closing dates, etc) 3. User uploads Contract Documents for the Specific Contract if necessary (to better define requirements) 4. User publishes simplified Contract Notice
Alternative Flow:	2a. User enters CPV/NUTS codes which are not a subset of the CPV/NUTS codes of the DPS: 2a1. An appropriate message is displayed to the user
Special Requirements:	The award criteria of the DPS must be also applied as award criteria for the Specific Contract within the DPS
Unresolved Issues:	None

3.3 Procurement Officer – Opening Staff

Users performing the role of *Procurement Officer Opening staff* are responsible for the opening (or unlocking) of Indicative Tenders for entering a DPS, as well as Tenders for Specific Contracts within a DPS. The main functionality available to the *Procurement Officer Opening staff* user is identical to those for Individual Contracts:

- Sign out
- Opening of Tenders

Figure 3-3: Use Cases for the *Procurement Officer Opening Staff User* for a system supporting DPS



3.4 Procurement Officer – Evaluating Staff

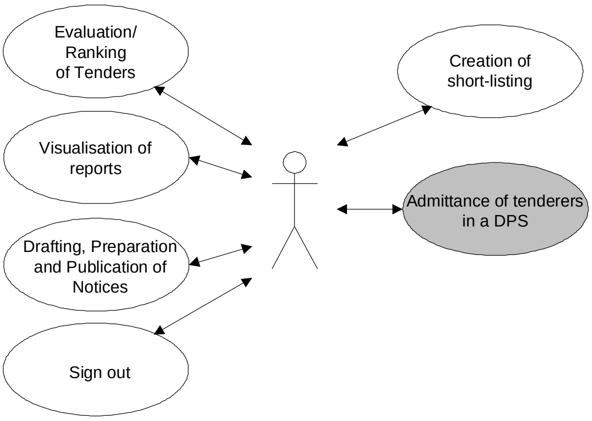
Users performing the role of *Procurement Officer Evaluating staff* are responsible for:

- Evaluation of Indicative Tenders
- Admittance of Tenderers in a DPS
- Evaluation of Tenders for a Specific Contract
- Conclusion of Specific Contract

All above responsibilities, with exception to the following two can be accommodated by the system using the "Evaluation and ranking of Tenders" Use Case, described in Individual Contracts. Only the following two responsibilities require new Use Cases, for being electronically supported by an eProcurement system:

- Admittance of Tenderers in a DPS
- Exclusion of Tenderers from a DPS

Figure 3-4: Use Cases for the *Procurement Officer Evaluating Staff User* for a system supporting DPS


Evaluation/
Ranking
of Tenders
Creation of
short-listing
Visualisation of
reports
Admittance of tenderers
in a DPS
Drafting, Preparation
and Publication of
Notices
Sign out

3.4.1 Admittance of Tenderers in a DPS

Admittance of Tenderers in a DPS	
Version:	1
Context:	Following evaluation of Indicative Tenders, this Use Case allows users to admit Tenderers in a DPS
Priority:	High
Frequency:	Often
Primary Actor:	Procurement Officer – Evaluating Staff
Preconditions:	User is signed in the system There is at least one published DPS The evaluation of Indicative Tenders is completed
Basic Flow:	1. User selects the Tenderers to be admitted into the DPS 2. User submits to the system the list of Tenderers to be admitted in the DPS 3. System makes the selected Tenderers part of the DPS 4. System automatically or semi-automatically dispatches notification message to successful Tenderers
Alternative Flow:	None
Special Requirements:	None
Unresolved Issues:	None

3.5 Tenderer

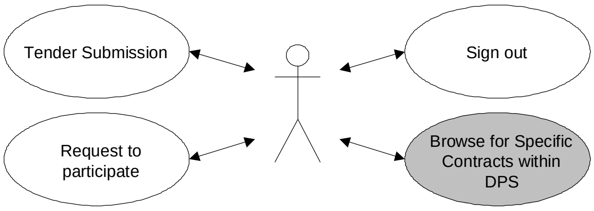
For Calls for Tenders under the DPS, *Tenderers* or *Economic Operators* are responsible for submitting Indicative Tenders (in order to be admitted into the DPS) and submitting Tenders for Specific Contracts within a DPS. The following Use Cases for *Tenderers* presented for Individual Contracts are also applicable in the case of DPS:

- Sign out
- Tender submission

Additionally, the following Use Case is required for implementing a system supporting DPS:

- Browse for Specific Contracts within DPS

Figure 3-5: Use Cases for the *Tenderer* for a system supporting DPS


Tender Submission
Sign out
Request to participate
Browse for Specific Contracts within DPS

3.5.1 Browse for Specific Contracts within DPS

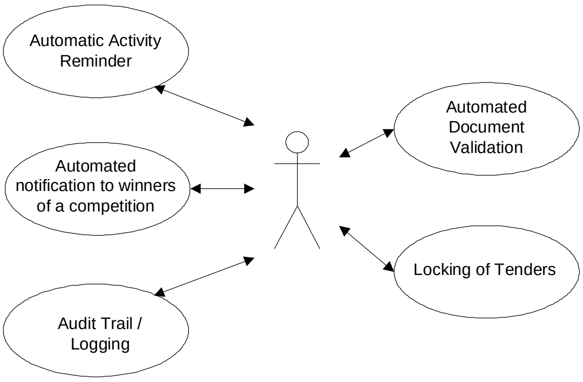
BROWSE FOR SPECIFIC CONTRACT WITHIN DPS	
Version:	1
Context:	Allows user to search through published Specific Contract within DPS
Priority:	High
Frequency:	Very Often
Primary Actor:	Tenderer
Preconditions:	None
Basic Flow:	1. User visits the search page of the application and supplies his preferred search criteria 2. System returns all DPS, as well as, the Specific Contracts within all DPS which satisfy the search criteria 3. User views details of a DPS 4. User views details of a Specific Contract within DPS 5. User submits Indicative Tender for being admitted in the DPS
Alternative Flow:	5a. Tenderer already admitted in the DPS 5a1. User submits Tender for Specific Contract
Special Requirements:	None
Unresolved Issues:	None

3.6 System

The eProcurement system occasionally needs to automatically perform certain actions, either triggered by user activities, or by the system on certain date/time. The main functionality performed by the *System* is the same as those presented for Individual Contracts:

- Audit Trailing/Logging
- Automatic Document Validation
- Locking of Tenders
- Automatic Activity Reminder
- Notification to winners of a competition

Figure 3-6: Use Cases for the *System* for a system supporting DPS


Automatic Activity Reminder
Automated Document Validation
Automated notification to winners of a competition
Locking of Tenders
Audit Trail / Logging

4 USE CASE ANALYSIS FOR FRAMEWORK AGREEMENTS

This section presents the Use Cases for an eProcurement system capable to support Framework Agreements (FA). Similarly to DPS, such system can be viewed as an extension to an eProcurement system supporting Individual Contracts; hence the Use Cases presented in this section are complementary to the ones presented for Individual Contracts.

The main actors of a Public eProcurement system supporting Framework Agreements are:

Table 4-1: Main actors of a Public eProcurement system

Actor Type	Actor	Notes
Guest	Anonymous Procurement Officers (not logged in) Economic Operators (not logged in)	The three types of guest users can perform the same actions in a Public eProcurement system. Therefore, the functions of the "Economic Operator (not logged in)" and the "Procurement Officer (not logged in)" are identical to the Anonymous role
Procurement Officers	Administrative staff	Procurement Officers which perform the role of "Administrative staff" are responsible for the establishment of Framework Agreements and specific contracts within it
	Opening staff	Procurement Officers which perform the role of "Opening staff" are responsible for the opening (or unlocking) of Tenders for the establishment of a Framework Agreement and of Tenders for specific contracts within it
	Evaluating staff	Procurement Officers which perform the role of "Evaluating staff" are responsible for the evaluation of Tenders for the establishment of a Framework Agreement and of Tenders for specific contracts within it.
Tenderers	Economic Operators (logged in)	To establish a Framework Agreement, the Tenderer is responsible to create and submit a Tender. For a specific contract within the DPS, the Tenderer can create and submit a Tender.
System	System	The eProcurement system occasionally needs to automatically perform certain actions either triggered by user activities, or by the system on certain date/time

4.1 Guest

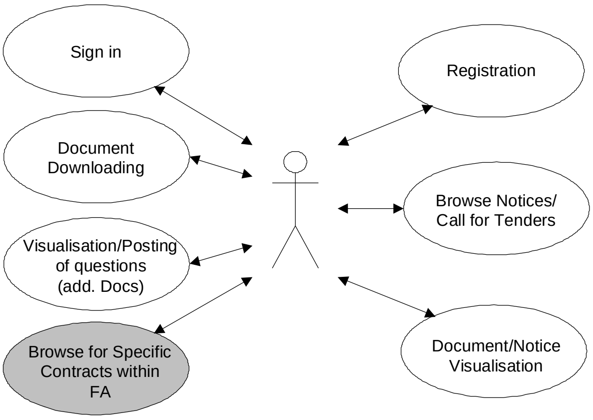
The role *Guest* is assumed by any non-authenticated user of the system. The following User Cases details in the Individual Contracts section are also applicable for FA:

- Register
- Sign-in
- Browse Notices/Call for Tenders (i.e. Calls for FAs)
- Visualise Documents/Notices
- Visualise Additional Documents
- Request for Additional Documents
- Download documents

The following Use Case is also required for FA:

- Browse for Specific Contract within FA

Figure 4-1: Use Cases for *Guest User* for a system supporting FA


Sign in
Registration
Document Downloading
Browse Notices/ Call for Tenders
Visualisation/Posting of questions (add. Docs)
Browse for Specific Contracts within FA
Document/Notice Visualisation

.

4.1.1 Browse for Specific Contracts within FA

BROWSE FOR SPECIFIC CONTRACT WITHIN FA	
Version:	1
Context:	Allows user to search through published Specific Contract within FA
Priority:	High
Frequency:	Very Often
Primary Actor:	Guest
Preconditions:	None
Basic Flow:	1. User visits the search page of the application and enters preferred search criteria 2. System returns all FA that satisfy the search criteria.
Alternative Flow:	None
Special Requirements:	The system should return Specific Contracts within an FA only if the user is a member of the FA. In the current Use Case the user is non-authenticated, so even if the user is a Tenderer who belongs to the FA, s/he is still not authenticated by the system, and therefore is not presented with its Specific Contracts
Unresolved Issues:	None

4.2 Procurement Officer – Administrative Staff

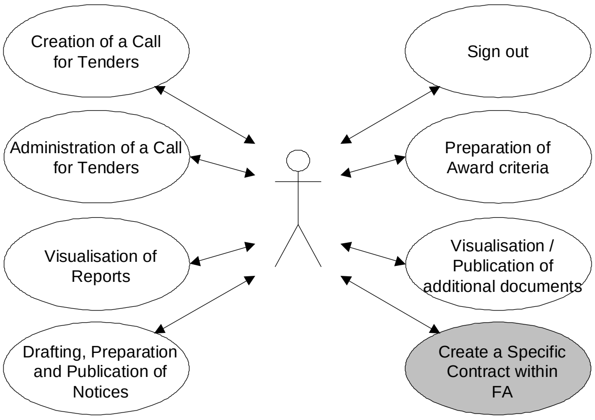
Users performing the role of *Procurement Officer Administrative staff* are responsible for the creation and management of Calls for Tenders (i.e. establishing FA), as well as, Specific Contracts within FA. Similarly to the Individual Contracts, such user may:

- Sign-out
- Create new Call for Tenders (for establishing a FA)
- Administer an existing Call for Tenders (for establishing a FA)
- Prepare Awarding Criteria (for the FA and its Specific Contracts)
- Draft/Prepare/Publish Notices (for establishing FA)
- Visualise and publish Additional Documents (for the FA)
- Visualise reports (for the FA)

The following Use Case is also required for FA:

- Create a Specific Contract within a FA

Figure 4-2: Use Cases for the *Procurement Officer Administrative User* for a system supporting FA


Creation of a Call for Tenders
Sign out
Administration of a Call for Tenders
Preparation of Award criteria
Visualisation of Reports
Visualisation / Publication of additional documents
Drafting, Preparation and Publication of Notices
Create a Specific Contract within FA

4.2.1 Create a Specific Contract within a FA

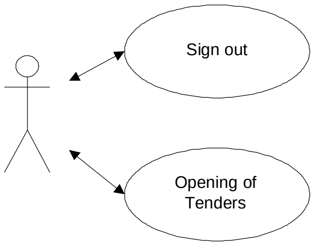
CREATE SPECIFIC CONTRACT WITHIN A FA	
Version:	1
Context:	Allows user to create a Specific Contract within a FA
Priority:	High
Frequency:	Very Often
Primary Actor:	Procurement Officer – Administrative Staff
Preconditions:	User is signed in the system There is one concluded FA
Basic Flow:	1. User accesses the details of a concluded FA 2. User initiates procedure for creating Specific Contract 3. a) If FA is established with a single operator, user places order with that operator b) If FA is established with multiple operators, user selects whether Specific Contract is “within terms” of the FA, or whether “re-opening competition” will be used
Alternative Flow:	3b. Multiple operators – Specific contract within terms of FA 3b1. User places an order with the “best” operator 3b. Multiple operators – Re-open competition 3b1. User uploads contract documents for Specific Contract 3b2. User invites all operators participating in the FA to submit a Tender for the Specific Contract
Special Requirements:	In case of a Specific Contract with single operator, or a Specific Contract with multiple operators “within terms” of the FA, the award criteria of the FA must also be applied as award criteria for the Specific Contract. In case of a Specific Contract with multiple operators, using “re-opening competition”, the award criteria may be refined.
Unresolved Issues:	None

4.3 Procurement Officer – Opening Staff

Users performing the role of *Procurement Officer Opening staff* are responsible for the opening (or unlocking) of Tenders for a Call (i.e. FA), as well as, opening Tenders for Specific Contracts within a FA, following the "re-open competition". The main functionality available to the *Procurement Officer Opening staff* user is identical to those for Individual Contracts:

- Sign out
- Opening of Tenders

Figure 4-3: Use Cases for the *Procurement Officer Opening Staff User* for a system supporting FA


Sign out
Opening of Tenders

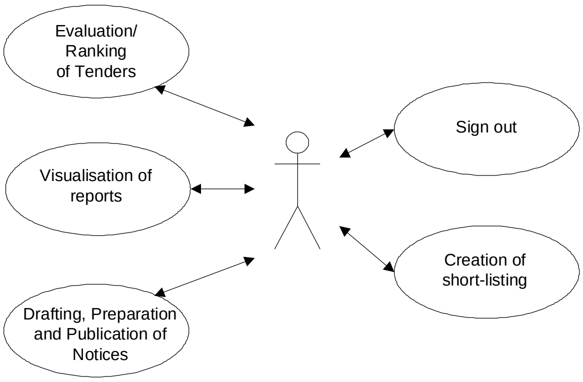
4.4 Procurement Officer – Evaluating Staff

Users performing the role of *Procurement Officer Evaluating staff* are responsible for:

- Evaluation of Tender
- Conclusion of a FA
- Evaluation of Tenders for a Specific Contract
- Conclusion of a Specific Contract

All above responsibilities can be accommodated by the system using the "Evaluation and ranking of Tenders" Use Case, described in Individual Contracts.

Figure 4-4: Use Cases for the *Procurement Officer Evaluating Staff User* for a system supporting FA


Evaluation/ Ranking of Tenders
Sign out
Visualisation of reports
Creation of short-listing
Drafting, Preparation and Publication of Notices

4.5 Tenderer

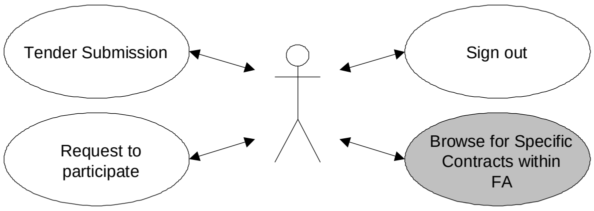
For Calls for Tenders under the FA, *Tenderers* or *Economic Operators* are responsible for submitting Tenders (in order to be included into the FA) and creating/submitting a Tender for Specific Contracts within a FA. The following Use Cases for *Tenderers* presented for Individual Contracts are also applicable in the case of FA:

- Sign out
- Tender submission

Additionally, the following Use Case is required for implementing a system supporting FA:

- Browse for Specific Contract within FA

Figure 4-5: Use Cases for the *Tenderer* for a system supporting FA


Tender Submission
Sign out
Request to participate
Browse for Specific Contracts within FA

4.5.1 Browse for Specific Contracts within FA

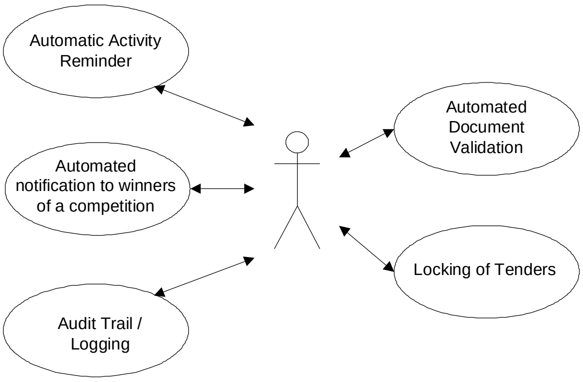
BROWSE FOR SPECIFIC CONTRACT WITHIN FA	
Version:	1
Context:	Allows user to search through published Specific Contract within FA
Priority:	High
Frequency:	Very Often
Primary Actor:	Tenderer
Preconditions:	None
Basic Flow:	1. User visits the search page of the application and enters preferred search criteria 2. System returns all FA 3. User views details of a FA 4. User views details of a Specific Contract within FA
Alternative Flow:	4a. User is single operator in FA 4a1. User views all Specific Contracts within FA 4b. User is one of many operators in FA 4b1.User views all Specific Contracts for which "re-opened" competition was used. Also, user views all Specific Contracts for which the Contracting Authority placed an order directly with that User (using the "within terms" method) 4a. User is not member of FA 4a1.User does not view Specific Contracts within FA
Special Requirements:	None
Unresolved Issues:	None

4.6 System

The eProcurement system occasionally needs to automatically perform certain actions, either triggered by user activities, or by the system on certain date/time. The main functionality performed by the *System* is the same as those presented for Individual Contracts:

- Audit Trailing/Logging
- Automatic Document Validation
- Locking of Tenders
- Automatic Activity Reminder
- Notification to winners of a competition

Figure 4-6: Use Cases for the *System* for a system supporting FA


Automatic Activity Reminder
Automated Document Validation
Automated notification to winners of a competition
Locking of Tenders
Audit Trail / Logging

5 USE CASE ANALYSIS FOR ELECTRONIC AUCTIONS

This section presents the main actors and functionality of an eProcurement system supporting the procurement of contracts utilising eAuctions as an extension to the chosen procedure.

The main actors of a Public eProcurement system that supports eAuctions are:

Table 5-1 - Main actors of a Public eProcurement system

Actor Type	Actor	Notes
Procurement Officers	Administrative staff	The Procurement Officers which perform the role of “Administrative staff” are responsible for definition and fixing of eAuction parameters
	Evaluating staff	The Procurement Officers which perform the role of “Evaluating staff” are responsible for the evaluation of Tenders for a Call, the invitation of tenderers to eAuctions, as well as, the conclusion of a competition by selecting the winner(s) and publication of the Contract Award Notice
Tenderers	Economic Operators (logged in)	For eAuction, tenderers are the parties that supply bids to the system, in order to improve aspects of their tenders submitted during the full initial evaluation
System	System	The eProcurement system for eAuction (referred to as the Auction device) is responsible for the automated opening and closing of the eAuction event, as well as, the automated calculation of scores and ranking of tenderers during the eAuction event

5.1 Procurement Officer – Administrative Staff

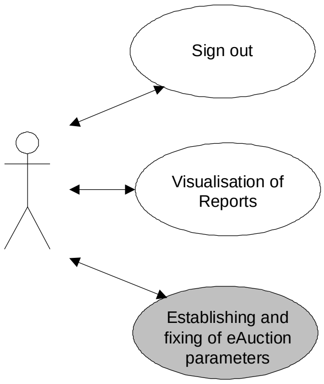
For eAuctions, *Procurement Officers – Administrative Staff* are responsible for establishing and fixing the eAuction parameters prior to the commencement of the eAuction event. The following Use Cases for *Administrative Staff* presented for Individual Contracts are also applicable in the case of eAuctions:

- Sign out
- Visualisation of Reports

Additionally, the following Use Case is required for implementing an eProcurement system supporting electronic auctions:

- Establishing and fixing eAuction parameters

Figure 5-1: Use Cases for the *Procurement Officer – Administrative Staff* for a system supporting electronic auctions



5.1.1 Establishing and fixing eAuction parameters

ESTABLISHING AND FIXING EAUCTION PARAMETERS	
Version:	1
Context:	Allows user to parameterise the eAuction device in order to run the required eAuction event
Priority:	High
Frequency:	Often
Primary Actor:	Procurement Officer – Administrative Staff
Preconditions:	User is signed in the system. The evaluation mechanism for the Full Initial Evaluation is defined (lowest price or most economically advantageous tender)
Basic Flow:	1. User specifies whether the eAuction will run in rounds or time, and specifies all requested time periods 2. User defines (in case of lowest price evaluation mechanism): a. Currency b. Starting price c. Minimum difference between bids 3. Specify visibility options for information to be made available to tenderers and procurement officers 4. Specify any other parameterisation options (depending on the exact functionality of the eAuction device)
Alternative Flow:	2a. User defines (in case of most economically advantageous tender evaluation mechanism): 2a1. which of the criteria specified for the full initial evaluation are quantifiable 2a2. minimum and maximum value for each quantifiable criterion 2a3. the weight to be used for the bid score calculation 2a4. for each criterion whether a large value (i.e. close to the maximum value) constitutes a good bid or not
Special Requirements:	None
Unresolved Issues:	None

5.2 Procurement Officer – Evaluating Staff

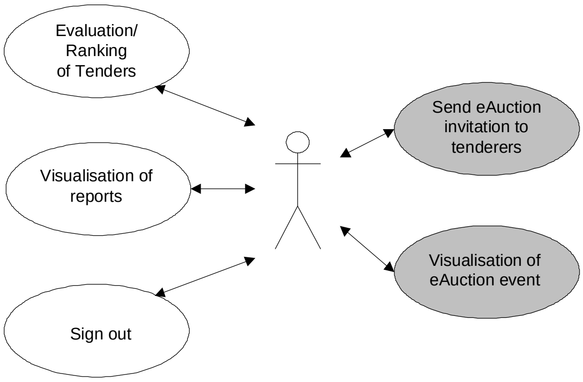
For eAuctions, *Procurement Officers – Evaluating Staff* are responsible for conducting the full initial evaluation (using Use Case "Evaluation and ranking of Tenders" of the Individual Contracts), and inviting tenderers to participate in an eAuction event. Additionally, they are responsible for the conclusion of a competition using electronic auctions. The following Use Cases for *Evaluating Staff* presented for Individual Contracts are also applicable in the case of eAuctions:

- Sign out
- Evaluation and ranking of Tenders
- Visualisation of Reports

Additionally, the following Use Cases are required for implementing an eProcurement system supporting electronic auctions:

- Send eAuction invitation to tenderers
- Visualisation of eAuction event

Figure 5-2: Use Cases for the *Procurement Officer – Evaluating Staff* for a system supporting electronic auctions


Evaluation/
Ranking
of Tenders
Send eAuction
invitation to
tenderers
Visualisation of
reports
Visualisation of
eAuction event
Sign out

5.2.1 Send eAuction invitation to tenderers

SEND EAUCTION INVITATION TO TENDERERS	
Version:	1
Context:	Allows user to invite tenderers to participate in eAuction
Priority:	High
Frequency:	Often
Primary Actor:	Procurement Officer – Evaluating Staff
Preconditions:	User is signed in the system. The Full Initial Evaluation is performed and the tenders are ranked accordingly
Basic Flow:	1. User selects the tenderers to invite to the eAuction 2. User defines the exact date/time to start the eAuction 3. User writes the message to be send to the tenderers, to invite them to the eAuction event 4. User uploads/attaches documents to be sent to the tenderers, to explain how the eAuction event will run, all related terms/conditions, all technical requirements for the connection/participation to the eAuction and any other important information
Alternative Flow:	None
Special Requirements:	The date/time for the beginning of the eAuction should allow sufficient time for tenderers to review the details of the eAuction and understand how the event will run
Unresolved Issues:	None

5.2.2 Visualisation of eAuction event

VISUALISATION OF EAUCTION EVENT	
Version:	1
Context:	Allows user to visualise the eAuction event
Priority:	Medium
Frequency:	Often
Primary Actor:	Procurement Officer – Evaluating Staff
Preconditions:	User is signed in the system. The Full Initial Evaluation is completed and the invitations to participate in the eAuction event are sent to the selected tenderers.
Basic Flow:	1. User access the eAuction room 2. The eAuction room displays to the user relevant information about the eAuction event, including best bid, tenderer ranking, time/rounds remaining for the closure of the eAuction, etc.
Alternative Flow:	None
Special Requirements:	The tenderer identities are not disclosed to procurement officers during the eAuction event. The identities can only be disclosed after the eAuction event is complete. The whole operation of the eAuction is fully automated and there is no manual intervention by procurement officers
Unresolved Issues:	None

5.3 Tenderer

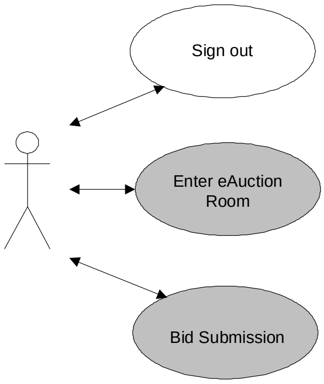
For eAuctions, *Tenderers* are responsible for entering the eAuction room and participating in eAuction events by placing bids. The following Use Case for *Tenderers* presented for Individual Contracts is also applicable in the case of eAuctions:

- Sign out

Additionally, the following Use Cases are required for implementing an eProcurement system supporting electronic auctions:

- Enter eAuction Room
- Bid Submission

Figure 5-3: Use Cases for the *Tenderer* for a system supporting electronic auctions



5.3.1 Enter eAuction Room

ENTER EAUCTION ROOM	
Version:	1
Context:	Allows user to accept the invitation to participate in an eAuction event
Priority:	Medium
Frequency:	Often
Primary Actor:	Tenderer
Preconditions:	User is signed in the system and is invited to participate in an eAuction event.
Basic Flow:	1. User accesses the relevant page for accessing the eAuction room 2. eAuction device registers that the tenderer has accepted the invitation to participate in eAuction
Alternative Flow:	None
Special Requirements:	Depending on the exact specifications of the eAuction device and the requirements of the contracting authority, a tenderer may be able to accept the invitation to participate in an eAuction event only before the beginning of the eAuction.
Unresolved Issues:	None

5.3.2 Bid Submission

BID SUBMISSION	
Version:	1
Context:	Allows users to submit a bid during the eAuction event
Priority:	High
Frequency:	Often
Primary Actor:	Tenderer
Preconditions:	User is signed in the system, has received an invitation to participate in the eAuction event and has accepted this invitation. The eAuction event is underway.
Basic Flow:	1. eAuction device displays to the user the relevant form for providing his/her bid 2. User fills in the bid submission form and submits it to the system 3. System accepts the new bid
Alternative Flow:	2a. User provides a bid which does not meet the bid specifications (e.g. a bidding values are above the maximum value allowed by the contracting authority): 2a1. System rejects new bid and informs user of the error 2b. User submits a bid to the eAuction device after the closure of a round, or after the closure of the eAuction event: 2b1. System rejects new bid and informs user of the error
Special Requirements:	None
Unresolved Issues:	None

5.4 System

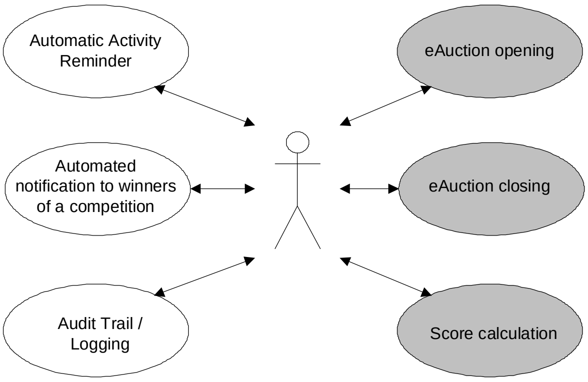
For eAuctions, *System* is responsible for all automated actions to be performed during the eAuction. These comprise the automated opening of the eAuction event, its automated closure, as well as, the automated score calculation for all bids submitted during the eAuction. The following Use Cases for *System* presented for Individual Contracts are also applicable in the case of eAuctions:

- Audit Trailing/Logging
- Automated activity reminder
- Notification to winners of a competition

Additionally, the following Use Cases are required for implementing an eProcurement system supporting electronic auctions:

- eAuction opening
- eAuction closing
- Score calculation

Figure 5-4: Use Cases for the *System* for a system supporting electronic auctions


Automatic Activity Reminder
eAuction opening
Automated notification to winners of a competition
eAuction closing
Audit Trail / Logging
Score calculation

5.4.1 eAuction opening

EAUCTION OPENING	
Version:	1
Context:	eAuction device automatically starts the eAuction event when the pre-defined date/time is reached
Priority:	High
Frequency:	Often
Primary Actor:	System
Preconditions:	The Full Initial Evaluation of Tenders is completed and tenderers are invited to participate in the eAuction event.
Basic Flow:	1. System constantly monitors whether the pre-defined date/time for the initiation of the eAuction event is reached 2. System initiates eAuction event
Alternative Flow:	None
Special Requirements:	Depending on the exact specifications of the eAuction device and the requirements of the contracting authority, a tenderer may be able to accept the invitation to participate in an eAuction event only before the beginning of the eAuction (see Use Case “Enter eAuction room”)
Unresolved Issues:	None

5.4.2 eAuction closing

EAUCTION CLOSING	
Version:	1
Context:	eAuction device automatically stops the eAuction event when the pre-defined conditions are met
Priority:	High
Frequency:	Very Often
Primary Actor:	System
Preconditions:	An eAuction event is underway
Basic Flow:	1. System constantly monitors whether the pre-defined conditions are met for stopping the eAuction event 2. eAuction stops the eAuction event
Alternative Flow:	None
Special Requirements:	In case of an eAuction event running in rounds, this mechanism needs to constantly monitor the closure of each round. The closing of the final round constitutes the closure of the eAuction event itself. In case of an eAuction event running in time, this mechanism needs to constantly monitor whether the pre-specified date/time is reached. The eAuction device may allow for the eAuction time period to be automatically extended in case a bid is received at the closing minutes of the eAuction event.
Unresolved Issues:	None

5.4.3 Score Calculation

SCORE CALCULATION	
Version:	1
Context:	Allows the eAuction device to automatically evaluate and rank bids according to the predefined bidding fields and evaluation formula
Priority:	High
Frequency:	Often
Primary Actor:	System
Preconditions:	An eAuction event is underway. A valid bid is submitted to the eAuction device
Basic Flow:	1. eAuction device accepts the new bid 2. eAuction device applies the predefined evaluation formula to the various bids and calculates the bid score 3. eAuction device ranks tenderers according to the new bid score received (in case of lowest price the ranking is in ascending order, while in case of the most economically advantageous tender is in descending order) 4. eAuction device discloses details of the received bids to tenderers and procurement officers according to the pre-defined visibility of options (see Use Case “Establishing and fixing eAuction parameters”)
Alternative Flow:	None
Special Requirements:	None
Unresolved Issues:	None

6 Scenarios for using the Dynamic Demonstrators

This section provides a proposed scenario for each eProcurement procedure supported by the Dynamic Demonstrators, developed in the context of the current project. It is aimed to assist users to easily experiment with the Dynamic Demonstrators and better comprehend the concepts of the Use Case analysis, as well as, the functional requirements, as described in the FReq Volume I.

The Dynamic Demonstrator User Manual provides more elaborate information for interested parties to more easily experiment with the demonstrators. Interested parties can gain access to the Dynamic Demonstrators at the URL: **http://europa.eu.int/idabc/eprocurement**.

6.1 Open Procedure

STEP. 1. Login as ***jsmith01 (procurement officer – administrative staff)***

STEP. 2. Create a new Call for Tenders

STEP. 3. Provide details similar to the ones below:

Field	Text
Title	GR – CCTV Video film
Contract Type	Supplies
NUTS	GR000
Notice Involves	Public Contract
Short Description	The Ministry of Public Order wishes to purchase CCTV video film supplies for a number of security network installations in the country.
CPV Codes	25330000
Estimated Value	450000
Currency	EURO
Duration of FA	2 years
Type of Procedure	Open
Previous Publications	-
Internal Reference No	376925
Electronic transmission of CN	YES
Electronic availability of CDs	YES
Estimated date for CN	09/12/2004
Number of days for opening	0

STEP. 4. Create Evaluation Forms

STEP. 5. Provide details similar to the ones below:

Details
Personal Situation Country of registration evidence Non-convinction evidence Economic and Financial Capacity Latest balance sheet or extracts
MEAT
No eAuction
Price (0.4) Quality Assurance (0.2) Quantity (0.3) Delivery (0.1)

STEP. 6. Upload Contract Document “Technical Specifications”

STEP. 7. Publish Contract Notice

STEP. 8. Logout

STEP. 9. Login as ***NvanBout (tenderer)***

STEP. 10. Go to “New”

STEP. 11. Access the Call for Tenders

STEP. 12. Click on “Create Tender”

STEP. 13. Submit Tender

STEP. 14. Logout

Perform steps 9-14 also for tenderer users *KSchneid, MPeroto5,* and *ATsolias*

STEP. 15. Login as ***SVeryard (procurement officer – opening staff)***

STEP. 16. Go to “My Calls”

STEP. 17. Access the Call for Tenders

STEP. 18. Click “DEMO OPEN”

STEP. 19. Go to “My Messages”

STEP. 20. Access relevant page

STEP. 21. Unlock tenders

STEP. 22. Logout

STEP. 23. Login as ***JMoratti (procurement officer – evaluation staff)***

STEP. 24. Go to "My Messages"

STEP. 25. Read message about evaluation

STEP. 26. Select the winner of the competition

STEP. 27. Public Contract Award Notice

STEP. 28. View report

6.2 Dynamic Purchasing System

STEP. 1. Login as ***jsmith01 (procurement officer – administrative staff)***

STEP. 2. Create a new Call for Tenders

STEP. 3. Provide details similar to the ones below:

Field	Text
Title	IT – Workwear accessories
Contract Type	Supplies
NUTS	IT500
Notice Involves	DPS
Short Description	The Ministry of Development establishes a DPS for the purchases of workwear and accessories in the Italy Centro region.
CPV Codes	1814000
Estimated Value	400000
Currency	EURO
Duration of FA	4 years
Type of Procedure	-
Previous Publications	-
Internal Reference No	376928
Electronic transmission of CN	YES
Electronic availability of CDs	YES
Estimated date for CN	09/12/2004

STEP. 4. Create Evaluation Forms

STEP. 5. Provide details similar to the ones below:

Details
Economic and Financial Capacity Latest balance sheet or extracts
Lowest price
No eAuction
Stated in Contract Notice

STEP. 6. Upload Contract Document “Technical Specifications”

STEP. 7. Publish Contract Notice

STEP. 8. Logout

STEP. 9. Login as ***NvanBout (tenderer)***

STEP. 10. Go to “New”

STEP. 11. Access DPS

STEP. 12. Click on “Create Indicative Tender”

STEP. 13. Submit Indicative Tender

STEP. 14. Logout

Perform steps 9-14 also for tenderer users *KSchneid, MPeroto5* and *ATsolias*

STEP. 15. Login as ***SVeryard (procurement officer – opening staff)***

STEP. 16. Go to “My Calls”

STEP. 17. Access DPS

STEP. 18. Click “DEMO OPEN”

STEP. 19. Go to “My Messages”

STEP. 20. Access relevant page

STEP. 21. Unlock tenders

STEP. 22. Logout

STEP. 23. Login as ***JMoratti (procurement officer – evaluating staff)***

STEP. 24. Go to Call to “I – Construction Workwear Accessories”

STEP. 25. Access tab Tenders

STEP. 26. Perform evaluation. Disqualify tenderer ***NvanBout (Flandra Constructions)***

STEP. 27. Include the three in the DPS

STEP. 28. Provide justification: “The three tenderers that have submitted indicative tenders meeting the DPS specifications are admitted in the DPS”

STEP. 29. Logout

STEP. 30. Login as ***jsmith01 (procurement officer – administrative staff)***

STEP. 31. Access DPS

STEP. 32. Access Specific Contracts

STEP. 33. Create a new Specific Contract

STEP. 34. Provide details similar to the ones below:

Field	Text
Title	Safety visors
NUTS	Select a sub-category of the NUTS
Short Description	Provide safety visors, as detailed in the simplified contract notice
CPV Codes	Select a sub-category of the CPV
Estimated Value	25000
Currency	EURO
Contract Duration	3 months and 15 days
Type of Procedure	Open
Reference Number	376929
Opening date for receipt of Indicative Tenders	09/12/2004
Closing date for receipt of Tenders	24/12/2004
Opening date for receipt of Tenders	26/12/2004
Closing date for receipt of Tenders	31/12/2004
Number of days for opening	0

STEP. 35. Publish simplified contract notice

STEP. 36. Logout

Tenderers *KSchneid, MPeroto5* and *ATsolias* already part of the DPS

Tenderer *NvanBout* has submitted an Indicative Tender but was not admitted

STEP. 37. Login as ***NvanBout (tenderer)***

STEP. 38. Go to “New”

STEP. 39. Access specific contract *(create a tender button is disabled because user is not part of the DPS)*

STEP. 40. Access "My Indicative Tender" *(submitted previously)*

STEP. 41. Update my Financial Offer

STEP. 42. Submit Indicative Tender

STEP. 43. Logout

Tender *RParihon* has not yet submitted an Indicative Tender

STEP. 44. Login as ***RParihon (tenderer)***

STEP. 45. Go to "New"

STEP. 46. Access specific contract

STEP. 47. Create Indicative Tender

STEP. 48. Submit Indicative Tender

STEP. 49. Logout

STEP. 50. Login as ***SVeryard (procurement officer – opening staff)***

STEP. 51. Go to "My Calls"

STEP. 52. Access DPS

STEP. 53. Click "DEMO OPEN"

STEP. 54. Go to "My Messages"

STEP. 55. Access relevant page

STEP. 56. Unlock tenders

STEP. 57. Logout

STEP. 58. Login as ***JMoratti (procurement officer – evaluating staff)***

STEP. 59. Go to "My Messages"

STEP. 60. Access relevant page

STEP. 61. Perform evaluation for the two new tenderers (disqualify one)

STEP. 62. Include all in DPS (change justification to "All")

STEP. 63. Access Specific contracts

STEP. 64. Access Specific contract

STEP. 65. Edit invitation to tender (Please submit tenders for this specific contract)

STEP. 66. Edit disqualification note (just send)

STEP. 67. Logout

STEP. 68. Login as ***KSchnei (tenderer)***

STEP. 69. Go to "My messages"

STEP. 70. Read message

STEP. 71. Access the relevant page

STEP. 72. Edit Tender

STEP. 73. Submit Tender

STEP. 74. Logout

STEP. 75. Login as ***ATsolias (tenderer)***

STEP. 76. Go to "My messages"

STEP. 77. Read message

STEP. 78. Access the relevant page

STEP. 79. Edit Tender

STEP. 80. Add new Technical Document (Delivery Details)

STEP. 81. Submit Tender

STEP. 82. Logout

STEP. 83. Login as ***SVeryard (procurement officer – opening staff)***

STEP. 84. Go to "New"

STEP. 85. Access specific contract

STEP. 86. Click Associated People

STEP. 87. Click "DEMO OPEN"

STEP. 88. Go to "My Messages"

STEP. 89. Read message

STEP. 90. Access relevant page

STEP. 91. Unlock tenders

STEP. 92. Logout

STEP. 93. Login as ***JMoratti (procurement officer – evaluating staff)***

STEP. 94. Go to "My messages"

STEP. 95. Read message

STEP. 96. Access the relevant page

STEP. 97. Evaluate Tenders (DMV-23000, Hanover-23500)

STEP. 98. Select winner and conclude contract (Lowest price winner)

STEP. 99. View report

6.3 Framework Agreement

STEP. 1. Login as ***jsmith01 (procurement officer – administrative staff)***

STEP. 2. Create a new Call for Tenders

STEP. 3. Provide details similar to the ones below:

Field	Text
Title	F – Office Stationary
Contract Type	Supplies
NUTS	FR000
Notice Involves	Framework Agreement
Short Description	The Ministry of Education is establishing a Framework Agreement for the purchase of office stationary for all public schools in the country.
CPV Codes	21230000
Estimated Value	500000
Currency	EURO
Duration of FA	3 years and 6 months
Type of Procedure	Open
Previous Publications	-
Internal Reference No	376925
Electronic transmission of CN	YES
Electronic availability of CDs	YES
Estimated date for CN	09/12/2004
Number of days for opening	0

STEP. 4. Create Evaluation Forms

STEP. 5. Provide details similar to the ones below:

Details
Personal Situation Country of registration evidence Non-convinction evidence Economic and Financial Capacity Latest balance sheet or extracts
Lowest price
No eAuction
Stated in Contract Notice

STEP. 6. Upload Contract Document "Technical Specifications"

STEP. 7. Upload Contract Document "Conditions"

STEP. 8. Publish Contract Notice

STEP. 9. Logout

STEP. 10. Login as ***NvanBout (tenderer)***

STEP. 11. Go to "New"

STEP. 12. Access

STEP. 13. FA

STEP. 14. Click on "Create Tender"

STEP. 15. Submit Tender

STEP. 16. Logout

Perform steps 9-14 also for tenderer users *KSchneid, MPeroto5, RParihon* and *ATsolias*

STEP. 17. Login as ***SVeryard (procurement officer – opening staff)***

STEP. 18. Go to "My Calls"

STEP. 19. Access FA

STEP. 20. Click "DEMO OPEN"

STEP. 21. Go to "My Messages"

STEP. 22. Access relevant page

STEP. 23. Unlock tenders

STEP. 24. Logout

STEP. 25. Login as ***JMoratti (procurement officer – evaluating staff)***

STEP. 26. Go to Call to “F – Office Stationary (Paper)”

STEP. 27. Access tab Tenders

STEP. 28. Perform evaluation. Disqualify one tenderer (Perfection)

STEP. 29. Include prices: Flandra-450.000, DMV-475.000. Hanover-475.000, Trinamella-500.000

STEP. 30. Include the first three in the FA

STEP. 31. Provide justification: “Three tenderers are required to be included in the Framework Agreement”

STEP. 32. Logout

STEP. 33. Login as ***jsmith01 (procurement officer – administrative staff)***

STEP. 34. Access FA

STEP. 35. Access Individual Contracts

STEP. 36. Create a new Individual Contract using “re-open competition”

STEP. 37. Provide details similar to the ones below:

Field	Text
Title	Printing paper
NUTS	Select a sub-category of the NUTS
Short Description	Provide laser printing paper, as detailed in the Contract Document
CPV Codes	Select a sub-category of the CPV
Estimated Value	18000
Currency	EURO
Contract Duration	2 months and 15 days
Type of Procedure	Open
Internal Reference No	376926
Opening date for receipt of Tenders	09/12/2004
Closing date for receipt of Tenders	15/12/2004
Number of days for opening	0
e-Catalogue format	NO

STEP. 38. Upload Contract Document “Technical Specifications”

STEP. 39. Send Request. Provide message “You are invited to submit a tender for the above specific contract”

STEP. 40. Logout

STEP. 41. Login as ***NvanBout (tenderer)***

STEP. 42. Go to “My messages”

STEP. 43. Read message

STEP. 44. Access the relevant page

STEP. 45. Create Tender

STEP. 46. Logout

Do steps 26-31 for *ATsolias* and *KSchneid (tenderers)*

STEP. 47. Login as ***SVeryard (procurement officer – opening staff)***

STEP. 48. Go to “My Calls”

STEP. 49. Access specific contract

STEP. 50. Click “DEMO OPEN”

STEP. 51. Go to “My Messages”

STEP. 52. Access relevant page

STEP. 53. Unlock tenders

STEP. 54. Logout

STEP. 55. Login as ***JMoratti (procurement officer – evaluating staff)***

STEP. 56. Go to “My Messages”

STEP. 57. Access relevant page

STEP. 58. Perform evaluation (one is 16000 and the other 18000)

STEP. 59. Conclude specific contract (Lowest price winner)

6.4 Electronic Auction

STEP. 1. Login as ***jsmith01 (procurement officer – administrative staff)***

STEP. 2. Create a new Call for Tenders

STEP. 3. Provide details similar to the ones below:

Field	Text
Title	UK – Radiology supplies
Contract Type	Supplies
NUTS	UK000
Notice Involves	Public Contract
Short Description	The Ministry of Health wishes to purchase radiology supplies for a number of public hospitals in the country.
CPV Codes	25310000
Estimated Value	600000
Currency	EURO
Duration of FA	3 years and 6 months
Type of Procedure	Open
Previous Publications	-
Internal Reference No	376925
Electronic transmission of CN	YES
Electronic availability of CDs	YES
Estimated date for CN	09/12/2004
Number of days for opening	0

STEP. 4. Create Evaluation Forms

STEP. 5. Provide details similar to the ones below:

Details
Personal Situation: Country of registration evidence
MEAT
Yes eAuction
Price (0.4) Quality Assurance (0.2) Quantity (0.3) Delivery (0.1)
Rounds (3) Time between rounds (3) Duration of round (5)
Select all checks
Select quantifiable criteria: Delivery Quantity Price
Price: Min – 300000, Max – 800000, Weight – 0.6, No tick Delivery: Min – 5, Max – 25, Weight – 0.1, No tick Quantity: Min – 10, Max – 200, Weight – 0.3, Tick

STEP. 6. Upload Contract Document “Technical Specifications”

STEP. 7. Publish Contract Notice

STEP. 8. Logout

STEP. 9. Login as ***NvanBout (tenderer)***

STEP. 10. Go to “New”

STEP. 11. Access the Call for Tenders

STEP. 12. Click on “Create Tender”

STEP. 13. Submit Tender

STEP. 14. Logout

Perform steps 9-14 also for tenderer users *KSchneid, MPeroto5,* and *ATsolias*

STEP. 15. Login as ***SVeryard (procurement officer – opening staff)***

STEP. 16. Go to “My Calls”

STEP. 17. Access the Call for Tenders

STEP. 18. Click “DEMO OPEN”

STEP. 19. Go to “My Messages”

STEP. 20. Access relevant page

STEP. 21. Unlock tenders

STEP. 22. Logout

STEP. 23. Login as ***JMoratti (procurement officer – evaluation staff)***

STEP. 24. Go to “My Messages”

STEP. 25. Read message about evaluation

STEP. 26. Select the first three tenderers to invite (Flandra, Hanover, DMV)

STEP. 27. Provide justification: “As per the specifications of the Call, only three tenderers are to be invited to the eAuction”

STEP. 28. Fix eAuction parameters (5 minutes from server time)

STEP. 29. Send invitation to the tenderers: “You are invited to participate in the eAuction”

STEP. 30. Open another three browsers and log in as ***KSchneid, NvanBout, ATsolias (tenderers)***

STEP. 31. Enter eAuction room for all tenderers

STEP. 32. Perform bidding similar to the one below

	Round 1	**Round 2**	**Round 3**
ATsolias, DMV	Price: 500000 Delivery: 8 Quantity: 110 *Score: 6.03* *Rank: 1*	Price: X Delivery: X Quantity: X *Score: 6.03* *Rank: 2*	Price: 400000 Delivery: 15 Quantity: 200 *Score: 8.3* *Rank: 1*
Schneid, Hanover	Price: 500000 Delivery: 20 Quantity: 100 *Score: 5.27* *Rank: 2*	Price: 450000 Delivery: 18 Quantity: 150 *Score: 6.76* *Rank: 1*	Price: X Delivery: X Quantity: X *Score: 6.76* *Rank: 3*
NvanBout, Flandra	Price: 600000 Delivery: 12 Quantity: 100 *Score: 4.47* *Rank: 3*	Price: 550000 Delivery: 10 Quantity: 100 *Score: 5.17* *Rank: 3*	Price: 430000 Delivery: 17 Quantity: 160 *Score: 7.21* *Rank: 2*

STEP. 33. Close the three tenderer windows and continue with the window of ***jmoratti (procurement officer – evaluation staff)***

STEP. 34. Select to award contract

STEP. 35. Select one winner. Justification: “Winner selected based on the best bid during the eAuction”

STEP. 36. Publish Contract Award Notice

STEP. 37. View Report

IP/05/1248

Brussels, 11 October 2005

Public procurement: Commission promotes online advertising of public contracts EU-wide

The European Commission has moved to make it easier to advertise large public contracts on the Internet. It has adopted new standard forms for such notices mainly for use online. This is part of a wider EU strategy on computerising public procurement procedures in the EU. The forms will be available in all EU languages by the end of October at the SIMAP website at: www.simap.eu.int.

Internal Market and Services Commissioner Charlie McCreevy said: *"This is an example of better regulation which will make it easier for companies to find out about the thousands of public contract opportunities across the EU. Public authorities also benefit not just from greater competition but also from a shorter streamlined procedure with one single set of online notice forms which can save them valuable time in the procurement process."*

The procurement Directives require that contracts above certain thresholds must be advertised EU-wide in the Supplement to the Official Journal of the European Union providing all relevant information for a given call for tender. Currently, public authorities use for this the standard forms contained in Directive 2001/78/EC. These will be replaced by the new forms that take into account elements introduced by the new procurement Directives (2004/18/EC and 2004/17/EC), e.g. framework agreements, electronic reverse auctions and dynamic purchasing systems.

The greatest advantage of the new forms comes however with online use. If submitted electronically, notices can be published on TED, the EU Tenders Electronic Daily within five days of being sent instead of the former twelve days. In addition, this is expected to reduce significantly administrations' paper handling costs and to facilitate the processing of tender information.

The regulation on the new standard forms enters into force on 21 October 2005 and is directly applicable in all Member States. Contracting authorities may continue to use the existing standard forms until the end of January 2006 if the new public procurement Directives have not been implemented into national law by then. The new forms will be available online in a structured XML format by the end of October at *www.simap.eu.int*.

The new forms follow the same structure as the existing ones, while simplifying and streamlining them. The conditions and rules for the use of the new notices are explained in a Commission staff paper on electronic public procurement issued in July 2005 (available at
http://europa.eu.int/comm/internal_market/publicprocurement/e-procurement_en.htm -
see IP/05/948).

The revised standard forms are one of the actions envisaged by the Commission's 2004 "Action Plan for the implementation of the legal framework for electronic public procurement". This Action Plan aims to take all necessary steps over a three-year period to ensure that electronic public procurement in Europe is implemented as smoothly as possible.

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 13.12.2004
SEC (2004)

COMMISSION STAFF WORKING DOCUMENT

PROPOSAL FOR AN ACTION PLAN FOR THE IMPLEMENTATION OF THE LEGAL FRAMEWORK FOR ELECTRONIC PUBLIC PROCUREMENT

EXTENDED IMPACT ASSESSMENT

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1. INTRODUCTION

The *e*Europe Action Plan[1] called on the Council and the European Parliament to adopt as quickly as possible the legislative package on procurement Directives and on Member States to carry out a significant part of public procurement electronically by end of 2005.

The first target was met in April 2004[2] by the entry into force of the new procurement Directives. Member States are due to transpose them into national law at the latest by 31st January 2006. Some Member States are well placed to reach the second target. However, the full potential of electronic public procurement remains largely untapped. This is not surprising given the complexity of the issues involved: the correct implementation of the legal framework, development of operational electronic procurement systems that are in line with the new legislation, modernisation of the operational environment, re-engineering of practices and streamlining of processes involved. Successful implementation of electronic public procurement will require considerable effort in the Member States in order to put all the pieces of the puzzle together and modernise the way procurement is conducted nationally and at regional level.

The legislative package introduced for the first time detailed provisions on the use of electronic means in the public procurement process. It sets the necessary legal guarantees for carrying procedures electronically in an open, transparent and non-discriminatory way across Europe and introduces the use of modern innovative purchasing techniques based on electronic means of communication.

This report presents the outcome of the research and consultations carried out by the Commission services in order to assess whether and what type of additional Community action is necessary to support the implementation of the legal framework for electronic public procurement.

The report is based on an in depth review of electronic public procurement across Europe. Consultations and specific studies were carried out by the Commission in order to assess the state of development of electronic public procurement, to review technical solutions and developments in the different Member States and to identify potential problems which may either raise barriers to the Internal Market or hinder the uptake of electronic public procurement in the near future if no action is taken. These studies will be available to all interested parties.

[The conclusion of the impact assessment is that Community action would strengthen national efforts to implement electronic public procurement and should produce substantial benefits for both buyers and suppliers in the EU]. [*Brackets to be removed after adoption of the proposal by the College*]

[1] COM (2002) 263 final, “eEurope 2005: An information society for all” and COM (2004) 380 final, “eEurope 2005 Action Plan: an Update”

[2] Legislative package of procurement Directives adopted on 31 March 2004 and entered into force on 30 April 2004; Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

2. PURPOSE AND STRUCTURE OF THE IMPACT ASSESSMENT

The starting point for the impact assessment is the adoption of the legal framework setting out the rules for using electronic means in public procurement covered by the Directives and the deadline of 31st January 2006 for implementing Community rules at national level in the EU's 25 Member States. The main policy question to be addressed by the impact assessment is whether the adoption and forthcoming transposition of the EU rules at national level provides an adequate framework for moving public procurement online rapidly and smoothly or whether additional measures are required in order to avoid barriers to the Internal Market and to achieve efficiency in public procurement.

This impact assessment does not consider the merits and advantages of electronic public procurement and of the specific new EU legal framework but rather the difficulties and risks of achieving the objectives of the Internal Market and the general policy objectives set out in the *e*Europe action plan.

The analysis of the current trends and risks are considered in section 3. Section 4 analyses the different options considered and section 5 the potential impacts of a Community Action Plan.

3. WHAT ISSUES IS THE ACTION PLAN EXPECTED TO TACKLE?

The research and studies accompanying this report provide a wealth of information on the state of development of electronic public procurement in the 25 Member States.[3] It shows that the uptake of electronic public procurement has been slow in Europe, as the absence of political commitment, a clear legal framework and technical and organisational problems have delayed progress in this direction.

An analysis on the issues at stake and driving forces for e-procurement can be found in Annex II.

3.1. The current use of electronic means in the procurement process

Analysis of the background information[4] points to a rather fragmented landscape and uneven development of operational electronic public procurement systems in Europe. In most Member States electronic public procurement is still at an initial state of development. In addition, the levels of sophistication and available functionalities vary enormously. Some Member States operate parts of their procurement electronically, in particular at central government level. In countries such as the United Kingdom, Denmark, Finland, Italy and France, fully operational systems exist for advertising and tendering procurement contracts electronically. In others, the effort was concentrated on developing portals which provide information for public authorities and economic operators along with some basic directory and search services. Pilot projects are also underway in different countries mostly for contracts below the EU thresholds, as public authorities are trying to acquire experience and experiment with the novel tools offered by ICT.

[3] The detailed analysis and comparison of the e-procurment situation in 25 EU Member States is presented in Part 1: Baseline analysis of the "Impact Assessment of an Action Plan on electronic public procurement", *Ramboll Management, December 2004. This chapter presents only the main conclusions.*

[4] Majority of the analysis in this chapter is based on the report done by *Ramboll Management in the* "Impact Assessment of an Action Plan on electronic public procurement"*, December 2004;*

National strategies and organisational structures

Introduction of electronic means in public sector procurement is pursued most often at national level in the framework of long term plans to modernise government and administrative practices. Interviews with Member States' experts show that governments' main incentive for introducing electronic public procurement is to achieve public savings. This effort is mainly driven by the central level of government, while other stakeholders in the public and private sector are often only marginally involved in this process. Most noticeably, the European dimension of this process does not seem to occupy a high rank on the administrations' policy agenda, despite the importance of ensuring an open and competitive EU public sector procurement market.

The degree of detail in national strategies on electronic public procurement varies considerably. Some have developed rather elaborate strategies while others have formulated brief, overall strategic statements concerning electronic public procurement without allocating specific resources for funding the transition from paper to electronic procurement.

Implementation of the new procurement rules should enable contracting authorities to use electronic means exclusively in the procurement process. In practice, however, it can be expected that paper based procedures and electronic means will co-exist for some time. This entails higher costs and can give rise to inefficiencies and errors. The sooner public authorities will be able to switch to the exclusive use of electronic means, the higher the benefits will be for both buyers and suppliers.

At institutional and organisational level, two trends can be observed: on the one hand public procurement is primarily organised in a decentralised way, as individual authorities are having responsibility for their own purchases and financial management. On the other hand, new structures are being put into place in order to introduce electronic public procurement and use electronic means effectively which tend to centralise responsibility for the management of procedures and purchases. In many cases, central purchasing bodies have taken the lead in trying to introduce electronic means in the public procurement process.

Differences can also be observed in the way electronic public procurement services to contracting authorities and suppliers are financed. Some Member States have committed significant funds for the realisation and operation of their *e*-procurement initiatives, offering the services to all parties free of any charge, achieving a return on investment from cost savings achieved in the public sector. On the other hand, some administrations charge fees to both contracting authorities and suppliers for using their e-procurement services. The latter may exclude suppliers or administrations which may not be ready to pay such fees for carrying their tenders electronically or managing their contracts with the public sector.

Legal and technical framework

National laws transposing the EU rules on the use of electronic means in public procurement are in the pipeline. Member States are planning to transpose the legal framework during 2005-2006. In some Member States some of the tools foreseen by the Directives have already been regulated (e.g. e-auctions, electronic receipt of offers). However, no Member State has yet transposed the complete set of rules on electronic public procurement. In any case, as the purchasing cycle covers a wider range of activities, in establishing the rules for electronic public procurement, Member States will have to take into account other pieces of Community legislation which regulate issues such as data protection, electronic invoicing, e-commerce, electronic signatures etc. The transposition of the EU provisions on electronic means should help eliminate a great deal of the legal risks encountered at present. It should provide the basis for a systematic spread of electronic means in public sector procurement; in particular, for building capacity among public sector entities and re-engineering traditional public procurement processes.

The Directives do not limit the definition of electronic public procurement to a given technology or a particular process; they rather opt for an open and technologically neutral definition which simply puts electronic means on a par with traditional paper based procurement. Their aim is to facilitate the efficient introduction of different solutions on the condition that they respect the safeguards and meet the procedural requirements set out by the Directives. The transposition of the new directives does not require the creation of a uniformly standardised environment. Different approaches may co-exist, as conditions and needs vary in the different countries and among different types of buyers.

The translation of the legal provisions into operational terms and technical specifications can create difficulties of interpretation which may result in diverging requirements, the application of incompatible standards and the use of different terminologies. A review of some of the most important operational systems carried out under the IDA programme confirms that none of the systems reviewed supported fully the functionalities prescribed by the new Directives[5]. Due to varying public procurement needs as well as laws and priorities in the different Member States, authorities appear to have privileged the digitisation of different procedures and processes. In addition, there exist significant divergences in the development of systems that model the tender reception process as prescribed by the Directives, the associated internal business processes of public administrations, as well as the use of CPV codes and security aspects.

Most existing systems were conceived, designed, and implemented prior to the adoption of the new public procurement directives. They are therefore based on national rules which are not necessarily aligned to the new legal framework. In practice, however, most applications are based on existing commercial marketplace products offered by vendors with minimal customisation. Although this approach can initially facilitate the timely launching of systems with relatively small investments, it results in electronic public procurement systems that are software-driven rather than legislation-driven and present limited interoperability across Europe. This trend may create barriers to the functioning of the Internal Market to the extent that future technical solutions may not reflect the EU requirements imposed by the procurement legislation.

Potential difficulties may arise from implementing security for electronic transactions and communications. In moving procurement online, developers need to consider various issues: for example, the secure transmission and safe storage of data, integrity and confidentiality of offers and authentication of users. Authorities and developers have often followed different approaches depending on their perception of security risks and obligations resulting from national legislation. At present, in some case existing systems require “basic” user authentication through credentials (e.g. user names and passwords), while other systems support “strong” authentication by imposing the use of advanced electronic signatures. Strong security measures may make systems difficult to access and use, leading to the exclusion of

[5] State of the Art report, Volumes 1 and 2, European Dynamics, December 2004; study financed under the IDA programme

potential suppliers. This is particularly the case with the use of advanced qualified electronic signatures (qualified signatures)- imposed in some systems in order to accept tenders submitted electronically by economic operators - due to technical and organisational problems which at present limit the mutual recognition of such signatures across borders (3.2; security and electronic signatures).

Use of electronic means in different phases of the procurement process

In the absence of systematic statistical data on the performance of public procurement markets it is very difficult to draw quantitative figures on the current level of use of electronic means in public procurement.

E-procurement in the *private sector* seems much more widespread than among public authorities. Generally, it is concentrated in two phases: sourcing (finding suppliers and products via internet) and payments. In 2003, 19% of European companies made online sales (employee weighed figures). This can be seen as an indicator of the 'e-maturity' of the supplier base. There is virtually no difference in figures for online selling between small, medium and large enterprises: 16% (0-49 employees), 22% (50-249 employees) and 18% (250+ employees). The share of European companies that procure online ('procurement of at least some of their direct or indirect production inputs) is considerably higher than the share of online sales: 50% in 2003 (employment weighed figures). This figure is lower for small enterprises (36%) compared to large businesses (61%). It should be noted that these figures include all companies that confirm that they procure/sell at least some of their goods online. It does therefore not necessarily mean that they have substantial online procurement or sales[6].

An analysis of 36 *public sector e-procurement systems* shows that the two first phases in the

Figure 1: Phases covered by electronic procurement systems in EU Member States

Procurement phase	**Electronic system**	**%**
Notification/Advertising of tenders	33	92%
Publication of tender documents	17	47%
Management of receipt/submission of tenders	9	25%
Evaluation of tenders	3	8%
Ordering	8	22%
Invoicing	1	3%
Total	**36**	**100%**

Source: *Impact Assessment of an Action Plan on electronic public procurement, Ramboll Management, December 2004*

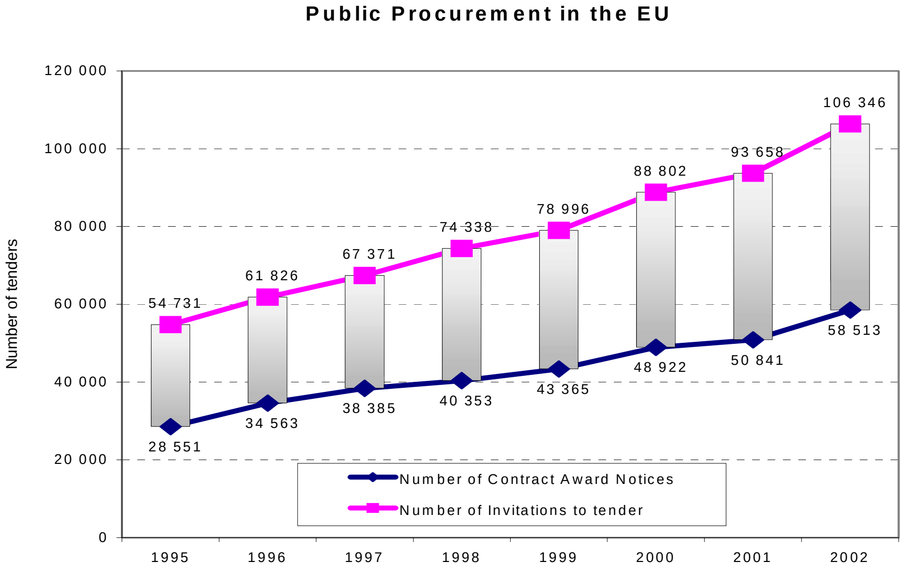
[6] "Impact Assessment of an Action Plan on electronic public procurement", *Ramboll Management, December 2004;* from E-Business Watch: The European e-Business Report – A portrait of e-business in 15 sectors of the EU economy, 2003 edition

procurement process, i.e. the electronic notification and publication of tenders have most often moved online at national level (figure 1). Despite this progress, the notification and advertising of contract opportunities at national level is very little integrated with the advertising at European level, thus resulting in the duplication of efforts at national and European level despite higher costs and lower efficiency.

Judging by the number of procurement portals and the electronic publication of tenders, the trend in using electronic means in public procurement is pointing rather upwards. Indeed, public procurement portals with some minimum functionality such as notification about tenders and publication of tender documents are established in 16 of the 25 Member States. As shown in Figure 2, the number of notices published electronically on TED has also been growing steadily. In 2002, 106,346 invitations to tenders and 58,513 contract award notices were published. This represents an increase in the share of EU covered procurement from 8.4% in 1995 to 16.2% in 2002 in the EU's 15 Member States.

Most operational electronic public procurement systems focus on the procurement of standard goods rather than more complex purchases such as services and works. The volume of tendering and ordering procedures carried out electronically today is probably rather small. According to IT vendor estimates, approximately 100 public institutions at national, regional or local level have currently implemented e-tendering or e-ordering procurement systems. The use of these systems remains unclear, though. IT vendors estimate that they probably represent less than 1% of orders and less than 5% of public procurement value. The potential group of users of electronic public procurement is, however, certainly much larger. The main target group for e-procurement systems (tendering and ordering) in Europe can be estimated at approximately 1.000 public institutions (ministries, regional authorities etc.) to which should be added some larger government agencies, health sector institutions (hospitals), educational bodies (Universities) and the utility sector.

Figure 2: Transparency in public procurement and use of electronic means



Source: "*A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future*", *Commission staff working document, 3 February 2004*

A small number of public authorities has been testing and experimenting with some more sophisticated tools such as electronic catalogues, electronic market places (including dynamic purchasing systems) and electronic auctions, which are some of the most innovative elements of the public procurement legislative package. In some countries, authorities have already decided to promote actively the use of electronic auctions. To this end, they have issued appropriate guidelines and put in place operational solutions enabling purchasing authorities to use such tools.

Savings and performance

To date only scattered and anecdotal evidence exists on realised savings from electronic means in the procurement process. Figure 3 compiles some figures given by public authorities on savings achieved on administrative costs and purchasing prices due to the use of electronic means in public purchases.

Figure 3: Savings from electronic public procurement on purchasing prices and administrative costs

Public Body	**Purchasing price**	**Administrative costs**
General Delegation for Armament, Ministry of Defence, France[7]		31% decrease in administrative costs
OGCbuying Solutions, UK (e-purchasing)		28-90£ savings per procurement transaction
CONSIP, Italy[8] (e-purchasing)	36% estimated average savings when buying online	-
DOPI, Denmark[9] (e-auctions	18% realised savings	-
National e-Procurement Program, Portugal (e-auction)	25% savings in the purchase of paper supplies for a month	-
Essex Marketplace[10] (e-auction)	53 % realised savings on goods 26% saving on IT consumables[11] 25% saving on stationery[12]	-
NHS Purchasing and Supply Agency (e-auction)	31% savings from IT hardware	-
Wales Health Supplies[13] (e-auction)	10% lower price - projected savings of £600,000 over three years	-

Source: *Impact Assessment on Action Plan on electronic public procurement, Ramboll Management 2004*

[7] Interview with representatives from the French Ministry of Defense, Rambol Management; savings from enhanced use of ICT, new management tools, and the creation of a purchasing function

[8] IDA Public eProcurement, State of the Art Report (May 2004)

[9] See www.doip.dk

[10] Source: http://www.ogc.gov.uk/index.asp?docid=1001028

[11] Basildon District Council, source : http://www.paessex.gov.uk/content1.php?sectionID=101

[12] Basildon District Council, source : http://www.paessex.gov.uk/content1.php?sectionID=101

[13] Source: http://www.ogc.gov.uk/index.asp?docid=1001028

It shows that the use of electronic public procurement in appropriate circumstances and depending on the type of purchases may result in considerable savings. These can range between 10% - 50% on the initial purchasing price. Transaction cost reductions are equally important. Buyers, for example, can save up to 50-80% of such costs. The cost of processing a notice for publication on the Supplement of the EU Official Journal could be from €111 today, down to €57.5, if only electronic forms were used by contracting authorities. Major buying agencies in France and the United Kingdom also report significant administrative savings.

It has not been possible to identify empirical data on suppliers' savings as these are difficult to measure. Typically they relate to: easier access to public sector markets within and beyond national borders; reduction of market surveillance costs; time savings; lower tendering costs due to the reuse of electronically supplied information; more transparent evaluation of tenders; elimination of costs related to printing and shipment of tenders; reduced market entry costs.

3.2. The main issues - is the Community intervention justified?

The transformation of paper based procurement to electronic is a complex operation which requires actions and decisions at many levels beyond the simple transposition of the new rules at national level. Organisational, technical and institutional issues should be addressed in order to re-engineer existing processes for tendering and purchasing so as to be able to exploit the available ICT solutions and tools.

Adoption of the EU legal framework for the use of electronic means in the public procurement process was a first significant step in order to remove legal uncertainties and establish the required safeguards for open, transparent and non-discriminatory public procurement using electronic means.

The move from paper based to electronic procurement is not without risks. Incorrect application of the new EU rules and discriminatory technical solutions and practices can deter businesses from embracing electronic public procurement and effectively fragment the Internal Market. Correct and timely implementation of the new EU provisions on electronic public procurement will determine Europe's capacity to keep the market open for public procurement conducted electronically and reaching a critical mass of users (buyers and suppliers). Use of electronic means should guarantee in practice that any business in Europe with a PC and an internet connection can participate in a public purchase conducted electronically.

However, there are a number of risks and problems related to the use of electronic means in procurement. They can be identified in the following areas:

- legal environment;
- technical environment;
- administrative and organisational processes;
- businesses' access;
- knowledge, skills and awareness.

Legal environment

The first policy concern relates to the development and implementation of the *regulatory framework for electronic public procurement* across Europe. Member States are required to implement the new procurement Directives including the provisions on electronic public procurement by 31 January 2006 at the latest. Transposition of the new rules is underway in some EU countries. Past records suggest, however, that delays in transposition beyond the 31 January 2006 deadline are likely to occur. In the absence of a particular effort at national and Community level to accelerate national transposition and ensure that the new rules are transposed in time, the current state of fragmentation not only threatens to persist, but could be aggravated due to legal uncertainties for both buyers and potential suppliers.

The quality of the legal environment is equally important. The design and organisation of procurement systems as well as the standards that should be used are going to be influenced by the national legal framework. Erroneous or divergent interpretation of the new rules means that operational electronic public procurement solutions may not always comply with the EU rules thus giving rise to legal and technical barriers. These may not only affect cross-border trade and distort competition but can also slow down the use of electronic public procurement at national level. The analysis shows that there is already some divergence in the systems, tools and solutions currently applied in the Member States. Such divergences can become effective “e-barriers” if no particular effort is made to ensure compliance and convergence of electronic public procurement tools and systems with the EC Directives. A ‘letting a thousand flowers bloom’ situation - whereby electronic public procurement systems with diverging requirements, even minimal, proliferate across Europe - may appear conceptually attractive but in reality it would mean that costs for businesses to access the different systems would become unmanageable.

International obligations

The same risks exist at international level. The use of electronic means in public procurement is being developed worldwide while the existing plurilateral General Procurement Agreement (GPA) and bilateral agreements do not regulate their use. In the absence of international rules, legal and technical choices in electronic public procurement systems may reduce procurement opportunities for EU businesses in third countries, as well as restrict access of third country suppliers to the EU market. In light of these developments, it is necessary to make sure that barriers to international trade are effectively avoided.

Security and electronic signatures

One of the most significant barriers to cross-border tendering arises in relation to *security issues* and, in particular, to the use of electronic signatures. In line with current practice for tenders submitted in paper, the new public procurement Directives do not define which type of e-signatures should be used in electronic tendering. The choice is left to the Member States, provided they apply national laws implementing the e-signatures Directive 1999/93/EC correctly. As the legal concept is not the same in all Member States, the way e-signatures are implemented in electronic public procurement is critical. Potential difficulties relate in particular to the use of advanced electronic signatures based on a qualified certificate, which are created by a secure-signature-creation device (hereafter ‘qualified signatures’). Several Member States require or intend to require the use of such qualified signatures for the submission of offers and/or requests to participate. They consider that only such means guarantee unique and unmistakeable authentication of signatories and ensure that any change of the data to which the signature relates can be detected.

The existence of significant differences between qualified signatures, as required by some Member States, should be reason for great concern. In the absence of a mature European market for this type of signatures and in the light of interoperability problems encountered at present, despite the existence of standards, they pose real obstacles to cross-border electronic tendering[14]. There is a risk that these problems may persist, even if at a later stage they will become essentially of an organisational nature.

The use of qualified signatures in public procurement is expected to be the first generalised application whereby businesses may be required to use qualified signatures in transactions with public authorities in a Member State other than their home country. The Directives oblige any public purchaser in the EU to effectively recognize, receive and process tenders submitted, if required, with a qualified signature and their accompanying certificates, regardless of their origin within the EU or their technical characteristics, and even when they contain documents of different origins (i.e., from a consortium of suppliers) and possibly bear signatures of different levels from different sources (i.e., from different national authorities)[15]. This means two types of problems will have to be addressed: ensuring the mutual recognition and acceptance of qualified signatures, their accompanying certificates and messages, and ensuring unhindered technical reception of those signatures and certificates. It seems likely that the market will not provide for a mutual recognition system of qualified signatures (i.e. advanced signatures accompanied by a qualified certificate and created on the basis of a security creation device) in the near future. This can impact negatively on the Internal Market and investments in electronic public procurement.

Technical environment

The development and penetration of ICT is continuing to grow rapidly both in the private and in the public sector. Introduction of electronic means in public procurement is not threatened to be compromised by infrastructure problems. Although the *EU rules do not prescribe specific technical solutions* for implementing electronic procurement in the public sector, they set out specific functional requirements in order to ensure transparency, equality of treatment and fair competition when using electronic means in the procurement process. The functional requirements are either expressed in terms of specific conditions for means of communication, tools and devices used in the procurement process, or procedural rules to guarantee the respect of the principles of equal treatment, non-discrimination and transparency.

It is likely that differences in the architecture of systems, diverging technical specifications and standards, and the choice of particular tools can hinder businesses’ access to electronic public procurement systems, thus limiting competition and leading to discriminations against certain businesses.

[14] For an in-depth analysis on the implementation of Directive 1999/93/EC see “The legal and market aspects of electronic signatures”, Study for the European Commission, Interdisciplinary Centre for Law and Information Technology, Catholic University of Leuven, October 2003.

[15] This situation becomes all the more complex as the provisions of art. 5 of Directive 1999/93/EC need to be taken into account. It requires Member States to not deny legal effectiveness to electronic signatures that they have received.

Internet based tools provide an environment which most businesses are familiar with. For the basic electronic tendering functions foreseen by the Directives, careful design and application of Internet based tools can avoid most problems, that is, for advertising tender opportunities, accessing tender documents, communicating documents and information, and submitting offers electronically. Security requirements are a particular case. If they are not set too high and conditions of operation of e-procurement systems allow for various formats and capacities, businesses are not expected to face any particular difficulties in communicating effectively with contracting authorities and in tendering electronically.

Currently, there is no sign of a uniform standardised environment emerging for conducting more complex electronic public procurement operations. With the current fragmentation in key areas such as schemes for exchange of messages, electronic catalogues, classifications and qualified signatures, and in light of the pace of standardization work, development towards a common set of agreed standards will be very slow. As standardisation in the ICT sector is driven by the market and evolves very rapidly, it would not be feasible to agree on one common standard at EU level for carrying procurement electronically. This is why in the procurement Directive the accent is placed on *interoperability* in order to make sure that different solutions are made compatible.

The major e-procurement IT vendors are working on further integrating e-procurement solutions by facilitating the shift between e-sourcing, e-tendering, e-ordering and e-payments. In the mid-term, the move towards more integrated e-procurement solutions is likely to create interoperability problems and cross-border barriers as far as not all businesses are equipped to cope with this type of processes. For this type of more advanced e-procurement, there is a risk that small enterprises (in particular with less than 20 employees) will not be able to participate on an equal footing. This is due to a shortage of relevant skills and knowledge among SMEs but also to the difficulty of achieving a return on investment. These differences between the smaller companies on one side and larger companies on the other side might be reinforced as e-public procurement systems become more advanced with the continuous upgrading of e-procurement software.

The major IT-vendors intend to develop software for most of the procurement procedures provided by the procurement Directives as part of their IT offer, i.e. electronic auctions, electronic framework agreements and dynamic purchasing systems. Today, these players account for more than 50% of the market. It can be expected that this can provide some homogeneity in the development of electronic public procurement. Historically, *e*-procurement has been developed in the business-to-business electronic commerce environment. In order to provide efficient and attractive systems, the needs of both buyers and suppliers should be carefully evaluated and coherence between B2B and G2B applications should be maintained. The Directives operate with certain trade-offs in terms of efficiency of electronic procurement solutions and legal safeguards to ensure equality of treatment and non-discriminatory access. The application of these principles should not be compromised by ill-adapted technical solutions. Therefore, some mechanisms will be necessary to monitor compliance of the electronic systems with the legal requirements.

Administrative and organisational processes

It is no secret that public sector procurement involves a lot of paperwork and red tape. Success depends on the degree of transformation of off-line practices to fully fledged online services. This requires an intensive effort in re-thinking the service provided and re-engineering the different processes. In this respect, the development of horizontal e-government services should open the way to higher efficiencies in the procurement process. Laws and regulations require from potential tenderers to submit a sizeable amount of certificates and documents to prove their qualifications and capacity to provide the works and services public authorities intend to purchase. Most of such documents are only available in paper form today. Although the new rules allow tenderers to submit them in paper form when they are not available electronically, it is clear that it will not be possible to develop a fully integrated electronic public procurement system until such e-government services are available across Europe. Agreement on a minimum set of certificates and their development across all Member States would be necessary in order to gradually streamline processes and eliminate red tape in the procurement process. It is absolutely necessary that such services develop across all Member States because otherwise public authorities will be obliged to maintain a dual system of paper and electronic records even if only one Member State is lagging behind in the development of such e-government services.

Problems can be also expected *with e-invoicing and e-ordering* systems, as they continue to be used differently in each Member State. These are factors which will have a more negative influence on electronic public procurement across borders in Europe than on national markets, where some positive developments may occur.

The re-engineering of administrative systems and practices is essential, as asymmetries in the incentive structure for developing electronic public procurement and resistance to change can delay the use of electronic public procurement systems at national and regional level. Inefficiencies in electronic public procurement systems and failures to reduce transaction costs will naturally limit the scope and interest for moving procurement online. This is a serious risk for both buyers and suppliers. Figure 4 shows that the strongest incentives for electronic public procurement exist at the aggregate level (national and European level). Therefore in order to release, the full benefits from moving traditional procurement procedures online, a certain critical mass of users should be reached.

Figure 4: Basic incentive structure in public and private sector – aggregate level, institutional level, and individual level

Level of aggregation	**Benefit of electronic procurement**	**Cost of electronic procurement**
Entire public sector at European level	Very significant	Marginal
Entire public sector at national level	Significant	Marginal
Large purchasers	Moderate	Minor
Medium purchasers	Minor	Moderate
Small purchaser	Marginal	Significant
Large enterprise (250+ employees)	Significant	Marginal
Medium sized enterprise (50-249 empl.)	Moderate	Minor
Small enterprise (20-49 employees)	Minor	Moderate

Micro enterprise (<20 employees)	Marginal	Significant

Source: Adapted from “Impact Assessment of an Action Plan on electronic public procurement”, Ramboll Management, December 2004

Businesses' access

The underlying vision of the new Directives is that any business with a PC and an internet connection should be able to participate effectively to a call for tender organised electronically. To this end, the Directives require that the means and tools of communication should be generally available, non-discriminatory and interoperable with means and tools of general use. Successful implementation of electronic public procurement will depend on how such conditions are fulfilled in practice. So far the development of electronic public procurement has been software-driven. The challenge and risk for Member States and the administrations is to ensure that the IT-tools satisfy the conditions set out by the regulatory framework.

Hence, it is particularly important to guarantee the full participation of SMEs in the new markets. Most public procurement contracts are currently awarded to SMEs. As one would have expected, SMEs' access to contracts with local authorities is relatively easier. However, their chances of success in cross-border procurement are much lower. SMEs acting as subsidiaries of foreign firms still have a high rate of success, but the difference with respect to large enterprises is not very significant in statistical terms. Sectoral differences also have an important influence. SMEs are particularly well represented in the construction sector and less so in the business services sector.

The use of electronic public procurement can threaten the current balance if electronic public procurement is introduced in such a way that:

- costs for participation in electronic tendering and procurement are proportionately higher for SMEs compared to large businesses, as government agencies employ systems and tools which require adaptations and specific investments in IT not commonly used in day-to-day business from economic operators;

- the use of electronic public procurement is accompanied by excessive centralisation and standardisation of public sector purchases in a drive to consolidate the supplier base and standardise purchases, and thereby increase volumes and reduce unit costs; this has often been the approach of large multinationals in using e-procurement solutions.

- charges are levied on operators wishing to access tender information and to bid electronically despite the efficiency gains and savings realised in the public sector from moving public procurement online.

Such risks are not new. They exist also in paper based public procurement. Nevertheless the introduction of electronic means risks aggravating them. The *institutional set up and organisational structure* is therefore crucial in order to ensure the successful implementation of electronic public procurement. Some good practices already exist in the Member States as identified in the IDA state of the Art report. It could be expected that the different parties agree to share such type of information and that they share their experiences. This, however, cannot happen automatically. Some effort at national and Community level will be required to collect information on and spread awareness of such issues.

Knowledge, skills and awareness

It is expected that *knowledge* of electronic public procurement will increase in public institutions and in companies following adoption of e-business/e-procurement in the private sector[16] and the introduction of electronic means in public sector procurement. It can also be expected that there will be an ongoing upgrading of computer skills in both the public and the private sector. Concerning the need to upgrade skills and knowledge in the public sector, it seems likely that specific training will need to be envisaged by Member States in particular, where implementation of electronic public procurement results in organisational restructuring and staff redundancies, or reallocation of staff to more qualified tasks. The demand for training from both public and private stakeholders will most likely increase in the near future. The tendency seen today in the countries with relatively developed e-public procurement initiatives is that national authorities and organizations will provide different training and awareness programmes. It seems therefore realistic to expect that more initiatives of this kind will commence at national level across the Member States.

The translation of the legal provisions into operational terms and technical specifications can create difficulties of interpretation which may result in diverging requirements, the application of incompatible standards and the use of different terminologies. A review of some of the most important operational systems carried out under the IDA programme confirms that none of the systems reviewed supported fully the functionalities prescribed by the new Directives[17]. Due to varying public procurement needs as well as laws and priorities in the different Member States, authorities appear to have preferred the digitisation of different procedures and processes. In addition, there exist significant divergences in the development of systems that model the tender reception process, prescribed by the Directives, and the associated internal business processes of public administrations, and the use of CPV codes and security aspects.

3.3. Conclusions

The current state of play and analysis of developments and problems (parts 3.1 and 3.2 above) leads to the conclusion that a *“business-as-usual”* scenario, whereby no action at all is taken by the Commission further to the adoption of the legal package to support the implementation of electronic public procurement across Europe, involves considerable risks of market fragmentation and exclusion as well as of inefficiencies. Despite agreement on a common legal framework for moving public procurement online, at least during an initial transitional period, barriers to the Internal Market may remain and new could emerge, thus limiting the potential of operational electronic public procurement across Europe.

[16] Ministry of Industry of France, ”E-commerce Scoreboard Update”, April 2004, p. 54

[17] State of the Art report, Volumes 1 and 2, European Dynamics, December 2004; study financed under the IDA programme

4. POLICY OBJECTIVES AND ACTIONS FOR IMPLEMENTING ELECTRONIC PUBLIC PROCUREMENT ACROSS EUROPE

4.1. Policy objectives

The analysis presented in section three showed that the take-up of electronic public procurement in Europe has been slow so far. This is a significant weakness in the Community's quest for increased competitiveness. In addition, agreement on a common legal framework for moving procurement online would not be enough to avoid, at least during an initial transitional period, barriers to the Internal Market and to realise the full potential of operational electronic public procurement across Europe. In view of this situation, three objectives have been set:

- *To ensure a well functioning Internal Market in public procurement;*
- *To achieve greater efficiency in public procurement and to improve governance;*
- *To work towards an international framework for electronic public procurement.*

The aim of this *first objective* is not only to ensure the correct and timely implementation of the new legislative framework by 31 January 2006 and to complete it by the adoption of appropriate basic tools such as all-electronic forms and an up-to-date classification system but also to ensure that contracting authorities use generally available, non-discriminatory and interoperable means and tools of communication in compliance with the new legislation. These are essential prerequisites for avoiding 'e-barriers' and ensuring competition and effective use of e-procurement applications across Europe.

The *second objective* aims to ensure that electronic public procurement effectively becomes a lever for modernising public procurement more generally, through a more efficient procurement environment for buyers and more competitive procurement markets for suppliers; for example by encouraging the full computerisation of the national transactional environment for public procurement procedures, co-ordinating efforts to cut red tape, encouraging standardisation of the national procurement environment and of documents for the greatest number of users, encouraging automated data collection, promoting transparency, auditing and traceability of e-procurement operations and encouraging SME participation.

Finally, the *third objective* is already sufficiently operational in aiming at bringing the same level of safeguards and discipline in international public procurement trade to ensure EU suppliers' non-discriminatory access to third country markets and to promote e-procurement in an efficient and open way in international trade.

4.2. Policy options

In order to meet these objectives and address the risks and problems identified in section 3, the following policy options were considered:

1. "*Business-as-usual*" scenario, as described in the previous section;

2. The *“classic approach*”: that is, the use of legal instruments available at European level in a focused and limited number of actions in order to ensure the full and correct transposition of the new provisions in national laws, to prevent the emergence of legal barriers and to complete the legal framework by adopting specific instruments (e.g. fully electronic standard forms, updated CPV) including agreement on international disciplines for electronic public procurement.

3. The *“partnership approach*”: that is, to initiate actions across the board in close co-operation and in a coordinated way between the Community and Member States in order to prevent barriers, improve governance and achieve greater efficiency in public procurement markets. In fact, such a “partnership” approach would encompass the “classic approach”, but also complement it by taking initiatives and proposing measures which address specific problems identified in the administrative and technical working environments within which electronic public procurement is set to take place so as to fully exploit efficiencies in the procurement process.

4. The *“full standardisation”:* that is, to promote the development of centrally designed and conceived, and possibly managed, common tools accompanied by detailed descriptions of the desired architecture and functions, including the adoption through regulation of detailed technical standards for the different steps in the electronic public procurement process in a top-down approach, aimed at achieving a uniform technical environment across all Member States and guaranteeing 100% accessibility to e-procurement markets for all tenderers.

Screening of options

The *“business-as-usual”* scenario, or status quo, has already been presented above. This option would not be sustainable in the medium and long run as it bears considerable risks of market fragmentation, low effectiveness and inefficiencies.

Option 4, that is, the *“full standardisation”* of the electronic public procurement environment would also need to be discarded as it is not a viable solution. Although it would eventually create a more uniform technical environment - meaning 100% accessibility to EU procurement markets for all tenderers – its implementation appears unrealistic given market developments and the policy instruments available. Implementing electronic public procurement on the basis of a detailed Community design would have been beyond Community competencies and would conflict with the subsidiarity and proportionality principles. In addition, such a top down approach would be ineffective due to the considerable time and effort this would require in order to accommodate the different needs at sectoral and national level.

Options 2 and 3 could offer an effective response and meet the policy objectives, provided all the appropriate actions for their implementation are correctly identified and adequate means are allocated to their practical implementation.

Figure 5 lists the proposals for action retained for further evaluation and the corresponding objectives to which these actions respond. This list was established on the basis of consultations with the experts in the Member States and through detailed analysis of the different studies and contributions received by the Commission services. Starting from a rather broad list of possible actions, the number of actions was progressively reduced by eliminating those that were considered to either have negligible impact or that were less likely to meet the policy objectives established at the beginning of the exercise.

Some of the actions discarded were, for example, proposals for the simplification of national rules as this is incompatible with the current public procurement policy, whose aim is to co-ordinate procurement procedures rather than to harmonise national laws. Actions aiming at extending the scope of electronic means below the Community thresholds were also abandoned as they conflict with the principle of subsidiarity. The regulation of electronic means for such contracts is an issue for the Member States. Due to their low value such contracts are unlikely to impact on the functioning of the Internal Market. The idea of fixing uniform quantitative targets for Member States' use of electronic public procurement was also set aside. Conditions in the Member States vary considerably, making such initiatives impractical and counter productive.

Figure 5: List of retained actions and corresponding operational objectives

	Objective 1: a well functioning Internal Market		Objective 2: greater efficiency in public procurement			Objective 3: international framework
Category of issues	Legal barriers	Technical barriers	Administrative and organisational barriers	Businesses' access	Knowledge, skills and awareness	Compliance with international obligations
Interpretative document on the new rules on electronic public procurement	✓	✓	✓	✓	✓	✓
Online training demonstrators allowing contracting authorities and economic operators to familiarise with the new e-procurement provisions and tools	✓	✓	✓	✓	✓	
Provide appropriate assistance to Member States in transposing the new provisions on electronic public procurement	✓	✓				
Revise the Common Procurement Vocabulary (CPV)	✓	✓		✓		
Fully electronic system for the collection and publication of procurement notices on TED (the EU online publication board)	✓	✓	✓			
Fully electronic notices at national level including appropriate tools for publishing at European level on TED	✓	✓				
Establish common functional requirements for electronic public procurement systems	✓	✓	✓	✓		
Adapt all operational e-procurement systems to the requirements of the Directives	✓	✓		✓		
Introduce national and European accreditation schemes to verify compliance of electronic tendering systems with the legal framework	✓	✓	✓			
Resolve interoperability problems affecting the use of advanced qualified signatures	✓	✓		✓		

Promote standardisation activities at European level and international level	✓	✓		✓		✓
Monitor interoperability issues and developments	✓	✓				✓
Establish national plans for introducing electronic public procurement	✓	✓	✓	✓	✓	✓
Main buyers to establish individual plans for introducing electronic public procurement		✓	✓	✓		
Pursue XML standardisation activities on e-invoices and e-ordering		✓		✓		✓
Set up electronic systems for the collection and processing of statistical procurement data			✓		✓	
Agree on a common set of frequently required electronic certificates for use in electronic public procurement procedures		✓	✓		✓	
Promote electronic supply of business information and certificates in public procurement			✓			
Promote standardisation of e-catalogues for use in Dynamic Purchasing Systems (DPS) and e-framework agreements			✓			
Promote transparency, auditing and traceability of e-procurement systems		✓		✓		
Promote standardisation of tender documents			✓	✓		
Promote awareness of and training programmes for SMEs at national and regional level				✓	✓	
Pursue negotiations on the review of the Government Procurement Agreement (GPA)				✓		✓
Promote use of a single common nomenclature for the classification of procurement goods and services in international trade				✓	✓	✓
Support technical assistance to third countries for computerising their public procurement regimes				✓	✓	✓
Consider electronic public procurement in the European external aid instruments and tools	✓	✓	✓	✓		✓

Source: Assessment by the European Commission services

Comparison of retained options

On the basis of the list of actions presented in Figure 5, the two retained options were compared against the *"business-as-usual"* scenario in order to determine the scope of policy intervention.

Figure 6 summarises the main points from the comparison of the three potential scenarios. It shows that the *"partnership"* option offers the best prospects for successfully introducing electronic means in public procurement. The comparison of the three options shows that the incremental costs for additional measures, beyond the traditional legal approach, are outweighed by far by the potential positive effects that a coordinated approach would have in rolling out electronic public procurement.

Figure 6: General comparison of main scenarios

	Business-as-usual	Classic Approach	Partnership
Main positive impact	The new procurement Directives and the general trend towards use of IT in public administrations will contribute to the uptake of electronic public procurement at least in a limited number of leading countries and regions	Intensive efforts result in correct transposition and application of new rules. Major compliance problems are avoided and legal uncertainties are reduced.	Action plan addresses problems across the board. Correct transposition and application of rules, interoperability and clear objectives reduce Internal Market barriers and stimulate uptake of electronic public procurement
Main negative impact	Main problems and barriers remain unsolved to the detriment of the Internal Market and efficiency in public procurement markets. Uptake of electronic public procurement is limited	Resolution of legal issues only marginally manages to stimulate uptake of electronic public procurement. Technical and organizational difficulties continue to impact negatively on uptake of electronic public procurement and efficiency gains	Some barriers and problems remain mainly because it is impossible to address all the potential problems due to their diverse nature and structural characteristics.
Costs	No direct costs but many opportunity costs as potentials benefits remain unexploited along with important barriers to the Internal Market	Limited direct costs to ensure legal and practical compliance with Internal Market rules and principles. Efficiency gains remain largely untapped	The Action Plan implementation entails higher costs. In light of potential benefits these seem justified. Additionally, economies of scale are achieved due to concerted and coordinated effort at national and European level
Influence on main objectives: **IM** **Lisbon objective**	EU regulation provides limited impulse to moving procurement online. Member States accord priority to other IT applications due to the complexity in reforming markets for electronic public procurement. Lisbon objectives are not met as economic impact is watered down by barriers and limited uptake	Positive impact on the removal of barriers to the Internal Market but limited economic impact due to limited penetration of electronic public procurement and diseconomies in using electronic means. Generalised use of electronic public procurement is not achieved by 2010	Strong impact on the IM and the EU economy as a whole. Likely generalisation of electronic public procurement across Europe.

Source: Adapted from "Impact Assessment of an Action Plan on electronic public procurement", Ramboll Management, December 2004

The impact of policy intervention seems therefore strongest if legal, technical and organisational problems are tackled simultaneously and on the basis of Europe-wide collaboration between all the different stakeholders. Indeed it is materially very difficult to dissociate the legal effects from those of greater efficiency, improved governance and higher competitiveness.Their effects are mutually reinforcing and cumulative.

Such a comprehensive approach requires the close collaboration of the Community and Member States, in line with the principles of subsidiarity and proportionality which should apply in defining the exact measures and identifying the most appropriate actors. The intention is to design an effective policy combining national and Community efforts in a coordinated way so as to facilitate and eventually accelerate the introduction of electronic means in public sector procurement at national and regional level. A coordinated development with clearly defined operational objectives is most likely to maximise benefits for both the public and the private sector. This type of partnership is new in the public procurement area but it is essential; results risk to be delayed and will be unsatisfactory if each Member State tried to deal individually with the complex issues involved.

5. WHAT ARE THE IMPACTS – POSITIVE AND NEGATIVE – EXPECTED FROM THE DIFFERENT OPTIONS?

This section addresses in more detail the possible impact of the actions which the Commission has identified as suitable for the Action Plan on electronic public procurement as part of the combined *'partnership'* scenario.

Figure 7 below lists the detailed actions and evaluates the expected impact on transparency, competition and efficiency of the selected measures described above. Their impact over time is also considered, e.g. whether a measure is likely to become effective in the short-, mid- or long-term. The actions, described in more detail in the Commission proposal for the Action Plan, are linked to each other so as to form a coherent whole. While all actions may therefore be seen to have at least some effect on each of the three criteria, the table shows where the intended impact is thought to be particularly relevant.

Very generally, the common feature of the actions proposed is to help avoiding the transactional costs related to the non-implementation or incorrect implementation of operational e-procurement systems. If one goes into the detail of each group of actions, one can see that the measures retained under option 1 are predominantly geared to achieve greater transparency and, as a consequence, competition; also, they are likely to yield results relatively quickly (1-2 years). Applying a form of 'negative' integration, they aim at abolishing and preventing barriers to the Internal Market in electronic public procurement. In comparison, measures retained under option 2 are geared more towards enhancing efficiency and competition also in national electronic public procurement markets and taking actions towards 'positive' integration by establishing interoperable tools and standards. This process may take longer, with results expected to be visible rather in the mid-term (2-4 years).

Figure 7: Comparative potential impact of proposed Action Plan measures on transparency, competition and efficiency as well as over time

	Action	Transparency	Competition	Efficiency	Impact over time
Objective 1	Interpretative document on the new rules on electronic public procurement	+++	+++	+++	Immediate
	Online training demonstrators allowing contracting authorities and economic operators to familiarise with the new e-procurement provisions and tools	++	+	+	ST-MT

	Action	Transparency	Competition	Efficiency	Impact over time
	Provide appropriate assistance to Member States in transposing the new provisions on electronic public procurement	++	++	+	ST-MT
	Revise the Common Procurement Vocabulary (CPV)	++	++	+++	ST
	Fully electronic system for the collection and publication of procurement notices on TED (the EU online publication board)	+++	+++	+++	ST
	Fully electronic notices at national level including appropriate tools for publishing on TED at European level	+++	+++	+++	ST-MT
	Establish common functional requirements for electronic public procurement systems	+++	+	+++	ST
	Adapt all operational e-procurement systems to the requirements of the Directives	+++	+++	++	ST-MT
	Introduce national and European accreditation schemes to verify compliance of electronic tendering systems with the legal framework	+++	++	++	MT
	Resolve interoperability problems affecting the use of advanced qualified signatures	+	+++	++	ST-MT
	Promote standardisation activities at European and international level	++	++	+	MT
	Monitor interoperability issues and developments	++	++	+	
Objective 2	Establish national plans for introducing electronic public procurement	++	++	+++	MT
	Main buyers to establish individual plans for introducing electronic public procurement	++	++	+++	MT
	Pursue XML standardisation activities on e-invoices and e-ordering	++	++	+++	ST-MT
	Set up electronic systems for the collection and processing of statistical procurement data	+++	+	+++	MT
	Agree on a common set of frequently required electronic certificates for use in electronic public procurement procedures	+	++	+++	MT
	Promote electronic supply of business information and certificates in public procurement	+	++	+++	MT
	Promote standardisation of e-catalogues for use in DPS and e-framework agreements	+	++	+++	MT
	Promote transparency, auditing and traceability of e-procurement systems	+++	+	+	ST-MT
	Promote standardisation of tender documents	++	+	++	MT
	Promote awareness of and training programmes for SMEs at national and regional level	++	++	+	MT

Objective 3	Pursue negotiations on the review of the Government Procurement Agreement (GPA)	++	++	++	ST-MT
	Promote use of a single common nomenclature for the classification of procurement goods and services in international trade	+	++	+++	ST-MT
	Support technical assistance to third countries for computerising their public procurement regimes	+	+	+	MT
	Consider electronic public procurement in the European external aid instruments and tools	+	+	+	ST-MT

+++ strong impact ++ moderate impact + low impact ST short term MT medium term LT long term

Source: Assessment by the European Commission services

In terms of the two alternative options previously considered, Objectives 1 and 3 correspond to the "classic" approach, while the three objectives combined correspond to the "partnership" scenario.

The following sub-sections describe the impact of introducing electronic public procurement on the different market actors and sectors of the economy, assuming that all actions listed in Figure 7 are fully and correctly implemented.

5.1. The impact on markets, trade and investment flows

Specific measures in the action plan proposals aim at removing or preventing potential 'e-barriers' in order to avoid fragmentation of procurement markets and to maintain competitive pressure across Europe. Correct introduction of electronic means in the procurement process should indeed increase transparency and strengthen competition in public procurement markets thus providing incentives for higher productivity for both governments and for businesses. Incorrect introduction of e-procurement could result in lesser efficiency in the relations of buyers to suppliers than currently achieved through paper procedures.

The public sector purchases a vast array of goods, works and services. Not all sectors will be equally affected by the introduction of electronic means in the procurement process. Competitive pressure is likely to be bigger for standard off-the-shelf products and services compared to more complex contracts. However, increased transparency should level the field for new entrants who are often outpaced by incumbent players who may capitalise on their better knowledge of public sector markets. It should also impact positively on cross-border trade in public procurement which is today relatively low. The use of electronic means can facilitate cross-border market access for businesses. It should also make it easier for public purchasers to organise on a more international basis where synergies can make cross-border purchases more effective. Initiatives in this direction have been underway in the utilities sector and may be extended to other areas where such types of synergies are available.

It should also be noted that excessive reliance on framework agreements can also limit competition and new market access as such agreements are usually established for 3 or more years. Certainly, the introduction of electronic means in framework agreements could improve their management, in particular if use is made of the multi-supplier agreements which allow the reopening of competition among parties to the agreement. Dynamic purchasing systems offer a credible alternative with the same efficiencies to framework agreements within a much more open procurement environment.

Establishing a European procurement market endowed with modern tools and technologies is a pre-requisite for competing effectively in global markets which are increasingly moving online. The use of electronic means in public procurement is being developed worldwide among the EU's traditional partners such as the United States, Canada and Japan, and new players entering the world ICT market such as China, India and Brazil[18]. In light of current international developments, legal and technical choices in electronic public procurement systems may reduce procurement opportunities for EU businesses in third countries, as well as restrict access of third country suppliers to the EU market. Existing WTO agreements in procurement (General Procurement Agreement, GPA) and bilateral agreements do not regulate their use. In the absence of such regulation, increased share of electronic means in the procurement process could impact negatively on international public procurement trade.

5.2. The direct and indirect costs for businesses

Successful implementation of the Action Plan should have a positive impact on some of the direct costs for businesses involved in public procurement procedures. Public procurement markets are notorious for their red tape. Although precise estimates are not available on tendering costs for businesses, it is clear that economic operators, who could reallocate resources to more productive activities, will benefit from a reduction in the administrative burden.

Businesses can also benefit indirectly from improved management of public contracts and better governance. The scale of such effects depends on the conditions of procurement markets at the outset. The use of electronic means cannot work miracles. While the use of electronic means can help reduce corruption and unlawful practices, it may involve also higher risks for the confidential treatment of commercially sensitive information submitted by tenderers during calls for competition.

5.3. The impact on innovation

Transposition of the procurement Directives will encourage standard e-procurement systems based on existing technologies. The important factor will be to reach a critical mass of buyers and suppliers using e-tendering or e-procurement marketplaces. Whereas the cost side of implementing electronic public procurement is not expected to change significantly for the contracting authorities, the benefit side is expected to improve significantly along with an increasing uptake of electronic public procurement. If that scenario materialises demand for electronic public procurement, this should stimulate investment in ITC both within the administrations and among businesses. The introduction of new procurement procedures and requirements is expected to increase demand for certain IT applications, electronic auctions, e-signatures, decision support tools etc. to the benefit of vendors specialising in this area of services.

5.4. Administrative requirements on businesses

Implementation of electronic public procurement should not lead to an increase in administrative requirements for businesses. On the contrary, it should lead to a reduction in

[18] COM (2004) 757 final, "Challenges for the European Information Society beyond 2005"

the administrative burden and the associated compliance costs during the tendering process. Nevertheless, in certain countries where security requirements for tendering electronically have been set at a very high level, businesses may find themselves obliged to invest in specific solutions in order to be able to tender electronically. The same may happen if tendering is unnecessarily complicated due to the compulsory use of unsatisfactory standards and formats not generally used by industry for the submission of tenders or the inappropriate automation of procurement processes without taking account of industry standards and practices.

There is certainly a trade-off between more stringent requirements and an approach based on a pragmatic assessment of market conditions and the capacity of businesses to cope with public administrations' requirements. The issue of electronic signatures analysed in the previous chapters highlights perfectly these types of problems and their impact not only on domestic markets but also on electronic cross-border trade.

In the absence of pragmatic approaches and solutions, the impact on businesses and on the functioning of the Internal Market could be negative and increase the cost for businesses when carrying procurement procedures electronically.

5.5. Impact on labour market and employment

The resulting economic changes and better governance from electronic public procurement could raise the EU's growth potential by giving an additional stimulus to labour productivity and business dynamism. Implementation of the Action Plan is not expected to have an impact on the functioning of the labour market. However, it may positively affect the quality of labour in terms of the IT skills required from the move to online public procurement.

The deployment of electronic public procurement may only marginally lead to loss of employment insofar as certain larger purchasing authorities may find it necessary to streamline purchasing departments. The most likely scenario is that natural attrition and reallocation of tasks will absorb the excess workforce in public administrations.

It is more than likely that for a certain period electronic means will continue to be used parallel to traditional paper based procedures. The effect on employment for private businesses involved in public procurement contracts would therefore be neutral. Some reallocation of tasks and upgrading of jobs should be expected.

5.6. The consequences for public authorities and governance

Effective introduction of electronic public procurement requires action at the level of public purchasers. The Action Plan calls for governments and major purchasers to establish national and individual plans respectively in order to introduce electronic means in the procurement process. To be effective, such plans should include the allocation of specific funds in national budgets and within the different administrative bodies and agencies.

IT costs for implementing electronic procurement are likely to go down, since a maturing market for electronic public procurement solutions will provide more standard, out-of-the-box solutions which will mean cheaper technology/software. Thus, the cost of an e-public procurement is more significant at the buyer side as it involves the reengineering of existing processes and in many cases requires upgrades in existing hardware and software installations and specific interfaces to link with legacy systems. Thus, the total cost of electronic public procurement is not expected to be significantly lower than currently as the purely IT part only constitutes a relatively small fraction (10-20%) of the total costs. The costs for individual purchasing authorities will be proportional to the number of participants to an electronic public procurement system. Tools and platforms can be shared by many suppliers and agencies, which significantly reduces the costs for users. Many Member States are effectively planning to outsource or sometimes even develop such central platforms that can provide services to individual buyers.

The positive impact on the management of public contracts is evident. Electronic means offer enormous improvements for monitoring expenditure, improved compliance with rules and regulations and auditing of operations.

The modernisation of procurement environment from the introduction of electronic means will pay off for public administrations through better prices and quality of purchases and increased productivity. These savings are proportionately more important for larger administrations with large purchasing departments. Smaller contracting authorities may not at first hand have incentives to use electronic public procurement. An appropriate incentive structure should be found so that benefits are shared across all levels of government.

5.7. The impacts on specific regions and sectors

In organising public procurement electronically, care should be taken not to push for an excessive centralisation of purchases. Without a careful assessment of market conditions, centralisation of purchases can lead to distortions of competition by privileging larger businesses that usually are better positioned to compete for large contracts. Electronic public procurement represents a great potential for SMEs, as administrative burden and transaction costs are proportionately higher for them. SMEs traditionally supplying to the public sector or interested to enter this market will have to adapt to this new environment and learn how to use the new tools. There is danger, however, that the introduction of highly integrated and sophisticated electronic public procurement systems is not affordable for SMEs and could lead to their exclusion from procurement markets if applied too early in the process of switching to electronic public procurement. This became evident in some past marketplace projects which were terminated due to the lack of businesses' participation.

The development of electronic public procurement is usually associated with central government. It is, however, worth noting that many initiatives across Europe are already regionally based. This is an encouraging sign which proves that the economics of electronic public procurement have improved in recent years. In order to make sure that no region is left behind, national plans should encourage development of electronic public procurement at all levels of government. The Action Plan gives the less technologically mature countries and regions an opportunity to catch up with the leading players.

Some sectors are likely to feel the impact of electronic public procurement more strongly than others during the initial phase of development, as pointed out in different studies. At the initial stage, the use of electronic means can be very effective for the procurement of articles characterized by low value of each component and high order frequency. A closer look on the goods, works and services procured by public institutions in Europe shows that the proportion of such purchases in total procurement is rather limited.

5.8. Potential overall economic impact of the proposal

On the basis of the relatively conservative figures of 5% savings on the purchasing price and 50 EUR savings per invitation to tender in administrative costs, it is estimated that annual savings from full implementation of electronic public procurement will amount to almost € 19 billion by 2010, when full generalisation of electronic public procurement can be expected.

Figure 8: Estimated annual savings on purchasing price and administrative costs for buyers (based on 2002 figures for EU15)

Savings on purchasing price	**Savings on administrative costs (buyers)**
▪ Total value of public procurement in the EU15: 1,500 Billion EUR ▪ Value of e-public procurement at a 25% level uptake in the public sector in EU15: 375 Billion EUR ▪ Range of savings realized today: Between 10% - 53% ▪ Conservative estimate for savings on purchasing price: 5% ▪ Estimated total savings calculation: 375 Billion EUR / 5%	▪ Total annual number of public procurement transactions in the EU (above and below threshold): 665,000 ▪ Estimated number of e-public procurement transactions at a 25% level uptake: 166,000 ▪ Savings per invitation to tender: 31% realized (40 EUR – 130 EUR per transaction) ▪ Conservative estimate for savings on administrative costs per transaction: 50 EUR ▪ Calculation for estimated total savings on administrative costs: 166,000 X 50 EUR
Estimated total savings on purchasing price: **€ 18.75 billion per year (for EU15)**	**Estimated total savings on administrative costs:** **€ 8.3 million per year (for EU15)**

Source: *Impact Assessment study on electronic public procurement, Ramboll Management 2004*

The calculations above show that the potential savings seem to be considerable at the aggregate European level, even under a conservative estimate. Annual savings do not include figures from electronic ordering and invoicing nor savings for suppliers or due to increased efficiency and improved governance.

6. MONITORING AND IMPLEMENTATION OF E-PROCUREMENT ACTION PLAN

The Commission assisted by the Advisory Committee for Public Contracts will monitor overall progress in implementing the Action Plan. By the end of 2007, the Commission will review the situation and report on the results achieved. This assessment will concentrate on the progress achieved on the legal front, the development of the necessary infrastructures for carrying procurement electronically, the use of electronic means and progress achieved in implementing the Action Plan. An assessment of economic impacts would be rather premature as experience shows that benefits from such reforms take longer to materialise.

In terms of indicators, the Commission will use the following type of information to monitor progress:

- **Indicators for the implementation of the legal framework:** Transposition of all provisions on electronic public procurement in each member state; timely implementation of the directives; number of legal actions for failure of transposition into national legislation; date of transposition of the directives into national legislation.

- **Indicators for use of electronic means in public procurement process:** share of notices dispatched electronically by contracting authorities; share of tender documents accessible electronically; number and volume of dynamic purchasing systems; share of calls for tender using electronic auctions.

- **Economic indicators:** statistical information is already collected on public procurement markets; these will be progressively extended to cover electronic means such as the share of central purchasing and evolution of dynamic purchasing systems

7. RESULTS OF THE STAKEHOLDER CONSULTATION

7.1. Which stakeholders were consulted, at which stage of the process and for what purpose?

To complement the Impact Assessment and guarantee the widest input possible to the Action Plan, the Commission has consulted all parties involved in introducing electronic public procurement: Member States and public administrations (buyers); economic operators and business associations (suppliers) and providers of electronic public procurement systems. Findings from these consultations have been thoroughly examined and taken on board in the Action Plan.

Because of the very nature of public procurement, national governments have a key role in introducing electronic procedures. This is why the Commission has sought to work in close partnership with the Member States.

- As a first step, the Commission organised detailed discussions on an on-going basis with the ***Advisory Committee on Public Contracts*** and in particular, the ***Working Group on e-procurement*** set up under its auspices, in order to bring together legal and technical experts actively involved in the development of electronic public procurement in the Member States. Member States tabled specific proposals. Discussions in the group during 2004 allowed the Commission services to create a synthesis of the views expressed in the group and to put forward specific proposals for action at EU and national level.

  In the framework of the impact assessment study, the contractor also consulted national experts on the state of play in each Member State.

- In addition, members of the ***Consultative Committee for the Opening of Procurement Contracts (CCO)***, including procurement specialists from academia, business associations and trade unions as well as procurement practitioners examined the impact of the forthcoming legislative framework for conducting procurement electronically and the draft Action Plan in three consecutive meetings from December 2003 to November 2004.

- In May 2004, the Commission organised a one-day conference in Brussels via the IDA programme on the topic ***'Electronic public procurement: bringing down e-barriers'***. The conference gathered approximately 450 participants from national administrations, industry and standardisation bodies and discussed technical developments and interoperability questions raised by the implementation of electronic public procurement.

To ensure the practical relevance of its proposals for action, the Commission has equally sought constant exchange with representatives of business.

- Based on its 'Interactive-Policymaking' tool (IPM), the Commission conducted an ***online survey*** on the attitudes to e-procurement of businesses and business associations from 15 September to 15 November 2004. More than 400 participants from all EU Member States, including the new members, as well as of EFTA and other third countries responded to the voluntary survey on their experiences with and expectations towards e-procurement.

  While the survey may be positively biased towards those businesses and business associations that already have experience with the use of electronic means in conducting business with government, it captures a first picture indicating both trends and areas of concern for businesses across Europe.

- Individual contributions were received from UNICE (European employers' confederation), Eurochambers (Association of European Chambers of Commerce and Industry) and the Chamber of Commerce and Industry of Paris. E-procurement was also one of the main themes at the UNICE conference 'Public procurement: the new regime ahead' in Oslo from 29-30 September 2004.

- Finally, the Commission services pursued contacts with operational e-procurement systems providers, IT vendors and industry experts through bilateral meetings and in public conferences.

7.2. Results of the consultations

The consultations showed a relative convergence of views of the different actors involved. All parties welcomed the new legislation on e-procurement, with some, e.g. UNICE and Eurochambers, calling explicitly for action by the Commission to facilitate its implementation. At the same time, the contributions made clear that legislative and implementing measures should aim at setting the general framework and improving conditions for conducting public procurement electronically, whilst development of specific systems and software solutions should be left to the markets.

Member States

All Member States recognise the potential of e-procurement for increased savings and greater efficiency, and hence the beneficial impact of migrating rapidly to electronic procedures. In fact, many consider e-procurement as a lever to modernise their public procurement more generally. At the same time, Member States identified together with the Commission major risks of incorrect implementation. The Working Group's priority was to clarify in detail the legal and functional requirements of the Directives. It also concentrated on the potential objectives and scope for action.

In the discussions and written contributions, it was evident that implementation of the new Directives will need to be supported by specific additional measures and accommodate different needs arising from Member States' different legal traditions, as well as their varying state of advancement in setting up operational e-procurement systems, e.g. in addressing the question of how to best organise the transition from, and possibly co-existence of, paper-based and electronic procedures.

After a detailed discussion in the ePWG, Member States in the ACPC endorsed the thrust and general principles underlying the draft Action Plan and its overall content. While some countries anticipate potential difficulties in implementing the Action Plan within the proposed time-frame, they consider it would, however, be a very good reference and political support for action. National plans setting performance targets were accepted as the most appropriate instrument and incentive to achieve the objectives of the Action Plan in due time.

Industry and business associations

UNICE and Eurochambers strongly welcome the Action Plan. They are particularly aware of the Internal Market aspects of e-procurement and support a coordinated approach to avoid fragmentation of EU public procurement markets through new 'e-barriers'. The mutual compatibility of the technical systems of the bidding industry and public authorities is the prerequisite to achieve cross-border procurement and to make e-procurement an incentive for businesses to go and trade online. Echoing the concerns of individual businesses about transparency, security and interoperability of electronic procurement procedures, industry associations therefore call for common guidelines on functional requirements for e-procurement systems, and even for harmonising 'to the greatest extent' the requirements set within the individual Member States, as well as for using internationally recognized applications and standards.

They have identified specific points to be most urgently addressed, namely such that relate to the mandatory use of qualified electronic signatures in some Member States and the transparency of and procedural safeguards for electronic auctions, followed by rules on electronic archiving and data protection.

Finally, both the IPM survey as well as consultations of UNICE show that businesses expect e-procurement to yield advantages for SMEs, such as new market opportunities and lower bidding costs. These are thought to outweigh possible detrimental effects from greater competition by large-size companies.

Business IPM survey

Individual businesses favour the introduction of electronic public procurement but remain cautious regarding security and performance, probably due to lack of familiarity with the new tools and procedures.

Asked what was important for them in using electronic public procurement, over half of the businesses interviewed in the IPM survey said that it should involve less effort than procedures using paper-based means (63.9%); that it should be easy to use, with reliable IT tools (62.5%), and that transparency of the electronic tendering procedures should be ensured (63.2%). In contrast, costs for investment in IT tools or the issue of staff training were considered less important (33.7% and 14.4% respectively).

Today, it seems that many businesses have already used electronic means in the early stages of a public procurement procedure, and consider the experience useful. Thus, a majority of 89.8% of businesses interviewed welcomed the opportunity to download specifications and tender documents and to search for tender opportunities online. This reflects the importance of transparency and possibly the use of tools already available, not least via EU sites such as TED. In comparison, more advanced tools - many of which may not yet be generally available in practice - are viewed with greater caution, such as documents using XML-standards, electronic signatures or electronic auctions. Instruments familiar from electronic commerce transactions, in particular for carrying out financial transactions such as electronic payments, also seem to be considered relatively useful (70%).

According to the survey a great majority of businesses is favourable to the immediate or progressive introduction of electronic public procurement in the EU (31% and 59.6% respectively). The greatest role for the Commission is seen in standardisation activities, e.g., with regard to forms and documents (67.3%), but also to electronic tools (47%). Secondly, the Commission is expected to promote the use of simple and generally available tools for conducting e-procurement (60%).

8. COMMISSION PROPOSAL AND JUSTIFICATION

(Tentative conclusions to be confirmed when the Commission adopts its proposal)

After examination of the all above options, the evaluation of the available information and the extensive consultations of stakeholders, the Commission is of the opinion that the adoption of an Action Plan on electronic public procurement is the most effective way to ensure the smooth functioning of the Internal Market when implementing the legal framework for electronic public procurement, to achieve greater efficiency in procurement, and to improve governance and competitiveness.

This solution relies on close co-operation and partnership between the Commission and the Member States in order to exploit the available synergies and co-ordinate efforts among all the actors involved in implementing the Action Plan. This may appear as a weakness as compared to more orthodox tools of regulatory intervention and legal action. In this environment, however, such tools would have been ineffective in view of the complexity of implementing electronic public procurement. In addition, the chosen route is compatible with the subsidiarity and proportionality principles which should be guiding the Community policy.

The targets and actions foreseen in the Plan are scheduled to be implemented over a short period. The decision to fix a tight schedule is driven by needs on the ground and the 31st January deadline for transposition of the legislative package of EU public procurement Directives. The foreseen monitoring of the Action Plan will provide feedback on progress achieved and provide guidance in due course on any additional operational needs and possible adjustment of targets.

9. ANNEXES

9.1. Annex I: List of references

European Commission documents

Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

European Commission (2004): "A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future", *Commission staff working document,* 3 February 2004 at http://europa.eu.int/comm/internal_market/publicprocurement/studies_en.htm

European Commission (2002): COM (2002) 263 final, "eEurope 2005: An information society for all";

European Commission (2004): COM (2004) 380 final, "eEurope 2005 Action Plan: an Update"

European Commission (2004): COM (2004) 757 final, "Challenges for the European Information Society beyond 2005"

European Commission (2003): COM (2003) 283 final, Communication from the Commission to the Council and the European Parliament – Public Finances in EMU - 2003

Studies mandated by the Commission

Ramboll Management (2004)*:* "Impact Assessment of an Action Plan on electronic public procurement", December 2004

European Dynamics (2004, forthcoming): *Electronic Public Procurement in Europe: State of the Art report*, Volumes 1 and 2, Study mandated by the European Commission under IDA Programme, December 2004

Other references

Catholic University of Leuven (2003): *"The legal and market aspects of electronic signatures"*, Study for the European Commission, Interdisciplinary Centre for Law and Information Technology of the Catholic University of Leuven, October 2003

EIM Business and policy research (2004): "*The access of SMEs to public procurement contracts*", 22 March 2004 at http://europa.eu.int/comm/enterprise/entrepreneurship/craft/craft-studies/craft-publicprocurement.htm

World Bank (2003): "Electronic Government Procurement World Bank draft strategy", October 2003;

E-Business Watch (2003): "*The European e-Business Report – A portrait of e-business in 15 sectors of the EU economy*", 2003 edition

Ministry of Industry of France (2004): "*E-commerce Scoreboard Update*", April 2004

MOD/Industry Commercial Policy Group (2004): "*Defense e-Business – A guide to Commercial Issues*".

OECD (2004): "OECD Information Technology Outlook 2004"

Annex II: The issues at stake and driving forces

The issues at stake

The implementation of the EU public procurement Directives agreed back in the 80s and 90s as part of the Single Market programme has increased cross-border competition and improved prices paid by public authorities[19]. Despite this progress, cross-border trade for procurement contracts remains low and advertising for business opportunities has not reached its full potential. In addition, the paper based processing and documenting of procurement information and transactions is slow, cumbersome and costly; in particular for SMEs[20],tendering costs can be disproportionately high as the same documentation and information is requested in different formats and must be submitted several times in order to participate in a call for tender. At macro level, lack of efficiency and barriers to trade in public procurement markets impact negatively on public finances and the control of public spending[21].

The possibilities offered by IT tools for improving cost efficiency and increasing competition in public procurement markets were already acknowledged in the *e*Europe Action Plan[22] which made electronic public procurement one of its priorities. Academics and practitioners all agree that if implemented correctly, electronic public procurement can:

- foster competition and improve cost effectiveness in public contracts, contributing to reducing fiscal expenditure and stimulating a more competitive supply base;
- generate savings of time and costs in the contract award process and improve the administration and implementation of contracts awarded;
- increase transparency and fairness in the award of contracts, contributing to stronger credibility and attractiveness of the public procurement market;
- contribute to better monitoring and auditing of contracts and hence improve compliance with rules and policies, thus minimising corruption and abuse;
- strengthen competitiveness with improved access to public sector markets and better opportunities for cross-border trade.

Figure 1 summarises these benefits for governments, suppliers and the public in general from the perspective of transparency and efficiency gains.

[19] As estimated in the Commission staff working paper on the functioning of public procurement markets in the EU[2], 10% savings in public procurement expenditure could have turned most of Member States' budget deficits in 2002 to surpluses while no euro zone Member State would have broken the 3% public sector deficit ceiling; "A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future", Commission staff working document, 3 February 2004 http://europa.eu.int/comm/internal_market/publicprocurement/studies_en.htm

[20] The access of SMEs to public procurement contracts, EIM Business and policy research, 22 March 2004 http://europa.eu.int/comm/enterprise/entrepreneurship/craft/craft-studies/craft-publicprocurement.htm

[21] COM (2003) 283 final, Communication from the Commission to the Council and the European Parliament – Public Finances in EMU - 2003

[22] COM (2002) 263 final, "*e*Europe 2005: An information society for all"; COM (2004) 380 final, "*e*Europe 2005 Action Plan: an Update"

Figure 1: Potential benefits from electronic public procurement

		Government	Suppliers	Public
Transparency		• Anti-corruption • Increased number of suppliers • Better integration and interaction between governments • Professional procurement monitoring • Higher quality of procurement decisions and statistics • Political return from the public	• Increased fairness and competition • Improved access to the government market • Open the government market to new suppliers • Stimulation of SME participation • Improved access to public procurement information • Government accountability	• Access to public procurement information • Monitor public expenditure information • "Have a say" in public sector purchases • Government accountability
Efficiency	***Costs***	• Lower prices • Lower transaction costs • Staff reduction	• Lower transaction costs • Staff reduction • Improved cash flow	• Redistribution of fiscal expenditure
	Time	• Reduction in fiscal expenditure • Simplification/ elimination of repetitive tasks • Communication anywhere/anytime • Shorter procurement cycle	• Simplification/ elimination of repetitive tasks • Communication anywhere/anytime • Shorter procurement cycle	• Communication anywhere/anytime

Source: *Electronic Government Procurement World Bank draft strategy, October 2003*

The overall positive effect on the economy in terms of competitiveness and improved allocation of resources from moving public sector procurement online is obvious. Electronic public procurement can lead to substantial productivity gains for both governments and for businesses as well as to important cost reductions and to price savings. The resulting economic changes should raise the EU's growth potential by giving an additional stimulus to labour productivity and business dynamism. Further, establishing a European procurement market endowed with modern tools and technologies is a pre-requisite for competing effectively in global markets which are increasingly moving online[23].

In social terms, the effects can also be positive not only due to higher growth and productivity but also to improved public sector performance in terms of services, public sector accountability and redistribution of fiscal expenditure.[24] Improved governance and reduced

[23] "Electronic Government Procurement World Bank draft strategy", October 2003;
"OECD Information Technology Outlook 2004"

[24] Although environmental concerns are not a key issue here, some reports have found a positive impact in terms of reduction in the use of paper as a result of digitisation of the procurement process. MOD/Industry Commercial Policy Group: "Defense e-Business – A guide to Commercial Issues". (2004)

opportunities for fraud and corruption can render public sector procurement more attractive. Indeed, the electronic documentation of procurement transactions can enhance management's information on spending and contracts' performance by encouraging possible savings and making governments more accountable in spending taxpayer's money. In addition, the electronic processing and documentation of procurement information and transactions, and the possibility to track down their detail at each stage of the procurement process, reduce opportunities and incentives for fraud. In the short term, certain adjustment costs should be foreseen in the public sector due to the need to reorganise purchasing activities and to reallocate responsibilities and tasks in departments which are responsible for the purchase of goods and services. However, the benefits from implementing electronic public procurement solutions outweigh such costs.

Benefits will not only be felt at the macro level. Inefficiencies and lack of transparency in public procurement markets impact on the costs and the quality of goods, works and services purchased by public authorities, affecting negatively both the value for taxpayers' money and the quality of services provided by the public sector. In addition, the administrative burden of complying with procurement procedures, the high transaction costs and the lack of transparency in contract opportunities often deter businesses from entering public procurement markets and from competing across borders or regions. The re-engineering of traditional paper based procedures required to operate electronic public procurement effectively can change this by, for example, automating repetitive and routine tasks and streamlining administrative processes. On the buyer side, the simplification and speeding up of procurement procedures can release resources currently tied up in performing bureaucratic tasks so as to improve the management, monitoring and performance of contracts. On the supplier side, businesses can also concentrate on improving their offer rather than focusing on compliance with administrative requirements.

Adoption of the EU legal framework for the use of electronic means in the public procurement process was a first significant step in order to remove legal uncertainties and establish the required safeguards for open, transparent and non-discriminatory public procurement using electronic means. The use of electronic means in the procurement process encompasses a broad range of solutions: the simple dispatch of notices for publication on electronic tender boards; the online access to tender documents and specifications; the exchange of messages and electronic submission of tenders and the evaluation and award of contracts including electronic auctions, and even fully fledged electronic systems for purchasing goods, services and works. But the use of electronic means is not limited to public procurement procedures only: it extends to the whole purchasing cycle from the stage of defining specifications up to billing and monitoring of contracts. Some of the most advanced IT applications developed by the market in e-business are used precisely in the ordering and invoicing stages of the purchasing cycle.

The transformation from paper based to electronic procurement is a complex operation which requires action and decisions at many levels beyond the simple transposition of the new rules at national level. Organisational, technical and institutional issues should be addressed in order to re-engineer existing processes for tendering and purchasing, so as to be able to exploit the available ICT solutions and tools.

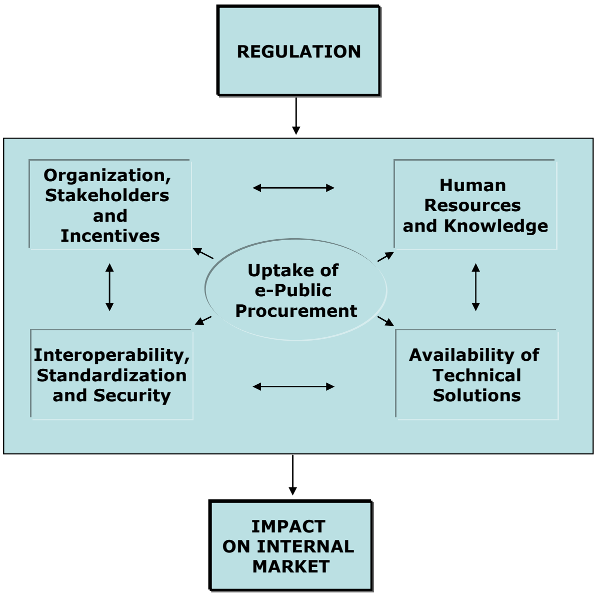
The move from paper based to electronic procurement is not without risks. Incorrect application of the new EU rules and discriminatory technical solutions and practices can deter businesses from embracing electronic public procurement and effectively fragment the Internal Market. Correct and timely implementation of the new EU provisions on electronic public procurement will determine Europe's capacity to keep the market open for public procurement conducted electronically and reaching a critical mass of users (buyers and suppliers). Use of electronic means should guarantee in practice that any business in Europe with a PC and an internet connection can participate in a public purchase conducted electronically.

Spreading electronic public procurement across Member States and regions is a major challenge for most public authorities. Its effective use will determine the size of benefit for buyers, suppliers and the economy as a whole. Network effects are important in this area and therefore, achieving a balanced development across all Member States is crucial for releasing the full potential from moving public procurement online. Its speedy application in all Member States will be decisive for further raising Europe's competitiveness. The challenge for policy makers and public purchasers is to ensure that the legal and technical conditions do not raise barriers to the Internal Market and allow for effective, open and fair competition in public procurement across Europe.

The driving forces in introducing electronic public procurement and parties affected

Various factors will influence and determine the development of operational electronic public procurement. Figure 2 illustrates the main driving forces which are expected to influence the transformation from traditional paper based to electronic procurement. While there can be variations between Member States and differences in the importance of these forces, the model is rather generic and can be used for analysing alternative options for policy intervention in order to promote electronic public procurement across Europe.

Figure 2: Main driving forces influencing developments in the electronic public procurement market


REGULATION
Organization, Stakeholders and Incentives
Human Resources and Knowledge
Uptake of e-Public Procurement
Interoperability, Standardization and Security
Availability of Technical Solutions
IMPACT ON INTERNAL MARKET

Source: *Impact assessment on Action Plan on electronic procurement, Ramboll Management*

The fundamental role of the *regulatory framework* is evident. The forthcoming transposition into national law of the EU procurement rules will provide the framework for the evolution of electronic public procurement in the coming years. The correct understanding of these rules, their timely implementation and uniform application will determine to a large extent the pace and quality of the environment for moving traditional public procurement procedures online.

The *institutional set up and organisational structures* put in place to operate public procurement electronically are one of the keys for the successful switch to electronic public procurement. They determine the relations of contracting authorities with different stakeholders, define their respective roles and responsibilities, and establish a framework for interaction between the authorities involved and private economic operators. There are numerous contracting authorities of different sizes and institutional character involved in the organisation of procurement competitions. There can be large government purchasing organisations (e.g. Ministries or central purchasing bodies), or small organisations, such as municipalities and local authorities. Similarly, on the supply side a wide range of businesses with different profiles and interests are involved. It is clear that administrations and businesses have a mutual interest in working together in order to benefit both from the opportunities offered by electronic means in the procurement process. However, incentives of the different stakeholders can vary enormously, therefore, in order to succeed in operating procurement electronically, the institutional and organisational set up should provide the right balance and the right incentives to all the stakeholders involved.

Human resources, knowledge and organisational capacity as well as ICT skills are capital in moving procurement online as they determine the readiness of the actors involved to employ new working processes and apply new technologies. In moving public procurement online, staffs both in the public and in the private sectors will need to become familiar with the new tools and procedures. Retraining staff to deal with more qualified tasks will also be necessary on both sides. Even if ICT technologies could fully automate the different stages in the purchasing process, human resources would remain central as they define the processes and programme, manage the IT systems and ultimately decide on actual purchases.

Finally, the *technology available* for electronic public procurement and the level of standardisation in solutions applied will determine the evolution and uptake of electronic procedures. The concept of *interoperability* stands out as a core element here, that is, the mutual compatibility of systems used by buyers and suppliers. Interoperability is important in the entire procurement process - from tendering to invoicing - to ensure that the move of public procurement online does not create new barriers to actors willing to participate in public procurement markets. A high degree of interoperability will increase participation in procurement carried out electronically whereas lack of interoperability will constitute an important barrier. *Security* is also an important issue. Some suppliers and buyers are concerned about using the Internet to transmit confidential information. Possible security flaws in transactions over the internet can decrease supplier confidence and trust in e-procurement, while too high security standards can generate barriers to electronic transactions if the solutions applied are not generally available.

9.2. Annex III: Results of the interactive policy making survey

Section 1			
Please indicate whether you are:			
		Number of replies	**% of total**
	a company	354	(85.7%)
	a business association	59	(14.3%)
Please indicate your main sector of activity.			
		Number of replies	**% of total**
	Services	223	(54%)
	Manufacturing	67	(16.2%)
	Other, please specify:	47	(11.4%)
	Trade	40	(9.7%)
	Construction	36	(8.7%)
Please indicate whether your business association is:			
		Number of replies	**% of total**
	National	33	(8%)
	European	9	(2.2%)
	International	7	(1.7%)
	Other, please specify:	6	(1.5%)
Please indicate the number of employees in your company.			
		Number of replies	**% of total**
	1 - 9	100	(24.2%)
	10 - 49	74	(17.9%)
	50 - 249	83	(20.1%)
	> 250	92	(22.3%)

Please indicate in which country you are based.			
		Number of replies	% of total
	EU Member State	379	(91.8%)
	Rest of Europe	14	(3.4%)
	North America	8	(1.9%)
	European Economic Area (Norway, Iceland, Lichtenstein)	3	(0.7%)
	Rest of the world	3	(0.7%)
	Asia	2	(0.5%)
Pleasy specify:			
		Number of replies	% of total
	France	74	(17.9%)
	Germany	65	(15.7%)
	United Kingdom	50	(12.1%)
	Sweden	33	(8%)
	Netherlands	31	(7.5%)
	Belgium	17	(4.1%)
	Spain	14	(3.4%)
	Finland	14	(3.4%)
	Austria	11	(2.7%)
	Portugal	11	(2.7%)
	Italy	7	(1.7%)
	Hungary	6	(1.5%)
	Czech Republic	5	(1.2%)
	Ireland	5	(1.2%)
	Latvia	4	(1%)
	Denmark	3	(0.7%)
	Poland	3	(0.7%)
	Greece	2	(0.5%)
	Malta	2	(0.5%)

	Slovenia	2	(0.5%)
	Luxembourg	1	(0.2%)
	Slovak Republic	1	(0.2%)
	Cyprus	0	(0%)
	Estonia	0	(0%)
	Lithuania	0	(0%)
Apart from your home country, in how many countries of the European Union do you regularly sell products and / or services?			
		Number of replies	**% of total**
	1 - 4	126	(30.5%)
	5 - 10	46	(11.1%)
	11 - 15	15	(3.6%)
	> 15	11	(2.7%)
	all Member States of the European Union	32	(7.7%)
	none	107	(25.9%)
Do you do business electronically with other businesses?			
		Number of replies	**% of total**
	Occasionally	124	(30%)
	Often	110	(26.6%)
	Main way of doing business	42	(10.2%)
	Never	38	(9.2%)
	Considered the possibility only	23	(5.6%)
Which of the following do you use when doing business electronically? Please tick the appropriate box(es).			
		Number of replies	**% of total**
	Downloading of specifications and business related documents	303	(73.4%)
	Online search for business opportunities	278	(67.3%)
	Electronic catalogues	211	(51.1%)
	Electronic payments	207	(50.1%)
	Receiving orders electronically	180	(43.6%)
	Submitting of offers online	178	(43.1%)

	Sending electronic invoices	118	(28.6%)
	Electronic marketplaces	89	(21.5%)
	Electronic auctions	87	(21.1%)
	Exchange of data using XML standards	84	(20.3%)
	Electronic signatures	80	(19.4%)
	Other EDI based applications	51	(12.3%)
	Other	24	(5.8%)
	Not applicable	16	(3.9%)
	I am not familiar with any of these tools	10	(2.4%)
Section 2			
Have you ever bid for public tenders in your home or in another Member State?			
		Number of replies	**% of total**
	Often	150	(36.3%)
	Occasionally	104	(25.2%)
	Never	74	(17.9%)
	Main area of business	57	(13.8%)
	Considered the possibility only	28	(6.8%)
In relation to public tenders using electronic means, which of the following aspects would you consider most important? Please tick the appropriate box(es).			
		Number of replies	**% of total**
	It must require less effort than traditional paper based means	264	(63.9%)
	Transparency of the electronic tendering procedures	261	(63.2%)
	The required IT tools must be easy to use and reliable	258	(62.5%)
	Confidence in the fairness of the contract awarding procedure	217	(52.5%)
	A secure environment for transactions	204	(49.4%)
	The required IT tools must be generally available	177	(42.9%)
	Investment costs in IT tools must be reasonable	139	(33.7%)
	Fewer legal requirements than traditional paper based procedures	121	(29.3%)
	Training of my staff	58	(14%)
	Other	15	(3.6%)

	I don't know	15	(3.6%)
Section 2.1			
a. The online search for tender opportunities:			
		Number of replies	**% of total**
	is not useful	11	(2.7%)
	makes no difference	19	(4.6%)
	is useful	337	(81.6%)
	I don't know	11	(2.7%)
	I have no experience with this tool	34	(8.2%)
b. Electronic marketplaces:			
		Number of replies	**% of total**
	are not useful	14	(3.4%)
	make no difference	31	(7.5%)
	are useful	218	(52.8%)
	I don't know	27	(6.5%)
	I have no experience with this tool	119	(28.8%)
c. Electronic catalogues:			
		Number of replies	**% of total**
	are not useful	8	(1.9%)
	make no difference	29	(7%)
	are useful	285	(69%)
	I don't know	21	(5.1%)
	I have no experience with this tool	65	(15.7%)

d. Electronic auctions:		

		Number of replies	**% of total**
	are not useful	71	(17.2%)
	make no difference	20	(4.8%)
	are useful	136	(32.9%)
	I don't know	26	(6.3%)
	I have no experience with this tool	148	(35.8%)
e. The downloading of specifications and tender documents:			
		Number of replies	**% of total**
	is not useful	3	(0.7%)
	makes no difference	11	(2.7%)
	is useful	371	(89.8%)
	I don't know	6	(1.5%)
	I have no experience with this tool	17	(4.1%)
f. The submission of offers online:			
		Number of replies	**% of total**
	is not useful	18	(4.4%)
	makes no difference	21	(5.1%)
	is useful	293	(70.9%)
	I don't know	10	(2.4%)
	I have no experience with this tool	67	(16.2%)
g. Electronic signatures:			
		Number of replies	**% of total**
	are not useful	14	(3.4%)
	make no difference	42	(10.2%)
	are useful	216	(52.3%)
	I don't know	17	(4.1%)
	I have no experience with this tool	120	(29.1%)

h. The tracking of orders online:			
		Number of replies	**% of total**
	is not useful	11	(2.7%)
	makes no difference	17	(4.1%)
	is useful	279	(67.6%)
	I don't know	16	(3.9%)
	I have no experience with this tool	79	(19.1%)
i. Receiving orders electronically:			
		Number of replies	**% of total**
	is not useful	6	(1.5%)
	makes no difference	27	(6.5%)
	is useful	291	(70.5%)
	I don't know	16	(3.9%)
	I have no experience with this tool	69	(16.7%)
j. Electronic invoicing:			
		Number of replies	**% of total**
	is not useful	7	(1.7%)
	makes no difference	36	(8.7%)
	is useful	247	(59.8%)
	I don't know	16	(3.9%)
	I have no experience with this tool	99	(24%)
k. Electronic payments:			
		Number of replies	**% of total**
	are not useful	6	(1.5%)
	make no difference	28	(6.8%)
	are useful	289	(70%)
	I don't know	19	(4.6%)
	I have no experience with this tool	68	(16.5%)

I. Documents using XML standards:			
		Number of replies	**% of total**
	are not useful	6	(1.5%)
	make no difference	12	(2.9%)
	are useful	177	(42.9%)
	I don't know	68	(16.5%)
	I have no experience with this tool	140	(33.9%)

Section 3			
Which, if any, significant problems or barriers have you encountered - or do you anticipate - when using electronic means whilst participating in public procurement in your own country? Please tick the appropriate box(es).			
		Number of replies	**% of total**
	Inappropriate design of tendering systems	181	(43.8%)
	Incompatible IT standards	123	(29.8%)
	Inappropriate security arrangements	106	(25.7%)
	Inadequate legal framework	97	(23.5%)
	Insufficient commercial benefits	86	(20.8%)
	High adjustment costs	66	(16%)
	Lack of IT skills	58	(14%)
	I don't know	52	(12.6%)
	No barriers encountered	50	(12.1%)
	My business is not suited for electronic trade	42	(10.2%)
	The necessity of reorganising our company	35	(8.5%)
	Other	21	(5.1%)

Which, if any, significant problems or barriers have you encountered - or do you anticipate - when using electronic means whilst participating in public procurement in other EU Member States? Please tick the appropriate box(es).

		Number of replies	% of total
	Linguistic barriers	141	(34.1%)
	Inappropriate design of tendering systems	135	(32.7%)
	I don't know	121	(29.3%)
	Incompatible IT standards	119	(28.8%)
	Inadequate legal framework	102	(24.7%)
	Inappropriate security arrangements	84	(20.3%)
	Insufficient commercial benefits	54	(13.1%)
	High adjustment costs	53	(12.8%)
	Lack of IT skills	52	(12.6%)
	My business is not suited for electronic trade	31	(7.5%)
	The necessity of reorganising our company	25	(6.1%)
	Other	21	(5.1%)
	No barriers encountered	14	(3.4%)

Which other factors do you think may limit the generalised use of electronic public procurement? Please tick the appropriate box(es).

		Number of replies	% of total
	Different rules in Member States	248	(60%)
	Complex rules in tendering procedures	212	(51.3%)
	Lack of information on how electronic tendering works	193	(46.7%)
	Fear of corrupt practices	131	(31.7%)
	Unsatisfactory rules on the security of data transmission	121	(29.3%)
	Lack of trust in electronic tools	118	(28.6%)
	Risks involved in doing business electronically	104	(25.2%)
	I don't know	20	(4.8%)
	Other	16	(3.9%)
	None of the above	15	(3.6%)

Are you aware that the recently adopted European Directives on public procurement introduce, for the first time, the use of electronic means in public procurement?			
		Number of replies	**% of total**
	Yes	221	(53.5%)
	No	145	(35.1%)
	I don't know	47	(11.4%)
Do you believe that the new rules on the use of electronic means in public procurement will resolve the concerns you mentioned earlier?			
		Number of replies	**% of total**
	Yes	48	(11.6%)
	No	62	(15%)
	I don't know	102	(24.7%)
In which fields do you think the European Commission should further undertake action in order to resolve the concerns you mentioned earlier? Please tick the appropriate box(es).			
		Number of replies	**% of total**
	Standardisation of forms and documents	278	(67.3%)
	Promotion of simple and generally available tools for procurement	249	(60.3%)
	Standardisation of electronic tools	194	(47%)
	Modernisation of the legal environment	182	(44.1%)
	Interoperability between electronic procurement systems	167	(40.4%)
	Environment for secure transactions	142	(34.4%)
	Remove obstacles to crossborder transactions	127	(30.8%)
	I don't know	20	(4.8%)
	Other	13	(3.1%)

Section 4			
Do you think that using electronic means in public procurement will make it easier to do business with the public sector?			
		Number of replies	**% of total**
	Yes	291	(70.5%)
	No	76	(18.4%)
	No opinion	46	(11.1%)
In your opinion, are there any substantial differences between trading with businesses electronically and doing electronic procurement with the public sector?			
		Number of replies	**% of total**
	Yes	209	(50.6%)
	No	127	(30.8%)
	No opinion	77	(18.6%)
The level of service is:			
		Number of replies	**% of total**
	worse	70	(16.9%)
	more or less the same	53	(12.8%)
	better	38	(9.2%)
	No opinion	36	(8.7%)
Procedures are:			
		Number of replies	**% of total**
	more or less the same	72	(17.4%)
	more unfair	55	(13.3%)
	fairer	37	(9%)
	No opinion	34	(8.2%)

Costs are:			
		Number of replies	% of total
	lower	63	(15.3%)
	higher	56	(13.6%)
	more or less the same	50	(12.1%)
	No opinion	26	(6.3%)
The level of trust is:			
		Number of replies	% of total
	more or less the same	82	(19.9%)
	lower	55	(13.3%)
	higher	35	(8.5%)
	No opinion	25	(6.1%)
Tendering systems are:			
		Number of replies	% of total
	more or less the same	71	(17.2%)
	No opinion	53	(12.8%)
	not reliable	36	(8.7%)
	reliable	35	(8.5%)
Tendering systems are:			
		Number of replies	% of total
	Complex to use	94	(22.8%)
	More or less the same	41	(9.9%)
	No opinion	35	(8.5%)
	Easy to use	28	(6.8%)

Section 4.1			
a. The use of electronic means in public procurement makes the process:			
		Number of replies	**% of total**
	more transparent	175	(42.4%)
	more or less the same	162	(39.2%)
	less transparent	42	(10.2%)
	No opinion	34	(8.2%)
b. Electronic means in public procurement provides:			
		Number of replies	**% of total**
	more or less the same security	218	(52.8%)
	more security	86	(20.8%)
	less security	57	(13.8%)
	No opinion	52	(12.6%)

c. The use of electronic means in public procurement:			
		Number of replies	**% of total**
	decreases transaction costs	266	(64.4%)
	more or less the same	82	(19.9%)
	No opinion	38	(9.2%)
	increases transaction costs	27	(6.5%)
d. Using electronic means in public procurement makes the process:			
		Number of replies	**% of total**
	faster	287	(69.5%)
	more or less the same	86	(20.8%)
	No opinion	31	(7.5%)
	slower	9	(2.2%)
e. The use of electronic means in public procurement makes it:			
		Number of replies	**% of total**
	easier to find information	300	(72.6%)
	more or less the same	58	(14%)
	No opinion	29	(7%)
	harder to find information	26	(6.3%)
f. Using electronic means in public procurement will help:			
		Number of replies	**% of total**
	competition to increase	215	(52.1%)
	more or less the same	136	(32.9%)
	No opinion	37	(9%)
	competition to decrease	25	(6.1%)

g. Using electronic means in public procurement creates:			
		Number of replies	**% of total**
	more business opportunities within the Internal Market	205	(49.6%)
	more or less the same	131	(31.7%)
	No opinion	47	(11.4%)
	less business opportunities within the Internal Market	30	(7.3%)
h. Using electronic means in public procurement:			
		Number of replies	**% of total**
	enhances international co-operation	77	(18.6%)
	more or less the same	33	(8%)
	No opinion	10	(2.4%)
	makes international co-operation more difficult	1	(0.2%)
h. Using electronic means in public procurement:			
		Number of replies	**% of total**
	allows easier access to new markets	272	(65.9%)
	more or less the same	88	(21.3%)
	No opinion	31	(7.5%)
	limits access to new markets	22	(5.3%)
Section 4.2			
How advanced is your country in the move from paper based means to electronic means in the area of public procurement?			
		Number of replies	**% of total**
	Electronic means are starting to be used in public procurement	262	(63.4%)
	I don't know	57	(13.8%)
	Procedures are all based on paper based means	56	(13.6%)
	Electronic means are generally used in public procurement	35	(8.5%)
	Procedures are all based on electronic means	3	(0.7%)

In what way do you think that electronic means should be introduced in public procurement within the EU?			
		Number of replies	**% of total**
	Progressively	246	(59.6%)
	Immediately	128	(31%)
	No opinion	19	(4.6%)
	Maybe in 5 years..	12	(2.9%)
	Never	8	(1.9%)
In which sectors do you think that the use of electronic means in public procurement will create most opportunities?			
		Number of replies	**% of total**
	Services	250	(60.5%)
	Trade	186	(45%)
	Construction	103	(24.9%)
	Manufacturing	96	(23.2%)
	No opinion	74	(17.9%)
In your opinion, how will a generalised use of electronic means in public procurement impact on SME's?			
		Number of replies	**% of total**
	SME's will have more opportunities to penetrate new markets	206	(49.9%)
	SME's will have lower bidding costs	151	(36.6%)
	The increase of competition will squeeze SME's margins	129	(31.2%)
	SME's risk loosing long-term business relationships	116	(28.1%)
	SME's are outcompeted by larger companies	89	(21.5%)
	I don't know	67	(16.2%)
	None of the above	12	(2.9%)
	Other	10	(2.4%)

Electronic Public Procurement in EU Member States: Country Reviews

Extract of the Extended Impact Assessment Study:
Action Plan on electronic public procurement
Part 1 Baseline Analysis

December 2004

Produced by Rambøll Management

Study commissioned by the EUROPEAN COMMISSION

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1. Introduction

The Internal Market Strategy sets out the target by 2006, to carry out a significant part of public procurement on an electronic basis and by 2010, to ensure that electronic public procurement has been generalised to meet the Lisbon objectives. To meet the targets, the European Commission adopted an Action Plan on e-public procurement and conducted an Impact Assessment of the Action Plan. The Extended Impact Assessment study was carried out by RAMBOLL Management for the Internal Market Directorate-General.

As part of the report on the Extended Impact Assessment, the following sections contain the presentations of the current status of electronic public procurement in each of the EU Member States. Each section follows the same structure and includes descriptions of:

- The organizations and institutions responsible for implementing e-public procurement
- The national strategies and objectives for e-public procurement
- Legal framework
- Current usage of electronic means in public procurement
- Promotion of e-public procurement

The country reviews are based on two main sources of data:

- Desk research of official documents, strategy papers etc. in EU Member States, reports and analyses of e-public procurement and public procurement at country level and at European level and of the forthcoming European public procurement directives.
- Interviews and consultations with experts in Member States and representatives of governmental institutions responsible for or involved in public procurement and the development of e-public procurement in the country.

In this regard it should be noted that the reviews attempt to include use and experiences of e-public procurement systems at all levels of government in the Member States (national, regional, local), but does not uncover the vast total number of existing e-public procurement systems and primarily looks at the situation in a Member State seen from the perspective of the central level (due to the fact that the main data sources are key documents prepared at the national level and interviews with experts and representatives at the central, governmental level).

2. Austria

2.1 Organisations and Institutions

Responsible institution(s) for public procurement policy	Federal Chancellery (Bundeskanzleramt, www.bka.gv.at)
Responsible institution(s) for legal aspects	Federal Chancellery (Bundeskanzleramt, www.bka.gv.at) The "Länder" (regions, according to the Austrian Federal Constitution) regarding remedies procedures
Responsible institution(s) for technical solutions	Austrian Federal Economic Chamber (Wirtschaftskammer Österreich) has been dealing with the implementation of e-procurement in practice. It initiated the electronic public procurement service "er@t" which is now continued by the tender service company Auftrag.at ausschreibungsservice GmbH (www.auftrag.at). It contains all Austrian tenders as well as EU-wide tenders (TED). Austrian Standards Institute (www.on-norm.at) is currently working on a contractual standard for public e-procurement
Central procurement institution(s)	Federal Procurement Company Ltd. (Bundesbeschaffung GmbH, www.bbg.gv.at) organizes the field of procurement, excluding works at the national level. The Federal Procurement company is the purchasing service provider, mainly to the federal state administration and offers its services also to the regional governments and municipalities. Its responsibility lies in realizing a large number of enumerated services and supplies procurements for the federal state, whereas the regional and local levels do not have a central procurement facility and procurement is mostly done by the individual institutions.
Other important organisations	Chief Information Office (www.cio.gv.at) creates, coordinates and supports the implementation of e-government. ICT-Board is staffed by the federal chief information officer and one member of each Federal Ministry. It is the central department for consolidating the different IT-activities at the state level.
Type of coordination between different institutions	-

2.2 Strategy

Within the area of e-procurement there is no explicit strategy and no quantitative objectives due to lack of staff capacities within public procurement institutions to work with e-public procurement.

However, the overall federal Austrian e-government strategy is based on tight cooperation between all public stakeholders, which means the national level, regions, cities and municipalities as well as lobbies and major public institutions. Innovative e-government is therefore an important aim.

Another key element is to work for the adoption of uniform interfaces and for clear as well as open standards. This would avoid further adjustments between single parts of applications. Therefore, there is a need to define uniform standardized processes, data formats and specifications for all proceeding steps.

2.2.1 Statement of objectives

With the overall readjustment of the administration towards e-government, the Austrian government highly prioritizes its e-government efforts and with it e-public procurement.

There are no specific objectives on e-public procurement. However, the main objective hereby lies in the online provision of all federal administration services to the public by 2005.[1]

As public services are not excluded from the budgetary savings, the Austrian government is very motivated to extend its provision of e-government in order to realize financial savings of administrative costs that are expected to account to EUR 1.5 billion. Also, it emphasizes increasing efficiency. The government plans to create the most advanced European administration in the upcoming years.

Another overall objective is to implement the new procurement directives to facilitate e-public procurement and to create and transmit tenders electronically using electronic signature

2.2.2 Scope of strategy

Levels of government involved	Information unavailable
Legal framework	Information unavailable
Allocated resources	Information unavailable
Time frame	A year of fulfilment has yet to be set

2.2.3 Existing guidelines

A special regulation for electronic procurement especially concerning e-offers, has been issued ("Verordnung der Bundesregierung betreffend die Erstellung und Übermittlung von elektronischen Angeboten in Vergabeverfahren – E-Procurement-Verordnung 2004")

[1] http://www.cio.gv.at/egovernment/strategy/Teil_I.html

2.3 Legal framework

2.3.1 Legal status of the use of electronic means in Public Procurement

So far, the areas "rules applicable to communication", "storage of data" and "the use of specific procedures, e.g. e-auctions" are regulated in the legal framework.

Austria was the first country to implement the Directive on Electronic Signatures with its Electronic Signature Act in 1999 (Signaturgesetz BGBl I 1999/1). The same day that the EU directive (e-signatures Directive, 1999/93/EC) became effective, the Austrian Electronic Signature Act was implemented as well.

According to national standards for the electronic exchange of data there are two norms in the field of works: Ö-Norm B 2063 and Ö-Norm B 2064.

2.3.2 Implementation of the Directives

The government expects that the forthcoming EU public procurement directives will be implemented in 2005.

2.3.3 Status of tools

Public procurement portals	There is no official central electronic public procurement portal in Austria so far. At present the Bundeskanzleramt is planning a portal which should be implemented in approximately two years. So far, the most important portal on national level is the portal "@-AVA" of the national railways company "Österreichische Bundesbahnen", www.oebb.at
	www.lieferanzeiger.at is an online database by the official Viennese newspaper and a private enterprise
	The construction industry has its own database Ausschreibung (www.ausschreibung.at) which offers tenders online. It has open as well as public tenders and offers information on the bidders as well.
Electronic signature	An advanced electronic signature based on qualified certificated has been introduced. The use of electronic signature is mandatory when participating in public calls for competition
Electronic catalogues	Pilot schemes of the implementation of e-catalogues have been outlined
Electronic auctions	On an experimental level, implementation of an e-auction system has been started
Dynamic Purchasing Systems	Pilot schemes of the implementation of dynamic purchasing systems have been outlined
Framework agreements	Below the threshold values the use of framework agreements is possible

2.3.4 Reference to the relevant legal acts

Use of electronic means is regulated by:

- E-Government-Gesetz, BGBl. I 2004/10: The government passed the e-government law in Februrary 2004 which regulates the electronic communication with public bodies. Accompanying the e-government law, the government passed the administration signature regulation (Verwaltungssignaturverordnung (VerwSigVO), BGBl. II 2004/159). It contains the security, technical and organisational relevant requirements for the administration signature.
- Bundesvergabegesetz (BVergG), BGBl I 2002/ 99: The law on Federal tender creates the legal conditions for electronic tender. Since-July 2003, it is possible to make overall invitations to tender for the state, regions and municipalities. Accompanying the BVergG a special regulation for electronic procurement has been issued (see above 1.2.3.)
- Bundesbeschaffung GmbH (BB-GmbH-Gesetz) BGBl I 2002/99: The Federal Procurement Company was created with the passing of the Law in 2002. This concentrated the task of federal procurement into one body.

2.4 Current usage of electronic means in Public Procurement

So far, there is very little experience with electronic means in public procurement. Nevertheless, the Federal Procurement company is running pilot projects in each field of the procurement phase and hopes to implement them shortly for regular use.

An international study found out that Austria is the country that had the highest growth in full electronic case handling in its e-government activities and in the field of e-public procurement in 2003. (Full electronic case handling means that the publicly accessible website offers the possibility to completely treat the public service via the website, including decision and delivery. No other formal procedure is necessary for the applicant via "paperwork"). Compared to 2002 it increased by 48 per cent to now 68 per cent in terms of percentage of services that offer a complete electronic case handling. This is the largest progress inside the EU and gives Austria a good standing at second place of the EU-wide study[2].

2.4.1 Which phases of procurement are covered?

The status for automating procurement phases in Austria is as follows:

- Notification about tender (to some extent)
- Publication of tender (to some extent)
- Management of receipt/submission of tenders (to a low extent today)
- Evaluation of tenders (to a low extent today)
- Ordering (to a low extent today)
- Invoicing (to a low extent today).

[2] Source: Cap Gemini Ernst & Young

2.5 Raising awareness & Promotion of electronic means

Austria is expecting that ‘buyer profile’ will be implemented by the end of 2005. At present some of the regions together with the Austrian confederation of municipalities (Gemeindebund) and the confederation of cities (Städtebund) participate in an electronic public procurement project “ANKÖ” (Auftragsnehmerkataster Österreich, www.ankoe.at). This is a supplier database of suitable contractors who fulfil the legal requirements for public tenders.

The Austrian municipalities have implemented a joint venture internet portal for the communal level which also contains tender information (www.kommunalnet.at).

Impact assessments of the introduction of e-procurement are of no major concern to the government. At present it is discussed whether to do it within the next three years.

3. Belgium

3.1 Organisations and Institutions

Responsible institution(s) for public procurement policy	Federal Steering Group on Joint E-Procurement (major federal organisms are represented)
Responsible institution(s) for legal aspects	Public Procurement Commission (Commission des marches publics)
Responsible institution(s) for technical solutions	Federal ICT Department (FEDICT)[3]
Central procurement institution(s)	A central procurement body called "Services contrat-cadre multi-SPF" (Multi-ministry framework contract service) organises grouped purchases (IT material, cars, office stationery, and furniture). Its services are being used by some federal authorities and are accessible through the federal Intranet.
Other important organisations	-
Type of coordination between different institutions	Other Belgian non-federal public entities such as the federated (regional and community) entities, local and parastatal authorities will be able to file orders and use the same applications as federal authorities. It is now possible for all these entities to sub-scribe to JEPP (see below). The Walloon Region has developed its own e-public procurement strategy and portal[4]. The Flemish and Brussels regions have not started own initiatives as yet.

3.2 Strategy

Although no overall strategy for e-public procurement has been designed yet, a working group will, on the basis of the consultation of businesses mentioned below, draft a strategic paper (*"plan d'informatisation"*) which will contain a business case, a calendar for implementation and a budget for 2005.

The first step of the Belgian e-procurement has been realised on a "buy a little, test a little field a little" strategy. This activity covers the e-publication phase and has been placed under the lead of the Ministry of Defence.
A second step (e-payment or e-tendering) is under consideration and initial coordination on the feasibility is ongoing.

[3] Technically, e-public procurement projects are conducted by line ministries in cooperation with and under the coordination of the Federal ICT Service (SPF FEDICT). Due to its large spending budget, SPF Défense (Federal Ministry of Defence) has been particularly involved in the activities. SPF Justice (Federal Ministry of Justice) has also been involved since it runs the official journal (Moniteur belge – Bulletin des adjudications)

[4] http://avis.marchespublics.wallonie.be/

The e-public procurement initiatives are embedded in the overall government strategy of administrative simplification and reduction of administrative burden as well as the government's e-government strategy.
There are also regional and local initiatives like by the walloon region (http://avis.marchespublics.wallonie.be/)

3.2.1 *Statement of objectives*

The main objective is to lower the administrative burden for enterprises. In terms of timeframe, the authorities involved have issued the aim of publishing all federal calls for competition by end of 2004.

3.2.2 *Scope of strategy*

Levels of government involved	Central government (federal)
Legal framework	EC directives and guidelines complemented by or translated into royal decrees (AR)
Allocated resources	-
Time frame	2006

3.2.3 *Existing guidelines*

Information unavailable

3.3 Legal framework

3.3.1 *Legal status of the use of electronic means in Public Procurement*

A royal decree (*arrêté royal*) of 18 February 2004 authorises the use of electronic means in all or part of the public procurement procedure. It contains rules applicable to communication, regulates storage of data, but does not cover specific procedures such as e-auctions. A special law on electronic signatures has been passed in 1999. While Belgian authorities will probably not be authorised to use electronic auctions, they may employ Dynamic Purchasing Systems and e-catalogues.

3.3.2 *Implementation of the Directives*

All existing and future applications are compliant with the European public procurement directives and it is expected that they will be fully implemented after formal endorsement of the relevant EC directives/regulations.
Status of tools

Public procurement portals	www.jepp.be – Joint Electronic Public Procurement (JEPP) is the instrument used by the Belgian federal government for electronic publication of calls for tender. JEPP was launched on 13 November 2002 and is available to companies since 6 January 2003. At the beginning only the Federal Ministry of Defence published in JEPP, other federal organisms follow suit. The objective is that, at least, all federal calls for tender are published in JEPP by end of 2004. As a first major evolution of the system it is the intention to generalize used of the JEPP portal to non-federal entities by end of 2005. JEPP is today providing the following services : the objective is to assist buyers in drafting their calls for tender and submit them electronically to the official publication organisms[5] A pyramidal structure of websites (a joint national portal, a portal for each public entity, and a site for each adjudicating authority) make the calls for tender and the terms of reference available online. A search engine assist is finding and downloading these documents. General data such as information on purchasing ser-vices or technical notes can be published as well. Enterprises have the faculty to subscribe to the JEPP system, which automatically notifies them by e-mail on new opportunities which correspond to the chosen criteria. Businesses can also choose to be automatically informed on errata on documents they have downloaded. The adjudicating authorities can use JEPP to notify contract awards, invitations to tender as well as other documents such as minutes of clarification meetings. It is foreseen that the JEPP joint portal will eventually become the official publication site of the Bulletin des Adjudications which will unify all Belgian public procurement publications, offering the private sectors services equivalent to those described above. Public entities can affiliate to JEPP in three different ways: The JEPP application is working within the installations of the concerned public entity. The successful tenderer will take upon itself the delivery and installation of the necessary software and hardware. The successful tenderer plays the role of an Application Service Provider (host). In this case the public entity only needs a simple browser. The public entity only acquires a user licence. It will have to install JEPP on its own responsibility.

[5] Official Journal of the European Union, Bulletin des Adjudications - Belgian official journal

	In order to reduce costs, several public entities can group together in order to file a joint order and install the application in a single spot. A federal grouped managed by the Federal ICT Service (FEDICT) allows each federal service and each parastatal under its authority to benefit from JEPP services.
Electronic signature	The introduction of qualified electronic signatures has been delayed, but certifying organisms are being established now. The signature will be based on the electronic identity card, a pilot project now being rolled out to all of Belgium and supposed to cover all citizens by 2007.
Electronic catalogues	Electronic catalogues are being used by the above-mentioned central purchasing agency *Services contrat-cadre multi-SPF*
Electronic auctions	No electronic auctions activities have been tested so far
Dynamic Purchasing Systems	No Dynamic Purchasing Systems activities have been initiated so far
Framework agreements	Framework contracts are being used by the above-mentioned central purchasing agency *Services contrat-cadre multi-SPF*

3.3.3 Reference to the relevant legal acts

Information unavailable.

3.4 Current usage of electronic means in Public Procurement

3.4.1 Practical use of electronic means in Public Procurement

Phase I of the e-public procurement project which was running from 2001 to 2002 led to the establishment of a central e-public procurement portal (JEPP[6]) at federal level, which was established at the beginning of 2003. It is operational, but it is not used yet by all federal public entities and covers only the publication phase of the tendering process. The aim is that all federal entities use the portal by end of 2004.

Concepts for other applications have been drafted; however, they have not been developed yet. Since the Belgian federal e-public procurement activities have been re-launched in January 2004, an inter-ministerial working group is preparing Phase II of the e-public procurement activities, going well beyond publication and covering the actual tendering process. Prior to updating the e-public procurement plan and to drafting a timetable and a budget, the group has launched a request (trough the Belgian Official Journal) for information to enterprises and organisations in order to allow for a stocktaking of current applications on the market. This will feed into the terms of reference for a tender on the new application.

[6] http://www.jepp.be

Different applications have been conceived at federal level, however apart from JEPP, none of these applications is operational yet, and most of them are still in the concept phase:

- JEPP: electronic publication (see above)
- E-Bid: electronic bidding (see below)
- E-registered mail (see below)
- E-File (see below)
- E-Cat: electronic catalogues (see below)
- E-Payable: electronic invoicing and payment (see below)

Currently no systematic assessment of the impact of e-public procurement is carried out or planned in Belgium. Evaluation is not yet integral part of the Belgian administrative culture, but some kind of assessment mechanism will form part of the strategic paper developed by the e-public procurement working group to be delivered by September 2004. Monitoring will take place at least on an annual basis.

3.4.2 Which phases of procurement are covered?

In Belgium, only the publication phase has been automated so far, all other phases are expected to be automated within 5 years. However, the Belgian federal services have already developed concepts for several modular but integrated and communicating applications for e-public procurement, and have ensured the possibility to connect with back office IT legacy such as logistical systems and budgetary data bases. The user will therefore only perceive a single system. The interface of the synchronised system will be an Enterprise Application Integration (EAI) which will manage this interchange based on the accepted W3C XML standard. This EAI will be sufficiently flexible in order to connect budgetary information systems of different federal public services to the same e-public procurement application (e.g. the federal e-catalogue).

3.5 Raising awareness & Promotion of electronic means

The Belgian federal government has launched its first e-public procurement activities under its public administration modernisation programme in the 1999-2003 legislatures, between 2001 and 2002. The current state of affairs in e-public procurement can be viewed on the Belgian government's web portal[7]. This initiative was then put on hold for a year. In January 2004 it was re-launched and put on top of the agenda again, when a federal Council of Ministers meeting decided to accelerate the development of e-public procurement activities.

[7] http://www.belgium.be/eportal/application?origin=navigationBanner.jsp&event=bea.portal.framework.internal.refresh&pageid=indexPage&navId=4603

Forthcoming initiatives:

Apart from JEPP, several applications have been conceived, but they are still in the concept phase:

E-Bid
The objective of this project is to allow public entities to receive bids and expressions of interest, to give them a time stamping, to control the validity of the digital signature and to keep these documents in a well-secured and widely accessible system. This phase is still in the market-survey and information gathering phase.

The launch of E-Bid depends on certain prerequisites, such as the adaptation of Belgian legislation on public procurement. The draft royal decree on the use of electronic means in public procurement has been approved by the Public Procurement Committee in March 2003 and follows its way. The difficulties in this process are related to proper implementation of agreed interoperable procedures and the availability of proven technologies.

E-File
In order to accelerate the public procurement procedures and to simplify administrative work, it is envisaged to completely digitalise the files handled by purchasing services. These digital files would circulate between the various authorities involved (e.g. Inspecteur des Finances – tax inspector) by means of an electronic workflow system.

Particular attention will be paid to the availability of an integrated tool to manage the evolution of these files and to the integration of this software within the other applications (logistical, budgetary or public procurement). This project will be implemented when the above projects will have succeeded.

E-Cat
Open markets are only useful when information flows well. Buyers must know possibilities of ordering, the adjudicating authorities wish to follow the progress of their calls, and tenderers demand administrative simplification. A catalogue accessible online, which is reliable and taking into account of the common rights and requirements of everybody involved, is therefore an indispensable tool to support the new model of federal grouped purchases.

The following functions are envisaged:

- Loading and updating of the catalogue
- Consultation of the catalogue
- Approval workflow
- Control of budgetary availability
- Drafting and sending of a letter to the successful bidder
- Confirmation of receipt by the bidder
- Confirmation of the order to the buyer

The other usual functions for e-catalogues (delivery request, billing etc.) are part of the E-Payable project since they have no particularities compared with a closed contract.

The two main difficulties for e-catalogues are the non-existence of universally accepted standards and the administrative burden of loading and controlling the catalogue. The solution envisaged in Belgium is to impose for the offers a normalised inventory in one or several commercially available and widely supported standards (e.g Excel or DTD XML) and to apply to the chosen bidder's inventory an automatic conversion and loading tool.

The feasibility study for this project has been closed, and it is planned to launch the project shortly to support the new purchasing model of the federal administration.

E-Payable

The area of E-Payable starts with the request of receipt and ends with the payment of the invoice. It aims at:

- giving the administration a powerful management tool
- allowing electronic invoicing
- allowing electronic settlement (invoice control), remittance and payment
- improving the information of winning tenderers
- accelerating payments and thus meeting tenderers expectation for a work well done.

4. Republic of Cyprus

4.1 Organisations and Institutions

Responsible institution(s) for public procurement policy	The Public Procurement Directorate Treasury of the Republic of Cyprus
Responsible institution(s) for legal aspects	The Public Procurement Directorate Treasury of the Republic of Cyprus
Responsible institution(s) for technical solutions	The Public Procurement Directorate Treasury of the Republic of Cyprus
Central procurement institution(s)	Public Procurement Department is at the national level authorized to and responsible for the procurement of common used items for individual government and public institutions[8]
Other important organisations	-
Type of coordination between different institutions	Information unavailable

4.2 Strategy

The strategy for introducing and developing an electronic public procurement system for government and public institutions in The Republic of Cyprus is an integrated part of the Cyprus Government strategy on modernizing public procurement procedures.

4.2.1 Statement of objectives

An overall objective is to ensure that a large proportion of public procurements shall be awarded through electronic procurement procedures by 2008 In the endeavour of realizing this overall objective the Cyprus Government has set as objective to design an electronic system making government institutions capable for undertaking procurements by electronic means.

[8] Based on interview with Mr. Stelios Kountouris, Public Procurement Department, Treasury of the Republic of Cyprus

4.2.2 *Scope of strategy*

Levels of government involved	Central and local government are included
Legal framework	Information unavailable
Allocated resources	The government will spend EUR 100.000 on an assessment for the introductoion of electronic procurement and EUR 2.4 million over a period of three years with the purpose of implementing electronic procurement in all levels of state level authorities. The resources have been allocated to the following areas: • IT hardware: EUR 500.000 • IT software: EUR 1.700.000 • Training: EUR 200.000
Time frame	Implementation of an electronically based procurement system will take place during 2005 and is estimated to be fulfilled in year 2007

4.2.3 *Existing guidelines*

No specific guidelines guiding electronic public procurement have so far been issued.

4.3 Legal framework

4.3.1 *Legal status of the use of electronic means in Public Procurement*

Operational electronic procurement systems in Cyprus that are compliant with the requirements in the Directives do not presently exist. Specifically, the use of electronic means for communication in public procurement process is not regulated by national legislation.

4.3.2 *Implementation of the Directives*

The Cyprus Government estimates that the new EU public procurements directives will be implemented in January 2006.

It is considered by the government that all contracting authorities will have access to Electronic Auctions. Dynamic Purchasing Systems is expected to be used by central purchasing authorities for common used items.

4.3.3 *Status of tools*

Public procurement portal(s)	-
Electronic signature	Electronic signature does not exist but will be introduced
Electronic catalogues	Government authorities have no experience with e-catalogues
Electronic auctions	Government authorities have no experience with e-auctions
Dynamic Purchasing Systems	Government authorities have no experience with dynamic purchasing systems
Framework agreements	Framework agreements are not being used

4.3.4 *Reference to the relevant legal acts*

Information unavailable

4.4 Current usage of electronic means in Public Procurement

4.4.1 *Practical use of electronic means in Public Procurement*

Presently, no data on practical use of electronic means in Public Procurement are available. However, the Cyprus government is planning to do an assessment on the impact of introducing electronic public procurement.

The Cyprus Government expects that a system operating with an automated electronic public procurement cycle will be implemented within three years. The elements included in the procurement system are: notification about tender, publication of tender, management of receipt/submission of tender and evaluation of tender

4.4.2 *Which phases of procurement are covered?*

Information unavailable

4.5 Raising awareness & Promotion of electronic means

Since July 2003 the Treasury has worked with implementing suggestions from a study of e-commerce in Cyprus. The study concerned among other things assessment of the existing legal framework and suggestions for changes and recommendations on legal and institutional infrastructure for the promotion and operation of e-commerce in Cyprus.

With the purpose of stimulating the general use of electronic procurement in Cyprus the Government has made a proposal for the financing of a project through the Transition Facility Funds of the EU. This proposal includes objectives on implementing electronically procurement procedures for public institutions.

5. Czech Republic

5.1 Organisations and Institutions

Responsible institution(s) for public procurement policy	Ministry of Informatics (www.micr.cz) is in charge of policy formulation in the area of electronic public procurement
Responsible institution(s) for legal aspects	Ministry of Informatics (www.micr.cz) Ministry of Regional Development (www.mmr.cz)
Responsible institution(s) for technical solutions	-
Central procurement institution(s)	-
Other important organisations	-
Type of coordination between different institutions	At the national level, a central body is responsible for public procurement. Furthermore, selection of suppliers is a responsibility for the central procurement body. No individual public institutions are involved in selecting suppliers for procurements.

5.2 Strategy

Since 2002 the Government of the Czech Republic has had electronic public procurement as a political priority. At the moment the government considers the development of electronic public procurement as having a medium political priority.

Strategy and priorities on electronic public procurement are integrated in the overall strategy on the Information Society and E-government among others "State Information Policy (SIP)" (1999)

5.2.1 Statement of objectives

The overall objective is to promote an electronic marketplace used for repeated and bulk purchases in the whole field of the public administration.

The central body for the electronic market place is the Ministry of Informatics but just for office facilities including information and communication technology (under condition that it is lower than 2 millions czech crowns).[9]

[9] Based on information from David Kotris, Ministry of Informatics

5.2.2 *Scope of strategy*

Levels of government involved	The strategy on electronic public procurement includes the central government. Regional and local governments are at the moment not included in the strategy for electronic public procurement
Legal framework	-
Allocated resources	Information on amount of allocation is presently unavailable
Time frame	2002 – 2006

5.2.3 *Existing guidelines*

Special guidelines for electronic public procurement have been developed, but it is not obligatory to use them

5.3 Legal framework

5.3.1 *Legal status of the use of electronic means in Public Procurement*

National legislation regulates the use of electronic means in the public procurement process. The legislation concerns specific rules for the communication process related to the electronic procurement process.

5.3.2 *Implementation of the Directives*

The government has not yet formulated an exact time-schedule for implementing the new EU Directives on public procurement.

The government intends to introduce national standards for the electronic exchange of data in the electronic public procurement process.

According to the EU Directives the government expects that the use of both electronic actions and dynamic purchasing may be regulated by the use of Contracting Authorities. It is not expected that Contracting Authorities may publish tender-related information on a ‘buyer profile’.

5.3.3 *Status of tools*

Public procurement portals	A public electronic procurement portal for electronic procurements is expected to be functional within few years.
Electronic signature	An electronic signature has been introduced by the government. At the moment the signature is used to a medium degree. It is expected that the use of the signature will be obligatorily for actors participating in public calls for competition.
Electronic catalogues	Authorities have no experiences with systems for procurement involving catalogues
Electronic auctions	Authorities have no experiences with systems for procurement involving electronic auctions
Dynamic Purchasing Systems	Authorities have no experiences with systems for procurement involving electronic purchasing systems
Framework agreements	-

5.3.4 *Reference to the relevant legal acts*

5.4 Current usage of electronic means in Public Procurement

5.4.1 *Practical use of electronic means in Public Procurement*

There are no operational public procurement systems compliant with the requirements of the forthcoming European Public Procurement Directives in The Czech Republic presently.

The Czech Republic government has implemented an automated electronic public procurement system for procurements in the public sector. In this respect, procedures for notification about tender as well as publications about tender are integrated in the procurement cycle. This procurement phase has been automated to a large extent.

5.4.2 *Which phases of procurement are covered?*

Procedures for ordering and invoicing are integrated in the automated electronic procurement system. This procurement phase has been automated to some extent.

5.5 Raising awareness & Promotion of electronic means

Within the next three years the Government of the Czech Republic is planning to introduce regular assessments of the impacts expected to be related to the introduction of electronic public procurement.

6. Denmark

6.1 Organisations and Institutions

Responsible institution(s) for public procurement policy	The Danish Competition Authority (www.ks.dk) under the Danish Ministry of Economic and Business Affairs (www.oem.dk) Ministry of Finance (www.fm.dk)
Responsible institution(s) for legal aspects	The Danish Competition Authority (www.ks.dk) under the Danish Ministry of Economic and Business Affairs (www.oem.dk)
Responsible institution(s) for technical solutions	The Agency for Governmental Management (www.oes.dk) under the Danish Ministry of Finance (www.fm.dk)
Central procurement institution(s)	National Procurement Ltd. (SKI, www.ski.dk) was established to ensure the highest possible procurement efficiency in public organizations. It has more than 8500 public organization subscribers, around 250 suppliers on framework agreements many with distributors and totalling more than 1200 order addresses in Denmark. SKI runs the e-tendering systems ETHICS, Netindkøb and Netkatalog.
Other important organisations	The Ministry of Science, Technology and Innovation (www.vtu.dk) and Local Government Denmark (KL, www.kl.dk), an association of Danish municipalities.
Type of coordination between different institutions	Procurement is organized as a mixture of a centralized and decentralized approach: • The main principle is that each individual public authority is responsible for procurement (award of contract) and arrangement of framework contracts • Each institution e.g. ministry or agency can organize procurement in a centralized or decentralized way • There is a central public procurement body, SKI which arranges framework contracts, which can be used by all public authorities in Denmark. However, the individual public authority is free to arrange individual framework agreements. • The total procurement through national framework contracts (SKI) is approximately 0.5 billion Euro per year. Figures for regional and local level are unknown.

6.2 Strategy

The national strategy on e-public procurement is part of the existing strategy for e-commerce from 2002

- "IT for everybody" (Ministry of Science, Technology and Innovation, 2002)
- "Strategy for e-commerce 2002" (Ministry of Science, Technology and Innovation, 2002)

A new strategy from the government and the coalition of municipalities includes guidelines for digitizing towards 2006 has been published:

- "Strategy for digital administration 2004-06" (The Digital Taskforce, 2004)

6.2.1 Statement of objectives

There are no specific objectives on e-public procurement as a whole. However, some overall objectives for all of the initiatives and strategies have been defined:

- to save money by centralizing the procurement process
- to make the public sector a leading force in electronic procurement and commerce
- to realize un-utilized economic potential within electronic commerce in both the public and private sector

6.2.2 Scope of strategy

The strategy has four core elements:

- Electronic public procurement: Promoting electronic communication in the relation between the private suppliers and public buyers. The strategy calls for a far more efficient public sector in close partnership with private businesses. Various initiatives have been made already. For example the establishment of the Public Procurement Portal (DOIP) in the beginning of 2002 (see below).
- Safety and increased knowledge on e-commerce: Technical and legal insecurity are main barriers for making use of the full potential for e-commerce. Various projects have been put in effect (see later).
- Legal and technical e-commerce infrastructure: Coordinating the effort concerning standardization of data exchange for example in the area of e-payment.
- International dimensions within e-commerce: A major part of e-commerce is cross-border trading. This has lead to a focus on customs barriers, etc. Various projects have been initiated in relation to European initiatives.

In addition, the regional and local players have a high priority on electronic commerce and digital government/administration. A new strategy (February 2004) from the Danish government and the coalition of municipalities includes guidelines for digitizing towards 2006.

Levels of government involved	National, regional and local government are included in the strategies.
Legal framework	No information
Allocated resources	Public investment has been made to introduce e-public procurement, but there is no available specification of the amount spent (or allocated).
Time frame	Year of fulfilment has not been specified

6.2.3 Existing guidelines

As part of its modernization program for the public sector (from 2003), a guide on public procurement was published including guidelines on electronic procurement. It is required that all state institutions use electronic procurement whenever possible and of economic advantage to the state.

- “The digital supplier” (Ministry of Science, Technology and Innovation, 2002)[10]: Specific guidelines on electronic public procurement for the private supplier. Recommends DOIP.
- “The digital buyer” (Ministry of Science, Technology and Innovation, 2002): Specific guidelines on electronic public procurement for the private and public buyer at all levels of administration. Recommends DOIP but is open to the fact that the buyer might also use other systems.
- “Public procurement Guidelines” (Ministry of Finance, 2003)[11]: General guidelines on public procurement in the national administration. The target group is buyers in the public sector. No recommendations on solutions.

6.3 Legal framework

6.3.1 Legal status of the use of electronic means in Public Procurement

According to National Procurement Ltd., ETHICS fulfils the requirements of the forthcoming EU public procurement directives. DOIP shouldn’t conflict with the directives either, but it remains to be seen when further guidelines, etc. will be published.

Buyer profiles to publish tender-related information on a ‘buyer profile’ are being used in systems such as DOIP, KMD and RAKAT.

6.3.2 Implementation of the Directives

The forthcoming EU public procurement directives are expected to be implemented in the beginning of 2005. Public procurement is regulated in national legislation, and follows the EU public procurement directives. Use of electronic means in the public procurement process falls within the general rules for entering into an agreement.

With the new EU directives, the Danish government will provide that Contracting Authorities may use electronic auctions and dynamic purchasing systems. However, a restriction on electronic auctions is foreseen on works contracts.

[10] See www.videnskabsministeriet.dk

[11] See http://www.moderniseringsprogram.dk/visArtikel.asp?artikelID=5462

6.3.3 Status of tools

Public procurement portal(s)	www.doip.dk is provided by Gatetrade and was launched in 2002. The portal is a web-based system based on Oracle exchange software. The current version supports: e-auctions, e-catalogues and integration with back-office systems.[12]
	www.rakat.dk is run by the private company COMCARE. Functionalities are mainly e-purchasing (ordering and electronic invoice). Up to 40 regional and local authorities have selected RAKAT.
	KMD Webindkøb (www.kmd.dk) is run by the private company KMD. Functionalities are mainly e-purchasing (ordering and electronic invoice). Up to 70 regional and local authorities have selected KMD Webindkøb.
	ETHICS (http://ski.ethics.dk/), www.netkatalog and www.netindkøb is operated by National Procurement Ltd. Functionalities on these portals include e-tendering.
Electronic signature	An electronic signature has been introduced (www.digitalsignatur.dk), but not been used for electronic public procurement.
Electronic catalogues	Electronic catalogues are being used.
Electronic auctions	Electronic auctions are being used to a low extent.
Dynamic Purchasing Systems	There is no experience with dynamic purchasing systems.
Framework agreements	Framework agreements are used on national, regional and local level of government.

6.3.4 Reference to the relevant legal acts

Information unavailable since special rules do not exist.

6.4 Current usage of electronic means in Public Procurement

6.4.1 Practical use of electronic means in Public Procurement

Electronic public procurement is not being monitored specifically, but other data on e-commerce are available:

- 54% of state authorities use an e-procurement system.
- 63% of regional authorities use an e-procurement system.
- 34% of local authorities use an e-procurement system.

Source: ”*IT i praksis® 2003*”, RAMBOLL Management

Moreover, turnover at the Public Procurement portal (DOIP) increased to approximately 5 million Euro in 2003, which represented a significant increase.

[12] IDA ”State of the Art Report. Version 0.60” Brussels (2004)

6.4.2 Which phases of procurement are covered?

The following is the status for automating procurement phases in Denmark:

- Notification about tenders (to a large extent today)
- Publication of tenders (to some extent today, but a further increase the next three years is expected)
- Management of receipts/submission of tenders (to a low extent today, a further increase the next three years is expected)
- Evaluation of tenders (to a low extent today, a further increase the next three years is expected)
- Ordering (to some extent today, a further increase the next three years is expected)
- Invoicing (to a low extent today, a further increase the next three years is expected)

6.5 Raising awareness & Promotion of electronic means

Several initiatives have been started to provide free help-desk for public organizations, establish interest in e-commerce in smaller municipalities and counties through campaigns and workshops, set off pilot projects and collect best practice, and create a special award for best e-merchant every year.

Various projects have been put in effect in the area of safety and knowledge, including the e-brand ("E-handelsmærket"), to help small and medium-sized businesses start e-commerce.

Generally, international standards are followed, implemented and translated, e.g. EDI/EDIFACT and XML. Danish Standards Association has established a special working group on e-public procurement (Group 380 on e-business). Standard formats for all public contracting authorities on tendering or purchasing have not yet been issued.

The Danish Ministry of Science, Technology and Innovation has chosen XML as the core communication standard in the public sector (Source: Handlingsplan for e-handel 2002).

A XML project consisting of two main sub-projects was started:

- Standardizing public data. The main target to determine standards for exchanging data between public authorities and between public and private institutions/organizations.
- Establishment of the Infostructurebase has, as the key objective, to create a database with information on the content of public databases and how to access these data. (Source: http://www.oio.dk/XML). The main purpose and value is to support exchange and reuse of data related to public and private service delivery.

It is the vision that it will be possible from this website to look up all the above types of information from public and private organizations, and thus to collect information about what data are available and how data are accessed. An important part of the content will be standards approved by the Danish e-Government IT-architecture and XML committees. The formal status of content will be part of the metadata of the content. (Source: http://isb.oio.dk/info/)

In January Denmark became the first country to adopt an early version of OASIS Universal Business Language (UBL) as a standard for e-Commerce in the public sector. Following a 30-day public hearing, the Danish XML Committee decided to use UBL 0.7 to enable integration between systems controlled by state authorities and the Pub-lic Procurement Portal (DOIP). UBL provides an XML library of common business data components together with a set of standard business documents such as purchase orders and invoices that are assembled from the component library.

Another project on establishing standards for e-commerce in Denmark is translating the international UNSPEC coding initiated by the Ministry of Science, Technology and Innovation.

7. Estonia

7.1 Organisations and Institutions

There are only few core actors in the field of electronic public procurement in Estonia. It is mainly a State level initiative and it is in the phase of beginning.

Responsible institution(s) for public procurement policy	Ministry of Finance (www.fin.ee)
Responsible institution(s) for legal aspects	Ministry of Finance (www.fin.ee)
Responsible institution(s) for technical solutions	Ministry of Finance (www.fin.ee)
Central procurement institution(s)	-
Other important organisations	-
Type of coordination between different institutions	The selection of suppliers is the responsibility of the individual public institutions – there is no central procurement body which is responsible for framework agreements etc.

7.2 Strategy

Development of e-public procurement is a priority and a strategy on e-public procurement is expected to be formulated and introduced in 2005[13].

7.2.1 Statement of objectives

The process of drafting of new Public Procurement Act has been started to transpose the new directives. In the new Public Procurement Act the principles of e-public procurement will be provided[14]. By introducing e-public procurement achieving such objectives like additional transparency, lower transaction costs and more effective supervision are expected.

[13] Based on interview with Mr. Märt Kiisel, State Aid and Public Procurement Division, Financial Policy Department, Ministry of Finance

[14] Based on interview with Mr. Märt Kiisel, State Aid and Public Procurement Division, Financial Policy Department, Ministry of Finance

7.2.2 *Scope of strategy*

The content of the strategy has not been formulated.

Levels of government involved	Information unavailable
Legal framework	Information unavailable
Allocated resources	Information unavailable
Time frame	Information unavailable

7.2.3 *Existing guidelines*

Basic guidelines for using the electronic Public Procurement State Register have been issued. Guidelines are improved continually.

7.3 Legal framework

7.3.1 *Legal status of the use of electronic means in Public Procurement*

Public Procurement Act and Government Regulation establishing the Public procurement State Register cover rules for e-notifying via Public Procurement State Register. Rules for communication (e.g. e-mailing, using of e-signature) and moreover storage of data are regulated by other legal acts.

7.3.2 *Implementation of the Directives*

The new directives on public procurement are expected to be transposed by the end of 2005[15]. Issues concerning use of electronic means in e-public procurement are already regulated with different legal acts e.g. the electronic signature.

In course of transposing the principles of the new public procurement directives into national law no restrictions for using e-public procurement systems described in the directives have been planned (contracting authorities may use in the public procurement process all e-public procurement systems described in the directives - e-auctions, dynamic purchasing systems, e-catalogues etc.). In the area of standards no specific provisions have been planned.

[15] Based on interview with Mr. Märt Kiisel, State Aid and Public Procurement Division, Financial Policy Department, Ministry of Finance

7.3.3 *Status of tools*

Public procurement portal(s)	The Public Procurement State Register (established in 2001, http://register.rha.gov.ee/) is a simple e-public procurement portal, where all public procurement notices are published electronically. The register is using CPV standards in the catalogue, and all the information in the register is publicly accessible via internet free of charge.
Electronic signature	Electronic signature has been introduced, but is being used to low extent. However, it will be made mandatory to use the e-signature to participate in public calls for competition.
Electronic catalogues	No experience with e-catalogues.
Electronic auctions	No experience with e-auctions.
Dynamic Purchasing Systems	No experience with dynamic purchasing systems.
Framework agreements	Information unavailable.

7.3.4 *Reference to the relevant legal acts*

Public Procurement Act, Databases Act, Digital Signature Act, Administrative Procedure Act.

7.4 Current usage of electronic means in Public Procurement

7.4.1 *Practical use of electronic means in Public Procurement*

In 2003 the number of procurements advertised via Public Procurement State Register was 4,859 with the value declared of EUR 663 Million.

7.4.2 *Which phases of procurement are covered?*

Till now there is covered only publicising phase of the public procurement notices. Further impact of the use of electronic means in public procurement has not been assessed yet, but it is planned to measure impact of electronic public procurement in the future. The following aspects will be assessed: number of electronic transactions, types of purchases, transaction costs, effect on price and number of bidders.

7.5 Raising awareness & Promotion of electronic means

Information unavailable.

8. Finland

8.1 Organisations and Institutions

The main institutions in the field of electronic public procurement are:

- Ministry of Finance
- Ministry of Trade and Industry
- Ministry of Transport and Communication
- Hansel Ltd.

Responsible institution(s) for public procurement policy	Ministry of Finance[16]
Responsible institution(s) for legal aspects	Ministry of Trade and Industry[17]
Responsible institution(s) for technical solutions	Ministry of Finance Ministry of Trade and Industry
Central procurement institution(s)	Hansel Ltd.[18]
Other important organisations	The Finnish Association of Local Authorities Finnish Information Society Development Centre (Tieke)
Type of coordination between different institutions	Public Procurement in Finland is organized as a mixture of a centralized and decentralized approach: • There is a central public procurement body for state entities, Hansel Ltd (www.hansel.fi). Hansel is a government owned public procurement company. • It arranges framework contracts which can be used by all state authorities[19] in Finland. However, individual public authorities are free to arrange individual framework agreements (buying through or with help of Hansel is not compulsory). • Procurement (selection of suppliers) is a responsibility of the individual public authority.

[16] Ministry of Finance is responsible of policymaking with regard public procurement in general which includes eProcurement; the ministry is also responsible for development of electronic administration

[17] Ministry of Trade and Industry is responsible of legal framework for public procurement in general which includes also implementation of new electronic measures/procedures from new public procurement directives

[18] Hansel is a state owned central purchasing authority

[19] Municipalities are not allowed to buy direct (without competition) from Hansel. Hansel is central purchasing body only for state entities.

8.2 Strategy

The government procurement strategy was published in January 2004, and the government's "Information Society Programme" in April 2004.

Initiatives on e-public procurement are integrated in the government's overall strategy on public procurement. According to it utilization of information technology is one element when developing public procurement and its eProcurement policies and procedures. Pilot projects will be initiated to improve procurement procedures and utilization of information technology.

The municipalities are independent and the government procurement strategy does not apply to them. They do not have a common procurement or e-procurement strategy. However, municipalities are more and more cooperating when doing or developing procurement.

8.2.1 Statement of objectives

The overall objective is to take advantage of information technology to enhance effectiveness of public procurement

8.2.2 Scope of strategy

Levels of government involved	Procurement strategies cover only central government
Legal framework	Is at the moment under renewal. First draft of the new pp law shall be at the end of October 2004. Deadline for implementation is the end of 2005.
Allocated resources	Public resources are allocated but specific information concerning the size of the amount is unavailable
Time frame	-

8.2.3 Existing guidelines

A recommendation for electronic public procurement has been issued on electronic invoicing - another on electronic ordering is being prepared.

8.3 Legal framework

8.3.1 Legal status of the use of electronic means in Public Procurement

None of the current e-procurement systems are expected to fulfil the requirements of the forthcoming EU public procurement directives fully (e.g. systems for the entire procurement process and digital signature), but it remains to be seen when further guidelines etc. are published.

8.3.2 Implementation of the Directives

The forthcoming EU public procurement directives are expected to be implemented in 2005. Public procurement is regulated in national legislation, which follows the EU public procurement directives. Use of electronic means in the public procurement process falls within the general rules for entering into an agreement.

8.3.3 *Status of tools*

Public procurement portals[20]	www.ktm.fi/julma Responsible authority is Ministry of Trade and Industry and the portal is run by the private undertaking Edita Oy. Functionality includes information and notices concerning public procurement below the threshold value. www.credita.fi The portal contains information concerning publication of notices especially above the threshold value. It also provides information about public procurement. The portal is run by the private undertaking Edita Oy.
Electronic catalogues	Electronic catalogues are used when purchasing goods[21]
Electronic auctions	E-auctions are not being used
Electronic signature	An official electronic signature has been introduced in Finland, but so far it has not been used for electronic public procurement[22]
Dynamic Purchasing Systems	Dynamic purchasing systems are not being used
Framework agreements	The total procurement through national framework contracts is not known precisely, but it is estimated to be 5% or below.

8.3.4 *Reference to the relevant legal acts*

The Act on Public Procurement; the Act on Electronic Signatures.

8.4 Current usage of electronic means in Public Procurement

8.4.1 *Practical use of electronic means in Public Procurement*

The annual value of public procurement in Finland is about EUR 19 billion which is about 15% of the GDP. Electronic public procurement is not being monitored.

The most significant advantages from the introduction of electronic public procurement for public authorities are expected to be:

- Speeding up of procurement procedures
- Lower transaction costs
- Better procurement statistics and enhanced budgetary control.

[20] Hansel Ltd (www.hansel.fi) once operated a complete system for electronic tendering and procurement but due to lack of turnover, the system is no longer in operation.
[21] Catalogues are usually suppliers own
[22] Information is available at the internet (Population Register Centre): www.vaestorekisterikeskus.fi/vrk/home.nsf/pages/index_eng

Initiatives which are primarily focused on information and tools about electronic public procurement include:

- www.kilpanet.fi: Provides information and models concerning public procurement in the field of services. It is run by private local authorities owned undertaking Efectia Oy.
- www.hymonet.com: This includes information and models concerning environment issues in connection to public procurement. It is run by private local authorities owned undertaking Efectia Oy.
- www.kunnat.net: Provides much information on public procurement legal issues. It is the Finnish local authority portal.

8.4.2 Which phases of procurement are covered?

The status for automating procurement phases in the Finland is as follows:

- Notification about tenders (to a large extent today)
- Publication of tenders (to some extent today, but a further increase the next three years is expected)
- Management of receipt/submission of tenders (to some extent today, but a further increase the next three years is expected)
- Evaluation of tenders (to a low extent today, but a further increase the next three years is expected)
- Ordering (to a low extent today, but a further increase the next three years is expected)
- Invoicing (to a low extent, but a further increase the next three years is expected).

Notification is the phase of public procurement which has been automated the most via the Credita and Julma portals, whereas the more advanced stages of electronic procurement are only automated to a low extent. Most frequently used electronic tools are e-mail and internet based ordering.

8.5 Raising awareness & Promotion of electronic means

Electronic means will be promoted when implementing public procurement strategy for central government and Information Society Programme. A recommendation for electronic invoice has and will be promoted.

New projects have started also in municipal sector. It is worth to mention i.e. Juhk e–project, which has started on spring together with about 10 municipals and Finnish Association of Local Authorities, private enterprises etc stakeholders. The aim is to promote e-procurement’s implementation among municipals starting from guide lining e-invoicing, e-ordering partly even to tendering procedures. Target is not however to develop any new purchasing system.

9. France

9.1 Organisations and Institutions

The responsibility for the e-public procurement activities in France are shared between mainly two government bodies:

- the Agency for the Development of Electronic Administration (*Agence pour le Développement de l'Administration Électronique – ADAE*)[23], under the direct authority of the Prime Minister, which has drafted the electronic administration strategy and action plan (ADELE); and
- the Ministry for Economy, Finance and Industry.

Responsible institution(s) for public procurement policy	Ministry for Economy, Finance and Industry
Responsible institution(s) for legal aspects	Ministry for Economy, Finance and Industry, Legal Department
Responsible institution(s) for technical solutions	Agency for the Development of Electronic Administration
Central procurement institution(s)	Union de Groupements d'Achats Publics (UGAP) [24] which local, regional and national authorities can make use of, will allow bidders to submit tenders electronically through State solution.
Other important organisations	Ministry of Defence
Type of coordination between different institutions	The selection of suppliers, however, remains within the responsibility of individual public institutions

Within the ministry for Economy, Finance and Industry, a Mission for the Digital Economy (*Mission pour l'Economie Numérique*) (www.men.minefi.fr) has been created for five years to play a concertation role between the public and the private sector. It contributes to inter-ministerial initiatives to adapt the legal framework to the digital economy and prepares the French position in multilateral negotiations and at EU level. It is divided into working groups, of which group no. 7 "Dematerialisation of public procurement and of settlement of public expenditure"[25] works on these issues. Legal affairs are dealt with by the legal department of the ministry (*Direction des Affaires Juridiques*), while the development of e-public procurement solutions are coordinated between ADAE and the ministries (Defense will joint later as they have their own solution).

[23] See http://www.adae.gouv.fr

[24] See http://www.ugap.fr/

[25] *Dématérialisation des achats publics et de l'exécution de la dépense publique*; http://www.men.minefi.gouv.fr/webmen/groupetravail/g7.html

9.2 Strategy

E-public procurement enjoys medium priority in France as it is not promoted by a minister, but is the fruit of cooperation between several ministries[26]. The e-public procurement strategy of the French government is therefore twofold: It forms part of the e-government and information society initiatives made public at large scale, but is also part of efforts to generally modernise the national public procurement system. There is no separate strategy for e-public procurement.

- The governmental modernisation plan “Administration électronique 2004/2007” (ADELE), launched in February 2004 by the Prime Minister. The project is one of 140 measures which are part of the plan.

- Reforms of the Public Procurement Act (Code des marchés publics) in 2001 and 2004. This law includes the objective that all public entities have to accept electronic bids by 1 January 2005, whereas enterprises are free to use electronic means or paper. No obligation for businesses is introduced by the reforms.

9.2.1 Statement of objectives

Main objective is to publish all calls for tenders electronically by 2010. This objective is part of the project “100% Dématerialisation”, which covers the whole procurement chain including control, payment and archiving, is anticipated for 2007-2010).

Besides the development of electronic tools, the other objectives of the project are reengineering of process and training in order to professionalize the buyer function.

Another objective is introduction of e-tendering by 2005.

9.2.2 Scope of strategy

Levels of government involved	Central, regional and local government are included in the strategies for procurement. Also public enterprises are covered by the initiatives
Legal framework	Public Procurement Code
Allocated resources	Approximately EUR 2 million has been allocated for the introduction of operational electronic procurement at national level The Ministry of Defence has allocated approximately EUR 4 million over the last 3 – 4 years In 2005, EUR 1 million is earmarked for using on an inter-ministerial platform
Time frame	2004-2005 2005-2008

[26] In France called ‘dematerialisation of public procurement’

9.2.3 Existing guidelines

A guide for dematerialization will be published in September, 2004. It will be based on legal framework developed and interpreted through working group managed by Ministry of Economy and ADAE.

9.3 Legal framework

9.3.1 Legal status of the use of electronic means in Public Procurement

The use of electronic means for communication in the public procurement process are regulated by French national legislation, covering rules applicable to communication, storage of data and use of specific procedures. This was already done with the reform of the *Code des marchés publics* in 2001, however, the provisions have been formulated in a very open way, in order not to freeze the *status quo* and thereby prevent technological development and innovation.

9.3.2 Implementation of the Directives

The systems developed in France are very nearly compliant with the requirements of the forthcoming EU public procurement directives. While part of the directives requirements have already been taken into account for the 2001 and 2004 reform of the *Code des marchés publics*, it is expected that the directives will be fully implemented by autumn 2005. Electronic auctions are allowed in France and used, among others, by the Ministry of Defence. Dynamic Purchasing Systems are not allowed yet, but the directives' provisions will be implemented, as well as the ones on the "buyer profile". No national standards on electronic exchange of data will be introduced in order not to prevent evolution, and it is expected that standards will be developed at EU level.

9.3.3 Status of tools

Apart for State administration, there is no central e-public procurement portal for all national (and sub-national) public entities in France, so that local and regional authorities have launched their own activities, sometimes by joining forces where appropriate. They will nevertheless be able to access to State administration platform trough UGAP, customer of the same market.

Public procurement portals	The French Ministry of Defence has developed an electronic market place, called *Service public Défense*, consisting of two e-public procurement portals. • One of these portals relates to the purchase of current supplies and support material (www.achats.defense.gouv.fr) • whereas the other is specifically dedicated to the purchase of armament, ammunition and war material (IXARM) (http://www.ixarm.com) All prior information, tender and award notices are published on these websites which also contain a search engine as well as an alert system for businesses who register on the website. Also procurement contracts that do not have to be published feature on the ministry's portal, and terms of reference can be consulted online. There is a possibility for enterprises to present their services and products as well as available information on conclusion and settlement of public procurement contracts. Finally, companies can submit their expressions of interest and bids electronically, through a secured tendering system with time-stamping of the digital signature. The investment costs of the ministry's portals amount to EUR 4 million for the last three or four years.
	The French Ministry of Equipment, Transport, Housing, Tourism and Maritime Affairs offers it own public procurement portal, called "*Serveur d'appels d'offres et de marchés publics*" (SAOMAP) (http://saomap.application.equipement.gouv.fr/saomap_public). Businesses can search tender all over the French territory, consult tender material and communicate it to subcontractors. Twelve services of the ministry are already using the service which allows them to publish calls for tender, tender material and other information. It is expected that all service will do so before end of 2004
	All ministries are currently working, under the aegis of the Ministry of Economy, Finance and Industry and the Agency for the Development of Electronic Administration, on an inter-ministerial platform for e-public procurement. It will, for legal reasons, not be open to regional or local public entities except through Union de Groupements d'Achats Publics, but only for national ministries. The portal will be set up in third quarter 2004 and should be operational by 1st quarter 2005. The budget for this project is about EUR 1 million
	Several General Councils (at department level), for instance *Conseil general de la Moselle*[27], or Conseil général de l'Oise have established their own e-public procurement portals. An accompanying ministerial project for regional and local entities as well as public enterprises is designed to favour exchange of best practice between public authorities. The *Observatoire de l'Administration Electronique* identifies best practices in the field of e-public procurement among others and awards the Prix Hourtin to outstanding portals
Electronic signature	About 16 certificate families from the private sector have been referenced by the Ministry of Economy, Finance and Industry for use in general electronic procedures, among which e public procurement.

[27] http://marches-publics57.com

Electronic catalogues	The Ministry of Defence also has experience with electronic catalogues
Electronic auctions	The Ministry of Defence and certain local authorities have experience with using e-auctions.
Dynamic Purchasing Systems	Dynamic purchasing systems have not been used
Framework agreements	No framework contracts are being used for the time being since they are not permitted by law.

9.3.4 *Reference to the relevant legal acts*

Public procurement code

9.4 Current usage of electronic means in Public Procurement

9.4.1 *Practical use of electronic means in Public Procurement*

So far, only the Ministry of Defence has introduced e-public procurement on a wide scale, assessing in particular, the number of electronic transactions, the speeding-up of procurement procedures, transaction costs and e-procurement's share of the total public procurement volume. The reduction of costs for companies should also be included in the assessment. The Ministry of Equipment has also obtained interesting results reducing publishing costs.

No assessment is as yet planned for the inter-ministerial platform, but there will probably be a regular monitoring of activities. France expects that the introduction of e-public procurement will significantly lower transaction costs and prices through increased competition and reduction of the cost of public procurement for administration and businesses etc.

9.4.2 *Which phases of procurement are covered?*

So far, only the first phases in the public procurement cycle, i.e. notification and publication of tender, have been automated, at least to some extent. Pilot projects have been launched for dematerialisation of ordering and invoicing, and the management of receipt as well as the evaluation of tender is expected to be done automatically within 3 years.

9.5 Raising awareness & Promotion of electronic means

There are a number of initiatives at the state and local level as well as in the private sector to increase awareness of the benefits of e-public procurement.

10. Germany

10.1 Organisations and Institutions

Responsible institution(s) for public procurement policy	The Ministry of Economics and Labour (www.bmwa.de) and the Ministry of the Interior (www.bmi.de) are the overall responsible authorities in the area of e-procurement.
Responsible institution(s) for legal aspects	Ministry of Economics and Labour (www.bmwa.de)
Responsible institution(s) for technical solutions	Ministry of the Interior (www.bmi.de)
Central procurement institution(s)	Procurement Office of the Federal Ministry of the Interior (Beschaffungsamt, www.bescha.bund.de) manages purchases for 26 different federal authorities, foundations and research institutions. It runs a pilot project called “Öffentlicher Eink@uf Online” (Public Purch@sing Online). The project sets out a path for electronic procurement. From February 1st it is possible to transfer the offers electronically (www.evergabe-online.de). Federal Office of Defense Technology and Procurement (Bundesamt für Wehrtechnik und Beschaffung) of the Federal Ministry of Defense (www.bmvg.de). Federal Customs Administration (Beschaffungsamt der Bundeszollverwaltung) of the Federal Ministry of Finance (www.bundesfinanzministerium.de)
Other important organisations	Several private providers offer either software products which support electronic procurement, e.g.: • www.beschaffen.de: Beschaffen.de is provided by the company Wegweiser and offers a platform for purchasers of the public authorities to find e-procurement solutions according to their needs. • www.ai-ag.de: Administration Intelligence AG (AI-AG) offers electronic pro-curement solutions for a public procurement law-conforming handling of public tenderings. • www.bos-bremen.de: bremen online services (bos) GmbH & Co. KG develop and implement eGovernment solutions for the German Federal Government, the federal states and local governments. ...or online databases for public as well as private purchasers, e.g. • www.vergabereport.de: offers two online databases with calls for tender. It serves also as an information portal. ...or both supporting products and online databases, e.g.: • www.cosinex.de: Cosinex.de has been the first private provider for electronic public procurement. It offers the public authorities support for the realization of a strategic management of procurement.

	• www.subreport.de: Subreport.de is the biggest platform for e-procurement. About 98% of all public tenders can be found. Subreport.de is the first Internet platform for a complete digital awarding of contract. A registration is required.
Type of coordination between different institutions	It is the responsibility of each of the 16 Länder to implement e-procurement strategies on the basis of a close co-ordination between the state, the other Länder and the Kommunen (local governments). So far each of the Länder are developing or already have developed and implemented a strategy (see www.deutschland-online.de/Links/links.htm). Some of the most advanced Länder as regards e-government strategies are Nordrhein-Westfalen, Baden-Württemberg, Bavaria, Lower Saxony and Bremen. Hamburg was the first to implement its e-procurement strategy[28]

10.2 Strategy

Electronic public procurement is highly prioritized in Germany. E-public procurement initiatives are part of an overall strategy to develop the information society and create e-government.

In September 2000 the initiative "BundOnline 2005" that also include e-procurement was started by Federal Chancellor Gerhard Schröder. More than 100 individual authorities and departments of the Federal Administration are taking part in the project.

To overcome the heterogeneous IT-landscape of Germany, the relevant players have agreed on a joint e-government strategy in June 2003 ("Deutschland-Online"). The aim of the joint "Deutschland-Online" e-government strategy is to develop integrated electronic services on all administrative levels as well as to create the standards and infrastructures which are necessary. In addition to this strategy, the government in autumn 2003 decided on the program of action "Information Society Germany 2006". The objective of this procurement-focused program is to have a Federal Government's contract-awarding procedure exclusively via a secure e-tendering system in line with legal requirements by the end of 2005.

10.2.1 Statement of objectives

Overall objectives are:

- Achieve greater efficiency and transparency, and cut costs in the tendering cycle
- Develop integrated electronic services on all administrative levels and create standards and infrastructures
- Secure e-tendering system by the end of 2005
- Public sector strives to be the pioneer in the field of e-business in Germany

[28] See http://fhh.hamburg.de/stadt/Aktuell/behoerden/finanzbehoerde/ausschreibungen/e-vergabe/start.html

10.2.2 *Scope of strategy*

Levels of government involved	The strategies include central government
Legal framework	-
Allocated resources	At state level, the public authorities allocate approximately EUR 4.5 million per year to introduce operational electronic procurement
Time frame	-

10.2.3 *Existing guidelines*

Public procurement portals	The official online database for public tendering on the Federal level is titled Bundesausschreibungsblatt online, www.bundesausschreibungsblatt.de
	"E-Vergabe", www.evergabe-online.de has been developed by the Ministry of Economics and Labour (BMWA) together with the Ministry of the Interior (BMI). E-vergabe is an online database with call for tenders. From February 1st it is possible to transfer the offers electronically.
	Several Länder own an online database with call for tenders, e.g. • Nordrhein-Westfalen (www.vergabe.nrw.de), • Hessen (www.had.de), • Brandenburg together with Berlin (www.ausschreibungen-brandenburg.de), • Hamburg (www.ausschreibungen.hamburg.de), • Bayern (www.bayerischer-staatsanzeiger.de), • Sachsen-Anhalt (www.ausschreibungsanzeiger.com), • Thüringen (www.ausschreibungsanzeiger-thueringen.de)
	Another leading electronic public procurement platform for public and private calls for tenders is www.ausschreibungs-abc.de
Electronic signature	Advanced qualified electronic signature has been introduced
Electronic catalogues	There exists an electronic catalogue on behalf of the Federal Ministry of the Interior and its Procurement Office, which is called "Öffentlicher Eink@auf Online".
Electronic auctions	E-auctions are not a legal possibility
Dynamic Purchasing Systems	Dynamic purchasing systems are not a legal possibility
Framework agreements	-

The Ministry of Economics and Labor has published a guide on electronic public procurement (www.bmwa.bund.de/Redaktion/Inhalte/Downloads/br-elektronische-vergabe-von-auftraegen,property=pdf.pdf). It is required that all state institutions use electronic procurement whenever possible and of economic advantage to the state. In December 2003 the Federal Government has taken a cabinet decision initiating an optimization of public procurement with the means of new information technology. The cabinet decision aims to realize a thorough digitalization of the procurement process and to establish a virtual marketplace (Kaufhaus des Bundes) on the basis of framework agreements.

10.3 Legal framework

10.3.1 Legal status of the use of electronic means in Public Procurement

Multiple legal acts regulated e-public procurement at present time (see below).

10.3.2 Implementation of the Directives

The forthcoming EU public procurement directives are expected to be implemented by the end of 2005. The storage of data is regulated by national legislation. With the new EU directives, Germany expects the government to provide that Contracting Authorities may use electronic auctions (with the possible exception of works contracts) and dynamic purchasing systems. Buyer profiles to publish tender-related information are being used by Contracting Authorities in Germany.

The use of an electronic signature will be made mandatory to participate in public calls for competition

10.3.3 Status of tools

Public procurement portals	The official online database for public tendering on the Federal level is titled Bundesausschreibungsblatt online, www.bundesausschreibungsblatt.de
	"E-Vergabe", www.evergabe-online.de has been developed by the Ministry of Economics and Labour (BMWA) together with the Ministry of the Interior (BMI). E-vergabe is an online database with call for tenders. From February 1st it is possible to transfer the offers electronically.
	Several Länder own an online database with call for tenders, e.g. • Nordrhein-Westfalen (www.vergabe.nrw.de), • Hessen (www.had.de), • Brandenburg together with Berlin (www.ausschreibungen-brandenburg.de), • Hamburg (www.ausschreibungen.hamburg.de), • Bayern (www.bayerischer-staatsanzeiger.de), • Sachsen-Anhalt (www.ausschreibungsanzeiger.com), • Thüringen (www.ausschreibungsanzeiger-thueringen.de)

	Another leading electronic public procurement platform for public and private calls for tenders is www.ausschreibungs-abc.de
Electronic signature	Advanced qualified electronic signature has been introduced and is presently used to some extent.
Electronic catalogues	There exists an electronic catalogue on behalf of the Federal Ministry of the Interior and its Procurement Office, which is called “Öffentlicher Eink@auf Online”.
Electronic auctions	E-auctions are not a legal possibility
Dynamic Purchasing Systems	Dynamic purchasing systems are not a legal possibility
Framework agreements	-

10.3.4 *Reference to the relevant legal acts*

At present the legal framework for e-public procurement is among other things based on:

- „Gesetz über Rahmenbedingungen für elektronische Signaturen (Signaturgesetz – SigG)“ of 16. May 2001 (BGBl. I S. 876)
- Signaturverordnung vom 16. November 2001 (BGBl. I S. 3074)
- Verordnung über die Vergabe öffentlicher Aufträge in der Fassung vom 11.Februar 2003 (BGBL I, S.169) – im Besonderen § 15 VgV.
- Anpassung der Verdingungsordnungen (VOL/A Abschnitt 1 und VOB/A[29]) (in order to implement directive2001/78/EC)
- "Gesetz zur Anpassung der Formvorschriften des Privatrechts und anderer Vorschriften an den modernen Rechtsgeschäftsverkehr" – Formvorschriften-Anpassungsgesetz. Implementation 1. August 2001 (BGBL I Nr. 35 vom 18. Juli 2001)

10.4 Current usage of electronic means in Public Procurement

10.4.1 *Practical use of electronic means in Public Procurement*

Every year, the approximately 600 awarding offices of the Federal Government buy products and services worth around EUR 63 billion.
In January 2004, nine federal authorities, as well as state and communal authorities, used eTendering.

Monitoring of the up-take and progress of e-public procurement is carried out on an annual basis by a questionnaire to a Working Committee of all government departments. The following aspects are watched: Transaction costs and the effect on prices.

[29] See http://www.bmwi.de/Navigation/Wirtschaft/Wirtschaftspolitik/Oeffentliche_20Auftr_C3_A4ge/vergaberecht-vorschriften.html

The resources allocated by public authorities to introducing operational public procurement are also monitored at national level. Other aspects which should be considered in the future are: Number of electronic transaction, e-public procurement's share of total public procurement volume, types of purchases, speeding up of procurement procedures, SME participation and number of bidders.

10.4.2 Which phases of procurement are covered?

The status for automating procurement phases in Germany is as follows:

- Notification about tender (to a large extent)
- Publication of tender (to a large extent)
- Management of receipt/submission of tenders (to a large extent)
- Evaluation of tenders (not automated, but expected to be within two years)
- Ordering (to a large extent)
- Invoicing (to a large extent).

10.5 Raising awareness & Promotion of electronic means

At state level the public authorities allocate approximately EUR 4.5 mio per year to introduce operational electronic procurement. These resources are e.g. used for the development and implementation of software and the support of research dealing with e-public procurement.

Within 2004 it is planned that all electronic public tenders on Federal level will be published on the central portal of the State, www.bund.de

In Germany special advice centers (Auftragsberatungsstellen) impart practical experi-ence and information to enterprises that plan to tender for public contracts. www.abst.de lists every advice centre of each of the Länder. Some local governments have initiated portals, see e.g. Düsseldorf (www.duesseldorf.de/ausschreibung/index.shtml)

The German Association of Towns and Municipalities (www.dstgb.de) decided on electronic procurement regarding trade in co-operation with the Central Organization of German Trade (www.handwerk.de/dstgb). Together with the German Telecom the DSTGB also started an initiative with the goal to identify the chances of small and medium-sized towns regarding their potential to modernize, rationalize and initiate new projects[30].

The Federal Government, the Länder and the municipalities have developed a common architecture for e-government. The e-government standard is called SAGA (Standards and Architectures for e-Government Applications[31]). SAGA defines a series of uniform standards which must be used for the implementation of e-government applications. Furthermore SAGA is included in the "Interoperability Framework" of the IDA-program of the European Union. OSCI (Online-Services-Computer-Interface) as well as ISIS-MTT (Industrial Signature Interoperability and Mailtrust Specification) are two obligatory standards in the Federal Administration which are based on SAGA. Communication standards are XML, HTML and PDF.

[30] See www.dstgb.de/index_inhalt/homepage/index.html

[31] See http://www.kbst.bund.de/Anlage304417/Saga_2_0_en_final.pdf

Another existing e-procurement tool is the Vergabe@Governikus[32]. This is a software solution for the control of the communication and handling of public tenders via Internet. It is possible to publish digital announcements, provide data for placing of contracts by tender (Verdingungsunterlagen) and accept electronic offers.

Vergabe@Work is an electronic management solution for tendering. The control system is form-based and supports the handling of the entire internal process of contract awarding digitally and law-conforming. Vergabe@Work has been specially designed for the application within contracting authorities (www.ai-ag.de). Vergabe@Work is being used by the Ministry of Finance and the Ministry of Defence.

[32] See www.bos-bremen.de/produkte/kap2_6.html

11. Greece[33]

11.1 Organisations and Institutions

Responsible institution(s) for public procurement policy	General Secretariat of Commerce, Ministry of Development
Responsible institution(s) for legal aspects	General Secretariat of Commerce, Ministry of Development
Responsible institution(s) for technical solutions	General Secretariat of Commerce, Ministry of Development
Central procurement institution(s)	General Secretariat of Commerce, Ministry of Development
Other important organisations	-
Type of coordination between different institutions	The selection of suppliers is typically the responsibility of a central procurement body. In some cases the Ministry of Development gives authorization to other ministries and bodies of public sector, to run their own auction. In these cases they are responsible for the selection of suppliers.

11.2 Strategy

In general the introduction of electronic public procurement has a high priority in Greece.

The strategy for the introduction of operational electronic public procurement is an integrated part of the overall strategy on e-government and the development of the information society.

The focus of the strategy is to obtain improved IT skills in public and private sector, speeding up procurement procedures, and to secure lower prices on public procures.

11.2.1 Statement of objectives

The overall objective is to introduce an operational electronic public procurement system in Greece by the end of 2007.

It is planned that about 30% of goods which are awarded from the Ministry of development will be awarded by electronic means by the end of 2008.

[33] This section is based entirely on information from Mr. Spatharis, Ministry of Development

11.2.2 Scope of strategy

Levels of government involved	Central government
Legal framework	Information unavailable
Allocated resources	Information unavailable
Time frame	2004 – 2010[34]

11.2.3 Existing guidelines

No special guidelines for e-public procurement have been issued.

11.3 Legal framework

11.3.1 Legal status of the use of electronic means in Public Procurement

The use of electronic means for communication in the public procurement process will be regulated by national legislation. The following aspects will be regulated: rules applicable to communication, storage of data, use of specific procedures e.g. e-auctions; dynamic purchasing system; open, restricted and negotiated procedures; notification about tender; publication of tender; management of receipt/submission of tender; and ordering.

Operational electronic procurement system does not exist in the public sector in Greece yet. However, a system in compliance with the requirement of the forthcoming directives will be introduced shortly.

11.3.2 Implementation of the Directives

The directives are expected to be implemented in 2006

[34] Estimated number of years for full migration in public procurement to electronic means is 6 years (Source: Based on information from Mr. Spatharis, Ministry of Development)

11.3.3 Status of tools

Public procurement portals	www.gge.gr is the public procurement portal (only in Greek) The portal has the following functionalities: Publication of legal framework of public procurement, guidelines on public procurement, central government annual programme of supplies, calls for tendering on monthly basis, contracts on monthly basis.
Electronic signature	Electronic signature has been introduced and is being used to a low extent. However, the use of electronic signature will be made mandatory to participate in public calls for competition.
Electronic catalogues	There is no experience with electronic catalogues
Electronic auctions	There is no experience with electronic auctions
Dynamic Purchasing Systems	There is no experience with dynamic purchasing systems
Framework agreements	Framework agreements are not being used

11.3.4 Reference to the relevant legal acts

Information unavailable

11.4 Current usage of electronic means in Public Procurement

Currently, the uptake on electronic public procurement is not being monitored on a regularly basis in Greece.

Hence, there is no information available on the existing usage of electronic means in public procurement.

11.4.1 Which phases of procurement are covered?

Information unavailable

11.5 Raising awareness & Promotion of electronic means

Information unavailable

12. Hungary

12.1 Organisations and Institutions

Responsible institution(s) for public procurement policy	Council for Public Procurement (www.kozbeszerzes.hu)
Responsible institution(s) for legal aspects	Council for Public Procurement (www.kozbeszerzes.hu)
Responsible institution(s) for technical solutions	Electronic Government Centre, Office of the Prime Minister (www.magyarorszag.hu)
Central procurement institution(s)	Central Service Directorate is the central procurement body for public procurements at the national level .This institution has responsibility for the selection of suppliers for procurements in public institutions
Other important organisations	-
Type of coordination between different institutions	

12.2 Strategy

Electronic public procurement has been on the Hungarian government's agenda since 2001. At the present the development of an operational electronic public procurement system has a medium priority on the Hungarian government's agenda.

The strategy for introducing an operational electronic public procurement is included in the overall strategy on E-government and Information society among others "Hungarian Information Society Strategy" (HISS), 2002[35].

12.2.1 Statement of objectives

The government has specified overall objectives for introducing electronic public procurement. In a draft plan for secondary legislation these objectives are stipulated and are as follows:

- the harmonization and modernization of the law
- ease of use among wide range of participants
- transparency
- support of centralised procurement

[35] See http://www.ihm.hu/English/_20030211_1.html

12.2.2 *Scope of strategy*

There are different stages in the strategy for the implementation of e public procurement. The first stage concerns strategic procurement on obligatory basis in central government. The second stage is widening the scope toward voluntarily participants and non-strategic procurements.

Levels of government involved	The plan includes a strategy for e-procurement at different levels of the Hungarian public sector, including central-, regional- and local governments
Legal framework	
Allocated resources	Internal government figures exists but cannot be disclosed publicly
Time frame	Implementation of the plan will start in June 2004. Objectives are estimated to be realized in March 2005.

12.2.3 *Existing guidelines*

Specific and detailed guidelines for electronic public procurement are under preparation in Government Decree on the electronically supported activities allowed in public procurement and in special electronic procurement procedures.

12.3 Legal framework

12.3.1 *Legal status of the use of electronic means in Public Procurement*

No national legalization is presently regulating the use of electronic means for communication in the public procurement process. However, legalization is under preparation in *Government Decree on the electronically supported activities allowed in public procurement and in special electronic procurement procedures.*

12.3.2 *Implementation of the Directives*

The Hungarian Government expects that implementation of the forthcoming EU-public procurement directives will take place in 2005.

Future electronic procurement systems will be compliant with the requirements of the forthcoming European Public Procurement Directives. It is estimated that Contracting Authorities will be allowed to use Electronic Auctions according to the Directives. It is not expected that Contracting Authorities will be mandated to implement Dynamic Purchasing Systems. Electronic Auctions are assumed will be used for purchasing MRO goods (Maintenance, Repair and Operations goods) by central government institutions.

The Hungarian Government expects that buyer profiles will be used by Contracting Authorities. Moreover, the government intends to introduce national standards for the electronic exchange of data in the public procurement process. The standards considered relevant are XML and EDI - both EAN compatible.

12.3.3 *Status of tools*

Public procurement portals	So far a central electronic public procurement portal has been established at www.kozbeszerzes.hu. The website is public owned by the Advertising Agency of the Council of Public Procurement. On this site one can reach the relevant public procurement rules, the Hungarian Official Journal in public procurement and the tender notices, recommendations and information of the Council, information on the Council and its working structure (Secretariat), contact details, international related links.
Electronic signature	An electronic signature has been introduced, but currently the signature is used only to a low extent. It is expected that a full operational electronic signature will be ready for use in March 2005. It is expected that the use of the signature will be mandatory for participating in public calls for competition.
Electronic catalogues	E-catalogues are also used to some extent in order to gather information
Electronic auctions	E-auctions are being used below threshold for experimental purpose
Dynamic Purchasing Systems	Dynamic purchasing systems are not being used
Framework agreements	Framework agreements are not used at the moment.

12.3.4 *Reference to the relevant legal acts*

Information unavailable

12.4 Current usage of electronic means in Public Procurement

12.4.1 *Practical use of electronic means in Public Procurement*

At the moment there are no operational electronic procurement systems in Hungary that are compliant with the requirements of the forthcoming European Public Procurement Directives.

The Hungarian government expects to carry out assessments during the implementation of electronic public procurement. The activities which will be assessed include the number of electronic transactions and the speeding up of procurement procedures. Other activities for regular assessments are workflow atomization and the professionalism of the system for electronic public procurement.

12.4.2 *Which phases of procurement are covered?*

The Hungarian Government expects that a fully automated electronic public procurement system will be available within tree years. The system will include the central elements in electronic procurement: notification about tender, publication of tender, management of receipt/submission of tender, evaluation of tender and ordering. Within five years the government anticipates procedures for invoicing to be an integrated part of the electronic procurement system as well.

12.5 Raising awareness & Promotion of electronic means

Information unavailable

13. Ireland

13.1 Organisations and Institutions

The main institution is The Department of Finance, National Public Procurement Policy Unit. It is responsible for policy formulation and the legal framework for e-procurement.

Responsible institution(s) for public procurement policy	Public Procurement Policy Unit, Department of Finance
Responsible institution(s) for legal aspects	Public Procurement Policy Unit , Department of Finance
Responsible institution(s) for technical solutions	Public Procurement Policy Unit, Department of Finance Centre for Management and Organisation Development, Department of Finance Local Government Computer Services Board • A public sector organisation closely aligned with local government in Ireland • Main task is to provide local authorities with the best solutions to meet all their information and communication technology needs ICT bodies within the Health Sector
Central procurement institution(s)	Government Supplies Agency and Office of Public Works
Other important organisations	Information Society Commission
Type of coordination between different institutions	The selection of suppliers is typically a responsibility of the individual public institution. Some coordination exists in parts of the health sector and in third level educational institutions

13.2 Strategy

Strategies on e-public procurement are integrated in an overall strategy on modernising Public Procurement

- "Strategy for the Implementation of eProcurement in the Irish Public Sector" (2001)
- "Modernising Public Procurement" (2003) (See below)

Arising out of the Government's Action Plan on Implementing the Information Society in Ireland the Department of Finance, in conjunction with the Department of the Taoiseach, identified e-procurement as an essential element in eCommerce, having a role in both:

- Accelerating the transition of the Irish economy to an information society
- Contributing to the attainment of the Government objective of modernizing the public service through the development of new, innovative and more efficient procurement processes.

The government has a Strategy for the Implementation of e-Procurement in the Irish Public Sector approved by Government in April 2002. This strategy emphasized the need for procurement management reform, and points out four aspects to implementation of e-procurement in Ireland. These are:

- Capacity building: organisational capacity to strategically manage procurement effort in order to maximize measurable savings and benefits;
- Training and education developing for public sector staff through targeted procurement training and education to sustain measurable improvements in procurement performance;
- Aggregation: reducing costs by leveraging public sector demand in certain markets; and lastly
- e-procurement systems: improving efficiency through the use of cost effective technologies in support of various aspects of procurement.

13.2.1 Statement of objectives

The strategy contains a number of key targets to be achieved by the end of 2007. These include:

- Unit cost reductions of 2.5% of total expenditure on supplies and services and works (repairs and maintenance), arising from reductions in off-contract procurement and aggregation of procurement across agencies;
- Average transaction costs reductions of 5% for supplies services and works (repair and maintenance) as a result of standardisation, streamlining and automation;
- Unit cost reductions of 0.5% of total expenditure on capital works arising from savings in professional fees resulting from efficiency gains in the tender process and contract administration;
- Transaction cost related reductions of 0.25% in overall expenditure on capital works as a result of public sector administrative cost savings;
- 90% of tender competitions (above EU thresholds) carried out electronically;
- 80% of payments carried out electronically;
- 10% of all expenditures on supplies and services supported by electronic catalogue and ordering facilities.

13.2.2 *Scope of strategy*

Levels of government involved	All levels of government included in the national strategies on e-public procurement. Projects are planned for development of a separate e-procurement strategy for local and sector level
Legal framework	The two principal sources of regulation that impact on e-public procurement in Ireland are public procurement regulation and eCommerce regulation. • The public procurement legislative framework consists principally of the EC Treaty, the EU Public Procurement Directives (implemented by was of Statutory Instrument into Irish law) and the World Trade Organisation Agreement on Government Procurement. • The principal sources of eCommerce regulation are the Electronic Commerce Directive, the Electronic Signatures Directive and the Electronic Commerce Act, 2000. The Electronic Commerce Act implements the Electronic Signatures Directive and those parts of the Electronic Commerce Directive dealing with the formation of contracts.
Allocated resources	Approximately € 4 million annually from central allocation during implementation stage of national strategy. Some sectoral projects are funded by other sources
Time frame	The Strategy for the Implementation of eProcurement in the Irish Public Sector originally envisaged targets being achieved by end 2007 but this timeframe is currently being reviewed.

13.2.3 *Existing guidelines*

Public procurement guidelines setting out the steps to be followed in conducting an appropriate competitive process under EU and national rules have been issued. These guidelines encourage the use of the national public procurement website www.etenders.gov.ie.

Guides, help and resources are available on the website for awarding authorities and suppliers that wish to participate in e-procurement.

13.3 Legal framework

13.3.1 *Legal status of the use of electronic means in Public Procurement*

None of the current e-procurement systems presently fulfil the requirements of the EU public procurement directives fully, but the necessary investments are expected to be allocated at a later stage.

13.3.2 *Implementation of the Directives*

The forthcoming EU public procurement directives are expected to be implemented by 2005. The following areas of use of electronic means in the public procurement process are already regulated by national legislation: rules applicable to communication, and storage of data.

With the new EU directives it is expected that the Irish the government will provide that Contracting Authorities may use electronic auctions and dynamic purchasing systems and that these will be generally available. Buyer profiles to publish tender-related information on a 'buyer profile' are expected to be used by Contracting Authorities in Ireland

It is also expected that Ireland will introduce national standards for the electronic ex-change of data in the public procurement process.

13.3.3 *Status of tools*

Public procurement portals	www.etenders.gov.ie is the central government procurement portal. It provides information and tools about electronic public procurement and advertises notices for EU and sub-EU threshold contracts for the Irish public sector including central government, local authorities, Health Boards and hospitals, universities and schools. Developments in 2004 will include an electronic "post-box" to facilitate the electronic transmission of tenders by suppliers; site forums for the different sectors involved in public procurement such as central government, local government, health and education; and more comprehensive guidance material. Other features planned for the duration of the current contract include a pilot online tender evaluation system; and a facility to conduct tender clarifications/discussions between buyers and vendors online. Ireland recently became the first country to have "national" eSender status. The etenders website has a facility for the online creation and submission of OJEU notices.
	www.tendersireland.com (Public Sector Tender Market in Ireland) is a website where all of the procurement opportunities advertised by Central and Local Government in Ireland (North and South) are published on the Tenders Ireland Web Site.
	www.go-source.com (Go-Source) is a webguide for doing business in the public sector in Ireland. Three private companies are responsible for this joint directory of public sector procurement opportunities.
Electronic signature	An official digital signature has not yet been introduced in Ireland and it is unclear when one will be introduced
Electronic catalogues	The public authorities have no experience electronic catalogues. Pilot initiatives on national level are recommended in the strategies, e.g. a pilot project on electronic ordering using electronic catalogues
Electronic auctions	The public authorities have no experience with e-auctions

Dynamic Purchasing Systems	The public authorities have no experience with dynamic purchasing systems
Framework agreements	The public authorities plan to set up broad based framework agreements.

13.3.4 *Reference to the relevant legal acts*

Electronic Commerce Act 2000:

- The purpose of the Act is to create a legal framework by providing a comprehensive piece of legislation which addresses many of the legal issues that have arisen as a result of electronic commerce and facilitate the growth of electronic commerce and electronic transactions in Ireland.
- The Electronic Commerce Act, 2000 provides for the legal recognition of contracts, electronic writing, electronic signatures and original information in electronic form in relation to commercial and non-commercial transactions and dealings and other matters, the admissibility of evidence in relation to such matters, the accreditation, supervision and liability of certification service providers and the registration of domain names, and provide for related matters.

13.4 Current usage of electronic means in Public Procurement

13.4.1 *Practical use of electronic means in Public Procurement*

The total non-payroll procurement spending in the non commercial public sector in Ireland is in the region of € 9 billion per annum of which Central government is responsible for approximately 2.4 billion € of procurement, education 1.4 billion €, health 1.9 billion €, and local authorities 3.1 billion € (2001 figures).

Monitoring of the up-take and progress of e-procurement is monitored regularly focusing on the number of users of the eTenders website and the extent of its usage. The site was launched on a pilot basis in March 2001 and three years of operation have seen its usage increase significantly. As of March 2004 there are close to 20,000 registered suppliers and over 1,700 registered Awarding Authority users (buyers). In 2003 close to 4,500 tender opportunities were advertised on the site.

The resources allocated by public authorities to introduce operational public procurement amounts to 4 million € per year at state level for the implementation of the national strategy, of which 2.5 million € are allocated for capital and 1.5 million € for administration, etc.

13.4.2 *Which phases of procurement are covered?*

The status for automating procurement phases in Ireland is as follows:

- Notification about tender (to a large extent today)
- Publication of tender (to a large extent today)
- Provision of contract documents for downloading electronically (to a large ex-tent today)
- Management of receipt/submission of tenders (to a low extent today)
- Evaluation of tenders (not automated, but a pilot system will be established)
- Ordering (to some extent)

- Invoicing (to some extent)

Generally, notification and publication and downloading of tender documents are the phases of public procurement which have been automated the most, whereas management and evaluation are not or only to a low extent automated.

There is generally little experience with electronic auctions and multi-supplier electronic purchasing systems yet. However, the first electronic catalogue, with information on current contract arrangements, has been developed and is expected to be online very shortly.

13.5 Raising awareness & Promotion of electronic means

In September 2003 a new report from the Information Society Commission was published. Modernising Public Procurement indicated that the Government could potentially save up to 1 EUR billion annually on public procurement. This new report was made because of the slow pace of progress since the former strategy was finalized at the end of 2001. It also acknowledges important developments following from among other things the establishment of the National Public Procurement Policy Unit (NPPPU) in the Department of Finance (in 2003). The key recommendations from the report are:

- Resource the National Procurement Strategy adequately
- Enhance the e-tenders website
- Examine alternative delivery models – including PPP
- Support SME adjustment in line with procurement reform.

Forthcoming initiatives:

A “signpost” website, the “Irish Public Procurement Portal”, will shortly be available and this site will contain links to all websites associated with public procurement in Ireland.

14. Italy

14.1 Organizations and Institutions

Responsible institution(s) for public procurement policy	Prime Minister - Cabinet Office (http://www.governo.it) Ministry of Economic Affairs and Finance - MEF (www.tesoro.it) Local Administrations (for example Regions, Municipalities)
Responsible institution(s) for legal aspects	Prime Minister - Cabinet Office (http://www.governo.it) Ministry of Economic Affairs and Finance (www.tesoro.it) Ministry of Innovation and Technology (www.innovazione.gov.it)
Responsible institution(s) for technical solutions	Ministry of Economic Affairs and Finance (MEF) by means of Consip S.p.A. (www.acquistinretepa.it), a State owned company that operates exclusively to serve Public Administrations. The overall mission of Consip is to ensure that every Public Administration employee will be able to order different categories of goods and services online through web-based technologies. Consip (following the MEF guidelines) is responsible for the development and operation of e-public procurement solutions. Ministry of Innovation and Technology (www.innovazione.gov.it) defines/suggest guidelines to implement e-procurement systems. Local Administrations are able and authorized to develop and implement e-procurement systems.
Central procurement institution(s)	Consip S.p.A. (www.consip.it)
Other important organisations	Every Public Administration can develop and implement specific e-procurement systems
Type of coordination between different institutions	The organization of public procurement contains both centralized and decentralized elements: • There is a central public procurement body, but the establishment of procurement bodies at the regional level is planned . • Procurement (selection of suppliers) is the responsibility of the individual public authority.

14.2 Strategy

Since December 1999, the Italian Government has constantly developed and improved a program for public procurement in the Italian Public Administration. It places a high priority on the introduction of operational e-public procurement.

Strategy on e-public procurement is integrated in an overall plan of introducing e-government and integrated into the program of rationalizing public spending for goods and services e.g. “The Public Spending Rationalization Program” (2000) (Programma di Razionalizzazione della Spesa per Beni e Servizi della Pubblica Amministrazione).

This program deals with the following principles and guidelines:

- Defining purchasing strategies
- Drawing up competitive frame contracts for public administrations
- Delivering innovative e-procurement models
- Promoting the use of e-procurement within the public administration
- Providing purchasing monitoring tools to the public administration that use the framework contracts and other e-procurement systems.

14.2.1 Statement of objectives

The overall goals of the e-procurement program are to:

- Limit a potential "digital divide" across society;
- Reduce the expenses of goods and utilities, simplify the buying procedures and improve the transparency, efficiency and the effectiveness of public sector purchases;
- Provide a better service for both buyers and suppliers;
- Improve the transparency, the visibility and therefore accountability of public sector contracting;
- Reinforce the Italian government's commitment to the goals of e-Europe;
- Minimize transaction costs through standardization and to obtain scale economics in selected purchasing areas.
- Goods and services for EUR 12 billion purchased electronically (timeframe: 2000 – 2005).

14.2.2 Scope of strategy

Levels of government involved	Strategies cover all levels of government
Legal framework	Information unavailable
Allocated resources	Information unavailable
Time frame	2000 – 2005

14.2.3 Existing guidelines

Guidelines in support of the different areas have been issued as part of the strategy for e-government e.g. a special guideline for e-public procurement:

- Decree of Republic President n. 101/2002 (Rules to accede and utilize public administration market-places and electronic auctions, guidelines to adopt and utilize electronic advanced signatures).

14.3 Legal framework

14.3.1 Legal status of the use of electronic means in Public Procurement

	Date	N.	Argument
Legislative Decree	12th February 1993	39	Art.3 – Rules on automated informative systems of public administrations, as laid down in the art.2, co.1, let. mm) of the Law 23rd October 1992, n.421
Law	15th March 1997	59	Art.15, co.2 – Proxy to Government on granting functions to Regions and local Authorities about Public Administration reform and administrative simplification
Decree of the President of the Republic	10th November 1997	513	Regulation on procedures for documents registration and transmission with electronic systems, as laid down in the art.15, co.2, of Law 25th March 1997, n.59
Decree of the President of the Republic	20th October 1998		Rules on procedures on managing of electronic protocol by public administration
Prime Minister Decree	8th February 1999		Technical rules on registration, transmission, duplication, copying and approving of electronic documents
Law Decree	22nd May 1999	185	Implementation of the Directive 97/7/CE on consumer protection
Prime Minister Decree	28th October 1999		Electronic management of internal flow of information of Public Administration
Law	23rd December 1999	488	Financial act 2000
Prime Minister Decree	31st October 2000		Technical rules on electronic protocol - Decree of the President of the Republic 20th October 1998, n.428
Law	23rd December 2000	388	Financial act 2001
Decree of the President of the Republic	28th December 2000	445	Administrative procedure Act
Law	28th December 2001	448	Financial act 2002
Legislative Decree	23rd January 2002	10	Implementation of Directive 1999/93/CEE on the communitarian framework for electronic signature

	Date	N.	Argument
Decree of the President of the Republic	4th April 2002	101	Regulates online auctions and marketplace
Law	24th December 2003	350	Financial act 2004
Law Decree	12th July 2004	168	Amendments on Financial act

14.3.2 *Implementation of the Directives*

The forthcoming EU public procurement directives are expected to be implemented in 2005. The following areas of use of electronic means in the public procurement process are already regulated by national legislation: rules applicable to communication, storage of data and use of specific procedures, e.g. e-auctions, e-catalogues and marketplaces. Others follow the Decree of Republic President n. 445/2002 on administrative documentation, technical rules on electronic advanced signatures and certificated mails.

14.3.3 *Status of tools*

Public procurement portals	The portal www.acquistinretepa.it (Acquisti in Rete[36]; AiR) is the Public government procurement portal. The goal of the e-procurement platform is to improve public procurement and efficiency. The platform facilitates the use of three main tools for public e-procurement: *Electronic Shops, Reversed on-line Auctions* and *The Marketplace.* Furthermore the platform provides information on e-procurement activities already started or about to start as well as to diffuse this information, it provides newsletters, best cases and community on e-procurement.
	Local public procurement portal: Intercent ER is a portal for e-sourcing, which belongs to the Emilia Romagna Region and local public authorities
	Local public procurement portal: Purchasing System Piedmont Region is a portal e-sourcing and e-catalogues, which is owned by the region of Piedmont and the local public authorities www.csi.it
	Local public procurement portal: Marketplace for the Municipality of Florence: http://news.comune.fi.it/cgi-bin/market/index.pl
Electronic signature	Electronic signature has been introduced. Nevertheless the use of a qualified electronic signature is compulsory in e-procurement.
Electronic catalogues	Public Administration procurement system and some Local Administrations uses high quality e-purchasing models such as electronic catalogues.
Electronic auctions	Electronic auctions have been a legal possibility since 2002 and there are numerous experiences both on national and local level.

[36] Translation: "Purchases on the Net"

Dynamic Purchasing Systems	For purchases under threshold, exists Market Place of Public Administration based on the principles of dynamic purchasing systems
Framework agreements	Framework agreements are similar to dynamic purchasing system (strictly bilateral)

14.3.4 Reference to the relevant legal acts

Information unavailable

14.4 Current usage of electronic means in Public Procurement

14.4.1 Practical use of electronic means in Public Procurement

On an operating level, the government procurement service, through Consip S.p.A. uses high quality e-purchasing models (electronic catalogues, reverse auctions, market place) as well as standard framework agreements for certain types of categories of goods and services.

The total amount of public expenditure in Italy for Goods & Services equals about EUR 97 billion (2002). This amount represents about 15% of overall public spending. In 2003 the Program's activity has been covering about EUR 16 billion. Despite their non-compulsory participation to the program on public spending rationalization, 21% of municipalities are ordering through Consip system. (year 2004 Good & Services EUR 102 billion, Program's activity cover EUR 6,7 billion, 16% of municipalities ordering)

Monitoring of the up-take and progress of e-procurement is followed on an annual basis and reported to the Ministry of Economic Affairs and Finance and Consip S.p.A. respectively. The following aspects are monitored: Number of procurement and e-procurement transactions, electronic public procurement's share of total public procurement volume, type of purchase, transaction costs and number of bidders, number of e-suppliers and number of e-products.

14.4.2 Which phases of procurement are covered?

The status for automating procurement phases in Italy is as follows:

- Notification about tender (to a low extent)
- Publication of tender (to a large extent)
- Management of receipt/submission of tenders (to a low extent)
- Evaluation of tenders (to a low extent)
- Ordering (to a low extent)
- Invoicing (not automated today, but expected to be within three years).

14.5 Raising awareness & Promotion of electronic means

In 2005 one-half of Italy's public expenditure for goods and services is to be spent on offers which were made electronically. In addition, the government wishes to promote e-business in the wider economy – the huge and influential public sector pushing, by example and by insistence, smaller private business into computer usage and hence to e-business.

In the field of electronic exchange of data in the public procurement process, Italy intends to introduce national standards, but they are not yet defined. Some working groups, mainly composed by Local Administrations, are evaluating standards and guidelines.

15. Latvia

15.1 Organizations and Institutions

Responsible institution(s) for public procurement policy	Procurement Monitoring Bureau (PMB), Ministry of Finance. • Started its activity on 1 January 2002, and is a separate government administrative body, supervised by the Ministry of Finance. • Has its own legal personality and its own separate budget. • Is under the control of the Ministry of Finance. The Minister of Finance exercises a supervisory control over the PMB, in respect of administrative procedure. • Monitors the conformity of the state and local government procurement procedures.
Responsible institution(s) for legal aspects	Procurement Monitoring Bureau, Ministry of Finance. • Practically prepares all the draft regulations relating to public procurement matters, although theoretically, the task belongs to the Ministry of Finance.
Responsible institution(s) for technical solutions	Procurement Monitoring Bureau, Ministry of Finance • Fulfilling the duties provided by Law, PMB is also publishing Tender notices and Contract award notices, examining complaints, providing methodological assistance and consultations and compile and analyze the statistical information available.[37]
Central procurement institution(s)	-
Other important organisations	-
Type of coordination between different institutions	There is no central procurement body, which arranges framework contracts or is responsible for the selection of suppliers. These functions are the responsibility of each individual public authority.

15.2 Strategy

At the present time the development of an operational electronic public procurement system has a medium priority on the political agenda in Latvia.

Significant advantages from the introduction of electronic public procurement are expected in the following areas:

- Lower transactions costs
- Better procurement statistics and enhanced budgetary control
- Lower prices
- Better access for SMEs in accessing and responding to public tenders
- Improving IT skills in public and private sector.

A separate strategy on e-public procurement was adopted on January 29th 2004: “Usage of information technology in the development of a public procurement system” (2004).

[37] See http://www.iub.gov.lv

15.2.1 *Statement of objectives*

It is projected that:

- 33% of all public procurement procedures will be done electronically by 2008
- the government can save EUR 1 million per year after 2008 by undertaking the procurement procedures in the public sector, electronically
- the electronic catalogue will be fully implemented in 2008 e-auctions will be used in 15 % of all procedures by 2008

15.2.2 *Scope of strategy*

The strategy has three focus areas:

- Development of a public procurement portal with the possibility of electronic notification.
- Realization of activities for using e-auctions and electronic catalogues
- Constructions of a central public procurement body

Levels of government involved	The initiatives of the strategy are obligatory for the whole central government; moreover part of the local government will be given a chance to participate in some of the projects
Legal framework	For pilot project changes in legislation are not necessary. Directive 2004/17/EC is implemented in 2004 in Latvia Deadline to the Directive 2004/18/EC implementation time is the end of 2005.
Allocated resources	Approximately EUR 0.5 million has been allocated for the introduction of operational pilot electronic procurement system at national level
Time frame	2004 – 2008

15.2.3 *Existing guidelines*

Guidelines have not been issued

15.3 Legal framework

15.3.1 *Legal status of the use of electronic means in Public Procurement*

There is no legal framework for usage of e-auctions or dynamic purchasing system or e-catalogues in the classical sector, but e-catalogues will be established using framework agreements, but all these methods have been already set in the utility sector procurement legislation.

15.3.2 *Implementation of the Directives*

The forthcoming EU public procurement directives are expected to be implemented in 2005. Public procurement is currently regulated in national legislation by “Law on Procurement for State or Local Government Needs” (July 2001, amended June 2004) and “Law on Procurement for Public Services Providers needs” (October 2004). Electronic means for communication in the public procurement process is already regulated for utility sector.

15.3.3 *Status of tools*

Public procurement portal(s)	www.iub.gov.lv/ IUB (PMB) is a central e-public procurement portal with online notification of tenders. Moreover limited negotiations procedures are available (you can fill in the forms online); also legislation, statistics and an online Q&A functions can be found on the site (but only in Latvian). IUB (PMB) was introduced in January 2004.
Electronic signature	A qualified electronic signature has not yet been introduced in Latvia, but it is planned to be by the end of 2004. Specifications are not available
Electronic catalogues	There is no experience with e-catalogues
Electronic auctions	There is no experience with e-auctions
Dynamic Purchasing Systems	There is no experience with dynamic purchasing systems
Framework agreements	Legislation allows using of Framework agreement in utility and classical sector

15.3.4 *Reference to the relevant legal acts*

Information unavailable

15.4 Current usage of electronic means in Public Procurement

15.4.1 *Practical use of electronic means in Public Procurement*

Up-take and progress on electronic public procurement is not monitored on a regular basis.

In the strategy it is assessed to save 2 mio. EUR from centralising and administrative savings. The following aspects are being assessed: number of transactions, electronic public procurement's share of total public procurement volume, types of purchases, speeding up the procurement procedures, transaction costs, and number of bidders

15.4.2 *Which phases of procurement are covered?*

The status for automating procurement phases in Latvia is as follows:

- Notification about tenders (to some extent today, but a further increase the next three years is expected)
- Publication of tenders (to some extent today, but a further increase the next three years is expected)
- Management of receipts/submission of tenders (not automated and currently not expected to be automated)
- Evaluation of tenders (not automated and currently not expected to be automated)
- Ordering (not automated and currently, but expected to be automated)
- Invoicing (not automated and currently not expected to be automated)

15.5 Raising awareness & Promotion of electronic means

A project named *"Sabiedrikais iepirkumu portāls"*[38] has been launched, which will lead to the establishment of a central e-public procurement portal. For this project, financial and human resources have been made available. The project has started in 2003, and the ambition that has been set is to finalise it by 2004.

This project prepares the set-up of a portal comprising an informational part on legal issues as well as a platform for publication of calls for tender, tender documents and consultation of terms of reference. A first phase only allow publication, facilitating this process for public entities, since the portal automatically transfer calls for tender above threshold to the relevant publication papers, i.e. the Luxembourg written press and EU official journal.

[38] Translation: " Public procurement portal"

16. Lithuania

16.1 Organisations and Institutions

In Lithuania there are three bodies with equal authority in the field of e-public procurement.

Responsible institution(s) for public procurement policy	Ministry of Economy (www.ukmin.lt) Public Procurement Office (www.vpt.lt) • Established under the Government of the Republic of Lithuania to co-ordinate and monitor compliance with the Law on Public Procurement and relevant regulations Information Society Development Committee (www.ivpk.lt) • Was set up in mid 2001, when the Ministries of Communication and of the Interior started to transfer functions of the regulation of information technologies and telecommunications and co-ordination of the development of information society[39]
Responsible institution(s) for legal aspects	Ministry of Economy (www.ukmin.lt)
Responsible institution(s) for technical solutions	Public Procurement Office (www.vpt.lt) • Responsible for development and operation of the forthcoming electronic public procurement system[40] Information Society Development Committee (www.ivpk.lt) • Responsible for the establishment of an e-society in Lithuania including the electronic signature
Central procurement institution(s)	-
Other important organisations	-
Type of coordination between different institutions	Procurement is organized in a decentralized approach. There is no central public procurement body in Lithuania.[41] Public procurement entities can make "centralized" procurements, and they buy big amounts of goods or other supplies at much lower cost and then distribute them to its subsidiaries. For instance Ministry of Interior and Ministry of National Defense have used centralized procurements.

[39] See www.ivpk.lt/main_en.php

[40] See www.vpt.lt

[41] The national law on public procurement does not specify that central procurement bodies can exist at national, regional or local level.

16.2 Strategy

The overall strategy on e-public procurement is an integrated part of a general strategy on modernising the public sector and development of the information society.

Three strategies in the field of information society development and e-government are included:

- *National Concept of Development of Information Society* (Feb. 2001)[42]: Basic tasks in creation of e-government.
- *Strategic Plan for Development of Information Society* (Aug. 2001)[43]: Ensuring progressive development of information society in Lithuania through four priorities: 1) competence of Lithuanian citizens; 2) public administration; 3) electronic business; and 4) Lithuanian culture and Lithuanian language.
- *Long-term Development Strategy of the State* (Nov. 2002)[44]: This strategy clearly emphasizes, that one of the main strategic trends in the field of development of public administration, is establishment and functioning of e-government.

Furthermore, Lithuania has a strategy for Modernising the activities of Public Procurement which is part of the general Government programme. This strategy includes activities in the field of e-public procurement. It involves only central government and focuses on a gradual transformation of public procurement into an electronic environment for adoption of the best EU Member State's practices and creation for the public procurement information system.

16.2.1 Statement of objectives

Electronic public procurement is an area which is highly prioritized by the government of Lithuania. The overall objectives for e-public procurement is to revise the national public procurement legislation, increase transparency and availability of information and develop an electronic public procurement system.

The development of e-government is followed by a variety of specific tasks. The objective here is among other things to deliver public procurement services on the Internet by 2005.

[42] See Vilnius University, Law Faculty, Legal Informatics Center (2003): "Situation of e-government in Lithuania and principles of e-government in Lithuania", Vilnius
[43] See Vilnius University, Law Faculty, Legal Informatics Center (2003): "Situation of e-government in Lithuania and principles of e-government in Lithuania", Vilnius
[44] See "eGovernment Factsheet – Lithuania" at http://europa.eu.int/ISPO/ida

16.2.2 Scope of strategy

Levels of government involved	Central government is included in the strategies[45]
Legal framework	Information unavailable
Allocated resources	To cover the development costs of the first phase of CPPP, Public procurement office already has received funding of more than 300.000 EUR this year. As stated in the PPO strategic planning document, expected funding for the development of the CPPP in 2004 should reach approximately 1.150.000 EUR, in 2005 – 3.200.000 EUR and in 2006 - 2.000.000 EUR per year (including the state budget and the European regional develop fund sources).
Time frame	Variable (specific information unavailable)

16.2.3 Existing guidelines

Guidelines have not been issued.

16.3 Legal framework

16.3.1 Legal status of the use of electronic means in Public Procurement

Rules applicable to communication and storage of data are already regulated by national legislation.

16.3.2 Implementation of the Directives

The forthcoming EU public procurement directives are expected to be implemented in 2006.

The use of e-auctions, dynamic purchasing systems etc. is not regulated by the legislation, but the government will provide that contracting authorities may use these procedures. However they will only be allowed for certain types of purchasing expectantly standard goods. The Public Procurement Office will develop e-procurement solutions following all requirements set by the EU e-procurement legislation.

E-auctions and DPS would be available after implementation of new public procurement directives (expected in 2006) and according implementation of technical solutions allowing these procedures.

[45] Based on interview with Mr. Ainis Pumputis, Public Procurement Office

16.3.3 *Status of tools*

Public procurement portals	A central electronic public procurement portal (CPPP) is expected to be established in the second half of 2004. The functionality of the portal will fulfil the Directive requirements. For the CPPP functionality, implemented in the first development phase, Directive requirements will be met. [46] In 2004 the first phase of Central public procurement portal (CPPP) will be established. However, a central public procurement portal with full functionality will most likely be completed approximately in 2008. Development of the first phase includes fundamental portal functionality (user authorisation system, content management, statistical and analytical functionality), notifications and tender information publishing, and e-catalogues (e-auctions are not planned for the first phase of CPPP development).
Electronic signature	The use of electronic signature has been a legal possibility since 2000.
Electronic catalogues	No experience with e-catalogues
Electronic auctions	No experience with e-auctions
Dynamic Purchasing Systems	No experience with dynamic purchasing systems
Framework agreements	No experience with framework agreements

16.3.4 *Reference to the relevant legal acts*

No information

16.4 Current usage of electronic means in Public Procurement

16.4.1 *Practical use of electronic means in Public Procurement*

There is no regular monitoring of the up-take and progress of e-procurement. However a pilot project is being planned. Moreover the government is planning to assess the impact of introducing electronic public procurement within three years when all initiatives on the field have been implemented.

16.4.2 *Which phases of procurement are covered?*

Specific statistical information about a number of e-public procurement functions will be available following the introduction of the central procurement portal by the end of 2004.

[46] Based on interview with Mr. Ainis Pumputis, Public Procurement Office

16.5 Raising awareness & Promotion of electronic means

The most significant advantage from introducing e-public procurement is expected to be public sector savings through lower prices. Moreover it is expected that the transactions costs will be lowered, and that it will be able to speed the procurement process. Finally SMEs is expected to have better access to public tenders.

17. Luxemburg

17.1 Organizations and Institutions

Responsible institution(s) for public procurement policy	The Ministry of Public Works[47] (www.etat.lu/MTP) The Ministry of Civil Service and Administrative Reform[48] (www.mfpra.public.lu) • The Ministry of Civil Service and Administrative Reform is involved in the function of coordinator of the *e*Luxembourg Action Plan and as pilot ministry for the first phase. The National Information Society Commission[49]
Responsible institution(s) for legal aspects	The Ministry of Public Works (www.etat.lu/MTP)
Responsible institution(s) for technical solutions	*Centre Informatique de l'Etat*, The Ministry of Civil Service and Administrative Reform (www.mfpra.public.lu) (www.cie.public.lu)
Central procurement institution(s)	*Centre Informatique de l'Etat*, The Ministry of Civil Service and Administrative Reform (www.mfpra.public.lu) *Service Central des imprimés des l'Etat*, The Ministry of Civil Service and Administrative Reform (www.mfpra.public.lu) (www.scie.public.lu) • Has developed an electronic catalogue through which different authorities can pass aggregated orders.
Other important organisations	-
Type of coordination between different institutions	The selection of suppliers falls in the responsibility of the Centre Informatique, as far as IT equipment is concerned, and of the individual public authorities for the rest.

17.2 Strategy

The strategy is part of a drive to modernise public procurement in general. It mainly covers central government, although there is a common will to involve local authorities (as well as every organism falling under the national public procurement legislation), which will be obliged to use some functionalities of the new structures while they will be sensitised on the issue in general.

E-public procurement has a high priority in Luxembourg, since it forms part of the action plan *e*Luxembourg (www.eluxembourg.lu), which has been presented to the Government on 26 January 2001. One of the objectives, within the pillar "Putting new technologies at the service of citizens and enterprises as well as civil servants and public organisms", is to promote use of "tele-procedures" by businesses and professionals in communication with public authorities. Under this heading, which implies two phases (one without electronic signature, the second one implying such a signature), e-public procurement activities have been launched.

[47] *Ministère des Travaux Publics*
[48] *Ministère de la fonction publique et de la réforme administrative*
[49] *Commission nationale pour la société de l'information*

17.2.1 *Statement of objectives*

The objective has been formulated that the whole public procurement procedure from notification to invoicing and accounting should be made electronically accessible by 2005. A feasibility study launched in 2002, of which the conclusions (feasibility within 3 years) have been presented to the Government and have been approved, is considered as the strategy for introducing e-public procurement in Luxembourg. A new strategic paper will be prepared for the new Government which will emerge from the June 2004 elections, taking stock of achievements and setting new objectives. No proper guidelines have been issued, apart from minor communications and recommendations, for instance on the law establishing the possibility to include part of the proposal on CD-ROM with the paper documents.

17.2.2 *Scope of strategy*

Levels of government involved	Central government is the only level included in the strategy. Representatives of local government and the Health Sector have been consulted for the strategic study.
Legal framework	Legal aspects have been outlined in the strategic study.
Allocated resources	-
Time frame	-

17.2.3 *Existing guidelines*

Special guidelines for using e-public procurement have not been produced

17.3 Legal framework

17.3.1 *Legal status of the use of electronic means in Public Procurement*

Information unavailable

17.3.2 *Implementation of the Directives*

The systems developed will be compliant with the new European public procurement directives; however Luxembourg is expecting to use the full transposition period of 21 months, completing implementation in 2006. Apart from the possibility of electronic publication of calls for competition and the possibility to submit part of the proposal in electronic form, the use of electronic means for communication in public procurement has not been regulated yet in Luxembourg.

Electronic auctions and Dynamic Purchasing Systems will probably be authorised in Luxembourg, and national standards for the electronic exchange of data in the public procurement process, e.g. for submission templates and invoices, will be introduced.

17.3.3 *Status of tools*

Public procurement portals	A project named *"Mise en ligne des Marchés Publics"*[50] has been launched, which will lead to the establishment of a central e-public procurement portal. For this project, financial and human resources have been made available. The project has started in 2002, and the ambition that has been set is to finalise it by 2005. This project prepares the set-up of a portal comprising an informational part on legal issues as well as a platform for publication of calls for tender, tender documents and consultation of terms of reference. It will be tested by the back office in Summer 2004. A first phase will only allow publication, facilitating this process for public entities, since the portal will automatically transfer calls for tender above threshold to the relevant publication papers, i.e. the Luxembourg written press and EU official journal. A second phase will also contain features such as bid receipt with time stamping. No other public procurement portals have been created yet in Luxembourg.
Electronic signature	While no qualified electronic signature has been introduced in Luxembourg to date, a mixed economic interest group consisting of Ministry of Economy officials and representatives of the banking sector is drafting terms of reference for the development of a qualified electronic signature by 2005. However, it is not decided yet, whether the use of a qualified signature will be made mandatory for the next phase of the portal, i.e. electronic submission of tenders.
Electronic catalogues	The central purchasing agency "Service central des imprimés de l'Etat" is using electronic catalogues
Electronic auctions	There is no experience with e-auctions in the public authorities
Dynamic Purchasing Systems	There is no experience with dynamic purchasing systems in the public authorities
Framework agreements	No framework agreements are being used in Luxembourg at national level for the time being.

17.3.4 *Reference to the relevant legal acts*

Information unavailable

17.4 Current usage of electronic means in Public Procurement

17.4.1 *Practical use of electronic means in Public Procurement*

Statistics on e-public procurement will be taken in Luxembourg, covering aspects such as number of electronic transactions, number of bidders, types of purchases as well as effect on prices. Ad hoc monitoring will be performed once the system is operational.

[50] Translation: "Public Procurement Online"

17.4.2 Which phases of procurement are covered?

In Luxembourg, the publication phase has been automated to a low extent so far, as well as the reception and evaluation of tenders (if one counts the receipt of part of the proposal on CD-ROM), but the complete public procurement process is expected to be available electronically within the next three years, except for invoicing, which probably will take longer.

17.5 Raising awareness & Promotion of electronic means

Information unavailable

18. Malta

18.1 Organisations and Institutions

The two main institutions in the field are:

- The Central Information Management Unit (CIMU) within the Office of the Prime Minister
- The Department of Contracts within the Ministry of Finance and Economic Affairs is the central procurement body in Malta

Responsible institution(s) for public procurement policy	Central Information Management Unit, Office of the Prime Minister (www.opm.gov.mt)
Responsible institution(s) for legal aspects	Central Information Management Unit, Office of the Prime Minister (www.opm.gov.mt)
Responsible institution(s) for technical solutions	Central Information Management Unit, Office of the Prime Minister (www.opm.gov.mt)
Central procurement institution(s)	Department of Contracts, Ministry of Finance and Economics (www.mfin.gov.mt)
Other important organisations	-
Type of coordination between different institutions	Being the smallest country among the 25 EU member states, Malta has two administrative levels, the national governmental level and the local level, which is governed by local councils. Procurement is organized with a strong role assigned to the central governmental level. The selection of suppliers above the threshold for government is done by the Department of Contracts. The Department of Contracts is also involved in the selection of suppliers at local level for procurement above the threshold, which is done in collaboration between the department and the local councils. Procurement below the threshold at local level is done through evaluation committees operating under the local councils. Framework agreements are used neither at the national level nor at the local level.

18.2 Strategy

The Ministry for Information Technology and Investment has drawn up a programme to ensure the timely implementation of their objectives. The government's efforts in the field of e-public procurement are part of this programme as they are closely related to the third component. Being an integral part of the overall vision, the introduction of e-public procurement has a high political priority.

The government's strategy for the introduction of e-public procurement is integrated in the country's overall strategy on e-government and the development of the information society e.g. "e-Government program" (2000). The part of the strategy concerning e-public procurement is currently being developed and the more precise strategic focus is therefore yet to be determined.

18.2.1 *Statement of objectives*

The overall vision and mission in Malta is to develop a first-class information society. The three main components of the vision are:

- deliver first-class public service
- increase citizen participation in government decision making
- streamline public services and realize efficiency-gains

At present there is no specific, quantitative objectives defined which describe the efficiency gains which the Maltese government expects to achieve through the deployment of e-public procurement.

18.2.2 *Scope of strategy*

Levels of government involved	Central and local are included in the strategy
Legal framework	Information unavailable
Allocated resources	Information unavailable
Time frame	Information unavailable

18.2.3 *Existing guidelines*

At a more specific level, Malta has issued a set of guidelines (published 15 April 2004) that relate to the government's recently launched e-public procurement initiative for the procurement of standard office automation hardware and software.

18.3 Legal framework

18.3.1 *Legal status of the use of electronic means in Public Procurement*

The government's e-public procurement portal is the first and only e-public procurement initiative in Malta. As described it is aimed at procurement below the threshold and it does presently not comply with the requirements of the forthcoming Public Procurement directive.

18.3.2 *Implementation of the Directives*

The forthcoming EU public procurement directives are expected to be implemented in 2006. The use of electronic means for communication in the public procurement process is presently not regulated by national legislation.

With the new EU directives the Maltese government expects to provide that Contracting Authorities may use electronic auctions and dynamic purchasing systems. It is presently not clearly defined whether use will be applied to certain type of purchases or authorities, but the present expectation is that usage will be general and applied to different types of purchases. The same applies to the future use of dynamic purchasing systems.

Concerning the publishing of tender-related information on a ‘buyer profile by contracting authorities, it is expected that this opportunity will be used in the future.

18.3.3 Status of tools

Public procurement portals	As of mid-April 2004 the government has launched the first central electronic public procurement portal (www.e-procurement.gov.mt). The portal, which is developed and maintained by CIMU, is seen as the foundation for e-public procurement at the governmental level. The portal enables public officers to acquire IT hardware and software below the threshold and below Lm 2,500. The e-Procurement system will be reviewed and enhanced to include other functionalities including a payment gateway. Private companies may apply to become an Authorised Supplier. Application will be vetted by CIMU and if the company is approved, it will receive a login and password which will enable it to access the system. Following successful completion of a probation period, the company will be awarded the Quality Mark and thereafter become a Quality Mark Supplier.
Electronic signature	Malta has not introduced a qualified electronic signature, as this is presently not allowed by the national legislation. However, it is expected that the legislation will be amended and that a qualified electronic signature will be introduced within the next three years.
Electronic catalogues	There is no experience with electronic catalogues
Electronic auctions	There is no experience with electronic auctions
Dynamic Purchasing Systems	There is no experience with dynamic purchasing systems
Framework agreements	Information unavailable

18.3.4 Reference to the relevant legal acts

Information unavailable

18.4 Current usage of electronic means in Public Procurement

18.4.1 Practical use of electronic means in Public Procurement

There is no figure available on the total volume of e-public procurement as the first e-public procurement portal was launched very recently.
There is presently no assessment of the impact of the introduction of e-public procurement, but it is expected that the impacts will be assessed in the course of the next three years concerning the number of electronic transactions, e-public procurements share of total public procurement volume, types of purchases and the impact on speeding up the procurement procedures. Notably, the security aspect of electronic transactions is an area where regular assessment is considered very important and necessary.
Monitoring of the up-take and progress of e-procurement is presently not carried out.

The resources allocated by public authorities to introducing operational public procurement are not monitored at national level, but government resources have been channeled into the development and maintenance of the recently launched e-public procurement website (precise figure is not available).

18.4.2 Which phases of procurement are covered?

The status for automating procurement phases in Malta is as follows:

- Notification about tenders and publication of tenders have been automated to a large extent
- The management of receipt/submission of tenders and evaluation of tenders have not been automated today and it is not expected to happen within the next three years
- Ordering has been automated to some extent, but expected to be increased within three years
- Invoicing is not automated today but automation is expected to take place within the next three years

18.5 Raising awareness & Promotion of electronic means

Information unavailable

19. Netherlands

19.1 Organisations and Institutions

Responsible institution(s) for public procurement policy	Ministry of Economic Affairs (www.minez.nl) - plays a key role in the overall policy formulation in the area of public procurement, including the introduction of operational electronic public procurement, and in the collection of experiences on the ministerial use of electronic tendering. - has recently begun the preparations for the implementation of the forthcoming EU Directives on public procurement, including the development of an outline for a new legal framework for public procurement in general.
Responsible institution(s) for legal aspects	Ministry of Economic Affairs (www.minez.nl)
Responsible institution(s) for technical solutions	Ministry of Economic Affairs (www.minez.nl)
Central procurement institution(s)	Currently no central procurement bodies exist in the Netherlands. A national agency has before been responsible for the overall public procurement, but the agency was abolished due to unsuccessful results. Therefore, the selection of suppliers is typically a responsibility of the individual public institutions.
Other important organisations	-
Type of coordination between different institutions	Public procurement in the Netherlands generally takes place in a decentralised manner. According to the Action Plan (see below), all ministries are to be involved in the introduction of electronic tendering.

19.2 Strategy

The introduction of operational electronic public procurement has a medium priority in the Netherlands. Currently a national programme or strategy within the area of electronic public procurement does not exist. “Action Plan on Professional Procurement and Purchase” (2001), which described a way of working for the national government within the area of public procurement, is currently the main strategic document

The main reasons for the lack of an overall objective or strategy is firstly the absence of a regulated procurement tradition in the Netherlands, and secondly that the Dutch government find it important to integrate a national strategy into the forthcoming EU Directives on public procurement.

The abovementioned Action Plan describes a way of working for the national government within the area of public procurement, and has three main objectives:

1. *Innovative tendering:* Promoting innovation and if necessary, co-operation (cluster formation) by presenting a challenge in the invitation to tender and tailoring the contract forms to this. The government acts as a demanding customer and invites innovative tenders. This is applied on an increasing scale.
2. *European tendering:* Publishing the invitation to tender and, so increasing competition in the market. This creates opportunities for better bids. Furthermore, it is a statutory requirement for government procurement (above certain thresholds). Incentives are needed at this level, as there are shortcomings in compliance.
3. *Electronic tendering:* Publishing announcements and invitations to tender via the Internet, and further deployment of modern information and communications technology (ICT) that supports the entire procurement process.

At the central level, the Action Plan describes a number of steps to be taken among ministries to strengthen inter-departmental co-operation. Among these steps, the ministries will need to publish invitations for tender electronically at the earliest opportunity.

In addition, the central government intranet will need to incorporate en electronic network for buyers and tendering offers, acting as a virtual knowledge centre for professional procurement and tendering. The functions of the electronic procurement network will also need to include a list of buyers and tendering officials at each ministry and a list of planned and current tenders.

Finally, the Action Plan states that the Ministry of Economic Affairs will need to gain experience with electronic ordering and tendering, and place this at the disposal of other parties.

The Action Plan also lists a number of activities, which already has been initiated or implemented. Within the area of electronic public procurement, these activities cover the establishment of a network of professional purchases of the government, including a virtual meeting place (www.PIANOdesk.info), and the setting up of an interdepartmental project team on electronic purchasing.

19.2.1 Statement of objectives

The Dutch government has not yet specified an overall objective for the introduction of operational electronic public procurement in the Netherlands. Scope of strategy

Levels of government involved	Information unavailable
Legal framework	Information unavailable
Allocated resources	Significant resources on the introduction of e-public procurement have yet to be allocated
Time frame	Information unavailable

19.2.2 Existing guidelines

Information unavailable

19.3 Legal framework

19.3.1 Legal status of the use of electronic means in Public Procurement

No legal framework for electronic public procurement exists at this moment. Implementation of the new EU Directives on public procurement (see next paragraph) will provide this framework.

To date electronic announcement of tenders is stimulated. With a view to the forthcoming legal framework for electronic procurement some pilot-projects have been executed by individual contracting authorities.

19.3.2 Implementation of the Directives

The forthcoming EU Directives on public procurement are expected to be formally implemented in the Netherlands in 2005. However, additional Dutch requirements will not be implemented before 2007. Currently the use of electronic means in the public procurement process is not regulated by national legislation

With the new EU directives, the government is expected to provide that all Contracting Authorities may use electronic auctions and all other options as indicated in the new EU directives. In addition, Contracting Authorities may and will probably publish tender-related information on a “buyer-profile”.

The Dutch government is currently preparing for the implementation of the forthcoming EU Directives on public procurement. Following these preparations, the Dutch government will develop a more explicit strategy for the introduction of operational electronic public procurement. In this respect, full migration in public procurement to electronic means is considered a realistic and desirable goal within a timeframe of 10 years.

19.3.3 Status of tools

Public procurement portals	The Dutch government has recently introduced an electronic procurement website for the use of the construction sector. The site, which can be found at www.aanbestedingskalender.nl, provides an overview of current procurement within the construction sector. The site is however expected to form a template for the development of a central electronic public procurement portal[51]
Electronic signature	The Dutch government has recently passed an electronic signature bill (May 2003), which ensures the transposition in Dutch law of the European Directive 1999/93/EC on a Community framework for electronic signatures, and provides a firm legal basis for the deployment and use of electronic signatures in e-commerce and e-government.
Electronic catalogues	Electronic catalogues have not been used
Electronic auctions	Ministry of Social Affairs and Employment and different local hospitals and health departments have gained experience with e-auctions in pilot-projects.
Dynamic Purchasing Systems	Dynamic purchasing systems have not been used
Framework agreements	-

19.3.4 Reference to the relevant legal acts

Information unavailable

19.4 Current usage of electronic means in Public Procurement

19.4.1 Practical use of electronic means in Public Procurement

The total impact of introducing electronic public procurement in the Netherlands has not yet been assessed, and the Ministry of Economic Affairs has not agreed on whether the impact will be assessed within the next three years.

Monitoring of the up-take and progress of e-procurement does not take place in the Netherlands yet. However, with the implementation of the forthcoming EU Directives on public procurement, the Ministry of Economic Affairs is expected to do this on a regularly basis (it is not possible to estimate the frequency at this time).

[51] The portal for information and knowledge-transfer for officials in contracting authorities is www.ovia.nl. The portal is also a government initiative. Based on information from Leo Baaijen, Ministry of Economics

19.4.2 Which phases of procurement are covered?

Information unavailable

19.5 Raising awareness & Promotion of electronic means

Within this framework, the Netherlands Accreditation Council has recently accredited KPMG Certification to certify ICT service providers for the issuance of qualified certificates for electronic signatures. KPMG has carried out his first certification at PinkRoccade Megaplex, who is the first party in the Netherlands to meet all the requirements. However, it is currently unclear whether the signature will be used in public procurement and whether the use of qualified electronic signature will be made mandatory to participate in public calls for competition.

At the current time, it is still unclear whether the Dutch government intends to introduce national standards for the electronic exchange of data in the public procurement process. However, the government expect to follow the standards mentioned in the forthcoming EU Directives on public procurement.

20. Poland

20.1 Organisations and Institutions

Responsible institution(s) for public procurement policy	Public Procurement Office (www.uzp.gov.pl) • Independent unit within the Polish government, and the main co-ordinating institution on public procurement. • Created on 1 January 1995, following the adoption of the Act on Public Procurement on 10 June 1994. • Pays a policy making and co-ordinating role for the entire Polish public procurement system Elaborates training programs, and organises and inspires training events in the field of public procurement. Ministry of Scientific Research and Information Technology (www.informatyzacja.gov.pl) • Responsible for development and implementation of projects and solutions in the filed of e-public procurement in collaboration with the Public Procurement Office.
Responsible institution(s) for legal aspects	Public Procurement Office (www.uzp.gov.pl)
Responsible institution(s) for technical solutions	Public Procurement Office (www.uzp.gov.pl) • Responsible for developing and operating e-public procurement solutions including the official Public Procurement Bulletin in which public procurement notices are published
Central procurement institution(s)	Public Procurement Office (www.uzp.gov.pl) • Responsible for issuing administrative decisions in response to requests for the application of a procedure other than unlimited tendering
Other important organisations	-
Type of coordination between different institutions	Poland has a decentralized system of public procurement. Every public administration entity is responsible for its own procurement procedures and selection of suppliers. There are no central institutions which purchase on behalf of government or self government entities. However, there is a legal possibility that various public administration units agree to award public procurement contracts together (e.g. IT equipment, vehicles etc.) in order to combine their "purchasing power" and get better prices

20.2 Strategy

The overall vision regarding electronic public procurement in Poland is to ensure efficiency, and general savings in the public administration. An additional objective is to minimizing corruptive behaviour and secure transparency in the public sector activities. In general, electronic public procurement has a medium priority on the national political agenda in Poland.

In order to achieve the objectives Poland has different associated strategies on information society and technology, e-commerce and e-government in Poland. These are reflected in two core projects:

- "Gateway to Poland", State Committee for Scientific Research (2002)[52] is the Polish e-government action plan. Moreover it is an online integrated platform of public administration services available to the public. The platform is expected to increase the efficiency of public administration services by about 40 %.
- "e-Poland – Strategy for the Information Society Development in Poland, 2001-2006", The Ministry of Economy (2001, 2004)[53] is the strategy for development of the information society and includes actions in the fields of e-commerce and on-line public administration. The strategy outlines several planned actions in the period 2001 – 2006 among them a build-out of the Internet service of the Public Procurement Office and introduction of fully electronic procedures for awarding public procurement contracts. For example, it will be required to publish notices relating to public procurement electronically. Furthermore a specific task of the Office of Public Procurement described in the strategy is to introduce fully electronic procedures for awarding public procurement contracts at the latest in 2005.[54]

20.2.1 Statement of objectives

There is a set of overall objectives:

- to ensure efficiency and general savings in the public administration
- to minimize corruptive behaviour
- to secure transparency in the public sector activities

[52] See the State Committee for Scientific Research (www.kbn.gov.pl); and the Ministry of Scientific Research and Information Technology (www.informatyzacja.gov.pl)

[53] See the Ministry of Scientific Research and Information Technology (www.informatyzacja.gov.pl)

[54] "*e-Poland – Strategy for the Information Society Development in Poland, 2001-2006*" (The Ministry of Economy)

20.2.2 Scope of strategy

Levels of government involved	National, regional and local public administration are included in the strategies
Legal framework	Information unavailable
Allocated resources	There is no specific information on this issue
Time frame	Information unavailable

20.2.3 Existing guidelines

Guidelines have not been issued.

20.3 Legal framework

20.3.1 Legal status of the use of electronic means in Public Procurement

The Polish public procurement system was established in 1994 with the adoption of the Act on Public Procurement. Since then the Act has been amended several times mainly with the aim to clarify its rules and definitions, broaden the scope of application and make the procurement process more transparent and to adjust the Polish law to the EU regulatory framework.

Public procurement including E- procurement is now regulated in Poland in the new Law on public procurement (LPP), which entered into force on March 2, 2004. LPP allows among other things use of advanced electronic signature in submission of tenders in public procurement proceeding. The act dealing in general with the use of electronic signature was adopted in Poland in September 2001 and entered into force in 2002. However this legislation does not deal particularly with electronic procurement.
Moreover the Polish legislation also regulates rules applicable to communication and the use of e-auctions.

20.3.2 Implementation of the Directives

The new EU public procurement directives are expected to be implemented in the second half of 2005. Polish legislation on public procurement provides that Contracting Authorities may use e-auctions on purchases of “generally available” goods below of 60.000 EUR.

20.3.3 *Status of tools*

Public procurement portals	**There is no central public procurement portal in Poland, and generally only few activities in the public sector can take place on–line**
	In the private sector two electronic market places among other things deliver the possibility for e-procurement for utilities with low thresholds and therefore not covered by the legislation: • X – Trade (www.xtrade.pl/xtrade) • MarketPlanet (www.marketplanet.pl/en)
Electronic signature	The use of electronic signature in submission of tenders subject to consent of awarding entity has been a possibility in legislation since March 2004 and is required if the tender is submitted electronically. The new legislation equalizes the electronic signature with the written, but it is only used to a low extent in practice
Electronic catalogues	No experience with e-catalogues
Electronic auctions	A few entities in the Polish public sector have experience in organizing e-auctions[55], e.g. a small number of municipalities including the Warsaw Municipality. However the use of e-auctions is not a widespread activity in Poland.
Dynamic Purchasing Systems	No experience with dynamic purchasing systems
Framework agreements	Framework agreements are only allowed in the utility sector.

20.3.4 *Reference to the relevant legal acts*

ACT of 29 January 2004 Public Procurement Law

20.4 Current usage of electronic means in Public Procurement

20.4.1 *Practical use of electronic means in Public Procurement*

The Ministry of Scientific Research and Information Technology has assessed the impact of introducing electronic public procurement. The following aspects are being assessed: Number of electronic transaction, electronic public procurement's share of total public procurement volume, speeding up of procurement procedures, transaction costs, and effect on prices.

There has been no regular monitoring on up-take and progress on e-public procurement in Poland so far, but a more regular statistical monitoring is expected within two years.

[55] Based on interview with Mr. Dariusz Piasta, Public Procurement Office, European Integration Department

20.4.2 Which phases of procurement are covered?

IT software to be developed under the project financed from EU funds will cover all phases of public procurement up to award of contracts.

20.5 Raising awareness & Promotion of electronic means

The use of standards for electronic data exchange is a focus area in Poland, but decisions on which and how standards are to be used in the future have not been made. Under the current legislation it is obligatory to use a CPV code when sending notices.

21. Portugal

21.1 Organisations and Institutions

The recently established *Mission, Innovation and Knowledge Unit* (UMIC) is currently the institution driving the development of e-public procurement in Portugal. UMIC is established as a support structure for the development of the Portuguese government's policy for innovation, information society and e-government. UMIC is thus assigned with policy formulation for e-public procurement, the development of e-public procurement solutions and for the legal framework for e-public procurement. The latter responsibility is shared with the Ministry of Finance. In addition to the strong position currently taken by UMIC, the institutional infrastructure is expected to be strengthened through the future establishment of the new institution which will be assigned with the responsibility for public procurement, including e-public procurement.

Responsible institution(s) for public procurement policy	Mission, Innovation and Knowledge Unit, Ministry of Finance (www.min-financas.pt)
Responsible institution(s) for legal aspects	Mission, Innovation and Knowledge Unit, Ministry of Finance (www.min-financas.pt)
Responsible institution(s) for technical solutions	Mission, Innovation and Knowledge Unit, Ministry of Finance (www.min-financas.pt)
Central procurement institution(s)	Whithin the Ministry of finances the Direcção-Geral do Património is the central department which coordinates public procurement for the whole administration, at a national level, launching the adequate framework agreements for a range of goods and services. It also gives its collaboration to UMIC where e-Procurement is concerned and in the study of the legal framework for e-Procurement
Other important organisations	-
Type of coordination between different institutions	Generally public procurement has until now been conducted in a decentralized manner as regards both procurement within the ministries and the entire ministerial level. This means e.g. that when no framework agreements exist the selection of suppliers is typically done by the individual institutions both for procurement above and below the threshold. However, the decentralized model is expected to change in the future with the strategy towards more centralized organization of the procurement within the ministries as well as for the entire ministerial level. There are no central procurement institutions at regional and local levels. The Ministry of Finance is presently in a coordinating role as regards public procurement and as such it functions to some extent as a central procurement body at the national level. In this capacity the Ministry of Finance is responsible for the administration of framework agreements and the selection of suppliers under these agreements.

21.2 Strategy

Electronic public procurement is an area which is highly prioritized by the government of Portugal. The government's strategy for the deployment of e-public procure is outlined in its National e-Procurement Program, which is an integral part of the overall strategy on the development of e-government and the information society in Portugal. The main motives for introducing electronic public procurement are to achieve better control of public sector spending, achieve public sector savings, modernize the public sector, align Portugal with other EU member states and increase the efficiency and competitiveness of the private sector.

The ambitions embedded in the program are illustrated by the government's stated intention to realize savings in the magnitude of 10% - 20% on public procurement costs during the period 2003-2006. This is a direct consequence of the deployment of e-public procurement systems across government institutions at the central governmental level as well at the regional and local governmental levels. E-public procurement systems are expected to be extended across the entire public administration during 2004, and the Portuguese government plans to carry out approximately 50% of its total acquisitions electronically by 2006.

The strategic focus of the national e-public procurement program puts a strong emphasis on the organizational aspects of public procurement as it concerns the establishment of a unit at the national level for e-public procurement and outlines that all ministries should centralize the processes related to e-public procurement.

21.2.1 Statement of objectives

Overall objectives:

- Establishment of an organisation responsible for national e-public procurement
- Centralized procurement within the ministries
- Intention to realize savings in the magnitude of 10% - 20% on public procurement costs during the period 2003 – 2006
- Approximately 50% of total acquisitions to be carried out electronically by 2006

21.2.2 Scope of strategy

Levels of government involved	All levels of government included
Legal framework	Information unavailable
Allocated resources	Information unavailable
Time frame	2003 – 2006

21.2.3 Existing guidelines

Guidelines for e-public procurement have been developed and are integrated into the “National Initiative for Electronic Commerce” (Cabinet Resolution no. 143/2000).

21.3 Legal framework

21.3.1 Legal status of the use of electronic means in Public Procurement

The future legal framework will fully respect the Directives, as the existing legal acts fully respect the Directives in what concerns public procurement

21.3.2 Implementation of the Directives

It is presently not clarified when the forthcoming EU public procurement directives will be implemented into national legislation as the timing will depend on the government’s decision. The use of electronic means for communication in the public procurement process is presently regulated by national legislation which encompasses the rules applicable to communication and the storage of data[56].

With the new EU directives, the Portuguese government expects to provide that Contracting Authorities may use electronic auctions and the expectation is that usage will be general and applied to different types of purchases. It is presently not clarified whether dynamic purchasing systems will be used in the future. Concerning the publishing of tender-related information on a buyer profile by contracting authorities, it is expected that this opportunity will be used in the future, but it is not determined when this will take place.

As mentioned above, the Portuguese government is preparing the launch of a central e-public procurement portal in 2004, and it is expected that the new portal will be in compliance with the forthcoming European public procurement directives.

[56] Decree Law 197/1999 and Decree Law 104/2002

21.3.3 Status of tools

Public procurement portals	The launch of a central electronic procurement portal is currently underway (www.compras.gov.pt), which will overtime include and converge the experiences made in the pilot projects.
Electronic signature	The legislation for the introduction of a qualified electronic signature is in place but electronic signatures are not used at present, and it is currently not clear when a qualified electronic signature will be introduced.
Electronic catalogues	Pilot projects on electro e-catalogues have been carried through
Electronic auctions	Pilot projects on electronic auctions have been carried through
Dynamic Purchasing Systems	There is no experience with dynamic purchasing systems
Framework agreements	Framework agreements exist and are used at the national level as well as at the regional and local levels. There is no aggregated data available (neither in total amounts nor as percentages of the total volume purchased through framework agreements) but for the Ministry of Finance alone the purchases made through framework agreements amounted to approximately 185 million EUR in 2002.

21.3.4 Reference to the relevant legal acts

Information unavailable

21.4 Current usage of electronic means in Public Procurement

21.4.1 Practical use of electronic means in Public Procurement

The uptake of e-public procurement is currently not monitored on a regular basis, but this aspect is expected to be monitored at some point in the future once e-public procurement accelerates. There is no figure available on the total volume of e-public procurement as the first e-public procurement initiatives are currently taking place on a pilot scale. UMIC is monitoring the implementation of the e-public procurement pilot projects in the seven ministries and will gather the experiences in terms of the number of electronic transactions, e-public procurement's share of total public procurement volume, the types of purchases undertaken, the effects on the speeding up of procurement procedures, transaction costs and the effect on prices. According to preliminary assessments, the experiences from the pilot projects are positive across the board.

As an example of the concrete experiences made, it can be mentioned that the Portuguese government conducted its first e-procurement pilot auction in November 2003. This initiative, carried out for the Ministry of Social Security and Work and the Ministry of Education, was organized in the framework of the National e-Procurement Program. According to UMIC, the auction attracted 7 companies and over 50 bids, and generated savings of EUR 9,600 in the purchase of paper for the month of December.

This represents savings of approximately 25%, which is consistent with the government's objective of achieving savings between 10% and 20% on public procurement costs between 2003 and 2006.

21.4.2 Which phases of procurement are covered?

Information unavailable

21.5 Raising awareness & Promotion of electronic means

At present seven ministries are implementing pilot projects on e-public procurement and the experiences achieved through these projects will be taken into account in the forthcoming mainstreaming of e-public procurement in the public sector. The involved ministries are: Ministry of Defense, Ministry of Justice, Ministry of Health, Ministry of Social Security, Ministry of Employment and Public Works, Ministry of Finance and the Office of the Prime Minister. Parts of these pilot projects concern the change process towards a more centralized procurement organization within the seven ministries, which is currently ongoing.

Private contractors have so far played an important role for the development of e-public procurement in Portugal as the development of the technical solutions. The operation of the portals, for the pilot projects as well as for the forthcoming central e-public procurement portal, has been contracted out to private companies. This means that the operational costs related to these e-public procurement solutions are underwritten by the users, buyers as well as suppliers, through e.g. transaction fees.

Through the pilot projects, some experience has been gained with electronic auctions and e-catalogues. Electronic auctions have been used in one of the pilot project (see further details below) for products below the threshold. E-catalogues have been used since 1999 for 14 different types of products (e.g. cars, paper, uniforms, fuel, IT hardware and software). There is no experience with multi-supplier electronic purchasing systems similar to Dynamic Purchasing Systems.

As e-public procurement presently is being explored on a pilot project level, none of the phases in the procurement cycle have been automated (i.e. notification about tender, publication of tender, management of receipt/submission of tenders, evaluation of tenders, ordering and invoicing).

The government is expected to introduce national standards for the electronic exchange of data in the public procurement process, but it is at present not clear which standards will be used and when this will happen.

22. Slovakia

22.1 Organisations and Institutions

In general, the responsibility for the implementation of the Information Society in Slovakia is shared between different government departments. Most of the relevant players are primarily working with e-government and the development of the information society and not e-procurement on a specific level. At the present, the main responsibility for information society belongs to the Ministry of Transport, Posts and Telecommunications. However, two players can be identified as the key institutions responsible for the implementation of electronic public procurement in Slovakia: The Office for Public Procurement and the upcoming the Office of the Commissioner for Information Society.

Responsible institution(s) for public procurement policy	Office for Public Procurement • directs the state policy on public procurement and concession procurement and exercises supervision over the public procurement and concession procurement. • notifies the conversion of financial thresholds for the above-threshold methods of public procurement into Slovak currency, etc. • is responsible for the overall responsibility of the future formulation of the Slovakian policies within the area electronic public procurement as well as the development of a legal framework for electronic public procurement. Office of the Commissioner for Information Society • has not yet been established • is expected to play a key role in the coordination of the ministries efforts to create favorable conditions within the area of ICT for the benefit of all segments of the society. This includes the development of the necessary platform for introducing electronic public procurement (access to the Internet, hardware, etc.)
Responsible institution(s) for legal aspects	Office for Public Procurement
Responsible institution(s) for technical solutions	Office for Public Procurement Office of the Commissioner for Information Society
Central procurement institution(s)	Office for Public Procurement
Other important organisations	National Security Authority (NSA) Ministry of Economy
Type of coordination between different institutions	Supra department coordination

22.2 Strategy

There is no specific strategy for introducing or implementing e-public procurement

However, an overall e-government strategy with the aim of introducing electronic services to citizens and business enterprises is currently under discussion. Currently, the general political priority of introducing electronic public procurement has a low priority.

In the meantime, the government focuses its efforts on the creation and development of the general environment for the introduction of operational electronic public procurement, including improving access to the Internet among SME's and the necessary IT-hardware.

The Slovakian government has recently adopted a **National Strategy for the Information Society in the Slovak Republic.** The policy derives from the e-Europe+ initiative and action plan, and defines the main challenges involved in building up an information society. In addition, the policy proposes solutions to the creation of favorable conditions to unleash the full potential of ICT's for the benefit of all segments of the society.

Several ministries are involved in the government's efforts on the creation of favorable ICT-conditions. However, there is no overall coordination among these efforts, which is seen as a weakness in relation to the introduction of electronic public procurement in Slovakia.

The Ministry of Education prepared a Policy for the Information Society in 2001, which among other matters contained a proposal for the establishment of the National Agency for the Information Society in the Slovak Republic. In 2003 coordinator for Information Society was changed from the Ministry of Education to the Ministry of Transport, Posts and Telecommunications.
Consequently, the Ministry of Transport, Posts and Telecommunications is implementing the Action Plan adopted with the National Strategy for Information Society. One of the activities is to establish the Office of the Commissioner for Information Society, which will coordinate the activities in the field of information society and ICT.

22.2.1 Statement of objectives

There are no overall objectives.

The main reasons for the lack of an overall objective or strategies for the introduction of operational electronic public procurement are:

- Fragmented responsibilities between the involved governmental institutions
- Absence of a regulated procurement tradition
- The added value of electronic public procurement is presently considered to be low compared to standard public procurement
- The government awaits experiences within the area of electronic public procurement before launching it in Slovakia
- Lack of capacities/skills within the public procurement institutions to work with electronic public procurement
- Many suppliers (especially SME's) are not ready for electronic procurement.

22.2.2 *Scope of strategy*

Levels of government involved	Information unavailable
Legal framework	Information unavailable
Allocated resources	Information unavailable
Time frame	Information unavailable

22.2.3 *Existing guidelines*

There are no special guidelines on e-procurement

22.3 Legal framework

22.3.1 *Legal status of the use of electronic means in Public Procurement*

Currently the use of electronic means for communication in the public procurement process is regulated by Act no. 610 of December 2003 on Electronic Communication, which contains the rules applicable to communication in Slovakia.

The Office for Public Procurement estimates that no operational electronic public procurement systems are currently compliant with the requirements of the forthcoming EC Directives on public procurement.

22.3.2 *Implementation of the Directives*

The Slovakian government expects to be ready to implement the forthcoming EC Directives on public procurement in 2006.

With the new EU directives, the government is expected to provide that Contracting Authorities may use electronic auctions and dynamic purchasing systems.

None of the current e-procurement systems is expected to completely fulfill the requirements of the EU public procurement directives, but the necessary investments are expected to be allocated once the requirements are clear.

22.3.3 *Status of tools*

Public procurement portals	The Slovakian government has not yet established a central electronic public procurement portal, and the Office for Public Procurement is not aware of any other public procurement portals or electronic marketplaces in Slovakia.
Electronic signature	The Slovakian law on Electronic Signature came onto effect in 2002. The certification agency for the institution of electronic signature is currently under the jurisdiction of the National Security Authority (NSA), which has recently begun the accreditation process. The Electronic Research and Project Office is currently the only certification authority entitled to issue electronic signatures. At this time, the electronic signature has therefore not been used in relation to public procurement, and the Office for Public Procurement does not expect the use of a qualified electronic signature to be made mandatory to participate in public calls for competition in Slovakia.
Electronic catalogues	Electronic catalogues have been introduced
Electronic auctions	Electronic auctions have been introduced
Dynamic Purchasing Systems	Dynamic purchasing systems have been introduced
Framework agreements	-

22.3.4 *Reference to the relevant legal acts*

- Act no. 22 of January 2004 on Electronic Commerce
- Act no. 215 of April 2002 on Electronic Signature
- Act no. 428 of July 2002 on Protection of Personal Data
- Act no. 610 of December 2003 on Electronic Communication
- Draft of Act on Information System for Public Administration, which is before approval procedure

22.4 Current usage of electronic means in Public Procurement

22.4.1 *Practical use of electronic means in Public Procurement*

The total impact of introducing electronic public procurement in Slovakia has not yet been assessed. However, the Office for Public Procurement plans to do this in line with the gradual introduction of an electronic public procurement system.

Monitoring the up-take and progress of e-procurement in Slovakia has not yet taken place. However, with the implementation of the forthcoming EC Directives on public procurement, the Office for Public Procurement is expected to do this on a regular basis (it is not possible to estimate the frequency at this time).

22.4.2 Which phases of procurement are covered?

The Office for Public Procurement has elaborated representative standard forms of public procurement notices, which will be sent by Contracting authority to the Office for Public Procurement electronically.

22.5 Raising awareness & Promotion of electronic means

Public institutions and Commercial firms or associations, which promote in the field of Information and Communication Technologies, contribute to raising awareness of using electronic means. There are for example:

- IT Association of the Slovak Republic (ITAS), which represents professional association of the most significant domestic and foreign firms.

23. Slovenia

23.1 Organisations and Institutions

Three entities can be identified as the main institutions responsible for the implementation of electronic public procurement in Slovenia:

- Ministry of Finance
- Government Centre for Informatics (CVI)
- Ministry for Information Society

Responsible institution(s) for public procurement policy	Ministry for Information Society (http://mid.gov.si/mid/mid.nsf) • responsible for information society applications and for information infrastructure including two action plans and the upgrading of the e-Slovenia strategy, the e-government strategy, and the strategy of electronic business in public administration Council for Information Society • a strategic council established by the Prime Minister • deals with strategic issues regarding information society and ICT. • among others, the tasks of SID include monitoring and assessing the implementation of directions in the field of e-commerce and preparing of initiatives and suggestions for managing issues in the field of information society
Responsible institution(s) for legal aspects	Ministry of Finance
Responsible institution(s) for technical solutions	Ministry of Finance Government Centre for Informatics (established in 1993) (www.sigov.si/cvi/eng/)
Central procurement institution(s)	Ministry of Finance
Other important organisations	
Type of coordination between different institutions	Public procurement in Slovenia is in general organised in a mixture of a decentralised and centralised approach.

23.2 Strategy

The introduction of operational electronic public procurement is highly prioritised in Slovenia. In relation to the work on EU accession, this is seen as very important for the Slovenian government to develop an information society that establishes relations between the public administration and the private businesses in order to be fully integrated in the internal market. In addition, the introduction of operational electronic procurement is seen as a very important instrument to control and reduce public sector spending as well as to modernise the public sector in general.

Furthermore, the establishment of an operational electronic public procurement system is seen as an important tool to increase the efficiency and competitiveness of the private sector in Slovenia as well as an instrument to improve the Slovenian alignment on European neighbours.

Initiatives on e-public procurement is integrated in the overall strategy on e-government and development of an information society
Strategic reports:

- "Strategy of E-commerce in Public Administration of the Republic of Slovenia for the period from 2001 until 2004" (2001)
- "Action Plan e-Government Up to 2004" (2002)

The Strategy of E-commerce in Public Administration serves as a basis for all efforts, projects, activities and tasks within the transition of public administration into an information society, with the emphasis on the introduction of electronic commerce as a basic characteristic of an information society.

The strategy contains suggestions for its realisation in the field of e-commerce of public administration through the mechanisms of realisation (procedures of planning, instalment, implementation, supervision) and institutions (organs, bodies). The strategy also refers to the fact that adoption of the Electronic Commerce and Electronic Signature Act (se below) has offered new possibilities for Slovenia in the field of public procurement.

In connection with the overall strategy, a number of programmes and projects have been outlined. Among these, the strategy outlines a programme on the introduction of electronic public procurement, enabling the Government Centre for Informatics and other state organs to transfer the procedures of public ordering into electronic form. The programme includes the following projects:

- Expert system for decision-making support on choosing the most suitable offer (EP-0901)
- Electronic system for submitting orders of smaller value (EP-0902)
- Electronic system for ordering software from chosen suppliers (EP-0903)
- Electronic system for the support of limited procedure for submitting public orders (EP-0904)
- Electronic system for publicising the intention on submitting public orders and chosen suppliers (EP-0905)

23.2.1 Statement of objectives

The overall objective is to remove administrative barriers

23.2.2 *Scope of strategy*

Levels of government involved	All levels of government are included
Legal framework	Information unavailable
Allocated resources	Information unavailable
Time frame	Information unavailable

23.2.3 *Existing guidelines*

Special guidelines have not been issued

23.3 **Legal framework**

23.3.1 *Legal status of the use of electronic means in Public Procurement*

The amended public procurement act (adopted January 2004) aims at removing administrative barriers by streamlining public contracting procedures, introducing e-operations and the option of centralising procurement and public contracting procedures. One of the key amendments is the introduction of an e-procurement system, including the establishment of an information portal.

23.3.2 *Implementation of the Directives*

The forthcoming EC Directives on public procurement are expected to be implemented in Slovenia in 2006. The following areas of use of electronic means in the public procurement process are already regulated by national legislation: rules applicable to communication, storage of data and use of specific procedures, e.g. e-auctions.

With the new EU directives, the government is expected to provide that Contracting Authorities may use electronic auctions and dynamic purchasing systems.

None of the current e-procurement systems is expected to fulfil the requirements of the EU public procurement directives fully, but the necessary investments are expected to be allocated once the requirements are clear.

23.3.3 *Status of tools*

Public procurement portals	Expected establishment of an information portal, where contracting authorities will need to publish public procurement notices. The aim is that the portal will be set up within in 2005
Electronic signature	The Electronic Signature in Slovenia is regulated by the Electronic Commerce and Electronic Signature Act[57] and the Decree on Conditions for Electronic Commerce and Electronic Signing. The main significance of the Act is that under special conditions it extends the same validity to the electronic signature as the autographic signature has in the paper world.
Electronic catalogues	In the phase of starting the project
Electronic auctions	Some government authorities have experience with electronic auctions
Dynamic Purchasing Systems	Dynamic purchasing systems are not being used
Framework agreements	Information unavailable

23.3.4 *Reference to the relevant legal acts*

Electronic Commerce and Electronic Signature Act
Decree on Conditions for Electronic Commerce and Electronic Signing

23.4 Current usage of electronic means in Public Procurement

23.4.1 *Practical use of electronic means in Public Procurement*

The total impact of introducing electronic public procurement in Slovenia has not yet been assessed, but the Ministry of Finance plans to do this within the next three years.

Monitoring of the up-take and progress of e-procurement is monitored on a regular basis by the Government Centre for Informatics and the Ministry of Finance

23.4.2 *Which phases of procurement are covered?*

Information unavailable

[57] The Act is entirely in accordance with the provisions of the United Nations' Commission or the International Trade Law's Model Law of the electronic commerce and with the provisions of the primary European legislation. It also includes all the provisions of the Directive 1999/93/EC concerning common framework of the Community for electronic signatures.

23.5 Raising awareness & Promotion of electronic means

The Slovenian government intends to introduce national standards (Open Source XML) for the electronic exchange of data in the public procurement process.

24. Spain

24.1 Organizations and Institutions

Responsible institution(s) for public procurement policy	Ministry of Economy and Finance (http://portal.minhac.es/Minhac/Home.htm) Ministry of Public Administration (www.map.es) Ministry of Trade, Industry and Tourism (www.mcyt.es)
Responsible institution(s) for legal aspects	Ministry of Economy and Finance (http://portal.minhac.es/Minhac/Home.htm) Ministry of Public Administration (www.map.es) Ministry of Trade, Industry and Tourism (www.mcyt.es)
Responsible institution(s) for technical solutions	Responsible for centralized procurement: Directorate of State Patrimony, Ministry of Economy and Finance (http://catalogopatrimonio.minhac.es)
Central procurement institution(s)	There is currently a Centralized Procurement System of goods and services which can be used by central administrations, as well as by Autonomous Communities and local administrations (http//catalogpatrimonio.minhac.es)
Other important organisations	-
Type of coordination between different institutions	Purchasing operations can be organized both centralized and decentralized. Centralized operations of goods and services are carried out through the central public procurement system (amount to around 900 million EUR). The remaining part of public procurement is under the responsibility of each individual institution.

24.2 Strategy

The Ministry of Public Administration is currently working on a strategy for the provision of e-public services in the coming years.

The Directorate of State Patrimony under the Ministry of Economy and Finance has designed a plan for centralized procurement system, which will be implemented by the end of 2004. Such a system will enable to achieve all phases of procurement electronically under the Centralized Procurement System, from the tender to the delivery phase.

24.2.1 Statement of objectives

The objective is that all transactions can be achieved electronically under the Centralized Procurement System in the course of 2005.

24.2.2 *Scope of strategy*

Levels of government involved	National and regional government are included
Legal framework	Law of Public Administration Contracts
Allocated resources	1.5 million EUR has been invested in the Centralized Procurement System during 2003-2004.
Time frame	2003-2005 (Centralized Procurement System)

24.2.3 *Existing guidelines*

Information unavailable

24.3 Legal framework

24.3.1 *Legal status of the use of electronic means in Public Procurement*

There are two relevant provisions:

- Law of public administration contracts
- Law of e-signature

A Ministerial decree is currently in the editing process. It will establish the criteria for use of electronic and telematic means in public procurement, and will be published during the last trimester of 2004.

24.3.2 *Implementation of the Directives*

The forthcoming EU public procurement directives are expected to be implemented in 2005.

The use of electronic means under public procurement will be delimited in the last semester of 2004.

With the new EU directives it is expected for the government to provide that Contracting Authorities may use electronic auctions and dynamic purchasing systems. It is also expected that buyer profiles to publish tender-related information will be used in Spain.

The current e-public procurement system in Spain needs only few changes to be compatible with the Directive’s requirements.

24.3.3 Status of tools

Public procurement portals	The Centralized Procurement System of goods and services can be used by central administrations, as well as by Autonomous Communities and local administrations. http://catalogopatrimonio.minhac.es
Electronic signature	An advanced electronic signature has been implemented and is used both in the central administration and in some of the Autonomous Communities
Electronic catalogues	Electronic catalogues of goods and services have existed within the central State Administration since 1997. They are also available for the local communities and administrations.
Electronic auctions	-
Dynamic Purchasing Systems	There is no experience with dynamic purchasing systems in the public administration
Framework agreements	In the Central State Administration, the Central Procurement System relies on framework contracts.

24.3.4 Reference to the relevant legal acts

Information unavailable

24.4 Current usage of electronic means in Public Procurement

24.4.1 Practical use of electronic means in Public Procurement

Electronic means are used to some extent in connection with procurement of goods, whereas it is only used to a low extent in connection with services. There are no available data in relation to works.

Monitoring of the up-take and progress of e-procurement is monitored on a yearly basis. However, at this stage no data pertaining to the quantitative impact are available.

24.4.2 Which phases of procurement are covered?

The status for automating procurement phases in Spain is as follows:

- Notification about tender (To a low extent today, expected to be within 3 years)
- Publication of tender (To a large extent today)
- Management of receipt/submission of tenders (To a low extent today)
- Evaluation of tenders (To some extent today, expected to be within 3 years)
- Ordering (N/A)
- Invoicing (N/A)

In the Central Procurement System, notification and publication of tenders, as well as provision of legal and technical information have been implemented since 2001. The remaining procurement phases except invoicing will be made electronic at the end of 2004.

24.5 Raising awareness & Promotion of electronic means

The Ministry of Public Administrations announced in October 2004 the launching of a plan to develop a system of public tenders online.

The Department of Centralized Procurement (Directorate of State Patrimony, Ministry of Economy and Finance) has developed a project of electronic tenders (from publication to contract signature) for operational goods (personal computers, furniture, cars etc.) and for public administrative services.

Both the central, regional and local administrations have access to this system and can purchase online from any computer located in the administration with a login and an advanced e-signature. Moreover, the system can deliver at any moment a picture of the advancement of ordered goods and services. Currently, 2,200 public institutions have access to this system.

The system also enables the economic operators to respond to the tender online. The bidders are entitled the access their catalogues, so that they easily can modify the description or add prices, products etc. The project has come to an end and is being implemented.

25. Sweden

25.1 Organisations and Institutions

Responsible institution(s) for public procurement policy	National Board for Public Procurement (Nämnden för offentlig upphandling, NOU, www.nou.se), Ministry of Finance • Central government agency under the Ministry of Finance. • Responsible for policy formulation in the area of e-procurement. • NOU is also responsible for day to day operations and for contacts with contracting entities, other organisations and individuals.
Responsible institution(s) for legal aspects	National Board for Public Procurement (Nämnden för offentlig upphandling, NOU, www.nou.se), Ministry of Finance
Responsible institution(s) for technical solutions	Each organisation, central authority, municipality, county council, is responsible for their own solution. Each organisation can follow the specifications, SFTI, but it is not mandatory[58]
Central procurement institution(s)	Swedish Agency for Public Management (Statskontoret)
Other important organisations	The Swedish Association of Local Authorities (Svenska Kommunförbundet) The Swedish Federation of County Councils (Landstingsförbundet)
Type of coordination between different institutions	Public procurement in Sweden is decentralized. However central and local authorities collaborate in different ways. Central authorities, county councils and municipalities work together in a Committee under the name of Single Face To Industry (SFTI). Its programme covers activities like awareness and promotion of eProcurement, development of standards and working practices and support to suppliers The Swedish government has established a co-ordination function for government procurement under The Swedish Agency for Public Management, with one of its main tasks being to coordinate framework contracts for central government authorities. Today, 12 procurement responsible authorities are working together with the co-ordination function in the system for framework purchasing. The system includes some 100 product areas, e.g. for stationery, cars, PC's and furniture[59]

[58] This is the result of a decentralized structure of the Swedish public sector. County councils and municipalities are independent. Central government authorities have budget and goals they must achieve but within that framework they can make their own decisions, for example about technical solutions. Therefore, there are many technical solutions and a somewhat market driven development; progress is dependent on collaboration. Based on information from Irene Andersson, The Swedish Agency for Public Management

[59] Based on information from Irene Andersson, The Swedish Agency for Public Management

25.2 Strategy

The goal of the Swedish Government's IT policy is to make the country a leading information society for all. Electronic commerce including electronic procurement is one area prioritized by the Government because it is an important medium for increasing rates of growth.

Work has taken place at the national level since the mid-1990's to facilitate the introduction of electronic procurement in the public sector.

The Swedish Government has made a commitment to take various measures to stimulate the development, and use, of electronic commerce. The role of the state is to ensure that electronic commerce is developed in a way that benefits both business and consumer. To encourage electronic commerce, the state must be aware of progress in the area, and work towards solving any problems. The Swedish IT policy is based on the principle of market-driven development. The tasks of the public sector are thus to ensure that regulation is in place, but also to set a good example by being progressive in terms of e-procurement, which can help to create a beneficial and more mature climate for e-commerce in general.

Initiatives on e-public procurement are an integrated part of different policies on adoption of the information society, among different publication is:

- "An Information Society for All, a publication" (2004), which is about the Swedish IT-policy

25.2.1 Statement of objectives

While the Swedish government has worked for a number of years to introduce and advance public e-procurement, it has not been possible to identify recent specific objectives in the area due to a decentralised organisation of activities on e-public procurement.

25.2.2 Scope of strategy

Levels of government involved	Only central government is included in the strategy
Legal framework	The national law on public procurement and national law implementing the EC-directives on electronic commerce
Allocated resources	Resources have been spent but there is no information available on the total amount due to the decentralized organisation.
Time frame	Authorities set their own time frames

In order to remove obstacles to the use of electronic signatures, the Swedish government has appointed a working group with the task to conduct a survey of form requirements (e.g. provisions that a communication or documentation must be signed or in writing). The WG presented a report in April 2003, revealing some 800 provisions that do not allow electronic communication or signatures, 180 of which were deemed to be unnecessary obstacles. Each Ministry is responsible for carrying out the necessary changes in legislation.

25.2.3 Existing guidelines

Guidelines have been issued, www.eh.svekom.se/mer/litteratur.html, even though no guidelines from central government.

25.3 Legal framework

25.3.1 Legal status of the use of electronic means in Public Procurement

Some of the current e-procurement systems are assessed as already meeting the requirements of the EU public procurement directives fully.

25.3.2 Implementation of the Directives

The forthcoming EU public procurement directives are expected to be implemented in 2005 and come into force in 2006. The following areas of use of electronic means in the public procurement process are already regulated by national legislation: rules applicable to communication, storage of data and use regarding security (such as electronic signatures).

In Sweden the drafting of the new public procurement legislation has just begun by appointing a committee and experts. The first proposal to a new legislation shall be given in February 2005. Any proposals concerning competitive dialogue, electronic auctions and dynamic purchasing systems can be reported at the latest on June 1st 2005. The final version will be finished during the summer of that year. The group is wide and contains representatives from the main ministries involved and representatives for contracting authorities, supplier and service providers. SMEs, labour unions and an environmental organisation are represented[60].

25.3.3 Status of tools

Public procurement portals	The Swedish government has not established any central electronic public procurement portals as this is deliberately left up to private operators. Several privately owned and operated portals exist instead. Opic and Ajour are two of them that concentrates on public procurement.
	www.opic.com Private portal with information on public tenders. Functionalities are notice and publication of tenders
	www.ajour.se Meeting point for authorities and procuring entities searching for suppliers. The company is a distributor of information about public procurement gathered through a vast and well established network of purchasers. All calls for tenders are structured and distributed through two channels, the printed version AnbudsJournalen and the database www.ajour.se. The functionalities are notices and publication of tenders.

[60] Based on information from Irene Andersson, The Swedish Agency for Public Management

Electronic signature	There are five framework agreements with five suppliers offering electronic signatures in Sweden, but e-signatures are so far only used to a low extent in relation to public procurement. There are no plans to make the use of a qualified electronic signature mandatory to participate in public calls for tenders in Sweden
Electronic catalogues	Electronic catalogues are used in relation to purchase of goods. Some suppliers when submitting a bid they refer to electronic catalogues and give discount on the prices given in these catalogues.
Electronic auctions	E-auctions are not being used.
Dynamic Purchasing Systems	Dynamic Purchasing Systems are not being used.
Framework agreements	Framework agreements are widely used. Framework agreements and electronic catalogues are often combined.

25.3.4 *Reference to the relevant legal acts*

The act on Public Procurement, www.nou.se/loueng.html

The Act on Electronic Signatures, Lag (2000:832) om kvalificerade elektroniska signaturerhttp://www.pts.se/Sidor/sida.asp?SectionId=1011

The directive 2001/115/EC harmonising the VAT invoicing rules has been implemented in the 3 laws that were affected.

25.4 Current usage of electronic means in Public Procurement

25.4.1 *Practical use of electronic means in Public Procurement*

According to a survey conducted in 2003, only 15 out of 241 central government authorities had introduced electronic ordering and invoicing, with a further 7 having initiated pilot projects. 76% of the central government authorities indicated that they had no immediate plans to introduce e-procurement. There are no figures to relate to the extent or up-take of e-procurement or the intentions to introduce e-procurement of the individual authorities with the volume of procurement carried out by those authorities.

The survey also showed that 83 of 290 municipalities have introduced systems for electronic procurement in some form, and according to information made available by the Swedish Ministry of Finance, 75 municipalities and 10 counties presently have solutions in place for electronic ordering and invoicing. A further 50 municipalities are planning to introduce electronic procurement, of which 35 have already initiated pilot-studies. Over 70 municipalities envisage the introduction of electronic procurement over the next few years. Of the municipalities that have introduced electronic procurement, they have mainly purchased food and office material.

The total public procurement in Sweden amounts to about SEK 400 billion. Central government is responsible for approximately SEK 85 billion.

The Swedish Agency for Public Management was in 2003 tasked by the government to carry out a yearly monitoring in cooperation with the Local Government Association of the up-take and progress on electronic public procurement. The monitoring is carried out as a web-based questionnaire which is distributed to contracting authorities. The Agency has also presented an action plan concerning electronic procurement. One goal is to a 50 % increase in the use of electronic procurement between 2004 and 2006.

The most significant advantages from the introduction of electronic public procurement for public authorities are expected to be:

- Speeding up of procurement procedures
- Lower transaction costs
- Better procurement statistics and enhanced budgetary control
- Correct prices
- Better usage of existing framework agreements

25.4.2 *Which phases of procurement are covered?*

The status for automating procurement phases in Sweden is as follows:

- Notification about tender (to a large extent today, both above and below threshold value)
- Publication of tender (to a large extent today, both above and below threshold value)
- Management of receipt/submission of tenders (to some extent today, but expected to be increased within the next three years)
- Evaluation of tenders (automated to some extent
- Ordering, increasing, particularly within regional and local authorities
- Invoicing, increasing, particularly within regional and local authorities

Generally, evaluation and management of receipt/submission of tenders are the phases of public procurement that have been automated the least.

Many municipalities are scanning their invoices and they are also developing solutions to be able to handle flows of invoices.

Some phases are not mentioned, for example planning before the start, dissemination of contract information and follow-up incl. statistics. The Swedish Agency for Public Management will in October 2004 open a website with information about all central framework agreements, www.statskontoret.se.

Procuring entities are reluctant to use new methods in procurement unless they feel assured that they comply with the legal framework.

25.5 Raising awareness & Promotion of electronic means

The main objectives appear to concern the development of the standard of Single Face to Industry: In the mid-1990’s, the Swedish experts from national, regional and local agencies started to work on a set of standards called ‘Single Face to Industry’ (SFTI, www.eh.svekom.se). SFTI is an industry standard for electronic commerce in the public sector in Sweden. The purpose of SFTI is to establish a single set of specifications for the interchange of electronic commercial transactions with all public operators, whether at governmental, regional (county council) or local community level.

To achieve this, a platform of co-operation has been organized where representatives for all three levels meet with representatives for the suppliers to develop a shared view of the public procurement processes and agree on common specifications. The objective is that pre-planning, the procurement process, ordering, and the invoicing process shall be done electronically. The processes shall follow the standards that have been produced and adopted under the SFTI concept. It is built on EDI-messages according to the EDI-FACT standards, and can be used along with other standards.

Some recent developments are based on ebXML.

26. United Kingdom

26.1 Organisations and Institutions

The main institutions in the field are:

- The Office of Government Commerce (OGC)
- The Improvement and Development Agency (IDeA)

Responsible institution(s) for public procurement policy	Office of Government Commerce (OGC; www.ogc.gov.uk) is an independent Office of the Treasury reporting to the Chief Secretary.
Responsible institution(s) for legal aspects	Office of Government Commerce (OGC; www.ogc.gov.uk)
Responsible institution(s) for technical solutions	Improvement and Development Agency (IDeA) was established by and for regional and local government in April 1999. The mission is to support self-sustaining improvement from within local government. The IDeA has given local authorities in England and Wales the means to enhance traditional methods of procurement, through IDeA marketplace (www.idea.gov.uk/marketplace/).
Central procurement institution(s)	OGC Buying Solutions (www.OGCbuyingsolutions.gov.uk)
Other important organisations	NHS Purchasing and Supply Agency - responsible for ensuring that the National Health Service makes the most effective use of its resources by getting the best value for money possible when purchasing goods and services. Defence Procurement Agency - an executive agency of the Ministry of Defence, whose task is to procure the equipment for the UK Armed Forces. Small Business Service (SBS)
Type of coordination between different institutions	Procurement is organized as a mixture of a centralized and decentralized approach: • There is a central public procurement body, OGC Buying Solutions. It arranges framework contracts, which can be used by all public authorities in UK. However, the individual public authority is free to arrange individual framework agreements. • Procurement (selection of suppliers) is a responsibility of the individual public authority. • The total procurement through national framework contracts (OGCbuyingsolutions) is approximately 16 million pounds (0.1% of central government procurement). Figures for regional and local level are unknown.

The devolved authorities in Scotland and Wales have their own eProcurement initiatives.

26.2 Strategy

The overall e-procurement vision of the UK government is that all central civil government purchasing transactions should be able to be transmitted securely over the Internet between government and suppliers using interoperable systems based on open standards.

On the national political agenda, the introduction of operational e-public procurement has a medium priority. This reflects a recent increase of priority to this area driven by focus on more efficient procurement procedures.

A specific e-procurement Strategy for Central Civil Government from 2002 exists

It is composed by several strategic documents/sites on www.ogc.gov.uk. It is a central government strategy, but it is an inspiration for regional and local government as well. The strategy is composed of three main elements:

- The Establishment of Framework Agreements: to procure Commercial Off The Shelf (COTS) tools for interoperable systems to e-enable the procurement and sourcing processes, for example electronic tendering, auctions and payment solutions.
- Change Management: to influence policy direction and best practice and to establish a common approach for central civil government over the next 3 years; to help departments/agencies in understanding their business profiles, their procurement needs and in preparing their business cases (e.g. eProcurement Assessment Tool).
- Carrying out a feasibility study for an eHub examining how a single point of entry using common standards of communication language and coding convention might provide a data translation service between government and supplier systems, enable an improved commercial dialogue with suppliers and provide improved management information to government. The development name for this project is Zanzibar.

26.2.1 Statement of objectives

The government has specified an overall objective for the introduction of operational public procurement. The core objective is that:

- Web-enabled tools and techniques shall deliver 250 million pounds value for money improvements to government's commercial relationships during April 2003 – March 2006 (http://www.ogc.gov.uk/index.asp?docid=2364).
- 50% of citizen-facing transactions should be capable of electronic delivery by 2005 and 100% by 2008 (see also UK Online Strategy on www.citu.gov.uk).

26.2.2 *Scope of strategy*

Levels of government involved	Central, regional and local government are included
Legal framework	Information unavailable
Allocated resources	Resources have been spent but there is no information on the amount
Time frame	Information unavailable

26.2.3 *Existing guidelines*

Special guidelines for electronic public procurement have been issued:

- "E-procurement cutting through the hype – A guide to eProcurement for the public sector"; OGC; October 2002
- "Electronic Reverse Auctions"; OGC.

26.3 Legal framework

26.3.1 *Legal status of the use of electronic means in Public Procurement*

It is not known whether the current e-procurement systems will fulfil the requirements of the EU public procurement directives fully, but in forthcoming developments the requirements of the directives will be fully taken into account.

26.3.2 *Implementation of the Directives*

The forthcoming EU public procurement directives are expected to be implemented by the end of January 2006. The following areas of use of electronic means in the public procurement process will be regulated by national legislation: rules applicable to communication, storage of data and use of specific procedures, e.g. e-auctions.

The UK intends to implement the articles of the new EU directives relating to electronic auctions and dynamic purchasing systems, allowing Contracting Authorities to make use of them. Electronic auctions are expected to be used in particular. Buyer profiles to publish tender-related information on a 'buyer profile' are being used by Contracting Authorities in UK.

26.3.3 Status of tools

Public procurement portals	www.OGCbuyingsolutions.gov.uk is the central government procurement portal. It provides information and tools about electronic public procurement and framework agreements, but not yet functionalities of electronic tendering and purchasing[61]
	From CSARSS.NET – the Regional Supplies Service e-procurement site (www.csarss.net) firms and individuals can access potential public procurement business opportunities. On the site suppliers can register company de-tails and login and access procurement opportunities offered by the entire public sector.
	www.supplyinggovernment.gov.uk. Together with the Small Business Service (SBS), OGC has also launched a website – Supplying Government. This website provides a single point for information on selling to government and an access point to advertised contracts, as well as details of the West Midlands SME Procurement Pilot
Electronic signature	An official electronic signature has not been introduced in UK yet, but a pilot project has been conducted by the e-envoy[62] (www.e-envoy.gov.uk). UK is waiting on the EU directives to be finalized, and a digital signature is expected to be introduced within two years
Electronic catalogues	Amongst OGC Buying Solution's e-procurement initiatives, S-Cat and GCat. Both are designed to be used by public institutions (buyer-side) such as Government departments, Agencies, Local Authorities, Educational establishments, Police Forces, NHS bodies, public and privatised Utilities. • S-CAT is a web catalogue giving access to more than 170 service providers. S-Cat has 16 discrete Service Categories covering both IT and Business Consultancy Services. Examples are: IS Strategy Development (1) and Programme and Project Management (2). Before registering at S-CAT, suppliers have passed a tendering and evaluation process, meaning Public Sector discounts has already been negotiated for buyers. • GCAT is an online catalogue with more than 50.000 IT & Telecommunication products. GCAT provides functionalities for online ordering and online payment.

[61] The 'Zanzibar' project, a purchase to pay marketplace, is expected to be launched in 2005.

[62] Now the e-Government Unit

Electronic auctions	A number of public authorities in the UK have already gained experience with electronic auctions, and although expanding rapidly the use is not widespread. In addition to the earlier mentioned guidelines on electronic auctions, the OGC has provided public authorities with an eAuction Decision Tool to evaluate whether an eAuction is suitable for an intended procurement. A dynamic purchasing system has so far not been developed. Both eAuctions and dynamic purchasing are expected to increase with the implementation and greater understanding of the new EU public procurement directives.
Dynamic Purchasing Systems	-
Framework agreements	Framework Agreements are already used extensively in the UK either through central bodies such as OGC Buying Solutions or established directly by government departments and agencies.

26.3.4 *Reference to the relevant legal acts*

Information unavailable

26.4 Current usage of electronic means in Public Procurement

26.4.1 *Practical use of electronic means in Public Procurement*

The total public procurement in the UK is approximately 100 billion pounds. Central government is responsible for approximately £16 billion of procurement; the rest is the responsibility of regional and local authorities, including the health care system.

Monitoring of the up-take and progress of e-procurement is monitored on a 6-monthly basis by a questionnaire to all government departments. The following aspects are monitored: Number of procurement transactions and transaction costs, use of various eProcurement tools, and savings achieved. The monitoring is kept as simple as possible to ensure that public institutions actually use it.

The resources allocated by public authorities to introducing operational public procurement are not monitored at national level, but development and maintenance of OGCbuyingsolutions.gov.uk amounts to 16.5 million pounds alone.

26.4.2 *Which phases of procurement are covered?*

The following is the estimated status for automating procurement phases in the UK:

- Notification about tender (not automated today, but expected to be within three years)
- Publication of tender (to a low extent today, but expected to be within three years)
- Management of receipt/submission of tenders (to a low extent today, but expected to be within three years)
- Evaluation of tenders (not automated, but expected to be within three years)
- Ordering (to some extent, but expected to be within three years)
- Invoicing (to a low extent, but expected to be within three years).

Generally, repetitive purchasing is the phase of public procurement that has been automated the most, whereas individual contracts and invoicing are only automated to a low extent. Repetitive purchasing is done via individual systems for each contracting authority based on technology such as EDI and by use of electronic catalogues.

26.5 Raising awareness & Promotion of electronic means

Within the e-Government Interoperability Framework (e-GIF), UK has standardized a number of areas related to electronic public procurement, including XML schemes, metadata, GCL (Government Category List) and Government Data Standards Catalogue. Zanzibar will provide further standards in the area of electronic procurement.

Impact Assessment: Action Plan on electronic Public Procurement

Part 1: Baseline Analysis

December 2004

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1. Introduction

1.1 Background and objective of the study

The Internal Market Strategy sets out the relatively ambitious targets by 2006, to carry out a significant part of public procurement on an electronic basis and by 2010, to ensure that electronic public procurement has been generalised to meet the Lisbon objectives. To meet the targets, the European Commission intends to adopt an Action Plan on e-public procurement and has decided that an Impact Assessment of the Action Plan should be conducted.

This report is part one of the impact assessment. The objective of the report is:

- To provide an initial assessment and comparison of the current situation across and within EU member states.
- To undertake a preliminary review of the forthcoming EU directives on public procurement in order to identify elements that may have important implications for the member states.

The report is carried out by RAMBOLL Management for the Internal Market Directorate-General.

1.2 Content of the Baseline Analysis

The Baseline Analysis contains the following main sections:

- Section 2 contains the results of a preliminary review and assessment of the new public procurement directives. In this section we identify elements that may influence the development of e-public procurement across the EU. The objective of this analysis is to identify potential barriers which should be included in the next phase of the impact assessment.
- Section 3 contains a comparative analysis across the EU member states which presents main findings of the research and in which the main issues concerning the current status for e-public procurement in the EU member states are analysed. The purpose of the comparative analysis is to provide an overview across the EU member states that will give input to the subsequent phase of the study. The comparative analysis includes a compilation and presentation of findings and each main section is accompanied by a short concluding analysis and an assessment of the most important perspectives and implications.

The following 25 sections contain the presentations of the current status for e-public procurement in each of the EU member states. Each section follows the same structure and includes descriptions of:

- The organizations and institutions responsible for implementing e-public procurement
- The national strategies and objectives for e-public procurement
- Legal framework
- Current usage of electronic means in public procurement
- Promotion of e-public procurement

The Baseline Analysis is based on two main sources of data:

- Desk research of official documents, strategy papers etc. in EU member states, reports and analyses of e-public procurement and public procurement at country level and at European level and of the forthcoming European public procurement directives.
- Interviews and consultations with experts in member states and representatives of governmental institutions responsible for or involved in public procurement and the development of e-public procurement in the country.

In this regard it should be noted that the study attempts to include use and experiences of e-public procurement systems at all levels of government in the member states (national, regional, local), but does not uncover the vast total number of existing e-public procurement systems and primarily looks at the situation in a member state seen from the perspective of the central level (due to the fact that the main data sources are key documents prepared at the national level and interviews with experts and representatives at the central, governmental level).

2. Legal Aspects

The new consolidated Directive (Directive no. 2004/18/EC) and the new utilities Directive (Directive no. 2004/17/EC) sets out the procedural rules for the use of electronic means in public procurement. The new legislation entered into force on 20 April 2004.

The following chapter contains a description of the directives and an analysis of the impacts of the new directives on electronic procurement and other legislation relevant for electronic procurement.

2.1 The present public procurement directives

The former EU procurement legislation consists of the 4 main directives on procurement of public supplies, public works, public services and public utilities:

- Public Supplies Directive 93/36/EC as amended by Directive 97/52/EC.
- Public Works Directive 93/37/EC as amended by Directive 97/52/EC.
- Public Services Directive 92/50/EC as amended by Directive 97/52/EC.
- Public Utilities Directive 93/38/EC as amended by Directive 98/4/EC.

The directives do not contain specific provisions regarding the use of electronic means in the procurement process.

The use of written communication is to some extent, however, seen as a prerequisite for the proper documentation of the procurement process. Also, several articles of the directives contain mandatory use of written communication.

The combination of mandatory use of written communication in some situations and the general documentation requirements makes it difficult to use communication by electronic means under the present directives, as it would be necessary to supplement any electronic communication with written communication in most cases[1].

2.2 The new directives

The new procurement directives of the European Union have two main objectives: The first is to simplify and clarify the existing Community Directives; the second is to adapt them to the modern administrative needs in a changing economic environment.

Like the former directives, the new directives focus on the tendering procedure and establish the legal framework from the publication of notices to the award of contracts. Aspects such as ordering, invoicing and digital signatures are subject to other pieces of community law (such as Directive 2000/31/EC on electronic commerce etc.).

[1] Analysis of electronic procurement pilot projects in the EU" carried out by PLS Rambøll Management for The European Commission Internal Market DG, 2001, p. 137

The new directives introduce detailed provisions on the use of electronic means in the procurement process and new procurement processes based on the use of electronic means (dynamic purchasing systems and e-auctions). The directives also introduce new rules on notification and time-limits when using electronic means in the notification and tendering process. The introduction of the new framework on electronic means is a major part of the efforts to adapt the public procurement in the Internal Market to the modern administrative needs.

The use of electronic means for communication in the procurement process is built on the following principles:

- The directives put the use of electronic means on a par with traditional means of communication and information exchange. The definitions of: "written" or "in writing" in the directives is changed so that it now “may include information which is transmitted and stored by electronic means”.

- The directives only allow the use of electronic means for communication under the normal procedural guarantees of paper based procurement. Furthermore, certain specific conditions have to be fulfilled under the Directive in order to use electronic communication in the tendering process.

- The use of electronic means for communication in the procurement process is technological neutral in the sense that it does not require the use of specific technologies, but only that the technology used as far as possible is compatible with the technologies used in other Member States.

- The choice of electronic means for communication in the procurement process is left to the contracting authorities. The new directives make it clear that the contracting authorities can require the use of electronic communication for accessing documents and for submission of offers.

The regulation of the use of electronic means for communication in the procurement process is aimed at eliminating the legal barriers inherent to the use of different regulation on electronic means in the procurement process in the Member States.

It is foreseen in the new directives and various studies that the use of electronic purchasing techniques will help to increase competition and streamline public purchasing, particularly in terms of the savings in time and money.

2.3 The preconditions and specific requirements for the use of electronic means for communication in the procurement process

The directives offer a framework for using electronic means in public procurement. The choices go from the use of one/way dispatch of information, simple e-mails to fully electronic procedures, including the use of electronic catalogues, the dynamic purchasing system and e-auctions.

It is a precondition for the use of electronic procurement that the contracting authorities comply with the rules drawn up under the directives and the principles of equal treatment, non-discrimination and transparency.[2] This means that electronic procurement offers the same procedural guarantees as the paper based procurement process.

The directives require an electronic dispatch of tender notices to the central EU electronic board (TED – Tenders Electronic Daily) according to the format and procedures accessible at the SIMAP internet site.

In order to ensure these principles the use of electronic means for communication between the contracting authorities and the contactors shall meet some specific requirements. The table below illustrates the basic requirements related to the use of different procurement processes.

Table 2.1: Requirements related to the different e-procurement processes

E-procurement type	Features	Complexity/Requirements
Dispatch of information	Supports dispatch of information but does not offer any interactivity between participants	Low. Minimal technical requirements. The public authority must have a PC with Internet access. Businesses access to publication for tenders will also require a PC with Internet access
Electronic tendering	Supports the electronic exchange of documents between participants including the conclusion of contracts.	Low Both the contracting authority and the supplier may need special hardware and software. Business must have a PC with e-mail and normal word processing or spreadsheet software and internet access.
Advanced electronic tendering systems		Medium The contracting authority and the bidders must have a PC with internet access and specific software that complies with the specific requirements of the directive for using the e-action system or the dynamic purchasing system. The contracting authority must have software for the receipt of tenders and request to participate. This can in principle be based on normal available software such as spreadsheet or database software.

2.3.1 PC with Internet access

Logically, both business and the contracting authority need access to a PC and the Internet to use electronic means in the procurement process.

Cross-border electronic procurement could be influenced by differences among the level of business with PC's and Internet access in the Member States, because businesses in a Member State with a high level of PC's and Internet access hold a structural advantage over businesses from Member States with a lesser level of businesses with Internet access.

2.3.2 The requirements for dispatch of information

All that is required to dispatch award notices and tender documents is a PC with an (broadband) Internet connection, which almost all public authorities in the EU Member States have access to.

For businesses, having a PC with Internet access help them to become aware of notices that are being published electronically.

Online access to tender information reduces the importance of the location of the supplier. The use of tender boards can further make it easier for businesses to identify relevant tenders.

The dispatch of information on a given tender will consequently improve the economic efficiency by promoting competition amongst domestic and foreign suppliers. Stronger competition brings down costs, improves quality and delivery terms and foster innovation[3].

2.3.3 The requirements for electronic tendering

As mentioned earlier, the contracting authorities can require the use of electronic communication for accessing documents and for submission of offers. To do this, a number of requirements must be meet. The requirements include:

- General availability of means, including general availability of the tools used to communicate by electronic means and their technical characteristics
- Interoperability of the tools used with information and technology products in general use
- Integrity of data and confidentiality of data exchanged
- Limitations in the contracting authorities' access to data transmitted before the time-limits for submitting tenders, etc. have expired
- Availability of information regarding the specifications necessary for the electronic tendering, including encryption
- Security-measures guaranteeing that:
    - The exact time and date of the receipt of tenders, requests to participate and the submission of plans and projects can be determined precisely;
    - The access to data is possible only through simultaneous action by authorised persons, and only after the prescribed date

[3] A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future 03/02/04 page 6-8.

- The access to data is limited to persons authorised to acquaint themselves therewith
- Infringements of access prohibition is clearly detectable
- The dates for opening data received may be changed only by authorised persons (respect of the 4 “eyes” principle).

The requirements entails that the contracting authority must have the required devices for the receipt of tenders.

The principle of mutual recognition is explicitly mentioned in the directives. Article 42 states that diplomas, certificates or other evidence of formal qualifications required for participation in a procurement procedure or a design contest should be mutually recognized.

2.3.4 *The requirements for advanced electronic purchasing systems*

The use of fully automatic procurement processes should meet specific requirements related to the use of E-auctions and the dynamic purchasing systems in order to avoid the misuse of such systems.

2.3.5 *The dynamic purchasing system*

The dynamic purchasing system is a completely electronic process for making commonly used purchases. The duration of a dynamic purchasing system should be limited to 4 years and should be open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specification.

The dynamic purchasing system is set up following the rules applicable to the open procedure. Every operator taking part is automatically invited to submit a bid but in addition a new operator who submits an indicative tender in accordance with the specification and meets the selection criteria is also allowed to join the system.

This allows for a list of operators to be established and increases competition. New market entrants will be aware of the system via a notice when the system is put in place and a simplified contract notice is published for each specific contract to be awarded under the system.

2.3.6 *The E-auction*

The electronic auction is a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

The Directive introduces the use of electronic auctions in the open, restricted and negotiated procedure, and when reopening of competition among the parties to a framework agreement.

Electronic auctions can be used with contracts for works, supplies or services. The electronic auction can, however, only be used when the contract specifications can be established with precision. E-auctions shall be based on prices and/or other elements of the tenders suitable for automatic evaluation by electronic means indicated in the tender specification.

2.3.7 *Implementation of the dynamic purchasing and the E-auction*

The usage of e-auctions and the dynamic purchasing system are optional for the Member States. Thus, the directives state that Member States "may provide" that contracting authorities may use these procurement methods.

The survey shows that 23 Member States plan to introduce e-auctions, whereas only Belgium does not intend to do so. Finland has not yet decided whether to introduce the e-auction.

It is notable that the vast majority of the Member States have chosen to implement the e-auction.

18 Member States plan to introduce the dynamic purchasing systems. France, Hungary and Poland report that they will not introduce the system. Belgium, Finland, the Netherlands and Portugal have not decided whether to introduce the dynamic purchasing system or not.

More than half of the Member States plan to introduce the dynamic purchasing system, and that number might rise even further, as it is likely that some of the Member States who are now undecided will chose to implement the system.

The fact that not all the Member States plan to introduce the e-auction and the dynamic purchasing systems creates a situation, where the systems are implemented in some Member States, but not all. There will, hence, be differences in the electronic processes used in the Member States leading to fragmentation of the internal market and uneven spread of the benefits from the use of electronic means in public procurement procedures.

Differences in legislation are an inherent cause of market fragmentation in the Internal Market. Lack of uniform introduction of the e-auction and the dynamic purchasing among the Member States could therefore cause fragmentation.

However, the specific requirements for the dynamic purchasing system and the electronic auction ensure that businesses from other Member States will be able to participate in cross-border dynamic purchases and electronic auctions. Consequently, the differences regarding the implementation of the systems among the Member States will not cause the normal market fragmentation inherent to differences in legislation.

The most significant fragmentation caused by the Member States different approaches to the implementation of the electronic auction and the dynamic purchasing system will be that businesses from Member States that use the systems will be more experienced in the process than businesses from Member States that have not introduced these procedures.

2.3.8 *The Buyer profile*

One of the new tools to benefit from electronic procurement in the new directives is the introduction of the new "buyer profile". The buyer profile enables a contracting authority to use its Internet site to publish information on its future purchases in the same way as with publication of a prior information notice.

16 Member States report that they are aware that the new buyer profiles are/will be used by Contracting Authorities. Three Member States report that the buyer profile will not be used by the contracting authorities. Six Member States do not know whether the buyer profile will be used (Finland, Luxembourg, the Czech Republic, the Republic of Cyprus, Estonia and Lithuania).

2.3.9 The electronic catalogue

The new directives do not have specific rules regarding the use of electronic catalogues in the procurement process. However, recital 12 of the preamble of Directive 2004/18/EC states "[that] Contracting authorities may make use of electronic purchasing techniques, providing such use complies with the rules drawn up under this Directive and the principles of equal treatment, non-discrimination and transparency. To that extent, a tender submitted by a tenderer, in particular where competition has been reopened under a framework agreement or where a dynamic purchasing system is being used, may take the form of that tenderer's electronic catalogue if the latter uses the means of communication chosen by the contracting authority in accordance with Article 42."

This recital implies that the tenderer may use his electronic catalogue as a part of the tender, as long as the tenderer follows the means of communication chosen by the contracting authority.

Considering the specific requirements under the directives it can prove difficult to establish what requirements should be used in relation to the tenderers electronic catalogue, and in what circumstances the tenderer can use their own electronic catalogue.

If e-catalogues are used differently in the Member States, this might cause unnecessary problems for the contracting authorities in assessing whether the tenders met the required electronic standards. This might in turn have an adverse effect in relation to the use of electronic catalogues.

2.4 The implementation

The implementation of the directives raises questions in relation to the timely implementation of the directives, the impact of the implementation period and the correct implementation of the directives.

2.4.1 The timely implementation

The directives must be implemented within 21 months after coming into effect. This means that the Member States will need to complete the Implementation of the Directives before 31st January 2006[4]. Although the new directives entered into force on 30 April 2004 the existing directives will only be repealed with effect from the expiry of the implementation period, the 31st January 2006[5].

[4] Article 80 of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

[5] Article 82 of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

The survey shows that one Member State expects the directives to be implemented in 2004, 14 Member States expect the directives to be implemented in 2005 and eight Member States expect the directives to be implemented in 2006. Two of the Member States have not yet decided when the directives will be implemented.

Table 2.2: Implementation of directives

2004	2005	2006	Not decided
Denmark	Austria	Republic of Cyprus	Czech Republic
	Belgium	Greece	Portugal
	Estonia	Lithuania	
	Finland	Luxembourg	
	France	Malta	
	Germany	Slovakia	
	Hungary	Slovenia	
	Ireland	Sweden	
	Italy		
	Latvia[6]		
	The Netherlands		
	Poland		
	Spain		
	United Kingdom		

The majority of Member States expect the directives to be implemented in 2005. The Member States implementing the directives in 2006 will be faced with a very tight implementation schedule, as the directives will have to be implemented in January 2006. The same can be said for Member States implementing the directives in the later part of 2005. These Member States risk to be faced with a tight implementation process that does not leave room for unforeseen hindrances or delays. This situation poses risks of implementation beyond the implementation period.

There will, consequently, be a special need for a detailed and thorough planning as well as monitoring of the progress of the implementation process in the Member States.

2.4.2 *The implementation period and co-existence of different procurement rules*

When considering the impacts caused by the implementation period two issues arise. Firstly, what impacts are caused by the fact that the Member States will implement the directives with different speeds and Member states have reported that they do not expect any major difficulties in implementing the directives, and secondly what the impacts would be if the directives are not implemented within the given time-frame. The majority of member states refer to the fact that the new directives are a natural evolution of the former directives, and that any potential obstacles were eliminated in the process of implementing the old directives implementation period.

[6] DIRECTIVE 2004/17/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors is implemented in 2004 in Latvia

Only few conflicts with other non-procurement existing legislation are in evidence. The member states do not expect any risk of delay to come out of any such conflicts.

Some member states have already initiated comprehensive consultations with relevant stakeholders, such as industry and interests groups to streamline the political process of passing any new legislation through their respective parliaments. Those states that have not taken such initiatives could face the risk of lack of acceptance and poor compliance in the time immediately after implementation.

It is clear that if the Member States do not implement the directives at the same time, there will be a situation with different procurement regulation in the Member States, where some Member States have implemented the new directives and others still use the existing procurement directives.

The stakeholders in the member states acknowledge the political decision of implementing in different stages, but they also expect that this will contribute to further complicate the practical application of the rules.

In the transition period, potential bidders will need not only knowledge about the rules but also knowledge of the current status of implementation in the residence country of the procuring entity. This, combined with the number of areas where the new directive only sets minimum standards, could enhance the potential bidder's experience of non-uniform rules between the member states compared with the present system.

However, looking at the de facto differences in the application of the present directives, the introduction of the new, more coherent, directives will contribute to an overall more transparent situation where the differences between the member states are documented and based on a legal instrument.

It seems likely that information about the directives to businesses, especially SMEs, will be disseminated in the individual Member State. This means that businesses from slow-implementing Member States will not have access to the same information as other Member States, and are therefore not as well prepared to participate in cross-border electronic procurement.

Moreover, the existence of different legal procurement regimes can also cause market fragmentation in itself, as the legal systems that the businesses are operating in will be different.

2.4.3 The correct implementation

The correct implementation of the directives primarily raises the question of the actual correct understanding of the legal framework in the implementation phase.

Only Denmark has at present a complete draft for the implementation of the procurement directives[7].

[7] Finland has informed the Commission in the "Contribution of Finland concerning Working Documents 5 April 2004" that the drafting of the new public procurement legislation has begun"

The new directives do not regulate a new area, but they are an adjustment of the already existing procurement legislation and rules. It is therefore the general expectation from Member States, that the implementation will be less cumbersome than the implementation of a completely new directive. This probably applies to the *legal* implementation of the directives, whereas the application by purchasing entities and integration of electronic means in the procurement process will be an entirely new task in most Member States.

When considering the national obstacles in relation to the implementation of the directives, it should be particularly examined how existing national rules that are within the same field that is regulated by the new procurement directives should be dealt with[8].

The member states have their national procurement legislation well adopted to the present procurement directives. The new directives will require some adjustments to the national rules, but this is not generally regarded as an issue by the member states. Furthermore, the member states do not foresee that any difficulties arising out of existing procurement legislation will be allowed to in any way delay the implementation of the new directives.

The fact that the Member States have not at present drafted new rules, makes it likely that any interpretive document from the Commission on the correct understand of the new rules, will be considered by the Member States in the actual implementation of the directives. It is therefore likely that any guidance from the Commission on the correct interpretation of the new rules in the present phase could have a positive impact in relation to the uniform and correct understanding of the new directives.

Because of this, the Commission is presently in a position where it can greatly influence the uniformity of the final implementation across all member states. The member states do not envisage that they will seek to implement any specific national rules on the areas of electronic communication and tendering. Should the Commission issue guidelines and technical appendixes in due time, these will certainly also form the basis of the national implementation of the directives. Thus, there does not seem to be an issue of over-implementation or “gold-plating”, if only the Commission offers timely guidance.

2.4.4 Compliance

The most difficult and complex part of the implementation of the directives is the process of ensuring that existing electronic procurement systems complies with the rules of the directives. The question of whether the existing systems comply with the directives is relevant because, fear of the compliance issue might cause contracting authorities to abstain from using electronic procurement, and because use of non-complying systems will cause businesses and contracting authorities to lose trust in the electronic procurement,

The implications of this problem are significant, because the detection of compliance problems in the existing systems will be difficult and require a thorough scrutiny of existing systems that might be considered inappropriate and unnecessary cumbersome for the contracting authorities.

[8] See section 2.5

If a given electronic procurement system do not meet the requirement of the directives, use of that system will be a violation of the directives. Depending on the type of violations, it can be hard for the relevant actors (the government agency responsible for the implementation of the directive, the contracting authority it self, and businesses) to detect and address the violation. This would especially be the case with the requirements relating to the devices used by contracting authorities in the electronic procurement process.

The survey shows that 11 Member States think they have (at least one) electronic procurement system(s) that is compliant with the directives, whereas 14 Member States do not.

Table 2.3: Does your country have operational electronic procurement systems that are compliant with the requirements of the Directives?

Yes	No
Austria	Republic of Cyprus
Belgium	Czech Republic
Denmark	Estonia
France	Finland
Germany	Hungary
Ireland	Greece
Italy	Latvia
Lithuania	Malta
Luxembourg	Poland
The Netherlands	Slovakia
Portugal	Slovenia
Sweden	Spain
	United Kingdom

When considering the feed-back received from the Member States, attention should be given to a recent analysis by IDA with an examination of some the major national electronic procurement portals, see section 3.7 Potential risks and barriers. The analysis shows that they generally fail to meet all the requirement of the directives (e.g.) the requirement regarding interoperability).

The answers in table 2.5 and the actual examination of the leading national procurement systems in the IDA report under lines the fact that it is very important for the Member States and their contracting authorities to conduct a thorough examination of the shortcomings of the existing systems in relation to the requirements of the directives. It also shows that is difficult to assess whether a given system meets the requirements of the directives.

The member states expect that compliance concerning the new features of the directives, such as electronic tendering, will be rather low. The member states intend to counter this by launching information campaigns and issuing guidelines. Any guidance from the Commission in assessing procurement systems compliance is welcomed by the member states. There is a real danger, that act of certainty on the legal status of any available procurement system will pose a major barrier to the use of such systems.

Further, it should be underlined that the investment needed in order for the contracting authorities and for businesses to meet the requirements provides a major barrier against the successful integration of the electronic procurement framework. Even after the fulfilment of certain of the requirements compliance costs remains.

2.5 Contradicting national rules

The survey shows that 17 out of 25 Member States have regulated the use of electronic means in the procurement process in their national legislation.

Among the 17 Members States which have regulated the use of electronic means in the procurement process, 15 have regulated the rules applicable to communication, 12 have regulated the storage of data and seven have regulated the use of specific procedures (e.g. eAuction and DPS).

Table 2.4: Is the use of electronic means for communication in the public procurement process regulated by national legislation?

Yes	Yes, rules applicable to communication	Yes, storage of data	Yes, use of specific procedures (e.g. eAuction, DPS)	Other
Austria	√	√	√	
Belgium	√	√		√
Czech Republic	√			
Estonia	√	√		
Finland	*Don't know*	*Don't know*	*Don't know*	*Don't know*
France	√	√	√	
Germany		√		
Greece	√	√	√	
Ireland	√	√		
Italy	√	√	√	√
Lithuania	√	√		
Poland	√		√	
Portugal	√	√		
Slovakia	√			
Slovenia	√	√	√	
Sweden	√			√
United Kingdom	√	√	√	

Note: The following countries answered "No" to the question: Cyprus, Denmark, Hungary, Latvia[9], Luxembourg, Malta, The Nederland and Spain.

There are differences in the extent to which the Members States have regulated the use of electronic procurement in national law. Generally, only few Member States have regulation covering both rules applicable to communication, storage of data and the use of specific procedures. Almost half of the Member States have not introduced regulation applicable to communication, storage of data and the use of specific procedures (e.g. eAuction and DPS).

[9] DIRECTIVE 2004/17/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors is implemented in 2004 in Latvia.

The differences between the Member States regulation of the rules applicable to communication, storage of data, and the use of specific procedures presents challenges to the current use of cross-border electronic procurement as businesses will need to understand and comply with specific national rules and requirements when engaging in cross-border procurement[10][11].

The question naturally arises whether any existing national rules and standards are compatible with the directives, and if they are, to what extent they are compatible with one another. It is of course important for the transparency and effectiveness of the use of electronic communication that the systems and standards that are used are interoperable. As rules contradictory to the directive must be changed during the transposition phase, the main question is whether the national standards are interoperable with one another. That question is discussed under section 3 of the baseline analysis.

2.6 Digital signatures

The conclusion of contracts is often based on the signature of the parties of the contract or by the fact that one of the parties sends an order confirmation or similar document to the other party.

If the parties to the contract know one another in advance there will be no doubt as to the identity of the other party to the contract. However, many contracts are entered into by parties who have no prior knowledge of the other party, for instance when there communication are conducted by letter or faxes.

When the communication of the parties is based on paper, the signature of the parties serves as identification. The use of paper also serves as evidence of the contents of the document, as it is difficult to change written documents after they have been issued.

However when the communication is made through digital nets, which are open to general access, for instance the Internet, the parties can similarly sure of the identity of the other part. Further, electronic communication does not leave easy detectable tracks if the document used in the communication has been changed.

Electronic communication and commerce therefore necessitate electronic signatures' and related services allowing data authentication, and it can generally be said that the existence of an electronic contract law with digital signatures is a natural prerequisite for the use of electronic procurement.

Directive 1999/93/EC on a Community framework for electronic signatures contains a basic law of electronic signatures. The directive was to be implemented in 2002. The purpose of the directive is "to facilitate the use of electronic signatures and to contribute to their legal recognition". It establishes a legal framework for electronic signatures and certain certification-services in order to ensure the proper functioning of the internal market.

[10] We have not made any direct comparison of the given national rules. However, the fact that that there differences in the Member States regulation of the rules applicable to communication, storage of data, and the use of specific procedures suggest that differences exists between the national rules.

[11] Austria has, for instance regulated the areas communication, storage of data and the use of specific procedures, whereas Germany has only regulated storage of data. See table 2.6 in Preliminary Report for the full detail of which areas are regulated in the Member States.

The E-signature directive distinguishes between electronic signatures and advanced electronic signatures. The electronic signature is defined in article 2, section 1 of the Directive: "

- 'electronic signature' means data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication;"

The advanced digital signature is defined in Article 2, section 2:

- "'advanced electronic signature' means an electronic signature which meets the following requirements: (a) it is uniquely linked to the signatory; (b) it is capable of identifying the signatory; (c) it is created using means that the signatory can maintain under his sole control; and (d) it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable;"

According to article 5 of Directive 1999/93/EC the "Member States shall ensure that advanced electronic signatures which are based on a qualified certificate and which are created by a secure-signature-creation device:

(a) satisfy the legal requirements of a signature in relation to data in electronic form in the same manner as a handwritten signature satisfies those requirements in relation to paper-based data; and

(b) are admissible as evidence in legal proceedings."

Essentially article 5 of the Directive gives a "qualified electronic signature" attached to electronic data the same status as a hand written signature on a paper document.

2.6.1 *The use of electronic signatures in the procurement process*

The conclusion of electronic contracts is an important element in the new procurement directives. Recital 38 of the preamble of Directive 2004/18/EC EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts addresses the question of the interaction between the new procurement directives and the E-signature Directive. It is stated in the recital that:

"The public procurement procedures and the rules applicable to service contests require a level of security and confidentiality higher than that required by these Directives. Accordingly, the devices for the electronic receipt of offers, requests to participate and plans and projects should comply with specific additional requirements. To this end, use of electronic signatures, in particular advanced electronic signatures, should, as far as possible, be encouraged. Moreover, the existence of voluntary accreditation schemes could constitute a favorable framework for enhancing the level of certification service provision for these devices."

Annex X of Directive 2004/18/EC stipulates correspondingly that "[the] Devices for the electronic receipt of tenders, requests for participation and plans and projects in contests must at least guarantee, through technical means and appropriate procedures, that electronic signatures relating to tenders, requests to participate and the forwarding of plans and projects comply with national provisions adopted pursuant to Directive 1999/93/EC;"

The Member States are according to Article 42 of Directive 2004/18/EC on EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts left the option to require, in compliance with Article 5 of Directive 1999/93/EC, that electronic tenders be accompanied by an advanced electronic signature in conformity with paragraph 1. It is clear that if the Member States chooses to require the use of a specific advanced digital signature, then the general interoperability problems connected to the use of the advanced digital signature will arise in the electronic procurement.

The survey shows that 15 Member States have introduced an advanced digital signature. Ten Members States have not introduced an advanced digital signature. Six of the nine Member States that have not yet introduced an advanced digital signature plan to introduce one[12].

Table 2.5: Introduction of advanced digital signatures

Already introduced	Not introduced yet	Planning to introduce[13]
Austria	Belgium	Belgium
Czech Republic	Republic of Cyprus	Republic of Cyprus
Denmark	France	France
Estonia	Ireland[14]	
Finland	Latvia	
Germany	Lithuania	
Greece	Luxembourg	Luxembourg
Hungary	Malta	Malta
Italy	Portugal	
The Netherlands	United Kingdom	United Kingdom
Poland		
Slovakia		
Slovenia		
Spain		
Sweden		

Nine Member States report that the use of an advanced digital signature will be made mandatory in public calls for competition, seven Member States report that they will not require an advanced digital signature and two do not know yet if an advanced digital signature will be made mandatory.

[12] Further information about the standards for electronic signatures used in the Member States can be found in Leuven-report page 127.
[13] Only countries which have not yet introduced an advanced digital signature.
[14] In Ireland, the use of advanced signatures will be catered for where they are required by awarding authorities.

Table 2.6: Will the use of an advanced digital signature be made mandatory in calls for competition?

Yes	No	Do not know
Austria	Belgium	The Netherlands
Czech Republic	Denmark	Portugal
Estonia	Finland	Cyprus
Germany	France	Hungary
Greece	Ireland[15]	Latvia
Italy	Luxembourg	Lithuania
Poland	Slovakia	Malta
Slovenia	Sweden	United Kingdom
Spain		

There is reason to focus on how the Member States that expects to require an advanced digital signature, will handle the interoperability problem.

Looking at the national level, the present penetration of the advanced digital signature in the Member States will, of course, be of importance in relation to the question of how smoothly and successfully businesses will be able to use the advanced digital signatures in the procurement process.

The survey shows that among the Member States with an advanced digital signature more than half of the Members States report that the signature has been used to a low extent or not at all. Only one Member State reports that the advanced digital signature is used to a high extent.

Table 2.7: Use of advanced digital signatures

To a high extent	To some extent	To a low extent	Not used	Do not know
Austria	Slovenia	Czech Republic	Finland	Denmark
	Germany	Estonia	Slovakia	Ireland
		Greece	Belgium	The Netherlands
		Hungary	Cyprus	
		Italy	France	
		Poland	Latvia	
		Spain	Lithuania	
		Sweden	Luxembourg	
			Malta	
			Portugal	
			United Kingdom	

Only Austria reports that the current extent of usage of the advanced digital signatures is high and Slovenia and Germany report that the advanced digital signature is used to "some extent".

[15] The use of advanced digital signatures will not be made mandatory in the Irish system, but the system will cater for awarding authorities who wish to avail of such signatures in calls for competition.

The low general penetration of the advanced digital signature might cause problems if the contracting authorities require the use of advanced digital signatures. In Italy, for instance, it has been policy to let operators who do not dispose electronic certification to participate in procedures carried out electronically[16]

Otherwise there is a risk, that businesses will chose not to obtain the advanced digital signature, and thereby not participating in an electronic call for tender requiring an advanced digital signature. It is possible that particularly foreign businesses (from other Member States than the contracting authority) will find it so burdensome to obtain the national digital signature used in the contracting authority's Member State or face the interoperability problems related the use of a signature from the Member State of the business that it will decide not to participate in the public call for tender.

This could be a serious adverse effect to the use electronic procurement and the intentions of saving time and money, because the level off competition and particularly cross-border competition will drop.

According to a recent study, the various national Certification Authorities ("CA") has chosen different standards for the digital signature. Each CA has established its own methods for modeling this technology, usually abiding to local or national rules. It can be said that the Member States are divided into two general approaches. Some have interoperable but not secure-proof systems and other have chosen secure systems that exclude suppliers which do not have digital signatures from specific CAs[17].

Digitally signed documents verified by a CA, usually require software from the same CA in order for the documents to be opened. Furthermore, the time for obtaining the necessary software or hardware from a CA is usually lengthy and may require the physical presence of a supplier in the CA premises for approval[18].

It is clear that lack of cross-boarder interoperability of electronic signatures crates major obstacles in relation to the conclusion of electronic contracts and thereby hinder the free movement of goods in the Internal Market.

The most obvious way of reducing the recognition problem and the burdens of obtaining a digital signature in another Member State is a system of mutual recognition or a European trust centre that interfaces with different existing national trust centers[19]. It seems a prerequisite for the establishment of a European trust centre that a consensus is established among the Member States for a common level of the security of the digital signature[20]

[16] Advisory Committee on Public Procurement, working group on e-procurement minutes of the meeting 12 March 2003 p. 4.

[17] IDA Public eProcurement State of the Art Report, version 0.60 p. 129.

[18] IDA Public eProcurement State of the Art Report, version 0.60 p. 129.

[19] The recommendation for a European trust centre has for instance been made in the Analyses of Public eProcurement initiatives for IDA, by Unisys Management Consulting p. 11.

[20] The recommendation for a common level of security also suggested in the Analyses of Public eProcurement initiatives for IDA, by Unisys Management Consulting p. 57.

Such a system could provide the contracting authorities with the necessary guarantee that the signature is genuine and in compliance with the special security demands, and it would be easy to use for the companies.

2.7 Other contractual aspects

As mentioned earlier, aspects such as ordering, invoicing and digital signatures are subject to other pieces of community law.

Directive 2000/31/EC on certain legal aspects of information society services such as electronic commerce, contains three provisions on electronic contracts, the most important of which being the obligation on Member States to ensure that their legal system allows for contracts to be concluded electronically. This provision, in effect, requires the Member States to screen their national legislation to eliminate provisions which might hinder the electronic conclusion of contracts. Many Member States have introduced into their legislation a horizontal provision stipulating that contracts concluded by electronic means have the same legal validity as contracts concluded by more "traditional" means[21].

Furthermore, Articles 10 and 11 of the Directive, concerning information to be provided about the electronic conclusion of contracts and the requirement to confirm receipt of an order are transposed almost literally in national legislation. Feedback from the Member States indicates that after some phasing in and initial difficulties, information society service providers quickly adapted their websites to comply with those requirements. Three Member States have included rules in their transposition legislation dealing with the actual moment of the conclusion of a contract. In the other Member States this issue is governed by general contract law. So far, no case law has come to the attention of the Commission indicating difficulties created by the general contract law rules in determining the moment of conclusion of an electronic contract[22].

The provisions in the procurement directives, the Directive on electronic signatures and the Information society Directive complements each other. The Directive on electronic signatures and the Information society Directive provides the necessary legal framework for the award of electronically based public procurement contracts.

The basic contract law is, however, left for the individual rules of the Member States. The electronic signatures Directives similarly states: “that the directive does not seek to harmonize national rules concerning contract law, particularly the formation and performance of contracts, or other formalities of a non contractual nature concerning signatures”.

Once a procurement contract is awarded the national law of contracts and sale of goods will regulate the contractual relations between the contracting authority and the tenderer, who won the call for public procurement. This situation is similar to that of the normal non electronic procurement process, and therefore poses no special risks to electronic procurement.

[21] COM(2003) 702 final p. 11.
[22] COM(2003) 702 final p. 11.

Cross-border electronic procurement also raises the question of choice-of-law. For each electronic cross-border contract, there will be an applicable system of law.

The relevant system of law can be determined on the basis of an agreement by the parties prior to the contract in question. Generally the procurement contract will decide the applicable law. Otherwise the Convention on the law applicable to contractual obligations (codified version published in the Official Journal C 27, 26.01.1998) will apply.

The Convention applies to contracts between parties situated in different member states. As a rule the law of country in which the supplier resides is applicable to the contract.

When engaging in cross-border electronic procurement the procuring entity should be aware that the validity of a contract entered into with a supplier from a different member state, as a rule is governed by the legal system of the state in which the supplier resides.

The Convention on the law applicable to contractual obligations does not pose special risk in relation electronic procurement as the rules also apply similar in the normal procurement process.

2.8 Summary of legal issues

- The new procurement directives introduce a coherent set of rules governing the electronic procurement and thereby allowing for the use of electronic procurement in the Internal Market.

- Some businesses do not have the access to a PC and Internet that is required for the participation in electronic tendering. The investment and human resources needed for theses businesses to participate in electronic tendering is a structural barrier for the full development of the electronic procurement market, especially among SME's. However, the generally low costs of acquiring a functioning PC will not be a great problem in the development of the electronic public procurement market, because all most all business that compete in regular public tenders over the threshold values will have a PC for writing tenders etc.

- The Member States implementing the directives in 2006 and late in 2005 will be faced with a very tight implementation schedule, as the directives will have to be implemented in January 2006. Such short implementation process does not leave room for unforeseen hindrances or delays. This situation poses serious risks of hasty, erroneous and non coherent implementation of the directives or delays in the implementation beyond the implementation period.

- The co-existence of different procurement rules in EU (former and new) provides a strong risk that businesses, and especially SME's, in Member States that have not implemented the directives will not have the necessary information and guidance regarding the new procurement directives to participate in cross-border procurement in Member States that have implemented the directives.

- The implementation of the dynamic purchasing system and e-auctions are optional. Most of the Member States plan to introduce these procurement procedures. Assuming that not all Member States implement the procedures, the differences between Member States could cause problems for especially SMEs in those Member States, where the new procedures are not introduced.

- The feedback received from the Member States in relation to the compliance of the existing electronic procurement systems demonstrates the difficulties and correspondingly need for thorough examination of the existing electronic procurement systems

- Lack of cross-boarder interoperability of electronic signatures crates obstacles to the free movement in the Internal Market and can prevent confidence in electronic transactions. Several Member States plans to introduce a requirement for an advanced digital signature in relation to electronic procurement, which will create even further obstacles for cross-border electronic procurement.

- Different contractual and sale of goods laws provide a general barrier for cross-border procurement. However, the barrier is not limited to the use of electronic procurement

- The implementation of electronic invoicing may result in non-compatible solutions and the prevention of realizing the full potential savings from digitizing of the entire tendering process.

3. Comparative analysis

3.1 National strategies on e-public procurement

In order to provide an overview and comparison of the overall approach to e-public procurement in the member states the study uncovers the current state of play in each of the member states and in a cross-country perspective. The central parameters chosen for the description of the approaches of the member states are:

- National strategy
- Objectives
- Resources allocated or planned for the introduction of operational e-public procurement
- Levels of government included (national, regional, local)
- Plans for the implementation of operational e-public procurement

Although it is not possible to draw a clear cut line between those countries that have taken a very proactive approach and those that are still at the early stage of embarking, or have not yet embarked, on e-public procurement, the analysis does seek to identify to what extent the member states already have taken steps to promote a coherent approach to e-public procurement. As not all member states have taken actions in this direction, the interview survey also includes questions that uncover the reasons why some countries at the moment have chosen not to advance e-public procurement very actively at the overall political and strategic level. It is however important to note that the research conducted in the member states also shows that the absence of an overall objective and a coherent strategy does not mean that there are no e-public procurement initiatives and activities in the country. In fact, the interview survey documents that activities do exist in some countries that have not defined an overall objective and/or strategy, but the point to be made here is that they are not part of and tied into an overall strategy.

3.1.1 Findings

As a point of departure the interview survey shows that the majority of the member states have developed a strategy for the introduction of operational e-public procurement (21 countries[23]), and that a majority of the member states have set an overall objective for the introduction of operational e-public procurement (23 countries[24]). The timeframe for the achievement of the objectives defined by the member states mostly covers the period up until 2005-2006, while one country (Latvia) have formulated an objective for the coming four years until 2008 and another country (France) goes as far as 2010. The table below summarizes the findings concerning strategy; objectives, resources committed or spent and the levels of government (national, regional, local) included in the national strategies for e-public procurement for each of the EU member states. Moreover, the table summarizes the most important elements concerning the plans for the implementation of operational e-public procurement.

[23] Portugal, Slovenia, Lithuania, Sweden, Latvia, Germany, Czech Republic, Italy, Ireland, Luxembourg, Finland, Belgium, United Kingdom, Hungary, Malta, Cyprus, Poland, France, Greece, Denmark, Spain

[24] Portugal, Slovenia, Lithuania, Sweden, Latvia, Germany, Czech Republic, Italy, Ireland, Luxembourg, Finland, Belgium, Austria, Slovakia, United Kingdom, Hungary, Malta, Cyprus, Poland, France, Greece, Denmark, Spain

Table 3.1: National strategies on e-public procurement

	Strategy	Quantitative and qualitative objectives	Resources allocated to introduce operational e-procurement	Levels of government included	State of affairs on implementation of operational e-public procurement
Austria	No strategy for introducing operational e-public procurement due to lack of capacities within public procurement institutions to work with e-public procurement	No specific objectives on e-public procurement. Approximated financial savings of administrative costs as a result of introducing e-government account to EUR 1.5 billion Overall objective is to implement the directive on e-public procurement and to create and transmit tenders with electronic signature A year of fulfilment has yet to be set	Information unavailable	Information unavailable	An advanced electronic signature based on qualified certificated has been introduced. The use of electronic signature will be made mandatory when participating in public calls for competition On an experimental level, implementation of an e-auction system has been started Pilot schemes of the implementation of dynamic purchasing systems and e-catalogues have been outlined A special guideline for electronic procurement and especially e-tendering, has been issued ("Verordnung der Bundesregierung betreffend die Erstellung und Übermittlung von elektronischen Angeboten in Vergabeverfahren – E-Procurement-Verordnung 2004")
Belgium	No overall strategy for e-public procurement E-public procurement initiatives are part of the overall governmental strategies of administrative simplification and reduction of administrative burden and e-government A working group will draft a strategic paper on e-public procurement for implementation in 2005	Main objective is to lower the administrative burden for enterprises It is planned to publish all federal call for tenders, electronically, by end of 2004 E-tendering application should be operational by 2005	No resources allocated in 2004 Resources for implementation of the forthcoming strategy will be allocated in 2005	E-public procurement initiative covers central level, only	Electronic catalogues and framework contracts are being used by the central purchasing agency, "Services contrat-cadre multi-SPF" Projects on e-auctions or dynamic purchasing systems have yet to be initiated No special guidelines have been issued Electronic signature based on the electronic identity card will be introduced in 2004, and is expected to be fully implemented in 2007

	Strategy	Quantitative and qualitative objectives	Resources allocated to introduce operational e-procurement	Levels of government included	State of affairs on implementation of operational e-public procurement
Cyprus	The strategy is an integrated part of the Cyprus Government strategy on modernizing public procurement procedures[25]	An overall objective is to ensure that a large proportion of public procurements shall be awarded through electronic procurement procedures by 2008 Implementation of an electronically based procurement system will take place during 2005 and is estimated to be fulfilled in year 2007	The government has used EUR 800.000 on state level The government will spend EUR 2.4 million over a period of three years	Central and local government are included	Electronic signature does not exists but will be introduced No specific guidelines guiding electronic public procurement have so far been issued Government authorities have no experience with e-auctions, dynamic purchasing systems or e-catalogues
Czech Republic	Strategy and priorities on electronic public procurement are integrated in the overall strategy on the Information Society and E-government - among others “State Information Policy (SIP)” (1999)[26]	Overall objective is to promote an electronic marketplace used for repeated and bulk purchases in the whole field of the public administration (time-frame 2002 – 2006)	Information on amount of allocation is presently unavailable	Only central government is included	Electronic signature has been introduced Special guidelines for electronic public procurement have been developed, but it is not obligatory to use them Authorities have no experiences with systems for procurement involving electronic auctions, electronic purchasing systems or electronic catalogues
Denmark	Strategy on e-public procurement is part of the existing strategy for e-commerce (2002) - e.g. “IT for everybody”, “Strategy for e-commerce 2002”, “The digital supplier” and “The digital buyer” A new strategy (2004) from the government and the coalition of municipalities includes guidelines for digitizing towards 2006	The overall objectives are - to save money by centralizing the procurement process - to make the public sector a leading driving force in electronic procurement and commerce - to realize un-utilized economic potential within electronic commerce in both the public and private sector	Public investment have been made to introduce e-public procurement, but there is no available specification of the amount spent	All levels of government are included in the strategies	Guidelines on e-public procurement were published in 2003 An electronic signature has been introduced, but not been used for electronic public procurement Electronic catalogues are being used Few entities have experience with e-auctions There is no experience with dynamic purchasing systems

[25] Based on interview with Stelios Kountouris, Public Procurement Department, Treasury of the Republic of Cyprus

[26] The Czech e-government strategy is laid down in the State Information Policy (SIP) of 1999. This policy defines eight priority areas for the development of the Information Society in the Czech Republic, including e-government. It is being implemented through a SIP Action Plan which first version was adopted in 2000 (for the period to 2002) and an updated version adopted in February 2002 (for the period to 2003). http://europa.eu.int/ISPO/ida/jsps/index.jsp?fuseAction=showDocument&documentID=1356&parent=chapter&preChapterID=140-203-383-389. The Ministry of Informatics drafted in March 2004 Act on Electronic Communications (http://www.micr.cz/files/1282/Electronic_Communications_Act.pdf)

	Strategy	Quantitative and qualitative objectives	Resources allocated to introduce operational e-procurement	Levels of government included	State of affairs on implementation of operational e-public procurement
		Year of fulfilment has not been specified			
Estonia	There is no strategy on e-public procurement. However, a strategy has been prepared and introduced in the State Budget for 2005	Objectives on e-public procurement have not been formulated	Information unavailable	Information unavailable	Electronic signature has been introduced Governmental institutions have no experience with e-auctions, dynamic purchasing systems or e-catalogues
Finland	Initiatives on e-public procurement are integrated in the overall strategy on e-government - e.g. “Development programme 2002-2005 for electronic services” including initiatives on electronic signature and XML A procurement strategy was published in January 2004, and the government’s “Information Society Programme” in April 2004	Overall objective is to take advantage of information technology to enhance effectiveness of public procurement	Public resources are allocated but specific information concerning the size of the amount is unavailable	Strategies cover all levels of government	A recommendation for electronic public procurement has been issued on electronic invoicing - another on electronic ordering is being prepared An official digital signature has been introduced but is yet to be used for electronic public procurement Electronic catalogues are used when purchasing goods but neither e-auctions nor dynamic purchasing systems are being used
France	Project on e-public procurement is part of the governmental modernisation plan “Administration électronique 2004/2007” (ADELE) The overall strategy on electronic procurement also constitutes a part of the e-government and information society initiatives There is no separate strategy for e-public procurement	Main objective is to publish all calls for tenders electronically by 2010 (project: “100% Dematerialisation”) Introduction of e-tendering by 2005	Approximately EUR 2 million has been allocated for the introduction of operational electronic procurement at national level The Ministry of Defence has allocated approximately EUR 4 million over the last 3 – 4 years In 2005, EUR 1 million is earmarked for using on an inter-ministerial platform	Central, regional and local government are included in the strategies for procurement Also public enterprises are covered by the initiatives	Guidelines for e-public procurement have been issued The Ministry of Defence and certain local authorities have experience with using e-auctions. The Ministry of Defence also has experience with electronic catalogues An electronic signature does not exist, but will be introduced in 2004 Dynamic purchasing systems have not been used

	Strategy	Quantitative and qualitative objectives	Resources allocated to introduce operational e-procurement	Levels of government included	State of affairs on implementation of operational e-public procurement
Germany	E-public procurement initiatives are part of an overall strategy to develop the information society and create e-government - “BundOnline 2005” - “Deutschland-Online” - “Information Society Germany 2006”	Achieve greater efficiency and transparency, and cut costs in the tendering cycle Develop integrated electronic services on all administrative levels and create standards and infrastructures Secure e-tendering system by the end of 2005	At state level, the public authorities allocate approximately EUR 4.5 million per year to introduce operational electronic procurement	The strategies include central government	The Ministry of Economics and Labour has published a guide on e-public procurement Another guideline has been published to define the technical conditions for e-public procurement (“Optimierung der Beschaffung”) Advanced qualified electronic signature has been introduced and is used to some extent The Procurement Office of the Federal Ministry of the Interior are experienced in using electronic catalogues E-auctions and dynamic purchasing systems are not a legal possibility
Greece	The strategy for the introduction of operational electronic public procurement is an integrated part of the overall strategy on e-government and the development of the information society[27] The focus of the strategy is to obtain improved IT skills in public and private sector, speeding up procurement procedures, and to secure lower prices on public procures	Introduce an operational e-public procurement system by the end of 2007 30% of goods awarded from the Ministry of development will be awarded by electronic means by the end of 2008	Information unavailable	Include central government	Electronic signature has been introduced and is being used to a low extent There is no experience with electronic catalogues, electronic auctions, dynamic purchasing systems or Framework agreements
Hungary	The strategy for introducing an operational electronic public procurement is included in the overall strategy on E-government and Information society - among other things “Hungarian Information Society Strategy” (HISS), 2002[28]	The overall objectives are harmonization and modernization of the law, ease of use among a wide range of participants, transparency, and support of centralised procurement Objectives are estimated to be realized in March 2005	Internal government figures exists but cannot be disclosed publicly	All levels of government are included	Electronic signature has been introduced Specific guidelines have been issued E-auctions are being used below threshold for experimental purpose E-catalogues are also used to some extent in order to gather information Dynamic purchasing systems are not being used

[27] Information received from Mr. Spatharis, Ministry of Development. There is no information on title of the strategy/strategies.
[28] See http://www.ihm.hu/English/_20030211_1.html

	Strategy	Quantitative and qualitative objectives	Resources allocated to introduce operational e-procurement	Levels of government included	State of affairs on implementation of operational e-public procurement
Ireland	Strategies on e-public procurement are integrated in a overall strategy on modernising Public Procurement - "Strategy for the Implementation of eProcurement in the Irish Public Sector" (2001) - "Modernising Public Procurement" (2003)	Key targets to be achieved by the end of 2007 (described in the strategies): - Unit cost reductions of 2.5% of total expenditure on supplies and services and works - Transaction costs reduction of 5% for supply services and works - Unit cost reductions of 0.5% of total expenditure on capital works - Transaction cost related reductions of 0.25% in overall expenditure on capital works - 90% of tender competitions (above EU thresholds) carried out electronically - 80% of payments carried out electronically - 10% of all expenditures on supply and services supported by electronic catalogue and ordering facilities Approximated financial benefits by 2007 are estimated at EUR 414 million and potentially up to EUR 1 billion, annually	Approximately EUR 4 million on national level for implementation of the national strategy Some projects funded by other sources	All levels of government included in the national strategies on e-public procurement Projects are planned for development of a separate e-procurement strategy for local and sector level	The public authorities have no experience with e-auctions, dynamic purchasing systems or electronic catalogues. Project initiatives on these areas are outlined in the strategies Pilot initiatives on national level are recommended in the strategies, e.g. a pilot project on electronic ordering using electronic catalogues Guidelines on operational implementation have not been issued

	Strategy	Quantitative and qualitative objectives	Resources allocated to introduce operational e-procurement	Levels of government included	State of affairs on implementation of operational e-public procurement
Italy	Strategy on e-public procurement is integrated in an overall plan of introducing e-government and integrated into the program of rationalizing public spending for goods and services - e.g. "The Public Spending Rationalization Program" (2000)	Reduce expenses of goods and utilities and simplify the buying procedures Electronic procurement of goods and services for EUR 12 billion (timeframe: 2000 – 2005)	Information unavailable	Strategies cover all levels of government	Electronic signature has been introduced but is only being used to a low extent Electronic auctions has been a legal possibility since 2002 and there are numerous experiences both on national and local level For purchases under threshold, a market place of public administration exists based on the principles of dynamic purchasing systems Government procurement service through Consip S.p.A. uses high quality e-purchasing models such as electronic catalogues, reverse auctions, market place etc. Guidelines in support of the different areas have been issued as part of the strategy for e-government
Latvia	A separate strategy on e-public procurement (timeframe: 2004 – 2008) is available. - "Usage of information technology in the development of a public procurement system" (2004) This strategy is the part of e-government strategy, because the e-procurement strategy is mentioned in e-government strategy as one of the main goals.	It is projected that: - 10% of total public procurement contract amount will be awarded electronically by 2008 - the government can save EUR 1 million per year after 2008 by undertaking the procurement procedures in the public sector, electronically - the electronic catalogue and e-auctions will be fully implemented in 2008	Information unavailable	Central and regional authorities are included	An electronic signature has not been introduced There is no experience with neither e-auctions, dynamic purchasing systems or e-catalogues in the public sector, while private enterprises have experience in e-catalogue and e-auctions using Electronic auctions and dynamic purchasing system has been a legal possibility in the utility sector since 2004

	Strategy	Quantitative and qualitative objectives	Resources allocated to introduce operational e-procurement	Levels of government included	State of affairs on implementation of operational e-public procurement
Lithuania	The overall strategy on e-public procurement is an integrated part of a general strategy on modernising the public sector and develop the information society Three strategies in the field of information society development and e-government are included: - "National Concept of Development of Information Society" (2001) - "Strategic Plan for Development of Information Society" (2001) - "Long-term Development Strategy of the State" (2002) Activities for the modernising of the activities of Public Procurement have also been planned as a part of the general government programme.	Overall objectives are to revise the national public procurement legislation, increase transparency and availability of information and develop an electronic public procurement system	Approximately EUR 300.000 per year has been used for introducing e-procurement within national public authorities	Central government is included in the strategies	An electronic signature has not been implemented Guidelines have not been issued There is no experience with neither e-auctions, dynamic purchasing systems or e-catalogues
Luxembourg	Initiatives on e-public procurement are an integrated part of the action plan "eLuxembourg" (www.eluxembourg.lu) on development of e-government	All public procurement procedures including invoicing and accounting have to be done electronically by 2005	Information unavailable	Central government is the only level included in the strategy	An electronic signature will be introduced in 2005 Special guidelines for using e-public procurement have not been produced There is no experience with e-auctions or dynamic purchasing systems in the public authorities The central purchasing agency "Service central des imprimés de l'Etat" is using electronic catalogues

	Strategy	Quantitative and qualitative objectives	Resources allocated to introduce operational e-procurement	Levels of government included	State of affairs on implementation of operational e-public procurement
Malta	Strategy for the introduction of e-public procurement is integrated in the country's overall strategy on e-government and the development of the information society, but has not yet been fully developed - e.g. "e-Government program" (2000)[29]	Three overall objectives have been formulated: - deliver first-class public service - increase citizen participation in government decision making - streamline public services and realize efficiency-gains	Information unavailable	Central and local are included in the strategy	An electronic signature has not been introduced A set of guidelines relating to the government's e-public procurement initiative have been published (2004) There is no experience with electronic auctions, dynamic purchasing systems or electronic catalogues
Netherlands	There is no strategy on e-public procurement An action plan from 2001, which described a way of working for the national government within the area of public procurement is currently the main strategic document - "Action Plan on Professional Procurement and Purchase" (2001)	There is no overall objectives on e-public procurement	Significantly resources on the introduction of e-public procurement have yet to be allocated	Information unavailable	Ministries of Social Affairs and Employment and different local hospitals and health departments are experienced in using e-auctions An electronic signature has been introduced There is no guidelines on e-public procurement Dynamic purchasing systems and electronic catalogues have not been used
Poland	Strategy on e-public procurement is an integrated part of the overall strategy on e-government - "Gateway to Poland" is the Polish e-government action plan - "e-Poland" is the strategy for development of the information society	There is a set of overall objectives: - to ensure efficiency and general savings in the public administration - to minimize corruptive behaviour - to secure transparency in the public sector activities	There is no specific information on this issue	National, regional and local public administration are included in the strategies	Electronic signature has been a legal possibility since March 2004 A few entities in the Polish public sector have experience in organizing e-auctions, e.g. municipalities Public authorities have no experience with e-catalogues and dynamic purchasing systems

[29] See http://www.gov.mt/egovernment.asp?p=110&l=2

	Strategy	Quantitative and qualitative objectives	Resources allocated to introduce operational e-procurement	Levels of government included	State of affairs on implementation of operational e-public procurement
Portugal	Strategy for the deployment of e-public procure is outlined in “National e-Procurement Program”, which is an integral part of the overall strategy on the development of e-government and the information	Establishment of an organisation responsible for national e-public procurement Centralized procurement within the ministries Intention to realize savings in the magnitude of 10% - 20% on public procurement costs during the period 2003 – 2006 Approximately 50% of total acquisitions to be carried out electronically by 2006	Information unavailable	All levels of government included	Guidelines for e-public procurement have been developed and are integrated into the “National Initiative for Electronic Commerce” Pilot projects on electronic auctions and e-catalogues have been carried through There is no experience with dynamic purchasing systems Electronic signature has not been introduced
Slovakia	There is no strategy for introducing or implementing e-public procurement	No overall objectives	Information unavailable	Information unavailable	Electronic signature, electronic auctions, dynamic purchasing systems and electronic catalogues have been introduced There is no special guidelines on e-procurement
Slovenia	Initiatives on e-public procurement is integrated in the overall strategy on e-government and development of an information society Strategic reports: - “Strategy of E-commerce in Public Administration of the Republic of Slovenia for the period from 2001 until 2004” (2001) - “Action Plan e-Government Up to 2004” (2002)	The overall objective are to remove administrative barriers	Information unavailable	All levels of government are included	An electronic signature has been implemented Government authorities have experience with both electronic auctions and catalogues Dynamic purchasing systems are not being used Special guidelines have not been issued

	Strategy	Quantitative and qualitative objectives	Resources allocated to introduce operational e-procurement	Levels of government included	State of affairs on implementation of operational e-public procurement
Spain	Actions for adopting e-public procurement are integrated in an overall strategy for developing the information society - "Info XXI Action Plan for the development of the Information Society" (2001) A specification on adoption of e-procurement in the public administration has also been produced (SLICE)	All transactions in public e-procurement should be done electronically by 2005	Information unavailable	National and regional government are included	Special guidelines for electronic public procurement have been issued, which addresses functional, technical and security issues ("Guilas Silici") Local and regional public authorities have experience with e-auctions Central and regional public authorities have experience with electronic catalogues There is no experience with dynamic purchasing systems in the public administration An electronic signature has been issued but only used once in a while
Sweden	Initiatives on e-public procurement is an integrated part of different policies on adoption of the information society - "An Information Society for All, a publication" (2004) is about the Swedish IT-policy	There is no overall objective on electronic procurement due to a decentralised organisation of activities on e-public procurement	Resources have been spent at all levels of government but there is no information on the amount	Only central government is included in the strategy	Guidelines have not been issued E-auctions and dynamic purchasing systems are not being used Electronic catalogues are used in relation to purchase of goods Electronic signature has been introduced but is only but only used once in a while
United Kingdom	A specific e-procurement Strategy for Central Civil Government from 2002 exists It is composed by several strategic documents/sites on www.ogc.gov.uk	Web-enabled tools and techniques shall deliver £ 250 million pounds of value for money improvement to government's commercial relationships during April 2003 – March 2006 50% of dealings should be capable of electronic delivery by 2005 and 100% by 2008	Resources have been spent but there is no information on the amount	Central, regional and local government are included	No electronic signature – will be introduced in 2006 Guidelines have been issued, e.g. "E-procurement cutting through the hype – A guide to eProcurement for the public sector" (2002) and "Reverse Electronic Auctions" Electronic catalogues are, typically, used for ordering Dynamic purchasing systems are not being used Several authorities have experience with e-auctions, but the use is not widespread. An e-auction Decision Tool to evaluate whether an e-auction is suitable for an intended procurement also exists

Based on table 3.1 above, some observations across the EU member states may be highlighted:

- First, the table shows that most countries consider the field of e-public procurement as an integral part of their e-government and information society strategies. Four countries (France, Cyprus, Ireland and Lithuania) have integrated a strategy on e-public procurement into the national strategy on public procurement, while one country, the UK, have chosen to formulate a separate strategy for the introduction of e-public procurement.

- Second, eleven member states have issued special guidelines for e-public procurement (Austria, Czech Republic, Finland, France, Germany, Hungary, Italy, Malta, Portugal, Spain, UK), while the remaining countries have not.

- Third, in countries where strategies for the introduction of e-public procurement exist, the strategy is most often aimed at the central governmental level and less frequently at e-public procurement at the regional and local levels. Table 3.2 below summarizes which countries have included respectively the national, regional and local levels in their strategies.

Table 3.2: Levels included in the national strategy on e-public procurement[30]

Central government	Regional government	Local government
Belgium		
Cyprus		Cyprus
Czech Republic		
Denmark		
Finland	Finland	Finland
		France
Germany		
Greece		
Hungary		
Ireland	Ireland	Ireland
Italy	Italy	Italy
Latvia		
Lithuania		
Luxembourg		
Malta		Malta
Poland	Poland	Poland
Portugal	Portugal	Portugal
Slovenia	Slovenia	Slovenia
Spain	Spain	
Sweden		
United Kingdom		

[30] Information not available from the countries that have no strategy; Austria, Estonia, Nederland and Slovakia

Finally and related to the listing of the main elements of the national strategies and objectives, the interview survey uncovers the most important motives related to e-public procurement in the EU member states. The table below summarises and ranks the most important motives that, according to interview statements from member states representative, drive the efforts to introduce and mainstream e-public procurement in the member states that have formulated objectives and/or strategies for the introduction of e-public procurement.

Table 3.3: Motives for introducing e-public procurement (high and medium importance and total no. of countries that consider a specific motive important)

	High importance	Medium importance	Total (no. of countries)
Public sector savings	14	4	18
Modernisation of public sector	10	8	18
Increased efficiency and competitiveness of private sector	9	9	18
Better control of public sector spending	9	9	18
Alignment on European neighbours	3	11	14
Other	6	1	7

The table clearly shows that the achievement of public savings and the modernisation of the public sector through the introduction of electronic business processes are major driving forces. It is, however, also noteworthy that a number of member states see the introduction of e-public procurement as a mean to increase the efficiency and competitiveness of the private sector in the sense that demands from public institutions to suppliers will create an incentive for the suppliers to 'e-enable' their businesses. Some interviewees have mentioned additional motives, such as improving the transparency in the public sector, simplification of the administrative work for businesses and using the introduction of e-public procurement as a mean to promote the development of the information society in the country.

As mentioned, the survey seeks to uncover the underlying reasons why some member states have not at this point developed overall strategies or objectives for the introduction of operational public procurement. The analysis shows that four[31] of the 25 member states have presently not developed overall strategies or objectives in the field. The reasons given by the interviewees do not point at one single (or two) most important factor that seems to have barred or impeded the development of e-public procurement objectives and/or strategies across member states. The information provided by the interviewees point to a broad range of factors that have played a role in this respect[32]:

- Fragmented responsibilities between the involved governmental institutions (2 countries)
- Absence of regulated procurement tradition (2 countries)
- Lack of capacities/skills within institutions to work with e-public procurement (2 countries)
- Many suppliers are not ready for e-procurement (2 countries)
- Complex legal requirements (1 country)

[31] Austria, Estonia, Nederland and Slovakia.
[32] Each interviewee has been able to point at several reasons.

- Failed experiences in previous initiatives (1 country)
- The added value of e-public procurement is considered as low (1 country)
- Awaits experiences in e-public procurement in other countries before launching it in the country (1 country).

3.1.2 *Assessment*

The study shows that the EU member states have approached the development of e-public procurement differently in their national strategies, and that they presently are at various stages as regards the operational implementation of e-public procurement. In the light of this present situation it can be envisaged that the introduction and main-streaming of e-public procurement will be rolled out at varying speed across the EU in the coming years, which entails a risk for a certain level of market fragmentation. The more fragmented the market is, the greater the impediment to the development of an effective internal market and European competitiveness. The differences between the countries, which will maintain and possibly reinforce the existing variations in the level of implementation of e-public procurement, can be seen in the following areas:

- The existence of a comprehensive and detailed strategy
- The extent to which public investments have been made or earmarked to the introduction of e-public procurement

Although the majority of countries have included e-public procurement in a broader strategy or have formulated a separate strategy for e-public procurement, there are significant differences between the countries concerning the level of detailing and how comprehensive the strategy is. The formulation of quantitative targets is done at different levels of specification: In most cases, the targets are described in quite broad and qualitative terms that outline the overall direction, while some countries have defined targets that are more specific and expressed in measurable, quantitative terms. Examples of specific targets are seen e.g. in Ireland where a number of quite specific objectives for a range of parameters are defined, in the UK and in Latvia where the amount of savings and share of electronic transactions have been specified, and in Portugal where an overall target of savings on public procurement in the range of 10%-20% have been set.

The analysis shows that the introduction of e-public procurement is mainly driven from the level of central government as only 14 member states have included the regional and/or the local levels in their national strategies. However, as shown in the outline of activities in table 3.1 above, it is important to note that e-public procurement is an area in development where with many concrete activities currently ongoing or in the pipeline.

Although information about investments in e-public procurement is generally difficult to find, the study indicates that several countries have either not invested resources in e-public procurement or they have not earmarked resources for future investments. Information about public resources spent and allocated for the introduction of e-public procurement are in most cases sparse, most frequently because the investments in e-public procurement come from different public sources and there is consequently no aggregate information available. In some cases have public funding not been invested or allocated because the establishment and operational introduction has been contracted out to an external, private supplier.

This means that the initial investments have also been contracted out, as the business model includes that the private operator will obtain a return on investments from the transaction and subscription fees paid by the users (buyers and suppliers). In countries where information on invested resources is available, the typical level of investment in the establishment of operational systems seems to vary roughly between 1 and 5 million EUR, but there are also examples of larger investments, such as Italy where the e-public procurement system launched in 2000 required initial investments of 25 million EUR.

When the above mapping of the motives is compared with the expectations in the member states to the advantages of e-public procurement and the key performance indicators which the member states use or plan to use for monitoring uptake and assessing impact (presented in tables (3.8 and 3.9) later in this section), the overall picture across the countries is that the main focus is on the national context and the achievement of public savings and modernization of the public sector, while elements such as cross-border trade and the participation rate of small and medium-sized enterprises are generally absent. The broader European perspective, in terms of the creation of European competitiveness and an effective internal market through cross-border trade, is largely absent.

3.2 Organisations and institutions responsible for implementing electronic public procurement

The following contains an overall description of the main findings and assessment of the current situation in the member states with regard to the organisations and institutions responsible for implementing electronic public procurement.

3.2.1 Findings

Institutional set-up
The survey among member states has included a number of questions aiming at describing the distribution of responsibilities among public authorities within each country. The table on the next pages provides an overview of the public institutions, responsible for and involved in public procurement policies, legal aspects and technical issues within each member state. In addition, the table provides an overview of the existence of central procurement institutions within each country.

As the table shows, the general finding across the member states is that the typical institutional set-up involves one or more ministries or departments at national, governmental level, responsible for implementation of overall policies as well as legal aspects. The survey among member states shows that the same authorities are responsible for the overall public procurement policy and legal aspects in the following 20 member states:

- Austria
- Cyprus
- Czech Republic
- Estonia
- France
- Germany
- Greece
- Hungary
- Ireland
- Italy
- Latvia
- Lithuania
- Luxembourg
- Malta
- The Netherlands
- Portugal
- Slovakia
- Spain
- Sweden
- United Kingdom

These responsibilities within overall public procurement policies and legal aspects are typically assigned to the ministries of economic affairs, the ministries of finance or the ministries of science and information technology.

Table 3.4: Public authorities responsible for implementing e-public procurement

	Responsible institution(s) for public procurement policy	Responsible institution(s) for legal aspects	Responsible institution(s) for technical solutions	Central procurement institution(s)
Austria	Federal Chancellery Federal Procurement Company Ltd.	Federal Chancellery	Austrian Federal Economic Chamber	ICT-Board Chief Information Office
Belgium	Federal Steering Group on Joint E-Procurement	Public Procurement Commission	Federal ICT Department (FEDICT)	Services contract-cadre multi-SPF
Cyprus	Treasury of the Republic of Cyprus , The Planning Bureau	Treasury of the Republic of Cyprus , The Planning Bureau	Treasury of the Republic of Cyprus , The Planning Bureau	Public Procurement Department
Czech Republic	Ministry of Informatics	Ministry of Informatics Ministry of Regional Development		No name available
Denmark	Ministry of Science, Technology and Innovation	The Ministry of Economic and Business Affairs, Danish Competition Authority	Agency for Governmental Management	National Procurement Ltd. Denmark (SKI)
Estonia	Ministry of Finance Ministry of Transport and Communications	Ministry of Finance, Public Procurement Office		Ministry of Finance, Public Procurement Office
Finland	Ministry of Finance	Ministry of Trade and Industry	Ministry of Trade and Industry	Trading House Hansel Ltd.
France	Ministry for Economy, Finance and Industry Agency for the Development of Electronic Administration	Ministry for Economy, Finance and Industry, Legal Department	Ministry for Economy, Finance and Industry Agency for the Development of Electronic Administration	Union de Groupements d'Achats Publics (UGAP)
Germany	Ministry of Economics and Labour Ministry of the Interior	Ministry of Economics and Labour	Ministry of the Interior	Procurement Office of the Federal Ministry of the Interior
Greece	Ministry of Development	Ministry of Development	Ministry of Development	No name available
Hungary	Ministry of Informatics and Telecommunication Office of the Prime Minister, Electronic Government Centre	Ministry of Informatics and Telecommunication Office of the Prime Minister, Electronic Government Centre	Office of the Prime Minister, Electronic Government Centre	Central Service Directorate

	Responsible institution(s) for public procurement policy	Responsible institution(s) for legal aspects	Responsible institution(s) for technical solutions	Central procurement institution(s)
Ireland	Department of Finance	Department of Finance	Department of Finance Local Government Computer Services Board Other ICT Bodies within the Health and Education sectors	Government Supplies Agency Office of Public Works Local Government Computer Services Board Health Boards Executive
Italy	Ministry of Economic Affairs and Finance Ministry of Innovation and Technology	Ministry of Economic Affairs and Finance Ministry of Innovation and Technology	Ministry of Economic Affairs and Finance, Consip S.p.A	Ministry of Economic Affairs and Finance, Consip S.p.A
Latvia	Ministry of Finance, Procurement Monitoring Bureau	Ministry of Finance, Procurement Monitoring Bureau	Ministry of Finance, Procurement Monitoring Bureau	
Lithuania	Ministry of Economy Public Procurement Office Information Society Development Committee	Ministry of Economy	Public Procurement Office Information Society Development Committee	
Luxem-bourg	The Ministry of Public Works The Ministry of Civil Service and Administrative Reform The National Information Society Commission	The Ministry of Public Works	The Ministry of Civil Service and Administrative Reform, Centre Informatique de l’Etat The Ministry of Civil Service and Administrative Reform, Service Central des imprimés des l’Etat	The Ministry of Civil Service and Administrative Reform, Centre Informatique de l’Etat The Ministry of Civil Service and Administrative Reform, Service Central des imprimés des l’Etat
Malta	Office of the Prime Minister, Central Information Management Unit	Office of the Prime Minister, Central Information Management Unit	Office of the Prime Minister, Central Information Management Unit	Ministry of Finance and Economics, Department of Contracts
The Neth-erlands	Ministry of Economic Affairs	Ministry of Economic Affairs	Ministry of Economic Affairs	
Poland	Ministry of Scientific Research and Information Technology Public Procurement Office	Public Procurement Office	Public Procurement Office	Public Procurement Office
Portugal	Ministry of Finance Mission, Innovation and Knowledge Unit	Ministry of Finance Mission, Innovation and Knowledge Unit	Ministry of Finance Mission, Innovation and Knowledge Unit	
Slovakia	Office for Public Procurement Agency for Informatisation of Society	Office for Public Procurement	Office for Public Procurement Agency for Informatisation of Society	Office for Public Procurement

	Responsible institution(s) for public procurement policy	Responsible institution(s) for legal aspects	Responsible institution(s) for technical solutions	Central procurement institution(s)
Slovenia	Ministry for Information Society Council for Information Society	Public Procurement Office	Public Procurement Office Government Centre for Informatics	Public Procurement Office
Spain	Ministry of Economy and Finance Ministry of Public Administration Ministry of Trade, Industry and Tourism	Ministry of Economy and Finance Ministry of Public Administration Ministry of Trade, Industry and Tourism	Directorate of State, Patrimony, Ministry of Economy and Finance	
Sweden	Ministry of Finance, National Board for Public Procurement	Ministry of Finance, National Board for Public Procurement	Agency for Public Management	Agency for Public Management
United Kingdom	Office of Government Commerce	Office of Government Commerce	Improvement and Development Agency	OGC Buying Solutions

The institutions are often assigned with the development of overall national procurement policies and strategies, with the application of legal aspects, and coordination of the inter-ministerial initiatives to adapt both the national policies/strategies and the legal framework. As an example, the Office for Government Commerce (OGC), which is an independent office of the Treasury in United Kingdom, is responsible for an integrated government procurement policy and strategy and for helping to co-ordinate the procurement of governmental departments and agencies. In addition, OGC has an important role representing the UK on procurement matters in Europe and the World Trade Organisation, and in helping departments apply the rules in the UK. OGC also take the lead on the Government's policy of achieving value for money in public procurement as well as giving advice and producing guidance[33].

The survey thus also shows that different authorities are responsible for the overall policy and for the legal aspects in the following 5 countries: Belgium, Denmark, Finland, Poland and Slovenia:

- In Belgium and Denmark, four different institutions are responsible for the overall public procurement policy, legal aspects, technical solutions and the operational development of e-public procurement. In Belgium, policy formulation on e-public procurement is done by the federal Steering Group on Joint E-Procurement where all federal organisms are represented, whereas overall responsibility lies with the government (Conseil des Ministres) itself. The legal framework falls into the responsibility of the Public Procurement Commission (Commission des marchés publics) under the authority of the Prime Minister. Technically, e-public procurement projects are conducted by line ministries in consultation with and under the coordination of the Federal ICT Service (SPF FEDICT). In Denmark, The Ministry of Science, Technology and Innovation is responsible for policy formulation and support to promotion of operational electronic public procurement systems, while the Danish Competition Authority under the Danish Ministry of Economic and Business affairs is responsible for the legal framework for public procurement including electronic public procurement. The Agency for Governmental Management under the Ministry of Finance is responsible for the operation of the central public procurement portal.

- In Finland, the Ministry of Finance is responsible for the public procurement policy, while the Ministry of Trade and Industry is responsible for legal aspects and technical solutions. Finally, the Finnish government has established a central procurement body (Trading House Hansel), responsible for the operational development of e-public procurement, including the arrangement of framework contracts.

[33] "Fostering SMEs' Participation in the Information Society: What Lies Ahead?" (September 2003), by National Technical University of Athens, and www.ogc.gov.uk

- In Poland and Slovenia, the Public Procurement Offices are responsible for legal aspects, technical solutions as well as the operational development of e-public procurement[34]. In Poland, the Public Procurement Office is also involved in the overall public procurement policy in cooperation with the Ministry of Scientific Research and Information Technology. The responsibility for Slovenian procurement policy is shared between the Ministry for Information Society and the Council for Information Society.

The survey among member states also shows that the same authority is responsible for overall public procurement policies, legal aspects and technical issues in 11 member states. These member states are:

- Cyprus
- France
- Greece
- Ireland
- Italy
- Latvia
- Malta
- The Netherlands
- Poland
- Portugal
- Slovakia

These responsibilities within these countries are typically assigned to the ministries of economic affairs or the ministries of finance. In some of these countries, responsibility is however assigned to a governmental unit within these ministries.

As regards the operational development of e-public procurement, responsibility is most often assigned to a governmental unit with a more specific focus on IT and technological solutions, e.g. a ministry for IT or a public procurement agency. The study shows that the majority of the member states have established a central procurement institution.

These member states are:

- Austria
- Belgium
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Germany
- Hungary
- Italy
- Luxembourg
- Malta
- Poland
- Slovakia
- Slovenia
- Sweden
- United Kingdom

The survey thus shows that the Greece, Latvia, Lithuania, the Netherlands, Portugal and Spain have not established a central procurement institution. In the Netherlands, the selection of suppliers is typically a responsibility of the individual public institutions, but a procurement body has before existed on national level. The agency was however abolished due to unsuccessful results.

[34] In Slovenia, the responsibility for technical solutions is shared between the Public Procurement Office and the Government Centre for Informatics.

In Portugal public procurement has until now been conducted in a decentralized manner as regards both procurement within the ministries and the entire ministerial level. This means e.g. that when no framework agreements exist the selection of suppliers is typically done by the individual institutions both for procurement above and below the threshold. However, the decentralized model is expected to change in the future with the strategy towards more centralized organization of the procurement within the ministries as well as for the entire ministerial level.

Centralisation vs. decentralisation

At the aggregate level, the survey provide some data that may be used to establish the characteristics of the organisational model applied for public procurement in the EU as regards the application of a centralised approach vs. a decentralised approach to public procurement in the countries.

In short, a centralised approach includes, first, that there is one or more central procurement institutions in the country (at national, regional and/or local governmental levels), second, that these institutions are actively involved and responsible for the selection of suppliers (which may be selection of suppliers for contracts both above and below the EU threshold).

A decentralised approach includes that a central procurement institution, if it exists in the country, is responsible for the overall policy formulation and coordination of public procurement, but that the management of tenders and selection of suppliers are done at the institutional level[35], and that the central procurement body is not involved in this process.

The survey shows that there are central procurement bodies in the majority of the member states – 19 member states have central procurement bodies and 6 countries have not established such institutions. While central procurement bodies exist in most countries, the responsibility for the selection of suppliers typically rests with the individual public institution. Only in a few countries, including the Czech Republic, Hungary, and Malta, the central procurement body has the responsibility for the selection of suppliers for procurements in public institutions. In Malta, the selection of suppliers at national level above threshold is done by the Department of Contracts, which also is involved in the selection of suppliers at local level above threshold (in collaboration with local councils). Procurement below the threshold at local level is done through evaluation committees operating under the local councils.

[35] The term ‘institution’ is in this respect used in the broad sense and includes institutions such as e.g. a line ministry and a university or a hospital.

Framework agreements

The survey included questions about the use of framework agreement in the countries. The table below summarises the use of framework agreements among EU member states at national, regional and local level. The table also list those countries that do not use framework agreements:

Table 3.5: Use of framework agreements

National level	Regional level	Local level	No use
Austria			Republic of Cyprus
Belgium			Czech Republic
Denmark	Denmark	Denmark	Estonia
Finland	Finland	Finland	France
Germany	Germany	Germany	Greece
Hungary	Hungary	Hungary	Lithuania
Ireland		Ireland	Luxembourg
Italy	Italy	Italy	Malta
Latvia		Latvia	Slovenia
The Netherlands	The Netherlands	The Netherlands	
Poland			
Portugal	Portugal	Portugal	
		Slovakia	
Spain	Spain		
Sweden	Sweden	Sweden	
United Kingdom	United Kingdom	United Kingdom	

The table shows that more than half of the member states use framework agreements at the national level, and that 10 countries use framework agreements on regional level[36]. Most of those countries that use framework agreements at regional level also use framework agreements at the local level. The study thus also shows that 10 countries do not use framework agreements at any level.

The study also shows similarities in the use of framework agreements at the national level. As examples of this, the central public procurement bodies in Denmark, Finland and UK arrange framework contracts, which can be used by all public authorities. However, the individual public authorities are free to arrange individual framework agreements.

It should be noted that despite framework agreements exist, the analysis does not cover the extent to which these agreements are actually used. The survey included questions on the share of total procurement which is purchased through framework agreements, but only few data seems to exist on this matter, and it has therefore not been possible to carry out any valid analysis in this context. In other words, even though framework agreements exist at various levels under the aegis of a central procurement they might only be used to a relatively limited extent by the public institutions.

[36] Slovakia uses framework agreements at local level, but not at the national or regional level.

3.2.2 Assessments

Risks of a decentralised approach

The study on the characteristics of the organisational model applied for public procurement in the EU as regards the application of a centralised approach versus a decentralised approach, shows that public procurement across the EU is generally organised in a manner that follows the decentralised approach. The main rationale behind this organisational set-up seems to be that procurement is considered as an integral part of the financial management, responsibilities and accountabilities assigned to the institutional level and that placing this responsibility at the institutional level creates an incentive for sound financial management for the individual institution. However, it also indicates that the level and the speed of uptake of e-public procurement across the EU will mainly be determined by the individual institutions and the extent to which they decide to use e-public procurement instead of traditional, paper-based procurement.

The decentralised approach includes a risk for a relatively slow transition to e-public procurement. Because the responsibility for the use of public funding is decentralised to individual institutions, they will be able to decide whether they want to use e-public procurement or not. Therefore, the pace of transition to e-public procurement may be held up by the individual buyers, who choose not to use electronic means in procurement, e.g. because they consider the transition costs too high, because their procurement volume lacks sufficient critical mass in order to obtain added value from the transition to e-public procurement or because they lack the necessary skills to handle e-public procurement.

The decentralised approach also includes a risk of the development of many different e-procurement systems, which would mean the creation of additional barriers and costs for suppliers. This is the result of the decentralisation of the responsibility for the use of e-public procurement to the individual buyers, which would allow these to develop their own e-procurement systems, causing different requirements for suppliers.

Framework agreements and incentives for suppliers

The establishment of a framework agreement between buyer and a selected number of suppliers does not necessary award any business to a supplier. To begin with the framework agreement simply results in one or more suppliers being available for the buyer to contract with, if and when the buyer decides that it wishes to purchase something that is covered under the framework agreement. Furthermore, the incentives for suppliers to engage in framework agreements may be lowered by a low level of detail on the total contract volume in the tendering process. As an example, the central procurement institution in Denmark, SKI, has in the past received only limited discount from suppliers on tenders with no detailed estimate on the total contract volume. As a way to overcome this, SKI chose to include more precise estimates on the contract volume, resulting in better prices. However, according to interview data, there is also experience of extensive use of framework agreements (Sweden).

The push for development and implementation of e-public procurement

The interviewees in countries with defined objectives and/or strategies for e-public procurement were asked to assess the acceptance rate of the stated national objectives and/or strategies for the introduction of operational e-public procurement. The table below summarises and ranks the acceptance rate among different stakeholders:

Table 3.6: Acceptance rate of the stated national objectives or strategies for introducing operational e-public procurement

	High acceptance	Medium acceptance	Total no. of countries[37]
Public procurement experts, academia	14	3	21
National administration	10	9	21
Suppliers	3	11	21
Regional administration	3	10	20
SMEs	2	8	19
Local administration	2	9	20
General public opinion	1	8	21
Other	1	0	6

The analysis shows that the two stakeholders who seem to favor the introduction of e-public procurement at the most are public procurement experts, including experts in the academic community in the country, and the public administration at national level. This assessment is not surprising as these two groups are those most closely involved in the introduction of e-public procurement. The general impression of the acceptance rate from other stakeholders is that in half of the member states or more these stakeholders, including the suppliers from the private sector, do not appear as the leading advocates, who will drive the introduction of e-public procurement in the country.

The high acceptance rate within the public administration and the relatively low acceptance rate within the private sector, indicates that the push for development and implementation of e-public procurement primarily comes from the public administration at the national level. The main reason for this seems to be that the introduction of public e-procurement is seen as a driving force for improving the effectiveness of the public purchasing process, generating structural gains and savings.

However, the developments of an extensive use of e-public procurement will also require wide support and involvement from both the private sector and public administration at regional and local level. Because e-public procurement across the EU is generally organized in a manner, that follows the decentralized approach, the public decisions at regional and local level will be crucial for the introduction and main-streaming of e-public procurement across the EU.

[37] This figure describes the total number of countries which have answered the 8 questions. Some countries have answered "Low acceptance" or "Don't know". These answers are not described in the table.

3.3 The use of electronic means in the procurement cycle

The desk research and interviews have focused on identifying the most important procurement portals and e-marketplaces in the Member States. The portals and e-marketplaces identified are all primarily focused on public sector institutions as buyers and private companies as suppliers. The identified systems are listed in the table be-low. The table in annex B is not an exhaustive list of public procurement solutions in Europe, but rather a list of the most important, in terms of use and focus from government institutions.

Below, we describe the public procurement systems and their functionalities.

Existing public procurement solutions

The research has identified 36 electronic public procurement systems currently operating (please refer to annex B)[38]. In addition, two important pilot projects, which are not yet in operation, have been identified:

- www.compras.gov.pt (Portugal): Central e-public procurement portal.
- www.handwerk.de/dstgb (Germany): E-procurement system for tendering between small companies and towns / municipalities.

More than half the systems, 21 of the 36 systems in operation, are nationwide portals covering a broad range of sectors and institutions. Nine of the systems are regionally based:

- Marchespublics (Wallonie/Belgium)
- Marches-publics (France)
- Vergabe (Nordrhein-Westfalen/Germany)
- www.had.de (Hessen/Germany)
- www.ausschreibungen-brandenburg.de (Brandenburg/Germany)
- www.ausschreibungen.hamburg.de (Hamburg/Germany)
- www.bayerischerstaatsanzeiger.de (Bayern/Germany)
- www.ausschreibungsanzeiger-thueringen.de (Thueringen/Germany)
- www.csarss.net (Northern Ireland/United Kingdom)

The remaining six are nationwide, but sector/institution specific systems:

- www.oebb.at (Railway)
- www.achats.defense.gouv.fr (Defense)
- www.ixarm.com (Defense)
- www.saomap.application.equipement.gouv.fr (Ministry of Equipment, Transport and Housing)
- www.aanbestedingskalender.nl (Construction sector)
- www.e-procurement.gov.mt (IT software and hardware)

The majority of the systems, 29 of 36, are owned by public institutions, but it is important to note that a number of these are in fact operated and maintained by private companies.

The majority of the countries, 16 of the 25, have already established electronic public procurement systems. In 9 Member States important portals or e-marketplaces for public sector procurement have not been identified: Cyprus, Greece, Lithuania, Luxembourg, Poland, Portugal, Slovakia, Slovenia and Spain.

[38] It should be noted that this is not a complete listing of existing systems and the list mainly includes major e-public procurement systems at the central, national level.

As shown in the table in annex B, a total of 13 of the 25 member states have established such a central public procurement portal. Furthermore, as mentioned before, Portugal is currently establishing a central public procurement portal.

Functionalities of public procurement solutions
The research has mapped the main phases covered by the identified electronic public procurement solutions, as shown in the table in annex B.

For the purpose of simplicity, six main phases in the procurement cycle (functionalities) have been singled out: notification about tenders, publication of tenders, management of receipts /submission of tenders, evaluation of tenders, ordering and invoicing. Each of these functionalities is briefly described below:

Notification about tenders:
This functionality provide information to suppliers about past, current and future tenders. The supplier can read the information online or download it. Notification functionalities can be integrated in cross-government and cross-sector portals to provide suppliers with an overview of all relevant public tenders.

Publication of tenders:
This functionality makes tenders documents available online at a web-page. Tenders can be downloaded and returned by post, fax or e-mail.

Management of receipts /submission of tenders:
The simplest way to forward tenders is by e-mail, but this method does not provide the optimal security in the handling of tenders and ensuring tenders have been submitted by the right supplier. Thus, in this report management of receipt / submission of tenders are a specific functionality aimed at receiving tenders, ensuring that no tenders are opened before a given deadline and identify suppliers. Ultimately, such systems can be based on a digital signature and a public key infrastructure.
These systems can also include administration of questions from suppliers and answers from the awarding authority.

Evaluation of tenders
Elaboration of tenders (suppliers) and evaluation of tenders (buyers) can be very time-consuming. E-procurement systems can support this process by enabling systematic assessment of tenders on various pre-selected criteria. Such systems can motivate a re-engineering of the entire work flow from elaborating tenders to award of contract, to make the process simpler.

Ordering
Processing of orders by traditional means (paper or fax) is time consuming and slow. Electronic public procurement systems can manage the ordering process. This usually requires the suppliers to submit an electronic catalogue, which one or several buyers are permitted to order from. Orders can then be placed and order confirmation can be returned electronically.

Invoicing
E-invoicing is a system which is used for electronic invoicing between companies or private suppliers and public buyers. E-invoice systems can be based on e-mail, browser-based systems or fully integrated systems (e.g. Microsoft BizTalk technology). With the most advanced systems, the invoice is forwarded directly from the accounting system of the supplier to the accounting system of the buyer. Table 3.7 lists the procurement phases covered by the 36 identified procurement systems. An overview of the phases covered is shown in the table below:

Table 3.7: Procurement phases covered by the identified procurement systems

	Frequency	%
Notification about tenders	33	92%
Publication of tenders	17	47%
Management of receipts/submission of tenders	9	25%
Evaluation of tenders	3	8%
Ordering	8	22%
Invoicing	1	3%
Total	36	100%

As indicated in table 3.7 above, the two procurement phases most frequently included in the public procurement solutions are (1) Notification about tenders and (2) Publication of tenders. Please note that electronic notification and publication do not necessarily mean that the entire work-flow behind these processes are automated, i.e. that notices are generated by individual institutions and forwarded online to central portals.

Management of receipts/submission of tenders is only covered by nine systems, and evaluation of tenders is only covered by three: Ethics (Denmark), www.ausschreibungen.hamburg.de, (Germany) and OGCbuyingspublicsolutions.gov.uk (UK). Public procurement systems for ordering have been identified in eight cases, whereas for invoice, only one of the 36 identified system, DOIP (Denmark), have a system in operation with this functionality. Moreover, Sweden has acquired experience with electronic ordering and invoicing as 75 municipalities and 10 counties had solutions in place at the time of the study.

3.3.1 *Assessment*

As mentioned above, central public procurement portals and e-marketplaces have been established in 13 of the Member States, and several of the remaining member states are expected to establish central portals and e-marketplaces within the next couple of years. The research illustrate that the two procurement phases most frequently included in the solutions are notification about tenders and publication of tenders. To explain this tendency, the table below illustrates the costs and benefits related to the use of electronic means in the six procurement phases. The costs and benefits involved are based on Ramboll's expert assessment, and they are indicative and very much dependent on selected technology, level of back-end integration, organizational set-up etc.

The costs and benefits of using electronic means in the six procurement phases and implications of the cost/benefit relation are briefly described below:

Table 3.8: Estimated cost and benefits of using electronic means in the various procurement phases

	Costs	Benefits
Notification about tenders	Low • Adjustment and maintenance of web page	High • Reduced publication costs • Reduced search-cost • Increased transparency and competition in the public procurement market • Communication of tenders to a broader audience of suppliers
Publication of tenders	Low • Adjustment and maintenance of web page	Medium • Quick publication of tenders • Reduced administrative costs for buyers and suppliers
Management of receipts / submission of tenders	High • IT-investments (hardware and software) • Development of a digital signature and public key infrastructure	Medium • Reduced administrative and postage costs • Increased transparency • Ease of auditing • Better security/privacy.
Evaluation of tenders	Low • IT-investments (hardware and software) • Re-structurering of tender format	Medium • Reduction of work load involved in this part of the procurement process. • The evaluation process becomes much more well-documented and transparent.
Ordering	High • Communication about format • Developing electronic catalogues • IT-investments (hardware and software) • Re-organization of internal workflows • Back-end integration	High • Reduced printing and posting cost • Reduced administrative cost • Faster processing of orders • More efficient market/lower prices
Invoicing	High • Communication about format • IT-investments (hardware and software) • Re-organization of internal workflows • Back-end integration	High • Reduced printing and posting cost • Reduced administrative cost • Faster processing of invoices.

Costs
As shown in the table, the initial phases are relatively easy to automate, as it essentially means that notification and publication is done via a website. These early phases are also the stages characterized by the lowest complexity and the lowest degree of integration to e.g. back-end systems and management systems. The flow of communication between demand side and the supply side is entirely one-way from the public authorities to the potential suppliers. E.g. most of these systems are more simple one-way communication database systems. It is technically more complicated to establish two-way communicating systems and routines, which involves receipt /submission of tenders (technical clarification communication), ordering and invoicing.

Benefits
Notification about tenders has a significant impact by improving access and transparency for suppliers to the public procurement marketplace. Using electronic means in the processing of orders and invoices provides significant benefits, as these are often high-frequency processes, meaning potential benefits are likewise high.

Implications
The table on cost/benefits of using electronic means in the procurement cycle can provide an explanation on why the initial phases in the procurement cycle are those phases where the use of electronic means is most extensive compared to the other, subsequent phases in the cycle. These are steps which can easily done electronically, and, especially in the case of tender notification, provide significant benefits for buyers and suppliers.

3.4 The use of electronic means for different types of purchases and in utilities

A study of 36 electronic public procurement portals in 16 countries in the EU shows that procurement of goods is the most frequent procurement done by public authorities on the studied portals. Almost 70% of the portals are used for procurement of goods. To a slightly lower degree the authorities also use the procurement portals for purchases of services – here 56% of the portals have this function integrated. 42% of the portals studied are used for procurement of works, while 8%. of the portals are in use for procurement of utilities for the public sector. The study also demonstrates that a main part of the portals (58%) are multifunctional, e.g. being used for purchases of two or more types public procurements at the same time. The most frequent number of procurement that each portal is handling simultaneously is three.

The detailed data of the study is enclosed in annex A.

This research therefore indicates that electronic public procurement systems - as shown in other studies on electronic public procurement too[39] - typically are more applicable and functional for procurement of goods than purchases of more complex types of procurement, e.g. service and utilities.

[39] "An Economic Analysis of Electronic Marketplaces", Report for OGC by European Economics, (2001), (p .5)

The table below shows the assessments made by the interviewed experts in the member states concerning the extent to which electronic means are used for different types of purchases. The assessments made generally comply with the observations above and they indicate that goods are the type of purchase where the use of electronic means is most extensive.

Table 3.9: Level of use of electronic means for different types of purchases

	Works	Goods	Services
Austria	To a large extent	To a large extent	To some extent
Belgium	Don’t know	Don’t know	Don’t know
Cyprus	Not used	Don’t know	Not used
Czech Republic	Don’t know	To a large extent	Don’t know
Denmark	To low extent	To some extent	To a low extent
Estonia	Don’t know	Don’t know	Don’t know
Finland	Don’t know	To some extent	Don’t know
France	To a low extent	To a low extent	To a low extent
Germany	To a low extent	Don’t know	Don’t know
Greece	Not used	Not used	Not used
Hungary	Don’t know	To a low extent	To a low extent
Ireland	To some extent	To some extent	To some extent
Italy	To a low extent	To some extent	To a low extent
Latvia	To a low extent	To a low extent	To a low extent
Lithuania	Don’t know	To a low extent	To a low extent
Luxembourg	To a low extent	To a low extent	To a low extent
Malta	Not used	To a low extent	To a low extent
The Netherlands	Don’t know	Don’t know	Don’t know
Poland	Not used	To some extent	Not used
Portugal	Not used	To some extent	Not used
Slovakia	Don’t know	Don’t know	Don’t know
Slovenia	To a low extent	To low extent	To a low extent
Spain	Don’t know	To some extent	To a low extent
Sweden	To a low extent	To some extent	To a low extent
United Kingdom	To a low extent	To some extent	To a low extent

3.5 Experiences with e-auctions, dynamic purchasing systems and electronic catalogues

3.5.1 Findings

This section describes the use of electronic auctions, dynamic purchasing systems and electronic catalogues and outlines some of the key success factors for e-public procurement portals.

The interviewees have provided their assessment of whether full migration from traditional, paper-based procurement to e-public procurement is a realistic objective in their respective countries. The analysis shows that interviewees from 18 member states[40] consider this a realistic objective. Moreover, five countries[41] expect to use paper-based procurement procedures along with e-procurement procedures in a transition period of up to 3 years, while six other countries[42] expect to use both types of procedures in a transition period of up to 6 years. In total 11 countries[43] expect to use both types of procurement procedures in the long term, while the remaining countries are unable to assess this question.

As described in the section on legal aspects, the new procurement directives include that member states may provide that contracting authorities may use electronic auctions and dynamic purchasing systems. The survey shows that some countries have already gained experiences in this field, and that public authorities in several countries have experiences with electronic catalogues:

- Public authorities in 10 countries have experiences with electronic auctions[44]
- Public authorities in 2 countries have experiences with dynamic purchasing systems[45]
- Public authorities in 14 countries have experiences with electronic catalogues[46]

Regarding the extent of experiences, these vary between the countries as displayed in the table below.

[40] Austria, Belgium, France, Germany, Greece, Ireland, Italy, Nederland, Portugal, Spain, UK, Czech Republic, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia.

[41] Germany, Ireland, Spain, Malta, Slovenia.

[42] Greece, Italy, Sweden, UK, Latvia, Lithuania.

[43] Austria, Belgium, Denmark, Finland, France, Luxembourg, Portugal, Czech Republic, Cyprus, Hungary, Poland.

[44] Austria, Denmark, Finland, Italy, Nederland, Portugal, Spain, UK, Hungary, Slovenia

[45] Austria, Italy.

[46] Austria, Belgium, Denmark, Finland, France, Germany, Italy, Luxembourg, Portugal, Spain, Sweden, UK, Hungary, Slovenia.

Table 3.9: Extent of experience with electronic auctions, dynamic purchasing systems and electronic catalogues

	Electronic auction	Dynamic purchasing system	Electronic catalogue
Some experience on national level	Denmark Italy France United Kingdom	Italy	Denmark Germany Italy United Kingdom Finland France
Limited experience/ pilot projects	Austria Hungary Ireland Netherlands Portugal Slovenia	Austria	Austria Belgium Hungary Ireland Luxembourg Portugal Slovenia Sweden

Within each of the three fields there are only few countries with some experience on national level. Some member states use these features to some extent where other member states have less experience or just recently started pilot projects. Moreover, there are some countries that use these features to some extent and finally member states which have less experience or have started pilot projects.

Electronic auction
Two member states, Denmark and Italy, have experience with e-auctions. Both systems that are used for e-auctions in Denmark and Italy are based on an “out-of-the-box” Oracle Exchange server. As a matter of fact, the two systems have some similar characteristics as displayed below[47]:

Table 3.10: Characteristics of the e-auctions systems in Denmark and Italy

System feature		System implementation details
Overview of functionality		Submission of bids by online Web Forms Define e-auction space (type of event, bidding fields, evaluation function etc.) Automatic evaluation of bids and ranking of bidders in real-time
Actors		Administrator: responsible for defining e-auctions according to the buying administration’s requirements Supplier: responsible for the submission of bids during the e-auction
Interesting system characteristics	*Technology used*	Oracle Exchange Server is used for the back-office
	Security policy	Both systems use digital signatures for the user authentication
	Evaluation function	Support for advanced flexibility defining the evaluation function (e.g. include unlimited number of parameters and weights) Support the use of Web Forms based on customisable bidding fields for the submission of bids
	Supplier Intelligent Reporting	Obtaining information of previous auction events, savings generated by e-auctions, participation figures, etc.

[47] IDA Public eProcurement, State of the Art Report (April 2004).

Both systems can to a large extent be uniformed with the EU guidelines. The only fields where the functionality does not (yet) fit with the guidelines are the areas of interoperability, monitoring of logs, questions and answers as well as detection of tampering attempts. The following table presents a detailed overview of the possible activities within the two systems:

Table 3.11 Possible activities within the e-auction systems in Denmark and Italy

Activity	Actor	Description
Creation of an auction event	Buyer	Select the type of auction; define the exact parameters of the e-auction (e.g. single round, two rounds or multiple rounds e-auctions, conditions for closing a round, time period between rounds, etc.)
Definition of bidding fields	Buyer	Define bidding fields Define bidding fields specifications (i.e. minimum and maximum allowed figures for each field)
Definition of the evaluation function	Buyer	Define precise evaluation formula for determining bids ranking according to the requirements of each e-auction. Definition of Economic and Technical Evaluations utilising an unlimited number of variables and weights
Invitation of suppliers	Buyer	Select suppliers to be invited in the e-auction
Place bids	Supplier	A bid is placed online, utilising online Web Forms Set figures of their offer for all mandatory fields and submit the bid
Ranking of bids	System	Automatic ranking of bids based on the evaluation function No manual intervention is allowed
Closing a round	Buyer	A round is closed, either automatically by a pre-set deadline, or by a manual intervention by the buyer if all participating suppliers have submitted their bids
Closing of the auction event	System	Automatically termination of the e-auction when the number of pre-set rounds is reached No manual intervention is allowed

Dynamic purchasing system

In the field of dynamic purchasing systems, Italy is the only country with in-depth experience. One reason for this is that in a number of other member states, the national laws prohibit the use of dynamic purchasing systems.

The system in Italy (Lotto 1) is open to all suppliers, even those that do not have framework agreements with the Italian public sector. The system is available to all Italian public sector organisations. Buyers are provided with the functionality to purchase goods or services directly from suppliers, or issue a Request for Quotation (RFQ) first.[48] The following table presents an overview of the main aspects of the Lotto1 system:

[48] IDA Public eProcurement, State of the Art Report (April 2004)

Table 3.12: Lotto 1 (dynamic purchasing system, Italy)

System feature		System implementation details
Functionality overview		Purchasing from supplier catalogues Issue RFQs Update supplier catalogues Full audit trailing functionality
Exploitation model		Self-funding operation Buying administrations: • No cost • Free training Suppliers: • No cost • Upload eCatalogues for free
Actors		Standard User: responsible for browsing through supplier catalogues, comparing commodities, adding commodities to a shopping cart and place orders which require approval Super User: can perform direct purchasing, place RFQs and approve pending orders Administrator: responsible for uploading catalogues, reviewing logs, performing general maintenance of the database records
Interesting system characteristics	*Technology used*	Based on the Oracle Exchange software modified to some extent in order to comply with the Italian eProcurement legislation Oracle Database is utilised for the back-end Oracle Portal is the software solution for the front-end
	Security policy	Limited use of digital signatures by suppliers outside the system in order to prepare their catalogues Orders are digitally signed before sent to suppliers by email
	Uploading and updating of eCatalogues	Catalogue templates for all types of products in MS Excel format including technical and economic attributes Suppliers complete their eCatalogues and send via email to Consip Validation by Consip administrator and conversion into XML format (for uploading on the system) and PDF (for sending confirmation to supplier) Maintenance/updating of catalogues is performed in a similar process
	Version control	Document Management service used for safe-storage of supplier catalogues Version control allows for the storage of current and previous versions of a supplier eCatalogue, useful for conflict resolutions
	Audit trailing / reporting mechanism	Recording of all system activities in logs Generate standard reports "Supplier Intelligent Reporting" facility generates customised reports

Presently, this system only fulfils a couple of the requirements as described in the guidelines.

eCatalogue
The system, most frequently used by the member states, is the eCatalogue. Four countries (Denmark, Germany, Italy and United Kingdom) have already in-depth experiences with eCatalogues, while 2 countries have some and 8 countries less experience or are conducting pilot projects in this field.

Within the single e-Catalogues there are differences concerning the functionality and activities as well as the coverage of the new legislative framework on eProcurement. Presently, the Italian system Lotto 1 enables the following activities:[49]

[49] IDA Public eProcurement, State of the Art Report (April 2004).

Table 3.13: Lotto 1 (e-catalogue, Italy)

Activity	Description
Search eCatalogues	Search by keywords, favourite items Perform a complete catalogue search in a tree-exploring manner
Compare Products	Select two or more products from the same or different suppliers and compare them System presents all attributes of the selected products in a tabular form
Place an order	Place one or more products into the shopping cart and define the necessary quantity System automatically checks whether the actor is a Standard (approval steps need to be followed) or Super user (the order is directly send to the corresponding supplier via email after being digitally signed)
Approve an order	If an order is placed by a Standard User, a Super User is required to approve of the purchase Once approved, the order is automatically sent to the corresponding supplier by email (needs to be digitally signed first)
Define RFQ	Name of the RFQ, whether the RFQ will be visible to the public or not, the ranking criteria, etc.
Invoicing/Delivery Details	Specify invoice and delivery addresses, delivery details, relevant notes Upload any relevant attachments
Definition of attributes	Defined attributes cover both technical characteristics of the desired product and financial offer itself
Invitation of suppliers	Participation invitation must be sent to at least 5 suppliers Select from suppliers that are defined in the system, or invite suppliers to register in the system before participating
Execution definition	Define start and end date of the RFQ and delivery date
Submit	Confirm details and submit All relevant emails are sent to suppliers for their notification

At this stage the system is only accordable to some of the guidelines of the new EU legislation, e.g. the fields of Interoperability, order fulfilment, order invoice and order payment as well as data encryption are not supported online.

Portal
As regards the identified systems and solutions in the countries, some success factors for the implementation of an effective eProcurement system with relatively low or medium cost can be identified:[50]

First, to create a successful eProcurement system it is necessary to adopt a supplier adoption programme and an approach for helping public administrations to join the eProcurement programme and the eProcurement system must guarantee the equal treatment and transparency of competitions.

Second, other supplier related success factors are

- Simple registration process for suppliers
- Matching supplier profile to business opportunities
- Moderate Q&A session to ensure confidentiality
- Assist suppliers during submission through user-friendly GUI
- Phased opening of bids according to the bid documentation type
- Updating a bid.

[50] IDA Public eProcurement, State of the Art Report (April 2004) and Transborder eProcurement Study (IDA)

Procedures like this help to make the submission process easier and more user-friendly and, practically, and they help suppliers to understand the potentials of e-procurement and adhere to this.

In addition to this, the security of transaction must be guaranteed and the confidentiality of sensitive information submitted by suppliers and interoperability of technical solutions must to be taken into account. To enable this, following steps have proven to be successful:

- Utilisation of SSL to guarantee minimum communication security level
- Support of all widely used electronic document standards
- Matching logs from different modules and use a unified log
- Virus check supplier bids upon submission
- Third party to guarantee virus free bid documents.

Another useful feature is the assurance of system transactions and data storage as well as the provision of mechanisms that help tracking user activities and provide the capability of analysing their behaviour. The eProcurement system should also guarantee the general availability of its operations to the involved parties. To guarantee the continuous and consistent operation of the eProcurement system it can be helpful to define level of services with the technology providers and organise training events simulating the real competition environment.

3.5.2 Assessment

To obtain the full benefits of using an eProcurement system for the order and payment process, an integration of buyer and supplier systems is required. Ideally, systems should therefore use the same underlying protocol and semantics. Through the automated order and payment process, both public entities and suppliers can realise their cost saving objectives. However, in many countries this is not the case at the moment. There are only few countries that have introduced one system on national level. Today, many different implementations exist and interoperability proves to be difficult as well as time- and money-consuming. This makes the entrance level to the system too high for most of the smaller companies, especially when coming from another member state.

Nearly half of all member states have taken actions and at least started pilot projects in the direction of e-auctions, eCatalogues or dynamic purchases systems and are going to start the regular operation within a few years. To speed up the implementation and usage of such systems, the countries that already have working systems could serve as best practise.

In countries with some experience, the availability of only one public eProcurement platform has proven advantageous. On one hand, the investment costs for e.g. multiple catalogue management is seen as an important barrier for trading electronically on a large scale. On the other, it leave the suppliers feeling obliged to integrate their product catalogues in order to protect their market share within the public sector procurement market. However, many suppliers are reluctant to do so, whilst most of them have already previously invested in sophisticated and more specialised web shops, which they felt were better suited for their business. Suppliers feel that a common catalogue system is not always adequate to fully promote their products and services.

Nevertheless, to be able to compete on an equal basis, the idea of defining a common standard, e.g. catalogue standard, for Europe or beyond is supported.

3.6 Quantitative data concerning the impact and opportunities of public procurement and e-procurement

3.6.1 Findings

The survey among member states included a number of questions aimed at describing whether the countries have taken actions to assess the impact of introducing e-public procurement, including how often and by what methods the progress of e-public procurement is being monitored. Furthermore, the member states were asked to identify the areas in which they expect significant advantages from the introduction of e-public procurement.

The survey shows that almost half of the member states (10 countries[51]) have taken actions to assess the impact of introducing e-public procurement, and that most of the remaining member states responding to this question (12 countries[52]) plan to make an assessment within the next 3 years. The table below summarises and ranks the most important areas of assessment within the area of e-public procurement:

Table 3.14 List of aspects of electronic procurement, which are being assessed

Listed aspects	Countries
Number of electronic transactions	France, Italy, Luxembourg, Portugal, United Kingdom, Hungary, Latvia, Poland
Transaction costs	France, Germany, Ireland, Italy, Portugal, United Kingdom, Poland
Types of purchases	Ireland, Italy, Luxembourg, Portugal, Latvia,
Speeding up of procurement procedures	France, Ireland, Portugal, Hungary, Poland
Effect on prices	Germany, Ireland, Luxembourg, Latvia, Poland
Electronic public procurement's share of total public procurement volume	France, Italy, Portugal, Latvia
Number of bidders	Italy, Luxembourg
SME participation	Ireland, Latvia
Cross-border participation	Ireland

The analysis of the most important areas for impact assessment clearly shows that the frequency of electronic transactions and the costs of transaction are major aspects of e-public procurement. Likewise, the types of purchases, the speed of procurement procedures and the effect of e-procurement on prices are important areas of assessment among the member states. By contrast, the level of SME participation in public procurement

[51] France, Germany, Ireland, Italy, Luxembourg, Portugal, UK, Hungary, Latvia, Poland
[52] Austria, Belgium, Denmark, Finland, Spain, Czech Republic, Cyprus, Estonia, Lithuania, Malta, Slovakia, Slovenia

and the level of cross-border participation are not seen as important aspects of e-public procurement.

In connection with the extent of assessments of the impacts of e-public procurement, the survey shows that half of the member states (8 countries[53]) are monitoring and reporting the progress of e-public procurement on a regular basis. The study shows that the countries in general use different data transactions (number of users of websites, command-points, volume, prices, etc.) as a basis for monitoring the progress of e-public procurement. The table below summarizes and ranks the member states' expectations to the advantages from the introduction of e-public procurement.

Table 3.15: Expected advantages from introduction of e-public procurement

Listed aspects	Countries
Speeding up of procurement procedures	Austria, Denmark, Finland, Germany, Greece, Ireland, Italy, Latvia, Luxembourg, Nederland, Portugal, Spain, Sweden, United Kingdom, Czech Republic, Cyprus, Hungary, Lithuania, Malta, Poland, Slovakia, Slovenia
Lower transaction costs	Austria, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Nederland, Portugal, Spain, Sweden, United Kingdom, Czech Republic, Cyprus, Estonia, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia
Better procurement statistics and enhanced budgetary control	Finland, France, Greece, Ireland, Italy, Latvia, Luxembourg, Portugal, Sweden, United Kingdom, Czech Republic, Cyprus, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia
Lower prices (increased competition, reduction of maverick buying etc.)	Austria, Denmark, France, Germany, Greece, Ireland, Italy, Latvia, Luxembourg, Portugal, United Kingdom, Czech Republic, Cyprus, Estonia, Latvia, Lithuania, Poland
Better access for SMEs in accessing and responding to public tenders	Austria, Denmark, Germany, Greece, Ireland, Italy, Latvia, Luxembourg, Nederland, Spain, Cyprus, Hungary, Lithuania, Malta, Slovenia, Sweden
Improved IT skills in public and private sector	Austria, Finland, France, Germany, Italy, Portugal, Spain, Slovakia
Other significant advantages	Austria, Greece, Ireland, Italy, Latvia, Nederland, Estonia, Slovakia

The table clearly shows that the introduction e-public procurement is expected to speed up the procedures of procurement and to lower the costs of transaction. Likewise, the member states expect that the introduction and use of e-public procurement systems will lower prices, provide better statistics on procurement, including enhanced budgetary control, and improve the access of SMEs to public tenders.

[53] Belgium, Germany, Ireland, Italy, UK, Estonia, Hungary, Slovenia

The data situation regarding the impact of the introduction of e-public procurement in the EU is still rather weak, both in member states which do not conduct monitoring of e-public procurement activities yet and in member states already carrying out regular impact assessments. This is due to the relatively early stage of introducing e-public procurement in many member states, characterised by pilot projects and gradual roll-out of e-public procurement to all levels of public administration. This fact is also illustrated by the high number of countries planning to accomplish statistical monitoring within the next three years.

The information collected and documented often concerns primary figures, which do not directly demonstrate the impact of the introduction of e-public procurement. Statistics frequently cover the number of registered contracting authorities, registered suppliers, calls for tender published, resources allocated and the number of transactions, such as in Ireland. In March 2004, close to 20,000 suppliers and over 1,700 awarding authorities had registered in Ireland, and in 2003 close to 4,500 tender opportunities had been advertised on the e-public procurement portal. On the other hand, figures about the volume of public procurement contracted electronically are relatively rare, but can be found, for instance, in Estonia, where the declared value of electronically advertised calls for tender was EUR 475 million.

In some relatively advanced member states where statistics are taken, figures show that the percentage of electronic transactions is high or rising. In Finland, for instance, 50-60% of the tender notices over threshold value and 95% of the notices under threshold are sent electronically via the Internet to the national Official Journal[54]. In Denmark, 54% of state authorities and 63% of regional authorities use an e-procurement system, and turnover at the public procurement portal has increased to approximately EUR 5 million.

Also in countries where no overall figures exist, a steady increase in the use of electronic means in public procurement by procurement agencies and suppliers is registered. In France, the e-public procurement portals operated by the Ministry of Defence handled 50% of the ministry’s public procurement processes in the last quarter of 2003. The number of tender documentation put online and the number of download of electronic documentation increased considerably during the first months of 2004[55]. However, a high number of tender documentation downloads still originate from unregistered tenderers which eventually submit their bids offline. The upcoming challenge for public authorities will therefore be to encourage these suppliers to use electronic means for submitting their tenders.

In order to obtain a comparative overview, a recent web-based study, commissioned by the European Commission’s DG Information Society, has measured the state of the play in basic online public services for citizens and businesses in the then 15 EU member states[56].

[54] Office of Governmental Commerce (OGC), UK, An Economic Analysis of Electronic Marketplaces.

[55] IDA Public eProcurement, State of the Art Report, Version 0.60, 15 April 2004 (p. 38).

[56] European Commission / Cap Gemini Ernst & Young, Web-based Survey on Electronic Public Services, Results of the Third Measurement October 2002, February 2003.

Public Procurement was one of the 20 public services, of which level of online sophistication has been examined, and several stages of advancement in introducing e-public procurement have been defined for research purposes, from simple online information on calls for competition to the electronic case-handling of the entire tendering procedure. The member states found to be most advanced in introducing the complete cycle of e-public procurement included Finland, Sweden, Denmark, Germany and the UK, followed by Portugal Ireland and Italy, and behind them, France and Austria. Belgium, Greece, Spain and the Netherlands obtained the lowest ratings in this survey.

One of the advantages expected by most member states by means of introducing e-public procurement concerns savings caused through lower transaction costs and lower prices. The savings achieved or expected often lie in the range of 15 to 30% when public authorities buy online. A pilot e-procurement auction conducted in Portugal in November 2003 has, for instance, generated savings of approximately 25%, which is consistent with the government's objective of achieving savings between 10% and 20% on public procurement costs.

The volume of savings put forward by several member states are considerable, but frequently constitute mere expectations, even though they might be calculated through precise economic methods. Thus Ireland forecasts, in its e-public procurement strategy, cumulative potential savings of EUR 414 million for the years 2002 to 2007, with potential annual savings of EUR 177 million per annum thereafter[57]. This represents an approximate cost reduction of 2% on the total public procurement expenditure of EUR 8.8 billion.

Concrete and measured savings however are (still) at a relatively small scale compared to investments and often offset by high costs for introducing new IT systems and applications. The Italian e-public procurement system launched in 2000, for instance, required initial investment of EUR 25 million, whereas estimated gains through savings on administrative costs for 2001 were at EUR 774.700[58]. Also recurrent costs are generated by e.g. organising electronic auctions.

As for the impact of introducing e-public procurement on businesses and in particular SMEs, few figures are available yet. It should, however, be noted that participation and registration in operational e-public procurement systems entails transaction costs for suppliers and registration fees for administrative users in some countries (e.g. Denmark), while it does not in others (e.g. Finland). Enterprises are faced with a number of different costs when implementing e-procurement, and the various cost elements can add up to a significant level altogether. The case below is an illustration of the costs facing suppliers when entering into e-procurement with a public institution as buyer[59] with the purpose of exchanging business documents, i.e. orders or invoices. The example is based on evidence from Denmark, but the cost structure is largely the same in other European countries, that have established public procurement marketplaces.

[57] E-Procurement in Ireland – a strategy to provide an improved service to all stakeholders, IDA case study

[58] IDA Public eProcurement, State of the Art Report, Version 0.60, 15 April 2004.

[59] The example is based on evidence from the project conducted by Rambøll Management, 2003-2004: Implementation of e-commerce in [60] SMEs, Danish Ministry of Science, Technology and Innovation.

Case Box 3.1: Cost of e-procurement (ordering) for suppliers.

Example from Denmark

Integration with financial system, picture databases etc.: from EUR 3.000 and upwards depending on system, automatisation level, functionalities etc.

Sign on fee, portals: EUR 1,500[60] (DOIP), EUR 800-2,400 (RAKAT)[61], EUR 700 (KMD).

Annual fee: EUR 1,500 (DOIP[62]), EUR 800-2,400 (RAKAT)[63], EUR 700 (KMD).

Transaction costs: From EUR 0.03% (RAKAT) to 2% of turnover (DOIP).

In some cases, upgrading of the ERP system to a newer or more widely used software package can be a pre-requisite for automated and integrated e-procurement.

Total:
Implementation costs: from EUR 6,000 (excl. revisions in ERP system)
Annual costs: EUR 3,000 (fixed) + variable costs according to turnover and number of transactions

As shown in the example above, implementation cost and running costs are considerable for an SME, especially when the use of the systems by public authorities is often limited. It should be noted that the above example includes only the direct costs. Other derived costs, in terms of acquiring the necessary e-procurement software, briefing and/or training in-house staff, updating the company's ERP system, and generally adjusting the business routines cannot be estimated in a simple example, but they may add up to a considerable amount.

As illustrated by the country survey, cross-border participation in e-public procurement procedures is hardly measured in the member states' impact assessments, and is not named as one of the expected advantages of introducing e-public procurement. However, it is still worth to examine the trans-border impact of e-public procurement, in view of establishing an internal public procurement market within the EU.

Although few statistical data are available on the share of bids and contract awards across borders in e-public procurement, the current participation of foreign competitors does not appear higher in electronic procurement procedures than in traditional paper-based public procurement. A study on trans-border e-public procurement identifies actions that would enable interoperability in trans-border e-public procurement and to avoid obstacles to it[64]. It finds that although most vendors on the market agreed to use the XML standard, there are still strong differences as many companies introduced their own schemes (e.g. xCBL, cXML). E-public procurement systems use the Common Procurement Vocabulary (CPV), but this standard is not detailed enough. Security requirements and standards vary greatly in the EU member states. Furthermore the study identifies a lack of a European trust centre that interfaces with national institutions as regards digital signatures, and therefore calls for pan-European standards as the key for interoperability.

[60] If a framework contract has already been signed with a public institution, this fee is zero.
[61] EUR 800 per message format (order, order confirmation and invoice).
[62] 6-10 users, 1.001-5.000 catalogue lines.
[63] EUR 800 per message format (order, order confirmation and invoice).
[64] IDA / Unisys, Transborder eProcurement Study, August 2002.

Accordingly, the study issues recommendations on establishing a portal for EU-wide e-public procurement and information, actions to ensure interoperability and certification, new and updated legislation and awareness-raising.

In order to illustrate the potential impact of e-public procurement two examples from respectively the UK and France are described below. Both cases illustrate e-public procurement initiatives in large markets and describe some results which these initiatives have achieved in countries that have applied operational e-public procurement for some years.

***Case: The e-procurement portals of the French Ministry of Defence*[65]**

The e-public procurement strategy of the French Ministry of Defence is embedded in a larger modernization campaign. The Ministry of Defence is the largest French ministry in terms of purchases, spending between EUR 15 and 17 billion per annum, launching 8000 calls for tender per year above EUR 90.000, and 80.000 below this threshold, and comprising about 220 procuring entities. The Ministry was therefore best placed to improve its procurement performance.

Within the Ministry the largest procuring entity is the General Delegation for Armament (Délégation générale pour l'Armement). This body started a vast reform programme in 1997, including enhanced use of ICT, new management tools, and the creating of a purchasing function. The overall impact of this reform is estimated EUR 10 billion of savings on armament expenditure, and 31% of savings on administrative costs.

E-public procurement was one of the pillars of the reform, and the project "e-achat" was launched in 2000. The stated objectives were to facilitate the access to the public procurement of the Ministry, to create savings and to enlarge the base of suppliers, in particular to SMEs and at European level, since 30% of the calls for tender have been unsuccessful before.

It comprised the creation of two e-public procurement portals, www.ixarm.com, used for the procurement of arms, ammunition and other combat-related supplies, and www.achats.defense.gouv.fr, covering the remaining defense procurement needs, such as construction works, fuel, furniture, food, etc. In 2001, the tender regarding the creation of the portals was launched, and in November 2002, the two portals have been set up and are operational since. The costs of the project have been between EUR 6 and 7 million between 2001 and 2004, including technical assistance costs.

In the beginning the portals have been restrained to DG Armament, but have quickly been extended to all of the Ministry's procuring entities, especially in the light of the rule set by Article 56 of the new public procurement code, which requires all administrations to accept electronic bids by 1st January 2005. The two portals are linked by the "Service public défense" marketplace, which contains the different functionalities for both portals:

- "Avis de Publicité": Publication of tender notices, above and below threshold
- "Salle des Consultations":
  - Possibility to download all tender dossiers
  - Possibility to send bids electronically with receipt notice and within a secured space

[65] Source: Interview data.

- “Outils d’achat” (procurement tools):
    - “Salle des Enchères Inversées”: inversed electronic auctions
    - “Salle des Acquisitions sur Catalogues”: electronic catalogues
- “Salle de Facturation”: electronic invoicing, currently under development (the problem currently is that signatures are required from authorities outside of the MoD, e.g. the Ministry of Finance).

Furthermore, there is a vast information section, containing:

- An electronic address book of the Ministry’s procuring entities (with contact persons, contact details etc.)
- Legal news and information on administrative documents to be submitted
- Methodology on public procurement
- Glossary of public procurement
- Frequently Asked Questions (FAQ).

Beyond the functionalities foreseen by the two portals and the marketplace, an “Espace Partenaires” (Partner Room) has been created, which is used for the execution of contracts, such as transactions in frameworks, exchange of information, studies, documents etc. between DG Armament, enterprises, the armed forces and other state bodies, such as the Ministry of Finance. This is carried out on a private secured ENX network. The costs for this Espace Partenaires have been roughly EUR 15 million.

It is possible for suppliers to register on the portals, which allows them to personalize the portal according to their interests, to receive regularly information on calls for tender which correspond to the criteria they have chosen, to submit bids electronically (since March 2003), even without the administrative documents if such a dossier has been previously constituted (from September 2004). It is also possible for them to present their company, products and services; also it is possible to send unsolicited proposals.

Some statistics on the results achieved so far:

- 203 of the Ministry’s 220 procuring entities are now registered, with 5 to 6 buyers each
- More than 5300 users are registered, of which 4000 are suppliers (and the rest buyers), the estimation within a couple of months is 20.000
- 71% of the Ministry of Defence’s calls for tender are published on the portals in May 2004
- 909 tender dossiers have been made available in April 2004, 619 in May, up from around 140 in January
- 4400 downloads have been registered in May 2004, of which 75% came from non-registered enterprises, with about 7 downloads per tender dossier.

Change management was one of the main prerequisites, both internally and externally. 200 of the Ministry’s staff have been trained (roughly 1 per procuring entité), more are going to be trained. User manuals have been prepared, and a Help Desk with Hotline will be established. Information events have been organized across the country for suppliers, which were attended by 1400 people. It was essential to stress the security aspects with users. No exact statistics have been taken, but an estimated 80% of the project costs have been used on change management activities.

The number of bids submitted electronically is still very low: it concerns roughly 1-2 o/oo of all bids, but is slowly increasing, which shows the necessity for the administration to accompany the suppliers. The use of the portals and the marketplace is free of charge for suppliers. Only "télé TVA" type signature certificates have to be bought once. The problems for the suppliers are mostly weak technical capacities for SMEs and security aspects as well as heavy internal procedures in large companies.

For the administration, two kinds of savings are possible: on administrative costs and on prices. While statistics on lower prices are still difficult to get (on June 2000, the first e-auction took place in France, in which 24% on the purchasing amount have been saved), there are visible savings on administrative costs. The publication of a call for tender on the portal is much cheaper than on one of the legal announcement journals, which can be quite expensive, while it lives up to the publicity requirement. Also there are lower cost of reproduction and sending of tender dossiers, which are roughly EUR 90 per dossier, and between EUR 800 and 3000 in the construction sector. These repetitive costs are not occurred if tender documents are put online. The price for publishing tender dossiers is currently EUR 120 (EUR 30 under threshold), and will go down to EUR 60. Requests for paper dossiers have gone down by 90% since they are published on the e-public procurement portals.

Case: United Kingdom's 'Government IT Catalogue' (GCat) and the e-catalogue for professional services, 'S-Cat'[66]

Over the past 25 years the Central Computer and Telecommunications Agency (CCTA) has offered advice and guidance to Government organizations on the development of IS strategies, and the procurement and management of IT systems and services including telecommunications and data communications. In 1996, CCTA introduced the Government IT Catalogue (GCat www.gcat.gov.uk) which offers a wide catalogue of IT products and supply-related services from a variety of manufacturers and suppliers through pre-tendered framework contracts. The take up in the public sector has been increasing steadily and GCat is presently used by more than 700 organizations from across the public sector (up from around 200 in 1998-99), and it contains an online catalogue with more than 50,000 IT and telecommunication products and offers online ordering and payment. The value of the purchases made electronically has increased from £5.9 million in 2001-02 to £10.3 million in 2003-04, although a decrease in annual value has occurred as the figure for the financial year 2002-03 was £14.6 million. This decrease has spurred an effort from OGCbuyingsolutions to make public purchasers use the portal to a higher extent.

S-Cat (www.s-cat.gov.uk) is a catalogue based procurement scheme established by CCTA in 1997 to provide public sector organizations with a simplified means of procuring, and contracting for a wide range of IT related consultancy and specialist services from a variety of service providers. S-Cat is a sister scheme to GCat and covers wider IT consultancy and specialist services not available through GCat. S-Cat is based on framework contracts, which CCTA has established with a number of service providers following the conduct of an advertised procurement under EC procedures.

[66] Source: Interview data, presentation by OGCbuyingsolutions at the European Commission's Working Group on e-procurement, Brussels 7 July 2004.

Following a re-competition during 1999 (through the addition of the Management Consultancy offerings) it grew to take account of the increasing need for organizational change support required with the application of new technologies. S-Cat has been expanded to meet the government's requirements in the following areas:

- IT Consultancy, Services & Related Products including GIS
- Management & Business Consultancy
- Human Resources
- Financial Services
- Business Information & Research

All public sector organizations are eligible to use the scheme. It offers buyers to undertake anonymous electronic requests for information and submission of tenders can be done electronically. The e-catalogue gives contracting authorities access to more than 170 service providers, and the buyers can screen supplier profiles and get information on the service providers pricing online which allows online rate comparisons.

Although aggregate data concerning the impact, in terms of public savings, of the e-procurement solutions do not exist and although it is not possible to give a precise estimate of the impact for the individual institution, because it varies from one institution to another, the experience from the UK shows it is possible to achieve savings per transaction in the magnitude of £28 to £90, according to an independent review of e-procurement.

3.6.2 Assessment

Due to the current lack of statistical evidence, it appears to be too early to assess whether the expectations regarding advantages resulting from the introduction of e-public procurement have materialised, especially regarding the speeding-up of procedures, lower prices and the impact on SMEs and IT skills in private enterprises. However, the experience from existing procurement portals in France and the UK suggests that it is possible to achieve public savings in terms of reduced transaction costs through e-procurement. Other examples, as illustrated by the situation in Denmark, which is a much smaller market than in France and the UK, point in a different direction and indicate that the realization of lower transaction costs and administrative savings have yet to be achieved as the high transition costs for introducing new equipment and software, training, etc. appear to have outweighed the savings so far. In the longer term this finding may not hold true as the dynamics of the market evolve constantly, and it seems very relevant to reassess this aspect at a later stage.

3.7 Potential risks and barriers

3.7.1 Findings from existing reports and papers

The cases and examples in the previous section illustrate some of the opportunities and potentials in e-public procurement. This section will approach the matter from a different angle, as the research conducted has uncovered a range of factors that might work as barriers in different areas to the development of e-public procurement. The following text gives an overview of identified barriers in five categories respectively economic, technical, organisational, human resource and others barriers.

Economic barriers

In summary, adjustment and operational costs can be significant barriers for suppliers in adapting to an operational e-procurement system. The costs of participation in e-procurement for a supplier may include: purchasing hardware, connection setup and maintenance, catalogue build and maintenance, recoding of content in compliance with the classification used nationally (and in the EU), analysis and redesign of their internal processes, management of change within their own organization, staff training and support[67].

Results from existing reports point out that the high adjustment costs following from introduction of electronic procurement can be a significant barrier. Findings show that both authorities and firms are concerned for the relatively considerable costs following from the implementation of procurement procedures[68].

From an overall point of view electronic marketplaces need to be designed in such a way that they do not create unnecessary barriers to entry. Small suppliers in particular are likely to be disadvantaged when introducing e-procurement by entry fees, technological requirements or an obligation to provide a wide range of goods/services.[69] Smaller firms, which are suppliers to e.g. larger companies, may be forced from the introduction of e-procurement to adopt different types of electronic means in order to continue to trade with their customers even if the costs are higher than the potential gains.[70] The same impact on the suppliers could also happen if the public authorities decide only to use electronic means for procurement in the public sector. Their suppliers will be forced to adopt the solutions chosen by the public sector.[71]

In general, SMEs have fewer resources (in time and finances) available for the adjustment to e-procurement than larger companies; they have a limited capacity to take risks and the introduction and use of operational electronic procurement will therefore be an even bigger barrier for this group of suppliers, due to the risk of imposing additional costs on the smaller companies.[72]

Technical barriers

The e-public procurement systems, which are being used today, are in some respects not compatible. Protocols and standards are needed to make sure different computers and different operating systems can communicate. To develop fully compatible systems, standards need to be used in a number of different 'layers' of a computer network.

[67] OGC “eProcurement Guidance - "Cutting through the Hype” 2002 (See http://www.ogc.gov.uk/index.asp?id=2314).

[68] European Commission “A report on the functioning of public procurement markets in the EU: benefits from application of EU directives and challenges for the future”, Brussels 2004 (p. 21).

[69] Europe Economics OGC “An Economic Analysis of Electronic Marketplaces” 2001 (p. 5) and European Commission “A report on the functioning of public procurement markets in the EU: benefits from application of EU directives and challenges for the future”, Brussels 2004 (p. 22).

[70] European Commission “B2B Internet trading platforms: opportunities and barriers for SMEs” Brussels 2003 (p. 16).

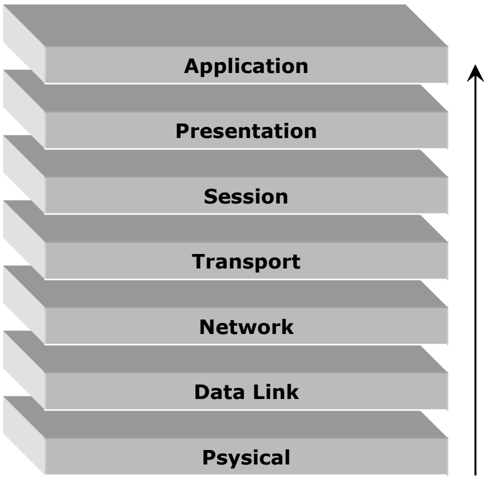
[71] European Commission “A report on the functioning of public procurement markets in the EU: benefits from application of EU directives and challenges for the future”, Brussels 2004 (p. 22).

[72] European Commission “B2B Internet trading platforms: opportunities and barriers for SMEs” Brussels 2003 (p. 16).

The so-called Open System Interconnection (OSI) model has been developed as an ISO standard for worldwide communications that defines a networking framework for implementing protocols and standards in seven layers. The OSI model was created to create common standards of communication between computers from different manufacturers[73].

The OSI model defines a hierarchical architecture that logically partitions the functions required to support system-to-system communication. Most of the functionality in the OSI model exists in all communications systems[74]. The model illustrates all the different layers of a computer network which needs to be standardised. Layering is a structuring technique to organize networking software design and implementation. The seven layers of the OSI model are as follows:

7. Application: Provides different services to the application
6. Presentation: Converts the information
5. Session: Handles problems which are not communication issues
4. Transport: Provides end to end communication control
3. Network: Routes the information in the network
2. Data Link: Provides error control
1. Physical: Connects the entity to the transmission media



OSI Reference Model

The application, presentation, and session layers comprise the upper layers of the OSI Model[75]. Software in these layers performs application specific functions like data formatting, encryption, and connection management. The interoperability between systems in these layers is important when doing e-commerce or e-procurement.

There is no data available for EU25 on the problem of interoperability, but the three tables below summarize the compliance with the requirements of the new directives of some of the existing systems in member states.

[73] Miller, Rachelle L. (2001): “The OSI Model: An Overview”, SANS Institute.

[74] It should be noted that some protocols do not exactly fit the OSI model. However, the concept of the OSI Model is still very useful since the terminology persists. An alternative for the OSI model is the TCP/IP model.

[75] The TCP/IP model refers to these three layers as the “Application layer”.

The content of the table is based on a recent report[76] which assesses a selection of existing systems against a range of criteria, including legal compliance. For the purpose of this report the description of the criteria in the right side column has been modified to reflect the legal requirements of the directives, as outlined in the previous section on legal aspects, but the content of table remains unchanged.

The selected systems compose a non-exhaustive list of the systems that presently are in operation in Europe, and as such they do not provide a complete overview of the extent to which existing systems in the member states comply with the requirements of the new directives. However, the systems are described in the recent study as 'best practice' examples, and due to this perspective they represent an assessment of the state-of-the-art concerning legal compliance of the most advanced systems. This can give an indication of the level of compliance in other systems throughout Europe. In other words, if there are areas where these, relatively advanced, systems do not comply with the new directives it is reasonable to assume that other, relatively less advanced, systems will have similar characteristics.

Table 3.16: The compliance with the requirements of the new directives of individual contracts

Requirements of the directives	***Individual contracts***		
	DTC Scottish Executive (Scotland)	**DPSM Ministry of Defence (France)**	**JEPP Ministry of Defence (Belgium)**
Interoperability of the tools used with information and technology products	✓ System accessibility	✓ System accessibility	✓ System accessibility
	✓ No software/ hardware requirements	✓ No software/ hardware requirements	✓ No software/ hardware requirements
	× Multilingualism support	× Multilingualism support	✓ Multilingualism support
	× Localisation parameterisation	× Localisation parameterisation	× Localisation parameterisation
Integrity of data and confidentiality of data exchanged	✓ User profiles	✓ User profiles	✓ User profiles
Limitations in the contracting authorities' access to data transmitted before the time-limits for submitting tenders	✓ Locking of supplier bids	✓ Locking of supplier bids	N/A (Locking of supplier bids)
	× Encryption when bids are stored	✓ Encryption when bids are stored	N/A (Encryption when bids are stored)
Availability of information regarding the specifications necessary for the electronic tendering	✓ Full competition documentation	✓ Full competition documentation	✓ Full competition documentation
The exact time and date of the receipt of tenders	× Official time	✓ Official time	× Official time
The access to data is possible only through simultaneous action by authorized persons	× Two officials to open bids	× Two officials to open bids	N/A (Two officials to open bids)
Infringements of access prohibition is clearly detectable	✓ All user actions recorded in system logs	✓ All user actions recorded in system logs	× Detection of tampering attempts
	× Detection of tampering attempts	✓ Detection of tampering attempts	✓ All user actions recorded in system logs

Symbols: Non-compliance = ×, Compliance = ✓

[76] IDA "Public e-procurement. State of the Art Report. Version 0.60" Brussels 2004

Table 3.17: The compliance with the requirements of the new directives of existing systems of Repetitive Purchasing

Requirements of the directives	*Repetitive Purchasing Systems*			
	PECOS **Scottish Executive** **(Scotland)**	**Lotto 2** **Consip** **(Italy)**	**DOIP/ DOIPEI** **Agency of Government Management** **(Denmark)**	**DPSM eCatalogues** **Ministry of Defence** **(France)**
Interoperability of the tools used with information and technology products	✓ System accessibility	× System accessibility	✓ System accessibility	✓ System accessibility
	✓ No software/hardware requirements	× No software/hardware requirements	× No software/hardware requirements	✓ No software/hardware requirements
	× Multilingualism support	× Multilingualism support	✓ Multilingualism support	✓ Multilingualism support
	× Localisation parameterisation	× Localisation parameterisation	✓ Localisation parameterisation	× Localisation parameterisation
	✓ Integration to other systems	× Integration to other systems	✓ Integration to other systems	× Integration to other systems
Integrity of data and confidentiality of data exchanged	✓ User profiles	✓ User profiles	✓ User profiles	✓ User profiles
Limitations in the contracting authorities’ access to data transmitted before the time-limits for submitting tenders	N/A	N/A	N/A	N/A
Availability of information regarding the specifications necessary for the electronic tendering	N/A	N/A	N/A	N/A
The exact time and date of the receipt of tenders	× Official time	✓ Official time	✓ Official time	× Official time
The access to data is possible only through simultaneous action by authorized persons	N/A	N/A	N/A	N/A
Infringements of access prohibition is clearly detectable	✓ All user actions recorded in system logs	✓ All user actions recorded in system logs	✓ All user actions recorded in system logs	✓ All user actions recorded in system logs
	× Detection of tampering attempts	× Detection of tampering attempts	✓ Detection of tampering attempts	× Detection of tampering attempts

Symbols: Non-compliance = ×, Compliance = ✓

Table 3.18: The compliance with the requirements of the new directives of existing systems of E-auctions

Requirements of the directives	*E-auction systems*			
	eAuction OGC (UK)	**Lotto 1 (e-auction) Consip (Italy)**	**DOIP eAuction Agency of Government Management (Denmark)**	**DSPM eAuctions Ministry of Defence (France)**
Interoperability of the tools used with information and technology products	✓ System accessibility	× System accessibility	✓ System accessibility	✓ System accessibility
	✓ No software/hardware requirements	× No software/hardware requirements	✓ No software/hardware requirements	✓ No software/hardware requirements
	✓ Multilingualism support	× Multilingualism support	✓ Multilingualism support	✓ Multilingualism support
	✓ Localisation parameterisation	× Localisation parameterisation	✓ Localisation parameterisation	× Localisation parameterisation
Integrity of data and confidentiality of data exchanged	✓ User profiles	✓ User profiles	✓ User profiles	✓ User profiles
	✓ Classification notification	✓ Classification notification	✓ Classification notification	✓ Classification notification
Limitations in the contracting authorities' access to data transmitted before the time-limits for submitting tenders	N/A (Locking of supplier bids)	✓ Locking of supplier bids	× Locking of supplier bids	N/A (Locking of supplier bids)
	N/A (Encryption when bids are stored)	× Encryption when bids are stored	× Encryption when bids are stored	N/A (Encryption when bids are stored)
Availability of information regarding the specifications necessary for the electronic tendering	✓ Full competition documentation	✓ Full competition documentation	✓ Full competition documentation	✓ Full competition documentation
The exact time and date of the receipt of tenders	× Official time	✓ Official time	✓ Official time	× Official time
The access to data is possible only through simultaneous action by authorized persons	N/A (Two officials to open bids)	× Two officials to open bids	× Two officials to open bids	N/A (Two officials to open bids)
Infringements of access prohibition is clearly detectable	✓ All user actions recorded in system logs	✓ All user actions recorded in system logs	✓ All user actions recorded in system logs	✓ All user actions recorded in system logs
	× Detection of tampering attempts	× Detection of tampering attempts	✓ Detection of tampering attempts	× Detection of tampering attempts

Symbols: Non-compliance = ×, Compliance = ✓

The tables show that the existing systems on a number of areas are generally compliant with the new directives. However, there are also areas where compliance are not fully meet across the systems, e.g. localization parameterization (currency, time/date format, units of measurement, etc.) and the specification of exact time and date of the receipt.

In summary, lack of common standards and the existence of incompatible standards for e-procurement are fundamental barriers for the realization of European e-public procurement[77]. For example is the use of an electronic signature in the e-procurement system based on national or local rules a hurdle for interoperability, which can exclude suppliers for taken part in a business opportunity. The lack of European standards in this area usually results in limited participation of foreign suppliers and SMEs[78]. A European e-procurement system needs to guarantee the general availability of its operations to the involved parties including the SMEs[79].

Security barriers are important issues for suppliers[80]; many suppliers are concerned about using the Internet to transmit confidential information. Use of procurement systems, which cannot guarantee the security of transactions and the confidentiality of sensitive information, will therefore be a significant barrier for operational e-public procurement in Europe[81].

A number of the technical barriers described above are also cross-border trade barriers[82]. A study from 2002 based on detailed analysis on e-procurement initiatives in Europe has identified several technical cross-border barriers which relate to e-procurement[83]:

- The current common e-procurement vocabulary (CPV) is not sufficiently developed
- The absence of centralized access point for information on all member states e-procurement
- Non-interoperability on standards for authentication
- Different and non-interoperable e-procurement systems[84]
- Lack of common standards for transmissions of notices (except from XML)
- Different formats for collecting supplier information

As regards barriers to cross-border trade in procurement in general, another more recent study has found evidence that cross-border procurement is fairly widespread; in fact this study suggests that 46 % of firms involved in procurement activities have carried out some kind of cross-border procurement.[85] However, the listed barriers are a significant obstacle for especially smaller firms as their costs related to the handling of such barriers are comparatively higher that those of larger firms.

[77] IDA / Unisys “Transborder eProcurement Study ‘Public eProcurement’ Initiatives and experiences, Borders and Enablers” (August 2002).
[78] IDA “Public e-procurement. State of the Art Report. Version 0.60” Brussels 2004.
[79] IDA “Public e-procurement. State of the Art Report. Version 0.60” Brussels 2004.
[80] Rambøll Management “Analysis of electronic public procurement pilot projects in the European Union” 2000 (p. 27).
[81] IDA “Public e-procurement. State of the Art Report. Version 0.60” Brussels 2004
[82] Se for example.
[83] IDA / Unisys “Transborder eProcurement Study ‘Public eProcurement’ Initiatives and experiences, Borders and Enablers” (August 2002).
[84] It is Important to ensure that European specific issues (linguistic, cultural, legislative) are taken fully into account (See “Standards – a key pre-requisite for interoperability” which can be found on http://europa.eu.int/ISPO/ida/export/files/en/1842.pdf)
[85] European Commission “A report on the functioning of public procurement markets in the EU: benefits from application of EU directives and challenges for the future”, Brussels 2004 (p. 3).

A report on the access of SMEs to public procurement contracts suggests that even through the overall success rate of SMEs is higher than for the larger companies; their chances of success in cross-border procurement are much lower.[86] This implies that SMEs have relatively easier access to contracts with local authorities than with national authorities in their own country or other European countries. This suggests that there are significant general barriers for SMEs associated with doing cross-border procurement which are not limited to e-public procurement.

Human resources

User adoption is also a general challenge. Behavior and competences on organizational and personal level need to be changed both in the public sector entities and in the suppliers companies. Lack of IT competences can be a significant barrier for e-procurement regarding the ability to understand technology and the ability to use technology.[87]

For instance, suppliers may lack the resource and skills to understand the technology and thus to build their business case for e-procurement. This means that suppliers do not have the ability to access public procurement contracts. This barrier can be significant for especially smaller firms. According to a recent report the access of SMEs to public procurement contracts is relatively low;[88] and three out of four Finnish and British SMEs think that external help and training would help them to an easier access to public contracts.[89]

Lack of technical competences is also a significant barrier in relation to sending and receiving material electronically. The employees in both public and private sector need to fully understand and be able to use electronic tools.[90]

Organisational barriers

Another barrier is human resistance to change. This is a cultural barrier based on human perceptions. Findings show that employees often resist changes within their organization partly because they are afraid of loosing their jobs and partly because they find it difficult to change their normal work procedures. Both private and public organizations experience this barrier.[91] Moreover, as pointed out in section 3.4, the fact that most countries use a decentralize approach in their overall organization will slow down the mainstreaming of e-public procurement as the decisions to connect to e-procurement are mainly made at the level of individual institutions.

[86] European Commission “A report on the functioning of public procurement markets in the EU: benefits from application of EU directives and challenges for the future”, Brussels 2004 (p. 20).
[87] OGC “eProcurement Guidance - "Cutting through the Hype” 2002 (http://www.ogc.gov.uk/index.asp?id=2314).
[88] EIM Business and Policy Research “The access of SMEs to public procurement contracts; Final report”, The Netherlands 2003 (p. 36).
[89] EIM Business and Policy Research “The access of SMEs to public procurement contracts; Final report”, The Netherlands 2003 (p. 113).
[90] KPMG Consulting “Analyse af statslige indkøb” Copenhagen (2000) (p. 35).
[91] KPMG Consulting “Analyse af statslige indkøb” Copenhagen (2000) (p. 35) and Rambøll Management “Analysis of electronic public procurement pilot projects in the European Union” 2000 (p. 27).

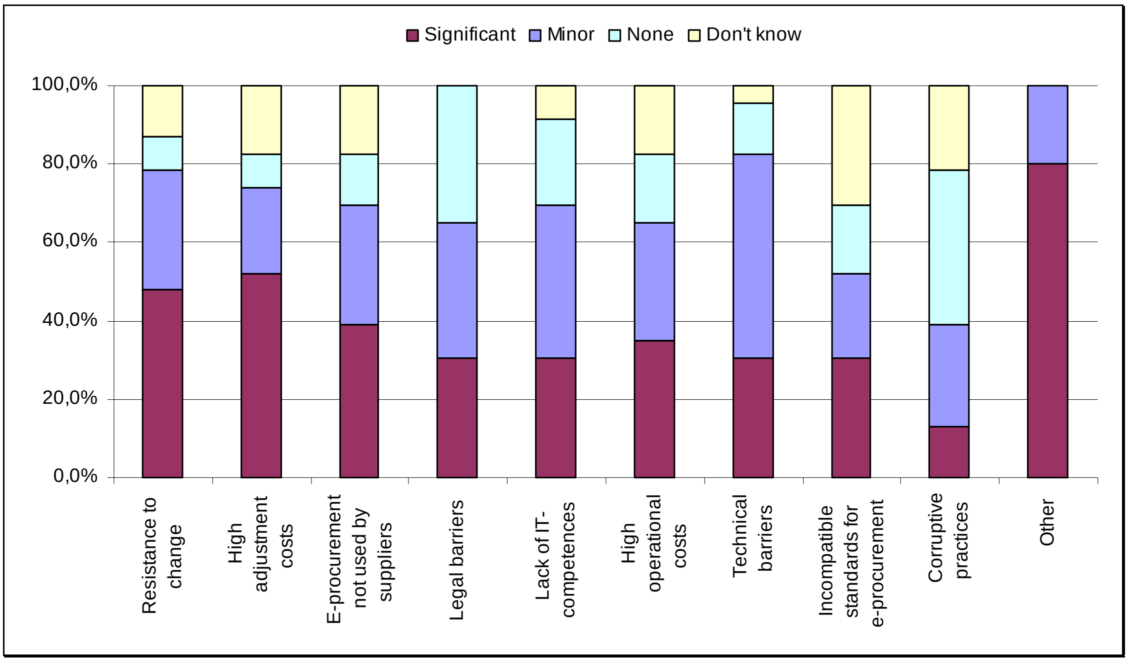
Other issues
Another factor which account for a significant barrier is contract length and size. Findings show that the size of contracts can be a barrier for SMEs to participate in public procurement.[92]

Further non-technical cross-border barriers for e-procurement are language borders related to the MS-languages and missing or incomplete general information on public procurement[93]. In summary, the lack of centralised, easily accessible information or the existence of insufficient information is an important obstacle for SMEs when tendering for public procurement contracts in Europe[94]. Additional main barriers for this category of businesses when tendering for contracts are bureaucracy, unclear wording in the invitation to tender and the short time span. [95]

3.7.2 *Findings from the survey*

The survey included a number of questions aimed at describing the potential risks or barriers of introducing e-public procurement, which generally reflects many of the barriers described above, in order to obtain an assessment from the point of view of expects in the member states covering the importance of these barriers. The figure below ranks the most significant barriers encountered by public authorities upon introducing e-public procurement.

Figure 3.1: Significant barriers encountered among public authorities upon introducing electronic public procurement

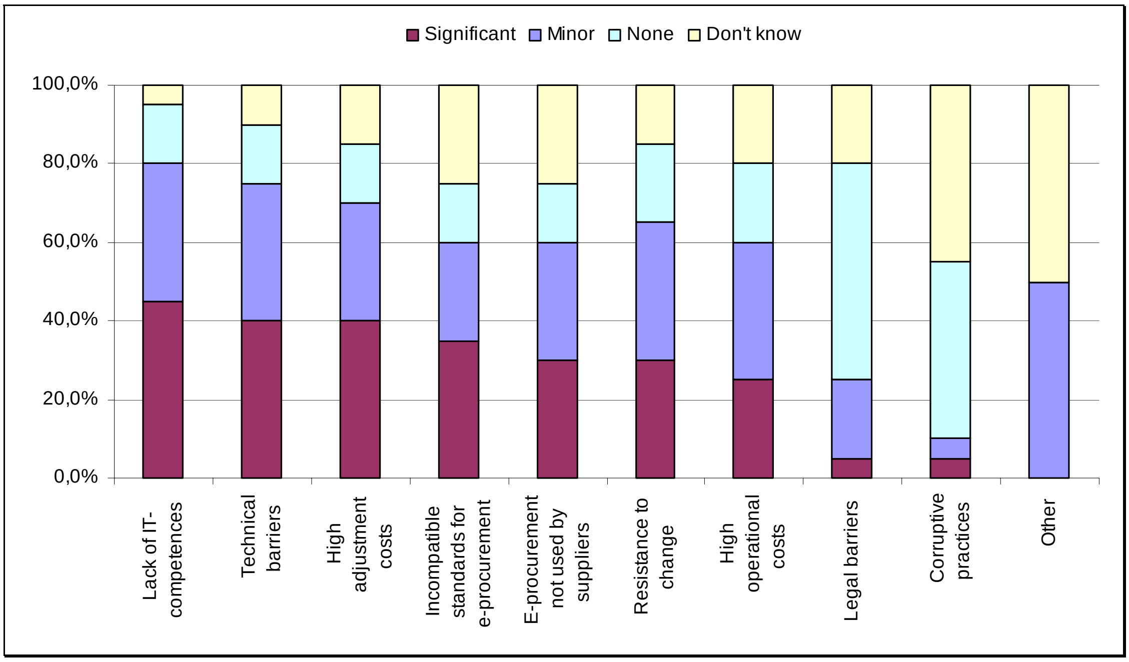


[92] EIM Business and Policy Research "The access of SMEs to public procurement contracts; Final report", The Netherlands 2003 (p. 81)
[93] IDA / Unisys "Transborder eProcurement Study 'Public eProcurement' Initiatives and experiences, Borders and Enablers" (August 2002)
[94] See also IDA / Unisys "Transborder eProcurement Study 'Public eProcurement' Initiatives and experiences, Borders and Enablers" (August 2002).
[95] EIM Business and Policy Research "The access of SMEs to public procurement contracts; Final report", The Netherlands 2003 (p. 90, 147) and Europe Economics OGC "An Economic Analysis of Electronic Marketplaces" 2001 (p. 16).

The figure shows that the presence of resistance to changes among public authorities and relatively high adjustment costs are seen as the most significant barriers of introduction of electronic procurement in the public sector among the member states. Likewise, the risk of a limited number of suppliers will use the e-procurement system, national legal issues, lack of IT-competencies within public authorities, and high operational costs are seen as significant obstacles. Some interviewees have mentioned other significant barriers, such as a low level of knowledge within e-procurement among both public authorities and suppliers and the need for consultation with experts on the practical use of e-procurement systems.

Similarly, the survey has included question on the most significant barriers encountered by SMEs upon introducing e-public procurement. The figure below ranks the most significant barriers among SMEs:

Figure 3.2: Significant barriers encountered among SMEs upon introducing electronic public procurement



The figure shows that lack of IT-competencies, technical issues, and high adjustment costs are seen as the most important barriers among SMEs upon introducing e-public procurement. On the contrary, legal barriers and corruptive practices are not seen as significant to the use of e-public procurement among SMEs.

The interview survey therefore indicates that high adjustment costs and lack of IT-competencies are highlighted as potentially significant barriers for both public authorities and SMEs upon introduction of e-public procurement. Correspondingly, corruptive barriers are not seen as significant for the introduction of e-public procurement among public authorities or SMEs.

3.7.3 *Assessment*

In summary, the following key existing and potential barriers have been identified in the two sections above.

Economic

- High investments and operational costs (e.g. subscription and transaction fees) for suppliers and public authorities are barriers that might impede and prevent the development of critical mass in the market.
- Small suppliers in particular are likely to be disadvantaged by entry fees, technological requirements etc. since they have fewer resources in time and finances

Technical

- Lack of technical standardization and lack of compatibility between e-procurement systems within and across countries may be a barrier to suppliers' cross-border participation in public procurement competition.
- Issues on lack of security and confidentiality of transactions are important for suppliers.

Human resources

- Many suppliers, in particular SMEs, and public authorities lack both strategic and substantial insight concerning the potentials of e-procurement and the operational skills to establish and maintain/operate e-procurement systems.

Organizational

- There is widespread resistance within public institutions to change existing procurement procedures and processes.
- Public procurement across the EU member states is to a high extent organized according to a decentralized approach. E-public procurement uptake will therefore largely be driven by the decisions of individual institutions whether to transform to e-procurement.

4. Austria

4.1 Organisations and Institutions

Responsible institution(s) for public procurement policy	Federal Chancellery (Bundeskanzleramt, www.bka.gv.at)
Responsible institution(s) for legal aspects	Federal Chancellery (Bundeskanzleramt, www.bka.gv.at) The "Länder" (regions, according to the Austrian Federal Constitution) regarding remedies procedures
Responsible institution(s) for technical solutions	Austrian Federal Economic Chamber (Wirtschaftskammer Österreich) has been dealing with the implementation of e-procurement in practice. It initiated the electronic public procurement service "er@t" which is now continued by the tender service company Auftrag.at ausschreibungsservice GmbH (www.auftrag.at). It contains all Austrian tenders as well as EU-wide tenders (TED). Austrian Standards Institute (www.on-norm.at) is currently working on a contractual standard for public e-procurement
Central procurement institution(s)	Federal Procurement Company Ltd. (Bundesbeschaffung GmbH, www.bbg.gv.at) organizes the field of procurement, excluding works at the national level. The Federal Procurement company is the purchasing service provider, mainly to the federal state administration and offers its services also to the regional governments and municipalities. Its responsibility lies in realizing a large number of enumerated services and supplies procurements for the federal state, whereas the regional and local levels do not have a central procurement facility and procurement is mostly done by the individual institutions.
Other important organisations	Chief Information Office (www.cio.gv.at) creates, coordinates and supports the implementation of e-government. ICT-Board is staffed by the federal chief information officer and one member of each Federal Ministry. It is the central department for consolidating the different IT-activities at the state level.
Type of coordination between different institutions	-

4.2 Strategy

Within the area of e-procurement there is no explicit strategy and no quantitative objectives due to lack of staff capacities within public procurement institutions to work with e-public procurement.

However, the overall federal Austrian e-government strategy is based on tight cooperation between all public stakeholders, which means the national level, regions, cities and municipalities as well as lobbies and major public institutions. Innovative e-government is therefore an important aim.

Another key element is to work for the adoption of uniform interfaces and for clear as well as open standards. This would avoid further adjustments between single parts of applications. Therefore, there is a need to define uniform standardized processes, data formats and specifications for all proceeding steps.

4.2.1 *Statement of objectives*

With the overall readjustment of the administration towards e-government, the Austrian government highly prioritizes its e-government efforts and with it e-public procurement.

There are no specific objectives on e-public procurement. However, the main objective hereby lies in the online provision of all federal administration services to the public by 2005.[96]

As public services are not excluded from the budgetary savings, the Austrian government is very motivated to extend its provision of e-government in order to realize financial savings of administrative costs that are expected to account to EUR 1.5 billion. Also, it emphasizes increasing efficiency. The government plans to create the most advanced European administration in the upcoming years.

Another overall objective is to implement the new procurement directives to facilitate e-public procurement and to create and transmit tenders electronically using electronic signature

4.2.2 *Scope of strategy*

Levels of government involved	Information unavailable
Legal framework	Information unavailable
Allocated resources	Information unavailable
Time frame	A year of fulfilment has yet to be set

4.2.3 *Existing guidelines*

A special regulation for electronic procurement especially concerning e-offers, has been issued (“Verordnung der Bundesregierung betreffend die Erstellung und Übermittlung von elektronischen Angeboten in Vergabeverfahren – E-Procurement-Verordnung 2004“)

[96] http://www.cio.gv.at/egovernment/strategy/Teil_I.html

4.3 Legal framework

4.3.1 Legal status of the use of electronic means in Public Procurement

So far, the areas “rules applicable to communication”, “storage of data” and “the use of specific procedures, e.g. e-auctions” are regulated in the legal framework.

Austria was the first country to implement the Directive on Electronic Signatures with its Electronic Signature Act in 1999 (Signaturgesetz BGBl I 1999/1). The same day that the EU directive (e-signatures Directive, 1999/93/EC) became effective, the Austrian Electronic Signature Act was implemented as well.

According to national standards for the electronic exchange of data there are two norms in the field of works: Ö-Norm B 2063 and Ö-Norm B 2064.

4.3.2 Implementation of the Directives

The government expects that the forthcoming EU public procurement directives will be implemented in 2005.

4.3.3 Status of tools

Public procurement portals	There is no official central electronic public procurement portal in Austria so far. At present the Bundeskanzleramt is planning a portal which should be implemented in approximately two years. So far, the most important portal on national level is the portal “@-AVA” of the national railways company “Österreichische Bundesbahnen”, www.oebb.at
	www.lieferanzeiger.at is an online database by the official Viennese newspaper and a private enterprise
	The construction industry has its own database Ausschreibung (www.ausschreibung.at) which offers tenders online. It has open as well as public tenders and offers information on the bidders as well.
Electronic signature	An advanced electronic signature based on qualified certificated has been introduced. The use of electronic signature is mandatory when participating in public calls for competition
Electronic catalogues	Pilot schemes of the implementation of e-catalogues have been outlined
Electronic auctions	On an experimental level, implementation of an e-auction system has been started
Dynamic Purchasing Systems	Pilot schemes of the implementation of dynamic purchasing systems have been outlined
Framework agreements	Below the threshold values the use of framework agreements is possible

4.3.4 Reference to the relevant legal acts

Use of electronic means is regulated by:

- E-Government-Gesetz, BGBl. I 2004/10: The government passed the e-government law in Februrary 2004 which regulates the electronic communication with public bodies. Accompanying the e-government law, the government passed the administration signature regulation (Verwaltungssignaturverordnung (VerwSigVO), BGBl. II 2004/159). It contains the security, technical and organisational relevant requirements for the administration signature.
- Bundesvergabegesetz (BVergG), BGBl I 2002/ 99: The law on Federal tender creates the legal conditions for electronic tender. Since-July 2003, it is possible to make overall invitations to tender for the state, regions and municipalities. Accompanying the BVergG a special regulation for electronic procurement has been issued (see above 1.2.3.)
- Bundesbeschaffung GmbH (BB-GmbH-Gesetz) BGBl I 2002/99: The Federal Procurement Company was created with the passing of the Law in 2002. This concentrated the task of federal procurement into one body.

4.4 Current usage of electronic means in Public Procurement

So far, there is very little experience with electronic means in public procurement. Nevertheless, the Federal Procurement company is running pilot projects in each field of the procurement phase and hopes to implement them shortly for regular use.

An international study found out that Austria is the country that had the highest growth in full electronic case handling in its e-government activities and in the field of e-public procurement in 2003. (Full electronic case handling means that the publicly accessible website offers the possibility to completely treat the public service via the website, including decision and delivery. No other formal procedure is necessary for the applicant via "paperwork"). Compared to 2002 it increased by 48 per cent to now 68 per cent in terms of percentage of services that offer a complete electronic case handling. This is the largest progress inside the EU and gives Austria a good standing at second place of the EU-wide study[97].

4.4.1 Which phases of procurement are covered?

The status for automating procurement phases in Austria is as follows:

- Notification about tender (to some extent)
- Publication of tender (to some extent)
- Management of receipt/submission of tenders (to a low extent today)
- Evaluation of tenders (to a low extent today)
- Ordering (to a low extent today)
- Invoicing (to a low extent today).

[97] Source: Cap Gemini Ernst & Young

4.5 Raising awareness & Promotion of electronic means

Austria is expecting that 'buyer profile' will be implemented by the end of 2005. At present some of the regions together with the Austrian confederation of municipalities (Gemeindebund) and the confederation of cities (Städtebund) participate in an electronic public procurement project "ANKÖ" (Auftragsnehmerkataster Österreich, www.ankoe.at). This is a supplier database of suitable contractors who fulfil the legal requirements for public tenders.

The Austrian municipalities have implemented a joint venture internet portal for the communal level which also contains tender information (www.kommunalnet.at).

Impact assessments of the introduction of e-procurement are of no major concern to the government. At present it is discussed whether to do it within the next three years.

5. Belgium

5.1 Organisations and Institutions

Responsible institution(s) for public procurement policy	Federal Steering Group on Joint E-Procurement (major federal organisms are represented)
Responsible institution(s) for legal aspects	Public Procurement Commission (Commission des marches publics)
Responsible institution(s) for technical solutions	Federal ICT Department (FEDICT)[98]
Central procurement institution(s)	A central procurement body called "Services contrat-cadre multi-SPF" (Multi-ministry framework contract service) organises grouped purchases (IT material, cars, office stationery, and furniture). Its services are being used by some federal authorities and are accessible through the federal Intranet.
Other important organisations	-
Type of coordination between different institutions	Other Belgian non-federal public entities such as the federated (regional and community) entities, local and parastatal authorities will be able to file orders and use the same applications as federal authorities. It is now possible for all these entities to sub-scribe to JEPP (see below). The Walloon Region has developed its own e-public procurement strategy and portal[99]. The Flemish and Brussels regions have not started own initiatives as yet.

5.2 Strategy

Although no overall strategy for e-public procurement has been designed yet, a working group will, on the basis of the consultation of businesses mentioned below, draft a strategic paper (*"plan d'informatisation"*) which will contain a business case, a calendar for implementation and a budget for 2005.

The first step of the Belgian e-procurement has been realised on a "buy a little, test a little field a little" strategy. This activity covers the e-publication phase and has been placed under the lead of the Ministry of Defence.
A second step (e-payment or e-tendering) is under consideration and initial coordination on the feasibility is ongoing.

[98] Technically, e-public procurement projects are conducted by line ministries in cooperation with and under the coordination of the Federal ICT Service (SPF FEDICT). Due to its large spending budget, SPF Défense (Federal Ministry of Defence) has been particularly involved in the activities. SPF Justice (Federal Ministry of Justice) has also been involved since it runs the official journal (Moniteur belge – Bulletin des adjudications)

[99] http://avis.marchespublics.wallonie.be/

The e-public procurement initiatives are embedded in the overall government strategy of administrative simplification and reduction of administrative burden as well as the government's e-government strategy.
There are also regional and local initiatives like by the walloon region (http://avis.marchespublics.wallonie.be/)

5.2.1 *Statement of objectives*

The main objective is to lower the administrative burden for enterprises. In terms of timeframe, the authorities involved have issued the aim of publishing all federal calls for competition by end of 2004.

5.2.2 *Scope of strategy*

Levels of government involved	Central government (federal)
Legal framework	EC directives and guidelines complemented by or translated into royal decrees (AR)
Allocated resources	-
Time frame	2006

5.2.3 *Existing guidelines*

Information unavailable

5.3 Legal framework

5.3.1 *Legal status of the use of electronic means in Public Procurement*

A royal decree (*arrêté royal*) of 18 February 2004 authorises the use of electronic means in all or part of the public procurement procedure. It contains rules applicable to communication, regulates storage of data, but does not cover specific procedures such as e-auctions. A special law on electronic signatures has been passed in 1999. While Belgian authorities will probably not be authorised to use electronic auctions, they may employ Dynamic Purchasing Systems and e-catalogues.

5.3.2 *Implementation of the Directives*

All existing and future applications are compliant with the European public procurement directives and it is expected that they will be fully implemented after formal endorsement of the relevant EC directives/regulations.
Status of tools

Public procurement portals	www.jepp.be – Joint Electronic Public Procurement (JEPP) is the instrument used by the Belgian federal government for electronic publication of calls for tender. JEPP was launched on 13 November 2002 and is available to companies since 6 January 2003. At the beginning only the Federal Ministry of Defence published in JEPP, other federal organisms follow suit. The objective is that, at least, all federal calls for tender are published in JEPP by end of 2004. As a first major evolution of the system it is the intention to generalize used of the JEPP portal to non-federal entities by end of 2005. JEPP is today providing the following services : the objective is to assist buyers in drafting their calls for tender and submit them electronically to the official publication organisms[100] A pyramidal structure of websites (a joint national portal, a portal for each public entity, and a site for each adjudicating authority) make the calls for tender and the terms of reference available online. A search engine assist is finding and downloading these documents. General data such as information on purchasing ser-vices or technical notes can be published as well. Enterprises have the faculty to subscribe to the JEPP system, which automatically notifies them by e-mail on new opportunities which correspond to the chosen criteria. Businesses can also choose to be automatically informed on errata on documents they have downloaded. The adjudicating authorities can use JEPP to notify contract awards, invitations to tender as well as other documents such as minutes of clarification meetings. It is foreseen that the JEPP joint portal will eventually become the official publication site of the Bulletin des Adjudications which will unify all Belgian public procurement publications, offering the private sectors services equivalent to those described above. Public entities can affiliate to JEPP in three different ways: The JEPP application is working within the installations of the concerned public entity. The successful tenderer will take upon itself the delivery and installation of the necessary software and hardware. The successful tenderer plays the role of an Application Service Provider (host). In this case the public entity only needs a simple browser. The public entity only acquires a user licence. It will have to install JEPP on its own responsibility.

[100] Official Journal of the European Union, Bulletin des Adjudications - Belgian official journal

	In order to reduce costs, several public entities can group together in order to file a joint order and install the application in a single spot. A federal grouped managed by the Federal ICT Service (FEDICT) allows each federal service and each parastatal under its authority to benefit from JEPP services.
Electronic signature	The introduction of qualified electronic signatures has been delayed, but certifying organisms are being established now. The signature will be based on the electronic identity card, a pilot project now being rolled out to all of Belgium and supposed to cover all citizens by 2007.
Electronic catalogues	Electronic catalogues are being used by the above-mentioned central purchasing agency *Services contrat-cadre multi-SPF*
Electronic auctions	No electronic auctions activities have been tested so far
Dynamic Purchasing Systems	No Dynamic Purchasing Systems activities have been initiated so far
Framework agreements	Framework contracts are being used by the above-mentioned central purchasing agency *Services contrat-cadre multi-SPF*

5.3.3 Reference to the relevant legal acts

Information unavailable.

5.4 Current usage of electronic means in Public Procurement

5.4.1 Practical use of electronic means in Public Procurement

Phase I of the e-public procurement project which was running from 2001 to 2002 led to the establishment of a central e-public procurement portal (JEPP[101]) at federal level, which was established at the beginning of 2003. It is operational, but it is not used yet by all federal public entities and covers only the publication phase of the tendering process. The aim is that all federal entities use the portal by end of 2004.

Concepts for other applications have been drafted; however, they have not been developed yet. Since the Belgian federal e-public procurement activities have been re-launched in January 2004, an inter-ministerial working group is preparing Phase II of the e-public procurement activities, going well beyond publication and covering the actual tendering process. Prior to updating the e-public procurement plan and to drafting a timetable and a budget, the group has launched a request (trough the Belgian Official Journal) for information to enterprises and organisations in order to allow for a stocktaking of current applications on the market. This will feed into the terms of reference for a tender on the new application.

[101] http://www.jepp.be

Different applications have been conceived at federal level, however apart from JEPP, none of these applications is operational yet, and most of them are still in the concept phase:

- JEPP: electronic publication (see above)
- E-Bid: electronic bidding (see below)
- E-registered mail (see below)
- E-File (see below)
- E-Cat: electronic catalogues (see below)
- E-Payable: electronic invoicing and payment (see below)

Currently no systematic assessment of the impact of e-public procurement is carried out or planned in Belgium. Evaluation is not yet integral part of the Belgian administrative culture, but some kind of assessment mechanism will form part of the strategic paper developed by the e-public procurement working group to be delivered by September 2004. Monitoring will take place at least on an annual basis.

5.4.2 Which phases of procurement are covered?

In Belgium, only the publication phase has been automated so far, all other phases are expected to be automated within 5 years. However, the Belgian federal services have already developed concepts for several modular but integrated and communicating applications for e-public procurement, and have ensured the possibility to connect with back office IT legacy such as logistical systems and budgetary data bases. The user will therefore only perceive a single system. The interface of the synchronised system will be an Enterprise Application Integration (EAI) which will manage this interchange based on the accepted W3C XML standard. This EAI will be sufficiently flexible in order to connect budgetary information systems of different federal public services to the same e-public procurement application (e.g. the federal e-catalogue).

5.5 Raising awareness & Promotion of electronic means

The Belgian federal government has launched its first e-public procurement activities under its public administration modernisation programme in the 1999-2003 legislatures, between 2001 and 2002. The current state of affairs in e-public procurement can be viewed on the Belgian government's web portal[102]. This initiative was then put on hold for a year. In January 2004 it was re-launched and put on top of the agenda again, when a federal Council of Ministers meeting decided to accelerate the development of e-public procurement activities.

[102] http://www.belgium.be/eportal/application?origin=navigationBanner.jsp&event=bea.portal.framework.internal.refresh&pageid=indexPage&navId=4603

Forthcoming initiatives:

Apart from JEPP, several applications have been conceived, but they are still in the concept phase:

E-Bid

The objective of this project is to allow public entities to receive bids and expressions of interest, to give them a time stamping, to control the validity of the digital signature and to keep these documents in a well-secured and widely accessible system. This phase is still in the market-survey and information gathering phase.

The launch of E-Bid depends on certain prerequisites, such as the adaptation of Belgian legislation on public procurement. The draft royal decree on the use of electronic means in public procurement has been approved by the Public Procurement Committee in March 2003 and follows its way. The difficulties in this process are related to proper implementation of agreed interoperable procedures and the availability of proven technologies.

E-File

In order to accelerate the public procurement procedures and to simplify administrative work, it is envisaged to completely digitalise the files handled by purchasing services. These digital files would circulate between the various authorities involved (e.g. Inspecteur des Finances – tax inspector) by means of an electronic workflow system.

Particular attention will be paid to the availability of an integrated tool to manage the evolution of these files and to the integration of this software within the other applications (logistical, budgetary or public procurement). This project will be implemented when the above projects will have succeeded.

E-Cat

Open markets are only useful when information flows well. Buyers must know possibilities of ordering, the adjudicating authorities wish to follow the progress of their calls, and tenderers demand administrative simplification. A catalogue accessible online, which is reliable and taking into account of the common rights and requirements of everybody involved, is therefore an indispensable tool to support the new model of federal grouped purchases.

The following functions are envisaged:

- Loading and updating of the catalogue
- Consultation of the catalogue
- Approval workflow
- Control of budgetary availability
- Drafting and sending of a letter to the successful bidder
- Confirmation of receipt by the bidder
- Confirmation of the order to the buyer

The other usual functions for e-catalogues (delivery request, billing etc.) are part of the E-Payable project since they have no particularities compared with a closed contract.

The two main difficulties for e-catalogues are the non-existence of universally accepted standards and the administrative burden of loading and controlling the catalogue. The solution envisaged in Belgium is to impose for the offers a normalised inventory in one or several commercially available and widely supported standards (e.g Excel or DTD XML) and to apply to the chosen bidder's inventory an automatic conversion and loading tool.

The feasibility study for this project has been closed, and it is planned to launch the project shortly to support the new purchasing model of the federal administration.

E-Payable

The area of E-Payable starts with the request of receipt and ends with the payment of the invoice. It aims at:

- giving the administration a powerful management tool
- allowing electronic invoicing
- allowing electronic settlement (invoice control), remittance and payment
- improving the information of winning tenderers
- accelerating payments and thus meeting tenderers expectation for a work well done.

6. Republic of Cyprus

6.1 Organisations and Institutions

Responsible institution(s) for public procurement policy	The Public Procurement Directorate Treasury of the Republic of Cyprus
Responsible institution(s) for legal aspects	The Public Procurement Directorate Treasury of the Republic of Cyprus
Responsible institution(s) for technical solutions	The Public Procurement Directorate Treasury of the Republic of Cyprus
Central procurement institution(s)	Public Procurement Department is at the national level authorized to and responsible for the procurement of common used items for individual government and public institutions[103]
Other important organisations	-
Type of coordination between different institutions	Information unavailable

6.2 Strategy

The strategy for introducing and developing an electronic public procurement system for government and public institutions in The Republic of Cyprus is an integrated part of the Cyprus Government strategy on modernizing public procurement procedures.

6.2.1 Statement of objectives

An overall objective is to ensure that a large proportion of public procurements shall be awarded through electronic procurement procedures by 2008 In the endeavour of realizing this overall objective the Cyprus Government has set as objective to design an electronic system making government institutions capable for undertaking procurements by electronic means.

[103] Based on interview with Mr. Stelios Kountouris, Public Procurement Department, Treasury of the Republic of Cyprus

6.2.2 *Scope of strategy*

Levels of government involved	Central and local government are included
Legal framework	Information unavailable
Allocated resources	The government will spend EUR 100.000 on an assessment for the introductoion of electronic procurement and EUR 2.4 million over a period of three years with the purpose of implementing electronic procurement in all levels of state level authorities. The resources have been allocated to the following areas: • IT hardware: EUR 500.000 • IT software: EUR 1.700.000 • Training: EUR 200.000
Time frame	Implementation of an electronically based procurement system will take place during 2005 and is estimated to be fulfilled in year 2007

6.2.3 *Existing guidelines*

No specific guidelines guiding electronic public procurement have so far been issued.

6.3 Legal framework

6.3.1 *Legal status of the use of electronic means in Public Procurement*

Operational electronic procurement systems in Cyprus that are compliant with the requirements in the Directives do not presently exist. Specifically, the use of electronic means for communication in public procurement process is not regulated by national legislation.

6.3.2 *Implementation of the Directives*

The Cyprus Government estimates that the new EU public procurements directives will be implemented in January 2006.

It is considered by the government that all contracting authorities will have access to Electronic Auctions. Dynamic Purchasing Systems is expected to be used by central purchasing authorities for common used items.

6.3.3 *Status of tools*

Public procurement portal(s)	-
Electronic signature	Electronic signature does not exist but will be introduced
Electronic catalogues	Government authorities have no experience with e-catalogues
Electronic auctions	Government authorities have no experience with e-auctions
Dynamic Purchasing Systems	Government authorities have no experience with dynamic purchasing systems
Framework agreements	Framework agreements are not being used

6.3.4 *Reference to the relevant legal acts*

Information unavailable

6.4 Current usage of electronic means in Public Procurement

6.4.1 *Practical use of electronic means in Public Procurement*

Presently, no data on practical use of electronic means in Public Procurement are available. However, the Cyprus government is planning to do an assessment on the impact of introducing electronic public procurement.

The Cyprus Government expects that a system operating with an automated electronic public procurement cycle will be implemented within three years. The elements included in the procurement system are: notification about tender, publication of tender, management of receipt/submission of tender and evaluation of tender

6.4.2 *Which phases of procurement are covered?*

Information unavailable

6.5 Raising awareness & Promotion of electronic means

Since July 2003 the Treasury has worked with implementing suggestions from a study of e-commerce in Cyprus. The study concerned among other things assessment of the existing legal framework and suggestions for changes and recommendations on legal and institutional infrastructure for the promotion and operation of e-commerce in Cyprus.

With the purpose of stimulating the general use of electronic procurement in Cyprus the Government has made a proposal for the financing of a project through the Transition Facility Funds of the EU. This proposal includes objectives on implementing electronically procurement procedures for public institutions.

7. Czech Republic

7.1 Organisations and Institutions

Responsible institution(s) for public procurement policy	Ministry of Informatics (www.micr.cz) is in charge of policy formulation in the area of electronic public procurement
Responsible institution(s) for legal aspects	Ministry of Informatics (www.micr.cz) Ministry of Regional Development (www.mmr.cz)
Responsible institution(s) for technical solutions	-
Central procurement institution(s)	-
Other important organisations	-
Type of coordination between different institutions	At the national level, a central body is responsible for public procurement. Furthermore, selection of suppliers is a responsibility for the central procurement body. No individual public institutions are involved in selecting suppliers for procurements.

7.2 Strategy

Since 2002 the Government of the Czech Republic has had electronic public procurement as a political priority. At the moment the government considers the development of electronic public procurement as having a medium political priority.

Strategy and priorities on electronic public procurement are integrated in the overall strategy on the Information Society and E-government among others "State Information Policy (SIP)" (1999)

7.2.1 Statement of objectives

The overall objective is to promote an electronic marketplace used for repeated and bulk purchases in the whole field of the public administration.

The central body for the electronic market place is the Ministry of Informatics but just for office facilities including information and communication technology (under condition that it is lower than 2 millions czech crowns).[104]

[104] Based on information from David Kotris, Ministry of Informatics

7.2.2 *Scope of strategy*

Levels of government involved	The strategy on electronic public procurement includes the central government. Regional and local governments are at the moment not included in the strategy for electronic public procurement
Legal framework	-
Allocated resources	Information on amount of allocation is presently unavailable
Time frame	2002 – 2006

7.2.3 *Existing guidelines*

Special guidelines for electronic public procurement have been developed, but it is not obligatory to use them

7.3 **Legal framework**

7.3.1 *Legal status of the use of electronic means in Public Procurement*

National legislation regulates the use of electronic means in the public procurement process. The legislation concerns specific rules for the communication process related to the electronic procurement process.

7.3.2 *Implementation of the Directives*

The government has not yet formulated an exact time-schedule for implementing the new EU Directives on public procurement.

The government intends to introduce national standards for the electronic exchange of data in the electronic public procurement process.

According to the EU Directives the government expects that the use of both electronic actions and dynamic purchasing may be regulated by the use of Contracting Authorities. It is not expected that Contracting Authorities may publish tender-related information on a ‘buyer profile’.

7.3.3 Status of tools

Public procurement portals	A public electronic procurement portal for electronic procurements is expected to be functional within few years.
Electronic signature	An electronic signature has been introduced by the government. At the moment the signature is used to a medium degree. It is expected that the use of the signature will be obligatorily for actors participating in public calls for competition.
Electronic catalogues	Authorities have no experiences with systems for procurement involving catalogues
Electronic auctions	Authorities have no experiences with systems for procurement involving electronic auctions
Dynamic Purchasing Systems	Authorities have no experiences with systems for procurement involving electronic purchasing systems
Framework agreements	-

7.3.4 Reference to the relevant legal acts

7.4 Current usage of electronic means in Public Procurement

7.4.1 Practical use of electronic means in Public Procurement

There are no operational public procurement systems compliant with the requirements of the forthcoming European Public Procurement Directives in The Czech Republic presently.

The Czech Republic government has implemented an automated electronic public procurement system for procurements in the public sector. In this respect, procedures for notification about tender as well as publications about tender are integrated in the procurement cycle. This procurement phase has been automated to a large extent.

7.4.2 Which phases of procurement are covered?

Procedures for ordering and invoicing are integrated in the automated electronic procurement system. This procurement phase has been automated to some extent.

7.5 Raising awareness & Promotion of electronic means

Within the next three years the Government of the Czech Republic is planning to introduce regular assessments of the impacts expected to be related to the introduction of electronic public procurement.

8. Denmark

8.1 Organisations and Institutions

Responsible institution(s) for public procurement policy	The Danish Competition Authority (www.ks.dk) under the Danish Ministry of Economic and Business Affairs (www.oem.dk) Ministry of Finance (www.fm.dk)
Responsible institution(s) for legal aspects	The Danish Competition Authority (www.ks.dk) under the Danish Ministry of Economic and Business Affairs (www.oem.dk)
Responsible institution(s) for technical solutions	The Agency for Governmental Management (www.oes.dk) under the Danish Ministry of Finance (www.fm.dk)
Central procurement institution(s)	National Procurement Ltd. (SKI, www.ski.dk) was established to ensure the highest possible procurement efficiency in public organizations. It has more than 8500 public organization subscribers, around 250 suppliers on framework agreements many with distributors and totalling more than 1200 order addresses in Denmark. SKI runs the e-tendering systems ETHICS, Netindkøb and Netkatalog.
Other important organisations	The Ministry of Science, Technology and Innovation (www.vtu.dk) and Local Government Denmark (KL, www.kl.dk), an association of Danish municipalities.
Type of coordination between different institutions	Procurement is organized as a mixture of a centralized and decentralized approach: • The main principle is that each individual public authority is responsible for procurement (award of contract) and arrangement of framework contracts • Each institution e.g. ministry or agency can organize procurement in a centralized or decentralized way • There is a central public procurement body, SKI which arranges framework contracts, which can be used by all public authorities in Denmark. However, the individual public authority is free to arrange individual framework agreements. • The total procurement through national framework contracts (SKI) is approximately 0.5 billion Euro per year. Figures for regional and local level are unknown.

8.2 Strategy

The national strategy on e-public procurement is part of the existing strategy for e-commerce from 2002

- “IT for everybody” (Ministry of Science, Technology and Innovation, 2002)
- “Strategy for e-commerce 2002” (Ministry of Science, Technology and Innovation, 2002)

A new strategy from the government and the coalition of municipalities includes guidelines for digitizing towards 2006 has been published:

- “Strategy for digital administration 2004-06” (The Digital Taskforce, 2004)

8.2.1 Statement of objectives

There are no specific objectives on e-public procurement as a whole. However, some overall objectives for all of the initiatives and strategies have been defined:

- to save money by centralizing the procurement process
- to make the public sector a leading force in electronic procurement and commerce
- to realize un-utilized economic potential within electronic commerce in both the public and private sector

8.2.2 Scope of strategy

The strategy has four core elements:

- Electronic public procurement: Promoting electronic communication in the relation between the private suppliers and public buyers. The strategy calls for a far more efficient public sector in close partnership with private businesses. Various initiatives have been made already. For example the establishment of the Public Procurement Portal (DOIP) in the beginning of 2002 (see below).
- Safety and increased knowledge on e-commerce: Technical and legal insecurity are main barriers for making use of the full potential for e-commerce. Various projects have been put in effect (see later).
- Legal and technical e-commerce infrastructure: Coordinating the effort concerning standardization of data exchange for example in the area of e-payment.
- International dimensions within e-commerce: A major part of e-commerce is cross-border trading. This has lead to a focus on customs barriers, etc. Various projects have been initiated in relation to European initiatives.

In addition, the regional and local players have a high priority on electronic commerce and digital government/administration. A new strategy (February 2004) from the Danish government and the coalition of municipalities includes guidelines for digitizing towards 2006.

Levels of government involved	National, regional and local government are included in the strategies.
Legal framework	No information
Allocated resources	Public investment has been made to introduce e-public procurement, but there is no available specification of the amount spent (or allocated).
Time frame	Year of fulfilment has not been specified

8.2.3 *Existing guidelines*

As part of its modernization program for the public sector (from 2003), a guide on public procurement was published including guidelines on electronic procurement. It is required that all state institutions use electronic procurement whenever possible and of economic advantage to the state.

- "The digital supplier" (Ministry of Science, Technology and Innovation, 2002)[105]: Specific guidelines on electronic public procurement for the private supplier. Recommends DOIP.
- "The digital buyer" (Ministry of Science, Technology and Innovation, 2002): Specific guidelines on electronic public procurement for the private and public buyer at all levels of administration. Recommends DOIP but is open to the fact that the buyer might also use other systems.
- "Public procurement Guidelines" (Ministry of Finance, 2003)[106]: General guidelines on public procurement in the national administration. The target group is buyers in the public sector. No recommendations on solutions.

8.3 Legal framework

8.3.1 *Legal status of the use of electronic means in Public Procurement*

According to National Procurement Ltd., ETHICS fulfils the requirements of the forthcoming EU public procurement directives. DOIP shouldn't conflict with the directives either, but it remains to be seen when further guidelines, etc. will be published.

Buyer profiles to publish tender-related information on a 'buyer profile' are being used in systems such as DOIP, KMD and RAKAT.

8.3.2 *Implementation of the Directives*

The forthcoming EU public procurement directives are expected to be implemented in the beginning of 2005. Public procurement is regulated in national legislation, and follows the EU public procurement directives. Use of electronic means in the public procurement process falls within the general rules for entering into an agreement.

With the new EU directives, the Danish government will provide that Contracting Authorities may use electronic auctions and dynamic purchasing systems. However, a restriction on electronic auctions is foreseen on works contracts.

[105] See www.videnskabsministeriet.dk

[106] See http://www.moderniseringsprogram.dk/visArtikel.asp?artikelID=5462

8.3.3 *Status of tools*

Public procurement portal(s)	www.doip.dk is provided by Gatetrade and was launched in 2002. The portal is a web-based system based on Oracle exchange software. The current version supports: e-auctions, e-catalogues and integration with back-office systems.[107]
	www.rakat.dk is run by the private company COMCARE. Functionalities are mainly e-purchasing (ordering and electronic invoice). Up to 40 regional and local authorities have selected RAKAT.
	KMD Webindkøb (www.kmd.dk) is run by the private company KMD. Functionalities are mainly e-purchasing (ordering and electronic invoice). Up to 70 regional and local authorities have selected KMD Webindkøb.
	ETHICS (http://ski.ethics.dk/), www.netkatalog and www.netindkøb is operated by National Procurement Ltd. Functionalities on these portals include e-tendering.
Electronic signature	An electronic signature has been introduced (www.digitalsignatur.dk), but not been used for electronic public procurement.
Electronic catalogues	Electronic catalogues are being used.
Electronic auctions	Electronic auctions are being used to a low extent.
Dynamic Purchasing Systems	There is no experience with dynamic purchasing systems.
Framework agreements	Framework agreements are used on national, regional and local level of government.

8.3.4 *Reference to the relevant legal acts*

Information unavailable since special rules do not exist.

8.4 Current usage of electronic means in Public Procurement

8.4.1 *Practical use of electronic means in Public Procurement*

Electronic public procurement is not being monitored specifically, but other data on e-commerce are available:

- 54% of state authorities use an e-procurement system.
- 63% of regional authorities use an e-procurement system.
- 34% of local authorities use an e-procurement system.

Source: "*IT i praksis*® *2003*", RAMBOLL Management

Moreover, turnover at the Public Procurement portal (DOIP) increased to approximately 5 million Euro in 2003, which represented a significant increase.

[107] IDA "State of the Art Report. Version 0.60" Brussels (2004)

8.4.2 Which phases of procurement are covered?

The following is the status for automating procurement phases in Denmark:

- Notification about tenders (to a large extent today)
- Publication of tenders (to some extent today, but a further increase the next three years is expected)
- Management of receipts/submission of tenders (to a low extent today, a further increase the next three years is expected)
- Evaluation of tenders (to a low extent today, a further increase the next three years is expected)
- Ordering (to some extent today, a further increase the next three years is expected)
- Invoicing (to a low extent today, a further increase the next three years is expected)

8.5 Raising awareness & Promotion of electronic means

Several initiatives have been started to provide free help-desk for public organizations, establish interest in e-commerce in smaller municipalities and counties through campaigns and workshops, set off pilot projects and collect best practice, and create a special award for best e-merchant every year.

Various projects have been put in effect in the area of safety and knowledge, including the e-brand ("E-handelsmærket"), to help small and medium-sized businesses start e-commerce.

Generally, international standards are followed, implemented and translated, e.g. EDI/EDIFACT and XML. Danish Standards Association has established a special working group on e-public procurement (Group 380 on e-business). Standard formats for all public contracting authorities on tendering or purchasing have not yet been issued.

The Danish Ministry of Science, Technology and Innovation has chosen XML as the core communication standard in the public sector (Source: Handlingsplan for e-handel 2002).

A XML project consisting of two main sub-projects was started:

- Standardizing public data. The main target to determine standards for exchanging data between public authorities and between public and private institutions/organizations.
- Establishment of the Infostructurebase has, as the key objective, to create a database with information on the content of public databases and how to access these data. (Source: http://www.oio.dk/XML). The main purpose and value is to support exchange and reuse of data related to public and private service delivery.

It is the vision that it will be possible from this website to look up all the above types of information from public and private organizations, and thus to collect information about what data are available and how data are accessed. An important part of the content will be standards approved by the Danish e-Government IT-architecture and XML committees. The formal status of content will be part of the metadata of the content. (Source: http://isb.oio.dk/info/)

In January Denmark became the first country to adopt an early version of OASIS Universal Business Language (UBL) as a standard for e-Commerce in the public sector. Following a 30-day public hearing, the Danish XML Committee decided to use UBL 0.7 to enable integration between systems controlled by state authorities and the Pub-lic Procurement Portal (DOIP). UBL provides an XML library of common business data components together with a set of standard business documents such as purchase orders and invoices that are assembled from the component library.

Another project on establishing standards for e-commerce in Denmark is translating the international UNSPEC coding initiated by the Ministry of Science, Technology and Innovation.

9. Estonia

9.1 Organisations and Institutions

There are only few core actors in the field of electronic public procurement in Estonia. It is mainly a State level initiative and it is in the phase of beginning.

Responsible institution(s) for public procurement policy	Ministry of Finance (www.fin.ee)
Responsible institution(s) for legal aspects	Ministry of Finance (www.fin.ee)
Responsible institution(s) for technical solutions	Ministry of Finance (www.fin.ee)
Central procurement institution(s)	-
Other important organisations	-
Type of coordination between different institutions	The selection of suppliers is the responsibility of the individual public institutions – there is no central procurement body which is responsible for framework agreements etc.

9.2 Strategy

Development of e-public procurement is a priority and a strategy on e-public procurement is expected to be formulated and introduced in 2005[108].

9.2.1 Statement of objectives

The process of drafting of new Public Procurement Act has been started to transpose the new directives. In the new Public Procurement Act the principles of e-public procurement will be provided[109]. By introducing e-public procurement achieving such objectives like additional transparency, lower transaction costs and more effective supervision are expected.

[108] Based on interview with Mr. Märt Kiisel, State Aid and Public Procurement Division, Financial Policy Department, Ministry of Finance

[109] Based on interview with Mr. Märt Kiisel, State Aid and Public Procurement Division, Financial Policy Department, Ministry of Finance

9.2.2 *Scope of strategy*

The content of the strategy has not been formulated.

Levels of government involved	Information unavailable
Legal framework	Information unavailable
Allocated resources	Information unavailable
Time frame	Information unavailable

9.2.3 *Existing guidelines*

Basic guidelines for using the electronic Public Procurement State Register have been issued. Guidelines are improved continually.

9.3 Legal framework

9.3.1 *Legal status of the use of electronic means in Public Procurement*

Public Procurement Act and Government Regulation establishing the Public procurement State Register cover rules for e-notifying via Public Procurement State Register. Rules for communication (e.g. e-mailing, using of e-signature) and moreover storage of data are regulated by other legal acts.

9.3.2 *Implementation of the Directives*

The new directives on public procurement are expected to be transposed by the end of 2005[110]. Issues concerning use of electronic means in e-public procurement are already regulated with different legal acts e.g. the electronic signature.

In course of transposing the principles of the new public procurement directives into national law no restrictions for using e-public procurement systems described in the directives have been planned (contracting authorities may use in the public procurement process all e-public procurement systems described in the directives - e-auctions, dynamic purchasing systems, e-catalogues etc.). In the area of standards no specific provisions have been planned.

[110] Based on interview with Mr. Märt Kiisel, State Aid and Public Procurement Division, Financial Policy Department, Ministry of Finance

9.3.3 Status of tools

Public procurement portal(s)	The Public Procurement State Register (established in 2001, http://register.rha.gov.ee/) is a simple e-public procurement portal, where all public procurement notices are published electronically. The register is using CPV standards in the catalogue, and all the information in the register is publicly accessible via internet free of charge.
Electronic signature	Electronic signature has been introduced, but is being used to low extent. However, it will be made mandatory to use the e-signature to participate in public calls for competition.
Electronic catalogues	No experience with e-catalogues.
Electronic auctions	No experience with e-auctions.
Dynamic Purchasing Systems	No experience with dynamic purchasing systems.
Framework agreements	Information unavailable.

9.3.4 Reference to the relevant legal acts

Public Procurement Act, Databases Act, Digital Signature Act, Administrative Procedure Act.

9.4 Current usage of electronic means in Public Procurement

9.4.1 Practical use of electronic means in Public Procurement

In 2003 the number of procurements advertised via Public Procurement State Register was 4,859 with the value declared of EUR 663 Million.

9.4.2 Which phases of procurement are covered?

Till now there is covered only publicising phase of the public procurement notices. Further impact of the use of electronic means in public procurement has not been assessed yet, but it is planned to measure impact of electronic public procurement in the future. The following aspects will be assessed: number of electronic transactions, types of purchases, transaction costs, effect on price and number of bidders.

9.5 Raising awareness & Promotion of electronic means

Information unavailable.

10. Finland

10.1 Organisations and Institutions

The main institutions in the field of electronic public procurement are:

- Ministry of Finance
- Ministry of Trade and Industry
- Ministry of Transport and Communication
- Hansel Ltd.

Responsible institution(s) for public procurement policy	Ministry of Finance[111]
Responsible institution(s) for legal aspects	Ministry of Trade and Industry[112]
Responsible institution(s) for technical solutions	Ministry of Finance Ministry of Trade and Industry
Central procurement institution(s)	Hansel Ltd.[113]
Other important organisations	The Finnish Association of Local Authorities Finnish Information Society Development Centre (Tieke)
Type of coordination between different institutions	Public Procurement in Finland is organized as a mixture of a centralized and decentralized approach: • There is a central public procurement body for state entities, Hansel Ltd (www.hansel.fi). Hansel is a government owned public procurement company. • It arranges framework contracts which can be used by all state authorities[114] in Finland. However, individual public authorities are free to arrange individual framework agreements (buying through or with help of Hansel is not compulsory). • Procurement (selection of suppliers) is a responsibility of the individual public authority.

[111] Ministry of Finance is responsible of policymaking with regard public procurement in general which includes eProcurement; the ministry is also responsible for development of electronic administration

[112] Ministry of Trade and Industry is responsible of legal framework for public procurement in general which includes also implementation of new electronic measures/procedures from new public procurement directives

[113] Hansel is a state owned central purchasing authority

[114] Municipalities are not allowed to buy direct (without competition) from Hansel. Hansel is central purchasing body only for state entities.

10.2 Strategy

The government procurement strategy was published in January 2004, and the government's "Information Society Programme" in April 2004.

Initiatives on e-public procurement are integrated in the government's overall strategy on public procurement. According to it utilization of information technology is one element when developing public procurement and its eProcurement policies and procedures. Pilot projects will be initiated to improve procurement procedures and utilization of information technology.

The municipalities are independent and the government procurement strategy does not apply to them. They do not have a common procurement or e-procurement strategy. However, municipalities are more and more cooperating when doing or developing procurement.

10.2.1 Statement of objectives

The overall objective is to take advantage of information technology to enhance effectiveness of public procurement

10.2.2 Scope of strategy

Levels of government involved	Procurement strategies cover only central government
Legal framework	Is at the moment under renewal. First draft of the new pp law shall be at the end of October 2004. Deadline for implementation is the end of 2005.
Allocated resources	Public resources are allocated but specific information concerning the size of the amount is unavailable
Time frame	-

10.2.3 Existing guidelines

A recommendation for electronic public procurement has been issued on electronic invoicing - another on electronic ordering is being prepared.

10.3 Legal framework

10.3.1 Legal status of the use of electronic means in Public Procurement

None of the current e-procurement systems are expected to fulfil the requirements of the forthcoming EU public procurement directives fully (e.g. systems for the entire procurement process and digital signature), but it remains to be seen when further guidelines etc. are published.

10.3.2 Implementation of the Directives

The forthcoming EU public procurement directives are expected to be implemented in 2005. Public procurement is regulated in national legislation, which follows the EU public procurement directives. Use of electronic means in the public procurement process falls within the general rules for entering into an agreement.

10.3.3 Status of tools

Public procurement portals[115]	www.ktm.fi/julma Responsible authority is Ministry of Trade and Industry and the portal is run by the private undertaking Edita Oy. Functionality includes information and notices concerning public procurement below the threshold value.
	www.credita.fi The portal contains information concerning publication of notices especially above the threshold value. It also provides information about public procurement. The portal is run by the private undertaking Edita Oy.
Electronic catalogues	Electronic catalogues are used when purchasing goods[116]
Electronic auctions	E-auctions are not being used
Electronic signature	An official electronic signature has been introduced in Finland, but so far it has not been used for electronic public procurement[117]
Dynamic Purchasing Systems	Dynamic purchasing systems are not being used
Framework agreements	The total procurement through national framework contracts is not known precisely, but it is estimated to be 5% or below.

10.3.4 Reference to the relevant legal acts

The Act on Public Procurement; the Act on Electronic Signatures.

10.4 Current usage of electronic means in Public Procurement

10.4.1 Practical use of electronic means in Public Procurement

The annual value of public procurement in Finland is about EUR 19 billion which is about 15% of the GDP. Electronic public procurement is not being monitored.

The most significant advantages from the introduction of electronic public procurement for public authorities are expected to be:

- Speeding up of procurement procedures
- Lower transaction costs
- Better procurement statistics and enhanced budgetary control.

[115] Hansel Ltd (www.hansel.fi) once operated a complete system for electronic tendering and procurement but due to lack of turnover, the system is no longer in operation.
[116] Catalogues are usually suppliers own
[117] Information is available at the internet (Population Register Centre): www.vaestorekisterikeskus.fi/vrk/home.nsf/pages/index_eng

Initiatives which are primarily focused on information and tools about electronic public procurement include:

- www.kilpanet.fi: Provides information and models concerning public procurement in the field of services. It is run by private local authorities owned undertaking Efectia Oy.
- www.hymonet.com: This includes information and models concerning environment issues in connection to public procurement. It is run by private local authorities owned undertaking Efectia Oy.
- www.kunnat.net: Provides much information on public procurement legal issues. It is the Finnish local authority portal.

10.4.2 Which phases of procurement are covered?

The status for automating procurement phases in the Finland is as follows:

- Notification about tenders (to a large extent today)
- Publication of tenders (to some extent today, but a further increase the next three years is expected)
- Management of receipt/submission of tenders (to some extent today, but a further increase the next three years is expected)
- Evaluation of tenders (to a low extent today, but a further increase the next three years is expected)
- Ordering (to a low extent today, but a further increase the next three years is expected)
- Invoicing (to a low extent, but a further increase the next three years is expected).

Notification is the phase of public procurement which has been automated the most via the Credita and Julma portals, whereas the more advanced stages of electronic procurement are only automated to a low extent. Most frequently used electronic tools are e-mail and internet based ordering.

10.5 Raising awareness & Promotion of electronic means

Electronic means will be promoted when implementing public procurement strategy for central government and Information Society Programme. A recommendation for electronic invoice has and will be promoted.

New projects have started also in municipal sector. It is worth to mention i.e. Juhk e–project, which has started on spring together with about 10 municipals and Finnish Association of Local Authorities, private enterprises etc stakeholders. The aim is to promote e-procurement’s implementation among municipals starting from guide lining e-invoicing, e-ordering partly even to tendering procedures. Target is not however to develop any new purchasing system.

11. France

11.1 Organisations and Institutions

The responsibility for the e-public procurement activities in France are shared between mainly two government bodies:

- the Agency for the Development of Electronic Administration (*Agence pour le Développement de l'Administration Électronique – ADAE*)[118], under the direct authority of the Prime Minister, which has drafted the electronic administration strategy and action plan (ADELE); and
- the Ministry for Economy, Finance and Industry.

Responsible institution(s) for public procurement policy	Ministry for Economy, Finance and Industry
Responsible institution(s) for legal aspects	Ministry for Economy, Finance and Industry, Legal Department
Responsible institution(s) for technical solutions	Agency for the Development of Electronic Administration
Central procurement institution(s)	Union de Groupements d'Achats Publics (UGAP) [119] which local, regional and national authorities can make use of, will allow bidders to submit tenders electronically through State solution.
Other important organisations	Ministry of Defence
Type of coordination between different institutions	The selection of suppliers, however, remains within the responsibility of individual public institutions

Within the ministry for Economy, Finance and Industry, a Mission for the Digital Economy (*Mission pour l'Economie Numérique*) (www.men.minefi.fr) has been created for five years to play a concertation role between the public and the private sector. It contributes to inter-ministerial initiatives to adapt the legal framework to the digital economy and prepares the French position in multilateral negotiations and at EU level. It is divided into working groups, of which group no. 7 "Dematerialisation of public procurement and of settlement of public expenditure"[120] works on these issues. Legal affairs are dealt with by the legal department of the ministry (*Direction des Affaires Juridiques*), while the development of e-public procurement solutions are coordinated between ADAE and the ministries (Defense will joint later as they have their own solution).

[118] See http://www.adae.gouv.fr

[119] See http://www.ugap.fr/

[120] *Dématérialisation des achats publics et de l'exécution de la dépense publique*; http://www.men.minefi.gouv.fr/webmen/groupetravail/g7.html

11.2 Strategy

E-public procurement enjoys medium priority in France as it is not promoted by a minister, but is the fruit of cooperation between several ministries[121]. The e-public procurement strategy of the French government is therefore twofold: It forms part of the e-government and information society initiatives made public at large scale, but is also part of efforts to generally modernise the national public procurement system. There is no separate strategy for e-public procurement.

- The governmental modernisation plan "Administration électronique 2004/2007" (ADELE), launched in February 2004 by the Prime Minister. The project is one of 140 measures which are part of the plan.

- Reforms of the Public Procurement Act (Code des marchés publics) in 2001 and 2004. This law includes the objective that all public entities have to accept electronic bids by 1 January 2005, whereas enterprises are free to use electronic means or paper. No obligation for businesses is introduced by the reforms.

11.2.1 Statement of objectives

Main objective is to publish all calls for tenders electronically by 2010. This objective is part of the project "100% Dématerialisation", which covers the whole procurement chain including control, payment and archiving, is anticipated for 2007-2010).

Besides the development of electronic tools, the other objectives of the project are reengineering of process and training in order to professionalize the buyer function.

Another objective is introduction of e-tendering by 2005.

11.2.2 Scope of strategy

Levels of government involved	Central, regional and local government are included in the strategies for procurement. Also public enterprises are covered by the initiatives
Legal framework	Public Procurement Code
Allocated resources	Approximately EUR 2 million has been allocated for the introduction of operational electronic procurement at national level The Ministry of Defence has allocated approximately EUR 4 million over the last 3 – 4 years In 2005, EUR 1 million is earmarked for using on an inter-ministerial platform
Time frame	2004-2005 2005-2008

[121] In France called 'dematerialisation of public procurement'

11.2.3 Existing guidelines

A guide for dematerialization will be published in September, 2004. It will be based on legal framework developed and interpreted through working group managed by Ministry of Economy and ADAE.

11.3 Legal framework

11.3.1 Legal status of the use of electronic means in Public Procurement

The use of electronic means for communication in the public procurement process are regulated by French national legislation, covering rules applicable to communication, storage of data and use of specific procedures. This was already done with the reform of the *Code des marchés publics* in 2001, however, the provisions have been formulated in a very open way, in order not to freeze the *status quo* and thereby prevent technological development and innovation.

11.3.2 Implementation of the Directives

The systems developed in France are very nearly compliant with the requirements of the forthcoming EU public procurement directives. While part of the directives requirements have already been taken into account for the 2001 and 2004 reform of the *Code des marchés publics*, it is expected that the directives will be fully implemented by autumn 2005. Electronic auctions are allowed in France and used, among others, by the Ministry of Defence. Dynamic Purchasing Systems are not allowed yet, but the directives' provisions will be implemented, as well as the ones on the "buyer profile". No national standards on electronic exchange of data will be introduced in order not to prevent evolution, and it is expected that standards will be developed at EU level.

11.3.3 Status of tools

Apart for State administration, there is no central e-public procurement portal for all national (and sub-national) public entities in France, so that local and regional authorities have launched their own activities, sometimes by joining forces where appropriate. They will nevertheless be able to access to State administration platform trough UGAP, customer of the same market.

Public procurement portals	The French Ministry of Defence has developed an electronic market place, called *Service public Défense*, consisting of two e-public procurement portals. • One of these portals relates to the purchase of current supplies and support material (www.achats.defense.gouv.fr) • whereas the other is specifically dedicated to the purchase of armament, ammunition and war material (IXARM) (http://www.ixarm.com) All prior information, tender and award notices are published on these websites which also contain a search engine as well as an alert system for businesses who register on the website. Also procurement contracts that do not have to be published feature on the ministry's portal, and terms of reference can be consulted online. There is a possibility for enterprises to present their services and products as well as available information on conclusion and settlement of public procurement contracts. Finally, companies can submit their expressions of interest and bids electronically, through a secured tendering system with time-stamping of the digital signature. The investment costs of the ministry's portals amount to EUR 4 million for the last three or four years.
	The French Ministry of Equipment, Transport, Housing, Tourism and Maritime Affairs offers it own public procurement portal, called "*Serveur d'appels d'offres et de marchés publics*" (SAOMAP) (http://saomap.application.equipement.gouv.fr/saomap_public). Businesses can search tender all over the French territory, consult tender material and communicate it to sub-contractors. Twelve services of the ministry are already using the service which allows them to publish calls for tender, tender material and other information. It is expected that all service will do so before end of 2004
	All ministries are currently working, under the aegis of the Ministry of Economy, Finance and Industry and the Agency for the Development of Electronic Administration, on an inter-ministerial platform for e-public procurement. It will, for legal reasons, not be open to regional or local public entities except through Union de Groupements d'Achats Publics, but only for national ministries. The portal will be set up in third quarter 2004 and should be operational by 1st quarter 2005. The budget for this project is about EUR 1 million
	Several General Councils (at department level), for instance *Conseil general de la Moselle*[122], or Conseil général de l'Oise have established their own e-public procurement portals. An accompanying ministerial project for regional and local entities as well as public enterprises is designed to favour exchange of best practice between public authorities. The *Observatoire de l'Administration Electronique* identifies best practices in the field of e-public procurement among others and awards the Prix Hourtin to outstanding portals
Electronic signature	About 16 certificate families from the private sector have been referenced by the Ministry of Economy, Finance and Industry for use in general electronic procedures, among which e public procurement.

[122] http://marches-publics57.com

Electronic catalogues	The Ministry of Defence also has experience with electronic catalogues
Electronic auctions	The Ministry of Defence and certain local authorities have experience with using e-auctions.
Dynamic Purchasing Systems	Dynamic purchasing systems have not been used
Framework agreements	No framework contracts are being used for the time being since they are not permitted by law.

11.3.4 Reference to the relevant legal acts

Public procurement code

11.4 Current usage of electronic means in Public Procurement

11.4.1 Practical use of electronic means in Public Procurement

So far, only the Ministry of Defence has introduced e-public procurement on a wide scale, assessing in particular, the number of electronic transactions, the speeding-up of procurement procedures, transaction costs and e-procurement's share of the total public procurement volume. The reduction of costs for companies should also be included in the assessment. The Ministry of Equipment has also obtained interesting results reducing publishing costs.

No assessment is as yet planned for the inter-ministerial platform, but there will probably be a regular monitoring of activities. France expects that the introduction of e-public procurement will significantly lower transaction costs and prices through increased competition and reduction of the cost of public procurement for administration and businesses etc.

11.4.2 Which phases of procurement are covered?

So far, only the first phases in the public procurement cycle, i.e. notification and publication of tender, have been automated, at least to some extent. Pilot projects have been launched for dematerialisation of ordering and invoicing, and the management of receipt as well as the evaluation of tender is expected to be done automatically within 3 years.

11.5 Raising awareness & Promotion of electronic means

There are a number of initiatives at the state and local level as well as in the private sector to increase awareness of the benefits of e-public procurement.

12. Germany

12.1 Organisations and Institutions

Responsible institution(s) for public procurement policy	The Ministry of Economics and Labour (www.bmwa.de) and the Ministry of the Interior (www.bmi.de) are the overall responsible authorities in the area of e-procurement.
Responsible institution(s) for legal aspects	Ministry of Economics and Labour (www.bmwa.de)
Responsible institution(s) for technical solutions	Ministry of the Interior (www.bmi.de)
Central procurement institution(s)	Procurement Office of the Federal Ministry of the Interior (Beschaffungsamt, www.bescha.bund.de) manages purchases for 26 different federal authorities, foundations and research institutions. It runs a pilot project called "Öffentlicher Eink@uf Online" (Public Purch@sing Online). The project sets out a path for electronic procurement. From February 1st it is possible to transfer the offers electronically (www.evergabe-online.de). Federal Office of Defense Technology and Procurement (Bundesamt für Wehrtechnik und Beschaffung) of the Federal Ministry of Defense (www.bmvg.de). Federal Customs Administration (Beschaffungsamt der Bundeszollverwaltung) of the Federal Ministry of Finance (www.bundesfinanzministerium.de)
Other important organisations	Several private providers offer either software products which support electronic procurement, e.g.: • www.beschaffen.de: Beschaffen.de is provided by the company Wegweiser and offers a platform for purchasers of the public authorities to find e-procurement solutions according to their needs. • www.ai-ag.de: Administration Intelligence AG (AI-AG) offers electronic pro-curement solutions for a public procurement law-conforming handling of public tenderings. • www.bos-bremen.de: bremen online services (bos) GmbH & Co. KG develop and implement eGovernment solutions for the German Federal Government, the federal states and local governments. ...or online databases for public as well as private purchasers, e.g. • www.vergabereport.de: offers two online databases with calls for tender. It serves also as an information portal. ...or both supporting products and online databases, e.g.: • www.cosinex.de: Cosinex.de has been the first private provider for electronic public procurement. It offers the public authorities support for the realization of a strategic management of procurement.

	- www.subreport.de: Subreport.de is the biggest platform for e-procurement. About 98% of all public tenders can be found. Subreport.de is the first Internet platform for a complete digital awarding of contract. A registration is required.
Type of coordination between different institutions	It is the responsibility of each of the 16 Länder to implement e-procurement strategies on the basis of a close co-ordination between the state, the other Länder and the Kommunen (local governments). So far each of the Länder are developing or already have developed and implemented a strategy (see www.deutschland-online.de/Links/links.htm). Some of the most advanced Länder as regards e-government strategies are Nordrhein-Westfalen, Baden-Württemberg, Bavaria, Lower Saxony and Bremen. Hamburg was the first to implement its e-procurement strategy[123]

12.2 Strategy

Electronic public procurement is highly prioritized in Germany. E-public procurement initiatives are part of an overall strategy to develop the information society and create e-government.

In September 2000 the initiative ”BundOnline 2005” that also include e-procurement was started by Federal Chancellor Gerhard Schröder. More than 100 individual authorities and departments of the Federal Administration are taking part in the project.

To overcome the heterogeneous IT-landscape of Germany, the relevant players have agreed on a joint e-government strategy in June 2003 (“Deutschland-Online”). The aim of the joint ”Deutschland-Online” e-government strategy is to develop integrated electronic services on all administrative levels as well as to create the standards and infrastructures which are necessary. In addition to this strategy, the government in autumn 2003 decided on the program of action ”Information Society Germany 2006”. The objective of this procurement-focused program is to have a Federal Government's contract-awarding procedure exclusively via a secure e-tendering system in line with legal requirements by the end of 2005.

12.2.1 Statement of objectives

Overall objectives are:

- Achieve greater efficiency and transparency, and cut costs in the tendering cycle
- Develop integrated electronic services on all administrative levels and create standards and infrastructures
- Secure e-tendering system by the end of 2005
- Public sector strives to be the pioneer in the field of e-business in Germany

[123] See http://fhh.hamburg.de/stadt/Aktuell/behoerden/finanzbehoerde/ausschreibungen/e-vergabe/start.html

12.2.2 *Scope of strategy*

Levels of government involved	The strategies include central government
Legal framework	-
Allocated resources	At state level, the public authorities allocate approximately EUR 4.5 million per year to introduce operational electronic procurement
Time frame	-

12.2.3 *Existing guidelines*

Public procurement portals	The official online database for public tendering on the Federal level is titled Bundesausschreibungsblatt online, www.bundesausschreibungsblatt.de
	"E-Vergabe", www.evergabe-online.de has been developed by the Ministry of Economics and Labour (BMWA) together with the Ministry of the Interior (BMI). E-vergabe is an online database with call for tenders. From February 1st it is possible to transfer the offers electronically.
	Several Länder own an online database with call for tenders, e.g. • Nordrhein-Westfalen (www.vergabe.nrw.de), • Hessen (www.had.de), • Brandenburg together with Berlin (www.ausschreibungen-brandenburg.de), • Hamburg (www.ausschreibungen.hamburg.de), • Bayern (www.bayerischer-staatsanzeiger.de), • Sachsen-Anhalt (www.ausschreibungsanzeiger.com), • Thüringen (www.ausschreibungsanzeiger-thueringen.de)
	Another leading electronic public procurement platform for public and private calls for tenders is www.ausschreibungs-abc.de
Electronic signature	Advanced qualified electronic signature has been introduced
Electronic catalogues	There exists an electronic catalogue on behalf of the Federal Ministry of the Interior and its Procurement Office, which is called "Öffentlicher Eink@uf Online".
Electronic auctions	E-auctions are not a legal possibility
Dynamic Purchasing Systems	Dynamic purchasing systems are not a legal possibility
Framework agreements	-

The Ministry of Economics and Labor has published a guide on electronic public procurement (www.bmwa.bund.de/Redaktion/Inhalte/Downloads/br-elektronische-vergabe-von-auftraegen,property=pdf.pdf). It is required that all state institutions use electronic procurement whenever possible and of economic advantage to the state. In December 2003 the Federal Government has taken a cabinet decision initiating an optimization of public procurement with the means of new information technology. The cabinet decision aims to realize a thorough digitalization of the procurement process and to establish a virtual marketplace (Kaufhaus des Bundes) on the basis of framework agreements.

12.3 Legal framework

12.3.1 Legal status of the use of electronic means in Public Procurement

Multiple legal acts regulated e-public procurement at present time (see below).

12.3.2 Implementation of the Directives

The forthcoming EU public procurement directives are expected to be implemented by the end of 2005. The storage of data is regulated by national legislation. With the new EU directives, Germany expects the government to provide that Contracting Authorities may use electronic auctions (with the possible exception of works contracts) and dynamic purchasing systems. Buyer profiles to publish tender-related information are being used by Contracting Authorities in Germany.

The use of an electronic signature will be made mandatory to participate in public calls for competition

12.3.3 Status of tools

Public procurement portals	The official online database for public tendering on the Federal level is titled Bundesausschreibungsblatt online, www.bundesausschreibungsblatt.de
	"E-Vergabe", www.evergabe-online.de has been developed by the Ministry of Economics and Labour (BMWA) together with the Ministry of the Interior (BMI). E-vergabe is an online database with call for tenders. From February 1st it is possible to transfer the offers electronically.
	Several Länder own an online database with call for tenders, e.g. • Nordrhein-Westfalen (www.vergabe.nrw.de), • Hessen (www.had.de), • Brandenburg together with Berlin (www.ausschreibungen-brandenburg.de), • Hamburg (www.ausschreibungen.hamburg.de), • Bayern (www.bayerischer-staatsanzeiger.de), • Sachsen-Anhalt (www.ausschreibungsanzeiger.com), • Thüringen (www.ausschreibungsanzeiger-thueringen.de)

	Another leading electronic public procurement platform for public and private calls for tenders is www.ausschreibungs-abc.de
Electronic signature	Advanced qualified electronic signature has been introduced and is presently used to some extent.
Electronic catalogues	There exists an electronic catalogue on behalf of the Federal Ministry of the Interior and its Procurement Office, which is called “Öffentlicher Eink@auf Online”.
Electronic auctions	E-auctions are not a legal possibility
Dynamic Purchasing Systems	Dynamic purchasing systems are not a legal possibility
Framework agreements	-

12.3.4 *Reference to the relevant legal acts*

At present the legal framework for e-public procurement is among other things based on:

- „Gesetz über Rahmenbedingungen für elektronische Signaturen (Signaturgesetz – SigG)“ of 16. May 2001 (BGBl. I S. 876)
- Signaturverordnung vom 16. November 2001 (BGBl. I S. 3074)
- Verordnung über die Vergabe öffentlicher Aufträge in der Fassung vom 11.Februar 2003 (BGBL I, S.169) – im Besonderen § 15 VgV.
- Anpassung der Verdingungsordnungen (VOL/A Abschnitt 1 und VOB/A[124]) (in order to implement directive2001/78/EC)
- "Gesetz zur Anpassung der Formvorschriften des Privatrechts und anderer Vorschriften an den modernen Rechtsgeschäftsverkehr" – Formvorschriften-Anpassungsgesetz. Implementation 1. August 2001 (BGBL I Nr. 35 vom 18. Juli 2001)

12.4 Current usage of electronic means in Public Procurement

12.4.1 *Practical use of electronic means in Public Procurement*

Every year, the approximately 600 awarding offices of the Federal Government buy products and services worth around EUR 63 billion.
In January 2004, nine federal authorities, as well as state and communal authorities, used eTendering.

Monitoring of the up-take and progress of e-public procurement is carried out on an annual basis by a questionnaire to a Working Committee of all government departments. The following aspects are watched: Transaction costs and the effect on prices.

[124] See http://www.bmwi.de/Navigation/Wirtschaft/Wirtschaftspolitik/Oeffentliche_20Auftr_C3_A4ge/vergaberecht-vorschriften.html

The resources allocated by public authorities to introducing operational public procurement are also monitored at national level. Other aspects which should be considered in the future are: Number of electronic transaction, e-public procurement's share of total public procurement volume, types of purchases, speeding up of procurement procedures, SME participation and number of bidders.

12.4.2 Which phases of procurement are covered?

The status for automating procurement phases in Germany is as follows:

- Notification about tender (to a large extent)
- Publication of tender (to a large extent)
- Management of receipt/submission of tenders (to a large extent)
- Evaluation of tenders (not automated, but expected to be within two years)
- Ordering (to a large extent)
- Invoicing (to a large extent).

12.5 Raising awareness & Promotion of electronic means

At state level the public authorities allocate approximately EUR 4.5 mio per year to introduce operational electronic procurement. These resources are e.g. used for the development and implementation of software and the support of research dealing with e-public procurement.

Within 2004 it is planned that all electronic public tenders on Federal level will be published on the central portal of the State, www.bund.de

In Germany special advice centers (Auftragsberatungsstellen) impart practical experi-ence and information to enterprises that plan to tender for public contracts. www.abst.de lists every advice centre of each of the Länder. Some local governments have initiated portals, see e.g. Düsseldorf (www.duesseldorf.de/ausschreibung/index.shtml)

The German Association of Towns and Municipalities (www.dstgb.de) decided on electronic procurement regarding trade in co-operation with the Central Organization of German Trade (www.handwerk.de/dstgb). Together with the German Telecom the DSTGB also started an initiative with the goal to identify the chances of small and medium-sized towns regarding their potential to modernize, rationalize and initiate new projects[125].

The Federal Government, the Länder and the municipalities have developed a common architecture for e-government. The e-government standard is called SAGA (Standards and Architectures for e-Government Applications[126]). SAGA defines a series of uniform standards which must be used for the implementation of e-government applications. Furthermore SAGA is included in the "Interoperability Framework" of the IDA-program of the European Union. OSCI (Online-Services-Computer-Interface) as well as ISIS-MTT (Industrial Signature Interoperability and Mailtrust Specification) are two obligatory standards in the Federal Administration which are based on SAGA. Communication standards are XML, HTML and PDF.

[125] See www.dstgb.de/index_inhalt/homepage/index.html

[126] See http://www.kbst.bund.de/Anlage304417/Saga_2_0_en_final.pdf

Another existing e-procurement tool is the Vergabe@Governikus[127]. This is a software solution for the control of the communication and handling of public tenders via Internet. It is possible to publish digital announcements, provide data for placing of contracts by tender (Verdingungsunterlagen) and accept electronic offers.

Vergabe@Work is an electronic management solution for tendering. The control system is form-based and supports the handling of the entire internal process of contract awarding digitally and law-conforming. Vergabe@Work has been specially designed for the application within contracting authorities (www.ai-ag.de). Vergabe@Work is being used by the Ministry of Finance and the Ministry of Defence.

[127] See www.bos-bremen.de/produkte/kap2_6.html

13. Greece[128]

13.1 Organisations and Institutions

Responsible institution(s) for public procurement policy	General Secretariat of Commerce, Ministry of Development
Responsible institution(s) for legal aspects	General Secretariat of Commerce, Ministry of Development
Responsible institution(s) for technical solutions	General Secretariat of Commerce, Ministry of Development
Central procurement institution(s)	General Secretariat of Commerce, Ministry of Development
Other important organisations	-
Type of coordination between different institutions	The selection of suppliers is typically the responsibility of a central procurement body. In some cases the Ministry of Development gives authorization to other ministries and bodies of public sector, to run their own auction. In these cases they are responsible for the selection of suppliers.

13.2 Strategy

In general the introduction of electronic public procurement has a high priority in Greece.

The strategy for the introduction of operational electronic public procurement is an integrated part of the overall strategy on e-government and the development of the information society.

The focus of the strategy is to obtain improved IT skills in public and private sector, speeding up procurement procedures, and to secure lower prices on public procures.

13.2.1 Statement of objectives

The overall objective is to introduce an operational electronic public procurement system in Greece by the end of 2007.

It is planned that about 30% of goods which are awarded from the Ministry of development will be awarded by electronic means by the end of 2008.

[128] This section is based entirely on information from Mr. Spatharis, Ministry of Development

13.2.2 Scope of strategy

Levels of government involved	Central government
Legal framework	Information unavailable
Allocated resources	Information unavailable
Time frame	2004 – 2010[129]

13.2.3 Existing guidelines

No special guidelines for e-public procurement have been issued.

13.3 Legal framework

13.3.1 Legal status of the use of electronic means in Public Procurement

The use of electronic means for communication in the public procurement process will be regulated by national legislation. The following aspects will be regulated: rules applicable to communication, storage of data, use of specific procedures e.g. e-auctions; dynamic purchasing system; open, restricted and negotiated procedures; notification about tender; publication of tender; management of receipt/submission of tender; and ordering.

Operational electronic procurement system does not exist in the public sector in Greece yet. However, a system in compliance with the requirement of the forthcoming directives will be introduced shortly.

13.3.2 Implementation of the Directives

The directives are expected to be implemented in 2006

[129] Estimated number of years for full migration in public procurement to electronic means is 6 years (Source: Based on information from Mr. Spatharis, Ministry of Development)

13.3.3 *Status of tools*

Public procurement portals	www.gge.gr is the public procurement portal (only in Greek) The portal has the following functionalities: Publication of legal framework of public procurement, guidelines on public procurement, central government annual programme of supplies, calls for tendering on monthly basis, contracts on monthly basis.
Electronic signature	Electronic signature has been introduced and is being used to a low extent. However, the use of electronic signature will be made mandatory to participate in public calls for competition.
Electronic catalogues	There is no experience with electronic catalogues
Electronic auctions	There is no experience with electronic auctions
Dynamic Purchasing Systems	There is no experience with dynamic purchasing systems
Framework agreements	Framework agreements are not being used

13.3.4 *Reference to the relevant legal acts*

Information unavailable

13.4 Current usage of electronic means in Public Procurement

Currently, the uptake on electronic public procurement is not being monitored on a regularly basis in Greece.

Hence, there is no information available on the existing usage of electronic means in public procurement.

13.4.1 *Which phases of procurement are covered?*

Information unavailable

13.5 Raising awareness & Promotion of electronic means

Information unavailable

14. Hungary

14.1 Organisations and Institutions

Responsible institution(s) for public procurement policy	Council for Public Procurement (www.kozbeszerzes.hu)
Responsible institution(s) for legal aspects	Council for Public Procurement (www.kozbeszerzes.hu)
Responsible institution(s) for technical solutions	Electronic Government Centre, Office of the Prime Minister (www.magyarorszag.hu)
Central procurement institution(s)	Central Service Directorate is the central procurement body for public procurements at the national level .This institution has responsibility for the selection of suppliers for procurements in public institutions
Other important organisations	-
Type of coordination between different institutions	

14.2 Strategy

Electronic public procurement has been on the Hungarian government's agenda since 2001. At the present the development of an operational electronic public procurement system has a medium priority on the Hungarian government's agenda.

The strategy for introducing an operational electronic public procurement is included in the overall strategy on E-government and Information society among others "Hungarian Information Society Strategy" (HISS), 2002[130].

14.2.1 Statement of objectives

The government has specified overall objectives for introducing electronic public procurement. In a draft plan for secondary legislation these objectives are stipulated and are as follows:

- the harmonization and modernization of the law
- ease of use among wide range of participants
- transparency
- support of centralised procurement

[130] See http://www.ihm.hu/English/_20030211_1.html

14.2.2 *Scope of strategy*

There are different stages in the strategy for the implementation of e public procurement. The first stage concerns strategic procurement on obligatory basis in central government. The second stage is widening the scope toward voluntarily participants and non-strategic procurements.

Levels of government involved	The plan includes a strategy for e-procurement at different levels of the Hungarian public sector, including central-, regional- and local governments
Legal framework	
Allocated resources	Internal government figures exists but cannot be disclosed publicly
Time frame	Implementation of the plan will start in June 2004. Objectives are estimated to be realized in March 2005.

14.2.3 *Existing guidelines*

Specific and detailed guidelines for electronic public procurement are under preparation in Government Decree on the electronically supported activities allowed in public procurement and in special electronic procurement procedures.

14.3 Legal framework

14.3.1 *Legal status of the use of electronic means in Public Procurement*

No national legalization is presently regulating the use of electronic means for communication in the public procurement process. However, legalization is under preparation in *Government Decree on the electronically supported activities allowed in public procurement and in special electronic procurement procedures.*

14.3.2 *Implementation of the Directives*

The Hungarian Government expects that implementation of the forthcoming EU-public procurement directives will take place in 2005.

Future electronic procurement systems will be compliant with the requirements of the forthcoming European Public Procurement Directives. It is estimated that Contracting Authorities will be allowed to use Electronic Auctions according to the Directives. It is not expected that Contracting Authorities will be mandated to implement Dynamic Purchasing Systems. Electronic Auctions are assumed will be used for purchasing MRO goods (Maintenance, Repair and Operations goods) by central government institutions.

The Hungarian Government expects that buyer profiles will be used by Contracting Authorities. Moreover, the government intends to introduce national standards for the electronic exchange of data in the public procurement process. The standards considered relevant are XML and EDI - both EAN compatible.

14.3.3 Status of tools

Public procurement portals	So far a central electronic public procurement portal has been established at www.kozbeszerzes.hu. The website is public owned by the Advertising Agency of the Council of Public Procurement. On this site one can reach the relevant public procurement rules, the Hungarian Official Journal in public procurement and the tender notices, recommendations and information of the Council, information on the Council and its working structure (Secretariat), contact details, international related links.
Electronic signature	An electronic signature has been introduced, but currently the signature is used only to a low extent. It is expected that a full operational electronic signature will be ready for use in March 2005. It is expected that the use of the signature will be mandatory for participating in public calls for competition.
Electronic catalogues	E-catalogues are also used to some extent in order to gather information
Electronic auctions	E-auctions are being used below threshold for experimental purpose
Dynamic Purchasing Systems	Dynamic purchasing systems are not being used
Framework agreements	Framework agreements are not used at the moment.

14.3.4 Reference to the relevant legal acts

Information unavailable

14.4 Current usage of electronic means in Public Procurement

14.4.1 Practical use of electronic means in Public Procurement

At the moment there are no operational electronic procurement systems in Hungary that are compliant with the requirements of the forthcoming European Public Procurement Directives.

The Hungarian government expects to carry out assessments during the implementation of electronic public procurement. The activities which will be assessed include the number of electronic transactions and the speeding up of procurement procedures. Other activities for regular assessments are workflow atomization and the professionalism of the system for electronic public procurement.

14.4.2 Which phases of procurement are covered?

The Hungarian Government expects that a fully automated electronic public procurement system will be available within tree years. The system will include the central elements in electronic procurement: notification about tender, publication of tender, management of receipt/submission of tender, evaluation of tender and ordering. Within five years the government anticipates procedures for invoicing to be an integrated part of the electronic procurement system as well.

14.5 Raising awareness & Promotion of electronic means

Information unavailable

15. Ireland

15.1 Organisations and Institutions

The main institution is The Department of Finance, National Public Procurement Policy Unit. It is responsible for policy formulation and the legal framework for e-procurement.

Responsible institution(s) for public procurement policy	Public Procurement Policy Unit, Department of Finance
Responsible institution(s) for legal aspects	Public Procurement Policy Unit , Department of Finance
Responsible institution(s) for technical solutions	Public Procurement Policy Unit, Department of Finance Centre for Management and Organisation Development, Department of Finance Local Government Computer Services Board • A public sector organisation closely aligned with local government in Ireland • Main task is to provide local authorities with the best solutions to meet all their information and communication technology needs ICT bodies within the Health Sector
Central procurement institution(s)	Government Supplies Agency and Office of Public Works
Other important organisations	Information Society Commission
Type of coordination between different institutions	The selection of suppliers is typically a responsibility of the individual public institution. Some coordination exists in parts of the health sector and in third level educational institutions

15.2 Strategy

Strategies on e-public procurement are integrated in an overall strategy on modernising Public Procurement

- "Strategy for the Implementation of eProcurement in the Irish Public Sector" (2001)
- "Modernising Public Procurement" (2003) (See below)

Arising out of the Government's Action Plan on Implementing the Information Society in Ireland the Department of Finance, in conjunction with the Department of the Taoiseach, identified e-procurement as an essential element in eCommerce, having a role in both:

- Accelerating the transition of the Irish economy to an information society
- Contributing to the attainment of the Government objective of modernizing the public service through the development of new, innovative and more efficient procurement processes.

The government has a Strategy for the Implementation of e-Procurement in the Irish Public Sector approved by Government in April 2002. This strategy emphasized the need for procurement management reform, and points out four aspects to implementation of e-procurement in Ireland. These are:

- Capacity building: organisational capacity to strategically manage procurement effort in order to maximize measurable savings and benefits;
- Training and education developing for public sector staff through targeted procurement training and education to sustain measurable improvements in procurement performance;
- Aggregation: reducing costs by leveraging public sector demand in certain markets; and lastly
- e-procurement systems: improving efficiency through the use of cost effective technologies in support of various aspects of procurement.

15.2.1 *Statement of objectives*

The strategy contains a number of key targets to be achieved by the end of 2007. These include:

- Unit cost reductions of 2.5% of total expenditure on supplies and services and works (repairs and maintenance), arising from reductions in off-contract procurement and aggregation of procurement across agencies;
- Average transaction costs reductions of 5% for supplies services and works (repair and maintenance) as a result of standardisation, streamlining and automation;
- Unit cost reductions of 0.5% of total expenditure on capital works arising from savings in professional fees resulting from efficiency gains in the tender process and contract administration;
- Transaction cost related reductions of 0.25% in overall expenditure on capital works as a result of public sector administrative cost savings;
- 90% of tender competitions (above EU thresholds) carried out electronically;
- 80% of payments carried out electronically;
- 10% of all expenditures on supplies and services supported by electronic catalogue and ordering facilities.

15.2.2 *Scope of strategy*

Levels of government involved	All levels of government included in the national strategies on e-public procurement. Projects are planned for development of a separate e-procurement strategy for local and sector level
Legal framework	The two principal sources of regulation that impact on e-public procurement in Ireland are public procurement regulation and eCommerce regulation. • The public procurement legislative framework consists principally of the EC Treaty, the EU Public Procurement Directives (implemented by was of Statutory Instrument into Irish law) and the World Trade Organisation Agreement on Government Procurement. • The principal sources of eCommerce regulation are the Electronic Commerce Directive, the Electronic Signatures Directive and the Electronic Commerce Act, 2000. The Electronic Commerce Act implements the Electronic Signatures Directive and those parts of the Electronic Commerce Directive dealing with the formation of contracts.
Allocated resources	Approximately € 4 million annually from central allocation during implementation stage of national strategy. Some sectoral projects are funded by other sources
Time frame	The Strategy for the Implementation of eProcurement in the Irish Public Sector originally envisaged targets being achieved by end 2007 but this timeframe is currently being reviewed.

15.2.3 *Existing guidelines*

Public procurement guidelines setting out the steps to be followed in conducting an appropriate competitive process under EU and national rules have been issued. These guidelines encourage the use of the national public procurement website www.etenders.gov.ie.

Guides, help and resources are available on the website for awarding authorities and suppliers that wish to participate in e-procurement.

15.3 Legal framework

15.3.1 *Legal status of the use of electronic means in Public Procurement*

None of the current e-procurement systems presently fulfil the requirements of the EU public procurement directives fully, but the necessary investments are expected to be allocated at a later stage.

15.3.2 *Implementation of the Directives*

The forthcoming EU public procurement directives are expected to be implemented by 2005. The following areas of use of electronic means in the public procurement process are already regulated by national legislation: rules applicable to communication, and storage of data.

With the new EU directives it is expected that the Irish the government will provide that Contracting Authorities may use electronic auctions and dynamic purchasing systems and that these will be generally available. Buyer profiles to publish tender-related information on a 'buyer profile' are expected to be used by Contracting Authorities in Ireland

It is also expected that Ireland will introduce national standards for the electronic ex-change of data in the public procurement process.

15.3.3 *Status of tools*

Public procurement portals	www.etenders.gov.ie is the central government procurement portal. It provides information and tools about electronic public procurement and advertises notices for EU and sub-EU threshold contracts for the Irish public sector including central government, local authorities, Health Boards and hospitals, universities and schools. Developments in 2004 will include an electronic "post-box" to facilitate the electronic transmission of tenders by suppliers; site forums for the different sectors involved in public procurement such as central government, local government, health and education; and more comprehensive guidance material. Other features planned for the duration of the current contract include a pilot online tender evaluation system; and a facility to conduct tender clarifications/discussions between buyers and vendors online. Ireland recently became the first country to have "national" eSender status. The etenders website has a facility for the online creation and submission of OJEU notices.
	www.tendersireland.com (Public Sector Tender Market in Ireland) is a website where all of the procurement opportunities advertised by Central and Local Government in Ireland (North and South) are published on the Tenders Ireland Web Site.
	www.go-source.com (Go-Source) is a webguide for doing business in the public sector in Ireland. Three private companies are responsible for this joint directory of public sector procurement opportunities.
Electronic signature	An official digital signature has not yet been introduced in Ireland and it is unclear when one will be introduced
Electronic catalogues	The public authorities have no experience electronic catalogues. Pilot initiatives on national level are recommended in the strategies, e.g. a pilot project on electronic ordering using electronic catalogues
Electronic auctions	The public authorities have no experience with e-auctions

Dynamic Purchasing Systems	The public authorities have no experience with dynamic purchasing systems
Framework agreements	The public authorities plan to set up broad based framework agreements.

15.3.4 *Reference to the relevant legal acts*

Electronic Commerce Act 2000:

- The purpose of the Act is to create a legal framework by providing a comprehensive piece of legislation which addresses many of the legal issues that have arisen as a result of electronic commerce and facilitate the growth of electronic commerce and electronic transactions in Ireland.
- The Electronic Commerce Act, 2000 provides for the legal recognition of contracts, electronic writing, electronic signatures and original information in electronic form in relation to commercial and non-commercial transactions and dealings and other matters, the admissibility of evidence in relation to such matters, the accreditation, supervision and liability of certification service providers and the registration of domain names, and provide for related matters.

15.4 Current usage of electronic means in Public Procurement

15.4.1 *Practical use of electronic means in Public Procurement*

The total non-payroll procurement spending in the non commercial public sector in Ireland is in the region of € 9 billion per annum of which Central government is responsible for approximately 2.4 billion € of procurement, education 1.4 billion €, health 1.9 billion €, and local authorities 3.1 billion € (2001 figures).

Monitoring of the up-take and progress of e-procurement is monitored regularly focusing on the number of users of the eTenders website and the extent of its usage. The site was launched on a pilot basis in March 2001 and three years of operation have seen its usage increase significantly. As of March 2004 there are close to 20,000 registered suppliers and over 1,700 registered Awarding Authority users (buyers). In 2003 close to 4,500 tender opportunities were advertised on the site.

The resources allocated by public authorities to introduce operational public procurement amounts to 4 million € per year at state level for the implementation of the national strategy, of which 2.5 million € are allocated for capital and 1.5 million € for administration, etc.

15.4.2 *Which phases of procurement are covered?*

The status for automating procurement phases in Ireland is as follows:

- Notification about tender (to a large extent today)
- Publication of tender (to a large extent today)
- Provision of contract documents for downloading electronically (to a large ex-tent today)
- Management of receipt/submission of tenders (to a low extent today)
- Evaluation of tenders (not automated, but a pilot system will be established)
- Ordering (to some extent)

- Invoicing (to some extent)

Generally, notification and publication and downloading of tender documents are the phases of public procurement which have been automated the most, whereas management and evaluation are not or only to a low extent automated.

There is generally little experience with electronic auctions and multi-supplier electronic purchasing systems yet. However, the first electronic catalogue, with information on current contract arrangements, has been developed and is expected to be online very shortly.

15.5 Raising awareness & Promotion of electronic means

In September 2003 a new report from the Information Society Commission was published. Modernising Public Procurement indicated that the Government could potentially save up to 1 EUR billion annually on public procurement. This new report was made because of the slow pace of progress since the former strategy was finalized at the end of 2001. It also acknowledges important developments following from among other things the establishment of the National Public Procurement Policy Unit (NPPPU) in the Department of Finance (in 2003). The key recommendations from the report are:

- Resource the National Procurement Strategy adequately
- Enhance the e-tenders website
- Examine alternative delivery models – including PPP
- Support SME adjustment in line with procurement reform.

Forthcoming initiatives:

A “signpost” website, the “Irish Public Procurement Portal”, will shortly be available and this site will contain links to all websites associated with public procurement in Ireland.

16. Italy

16.1 Organizations and Institutions

Responsible institution(s) for public procurement policy	Prime Minister - Cabinet Office (http://www.governo.it) Ministry of Economic Affairs and Finance - MEF (www.tesoro.it) Local Administrations (for example Regions, Municipalities)
Responsible institution(s) for legal aspects	Prime Minister - Cabinet Office (http://www.governo.it) Ministry of Economic Affairs and Finance (www.tesoro.it) Ministry of Innovation and Technology (www.innovazione.gov.it)
Responsible institution(s) for technical solutions	Ministry of Economic Affairs and Finance (MEF) by means of Consip S.p.A. (www.acquistinretepa.it), a State owned company that operates exclusively to serve Public Administrations. The overall mission of Consip is to ensure that every Public Administration employee will be able to order different categories of goods and services online through web-based technologies. Consip (following the MEF guidelines) is responsible for the development and operation of e-public procurement solutions. Ministry of Innovation and Technology (www.innovazione.gov.it) defines/suggest guidelines to implement e-procurement systems. Local Administrations are able and authorized to develop and implement e-procurement systems.
Central procurement institution(s)	Consip S.p.A. (www.consip.it)
Other important organisations	Every Public Administration can develop and implement specific e-procurement systems
Type of coordination between different institutions	The organization of public procurement contains both centralized and decentralized elements: • There is a central public procurement body, but the establishment of procurement bodies at the regional level is planned . • Procurement (selection of suppliers) is the responsibility of the individual public authority.

16.2 Strategy

Since December 1999, the Italian Government has constantly developed and improved a program for public procurement in the Italian Public Administration. It places a high priority on the introduction of operational e-public procurement.

Strategy on e-public procurement is integrated in an overall plan of introducing e-government and integrated into the program of rationalizing public spending for goods and services e.g. “The Public Spending Rationalization Program” (2000) (Programma di Razionalizzazione della Spesa per Beni e Servizi della Pubblica Amministrazione).

This program deals with the following principles and guidelines:

- Defining purchasing strategies
- Drawing up competitive frame contracts for public administrations
- Delivering innovative e-procurement models
- Promoting the use of e-procurement within the public administration
- Providing purchasing monitoring tools to the public administration that use the framework contracts and other e-procurement systems.

16.2.1 Statement of objectives

The overall goals of the e-procurement program are to:

- Limit a potential "digital divide" across society;
- Reduce the expenses of goods and utilities, simplify the buying procedures and improve the transparency, efficiency and the effectiveness of public sector purchases;
- Provide a better service for both buyers and suppliers;
- Improve the transparency, the visibility and therefore accountability of public sector contracting;
- Reinforce the Italian government's commitment to the goals of e-Europe;
- Minimize transaction costs through standardization and to obtain scale economics in selected purchasing areas.
- Goods and services for EUR 12 billion purchased electronically (timeframe: 2000 – 2005).

16.2.2 Scope of strategy

Levels of government involved	Strategies cover all levels of government
Legal framework	Information unavailable
Allocated resources	Information unavailable
Time frame	2000 – 2005

16.2.3 Existing guidelines

Guidelines in support of the different areas have been issued as part of the strategy for e-government e.g. a special guideline for e-public procurement:

- Decree of Republic President n. 101/2002 (Rules to accede and utilize public administration market-places and electronic auctions, guidelines to adopt and utilize electronic advanced signatures).

16.3 Legal framework

16.3.1 Legal status of the use of electronic means in Public Procurement

	Date	**N.**	**Argument**
Legislative Decree	12th February 1993	39	Art.3 – Rules on automated informative systems of public administrations, as laid down in the art.2, co.1, let. mm) of the Law 23rd October 1992, n.421
Law	15th March 1997	59	Art.15, co.2 – Proxy to Government on granting functions to Regions and local Authorities about Public Administration reform and administrative simplification
Decree of the President of the Republic	10th November 1997	513	Regulation on procedures for documents registration and transmission with electronic systems, as laid down in the art.15, co.2, of Law 25th March 1997, n.59
Decree of the President of the Republic	20th October 1998		Rules on procedures on managing of electronic protocol by public administration
Prime Minister Decree	8th February 1999		Technical rules on registration, transmission, duplication, copying and approving of electronic documents
Law Decree	22nd May 1999	185	Implementation of the Directive 97/7/CE on consumer protection
Prime Minister Decree	28th October 1999		Electronic management of internal flow of information of Public Administration
Law	23rd December 1999	488	Financial act 2000
Prime Minister Decree	31st October 2000		Technical rules on electronic protocol - Decree of the President of the Republic 20th October 1998, n.428
Law	23rd December 2000	388	Financial act 2001
Decree of the President of the Republic	28th December 2000	445	Administrative procedure Act
Law	28th December 2001	448	Financial act 2002
Legislative Decree	23rd January 2002	10	Implementation of Directive 1999/93/CEE on the communitarian framework for electronic signature

	Date	N.	Argument
Decree of the President of the Republic	4th April 2002	101	Regulates online auctions and marketplace
Law	24th December 2003	350	Financial act 2004
Law Decree	12th July 2004	168	Amendments on Financial act

16.3.2 *Implementation of the Directives*

The forthcoming EU public procurement directives are expected to be implemented in 2005. The following areas of use of electronic means in the public procurement process are already regulated by national legislation: rules applicable to communication, storage of data and use of specific procedures, e.g. e-auctions, e-catalogues and marketplaces. Others follow the Decree of Republic President n. 445/2002 on administrative documentation, technical rules on electronic advanced signatures and certificated mails.

16.3.3 *Status of tools*

Public procurement portals	The portal www.acquistinretepa.it (Acquisti in Rete[131]; AiR) is the Public government procurement portal. The goal of the e-procurement platform is to improve public procurement and efficiency. The platform facilitates the use of three main tools for public e-procurement: *Electronic Shops, Reversed on-line Auctions* and *The Marketplace.* Furthermore the platform provides information on e-procurement activities already started or about to start as well as to diffuse this information, it provides newsletters, best cases and community on e-procurement.
	Local public procurement portal: Intercent ER is a portal for e-sourcing, which belongs to the Emilia Romagna Region and local public authorities
	Local public procurement portal: Purchasing System Piedmont Region is a portal e-sourcing and e-catalogues, which is owned by the region of Piedmont and the local public authorities www.csi.it
	Local public procurement portal: Marketplace for the Municipality of Florence: http://news.comune.fi.it/cgi-bin/market/index.pl
Electronic signature	Electronic signature has been introduced. Nevertheless the use of a qualified electronic signature is compulsory in e-procurement.
Electronic catalogues	Public Administration procurement system and some Local Administrations uses high quality e-purchasing models such as electronic catalogues.
Electronic auctions	Electronic auctions have been a legal possibility since 2002 and there are numerous experiences both on national and local level.

[131] Translation: ”Purchases on the Net”

Dynamic Purchasing Systems	For purchases under threshold, exists Market Place of Public Administration based on the principles of dynamic purchasing systems
Framework agreements	Framework agreements are similar to dynamic purchasing system (strictly bilateral)

16.3.4 Reference to the relevant legal acts

Information unavailable

16.4 Current usage of electronic means in Public Procurement

16.4.1 Practical use of electronic means in Public Procurement

On an operating level, the government procurement service, through Consip S.p.A. uses high quality e-purchasing models (electronic catalogues, reverse auctions, market place) as well as standard framework agreements for certain types of categories of goods and services.

The total amount of public expenditure in Italy for Goods & Services equals about EUR 97 billion (2002). This amount represents about 15% of overall public spending. In 2003 the Program's activity has been covering about EUR 16 billion. Despite their non-compulsory participation to the program on public spending rationalization, 21% of municipalities are ordering through Consip system. (year 2004 Good & Services EUR 102 billion, Program's activity cover EUR 6,7 billion, 16% of municipalities ordering)

Monitoring of the up-take and progress of e-procurement is followed on an annual basis and reported to the Ministry of Economic Affairs and Finance and Consip S.p.A. respectively. The following aspects are monitored: Number of procurement and e-procurement transactions, electronic public procurement's share of total public procurement volume, type of purchase, transaction costs and number of bidders, number of e-suppliers and number of e-products.

16.4.2 Which phases of procurement are covered?

The status for automating procurement phases in Italy is as follows:

- Notification about tender (to a low extent)
- Publication of tender (to a large extent)
- Management of receipt/submission of tenders (to a low extent)
- Evaluation of tenders (to a low extent)
- Ordering (to a low extent)
- Invoicing (not automated today, but expected to be within three years).

16.5 Raising awareness & Promotion of electronic means

In 2005 one-half of Italy's public expenditure for goods and services is to be spent on offers which were made electronically. In addition, the government wishes to promote e-business in the wider economy – the huge and influential public sector pushing, by example and by insistence, smaller private business into computer usage and hence to e-business.

In the field of electronic exchange of data in the public procurement process, Italy intends to introduce national standards, but they are not yet defined. Some working groups, mainly composed by Local Administrations, are evaluating standards and guidelines.

17. Latvia

17.1 Organizations and Institutions

Responsible institution(s) for public procurement policy	Procurement Monitoring Bureau (PMB), Ministry of Finance. • Started its activity on 1 January 2002, and is a separate government administrative body, supervised by the Ministry of Finance. • Has its own legal personality and its own separate budget. • Is under the control of the Ministry of Finance. The Minister of Finance exercises a supervisory control over the PMB, in respect of administrative procedure. • Monitors the conformity of the state and local government procurement procedures.
Responsible institution(s) for legal aspects	Procurement Monitoring Bureau, Ministry of Finance. • Practically prepares all the draft regulations relating to public procurement matters, although theoretically, the task belongs to the Ministry of Finance.
Responsible institution(s) for technical solutions	Procurement Monitoring Bureau, Ministry of Finance • Fulfilling the duties provided by Law, PMB is also publishing Tender notices and Contract award notices, examining complaints, providing methodological assistance and consultations and compile and analyze the statistical information available.[132]
Central procurement institution(s)	-
Other important organisations	-
Type of coordination between different institutions	There is no central procurement body, which arranges framework contracts or is responsible for the selection of suppliers. These functions are the responsibility of each individual public authority.

17.2 Strategy

At the present time the development of an operational electronic public procurement system has a medium priority on the political agenda in Latvia.

Significant advantages from the introduction of electronic public procurement are expected in the following areas:

- Lower transactions costs
- Better procurement statistics and enhanced budgetary control
- Lower prices
- Better access for SMEs in accessing and responding to public tenders
- Improving IT skills in public and private sector.

A separate strategy on e-public procurement was adopted on January 29th 2004: "Usage of information technology in the development of a public procurement system" (2004).

[132] See http://www.iub.gov.lv

17.2.1 *Statement of objectives*

It is projected that:

- 33% of all public procurement procedures will be done electronically by 2008
- the government can save EUR 1 million per year after 2008 by undertaking the procurement procedures in the public sector, electronically
- the electronic catalogue will be fully implemented in 2008 e-auctions will be used in 15 % of all procedures by 2008

17.2.2 *Scope of strategy*

The strategy has three focus areas:

- Development of a public procurement portal with the possibility of electronic notification.
- Realization of activities for using e-auctions and electronic catalogues
- Constructions of a central public procurement body

Levels of government involved	The initiatives of the strategy are obligatory for the whole central government; moreover part of the local government will be given a chance to participate in some of the projects
Legal framework	For pilot project changes in legislation are not necessary. Directive 2004/17/EC is implemented in 2004 in Latvia Deadline to the Directive 2004/18/EC implementation time is the end of 2005.
Allocated resources	Approximately EUR 0.5 million has been allocated for the introduction of operational pilot electronic procurement system at national level
Time frame	2004 – 2008

17.2.3 *Existing guidelines*

Guidelines have not been issued

17.3 Legal framework

17.3.1 *Legal status of the use of electronic means in Public Procurement*

There is no legal framework for usage of e-auctions or dynamic purchasing system or e-catalogues in the classical sector, but e-catalogues will be established using framework agreements, but all these methods have been already set in the utility sector procurement legislation.

17.3.2 *Implementation of the Directives*

The forthcoming EU public procurement directives are expected to be implemented in 2005. Public procurement is currently regulated in national legislation by “Law on Procurement for State or Local Government Needs” (July 2001, amended June 2004) and “Law on Procurement for Public Services Providers needs” (October 2004). Electronic means for communication in the public procurement process is already regulated for utility sector.

17.3.3 Status of tools

Public procurement portal(s)	www.iub.gov.lv/ IUB (PMB) is a central e-public procurement portal with online notification of tenders. Moreover limited negotiations procedures are available (you can fill in the forms online); also legislation, statistics and an online Q&A functions can be found on the site (but only in Latvian). IUB (PMB) was introduced in January 2004.
Electronic signature	A qualified electronic signature has not yet been introduced in Latvia, but it is planned to be by the end of 2004. Specifications are not available
Electronic catalogues	There is no experience with e-catalogues
Electronic auctions	There is no experience with e-auctions
Dynamic Purchasing Systems	There is no experience with dynamic purchasing systems
Framework agreements	Legislation allows using of Framework agreement in utility and classical sector

17.3.4 Reference to the relevant legal acts

Information unavailable

17.4 Current usage of electronic means in Public Procurement

17.4.1 Practical use of electronic means in Public Procurement

Up-take and progress on electronic public procurement is not monitored on a regular basis.

In the strategy it is assessed to save 2 mio. EUR from centralising and administrative savings. The following aspects are being assessed: number of transactions, electronic public procurement's share of total public procurement volume, types of purchases, speeding up the procurement procedures, transaction costs, and number of bidders

17.4.2 Which phases of procurement are covered?

The status for automating procurement phases in Latvia is as follows:

- Notification about tenders (to some extent today, but a further increase the next three years is expected)
- Publication of tenders (to some extent today, but a further increase the next three years is expected)
- Management of receipts/submission of tenders (not automated and currently not expected to be automated)
- Evaluation of tenders (not automated and currently not expected to be automated)
- Ordering (not automated and currently, but expected to be automated)
- Invoicing (not automated and currently not expected to be automated)

17.5 Raising awareness & Promotion of electronic means

A project named *"Sabiedrikais iepirkumu portāls"*[133] has been launched, which will lead to the establishment of a central e-public procurement portal. For this project, financial and human resources have been made available. The project has started in 2003, and the ambition that has been set is to finalise it by 2004.

This project prepares the set-up of a portal comprising an informational part on legal issues as well as a platform for publication of calls for tender, tender documents and consultation of terms of reference. A first phase only allow publication, facilitating this process for public entities, since the portal automatically transfer calls for tender above threshold to the relevant publication papers, i.e. the Luxembourg written press and EU official journal.

[133] Translation: " Public procurement portal"

18. Lithuania

18.1 Organisations and Institutions

In Lithuania there are three bodies with equal authority in the field of e-public procurement.

Responsible institution(s) for public procurement policy	Ministry of Economy (www.ukmin.lt) Public Procurement Office (www.vpt.lt) • Established under the Government of the Republic of Lithuania to co-ordinate and monitor compliance with the Law on Public Procurement and relevant regulations Information Society Development Committee (www.ivpk.lt) • Was set up in mid 2001, when the Ministries of Communication and of the Interior started to transfer functions of the regulation of information technologies and telecommunications and co-ordination of the development of information society[134]
Responsible institution(s) for legal aspects	Ministry of Economy (www.ukmin.lt)
Responsible institution(s) for technical solutions	Public Procurement Office (www.vpt.lt) • Responsible for development and operation of the forthcoming electronic public procurement system[135] Information Society Development Committee (www.ivpk.lt) • Responsible for the establishment of an e-society in Lithuania including the electronic signature
Central procurement institution(s)	-
Other important organisations	-
Type of coordination between different institutions	Procurement is organized in a decentralized approach. There is no central public procurement body in Lithuania.[136] Public procurement entities can make "centralized" procurements, and they buy big amounts of goods or other supplies at much lower cost and then distribute them to its subsidiaries. For instance Ministry of Interior and Ministry of National Defense have used centralized procurements.

[134] See www.ivpk.lt/main_en.php

[135] See www.vpt.lt

[136] The national law on public procurement does not specify that central procurement bodies can exist at national, regional or local level.

18.2 Strategy

The overall strategy on e-public procurement is an integrated part of a general strategy on modernising the public sector and development of the information society.

Three strategies in the field of information society development and e-government are included:

- *National Concept of Development of Information Society* (Feb. 2001)[137]: Basic tasks in creation of e-government.
- *Strategic Plan for Development of Information Society* (Aug. 2001)[138]: Ensuring progressive development of information society in Lithuania through four priorities: 1) competence of Lithuanian citizens; 2) public administration; 3) electronic business; and 4) Lithuanian culture and Lithuanian language.
- *Long-term Development Strategy of the State* (Nov. 2002)[139]: This strategy clearly emphasizes, that one of the main strategic trends in the field of development of public administration, is establishment and functioning of e-government.

Furthermore, Lithuania has a strategy for Modernising the activities of Public Procurement which is part of the general Government programme. This strategy includes activities in the field of e-public procurement. It involves only central government and focuses on a gradual transformation of public procurement into an electronic environment for adoption of the best EU Member State's practices and creation for the public procurement information system.

18.2.1 Statement of objectives

Electronic public procurement is an area which is highly prioritized by the government of Lithuania. The overall objectives for e-public procurement is to revise the national public procurement legislation, increase transparency and availability of information and develop an electronic public procurement system.

The development of e-government is followed by a variety of specific tasks. The objective here is among other things to deliver public procurement services on the Internet by 2005.

[137] See Vilnius University, Law Faculty, Legal Informatics Center (2003): "Situation of e-government in Lithuania and principles of e-government in Lithuania", Vilnius
[138] See Vilnius University, Law Faculty, Legal Informatics Center (2003): "Situation of e-government in Lithuania and principles of e-government in Lithuania", Vilnius
[139] See "eGovernment Factsheet – Lithuania" at http://europa.eu.int/ISPO/ida

18.2.2 *Scope of strategy*

Levels of government involved	Central government is included in the strategies[140]
Legal framework	Information unavailable
Allocated resources	To cover the development costs of the first phase of CPPP, Public procurement office already has received funding of more than 300.000 EUR this year. As stated in the PPO strategic planning document, expected funding for the development of the CPPP in 2004 should reach approximately 1.150.000 EUR, in 2005 – 3.200.000 EUR and in 2006 - 2.000.000 EUR per year (including the state budget and the European regional develop fund sources).
Time frame	Variable (specific information unavailable)

18.2.3 *Existing guidelines*

Guidelines have not been issued.

18.3 Legal framework

18.3.1 *Legal status of the use of electronic means in Public Procurement*

Rules applicable to communication and storage of data are already regulated by national legislation.

18.3.2 *Implementation of the Directives*

The forthcoming EU public procurement directives are expected to be implemented in 2006.

The use of e-auctions, dynamic purchasing systems etc. is not regulated by the legislation, but the government will provide that contracting authorities may use these procedures. However they will only be allowed for certain types of purchasing expectantly standard goods. The Public Procurement Office will develop e-procurement solutions following all requirements set by the EU e-procurement legislation.

E-auctions and DPS would be available after implementation of new public procurement directives (expected in 2006) and according implementation of technical solutions allowing these procedures.

[140] Based on interview with Mr. Ainis Pumputis, Public Procurement Office

18.3.3 Status of tools

Public procurement portals	A central electronic public procurement portal (CPPP) is expected to be established in the second half of 2004. The functionality of the portal will fulfil the Directive requirements. For the CPPP functionality, implemented in the first development phase, Directive requirements will be met. [141] In 2004 the first phase of Central public procurement portal (CPPP) will be established. However, a central public procurement portal with full functionality will most likely be completed approximately in 2008. Development of the first phase includes fundamental portal functionality (user authorisation system, content management, statistical and analytical functionality), notifications and tender information publishing, and e-catalogues (e-auctions are not planned for the first phase of CPPP development).
Electronic signature	The use of electronic signature has been a legal possibility since 2000.
Electronic catalogues	No experience with e-catalogues
Electronic auctions	No experience with e-auctions
Dynamic Purchasing Systems	No experience with dynamic purchasing systems
Framework agreements	No experience with framework agreements

18.3.4 Reference to the relevant legal acts

No information

18.4 Current usage of electronic means in Public Procurement

18.4.1 Practical use of electronic means in Public Procurement

There is no regular monitoring of the up-take and progress of e-procurement. However a pilot project is being planned. Moreover the government is planning to assess the impact of introducing electronic public procurement within three years when all initiatives on the field have been implemented.

18.4.2 Which phases of procurement are covered?

Specific statistical information about a number of e-public procurement functions will be available following the introduction of the central procurement portal by the end of 2004.

[141] Based on interview with Mr. Ainis Pumputis, Public Procurement Office

18.5 Raising awareness & Promotion of electronic means

The most significant advantage from introducing e-public procurement is expected to be public sector savings through lower prices. Moreover it is expected that the transactions costs will be lowered, and that it will be able to speed the procurement process. Finally SMEs is expected to have better access to public tenders.

19. Luxemburg

19.1 Organizations and Institutions

Responsible institution(s) for public procurement policy	The Ministry of Public Works[142] (www.etat.lu/MTP) The Ministry of Civil Service and Administrative Reform[143] (www.mfpra.public.lu) • The Ministry of Civil Service and Administrative Reform is involved in the function of coordinator of the *e*Luxembourg Action Plan and as pilot ministry for the first phase. The National Information Society Commission[144]
Responsible institution(s) for legal aspects	The Ministry of Public Works (www.etat.lu/MTP)
Responsible institution(s) for technical solutions	*Centre Informatique de l'Etat*, The Ministry of Civil Service and Administrative Reform (www.mfpra.public.lu) (www.cie.public.lu)
Central procurement institution(s)	*Centre Informatique de l'Etat*, The Ministry of Civil Service and Administrative Reform (www.mfpra.public.lu) *Service Central des imprimés des l'Etat*, The Ministry of Civil Service and Administrative Reform (www.mfpra.public.lu) (www.scie.public.lu) • Has developed an electronic catalogue through which different authorities can pass aggregated orders.
Other important organisations	-
Type of coordination between different institutions	The selection of suppliers falls in the responsibility of the Centre Informatique, as far as IT equipment is concerned, and of the individual public authorities for the rest.

19.2 Strategy

The strategy is part of a drive to modernise public procurement in general. It mainly covers central government, although there is a common will to involve local authorities (as well as every organism falling under the national public procurement legislation), which will be obliged to use some functionalities of the new structures while they will be sensitised on the issue in general.

E-public procurement has a high priority in Luxembourg, since it forms part of the action plan *e*Luxembourg (www.eluxembourg.lu), which has been presented to the Government on 26 January 2001. One of the objectives, within the pillar "Putting new technologies at the service of citizens and enterprises as well as civil servants and public organisms", is to promote use of "teleprocedures" by businesses and professionals in communication with public authorities. Under this heading, which implies two phases (one without electronic signature, the second one implying such a signature), e-public procurement activities have been launched.

[142] *Ministère des Travaux Publics*
[143] *Ministère de la fonction publique et de la réforme administrative*
[144] *Commission nationale pour la société de l'information*

19.2.1 Statement of objectives

The objective has been formulated that the whole public procurement procedure from notification to invoicing and accounting should be made electronically accessible by 2005. A feasibility study launched in 2002, of which the conclusions (feasibility within 3 years) have been presented to the Government and have been approved, is considered as the strategy for introducing e-public procurement in Luxembourg. A new strategic paper will be prepared for the new Government which will emerge from the June 2004 elections, taking stock of achievements and setting new objectives. No proper guidelines have been issued, apart from minor communications and recommendations, for instance on the law establishing the possibility to include part of the proposal on CD-ROM with the paper documents.

19.2.2 Scope of strategy

Levels of government involved	Central government is the only level included in the strategy. Representatives of local government and the Health Sector have been consulted for the strategic study.
Legal framework	Legal aspects have been outlined in the strategic study.
Allocated resources	-
Time frame	-

19.2.3 Existing guidelines

Special guidelines for using e-public procurement have not been produced

19.3 Legal framework

19.3.1 Legal status of the use of electronic means in Public Procurement

Information unavailable

19.3.2 Implementation of the Directives

The systems developed will be compliant with the new European public procurement directives; however Luxembourg is expecting to use the full transposition period of 21 months, completing implementation in 2006. Apart from the possibility of electronic publication of calls for competition and the possibility to submit part of the proposal in electronic form, the use of electronic means for communication in public procurement has not been regulated yet in Luxembourg.

Electronic auctions and Dynamic Purchasing Systems will probably be authorised in Luxembourg, and national standards for the electronic exchange of data in the public procurement process, e.g. for submission templates and invoices, will be introduced.

19.3.3 *Status of tools*

Public procurement portals	A project named *"Mise en ligne des Marchés Publics"*[145] has been launched, which will lead to the establishment of a central e-public procurement portal. For this project, financial and human resources have been made available. The project has started in 2002, and the ambition that has been set is to finalise it by 2005. This project prepares the set-up of a portal comprising an informational part on legal issues as well as a platform for publication of calls for tender, tender documents and consultation of terms of reference. It will be tested by the back office in Summer 2004. A first phase will only allow publication, facilitating this process for public entities, since the portal will automatically transfer calls for tender above threshold to the relevant publication papers, i.e. the Luxembourg written press and EU official journal. A second phase will also contain features such as bid receipt with time stamping. No other public procurement portals have been created yet in Luxembourg.
Electronic signature	While no qualified electronic signature has been introduced in Luxembourg to date, a mixed economic interest group consisting of Ministry of Economy officials and representatives of the banking sector is drafting terms of reference for the development of a qualified electronic signature by 2005. However, it is not decided yet, whether the use of a qualified signature will be made mandatory for the next phase of the portal, i.e. electronic submission of tenders.
Electronic catalogues	The central purchasing agency "Service central des imprimés de l'Etat" is using electronic catalogues
Electronic auctions	There is no experience with e-auctions in the public authorities
Dynamic Purchasing Systems	There is no experience with dynamic purchasing systems in the public authorities
Framework agreements	No framework agreements are being used in Luxembourg at national level for the time being.

19.3.4 *Reference to the relevant legal acts*

Information unavailable

19.4 Current usage of electronic means in Public Procurement

19.4.1 *Practical use of electronic means in Public Procurement*

Statistics on e-public procurement will be taken in Luxembourg, covering aspects such as number of electronic transactions, number of bidders, types of purchases as well as effect on prices. Ad hoc monitoring will be performed once the system is operational.

[145] Translation: "Public Procurement Online"

19.4.2 Which phases of procurement are covered?

In Luxembourg, the publication phase has been automated to a low extent so far, as well as the reception and evaluation of tenders (if one counts the receipt of part of the proposal on CD-ROM), but the complete public procurement process is expected to be available electronically within the next three years, except for invoicing, which probably will take longer.

19.5 Raising awareness & Promotion of electronic means

Information unavailable

20. Malta

20.1 Organisations and Institutions

The two main institutions in the field are:

- The Central Information Management Unit (CIMU) within the Office of the Prime Minister
- The Department of Contracts within the Ministry of Finance and Economic Affairs is the central procurement body in Malta

Responsible institution(s) for public procurement policy	Central Information Management Unit, Office of the Prime Minister (www.opm.gov.mt)
Responsible institution(s) for legal aspects	Central Information Management Unit, Office of the Prime Minister (www.opm.gov.mt)
Responsible institution(s) for technical solutions	Central Information Management Unit, Office of the Prime Minister (www.opm.gov.mt)
Central procurement institution(s)	Department of Contracts, Ministry of Finance and Economics (www.mfin.gov.mt)
Other important organisations	-
Type of coordination between different institutions	Being the smallest country among the 25 EU member states, Malta has two administrative levels, the national governmental level and the local level, which is governed by local councils. Procurement is organized with a strong role assigned to the central governmental level. The selection of suppliers above the threshold for government is done by the Department of Contracts. The Department of Contracts is also involved in the selection of suppliers at local level for procurement above the threshold, which is done in collaboration between the department and the local councils. Procurement below the threshold at local level is done through evaluation committees operating under the local councils. Framework agreements are used neither at the national level nor at the local level.

20.2 Strategy

The Ministry for Information Technology and Investment has drawn up a programme to ensure the timely implementation of their objectives. The government's efforts in the field of e-public procurement are part of this programme as they are closely related to the third component. Being an integral part of the overall vision, the introduction of e-public procurement has a high political priority.

The government's strategy for the introduction of e-public procurement is integrated in the country's overall strategy on e-government and the development of the information society e.g. "e-Government program" (2000). The part of the strategy concerning e-public procurement is currently being developed and the more precise strategic focus is therefore yet to be determined.

20.2.1 *Statement of objectives*

The overall vision and mission in Malta is to develop a first-class information society. The three main components of the vision are:

- deliver first-class public service
- increase citizen participation in government decision making
- streamline public services and realize efficiency-gains

At present there is no specific, quantitative objectives defined which describe the efficiency gains which the Maltese government expects to achieve through the deployment of e-public procurement.

20.2.2 *Scope of strategy*

Levels of government involved	Central and local are included in the strategy
Legal framework	Information unavailable
Allocated resources	Information unavailable
Time frame	Information unavailable

20.2.3 *Existing guidelines*

At a more specific level, Malta has issued a set of guidelines (published 15 April 2004) that relate to the government's recently launched e-public procurement initiative for the procurement of standard office automation hardware and software.

20.3 **Legal framework**

20.3.1 *Legal status of the use of electronic means in Public Procurement*

The government's e-public procurement portal is the first and only e-public procurement initiative in Malta. As described it is aimed at procurement below the threshold and it does presently not comply with the requirements of the forthcoming Public Procurement directive.

20.3.2 *Implementation of the Directives*

The forthcoming EU public procurement directives are expected to be implemented in 2006. The use of electronic means for communication in the public procurement process is presently not regulated by national legislation.

With the new EU directives the Maltese government expects to provide that Contracting Authorities may use electronic auctions and dynamic purchasing systems. It is presently not clearly defined whether use will be applied to certain type of purchases or authorities, but the present expectation is that usage will be general and applied to different types of purchases. The same applies to the future use of dynamic purchasing systems.

Concerning the publishing of tender-related information on a ‘buyer profile by contracting authorities, it is expected that this opportunity will be used in the future.

20.3.3 *Status of tools*

Public procurement portals	As of mid-April 2004 the government has launched the first central electronic public procurement portal (www.e-procurement.gov.mt). The portal, which is developed and maintained by CIMU, is seen as the foundation for e-public procurement at the governmental level. The portal enables public officers to acquire IT hardware and software below the threshold and below Lm 2,500. The e-Procurement system will be reviewed and enhanced to include other functionalities including a payment gateway. Private companies may apply to become an Authorised Supplier. Application will be vetted by CIMU and if the company is approved, it will receive a login and password which will enable it to access the system. Following successful completion of a probation period, the company will be awarded the Quality Mark and thereafter become a Quality Mark Supplier.
Electronic signature	Malta has not introduced a qualified electronic signature, as this is presently not allowed by the national legislation. However, it is expected that the legislation will be amended and that a qualified electronic signature will be introduced within the next three years.
Electronic catalogues	There is no experience with electronic catalogues
Electronic auctions	There is no experience with electronic auctions
Dynamic Purchasing Systems	There is no experience with dynamic purchasing systems
Framework agreements	Information unavailable

20.3.4 *Reference to the relevant legal acts*

Information unavailable

20.4 Current usage of electronic means in Public Procurement

20.4.1 *Practical use of electronic means in Public Procurement*

There is no figure available on the total volume of e-public procurement as the first e-public procurement portal was launched very recently.
There is presently no assessment of the impact of the introduction of e-public procurement, but it is expected that the impacts will be assessed in the course of the next three years concerning the number of electronic transactions, e-public procurements share of total public procurement volume, types of purchases and the impact on speeding up the procurement procedures. Notably, the security aspect of electronic transactions is an area where regular assessment is considered very important and necessary.
Monitoring of the up-take and progress of e-procurement is presently not carried out.

The resources allocated by public authorities to introducing operational public procurement are not monitored at national level, but government resources have been channeled into the development and maintenance of the recently launched e-public procurement website (precise figure is not available).

20.4.2 Which phases of procurement are covered?

The status for automating procurement phases in Malta is as follows:

- Notification about tenders and publication of tenders have been automated to a large extent
- The management of receipt/submission of tenders and evaluation of tenders have not been automated today and it is not expected to happen within the next three years
- Ordering has been automated to some extent, but expected to be increased within three years
- Invoicing is not automated today but automation is expected to take place within the next three years

20.5 Raising awareness & Promotion of electronic means

Information unavailable

21. Netherlands

21.1 Organisations and Institutions

Responsible institution(s) for public procurement policy	Ministry of Economic Affairs (www.minez.nl) - plays a key role in the overall policy formulation in the area of public procurement, including the introduction of operational electronic public procurement, and in the collection of experiences on the ministerial use of electronic tendering. - has recently begun the preparations for the implementation of the forthcoming EU Directives on public procurement, including the development of an outline for a new legal framework for public procurement in general.
Responsible institution(s) for legal aspects	Ministry of Economic Affairs (www.minez.nl)
Responsible institution(s) for technical solutions	Ministry of Economic Affairs (www.minez.nl)
Central procurement institution(s)	Currently no central procurement bodies exist in the Netherlands. A national agency has before been responsible for the overall public procurement, but the agency was abolished due to unsuccessful results. Therefore, the selection of suppliers is typically a responsibility of the individual public institutions.
Other important organisations	-
Type of coordination between different institutions	Public procurement in the Netherlands generally takes place in a decentralised manner. According to the Action Plan (see below), all ministries are to be involved in the introduction of electronic tendering.

21.2 Strategy

The introduction of operational electronic public procurement has a medium priority in the Netherlands. Currently a national programme or strategy within the area of electronic public procurement does not exist. "Action Plan on Professional Procurement and Purchase" (2001), which described a way of working for the national government within the area of public procurement, is currently the main strategic document

The main reasons for the lack of an overall objective or strategy is firstly the absence of a regulated procurement tradition in the Netherlands, and secondly that the Dutch government find it important to integrate a national strategy into the forthcoming EU Directives on public procurement.

The abovementioned Action Plan describes a way of working for the national government within the area of public procurement, and has three main objectives:

1. *Innovative tendering:* Promoting innovation and if necessary, co-operation (cluster formation) by presenting a challenge in the invitation to tender and tailoring the contract forms to this. The government acts as a demanding customer and invites innovative tenders. This is applied on an increasing scale.
2. *European tendering:* Publishing the invitation to tender and, so increasing competition in the market. This creates opportunities for better bids. Furthermore, it is a statutory requirement for government procurement (above certain thresholds). Incentives are needed at this level, as there are shortcomings in compliance.
3. *Electronic tendering:* Publishing announcements and invitations to tender via the Internet, and further deployment of modern information and communications technology (ICT) that supports the entire procurement process.

At the central level, the Action Plan describes a number of steps to be taken among ministries to strengthen inter-departmental co-operation. Among these steps, the ministries will need to publish invitations for tender electronically at the earliest opportunity.

In addition, the central government intranet will need to incorporate en electronic network for buyers and tendering offers, acting as a virtual knowledge centre for professional procurement and tendering. The functions of the electronic procurement network will also need to include a list of buyers and tendering officials at each ministry and a list of planned and current tenders.

Finally, the Action Plan states that the Ministry of Economic Affairs will need to gain experience with electronic ordering and tendering, and place this at the disposal of other parties.

The Action Plan also lists a number of activities, which already has been initiated or implemented. Within the area of electronic public procurement, these activities cover the establishment of a network of professional purchases of the government, including a virtual meeting place (www.PIANOdesk.info), and the setting up of an interdepartmental project team on electronic purchasing.

21.2.1 Statement of objectives

The Dutch government has not yet specified an overall objective for the introduction of operational electronic public procurement in the Netherlands. Scope of strategy

Levels of government involved	Information unavailable
Legal framework	Information unavailable
Allocated resources	Significant resources on the introduction of e-public procurement have yet to be allocated
Time frame	Information unavailable

21.2.2 Existing guidelines

Information unavailable

21.3 Legal framework

21.3.1 Legal status of the use of electronic means in Public Procurement

No legal framework for electronic public procurement exists at this moment. Implementation of the new EU Directives on public procurement (see next paragraph) will provide this framework.

To date electronic announcement of tenders is stimulated. With a view to the forthcoming legal framework for electronic procurement some pilot-projects have been executed by individual contracting authorities.

21.3.2 Implementation of the Directives

The forthcoming EU Directives on public procurement are expected to be formally implemented in the Netherlands in 2005. However, additional Dutch requirements will not be implemented before 2007. Currently the use of electronic means in the public procurement process is not regulated by national legislation

With the new EU directives, the government is expected to provide that all Contracting Authorities may use electronic auctions and all other options as indicated in the new EU directives. In addition, Contracting Authorities may and will probably publish tender-related information on a “buyer-profile”.

The Dutch government is currently preparing for the implementation of the forthcoming EU Directives on public procurement. Following these preparations, the Dutch government will develop a more explicit strategy for the introduction of operational electronic public procurement. In this respect, full migration in public procurement to electronic means is considered a realistic and desirable goal within a timeframe of 10 years.

21.3.3 *Status of tools*

Public procurement portals	The Dutch government has recently introduced an electronic procurement website for the use of the construction sector. The site, which can be found at www.aanbestedingskalender.nl, provides an overview of current procurement within the construction sector. The site is however expected to form a template for the development of a central electronic public procurement portal[146]
Electronic signature	The Dutch government has recently passed an electronic signature bill (May 2003), which ensures the transposition in Dutch law of the European Directive 1999/93/EC on a Community framework for electronic signatures, and provides a firm legal basis for the deployment and use of electronic signatures in e-commerce and e-government.
Electronic catalogues	Electronic catalogues have not been used
Electronic auctions	Ministry of Social Affairs and Employment and different local hospitals and health departments have gained experience with e-auctions in pilot-projects.
Dynamic Purchasing Systems	Dynamic purchasing systems have not been used
Framework agreements	-

21.3.4 *Reference to the relevant legal acts*

Information unavailable

21.4 Current usage of electronic means in Public Procurement

21.4.1 *Practical use of electronic means in Public Procurement*

The total impact of introducing electronic public procurement in the Netherlands has not yet been assessed, and the Ministry of Economic Affairs has not agreed on whether the impact will be assessed within the next three years.

Monitoring of the up-take and progress of e-procurement does not take place in the Netherlands yet. However, with the implementation of the forthcoming EU Directives on public procurement, the Ministry of Economic Affairs is expected to do this on a regularly basis (it is not possible to estimate the frequency at this time).

[146] The portal for information and knowledge-transfer for officials in contracting authorities is www.ovia.nl. The portal is also a government initiative. Based on information from Leo Baaijen, Ministry of Economics

21.4.2 *Which phases of procurement are covered?*

Information unavailable

21.5 Raising awareness & Promotion of electronic means

Within this framework, the Netherlands Accreditation Council has recently accredited KPMG Certification to certify ICT service providers for the issuance of qualified certificates for electronic signatures. KPMG has carried out his first certification at PinkRoccade Megaplex, who is the first party in the Netherlands to meet all the requirements. However, it is currently unclear whether the signature will be used in public procurement and whether the use of qualified electronic signature will be made mandatory to participate in public calls for competition.

At the current time, it is still unclear whether the Dutch government intends to introduce national standards for the electronic exchange of data in the public procurement process. However, the government expect to follow the standards mentioned in the forthcoming EU Directives on public procurement.

22. Poland

22.1 Organisations and Institutions

Responsible institution(s) for public procurement policy	Public Procurement Office (www.uzp.gov.pl) • Independent unit within the Polish government, and the main co-ordinating institution on public procurement. • Created on 1 January 1995, following the adoption of the Act on Public Procurement on 10 June 1994. • Pays a policy making and co-ordinating role for the entire Polish public procurement system Elaborates training programs, and organises and inspires training events in the field of public procurement. Ministry of Scientific Research and Information Technology (www.informatyzacja.gov.pl) • Responsible for development and implementation of projects and solutions in the filed of e-public procurement in collaboration with the Public Procurement Office.
Responsible institution(s) for legal aspects	Public Procurement Office (www.uzp.gov.pl)
Responsible institution(s) for technical solutions	Public Procurement Office (www.uzp.gov.pl) • Responsible for developing and operating e-public procurement solutions including the official Public Procurement Bulletin in which public procurement notices are published
Central procurement institution(s)	Public Procurement Office (www.uzp.gov.pl) • Responsible for issuing administrative decisions in response to requests for the application of a procedure other than unlimited tendering
Other important organisations	-
Type of coordination between different institutions	Poland has a decentralized system of public procurement. Every public administration entity is responsible for its own procurement procedures and selection of suppliers. There are no central institutions which purchase on behalf of government or self government entities. However, there is a legal possibility that various public administration units agree to award public procurement contracts together (e.g. IT equipment, vehicles etc.) in order to combine their “purchasing power” and get better prices

22.2 Strategy

The overall vision regarding electronic public procurement in Poland is to ensure efficiency, and general savings in the public administration. An additional objective is to minimizing corruptive behaviour and secure transparency in the public sector activities. In general, electronic public procurement has a medium priority on the national political agenda in Poland.

In order to achieve the objectives Poland has different associated strategies on information society and technology, e-commerce and e-government in Poland. These are reflected in two core projects:

- "Gateway to Poland", State Committee for Scientific Research (2002)[147] is the Polish e-government action plan. Moreover it is an online integrated platform of public administration services available to the public. The platform is expected to increase the efficiency of public administration services by about 40 %.
- "e-Poland – Strategy for the Information Society Development in Poland, 2001-2006", The Ministry of Economy (2001, 2004)[148] is the strategy for development of the information society and includes actions in the fields of e-commerce and on-line public administration. The strategy outlines several planned actions in the period 2001 – 2006 among them a build-out of the Internet service of the Public Procurement Office and introduction of fully electronic procedures for awarding public procurement contracts. For example, it will be required to publish notices relating to public procurement electronically. Furthermore a specific task of the Office of Public Procurement described in the strategy is to introduce fully electronic procedures for awarding public procurement contracts at the latest in 2005.[149]

22.2.1 Statement of objectives

There is a set of overall objectives:

- to ensure efficiency and general savings in the public administration
- to minimize corruptive behaviour
- to secure transparency in the public sector activities

[147] See the State Committee for Scientific Research (www.kbn.gov.pl); and the Ministry of Scientific Research and Information Technology (www.informatyzacja.gov.pl)
[148] See the Ministry of Scientific Research and Information Technology (www.informatyzacja.gov.pl)
[149] "*e-Poland – Strategy for the Information Society Development in Poland, 2001-2006*" (The Ministry of Economy)

22.2.2 Scope of strategy

Levels of government involved	National, regional and local public administration are included in the strategies
Legal framework	Information unavailable
Allocated resources	There is no specific information on this issue
Time frame	Information unavailable

22.2.3 Existing guidelines

Guidelines have not been issued.

22.3 Legal framework

22.3.1 Legal status of the use of electronic means in Public Procurement

The Polish public procurement system was established in 1994 with the adoption of the Act on Public Procurement. Since then the Act has been amended several times mainly with the aim to clarify its rules and definitions, broaden the scope of application and make the procurement process more transparent and to adjust the Polish law to the EU regulatory framework.

Public procurement including E- procurement is now regulated in Poland in the new Law on public procurement (LPP), which entered into force on March 2, 2004. LPP allows among other things use of advanced electronic signature in submission of tenders in public procurement proceeding. The act dealing in general with the use of electronic signature was adopted in Poland in September 2001 and entered into force in 2002. However this legislation does not deal particularly with electronic procurement.
Moreover the Polish legislation also regulates rules applicable to communication and the use of e-auctions.

22.3.2 Implementation of the Directives

The new EU public procurement directives are expected to be implemented in the second half of 2005. Polish legislation on public procurement provides that Contracting Authorities may use e-auctions on purchases of “generally available” goods below of 60.000 EUR.

22.3.3 *Status of tools*

Public procurement portals	**There is no central public procurement portal in Poland, and generally only few activities in the public sector can take place on–line**
	In the private sector two electronic market places among other things deliver the possibility for e-procurement for utilities with low thresholds and therefore not covered by the legislation: • X – Trade (www.xtrade.pl/xtrade) • MarketPlanet (www.marketplanet.pl/en)
Electronic signature	The use of electronic signature in submission of tenders subject to consent of awarding entity has been a possibility in legislation since March 2004 and is required if the tender is submitted electronically. The new legislation equalizes the electronic signature with the written, but it is only used to a low extent in practice
Electronic catalogues	No experience with e-catalogues
Electronic auctions	A few entities in the Polish public sector have experience in organizing e-auctions[150], e.g. a small number of municipalities including the Warsaw Municipality. However the use of e-auctions is not a widespread activity in Poland.
Dynamic Purchasing Systems	No experience with dynamic purchasing systems
Framework agreements	Framework agreements are only allowed in the utility sector.

22.3.4 *Reference to the relevant legal acts*

ACT of 29 January 2004 Public Procurement Law

22.4 Current usage of electronic means in Public Procurement

22.4.1 *Practical use of electronic means in Public Procurement*

The Ministry of Scientific Research and Information Technology has assessed the impact of introducing electronic public procurement. The following aspects are being assessed: Number of electronic transaction, electronic public procurement's share of total public procurement volume, speeding up of procurement procedures, transaction costs, and effect on prices.

There has been no regular monitoring on up-take and progress on e-public procurement in Poland so far, but a more regular statistical monitoring is expected within two years.

[150] Based on interview with Mr. Dariusz Piasta, Public Procurement Office, European In-tegration Department

22.4.2 Which phases of procurement are covered?

IT software to be developed under the project financed from EU funds will cover all phases of public procurement up to award of contracts.

22.5 Raising awareness & Promotion of electronic means

The use of standards for electronic data exchange is a focus area in Poland, but decisions on which and how standards are to be used in the future have not been made. Under the current legislation it is obligatory to use a CPV code when sending notices.

23. Portugal

23.1 Organisations and Institutions

The recently established *Mission, Innovation and Knowledge Unit* (UMIC) is currently the institution driving the development of e-public procurement in Portugal. UMIC is established as a support structure for the development of the Portuguese government's policy for innovation, information society and e-government. UMIC is thus assigned with policy formulation for e-public procurement, the development of e-public procurement solutions and for the legal framework for e-public procurement. The latter responsibility is shared with the Ministry of Finance. In addition to the strong position currently taken by UMIC, the institutional infrastructure is expected to be strengthened through the future establishment of the new institution which will be assigned with the responsibility for public procurement, including e-public procurement.

Responsible institution(s) for public procurement policy	Mission, Innovation and Knowledge Unit, Ministry of Finance (www.min-financas.pt)
Responsible institution(s) for legal aspects	Mission, Innovation and Knowledge Unit, Ministry of Finance (www.min-financas.pt)
Responsible institution(s) for technical solutions	Mission, Innovation and Knowledge Unit, Ministry of Finance (www.min-financas.pt)
Central procurement institution(s)	Whithin the Ministry of finances the Direcção-Geral do Património is the central department which coordinates public procurement for the whole administration, at a national level, launching the adequate framework agreements for a range of goods and services. It also gives its collaboration to UMIC where e-Procurement is concerned and in the study of the legal framework for e-Procurement
Other important organisations	-
Type of coordination between different institutions	Generally public procurement has until now been conducted in a decentralized manner as regards both procurement within the ministries and the entire ministerial level. This means e.g. that when no framework agreements exist the selection of suppliers is typically done by the individual institutions both for procurement above and below the threshold. However, the decentralized model is expected to change in the future with the strategy towards more centralized organization of the procurement within the ministries as well as for the entire ministerial level. There are no central procurement institutions at regional and local levels. The Ministry of Finance is presently in a coordinating role as regards public procurement and as such it functions to some extent as a central procurement body at the national level. In this capacity the Ministry of Finance is responsible for the administration of framework agreements and the selection of suppliers under these agreements.

23.2 Strategy

Electronic public procurement is an area which is highly prioritized by the government of Portugal. The government's strategy for the deployment of e-public procure is outlined in its National e-Procurement Program, which is an integral part of the overall strategy on the development of e-government and the information society in Portugal. The main motives for introducing electronic public procurement are to achieve better control of public sector spending, achieve public sector savings, modernize the public sector, align Portugal with other EU member states and increase the efficiency and competitiveness of the private sector.

The ambitions embedded in the program are illustrated by the government's stated intention to realize savings in the magnitude of 10% - 20% on public procurement costs during the period 2003-2006. This is a direct consequence of the deployment of e-public procurement systems across government institutions at the central governmental level as well at the regional and local governmental levels. E-public procurement systems are expected to be extended across the entire public administration during 2004, and the Portuguese government plans to carry out approximately 50% of its total acquisitions electronically by 2006.

The strategic focus of the national e-public procurement program puts a strong emphasis on the organizational aspects of public procurement as it concerns the establishment of a unit at the national level for e-public procurement and outlines that all ministries should centralize the processes related to e-public procurement.

23.2.1 Statement of objectives

Overall objectives:

- Establishment of an organisation responsible for national e-public procurement
- Centralized procurement within the ministries
- Intention to realize savings in the magnitude of 10% - 20% on public procurement costs during the period 2003 – 2006
- Approximately 50% of total acquisitions to be carried out electronically by 2006

23.2.2 Scope of strategy

Levels of government involved	All levels of government included
Legal framework	Information unavailable
Allocated resources	Information unavailable
Time frame	2003 – 2006

23.2.3 Existing guidelines

Guidelines for e-public procurement have been developed and are integrated into the “National Initiative for Electronic Commerce” (Cabinet Resolution no. 143/2000).

23.3 Legal framework

23.3.1 Legal status of the use of electronic means in Public Procurement

The future legal framework will fully respect the Directives, as the existing legal acts fully respect the Directives in what concerns public procurement

23.3.2 Implementation of the Directives

It is presently not clarified when the forthcoming EU public procurement directives will be implemented into national legislation as the timing will depend on the government’s decision. The use of electronic means for communication in the public procurement process is presently regulated by national legislation which encompasses the rules applicable to communication and the storage of data[151].

With the new EU directives, the Portuguese government expects to provide that Contracting Authorities may use electronic auctions and the expectation is that usage will be general and applied to different types of purchases. It is presently not clarified whether dynamic purchasing systems will be used in the future. Concerning the publishing of tender-related information on a buyer profile by contracting authorities, it is expected that this opportunity will be used in the future, but it is not determined when this will take place.

As mentioned above, the Portuguese government is preparing the launch of a central e-public procurement portal in 2004, and it is expected that the new portal will be in compliance with the forthcoming European public procurement directives.

[151] Decree Law 197/1999 and Decree Law 104/2002

23.3.3 *Status of tools*

Public procurement portals	The launch of a central electronic procurement portal is currently underway (www.compras.gov.pt), which will overtime include and converge the experiences made in the pilot projects.
Electronic signature	The legislation for the introduction of a qualified electronic signature is in place but electronic signatures are not used at present, and it is currently not clear when a qualified electronic signature will be introduced.
Electronic catalogues	Pilot projects on electro e-catalogues have been carried through
Electronic auctions	Pilot projects on electronic auctions have been carried through
Dynamic Purchasing Systems	There is no experience with dynamic purchasing systems
Framework agreements	Framework agreements exist and are used at the national level as well as at the regional and local levels. There is no aggregated data available (neither in total amounts nor as percentages of the total volume purchased through framework agreements) but for the Ministry of Finance alone the purchases made through framework agreements amounted to approximately 185 million EUR in 2002.

23.3.4 *Reference to the relevant legal acts*

Information unavailable

23.4 Current usage of electronic means in Public Procurement

23.4.1 *Practical use of electronic means in Public Procurement*

The uptake of e-public procurement is currently not monitored on a regular basis, but this aspect is expected to be monitored at some point in the future once e-public procurement accelerates. There is no figure available on the total volume of e-public procurement as the first e-public procurement initiatives are currently taking place on a pilot scale. UMIC is monitoring the implementation of the e-public procurement pilot projects in the seven ministries and will gather the experiences in terms of the number of electronic transactions, e-public procurement's share of total public procurement volume, the types of purchases undertaken, the effects on the speeding up of procurement procedures, transaction costs and the effect on prices. According to preliminary assessments, the experiences from the pilot projects are positive across the board.

As an example of the concrete experiences made, it can be mentioned that the Portuguese government conducted its first e-procurement pilot auction in November 2003. This initiative, carried out for the Ministry of Social Security and Work and the Ministry of Education, was organized in the framework of the National e-Procurement Program. According to UMIC, the auction attracted 7 companies and over 50 bids, and generated savings of EUR 9,600 in the purchase of paper for the month of December.

This represents savings of approximately 25%, which is consistent with the government's objective of achieving savings between 10% and 20% on public procurement costs between 2003 and 2006.

23.4.2 Which phases of procurement are covered?

Information unavailable

23.5 Raising awareness & Promotion of electronic means

At present seven ministries are implementing pilot projects on e-public procurement and the experiences achieved through these projects will be taken into account in the forthcoming mainstreaming of e-public procurement in the public sector. The involved ministries are: Ministry of Defense, Ministry of Justice, Ministry of Health, Ministry of Social Security, Ministry of Employment and Public Works, Ministry of Finance and the Office of the Prime Minister. Parts of these pilot projects concern the change process towards a more centralized procurement organization within the seven ministries, which is currently ongoing.

Private contractors have so far played an important role for the development of e-public procurement in Portugal as the development of the technical solutions. The operation of the portals, for the pilot projects as well as for the forthcoming central e-public procurement portal, has been contracted out to private companies. This means that the operational costs related to these e-public procurement solutions are underwritten by the users, buyers as well as suppliers, through e.g. transaction fees.

Through the pilot projects, some experience has been gained with electronic auctions and e-catalogues. Electronic auctions have been used in one of the pilot project (see further details below) for products below the threshold. E-catalogues have been used since 1999 for 14 different types of products (e.g. cars, paper, uniforms, fuel, IT hardware and software). There is no experience with multi-supplier electronic purchasing systems similar to Dynamic Purchasing Systems.

As e-public procurement presently is being explored on a pilot project level, none of the phases in the procurement cycle have been automated (i.e. notification about tender, publication of tender, management of receipt/submission of tenders, evaluation of tenders, ordering and invoicing).

The government is expected to introduce national standards for the electronic exchange of data in the public procurement process, but it is at present not clear which standards will be used and when this will happen.

24. Slovakia

24.1 Organisations and Institutions

In general, the responsibility for the implementation of the Information Society in Slovakia is shared between different government departments. Most of the relevant players are primarily working with e-government and the development of the information society and not e-procurement on a specific level. At the present, the main responsibility for information society belongs to the Ministry of Transport, Posts and Telecommunications. However, two players can be identified as the key institutions responsible for the implementation of electronic public procurement in Slovakia: The Office for Public Procurement and the upcoming the Office of the Commissioner for Information Society.

Responsible institution(s) for public procurement policy	Office for Public Procurement • directs the state policy on public procurement and concession procurement and exercises supervision over the public procurement and concession procurement. • notifies the conversion of financial thresholds for the above-threshold methods of public procurement into Slovak currency, etc. • is responsible for the overall responsibility of the future formulation of the Slovakian policies within the area electronic public procurement as well as the development of a legal framework for electronic public procurement. Office of the Commissioner for Information Society • has not yet been established • is expected to play a key role in the coordination of the ministries efforts to create favorable conditions within the area of ICT for the benefit of all segments of the society. This includes the development of the necessary platform for introducing electronic public procurement (access to the Internet, hardware, etc.)
Responsible institution(s) for legal aspects	Office for Public Procurement
Responsible institution(s) for technical solutions	Office for Public Procurement Office of the Commissioner for Information Society
Central procurement institution(s)	Office for Public Procurement
Other important organisations	National Security Authority (NSA) Ministry of Economy
Type of coordination between different institutions	Supra department coordination

24.2 Strategy

There is no specific strategy for introducing or implementing e-public procurement

However, an overall e-government strategy with the aim of introducing electronic services to citizens and business enterprises is currently under discussion. Currently, the general political priority of introducing electronic public procurement has a low priority.

In the meantime, the government focuses its efforts on the creation and development of the general environment for the introduction of operational electronic public procurement, including improving access to the Internet among SME's and the necessary IT-hardware.

The Slovakian government has recently adopted a **National Strategy for the Information Society in the Slovak Republic.** The policy derives from the e-Europe+ initiative and action plan, and defines the main challenges involved in building up an information society. In addition, the policy proposes solutions to the creation of favorable conditions to unleash the full potential of ICT's for the benefit of all segments of the society.

Several ministries are involved in the government's efforts on the creation of favorable ICT-conditions. However, there is no overall coordination among these efforts, which is seen as a weakness in relation to the introduction of electronic public procurement in Slovakia.

The Ministry of Education prepared a Policy for the Information Society in 2001, which among other matters contained a proposal for the establishment of the National Agency for the Information Society in the Slovak Republic. In 2003 coordinator for Information Society was changed from the Ministry of Education to the Ministry of Transport, Posts and Telecommunications.
Consequently, the Ministry of Transport, Posts and Telecommunications is implementing the Action Plan adopted with the National Strategy for Information Society. One of the activities is to establish the Office of the Commissioner for Information Society, which will coordinate the activities in the field of information society and ICT.

24.2.1 Statement of objectives

There are no overall objectives.

The main reasons for the lack of an overall objective or strategies for the introduction of operational electronic public procurement are:

- Fragmented responsibilities between the involved governmental institutions
- Absence of a regulated procurement tradition
- The added value of electronic public procurement is presently considered to be low compared to standard public procurement
- The government awaits experiences within the area of electronic public procurement before launching it in Slovakia
- Lack of capacities/skills within the public procurement institutions to work with electronic public procurement
- Many suppliers (especially SME's) are not ready for electronic procurement.

24.2.2 Scope of strategy

Levels of government involved	Information unavailable
Legal framework	Information unavailable
Allocated resources	Information unavailable
Time frame	Information unavailable

24.2.3 Existing guidelines

There are no special guidelines on e-procurement

24.3 Legal framework

24.3.1 Legal status of the use of electronic means in Public Procurement

Currently the use of electronic means for communication in the public procurement process is regulated by Act no. 610 of December 2003 on Electronic Communication, which contains the rules applicable to communication in Slovakia.

The Office for Public Procurement estimates that no operational electronic public procurement systems are currently compliant with the requirements of the forthcoming EC Directives on public procurement.

24.3.2 Implementation of the Directives

The Slovakian government expects to be ready to implement the forthcoming EC Directives on public procurement in 2006.

With the new EU directives, the government is expected to provide that Contracting Authorities may use electronic auctions and dynamic purchasing systems.

None of the current e-procurement systems is expected to completely fulfill the requirements of the EU public procurement directives, but the necessary investments are expected to be allocated once the requirements are clear.

24.3.3 *Status of tools*

Public procurement portals	The Slovakian government has not yet established a central electronic public procurement portal, and the Office for Public Procurement is not aware of any other public procurement portals or electronic marketplaces in Slovakia.
Electronic signature	The Slovakian law on Electronic Signature came onto effect in 2002. The certification agency for the institution of electronic signature is currently under the jurisdiction of the National Security Authority (NSA), which has recently begun the accreditation process. The Electronic Research and Project Office is currently the only certification authority entitled to issue electronic signatures. At this time, the electronic signature has therefore not been used in relation to public procurement, and the Office for Public Procurement does not expect the use of a qualified electronic signature to be made mandatory to participate in public calls for competition in Slovakia.
Electronic catalogues	Electronic catalogues have been introduced
Electronic auctions	Electronic auctions have been introduced
Dynamic Purchasing Systems	Dynamic purchasing systems have been introduced
Framework agreements	-

24.3.4 *Reference to the relevant legal acts*

- Act no. 22 of January 2004 on Electronic Commerce
- Act no. 215 of April 2002 on Electronic Signature
- Act no. 428 of July 2002 on Protection of Personal Data
- Act no. 610 of December 2003 on Electronic Communication
- Draft of Act on Information System for Public Administration, which is before approval procedure

24.4 Current usage of electronic means in Public Procurement

24.4.1 *Practical use of electronic means in Public Procurement*

The total impact of introducing electronic public procurement in Slovakia has not yet been assessed. However, the Office for Public Procurement plans to do this in line with the gradual introduction of an electronic public procurement system.

Monitoring the up-take and progress of e-procurement in Slovakia has not yet taken place. However, with the implementation of the forthcoming EC Directives on public procurement, the Office for Public Procurement is expected to do this on a regular basis (it is not possible to estimate the frequency at this time).

24.4.2 Which phases of procurement are covered?

The Office for Public Procurement has elaborated representative standard forms of public procurement notices, which will be sent by Contracting authority to the Office for Public Procurement electronically.

24.5 Raising awareness & Promotion of electronic means

Public institutions and Commercial firms or associations, which promote in the field of Information and Communication Technologies, contribute to raising awareness of using electronic means. There are for example:

- IT Association of the Slovak Republic (ITAS), which represents professional association of the most significant domestic and foreign firms.

25. Slovenia

25.1 Organisations and Institutions

Three entities can be identified as the main institutions responsible for the implementation of electronic public procurement in Slovenia:

- Ministry of Finance
- Government Centre for Informatics (CVI)
- Ministry for Information Society

Responsible institution(s) for public procurement policy	Ministry for Information Society (http://mid.gov.si/mid/mid.nsf) • responsible for information society applications and for information infrastructure including two action plans and the upgrading of the e-Slovenia strategy, the e-government strategy, and the strategy of electronic business in public administration Council for Information Society • a strategic council established by the Prime Minister • deals with strategic issues regarding information society and ICT. • among others, the tasks of SID include monitoring and assessing the implementation of directions in the field of e-commerce and preparing of initiatives and suggestions for managing issues in the field of information society
Responsible institution(s) for legal aspects	Ministry of Finance
Responsible institution(s) for technical solutions	Ministry of Finance Government Centre for Informatics (established in 1993) (www.sigov.si/cvi/eng/)
Central procurement institution(s)	Ministry of Finance
Other important organisations	
Type of coordination between different institutions	Public procurement in Slovenia is in general organised in a mixture of a decentralised and centralised approach.

25.2 Strategy

The introduction of operational electronic public procurement is highly prioritised in Slovenia. In relation to the work on EU accession, this is seen as very important for the Slovenian government to develop an information society that establishes relations between the public administration and the private businesses in order to be fully integrated in the internal market. In addition, the introduction of operational electronic procurement is seen as a very important instrument to control and reduce public sector spending as well as to modernise the public sector in general.

Furthermore, the establishment of an operational electronic public procurement system is seen as an important tool to increase the efficiency and competitiveness of the private sector in Slovenia as well as an instrument to improve the Slovenian alignment on European neighbours.

Initiatives on e-public procurement is integrated in the overall strategy on e-government and development of an information society
Strategic reports:

- "Strategy of E-commerce in Public Administration of the Republic of Slovenia for the period from 2001 until 2004" (2001)
- "Action Plan e-Government Up to 2004" (2002)

The Strategy of E-commerce in Public Administration serves as a basis for all efforts, projects, activities and tasks within the transition of public administration into an information society, with the emphasis on the introduction of electronic commerce as a basic characteristic of an information society.

The strategy contains suggestions for its realisation in the field of e-commerce of public administration through the mechanisms of realisation (procedures of planning, instalment, implementation, supervision) and institutions (organs, bodies). The strategy also refers to the fact that adoption of the Electronic Commerce and Electronic Signature Act (se below) has offered new possibilities for Slovenia in the field of public procurement.

In connection with the overall strategy, a number of programmes and projects have been outlined. Among these, the strategy outlines a programme on the introduction of electronic public procurement, enabling the Government Centre for Informatics and other state organs to transfer the procedures of public ordering into electronic form. The programme includes the following projects:

- Expert system for decision-making support on choosing the most suitable offer (EP-0901)
- Electronic system for submitting orders of smaller value (EP-0902)
- Electronic system for ordering software from chosen suppliers (EP-0903)
- Electronic system for the support of limited procedure for submitting public orders (EP-0904)
- Electronic system for publicising the intention on submitting public orders and chosen suppliers (EP-0905)

25.2.1 Statement of objectives

The overall objective is to remove administrative barriers

25.2.2 *Scope of strategy*

Levels of government involved	All levels of government are included
Legal framework	Information unavailable
Allocated resources	Information unavailable
Time frame	Information unavailable

25.2.3 *Existing guidelines*

Special guidelines have not been issued

25.3 Legal framework

25.3.1 *Legal status of the use of electronic means in Public Procurement*

The amended public procurement act (adopted January 2004) aims at removing administrative barriers by streamlining public contracting procedures, introducing e-operations and the option of centralising procurement and public contracting procedures. One of the key amendments is the introduction of an e-procurement system, including the establishment of an information portal.

25.3.2 *Implementation of the Directives*

The forthcoming EC Directives on public procurement are expected to be implemented in Slovenia in 2006. The following areas of use of electronic means in the public procurement process are already regulated by national legislation: rules applicable to communication, storage of data and use of specific procedures, e.g. e-auctions.

With the new EU directives, the government is expected to provide that Contracting Authorities may use electronic auctions and dynamic purchasing systems.

None of the current e-procurement systems is expected to fulfil the requirements of the EU public procurement directives fully, but the necessary investments are expected to be allocated once the requirements are clear.

25.3.3 *Status of tools*

Public procurement portals	Expected establishment of an information portal, where contracting authorities will need to publish public procurement notices. The aim is that the portal will be set up within in 2005
Electronic signature	The Electronic Signature in Slovenia is regulated by the Electronic Commerce and Electronic Signature Act[152] and the Decree on Conditions for Electronic Commerce and Electronic Signing. The main significance of the Act is that under special conditions it extends the same validity to the electronic signature as the autographic signature has in the paper world.
Electronic catalogues	In the phase of starting the project
Electronic auctions	Some government authorities have experience with electronic auctions
Dynamic Purchasing Systems	Dynamic purchasing systems are not being used
Framework agreements	Information unavailable

25.3.4 *Reference to the relevant legal acts*

Electronic Commerce and Electronic Signature Act
Decree on Conditions for Electronic Commerce and Electronic Signing

25.4 Current usage of electronic means in Public Procurement

25.4.1 *Practical use of electronic means in Public Procurement*

The total impact of introducing electronic public procurement in Slovenia has not yet been assessed, but the Ministry of Finance plans to do this within the next three years.

Monitoring of the up-take and progress of e-procurement is monitored on a regular basis by the Government Centre for Informatics and the Ministry of Finance

25.4.2 *Which phases of procurement are covered?*

Information unavailable

[152] The Act is entirely in accordance with the provisions of the United Nations' Commission or the International Trade Law's Model Law of the electronic commerce and with the provisions of the primary European legislation. It also includes all the provisions of the Directive 1999/93/EC concerning common framework of the Community for electronic signatures.

25.5 Raising awareness & Promotion of electronic means

The Slovenian government intends to introduce national standards (Open Source XML) for the electronic exchange of data in the public procurement process.

26. Spain

26.1 Organizations and Institutions

Responsible institution(s) for public procurement policy	Ministry of Economy and Finance (http://portal.minhac.es/Minhac/Home.htm) Ministry of Public Administration (www.map.es) Ministry of Trade, Industry and Tourism (www.mcyt.es)
Responsible institution(s) for legal aspects	Ministry of Economy and Finance (http://portal.minhac.es/Minhac/Home.htm) Ministry of Public Administration (www.map.es) Ministry of Trade, Industry and Tourism (www.mcyt.es)
Responsible institution(s) for technical solutions	Responsible for centralized procurement: Directorate of State Patrimony, Ministry of Economy and Finance (http://catalogopatrimonio.minhac.es)
Central procurement institution(s)	There is currently a Centralized Procurement System of goods and services which can be used by central administrations, as well as by Autonomous Communities and local administrations (http//catalogpatrimonio.minhac.es)
Other important organisations	-
Type of coordination between different institutions	Purchasing operations can be organized both centralized and decentralized. Centralized operations of goods and services are carried out through the central public procurement system (amount to around 900 million EUR). The remaining part of public procurement is under the responsibility of each individual institution.

26.2 Strategy

The Ministry of Public Administration is currently working on a strategy for the provision of e-public services in the coming years.

The Directorate of State Patrimony under the Ministry of Economy and Finance has designed a plan for centralized procurement system, which will be implemented by the end of 2004. Such a system will enable to achieve all phases of procurement electronically under the Centralized Procurement System, from the tender to the delivery phase.

26.2.1 Statement of objectives

The objective is that all transactions can be achieved electronically under the Centralized Procurement System in the course of 2005.

26.2.2 *Scope of strategy*

Levels of government involved	National and regional government are included
Legal framework	Law of Public Administration Contracts
Allocated resources	1.5 million EUR has been invested in the Centralized Procurement System during 2003-2004.
Time frame	2003-2005 (Centralized Procurement System)

26.2.3 *Existing guidelines*

Information unavailable

26.3 Legal framework

26.3.1 *Legal status of the use of electronic means in Public Procurement*

There are two relevant provisions:

- Law of public administration contracts
- Law of e-signature

A Ministerial decree is currently in the editing process. It will establish the criteria for use of electronic and telematic means in public procurement, and will be published during the last trimester of 2004.

26.3.2 *Implementation of the Directives*

The forthcoming EU public procurement directives are expected to be implemented in 2005.

The use of electronic means under public procurement will be delimited in the last semester of 2004.

With the new EU directives it is expected for the government to provide that Contracting Authorities may use electronic auctions and dynamic purchasing systems. It is also expected that buyer profiles to publish tender-related information will be used in Spain.

The current e-public procurement system in Spain needs only few changes to be compatible with the Directive’s requirements.

26.3.3 *Status of tools*

Public procurement portals	The Centralized Procurement System of goods and services can be used by central administrations, as well as by Autonomous Communities and local administrations. http://catalogopatrimonio.minhac.es
Electronic signature	An advanced electronic signature has been implemented and is used both in the central administration and in some of the Autonomous Communities
Electronic catalogues	Electronic catalogues of goods and services have existed within the central State Administration since 1997. They are also available for the local communities and administrations.
Electronic auctions	-
Dynamic Purchasing Systems	There is no experience with dynamic purchasing systems in the public administration
Framework agreements	In the Central State Administration, the Central Procurement System relies on framework contracts.

26.3.4 *Reference to the relevant legal acts*

Information unavailable

26.4 Current usage of electronic means in Public Procurement

26.4.1 *Practical use of electronic means in Public Procurement*

Electronic means are used to some extent in connection with procurement of goods, whereas it is only used to a low extent in connection with services. There are no available data in relation to works.

Monitoring of the up-take and progress of e-procurement is monitored on a yearly basis. However, at this stage no data pertaining to the quantitative impact are available.

26.4.2 *Which phases of procurement are covered?*

The status for automating procurement phases in Spain is as follows:

- Notification about tender (To a low extent today, expected to be within 3 years)
- Publication of tender (To a large extent today)
- Management of receipt/submission of tenders (To a low extent today)
- Evaluation of tenders (To some extent today, expected to be within 3 years)
- Ordering (N/A)
- Invoicing (N/A)

In the Central Procurement System, notification and publication of tenders, as well as provision of legal and technical information have been implemented since 2001. The remaining procurement phases except invoicing will be made electronic at the end of 2004.

26.5 Raising awareness & Promotion of electronic means

The Ministry of Public Administrations announced in October 2004 the launching of a plan to develop a system of public tenders online.

The Department of Centralized Procurement (Directorate of State Patrimony, Ministry of Economy and Finance) has developed a project of electronic tenders (from publication to contract signature) for operational goods (personal computers, furniture, cars etc.) and for public administrative services.

Both the central, regional and local administrations have access to this system and can purchase online from any computer located in the administration with a login and an advanced e-signature. Moreover, the system can deliver at any moment a picture of the advancement of ordered goods and services. Currently, 2,200 public institutions have access to this system.

The system also enables the economic operators to respond to the tender online. The bidders are entitled the access their catalogues, so that they easily can modify the description or add prices, products etc. The project has come to an end and is being implemented.

27. Sweden

27.1 Organisations and Institutions

Responsible institution(s) for public procurement policy	National Board for Public Procurement (Nämnden för offentlig upphandling, NOU, www.nou.se), Ministry of Finance • Central government agency under the Ministry of Finance. • Responsible for policy formulation in the area of e-procurement. • NOU is also responsible for day to day operations and for contacts with contracting entities, other organisations and individuals.
Responsible institution(s) for legal aspects	National Board for Public Procurement (Nämnden för offentlig upphandling, NOU, www.nou.se), Ministry of Finance
Responsible institution(s) for technical solutions	Each organisation, central authority, municipality, county council, is responsible for their own solution. Each organisation can follow the specifications, SFTI, but it is not mandatory[153]
Central procurement institution(s)	Swedish Agency for Public Management (Statskontoret)
Other important organisations	The Swedish Association of Local Authorities (Svenska Kommunförbundet) The Swedish Federation of County Councils (Landstingsförbundet)
Type of coordination between different institutions	Public procurement in Sweden is decentralized. However central and local authorities collaborate in different ways. Central authorities, county councils and municipalities work together in a Committee under the name of Single Face To Industry (SFTI). Its programme covers activities like awareness and promotion of eProcurement, development of standards and working practices and support to suppliers The Swedish government has established a co-ordination function for government procurement under The Swedish Agency for Public Management, with one of its main tasks being to coordinate framework contracts for central government authorities. Today, 12 procurement responsible authorities are working together with the co-ordination function in the system for framework purchasing. The system includes some 100 product areas, e.g. for stationery, cars, PC's and furniture[154]

[153] This is the result of a decentralized structure of the Swedish public sector. County councils and municipalities are independent. Central government authorities have budget and goals they must achieve but within that framework they can make their own decisions, for example about technical solutions. Therefore, there are many technical solutions and a somewhat market driven development; progress is dependent on collaboration. Based on information from Irene Andersson, The Swedish Agency for Public Management

[154] Based on information from Irene Andersson, The Swedish Agency for Public Management

27.2 Strategy

The goal of the Swedish Government's IT policy is to make the country a leading information society for all. Electronic commerce including electronic procurement is one area prioritized by the Government because it is an important medium for increasing rates of growth.

Work has taken place at the national level since the mid-1990's to facilitate the introduction of electronic procurement in the public sector.

The Swedish Government has made a commitment to take various measures to stimulate the development, and use, of electronic commerce. The role of the state is to ensure that electronic commerce is developed in a way that benefits both business and consumer. To encourage electronic commerce, the state must be aware of progress in the area, and work towards solving any problems. The Swedish IT policy is based on the principle of market-driven development. The tasks of the public sector are thus to ensure that regulation is in place, but also to set a good example by being progressive in terms of e-procurement, which can help to create a beneficial and more mature climate for e-commerce in general.

Initiatives on e-public procurement are an integrated part of different policies on adoption of the information society, among different publication is:

- "An Information Society for All, a publication" (2004), which is about the Swedish IT-policy

27.2.1 Statement of objectives

While the Swedish government has worked for a number of years to introduce and advance public e-procurement, it has not been possible to identify recent specific objectives in the area due to a decentralised organisation of activities on e-public procurement.

27.2.2 Scope of strategy

Levels of government involved	Only central government is included in the strategy
Legal framework	The national law on public procurement and national law implementing the EC-directives on electronic commerce
Allocated resources	Resources have been spent but there is no information available on the total amount due to the decentralized organisation.
Time frame	Authorities set their own time frames

In order to remove obstacles to the use of electronic signatures, the Swedish government has appointed a working group with the task to conduct a survey of form requirements (e.g. provisions that a communication or documentation must be signed or in writing). The WG presented a report in April 2003, revealing some 800 provisions that do not allow electronic communication or signatures, 180 of which were deemed to be unnecessary obstacles. Each Ministry is responsible for carrying out the necessary changes in legislation.

27.2.3 Existing guidelines

Guidelines have been issued, www.eh.svekom.se/mer/litteratur.html, even though no guidelines from central government.

27.3 Legal framework

27.3.1 Legal status of the use of electronic means in Public Procurement

Some of the current e-procurement systems are assessed as already meeting the requirements of the EU public procurement directives fully.

27.3.2 Implementation of the Directives

The forthcoming EU public procurement directives are expected to be implemented in 2005 and come into force in 2006. The following areas of use of electronic means in the public procurement process are already regulated by national legislation: rules applicable to communication, storage of data and use regarding security (such as electronic signatures).

In Sweden the drafting of the new public procurement legislation has just begun by appointing a committee and experts. The first proposal to a new legislation shall be given in February 2005. Any proposals concerning competitive dialogue, electronic auctions and dynamic purchasing systems can be reported at the latest on June 1st 2005. The final version will be finished during the summer of that year. The group is wide and contains representatives from the main ministries involved and representatives for contracting authorities, supplier and service providers. SMEs, labour unions and an environmental organisation are represented[155].

27.3.3 Status of tools

Public procurement portals	The Swedish government has not established any central electronic public procurement portals as this is deliberately left up to private operators. Several privately owned and operated portals exist instead. Opic and Ajour are two of them that concentrates on public procurement.
	www.opic.com Private portal with information on public tenders. Functionalities are notice and publication of tenders
	www.ajour.se Meeting point for authorities and procuring entities searching for suppliers. The company is a distributor of information about public procurement gathered through a vast and well established network of purchasers. All calls for tenders are structured and distributed through two channels, the printed version AnbudsJournalen and the database www.ajour.se. The functionalities are notices and publication of tenders.

[155] Based on information from Irene Andersson, The Swedish Agency for Public Management

Electronic signature	There are five framework agreements with five suppliers offering electronic signatures in Sweden, but e-signatures are so far only used to a low extent in relation to public procurement. There are no plans to make the use of a qualified electronic signature mandatory to participate in public calls for tenders in Sweden
Electronic catalogues	Electronic catalogues are used in relation to purchase of goods. Some suppliers when submitting a bid they refer to electronic catalogues and give discount on the prices given in these catalogues.
Electronic auctions	E-auctions are not being used.
Dynamic Purchasing Systems	Dynamic Purchasing Systems are not being used.
Framework agreements	Framework agreements are widely used. Framework agreements and electronic catalogues are often combined.

27.3.4 Reference to the relevant legal acts

The act on Public Procurement, www.nou.se/loueng.html

The Act on Electronic Signatures, Lag (2000:832) om kvalificerade elektroniska signaturerhttp://www.pts.se/Sidor/sida.asp?SectionId=1011

The directive 2001/115/EC harmonising the VAT invoicing rules has been implemented in the 3 laws that were affected.

27.4 Current usage of electronic means in Public Procurement

27.4.1 Practical use of electronic means in Public Procurement

According to a survey conducted in 2003, only 15 out of 241 central government authorities had introduced electronic ordering and invoicing, with a further 7 having initiated pilot projects. 76% of the central government authorities indicated that they had no immediate plans to introduce e-procurement. There are no figures to relate to the extent or up-take of e-procurement or the intentions to introduce e-procurement of the individual authorities with the volume of procurement carried out by those authorities.

The survey also showed that 83 of 290 municipalities have introduced systems for electronic procurement in some form, and according to information made available by the Swedish Ministry of Finance, 75 municipalities and 10 counties presently have solutions in place for electronic ordering and invoicing. A further 50 municipalities are planning to introduce electronic procurement, of which 35 have already initiated pilot-studies. Over 70 municipalities envisage the introduction of electronic procurement over the next few years. Of the municipalities that have introduced electronic procurement, they have mainly purchased food and office material.

The total public procurement in Sweden amounts to about SEK 400 billion. Central government is responsible for approximately SEK 85 billion.

The Swedish Agency for Public Management was in 2003 tasked by the government to carry out a yearly monitoring in cooperation with the Local Government Association of the up-take and progress on electronic public procurement. The monitoring is carried out as a web-based questionnaire which is distributed to contracting authorities. The Agency has also presented an action plan concerning electronic procurement. One goal is to a 50 % increase in the use of electronic procurement between 2004 and 2006.

The most significant advantages from the introduction of electronic public procurement for public authorities are expected to be:

- Speeding up of procurement procedures
- Lower transaction costs
- Better procurement statistics and enhanced budgetary control
- Correct prices
- Better usage of existing framework agreements

27.4.2 *Which phases of procurement are covered?*

The status for automating procurement phases in Sweden is as follows:

- Notification about tender (to a large extent today, both above and below threshold value)
- Publication of tender (to a large extent today, both above and below threshold value)
- Management of receipt/submission of tenders (to some extent today, but expected to be increased within the next three years)
- Evaluation of tenders (automated to some extent
- Ordering, increasing, particularly within regional and local authorities
- Invoicing, increasing, particularly within regional and local authorities

Generally, evaluation and management of receipt/submission of tenders are the phases of public procurement that have been automated the least.

Many municipalities are scanning their invoices and they are also developing solutions to be able to handle flows of invoices.

Some phases are not mentioned, for example planning before the start, dissemination of contract information and follow-up incl. statistics. The Swedish Agency for Public Management will in October 2004 open a website with information about all central framework agreements, www.statskontoret.se.

Procuring entities are reluctant to use new methods in procurement unless they feel assured that they comply with the legal framework.

27.5 Raising awareness & Promotion of electronic means

The main objectives appear to concern the development of the standard of Single Face to Industry: In the mid-1990’s, the Swedish experts from national, regional and local agencies started to work on a set of standards called ‘Single Face to Industry’ (SFTI, www.eh.svekom.se). SFTI is an industry standard for electronic commerce in the public sector in Sweden. The purpose of SFTI is to establish a single set of specifications for the interchange of electronic commercial transactions with all public operators, whether at governmental, regional (county council) or local community level.

To achieve this, a platform of co-operation has been organized where representatives for all three levels meet with representatives for the suppliers to develop a shared view of the public procurement processes and agree on common specifications. The objective is that pre-planning, the procurement process, ordering, and the invoicing process shall be done electronically. The processes shall follow the standards that have been produced and adopted under the SFTI concept. It is built on EDI-messages according to the EDI-FACT standards, and can be used along with other standards.

Some recent developments are based on ebXML.

28. United Kingdom

28.1 Organisations and Institutions

The main institutions in the field are:

- The Office of Government Commerce (OGC)
- The Improvement and Development Agency (IDeA)

Responsible institution(s) for public procurement policy	Office of Government Commerce (OGC; www.ogc.gov.uk) is an independent Office of the Treasury reporting to the Chief Secretary.
Responsible institution(s) for legal aspects	Office of Government Commerce (OGC; www.ogc.gov.uk)
Responsible institution(s) for technical solutions	Improvement and Development Agency (IDeA) was established by and for regional and local government in April 1999. The mission is to support self-sustaining improvement from within local government. The IDeA has given local authorities in England and Wales the means to enhance traditional methods of procurement, through IDeA marketplace (www.idea.gov.uk/marketplace/).
Central procurement institution(s)	OGC Buying Solutions (www.OGCbuyingsolutions.gov.uk)
Other important organisations	NHS Purchasing and Supply Agency - responsible for ensuring that the National Health Service makes the most effective use of its resources by getting the best value for money possible when purchasing goods and services. Defence Procurement Agency - an executive agency of the Ministry of Defence, whose task is to procure the equipment for the UK Armed Forces. Small Business Service (SBS)
Type of coordination between different institutions	Procurement is organized as a mixture of a centralized and decentralized approach: • There is a central public procurement body, OGC Buying Solutions. It arranges framework contracts, which can be used by all public authorities in UK. However, the individual public authority is free to arrange individual framework agreements. • Procurement (selection of suppliers) is a responsibility of the individual public authority. • The total procurement through national framework contracts (OGCbuyingsolutions) is approximately 16 million pounds (0.1% of central government procurement). Figures for regional and local level are unknown.

The devolved authorities in Scotland and Wales have their own eProcurement initiatives.

28.2 Strategy

The overall e-procurement vision of the UK government is that all central civil government purchasing transactions should be able to be transmitted securely over the Internet between government and suppliers using interoperable systems based on open standards.

On the national political agenda, the introduction of operational e-public procurement has a medium priority. This reflects a recent increase of priority to this area driven by focus on more efficient procurement procedures.

A specific e-procurement Strategy for Central Civil Government from 2002 exists

It is composed by several strategic documents/sites on www.ogc.gov.uk. It is a central government strategy, but it is an inspiration for regional and local government as well. The strategy is composed of three main elements:

- The Establishment of Framework Agreements: to procure Commercial Off The Shelf (COTS) tools for interoperable systems to e-enable the procurement and sourcing processes, for example electronic tendering, auctions and payment solutions.
- Change Management: to influence policy direction and best practice and to establish a common approach for central civil government over the next 3 years; to help departments/agencies in understanding their business profiles, their procurement needs and in preparing their business cases (e.g. eProcurement Assessment Tool).
- Carrying out a feasibility study for an eHub examining how a single point of entry using common standards of communication language and coding convention might provide a data translation service between government and supplier systems, enable an improved commercial dialogue with suppliers and provide improved management information to government. The development name for this project is Zanzibar.

28.2.1 Statement of objectives

The government has specified an overall objective for the introduction of operational public procurement. The core objective is that:

- Web-enabled tools and techniques shall deliver 250 million pounds value for money improvements to government's commercial relationships during April 2003 – March 2006 (http://www.ogc.gov.uk/index.asp?docid=2364).
- 50% of citizen-facing transactions should be capable of electronic delivery by 2005 and 100% by 2008 (see also UK Online Strategy on www.citu.gov.uk).

28.2.2 *Scope of strategy*

Levels of government involved	Central, regional and local government are included
Legal framework	Information unavailable
Allocated resources	Resources have been spent but there is no information on the amount
Time frame	Information unavailable

28.2.3 *Existing guidelines*

Special guidelines for electronic public procurement have been issued:

- "E-procurement cutting through the hype – A guide to eProcurement for the public sector"; OGC; October 2002
- "Electronic Reverse Auctions"; OGC.

28.3 Legal framework

28.3.1 *Legal status of the use of electronic means in Public Procurement*

It is not known whether the current e-procurement systems will fulfil the requirements of the EU public procurement directives fully, but in forthcoming developments the requirements of the directives will be fully taken into account.

28.3.2 *Implementation of the Directives*

The forthcoming EU public procurement directives are expected to be implemented by the end of January 2006. The following areas of use of electronic means in the public procurement process will be regulated by national legislation: rules applicable to communication, storage of data and use of specific procedures, e.g. e-auctions.

The UK intends to implement the articles of the new EU directives relating to electronic auctions and dynamic purchasing systems, allowing Contracting Authorities to make use of them. Electronic auctions are expected to be used in particular. Buyer profiles to publish tender-related information on a 'buyer profile' are being used by Contracting Authorities in UK.

28.3.3 Status of tools

Public procurement portals	www.OGCbuyingsolutions.gov.uk is the central government procurement portal. It provides information and tools about electronic public procurement and framework agreements, but not yet functionalities of electronic tendering and purchasing[156]
	From CSARSS.NET – the Regional Supplies Service e-procurement site (www.csarss.net) firms and individuals can access potential public procurement business opportunities. On the site suppliers can register company de-tails and login and access procurement opportunities offered by the entire public sector.
	www.supplyinggovernment.gov.uk. Together with the Small Business Service (SBS), OGC has also launched a website – Supplying Government. This website provides a single point for information on selling to government and an access point to advertised contracts, as well as details of the West Midlands SME Procurement Pilot
Electronic signature	An official electronic signature has not been introduced in UK yet, but a pilot project has been conducted by the e-envoy[157] (www.e-envoy.gov.uk). UK is waiting on the EU directives to be finalized, and a digital signature is expected to be introduced within two years
Electronic catalogues	Amongst OGC Buying Solution's e-procurement initiatives, S-Cat and GCat. Both are designed to be used by public institutions (buyer-side) such as Government departments, Agencies, Local Authorities, Educational establishments, Police Forces, NHS bodies, public and privatised Utilities. • S-CAT is a web catalogue giving access to more than 170 service providers. S-Cat has 16 discrete Service Categories covering both IT and Business Consultancy Services. Examples are: IS Strategy Development (1) and Programme and Project Management (2). Before registering at S-CAT, suppliers have passed a tendering and evaluation process, meaning Public Sector discounts has already been negotiated for buyers. • GCAT is an online catalogue with more than 50.000 IT & Telecommunication products. GCAT provides functionalities for online ordering and online payment.

[156] The 'Zanzibar' project, a purchase to pay marketplace, is expected to be launched in 2005.
[157] Now the e-Government Unit

Electronic auctions	A number of public authorities in the UK have already gained experience with electronic auctions, and although expanding rapidly the use is not widespread. In addition to the earlier mentioned guidelines on electronic auctions, the OGC has provided public authorities with an eAuction Decision Tool to evaluate whether an eAuction is suitable for an intended procurement. A dynamic purchasing system has so far not been developed. Both eAuctions and dynamic purchasing are expected to increase with the implementation and greater understanding of the new EU public procurement directives.
Dynamic Purchasing Systems	-
Framework agreements	Framework Agreements are already used extensively in the UK either through central bodies such as OGC Buying Solutions or established directly by government departments and agencies.

28.3.4 Reference to the relevant legal acts

Information unavailable

28.4 Current usage of electronic means in Public Procurement

28.4.1 Practical use of electronic means in Public Procurement

The total public procurement in the UK is approximately 100 billion pounds. Central government is responsible for approximately £16 billion of procurement; the rest is the responsibility of regional and local authorities, including the health care system.

Monitoring of the up-take and progress of e-procurement is monitored on a 6-monthly basis by a questionnaire to all government departments. The following aspects are monitored: Number of procurement transactions and transaction costs, use of various eProcurement tools, and savings achieved. The monitoring is kept as simple as possible to ensure that public institutions actually use it.

The resources allocated by public authorities to introducing operational public procurement are not monitored at national level, but development and maintenance of OGCbuyingsolutions.gov.uk amounts to 16.5 million pounds alone.

28.4.2 Which phases of procurement are covered?

The following is the estimated status for automating procurement phases in the UK:

- Notification about tender (not automated today, but expected to be within three years)
- Publication of tender (to a low extent today, but expected to be within three years)
- Management of receipt/submission of tenders (to a low extent today, but expected to be within three years)
- Evaluation of tenders (not automated, but expected to be within three years)
- Ordering (to some extent, but expected to be within three years)
- Invoicing (to a low extent, but expected to be within three years).

Generally, repetitive purchasing is the phase of public procurement that has been automated the most, whereas individual contracts and invoicing are only automated to a low extent. Repetitive purchasing is done via individual systems for each contracting authority based on technology such as EDI and by use of electronic catalogues.

28.5 Raising awareness & Promotion of electronic means

Within the e-Government Interoperability Framework (e-GIF), UK has standardized a number of areas related to electronic public procurement, including XML schemes, metadata, GCL (Government Category List) and Government Data Standards Catalogue. Zanzibar will provide further standards in the area of electronic procurement.

Annex A: Procurement of works, goods, services, and utilities

Country	www-address	Description	Works	Goods	Service	Utilities
Austria	www.oebb.at	Portal established and operated by Österreichische Bundesbahnen (ÖBB).	No	Yes	No	No
Belgium	www.jepp.be	Federal e-public procurement portal. Online notification and publication of tenders.	?	?	?	?
Belgium	http://avis.marchespublics.wallonie.be/	Procurement portal of the Walloon Region	?	?	?	?
Czech Republic	http://www.micr.cz/e-trziste/	Purchases of IT products falling outside the Public Procurement Act (under 2 mil. CZK (62 500 EUR)). Obligatory for ministries in the Czech Republic.	No	Yes	No	No
Czech Republic	www.centralni-adresa.cz	This portal ensures publication of tender notices on the "Central Address" and sending of tender notices to OJEU. It enables access to the List of Qualified Suppliers. It contains information relating to public procurement laws and regulations, classifications, other useful information, FAQ section.	?	No	No	?
Denmark	www.doip.dk	Central e-public procurement portal. It is an electronic market place with procurement information and guidelines.	Yes	Yes	Yes	Yes
Denmark	www.ski.dk	'Ethics' is a central procurement portal with access to framework contract. Functionalities include e-tendering.	No	Yes	Yes	?
Denmark	www.kmd.dk	Functionalities of KMD Webindkob are mainly e-purchasing (ordering and electronic invoice).	?	Yes	Yes	?
Denmark	RAKAT	RAKAT is run by the private company COMCARE and functionalities are mainly e-purchasing (ordering and electronic invoice).	?	Yes	Yes	?
Estonia	www.rha.gov.ee	The State Register is a simple e-public procurement portal with online notification of tenders.	?	?	?	?
Finland	www.ktm.fi/julma	E-public procurement portal run by the Ministry of Trade and Industry. Information and notices about public procurement below the threshold value	?	?	?	?
Finland	www.credita.fi	E-public procurement portal. Publication of notices.	?	?	?	?
France	www.achats.defense.gouv.fr	E-market place for the French Ministry of Defence	?	?	?	?

Country	www-address	Description	Works	Goods	Service	Utilities
France	www.ixarm.com	E-market place for the French Ministry of Defence	?	Yes	?	?
France	http://saomap.application.equipment.gouv.fr/	The French Ministry of Equipment, Transport and Housing has its own portal called SAOMAP.	?	?	?	?
France	http://marches-publics57.com	Regional e-public procurement portal with information on notices.	Yes	Yes	Yes	?
France	http://www.ugap.fr/	A central purchasing agency that local, regional and national authorities can make use of. Allows bidders submit tenders electronically and organises reversed auctions for paper suppliers.	?	Yes	Yes	?
Germany	http://www.evergabe-online.de/	E-vergabe is an online database with call for tenders. From February 1st 2004 it is possible to transfer the offers electronically.	Yes	Yes	Yes	?
Germany	www.ausschreibungs-abc.de.	Electronic public procurement platform with calls for tenders in public and private sector.	Yes	Yes	Yes	?
Germany	http://www.vergabe.nrw.de	Regional e-public procurement portal for the region of Nordrhein-Westfalen	Yes	Yes	Yes	No
Germany	www.had.de	Regional portal for notification and publication of tenders (Ausschreibungen) for the region of Hessen.	Yes	Yes	Yes	No
Germany	http://www.ausschreibungen-brandenburg.de	Regional portal for notification and publication of tenders (Ausschreibungen) for the region of Brandenburg together with Berlin	Yes	Yes	Yes	No
Germany	www.ausschreibungen.hamburg.de	Regional portal for notification and publication of tenders (Ausschreibungen) for the region of Der Freien und Hansestadt Hamburg.	No	Yes	Yes	No
Germany	(http://www. bayerischer-staatsanzeiger.de	Regional portal for notification and publication of tenders (Ausschreibungen) for the region of Bayern	?	?	?	?
Germany	http://www.ausschreibungsanzeiger-thueringen.de	Regional portal for notification and publication of tenders (Ausschreibungen) for the region of Thüringen	Yes	Yes	No	No
Hungary	www.kozbeszerzes.gov.hu	Central e-public procurement portal. Information about the status of running contracts.	No	Yes	No	No
Ireland	www.etenders.gov.ie	National, central e-public procurement portal. Online notification of tenders above and below threshold value. Reference point for all public contracts.	Yes	Yes	Yes	Yes

Country	www-address	Description	Works	Goods	Service	Utilities
Ireland	www.tendersireland.com	Site where all of the procurement opportunities advertised by Central and Local Government in Ireland (North and South) are published.	Yes	Yes	Yes	?
Italy	www.acquistinretepa.it	Central e-public procurement portal – a market place for public administration. E-catalogues on national framework agreements. E-auctions. The platform facilitates the use of three main tools for public e-procurement: *E-shops, reversed e-auctions* and *marketplace.*	No	Yes	Yes	Yes
Latvia	www.iub.gov.lv	Central e-public procurement portal. Online notification of tenders. Information and statistics	Yes	Yes	Yes	Yes
Malta	www.e-procurement.gov.mt	E-Procurement portal for Public Service entities of IT desktop equipment which costs less than Lm2,500. Ordering of IT hardware and software from approved suppliers for procurement below the threshold value.	No	Yes	No	No
Netherlands	www.aanbestedingskalender.nl	E-public procurement site for the constructions sector.	Yes	No	Yes	No
Sweden	www.ajour.se	Private procurement portal. The functionalities are notice and publication of tenders	Yes	Yes	Yes	?
Sweden	www.opic.com	Private portal with information on public tenders. Functionalities are notice and publication of tenders	Yes	Yes	Yes	?
United Kingdom	www.OGCbuyingsolutions.gov.uk	Central government procurement portals with information and tools about electronic public procurement and framework agreements.	Yes	Yes	Yes	Yes
United Kingdom	www.csarss.net	Regional e-public procurement portal. Firms and individuals can access potential public procurement business opportunities	Yes	Yes	Yes	no

Annex B: The use of electronic means in different phases in the procurement cycle

Country	www-address	Ownership	Description	Notification about tenders	Publication of tenders	Management of receipts /submission of tenders	Evaluation of tenders	Ordering	Invoicing
Austria	www.oebb.at	Public	Portal established and operated by Österreichische Bundesbahnen (ÖBB).	Yes	Yes	Yes (digital signature)	?	No	No
Belgium	www.jepp.be	Public	Federal e-public procurement portal. Online notification and publication of tenders.	Yes	Yes	No	No	No	No
Belgium	www.avis.marchespublics.wallonie.be/	Public	Procurement portal of the Walloon Region	Yes	No	No	No	No	No
Czech Republic	www.micr.cz/e-trziste/	Public	Purchases of IT products falling outside the Public Procurement Act (under 2 mil. CZK (62 500 EUR)). Obligatory for ministries in the Czech Republic.	Yes	yes	?	?	Yes	?
Czech Republic	www.centralni-adresa.cz	Public	This portal ensures publication of tender notices on the "Central Address" and sending of tender notices to OJEU. It enables access to the List of Qualified Suppliers. It contains information relating to public procurement laws and regulations, classifications, other useful information, FAQ section.	Yes	No	No	No	No	No

Country	www-address	Ownership	Description	Notification about tenders	Publication of tenders	Management of receipts /submission of tenders	Evaluation of tenders	Ordering	Invoicing
Denmark	www.doip.dk	Public	Central e-public procurement portal. It is an electronic market place with procurement information and guidelines.	No	No	No	No	Yes	Yes
Denmark	www.ski.dk	Public	'Ethics' is a central procurement portal with access to framework contract. Functionalities include e-tendering.	Yes	Yes	?	Yes	No	No
Denmark	www.kmd.dk	Private	Functionalities of KMD Webindkob are mainly e-purchasing (ordering)	No	No	No	No	Yes	No
Denmark	www.rakat.dk	Private	RAKAT is run by the private company COMCARE and functionalities are mainly e-purchasing (ordering)	No	No	No	No	Yes	No
Estonia	www.rha.gov.ee	Public	The State Register is a simple e-public procurement portal with online notification of tenders.	Yes	?	?	?	?	?
Finland	www.ktm.fi/julma	Public	E-public procurement portal run by the Ministry of Trade and Industry. Information and notices about public procurement below the threshold value	Yes	?	?	?	?	?
Finland	www.credita.fi	Private	E-public procurement portal. Publication of notices.	Yes	?	?	?	?	?
France	www.achats.defense.gouv.fr	Public	E-market place for the French Ministry of Defence	Yes	?	?	?	?	?
France	www.ixarm.com	Public	E-market place for the French Ministry of Defence	Yes	Yes	Yes	No	Yes	No

Country	www-address	Ownership	Description	Notification about tenders	Publication of tenders	Management of receipts /submission of tenders	Evaluation of tenders	Ordering	Invoicing
France	www.saomap.application.equipment.gouv.fr/	Public	The French Ministry of Equipment, Transport and Housing has its own portal called SAOMAP.	Yes	Yes	No	No	No	No
France	www.marches-publics57.com	Public	Regional e-public procurement portal with information on notices.	Yes	No	No	No	No	No
France	www.ugap.fr/	Public	A central purchasing agency that local, regional and national authorities can make use of. Allows bidders submit tenders electronically and organises reversed auctions for paper suppliers.	Yes	Yes	Yes	?	Yes	?
Germany	http://www.evergabe-online.de/	Public	E-vergabe is an online database with call for tenders. From February 1st 2004 it is possible to transfer the offers electronically.	Yes	Yes	Yes	No	No	No
Germany	www.ausschreibungs-abc.de.	Public	Electronic public procurement platform with calls for tenders in public and private sector.	Yes	Yes	Yes	No	No	No
Germany	http://www.vergabe.nrw.de	Public	Regional e-public procurement portal for the region of Nordrhein-Westfalen	Yes	No	No	No	No	No
Germany	www.had.de	Public	Regional portal for notification of tenders (Ausschreibungen) for the region of Hessen.	Yes	No	No	No	No	No

Country	www-address	Ownership	Description	Notification about tenders	Publication of tenders	Management of receipts /submission of tenders	Evaluation of tenders	Ordering	Invoicing
Germany	www.ausschreibungen-brandenburg.de),	Public	Regional portal for notification of tenders (Ausschreibungen) for the region of Brandenburg together with Berlin	Yes	No	No	No	No	No
Germany	www.ausschreibungen.hamburg.de	Public	Regional portal for notification and publication of tenders (Ausschreibungen) for the region of Der Freien und Hansestadt Hamburg.	Yes	Yes	Yes	Yes	No	No
Germany	www.bayerischerstaatsanzeiger.de	Public	Regional portal for notification of tenders (Ausschreibungen) for the region of Bayern	Yes	No	No	No	No	No
Germany	www.ausschreibungsanzeiger-thueringen.de	Private	Regional portal for notification of tenders (Ausschreibungen) for the region of Thüringen	Yes	No	No	No	No	no
Hungary	www.kozbeszerzes.gov.hu	Public	Central e-public procurement portal. Information about the status of running contracts.	Yes	No	No	No	No	No
Ireland	www.etenders.gov.ie	Public	National, central e-public procurement portal. Online notification of tenders above and below threshold value. Reference point for all public contracts.	Yes	Yes	No (in progress)	No (at planning stage)	No	No
Ireland	www.tendersireland.com	Private	Site where all of the procurement opportunities advertised by Central and Local Government in Ireland (North and South) are published.	Yes	Yes	No	No	No	No

Country	www-address	Owner-ship	Description	Notifi-cation about tenders	Publication of tenders	Management of receipts /submission of tenders	Evaluation of tenders	Ordering	Invoicing
Italy	www.acquistinretepa.it	Public	Central e-public procurement portal – a market place for public administration. E-catalogues on national framework agreements. E-auctions. The platform facilitates the use of three main tools for public e-procurement: *E-shops, reversed e-auctions* and *marketplace.*	Yes	Yes	Yes (digital signature)	No	Yes	No
Latvia	www.iub.gov.lv	Public	Central e-public procurement portal. Online notification of tenders. Information and statistics	Yes	Yes	No	No	No	No
Malta	www.e-procurement.gov.mt	Public	E-Procurement portal for Public Service entities of IT desktop equipment which costs less than Lm2,500.	Yes	Yes	No	No	Yes	No
Netherlands	www.aanbestedingskalender.nl	Public	E-public procurement site for the constructions sector.	Yes	No	No	No	No	No
Sweden	www.ajour.se	Private	Private procurement portal. The functionalities are notice and publication of tenders	Yes	?	No	No	No	No
Sweden	www.opic.com	Private	Private portal with information on public tenders. Functionalities are notice and publication of tenders	Yes	Yes	No	No	No	No
United Kingdom	www.OGCbuyingsolutions.gov.uk	Public	Central government procurement portals with information and tools about electronic public procurement and framework agreements.	Yes	Yes	Yes	Yes	No	No

Country	www-address	Ownership	Description	Notification about tenders	Publication of tenders	Management of receipts /submission of tenders	Evaluation of tenders	Ordering	Invoicing
United Kingdom	www.csarss.net	Public	Regional e-public procurement portal. Firms and individuals can access potential public procurement business opportunities	Yes	Yes	Yes	No	No	No

Impact Assessment
Action Plan on
electronic Public Procurement

Part 2: Baseline Scenario

December 2004

Produced by Rambøll Management

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1. Introduction

1.1 Background, Objective and Methodology

This report contains Part 2 of the Impact Assessment on an Action Plan on e-Public Procurement. The report is carried out by RAMBOLL Management for the Internal Market Directorate-General.

To understand the objective of the impact assessment it is necessary to consider the broader political context, namely the realization of the *Lisbon objectives*: the European Council has set the overall target to develop Europe as the world's most dynamic and competitive economy by 2010. The underlying rationale behind the introduction of e-public procurement is to function as a mean that can improve the functioning of the internal market in the EU work and thereby make a contribution to the realization of the Lisbon objectives. The time horizon for assessing the potential impact of various policy instruments is defined as 2010 in order to align the impact assessment with the objective outlined by the European Commission, which states that "Generalised e-procurement should be achieved by 2010".

This broader context created by the Lisbon objectives means that all possible policy instruments should be assessed in light of their ability to contribute to a better functioning internal market in the EU and thereby to the realization of the Lisbon objectives.

The impact assessment consists of three main elements:

First, ***the baseline scenario***, which is a projection of the current main development trends in the field of e-public procurement based on the findings of Part 1: The baseline analysis.

The basic assumption of the baseline scenario is to provide an assessment of the development of main trends and factors related to e-public procurement until 2010 as they would seem likely to unfold under the influence and dynamics resulting from the transposition of the new public procurement directives into national legislation across the EU member states, but *without* further policy action at the European level.

The baseline scenario serves as a basis for assessing the potential results and impacts of a range of possible policy instruments which are included in two additional scenarios.

Secondly, the report contains ***the balanced approach scenario***. This is a scenario where a focused, and limited number of policy instruments are applied at the European level to ensure full and correct adoption of the new procurement directives at national level in collaboration with the EU member states and to ensure that the implementation of e-public procurement at national level across the EU does not conflict with the fundamental principles of the internal market. This scenario does not include policy instruments that go beyond this level.

Thirdly, the report contains ***the extensive effort scenario***. This is a scenario where a number of policy instruments are applied across the board by the European Commission in collaboration with the member states in order to ensure not only the full and correct adoption of the legal framework at national level and the compliance of e-public procurement systems with the fundamental principles of the internal market, but also to promote the uptake of e-public procurement across the EU.

The research methodology used for this impact assessment follows the European Commission's guidelines for impact assessment. The impact assessment is based on a number of data sources:

- An interview-based questionnaire survey among all 25 EU member states, which were represented by selected experts and officials from central, governmental institutions responsible for and/or deeply involved in the public procurement policy area in the member state.
- A review of existing data, studies and literature in the field. The sources used are listed throughout the report in the footnotes which contain detailed references to the sources.
- A range of interviews with experts from the IT industry, government officials, and managers and experts responsible for existing e-public procurement solutions in Europe (a list of interviewees involved in this type of interview is enclosed as an annex).
- A consultation process with the European Commission services throughout the period of the study.

1.2 Definitions

As Kalakota & Robinson[1] point out, purchasing refers to the specific activities associated with the buying process, whereas procurement is a broader term for all activities associated with obtaining goods and services from a supplier, including requisition, purchasing, transportation, warehousing and inbound receiving processes.

Thus, electronic procurement (e-procurement) can be defined as:

- The electronic integration and management of all procurement activities including purchase request, authorization, ordering, delivery and payment between a purchaser and a supplier[2].

The broad term e-procurement covers a number of different methods of purchase and sale in terms of IT-systems, procedures and underlying technologies. In order to make a distinction between the different methods of e-public procurement, these can be labelled e-tendering (for sourcing) and e-purchasing (for buying)[3]:

Tendering is in this report defined as the process of finding and selecting suppliers of public supplies, works or services. For tenders above the thresholds, this is regulated by the EU procurement directives. Tendering includes the procurement process from publication of tender notices by a contracting authority to award of contract.

[1] R. Kalakota & M. Robinson "e-Business 2.0" (2001), Addison Wesley.

[2] Chaffey, Dave: E-Business and E-Commerce Management (2004), Prentice Hall.

[3] A recent report distinguish between the following e-procurement 'solutions': eTendering, eAuctions, ePurchasing and Procurement cards. See local e-gov (2004): "The Benefits of e-procurement - National e-Procurement Project", Office of the Deputy Prime Minister. www.nepp.org.uk

Thus, *e-tendering* is the use of electronic means throughout the tendering processes. This includes the exchange of all relevant information and documents in electronic format.

Purchasing is the process of purchasing goods, works, services and utilities. This includes the processes from finding a product to invoicing and payment. Thus purchasing includes the process of ordering, but also the final stages of the procurement process (payment). *E-purchasing* is defined as the use of electronic means in the purchasing process.

1.3 Scope of the impact assessment

As illustrated above, e-procurement is a very broad term which involves many different steps. In line with the new EU procurement directives, the focus of this impact assessment is the digitization of the tendering process, i.e. the process from indicative notice/prior information to advertisement of contract award / communication of rejection. However, as the new directive also introduces rules related to e-purchasing (e-auctions and dynamic purchasing systems), the purchasing process is also subject of the analysis, although to a lesser extent.

1.4 Scope for e-Public Procurement

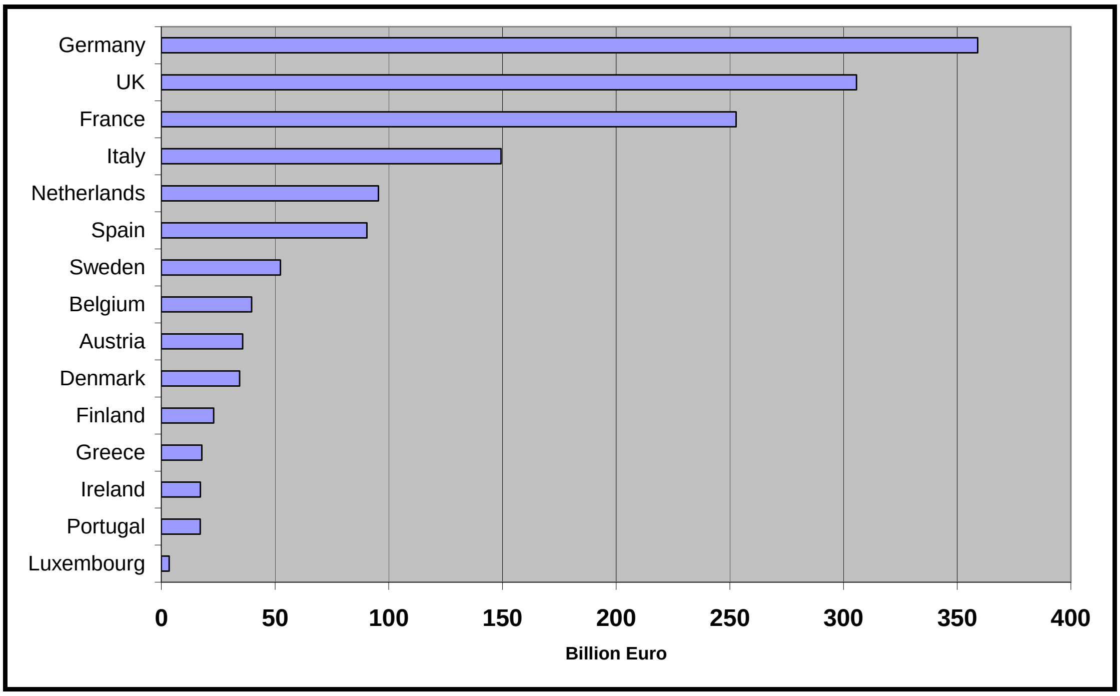
This section describes the scope for e-procurement by outlining some key figures and key characteristics about public procurement in Europe. These data will set the stage for the subsequent analysis.

1.4.1 The total value of public procurement

According to estimates, the total value of public procurement in the EU – i.e. the purchases of goods, services, works and public utilities (incl. defence) - is about €1500 billion in 2002 or about 16% of the Union's GDP[4]. It should be noted that these figures include procurement both above and below the EU procurement thresholds.

[4] DG Internal Market: A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future. 2004.

Figure 1.1: Total public procurement in 2002 in billion EUR (EU15)



Source: EU Commission, DG Internal Market data

A number of key figures are worth highlighting:

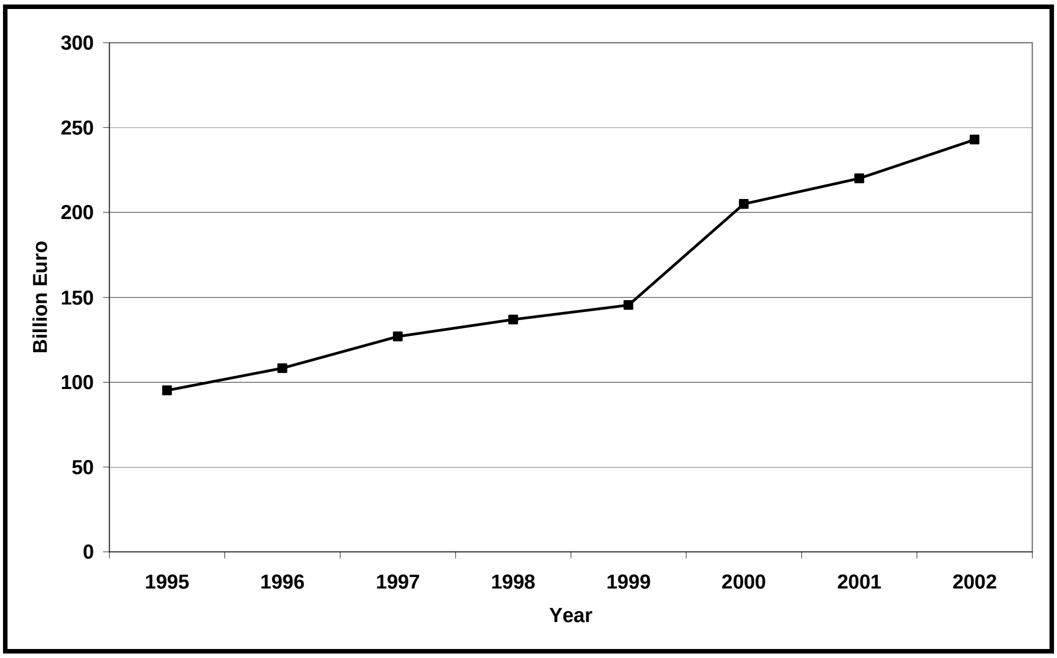
- The value of public procurement in Germany, UK, France and Italy totals approximately 1,070 billion EUR or 71% of the total public procurement in EU-15.
- In the 1995 to 2002 period, public procurement increased by almost a third (31%), from 1,140 billion EUR in 1995 to 1,490 billion EUR in 2002.
- In 2002, 106,346 invitations to tender and 58,513 contract award notices were published.

1.4.2 *Publication of public procurement electronically*

Online publication of contract opportunities can improve fair and open competition enabling suppliers to reap the full benefits of the internal market.

As mentioned earlier, the total amount of public procurement in EU 15 increased by 31% from 1995 to 2002. In the same period, the amount published in the official journal increased far more: over 250% (from 95 billion in 1995 to 243 billion in 2002). The share of public procurement published in the official journal / Tenders Electronic Daily as percentage of the total public procurement in EU-15 increased sharply from approximately 8% to 16%. If this development continues, the procurement published online in TED will reach approximately 25% of the total public procurement in 2010.

Figure 1.2: Estimated total value of public procurement published in the Official Journal. Billion EUR 1995-2002



Source: EU Commission, DG Internal Market data

1.4.3 *Types of procurement*

A closer look at the goods, works and services procured by public institutions in Europe shows that the most important types of procurement, construction work, represent a value of approximately 81 billion EUR or 37% of the total public procurement in the EU. The top three categories (construction, technical and professional services, medical and laboratory devices etc.) represent approximately 113 billion EUR or 52% of the total public procurement in Europe. These sectors are therefore very important in order to reach the goal of generalised use of e-procurement.

Table 1.1: Public procurement published in the official journal by CPV codes – no. of tenders (EU15; 2002 figures)

CPV Code	Description	No. of tenders	Value (billion EUR)	Share of total value
	Total (top 15)	*31,014*	*182.0*	*83.5%*
45	Construction work	10,189	81.3	37.3%
74	Architectural, engineering, construction, legal, accounting and other professional services.	6,625	22.6	10.4%
33	Medical and laboratory devices, optical and precision devices, watches and clocks, pharmaceuticals and related medical consumables.	2,349	9.2	4.2%
90	Sewage- and refuse-disposal services, sanitation and environmental services.	1,153	9.0	4.1%
30	Office and computing machinery, equipment and supplies.	1,966	7.9	3.7%
23	Fibreglass fabrics.	340	7.8	3.6%
72	Computer and related services.	1,013	6.9	3.2%
29	Machinery, equipment, appliances, apparatus and associated products.	1,307	6.2	2.8%
50	Repair, maintenance and installation services.	1,680	5.5	2.5%
60	Land transport services and transport via pipeline services	736	5.2	2.4%
24	Chemicals, chemical products and man-made fibres.	897	5.1	2.4%
35	Tractors	214	4.3	2.0%
40	Electricity, gas, nuclear energy and fuels, steam, hot water and other sources of energy.	147	3.9	1.8%
34	Motor vehicles, trailers and vehicle parts	1,405	3.8	1.8%
15	Food products and beverages	993	3.3	1.5%

Source: EU Commission, DG Internal Market data

1.5 Main drivers

A key point that may be derived from the theoretical literature concerning e-business, of which e-procurement is one element, is that the development of e-business is influenced and determined by a complex interaction between various factors: There is not one single factor that will determine the evolution of e-business and e-public procurement, but rather a plethora of factors that are constantly evolving and influencing each other.

Chaffey[5] distinguishes between the macro- and micro-environment in the 'e-environment' that directly influence organizations (public and private) and

[5] Dave Chaffey "E-business and E-commerce management" (2004), p. 135, Prentice Hall.

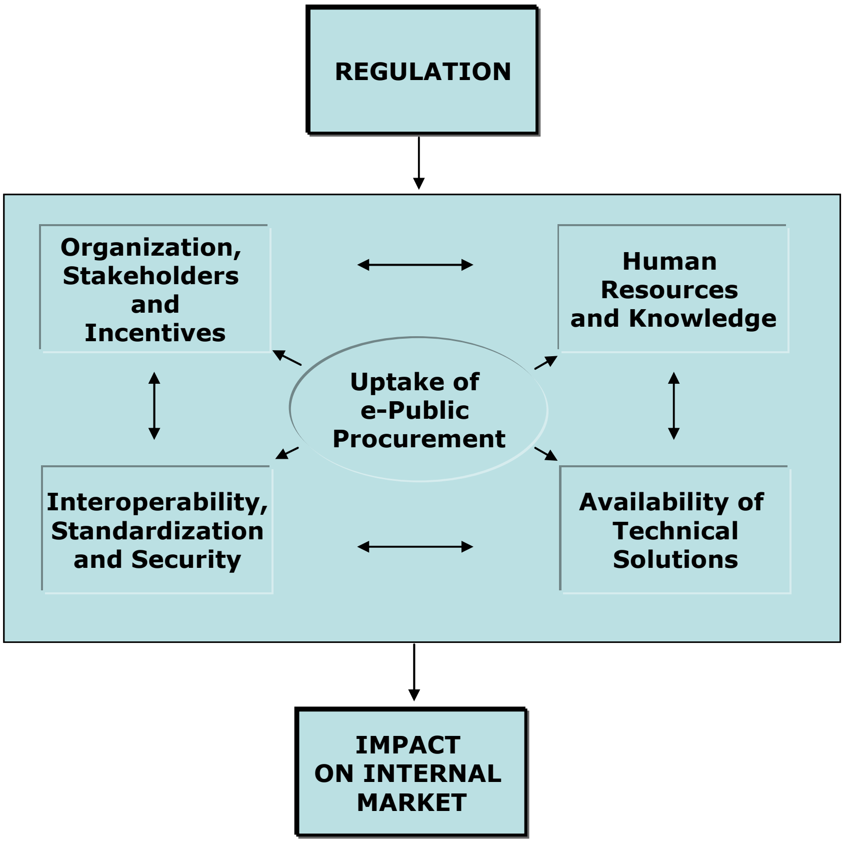
their decisions and behaviour in the field of e-business. Kalakota & Robinson[6] identify 20 different trends that drive e-business, which cut across and include the factors identified by Chaffey, and describe four common threads which are shared by these trends, and which are also influential drivers for the evolution of e-public procurement.

The theoretical literature concerning e-business and e-procurement and the empirical data collected for this study may be condensed into a number of factors which appear to work as the main driving forces that influence and determine the development of e-public procurement.

On the basis of these data and existing theories in the field, a conceptual model has been developed in order to offer a framework for explanation and interpretation of main driving forces in play that determine the evolution of e-public procurement.

The figure below illustrates the flow and interaction between the various driving forces in a logic model that indicates the most important cause and effect links.

Figure 1.3: Main driving forces influencing uptake of e-public procurement and the internal market


REGULATION
Organization, Stakeholders and Incentives
Human Resources and Knowledge
Uptake of e-Public Procurement
Interoperability, Standardization and Security
Availability of Technical Solutions
IMPACT ON INTERNAL MARKET

[6] R. Kalakota & M. Robinson "e-Business 2.0" (2001), Addison Wesley.

While there are natural variations between the EU countries, and differences between the strengths and importance of the drivers, the research findings indicate that this conceptual model is generic and may be applied as a framework for interpreting the processes and experiences in all countries as regards the development of e-public procurement.

As the figure illustrates, regulation is the framework within which all economic operators must work. The next level of drivers is directly influencing the procurement activities in contracting authorities and suppliers and will thus influence the uptake of e-public procurement. Finally, increased uptake of e-public procurement can have a positive impact on the internal market, i.e. through easier access to contract opportunities or lower transaction cost.

The various elements in the model are described in the following.

Regulation
As pointed out by Chaffey (2004), regulation is an important element of the macro-environment for e-business and e-public procurement. The new public procurement directives are, of course, the main factor in this respect is their forthcoming transposition into national legislation that will provide the fundamental framework for the evolution of e-public procurement above the threshold in the coming years. As described in the baseline analysis, implementation of the new procurement directives also raises a number of issues, including co-existence of paper and IT based procurement systems. This poses a risk of uncertainty and could create barriers to cross-border procurement.

The fundamental role of the regulatory framework is shown in the figure above as the basic driver that influences all other factors of the model.

Organization, Stakeholders and Incentives
The factor concerning organization, stakeholders and incentives refers to the (macro-level) institutional model in the field of public procurement, including which public institutions and companies are involved, how their respective roles and responsibilities are defined, and how the interaction between the involved institutions takes place. The main stakeholders in the field include public sector at European level, public sector at national level, local institutions, individual purchasers and companies (large enterprises and SMEs). The organizational set-up and stakeholders are closely linked to the third element – incentives. The organizational set-up influences the configuration of the incentives and vice versa. In this context, incentives are to be understood as the set of motivational factors, which make the various stakeholders act as they do within the defined organizational structure and processes.

Human Resources and Knowledge
Moving from organization and incentives at macro-level (above) to micro-level, the human resources and knowledge factor refers to the availability of strategic and organisational capacity as well as technical ICT skills at micro-level (contracting authorities and companies). This constitutes an important driving force in the diffusion of e-public procurement. Strategic capacity could include the e-business strategy and planning capability of public institutions to generate a market overview and select e-procurement solution. Also the skill to assess compliance of e-public procurement systems with (future) regulation is important at the micro-level. Organisational capacity is in many cases a question of organisational change readiness (i.e. the readiness of employees to employ new working processes, level of experience and trust in using electronic tools). Organisational capacity is also a question of

having the knowledge and skills to re-engineer internal or external workflows to reap the full benefits from e-procurement. Technical ICT skills at micro level are often dependent on the level of experience and trust in use of electronic tools.

While the majority of e-tendering systems are actually fairly simple to use, some are more advanced. Thus, ICT-skills in general as well as specific skills related to the process of electronic procurement of the key employees may be an essential factor to benefit from the advances of electronic procurement.

Studies have shown that lack of IT competences among the employees can be a significant barrier for e-procurement regarding the ability to understand technology and the ability to use the technology[7]. The problem is more significant for SMEs and in the latter stages of the procurement process (e.g. purchasing), where system integration internally and externally requires technical skills as well as redesign of internal business processes.

Interoperability, Standardization and Security

The level of interoperability and standardization of the solutions available is cited by most data sources as the main driving forces that will influence the evolution of e-public procurement. *Interoperability* concerns the existence of interoperable data formats vis-à-vis technical (e.g. 'attributes' and XML schemas) and semantic standards. For suppliers, harmonized demands in terms of tender information and electronic documents can lower the tender cost. Interoperability is especially important in the case of e-purchasing, as it is a pre-condition for making compatible IT systems (which can be both internally with ERP systems and externally with other procurement systems).

To ensure that e-procurement is not creating new barriers to the internal market, interoperability is important in a number of areas, including: across borders and between business-to-business and business-to-government e-procurement systems.

Regulation and standardisation in the field are naturally determining for the level of interoperability. A widespread interoperability will increase electronic procurement, whereas lack of interoperability will constitute a barrier.

Security is also an important issue, as lack of trust in e-procurement security can represent a barrier to suppliers and buyers. Some suppliers and buyers are concerned about using the Internet to transmit confidential information. Possible security flaws in transactions over the open internet will decrease confidence in e-procurement.

[7] OGC "eProcurement Guidance - "Cutting through the Hype" 2002. (http://www.ogc.gov.uk/index.asp?id=2314) and Gartner Group Research,"Strategies for Successful Government E-Procurement", 2003.

Availability of technical solutions – supply and demand for e-public procurement solutions

The availability of adequate and affordable technical solutions is an important driver for uptake of e-public procurement.

As mentioned in the baseline scenario, the directive requirements in terms of technological infrastructure is limited, e.g. a PC with internet access, office software and some sort of security (digital signature). Figures on the up-take of internet etc. show that most authorities and businesses in Europe have this basic infrastructure in place.

Thus, when we refer to adequate solutions we mean technically well functioning, user-friendly systems with the needed functionalities. Development of such systems requires investments of sufficient resources from IT-vendors.

Affordable solutions refer to the availability of reasonably priced solutions in various areas of e-procurement. Thus, it must be assumed that the cost-benefit (business case) of e-procurement is important for the up-take of the solutions. This depends, among other factors, on competition between IT-vendors, and sufficient demand to enable large-scale production. In relation to the demand side, the development in business-to-business e-procurement is also relevant, as the technology can be used for business-to-government e-procurement as well.

E-public procurement can be divided in to buy-side and sell-side applications[8]:

- Buy side applications: Are purchased (in this case) by public authorities and institutions, and provide authorities/institutions with an application to conduct e-tendering. This includes functionalities for publication of prior notices and tender documents, for management of incoming tenders and for evaluation of tenders. Other relevant functionalities are processing of electronic dynamic purchasing or e-Auctions.
- Sell side applications: Basically, no software other than an internet browser, e-mail and office software (word processing and spread sheet) are required at buyer side for participation in e-tendering. However, depending on the way the dynamic purchasing system is organised, an application to organise and structure electronic catalogues, e.g. different formats, different selection of goods/services etc. for different customers can be an advantage.

The market for e-tendering solutions primarily consists of buy side applications. Thus, a number of public institutions (frontrunners) have implemented e-tendering, e.g. procurement portals with information, guidelines and management of tender notices/documents etc. However, in principle, buy-side applications can be simple web pages (for publication) and database/spread sheets (for receipt and registration of tenders).

The market for sell-side e-tendering is more limited as the only technical requirement for participation in an e-tendering process is internet access and a browser. The market for sell-side applications is mainly in the later stages of the procurement process, i.e. web shops[9] or systems for management of electronic catalogues (which is most often done via spread sheets).

[8] Gartner Group, 2003: B2B Buy-Side E-procurement, Internet Commerce: Overview

[9] The supplier's website with access to buying from a product catalogue

Uptake of e-public procurement and impact on the internal market

As illustrated in figure 3.1 previously, the regulatory framework and the four driving forces will influence the up-take of e-public procurement. Furthermore, as illustrated in the figure, increased uptake of e-public procurement can have a positive impact on the internal market.

The table below provides an overview of the outcome and the impact on the internal market of the transformation from paper to IT-based e-tendering processes.

The table illustrates that the publications of tender notices and tender documents notices have a direct impact on the internal market, i.e. through better access to tenders, increased competition and reduced consumer prices. Transforming the remaining phases of e-tendering will provide process savings and lower tender cost, which in turn will increase the motivation for suppliers to participate in public procurement.

Table 1.2: Overview of the outcome and the impact on the internal market of the transformation from paper based to IT-based e-tendering processes

Process to be transformed from paper to IT-based tendering	**Outcome (related to internal market)**	**Impact on the internal market**
➔ Publication of tender notice / access to tender notices ➔ Publication of tender documents / access to tender document	*Main outcome: Easier to identify suppliers / tender opportunities, e.g.:* **Buyer's side benefits:** • Lower publication costs • Buyers reach out to a broader audience of suppliers • Lower search costs **Supplier's side benefits:** • Improved access to tenders, easier to identify business opportunities; lower search costs • Market surveillance costs are reduced; suppliers need only to interface with a few internet portals instead of with all customers	*Increased competition and lower prices (direct impact on the internal market):* ➔ Increased number of bidders for each tender ➔ Better price comparison between suppliers ➔ Increased market transparency ➔ Better access for SMEs in accessing and responding to public tenders ➔ Better access for 'foreign' companies in the tendering process ➔ Increase of cross-border procurement in public sector ➔ Facilitation of the free movement of gods
➔ Expression of interest ➔ Rejection or invitation to tender ➔ Submission of tender ➔ Technical clarification communication ➔ Tender evaluation ➔ Closing of contract ➔ Advertisement of contract award and communication of rejection	*Main outcome: Process savings, lower transaction cost e.g.:* **Buyer's side benefits:** • Time reduction in tasks of receipt, registration and distribution of tenders. Shortening of delays. • Increased efficiency in specifying and issuing tenders. • Automation of the evaluation process. • Automatic rejection of suppliers that fail to meet stipulated fixed criteria. **Supplier's side benefits:** • Suppliers need only to interface with e-procurement portals instead of with all customers. • A system of 'Buyer profiles' would mean reuse of information. • Elimination of costs related to printing and shipment of tenders.	*Increased motivation to participate in public procurement (indirect impact on the internal market):* ➔ Process efficiencies for buyers and suppliers ➔ Reduction of tender costs ➔ Improved quality of tenders

Sources:
Dave Chaffey: "E-business and E-commerce management" (2004).
Office of the Deputy Prime Minister: "The Benefits of e-procurement - National e-Procurement Project". Local eGov (2004).
MOD/Industry Commercial Policy Group: "Defense e-Business – A guide to Commercial Issues". (2004).

The table illustrates that increased uptake of e-public procurement can have a positive impact on the internal market in a number of areas. First and foremost, the electronic notification of tenders will make it easier for suppliers to identify contract opportunities. This will in turn lead to increased competition and lower prices, i.e. because of an increased number of bidders for each tender, better price comparisons between suppliers, increased market transparency etc.

Moreover, using electronic means in the procurement process will enable a number of process savings for buyers and suppliers and lower transaction costs. This will increase the motivation to participate in public procurement due to reduction of tender costs.

It should be noted that the outcome and impact listed in the table are what is considered the *main ones* based on a screening on literature in the field. Moreover, a number of other benefits are also often listed, including:

- A faster tendering process
- Reduction of maverick buying
- Improved statistics
- Improved audit trail

Finally, one source mentions support of green issues (reduction of the use of paper) as a benefit of e-procurement[10].

The following sections analyze the various driving forces in the model. Each driving force is analyzed from three perspectives:

- *Current situation* – What is the current situation of the main points under each driving force?
- *Trends* – What are the existing and emerging trends which these main points create?
- *Influence* – How may these trends impact on the evolution of e-public procurement in Europe until 2010?

[10] MOD/Industry Commercial Policy Group: “Defense e-Business – A guide to Commercial Issues”. (2004).

2. Scenario A: The Baseline Scenario

2.1 Regulation

There are several pieces of legislation that are relevant for the use of electronic public procurement. The new procurement directives are naturally the most important part of the relevant legislation, but other areas including the legislation on digital signatures are also relevant.

The baseline scenario on regulation focuses on the new procurement directives, but includes the expected development in other fields of legislation that is relevant for the use of electronic public procurement.

When considering the baseline scenario in the legal field it is important to note that the static nature of legislation implies that changes must be initiated by the legislators both in the Member States and the EU. The question pertaining to the excepted development in 2010 will, therefore, be concentrated on compliance issues.

2.1.1 Current situation

The former EU procurement legislation consists of the directives on procurement of public supplies, public works, public services and public utilities[11].

- The directives did not contain specific provisions regarding the use of electronic means in the procurement process. None of the four directives allow for, or forbid, the use of electronic means. Written communication is to some extent, however, seen as a prerequisite for the proper documentation of the procurement process. Also, several articles of the directives contain mandatory use of written communication.

The current legal situation in the Member States is that:

- More than half of the Member States have introduced some legislation in the field of electronic procurement
- There are differences in the extent to which the Members States have regulated the use of electronic procurement in national law. Generally, few Member States have regulation covering both rules applicable to communication, storage of data, and the use of specific procedures. Almost half of the Member States have yet to introduce regulation applicable to communication, storage of data and the use of specific procedures.

The differences between the Member States regulation present challenges to the current use of cross-border electronic procurement as businesses will need to understand and comply with specific national rules and requirements when engaging in cross-border procurement[12][13].

[11] The Public Supplies Directive 93/36/EC as amended by Directive 97/52/EC, the Public Works Directive 93/37/EC as amended by Directive 97/52/EC, the Public Services Directive 92/50/EC as amended by Directive97/52/EC, and the Public Utilities Directive 93/38/EC as amended by Directive 98/4/EC.

[12] The fact that that there differences in the Member States regulation of the rules applicable to communication, storage of data, and the use of specific procedures suggest that differences exists between the national rules.

[13] Austria has, for instance regulated the areas communication, storage of data and the use of specific procedures, whereas Germany has only regulated storage of data. See table 2.6 in Part 1 Report for the full detail of which areas are regulated in the Member States

- Generally, there are substantial differences in the level and types of regulation of the electronic procurement process in the Member States. Austria for instance, has regulated the areas regarding communication, storage of data and the use of specific procedures, whereas Germany has only regulated storage of data.

The new directives introduce specific rules for the use of electronic means for communication in the procurement process, thereby providing a coherent framework for the use of electronic public procurement. The new directives also introduce several new procurement processes based on the use of electronic communication.

- The new directives regulation of electronic means for communication in the procurement process eliminates the fundamental legal barriers inherent to the use of different regulation on electronic means in the procurement process of the Member States.

The directives put the use of electronic means on a par with traditional means of communication and information exchange. Technologically, the new directives are neutral and leave the choice of means of communication to the buyers rather than the suppliers[14]. The directives provide suppliers with a legal procedural guaranty and state that the technology used shall be non-discriminatory and as far as possible compatible with the technologies used in other Member States.

2.1.1.1 The timely and correct implementation of the directives

The implementation of the new public procurement directives should be completed by the end of January 2006. The current status in this area is that:

- One Member State expects the directives to be implemented in 2004, 14 Member States expect the directives to be implemented in 2005 and eight Member States expect the directives to be implemented in 2006. Two Member States do not know yet when the directives will be implemented.

- The Member States planning to implement the directives in 2006 will be faced with a very tight implementation schedule, as the directives will have to be implemented in January 2006. The same can be said for Member States planning to implement the directives late 2005. Planned implementations close to the expiry of the implementation period will leave little or no room for unforeseen hindrances or delays if timely implementation is to be achieved. This situation raises concern of hasty, erroneous and non coherent implementation of the directives or delays in the implementation beyond the implementation period.

[14] The Directives makes it clear that the contracting authorities can require the use of electronic means for communications and for accessing documents (Arts 39-42 of the Directive 2004/18 EC)

The new directives do not regulate a new area, but are an adjustment to the already existing procurement for legislation and rules.

- The Member States, therefore, expect the legal implementation of the directives (transposition into laws) to be less cumbersome than the implementation of a completely new directive. However, the application by purchasing entities and integration of electronic means in the procurement process will be an entirely new task in most Member States.

- The consequences of failure to comply with the implementation timeframe will cause several negative side effects. The most obvious and direct effect is legal uncertainty for economic operators within and outside of the member states resulting in lack of uptake of e-procurement. This will cause market fragmentation due to differences in legal regulation and slower development towards a single market for public procurement.

2.1.1.2 Co-existence of different procurement systems

The co-existence of different procurement systems raise problems in relation to the functioning of public procurement.

- The existence of both old and new procurement regulation, where some Member States have implemented the new directives and others still use the existing procurement directives, is likely to cause legal uncertainty among businesses. It will be necessary for the businesses to maintain different workflow systems to cope with legal environments.

- The differences in implementation speed pose the risk that businesses, and in particular SMEs, will not have the necessary information about the implementation of the new procurement directives in other Member States, e.g. procurement rules used in the procurement process in a call for tender in other Member States. This will mean higher cost in bidding across countries.

It is clear that the implementation of the directives will provide an incentive for businesses to participate in electronic procurement. The incentive for business to use electronic procurement is linked to the fact that the contracting authorities use electronic procurement. The implementation of the directive in member states can help achieving a critical mass of contracting authorities requesting tender documents electronically.

- This means that businesses will have a greater incentive to participate in electronic procurement once their respective Member States have implemented the new procurement directives, which in turn will give them more knowledge and experience when bidding under the new rules.

The information to businesses about the new directives for the Member States will, naturally, focus on the national rules implementing the directives.

- This situation poses the risk that business, and in particularly SMEs, in slow implementing countries will not have the necessary knowledge of the new procurement directives to participate in cross-border procurement in Member States that have already implemented the directives.

The combination of the better experience in how to use and inform about the new procurement rules will give businesses from Member States that have implemented the directives, a competitive edge compared with businesses in Member States that have not implemented the directives in electronic procurement. This is particularly the case for SMEs.

The general problems related to the legal coexistence of different procurement rules are linked to the implementation of the new procurement directives and will be subsequently eliminated when all Member States have implemented the directives.

2.1.1.3 The implementation of the specific new electronic procurement processes

The directives introduce the usage of e-auctions and the dynamic purchasing system. These specific procurement processes are optional for the Member States, who may decide whether they should be implemented or not.

Both procurement processes holds a number of advantages in relation to the single market. The Dynamic purchasing system is an open tender process, where tender opportunities are continuously made available to interested companies, which in turn will lower the barriers to enter a competition for companies. The e-auction provides a high level of transparency throughout the bidding process and facilitate test of suppliers. Advantages include stimulation of competition, efficient pricing and innovation.

The current plans in the Member States regarding introduction of dynamic purchasing systems and e-auctions are:

- 23 Member States plan to introduce e-auctions. One Member State has decided not to introduce e-auctions and on is yet undecided wheter or not to introduce the e-action.

- 18 Member States plan to introduce the dynamic purchasing systems. Three Member States report that they will not introduce the system. Four Member States are yet undecided whether to introduce the dynamic purchasing system or not.

The different approaches to the implementation of the electronic auction and the dynamic purchasing system in the Member States will be that businesses in some Member States will be more used to these procurement processes than others. Moreover, the Member States not implementing these options will fail to reap the benefits mentioned above, e.g. lower entry barriers and increased transparency.

2.1.1.4 Compliance of existing systems

An important aspect of the legal situation of the electronic procurement is whether the procurement systems used in the Member States are compliant with the up-coming rules.

- Approximately half of the Member States have reported to have systems compliant with conditions under the new procurement directives. However, the information provided in table 3.12-3.14 in the Part 1 report shows that this feedback is optimistic in relation to the systems considered in table 3.12-3.14[15]

[15] See table 2.5 and tables 3.12-3.14 in the report

- If the Member States do not perform a general examination and upgrading of systems currently used, there will be a strong risk that all the specific requirements related to electronic communication in the directives will not be met and that the systems will continue to be used. Another problem in this aspect is that the detection of lack of compliance will be very difficult for the buyers.

2.1.1.5 The current situation – other relevant regulation

The use of electronic procurement depends on the ability to form electronic contracts. In that respect, the directives on Electronic signature[16] and the Information Society[17] are relevant. These directives must therefore be considered in relation to the current situation. Finally, the combination of electronic procurement with the use of electronic invoicing will provide valuable reduction in the overall transaction costs. The regulation of the electronic invoicing directive[18] is, therefore, of importance to the current legal situation.

- The provisions of the directive on electronic signatures and the Information Society Directive support the completion of electronic contracts.

- The use of electronic signatures has given rise to problems in relation to the recognition of electronic signatures issued by the various national Certification Authorities in other Member States. The lack of cross-border interoperability of electronic signatures creates obstacles to the free movement in the Internal Market and prevents the needed general confidence in electronic transactions.

- Businesses have raised a number of concerns in relation to the electronic invoicing directive, especially with respect to self-billing and electronic invoicing where the directive leaves a large number of options to the Member States. This creates a possibility of differences between the operational environments in for e-public procurement, which companies encounter in the Member States

2.1.2 Trends

A number of Member States have begun to regulate different areas of electronic procurement[19]. The transposition of the directives can be seen as a strong trend towards a harmonized framework for the electronic procurement process at both Community and Member State level.

Especially, in relation to the specific new procurement process (the dynamic purchasing system and the e-auction) it can be noted:

The main part of the Member States expects to implement the e-auction (23 Member States) whereas only 18 Member States plan to introduce the dynamic purchasing systems.

[16] Directive 1999/93/EC on a Community framework for electronic signatures

[17] Directive 2000/31/EC on certain legal aspects of information society services

[18] Directive 2001/115/EC with a view to simplifying, modernising and harmonising the conditions laid down for invoicing in respect of value added tax

[19] See table 2.6 in Part 1 Report

2.1.3 *Influence on electronic public procurement until 2010*

In 2010 it is expected that:

- Although it is likely to expect that not all member states will be able to meet the deadline for transposition and general application of the new directives, the national legal framework for the new EU framework for public procurement is expected to be in place by 2010. With this framework in place, the use of electronic means in the procurement process will be on par with paper-based procurement. With the new directives, most of the main actors in the field (public institutions, suppliers and IT-vendors) regard the legal barriers related to electronic public procurement as limited.

- The specific electronic procurement processes optional to the Member States will not be implemented in all Member States. The Member States which do not implement these options will fail to reap the potential benefits, e.g. lower entry barriers and increased transparency.

- Compliance problems of e-public procurement systems and processes to the requirements of the directives are likely to remain in relation to some contracting authorities as the task of applying the directives widely is significant given the high number of contracting authorities in the EU.

- Cross-border procurement problems are likely to prevail: It seems likely that a mutual recognition system of digital signatures has not been introduced by 2010, and the electronic invoicing systems will continue to be used differently from Member State to Member State. These are factors which have a negative influence on the electronic public procurement across borders in Europe, although a positive development within individual national markets may occur.

2.2 Organisation, Stakeholders and Incentives

2.2.1 *Current situation*

Two main aspects concerning the current situation will be highlighted in the section as they significantly influence the current situation and also seem likely to remain important in the coming years:

- Centralisation vs. decentralisation: Public procurement across the EU member states is to a high extent organized according to a decentralized approach. This could slow down a major transformation to e-public procurement. Uptake will therefore largely be determined by the decisions of individual institutions concerning whether to implement e-procurement solutions.
- Incentive structure: Many important stakeholders in the public sector lack strong incentives that could motivate them to a conversion to e-public procurement. Private businesses have incentives to engage in e-public procurement, but the associated investment and operating costs may create negative incentives for companies

Centralisation vs. decentralisation
The survey conducted in the baseline analysis shows that public procurement across the EU is generally organised in a manner that follows the decentralised approach. This structure means that the level and the speed of uptake of e-public procurement across the EU will mainly be determined by the individual institutions and the extent to which they decide to use e-public procurement instead of traditional, paper-based procurement.

Incentive structure
The survey among member states in the Part 1 report shows that, in the view of the central administration, the promotion of e-public procurement is mainly driven by central, governmental institutions while other public stakeholders at regional and local level do not presently share their interest. The study also revealed that the resistance to change towards e-public procurement is a widely shared concern in almost all member states. The findings of this survey are similar to those of previous studies in the field: Previous findings show that employees often resist changes within their organization partly because they are afraid of loosing their jobs and partly because they find it difficult to change their normal work procedures. Behaviour and competences on organizational level need to be changed both in the public sector entities and in the suppliers companies, as both private and public organizations experience this barrier[20]. In addition to this, the apparent resistance to change should also be considered in the context of human resources, as a lack of the relevant competences needed to operate e-public procurement within different organizations can be a significant barrier for e-procurement as this would influence the ability to understand and to use technology.[21] This leads to a feeling of insecurity and a tendency to rely on old processes. An aspect which is further elaborated on in the section concerning human resources and knowledge.

Another recent study shows that although e-procurement system projects are rife with opportunities to empower first-line supervisors and managers — and often the business case assumes that first-line managers will take on currently centralized responsibilities, the current situation is that many employees are not ready or properly trained to manage these new responsibilities[22].

To understand the resistance it is helpful to analyse the incentive structure in terms of the benefits and disadvantages for the single employee, the public institution, the companies and the entire public sector in a country and at the European level.

[20] KPMG Consulting “Analyse af statslige indkøb” Copenhagen (2000) (p. 35) and Ramboll Management “Analysis of electronic public procurement pilot projects in the European Union” 2000 (p. 27).

[21] OGC “eProcurement Guidance - "Cutting through the Hype” 2002 (http://www.ogc.gov.uk/index.asp?id=2314).

[22] Gartner Group Research ”Strategies for Successful Government E-Procurement”, 2003, p.4-5.

Table 2.1: Basic incentive structure in public and private sector – aggregate level, institutional level and individual level

	Benefit of electronic procurement	**Disadvantage of electronic procurement**
Entire public sector at European level	Substantial	Marginal
Entire public sector at national level	Substantial	Marginal
Institution	Mixed	Mixed
Individual purchaser	Marginal	Substantial
Large enterprise	Substantial	Marginal
Small –and medium sized enterprise	Mixed	Mixed

The table above shows that there is an asymmetric incentive structure connected to the introduction of e-public procurement in the public sector where the positive incentives to introduce e-public procurement that exist at the aggregated level (national and European level) are not necessarily shared by other stakeholders at the institutional level and at the level of the individual purchaser. At these levels, the negative incentives might be stronger than the positive. Moreover, whereas larger enterprises have substantial incentives to introduce e-procurement, the benefits for smaller enterprises are more limited. A description of the incentives at each level is provided below.

Incentives for public sector at the European/national level

For the public sector as a whole (at national as well as European level) and for the individual institution, e-public procurement has a potential for a number of benefits, which provide incentives for the introduction of e-procurement (see table 2.1 above):

- Increased competition, more efficient public procurement markets and lower prices (increased number of bidders, better price comparison, increased market transparency etc.)
- More efficient public sector (process efficiencies for public institutions)
- More efficient business sector (process efficiencies for private enterprises)
- Improved audit trail.

What is also worth noticing is that the disadvantages are marginal, and primarily related to initial investments in the introduction of e-tendering.

Incentives for the individual public institution (central, regional and local level)

The potential benefits for the individual institution, which provide the incentives to push for conversion to e-public procurement, are:

- Increased competition and lower prices.
- Process savings (time reduction, increased efficiency in specifying and issuing tenders, automation of evaluation and rejection of suppliers).
- A faster tendering process
- Improved statistics on procurement.

However, for the individual institution there will be disadvantages related to transformation of the procurement process. One example is the open invitation to tender and the following labour intensive evaluation, which means that there in some cases, is a lack of incentives for buyers to diversify the supplier base. Also, some institutions might have to invest in new systems in order to implement e-Tendering system (although this is not a specific requirement in the directives).

Depending on the relative strengths of the costs and benefits, the cost factor may prevent the conversion to e-public procurement. The general rule of thumb is that the smaller the institution and the smaller the procurement volume, the stronger is the relative importance of the costs. The benefits listed remain largely the same for institutions at central, regional or local level.

Incentives for the individual purchaser

The potential benefits for the individual purchaser, which provide the incentives to push for conversion to e-public procurement include:

- Improved statistics on procurement
- Conformity with procurement law or internal procurement guidelines
- Time savings

However, despite these potential advantages the disadvantages, and hence the negative incentives, by introducing e-public procurement might be even stronger seen from the perspective of the individual purchaser.

First of all, many e-procurement systems do not represent the fastest and most convenient method of procurement. The failure of streamlining the entire notification process related to TED is an example of this. E-procurement systems needs to be designed intelligently to provide users with a sufficient increase in convenience (or value-added), otherwise traditional means of communication will often be the preferred method.

Another aspect is that a shift to electronic procurement means that the individual purchasers have to deal with changing circumstances, a re-organization of internal workflows and new working tasks (e.g. adjustment and maintenance of web page and re-structuring of tender format). These changes mean that the purchasers have to build up new competencies, which implies a distinctive change. Moreover, and most important, individual purchasers stand to lose their power as information and decision 'gate-keepers' in the institutional procurement process and possibly their jobs[23]. According to the sources used for this study, this is the single most important barrier to the introduction of e-public procurement.

This factor may also provide an explanation of why some processes in the contracting authorities are automated to a higher extent than other processes: The Part 1 report shows that sourcing (notification, publication and submission of tenders) and payments to a higher extent are automated, and these procurement phases can be managed and implemented from the central level in organization of the contracting authorities.

Contrary to this is procurement (evaluation of tenders, ordering) which generally is not automated to any significant extent, and these phases in the procurement cycle need involvement from the decentralized levels in the organization of the contracting authorities and therefore imply a more extensive change process for the contracting authorities.

Finally, the public sector should not be considered as one uniform entity with aligned interests as regards e-public procurement: While the various levels

[23] Interview data from Germany and Denmark; interview in Berlingske Tidende 4 July 2004 with the former director for the procurement portal Gatetrade in Denmark.

of governments (national, regional, local) and the EU Commission basically share the same incentives (i.e. cost reduction as a result of more efficient procurement process, improved the quality of the procurement statistics, enhanced budgetary control, a more efficient public sector with better service or cost reductions) to introduce e-public procurement, there are differences between these levels of government as regards the incentives that speak against introducing e-public procurement. This observation is confirmed in the Part 1 report where the introduction of e-public procurement is primarily seen by the member states as a mean to achieve efficiency gains in the national public sector while the European dimension in terms of improved competitiveness and increased cross-border trade (which are very important drivers for the European Commission and for the development of the internal market in Europe) in comparison do not stand out as very important objectives for the member states.

Incentives for large vs. small private companies
As regards the large as well as small enterprises, their incentive to engage in e-Tendering and e-Purchasing is first and foremost to meet demands from customers of using electronic means.

Other advantages, especially for large companies, include (see table 2.1):

- Easy access to public sector markets within and beyond national borders.
- Reduction of market surveillance costs.
- Time reduction (i.e. due to reuse of information by using a system of buyer profiles).
- Suppliers need only to interface with e-procurement portals instead of with all customers.
- More transparent evaluation of tenders
- Elimination of costs related to printing and shipment of tenders.
- Reduction of market entry costs

However, there are a number of disadvantages, and hence negative incentives, by introducing e-public procurement for especially small enterprises:

- E-procurement can threaten the business model of an enterprise, especially for retail companies or intermediaries.
- E-tendering means a substitution of the interaction with customers from personal to digital communication. Transparent procurement processes highlights the costs of elements such as personalised and flexible service.
- E-tendering is often a part of a process of consolidating the supplier base (and the selection of goods), and thereby increase volume on each supplier and cut cost. This means lower unit prices, which is often an advantage to large companies.
- E-marketplaces increase competition and lower prices.

As seen from the disadvantages above, there are a number of reasons why SMEs are hesitant towards e-procurement. Whether the gains will be judged to be sufficiently high will be determined by customer demands, the importance of the customer and the willingness of the single company to innovate (and in some cases identify new business models).

2.2.2 Trends

Centralization vs. decentralization
A general trend in public management is the implementation of a decentralised procurement structure in most countries. This will ensure ownership and budgetary responsibility in the individual institutions. However, the implica-

tion is that the transformation to e-public procurement is slowed down by the decentralized approach to procurement: Because the responsibility for the use of public funding is decentralised to individual institutions, they will be able to decide whether they want to use e-public procurement or not. Therefore, the pace of transition to e-public procurement may be held up by the individual buyers, who choose not to use electronic means in procurement, e.g. because they consider the transition costs too high, because their procurement volume lacks sufficient critical mass in order to obtain added value from the transition to e-public procurement or because they lack the necessary skills to handle e-public procurement.

The decentralised approach also includes a risk of development of many different e-procurement systems, which would mean the creation of additional barriers and costs for suppliers. This is the result of the decentralisation of the responsibility for the use of e-public procurement to the individual buyers, which would allow these to develop their own e-procurement systems, causing different requirements for suppliers.

Within the decentralized approach a couple of countries involve private companies, private investment and/or sector specific organisations in the design, planning, implementation and daily management of electronic procurement. An involvement of such partners on one side has a positive influence on e-procurement, but on the other side seems to improve the complexity of the projects.[24]

Incentive structure
The incentive structure described above is firmly rooted and difficult to change. In particular the individual purchasers lack incentives to push for e-public procurement, but also institutions may lack the incentives to introduce e-public procurement. The general trend may be described as a lack of strong incentives for key stakeholders in the public sector to introduce e-public procurement while the incentives for suppliers to embark on the more advanced phases of e-public procurement seem to be a mixture of positive and negative incentives.

However, there are initiatives underway which could turn out to be effective in addressing some aspects of the problems concerning the absence of positive incentives. There are some examples that e-public procurement systems are financed, developed and established at the centralized governmental level and will be made available for use to institutions at the decentralized level and SMEs at no or low cost.

This approach would address the problem identified in the draft action plan which mentions that tools for centralizing purchases and exploiting economies of scale are not yet fully developed in the member states. Such ‘plug-and-play’ solutions (which currently are being developed in the UK (the Zanzibar project) and already exist in Italy (Consip)) would reduce the start-up costs for the individual institutions while at the same time allowing more institutions to participate in e-public procurement even if they rarely have the need to carry out tenders. Moreover, the proliferation of this type of solutions would bring some clarity and transparency into the national markets as it would be easier for suppliers to navigate between a few main e-public procurement portals and systems as opposed to many systems and solutions at the institutional level.

[24] Rambøll Management “Analysis of electronic public procurement pilot projects in the European Union” 2000 (p. 144).

One of the elements under consideration in the Zanzibar project in the UK is to allow public institutions to keep the savings realized through e-public procurement and leave it to the discretion of the individual institution to dispose of the saved funds for other purposes. This would create a strong incentive for institutions to adopt e-public procurement and seek cost-effective solutions.

2.2.3 Influence on electronic public procurement until 2010

A decentralised procurement structure is implemented in most countries to ensure ownership and budgetary responsibility of the individual institutions. This set-up is expected to be maintained and expanded further (to other member states or more institutions) in the following years as this is a general trend in public management. This constitutes a barrier to the uptake of e-public procurement as this is an area where network effects are very significant[25]. The value of e-procurement systems increases at an exponential rate with the up-take of e-procurement in other institutions, including both buyers and suppliers (the bigger the network, the greater its critical mass and hence its value[26]). Thus, the decentralised procurement structure could delay the up-take of e-procurement which could call for co-ordinated initiatives at national and EU-level to increase the network of institutions using e-procurement.

The underlying incentive structure for the various stakeholders involved will not counter the barriers posed by the decentralized public procurement structure, but will serve to reinforce them.

This means, in conclusion, that there is a lack of strong drivers in favour of e-public procurement at the institutional and individual level (purchaser) and in SMEs (supplier), and these factors will impede the conversion to e-public procurement in the public sectors in the majority of EU member states.

The implication of this incentive structure, where reluctance, and possibly even resistance, to e-public procurement at the institutional and individual level can be expected, is that it is necessary to consider how other types of positive incentives can be developed and integrated into the institutional set-up of e-public procurement systems.

2.3 Interoperability, Standardization and Security

2.3.1 Current situation

Interoperability, standardisation and security are key issues in electronic public procurement to enable exchange of data between enterprises and public institutions. However, it is also important to realise that standards are particularly important in procurement processes with a significant exchange of business documents, e.g. purchasing and invoicing. Simple one-way communication such as online advertisement of tenders and publication of tender documents can be conducted on existing web pages and accessed through generally available software (browsers). As illustrated in the OSI

[25] Tapscott, Don, 2000: Digital Capital – Harnessing the Power of Business Webs. Nicholas Brealey Publishing.

[26] Ibid.

model[27] (please refer to the baseline analysis), more extensive exchange of data in e-procurement require standards in a number of different areas or 'layers' in a data network.

The current areas of problems with interoperability in e-tendering include[28]:

- Different classifications of products (CPV, UNSPSC, EAN).
- Different digital signature formats

In the area of e-purchasing, where more extensive interaction between buyers and suppliers take place, the interoperability problems are more significant. The most important areas are:

- Use of different underlying format for exchange of data, i.e. which protocols are used (i.e. different XML formats).
- Different semantics or DTD (document Type Definition)[29].
- Different 'attribute' standards, i.e. different definitions of the content of business documents. Examples are tender documents request (e-Tendering) or e-catalogues (e-Purchasing).

The different standards are a consequence of the existence of many different actors in the area, including CEN/ISSS, IDA (DG Enterprise), UN/CEFACT, OASIS / UBL, RosettaNet, national standardisation bodies etc. The fact is that each of these defines standards or guidelines for e-procurement, which are not directly compatible. Another problem is that the publication of a standard does not secure a wide adoption of the standard by IT-vendors (in e-procurement solutions) or by end users (contracting authorities and companies).

Thus, basically two challenges exist in the area of standardisation and e-procurement:

1. To define (global) standards to support the various processes of e-procurement (e-tendering, e-ordering and e-invoicing) in areas where business documents are transferred between IT-systems of the buyer and IT-systems of the supplier.
2. To promote the use of standards by IT-vendors and end users instead of proprietary standards.

Regarding (1), standards are currently being developed by a number of actors. Some of these are public, i.e. IDA (DG Enterprise) and UN/CEFACT, and others are non-public, non-profit consortiums, i.e. OASIS UBL and RosettaNet. Some standardisation initiatives are national (like eGIF in UK); others are international (like OASIS UBL). The consequence is that different standards are developed, which can cause fragmentation in different areas:

- Business to government / Business to business: While UN/CEFACT and IDA to a large extent are driven by public actors; other initiatives are industry consortiums such as OASIS and RosettaNet. This poses the risk that incompatible standards are implemented in the public and private sector.
- National / International: Because of the lack of international standards, some EU member states are developing their own formats for exchange of

[27] www.whatis.com & Miller, Rachelle L.: "The OSI Model: An Overview", GSEC Practical Assignment Version 1.2e.
[28] Eylen, Hilde Van and others: Transborder eProcurement Study: Public eProcurement – Initiatives and experiences, borders and enablers (2002).
[29] Also called semantic interoperability, see IDA: European Interoperability Framework for Pan-European eGovernment Services. IDA working document version 4.2 (2004).

business documents[30] (though usually, to the extent possible, based on internationally agreed formats such as UBL).

Initiatives have been put in place to address these problems, most notably initiatives by UN/CEFACT to develop an open XML based framework and the IDA XML schemas initiative:

- In 1999, UN/CEFACT launched an initiative to develop an open XML based framework, enabling the global use of electronic business information. The initiative was named ebXML and undertaken in conjunction with OASIS (Organization for the Advancement of Structured Information Standards).
- Under the IDA programme, the IDA eProcurement XML schemas initiative have been launched. The initiative "aims at proposing a set of generic XML schemas to support the automation of data exchanges in the different phases of electronic public procurement"[31].

Regarding the UN/CEFACT initiative, it is supported by the general development where XML is being promoted by a number of different organizations as the standard to share business documents. However, the current situation is that "many projects or standards (EDIFACT, X12, RosettaNet, UBL and other national, regional or industry specific initiatives) have developed electronic order and invoice messages. All the message definitions are very similar in essence but all have significant differences."[32] Many different implementations of XML exist, and the key IT-vendors have introduced their own Document Type Definitions based on XML, e.g. Ariba cXML, Oracle XML and SAP XML.

As mentioned, there is are also national initiatives trying to enhance the use of e-procurement through defining standards, e.g. the e-GIF project in UK (which is also inspired by the OASIS UBL model) and the OIOXML project in Denmark (based on UBL). The e-GIF defines the technical policies and specifications governing information flows across government and the public sector in the United Kingdom. Under the eGIF initiative, XML Schemas for different phases of the procurement process has been developed.[33]

The IDA XML schema initiative has been launched to address the problem of the many different XML standards. Apart from being a new Pan European standard, the IDA initiative is also intended to be used as a 'common denominator', a common basis for mapping of different existing standards[34]. The table below provides an overview of published IDA e-procurement XML schemas.

[30] WS/ePRO Secretariat: First draft of the CEN workshop Agreement on eProcurement.
[31] http://europa.eu.int/ISPO/ida.
[32] IDA (2004): IDA e-procurement XML schemas initiative - e-Ordering and e-Invoicing phases.
[33] See http://www.govtalk.gov.uk/schemasstandards/egif_document.asp?docnum=874
[34] IDA (2004): IDA e-procurement XML schemas initiative - e-Ordering and e-Invoicing phases.

Table 2.2: Published Ida XML schemas

Procurement phases	IDA XML Schemas	Interoperability
e-Tendering	√	
• Dynamic purchasing system	√	
• e-Auction	÷	
e-Awarding	√	
e-Ordering	√	
e-Catalogue	÷	
e-Invoicing	√	
Classification systems		÷
e-Signature		÷

IDA XML schema have been published in the following areas: e-Tendering, e-Awarding, e-Ordering and e-Invoicing, but so far not in the area of e-Auctions and eCatalogues.

The new procurement processes dynamic purchasing systems, which is introduced with the forthcoming EU directives, is described in the e-Tendering and e-Awarding IDA XML schemas. So far, e-Auctions are not described. The argument by IDA for not developing e-Auctions XML schemas is that e-Auctions will be conducted at web sites, and will not require the same exchange of business documents between different electronic systems as the other procurement phases.

Two other important areas with interoperability problems are classification systems and e-Signature. The status regarding e-Catalogues, classification systems and e-Signature is shortly described below.

Electronic catalogues:
There are a number of different formats when it comes to electronic catalogues. Hence, different e-procurement systems have defined different catalogue standards which suppliers need to adjust to. [35] A survey among 251 respondents mainly from private enterprises in Europe shows that the amount of different eCatalogue formats applied is very high. More than 20 different eCatalogue formats were used by the respondents, and on top of this comes a number of proprietary eCatalogue formats[36].

The initial set of procurement documents in UBL 1.0 does not include a document type for catalogues, but there are data elements for catalogue references in some of the other documents, such as Purchase Order. There are also catalogue-related data elements in the UBL library. However, UBL as it stand, does not have any UBL business document schemas specifically for catalogue management. xCBL (which provided the starting point for UBL) does contain such a catalogue schema, and it has long been part of the plans for future development. It is believed that a UBL catalogue schema will be adopted for UBL 1.1, which is projected for delivery in mid-2005.

In general, it would be an advantage to suppliers (and buyers) if catalogue formats were more standardized, so that they only have to develop one product catalogue to be used on an European scale.[37]

Classification systems

[35] IDA (2002): Public eProcurement. Iniatives and experiences.
[36] CEN/ISSS WS/eCAT: Multilingual catalogue strategies for eCommerce and eBusiness. Combined report. Version 2004-02-17.
[37] IDA (2002): Public eProcurement. Iniatives and experiences.

Different classification systems for public procurement are being used in Europe, the most important ones being:

- The CPV (Common Procurement Vocabulary) establishes a classification system for public procurement aimed at standardising the references used by contracting authorities and entities to describe the subject of procurement contracts.
- UNSPSC (The United Nations Standard Products and Services Code)[38] is an open, non-proprietary system of codes and standardised descriptions for classifying all goods and services.

CPV has been translated into 25 languages and has a clear versioning. CPV was not initially designed for e-procurement, and according to an IDA analysis is "not detailed enough to determine product groups or to define the products in the catalogue"[39].

Currently, CPV is primarily used in the initial stages of the procurement process; to draw up tender notices. Contrary, UNSPSC is used to carry through the ordering process since it is possible to classify subjects more detailed than with CPV[40]. Irish health sector studies support this. They have found that the CPV codes do not meet the need for financial reporting in terms of costing etc. and therefore are not suitable for e-purchasing.[41]

e-Signature

Member States all over Europe are currently establishing national based e-Signature systems, which are generally not technically compatible with systems in other countries[42]. Other recognised digital signatures could be global standards such as Verisign and Globalsign.

The current situation is that national specifications are often only published in the national language which could be a potential market barrier: e.g. for a small municipality in Estonia who receives a tender with a digital signature from a Belgian firm - in French. How shall the municipality evaluate if this is based on generally accepted standards? There are also technical complications: what if the municipality has installed an e-tendering system and the digital signature from Belgium is not compatible with this system?

Member states have taken very different approaches to the establishment of a digital signature infrastructure. Some use hardware based systems (signature cards and card readers provided by trust centres as in Germany) and other countries use software based systems (i.e. Denmark).

Specific problems exist in this field of digital signature. For a company to obtain a Danish digital signature, a specific CVR / SE number is needed, which is only provided to Danish companies.

Various standards are being promoted in the field of digital signatures, including the X509 for certificate authentication. X509 is a basic interoperability standard, and currently used by most of the market players for electronic signatures based on PKI[43].

[38] http://www.unspsc.com/

[39] IDA (2002): Public eProcurement. Iniatives and experiences.

[40] IDA (2002): Public eProcurement. Iniatives and experiences.

[41] Comments on action plan Ireland

[42] E.g. the OCES developed in Denmark OCES is basically a definition of fields and the content of these fields.

[43] Dumortier, Joe et al.: The legal and market aspects of digital signatures (2003), Leuven University.

According to some sources, and as mentioned in the Baseline Scenario, security can represent a barrier to suppliers and buyers[44]. Some suppliers and buyers are concerned about using the Internet to transmit confidential information.

Various approaches to developing secure systems have emerged in e-procurement, including digital certificates and digital signatures. Both use encryption of data to protect the information when transported over the public internet. Two main methods of encryption exist: secret-key (symmetric) encryption and public-key (asymmetric) encryption[45].

The security level of an encrypted system is directly affected by the length of encryption/decryption keys, and the current versions of the Data Encryption Standard (DES) adopt 122-bit or 168-bit keys[46]. The security level of an encrypted system is measured in the time it would take for someone to break the encryption. Thus, no encrypted system is 100% secure.

2.3.2 *Trends*

While standards have been developed in some areas, the implementation of these are only just starting. Various barriers exist in the use of available standards:

- Lack of incentives for IT-vendors like SAP and Oracle to implement XML schema standards in their e-procurement solutions.
- Lacking demand for standards among end-users. Implementing standards will sometimes mean higher cost of an e-procurement solution, because international standards are often a framework which needs to be completed in the individual case.
- Industries and specific (large) companies which are not using standards because they prefer to establish their own developed, do not feel they suit their specific needs, which is especially an argument for large companies that want to develop their own message format (Document Type Definitions).

There are indications that XML will gain a larger market share in the future when it comes to document standards. Specifically, UBL seems to be the standard preferred by many actors in the public sector at the moment.

Additionally, the current trend in standards within electronic catalogues is an advance in the use of UNSPSC instead of CPV. However, as described earlier, CPV holds a number of advantages regarding language, clear versioning etc.

To summarize, there is currently no sign that a uniform standard for underlying format, attributes, classification and digital signature at EU-level will emerge if no action is taken by standardisation bodies and the EU Commission.

[44] OGC: A Guide to E-procurement for the public sector (2002).
[45] Dave Chaffey: ”E-business and E-commerce management” (2004).
[46] European Information Technology Observatory 2004.

2.3.3 *Influence on electronic public procurement until 2010*

With the current fragmentation in key areas such as different schemes, electronic catalogues, classifications and digital signatures, and with the current pace of standardization, the development towards world wide agreed standards will be very slow.

The limited implementation of developed standards constitutes another problem. The inconsistent use of standards by main operators is expected to keep constituting a problem in the area of e-public procurement. Moreover, public administrations in member states or regions are often hesitant to agree on a common set of standards or common use of a specific system, which would minimize the problem with different standards.

In the area of electronic signatures, standards are lacking in two areas: security standards and interoperability standards[47]. It is very complicated to agree on one common standard at EU level and obtaining acceptance from all the different authorities and sectors and their specific needs and demands whereas creating a system of 'mutual recognition' of national digital signatures in EU might be easier.

Security will remain an important issue in the future. No IT system is 100% secure, and it is likely, especially with an expected increase in transactions, that attacks will occur. Such cases will create distrust towards systems and decrease confidence in e-procurement. The development in this area changes from day to day, which means that it is also important that the situation is monitored closely, and that action is taken swiftly when needed.

2.4 Human Resources and Knowledge

2.4.1 *Current situation*

Currently, there is no general data from EU25 on the human resources and knowledge related to e-public procurement. However, some lessons learned exist at country level which can provide elements to an assessment of the current situation in this area. The key aspects regarding the current status and the evolution of e-public procurement are:

- Knowledge
- Use of ICT
- Skills

Knowledge
Currently the knowledge on the benefits of introducing operational e-public procurement in public institutions and private enterprises is limited. Several sources emphasize that it is important to disseminate the knowledge – and preferable solid evidence and documentation – of the cost/benefit ratio and the benefits related to electronic public procurement. This concerns the benefits related to more efficient working processes and lower transaction costs, but also benefit better management of the procurement process, added value, more competence for employees, faster acquisition time etc[48].

[47] Dumortier, Joe et al.: The legal and market aspects of digital signatures (2003), Leuven University.
[48] Rambøll Management (2000): “Analysis of electronic public procurement pilot projects in the European Union”, p. 5-6; and case interviews conducted in Denmark and Germany

Use of ICT
Indirectly, the general access to computers and Internet are important variables for a successful introduction of operational e-public procurement throughout Europe. Data from Eurostat show that 84% of enterprises in EU15 had access to the Internet in 2003 compared to 70% in 2001. Moreover that 45% of all households in EU15 had access to the Internet in 2003 increasing from 36% in 2001. [49] These findings are indicators of the increasing ICT-awareness and -readiness of the European people.

Specifically, an assessment in the e-Business W@tch from March 2003 shows that 93% of all employees from the seven sectors surveyed work in companies that use computers, and 87% in companies with Internet access. [50] This indicates a high degree of e-readiness in European businesses and that the very basic conditions regarding the human resource capacities for the application and use of e-public procurement are in place in the companies.

However, this overall observation needs to be complemented by more nuances: First, recent data show that while the general internet penetration in SMEs is high, a large share of the smaller segment of the SMEs (with less than 20 employees) still do not have high-speed internet access even in France which is among the best equipped European countries in terms of the penetration of the business sector by high-speed internet access[51]. The comparatively low penetration of high-speed internet access in the smallest companies implies a risk that these companies will effectively opt out of e-public procurement because participation in e-public procurement procedures is too cumbersome (which e.g. require up- and downloading large files which is difficult, if at all possible, without state of the art high-speed internet access), except for the more simple phases of the procurement cycle (notification and publication of tenders).

Secondly, a large number of the public sector institutions in Europe, which in a generally decentralized procurement structure are responsible for their own procurement, only purchase goods and services in small amounts that are below the threshold value defined by the public procurement directives and nationally defined threshold values for smaller purchases. In general, the incentive for public institutions to engage in e-public procurement grows stronger with the volume and number of transactions that the individual institutions makes on an annual basis (the higher the volume and the number of transactions, the better the return on investment made by the public institution). Consequently, the incentive for many public institutions (especially smaller institutions) to engage in e-public procurement and acquire the necessary skills and knowledge does not currently seem very strong.

Skills
The skills needed to operate simple e-tendering procedures are limited assuming that the user is fairly used to IT (please refer to table 2.1 in Part 1; the baseline analysis). However, for more advanced systems such as Dynamic Purchasing Systems (using e-Catalogues), e-Purchasing and e-Invoicing, the requirements are higher. It should be noted that the use of

[49] Eurostat, Structural indicators, Innovation and Research, Level of Internet access. See http://europa.eu.int/comm/eurostat

[50] European Commission (2003): The European e-business Report. Second Synthesis Report of the e-business watch. Brussels. See http://www.ebusiness-watch.org

[51] Ministry of Industry of France, "Digital Economy Task Force, E-commerce Scoreboard Update", April 2004, p. 21

advanced e-procurement system is not a requirement of the directives and the directives explicitly stipulates that e-procurement systems do not conform with the legislation if they constitute a market access barrier.

In the recent years the importance of e-skills has increased. Nonetheless, in 2004, the European Commission has calculated that while over 70% of the EU workforce regards computer skills as important for their employment situation, only about 27% of the workforce has received job-related computer training.[52] These figures indicate that a skills shortage might occur in the workforce, but it is at the same time important to bear in mind that ICT skills at user level are very often acquired through informal on-the-job-training and everyday usage, which is a factor that will counter the occurrence of a skills shortage.

More specifically concerning e-public procurement, an evaluation of the experiences with implementing e-public procurement systems for the public authorities in Sweden has concluded that the most critical factors of implementing the systems are related to recruitment of skilled staff and to the development of training programmes for the employees of the public authorities.[53] To be effective such training programmes would need to be a mixture of awareness raising and the IT skills needed to operate e-public procurement systems. In this regard they would need to address the implications of the new legal framework and disseminate experience and knowledge on good public procurement practice.

Several initiatives have been taken already on a national level to increase the skills of the public and private employees working with e-public procurement. In UK, The Improvement and Development Agency on procurement (IDeA) has recently expanded its free procurement advisory service and developed a range of new services. During 2004, IDeA will publish comprehensive practice guidance and programs on different aspects of procurement together with a wide range of resources[54]:

- Training of member/managers and project teams
- Sustainability and local government procurement
- Skills framework for local government procurement
- Addressing e-procurement

Furthermore, findings in Ireland show that SMEs are ill prepared to take on the advantages of the opportunities presented by public and private e-procurement. Therefore, the Irish Chamber of Commerce is taking practical steps to help SMEs meet the e-business challenge, e.g. an SME e-procurement training programme in 2003. The programme is set up to prepare Irish businesses for the introduction of e-procurement, particularly within the public sector. The programme provides seminars, online training and guides. [55]

[52] See “All about e-learning” on the eEurope 2005 website (http://europa.eu.int/information_society/eeurope/2005/all_about/elearning/index_en.htm)

[53] International Journal of Communications Law and Policy, Issue 8, Winter 2003/2004: ”Electronic procurement in the public sector in Sweden- SFTI” (See www.ijclp.org)

[54] See www.idea.gov.uk/procurement ”Training for members/managers and project teams”

[55] See the ”SME E-procurement Training Programme” 18 May 2004 on www.chambersireland.ie

Recent experiences from Denmark are in line with the Irish view that SMEs need to upgrade their skills and knowledge to better exploit the possibilities of advanced e-public procurement (again: please note that these a not a requirement of the new directives).

A development project for SMEs aiming at improving the capacities and possibilities for SMEs to take part in e-commerce concluded that SMEs have a number of general needs that must be covered adequately in order to effectively exploit the opportunities in e-commerce, including e-procurement, but that these needs are not presently covered sufficiently[56].

As regards skills and knowledge, this includes knowledge and competences in relation to IT strategy, IT project design, management and implementation and IT solutions, which, at a more specific level, can be translated into the following skills needs, where the 60 SMEs participating in the Danish e-commerce development project generally do not have sufficient capacity:

- Upgrading of the skills of management and administrative staff for IT use and general understanding of the use of IT in the business processes of the firm
- Ability to assess, and possibly upgrade, enterprise resource planning (ERP) systems
- Management and implementation of costumer relationship management (CRM) systems and sales
- Development of IT strategy, including the decision to outsource IT development and day-to-day IT operations to suppliers
- Ability to integrate and mainstream IT into critical business processes in the value chain, e.g. logistics, procurement, sales, production, marketing and after sales service.

Although a firm has the possibility to outsource some of these tasks there still need to be a certain level of knowledge in the firm to make informed strategic and operational decisions and manage the suppliers to which tasks are outsourced.

2.4.2 Trends

Knowledge

It is expected that knowledge on e-public procurement will increase in public institutions and in companies following the market development in the field where companies will continue to adopt e-business, including e-procurement, on the B2B market in order to achieve efficiency gains[57]. However, there will be a continued demand for specific documentation on the effects of e-public procurement in order to convince all stakeholders – especially smaller public entities, line units in larger public institutions, purchasers and SMEs – about the business case for e-public procurement and the potential in introduction of operational e-public procurement.

[56] Ministry of Science and Technology of Denmark, ”Genvej til e-handel” (in English: Shortcut to e-commerce), unpublished note, May 2004, prepared by RAMBOLL Management. The project included 60 Danish SMEs from different business sectors who received coaching and advisory services in order to improve their capacities to exploit and participate in e-commerce.

[57] Ministry of Industry of France, ”E-commerce Scoreboard Update”, April 2004, p. 54

Use of ICT
The development of common ICT penetration and usage is increasing, and it is expected that that there will be a continuation of the ICT penetration in the wider public including the workforce in all countries. However, the current situation with a marked difference in ICT infrastructure and capacity between the smallest SMEs with less than 20 employees and larger companies might be the harbinger of a future trend where this segment of companies is constantly lacking behind the larger companies concerning ICT upgrades and investments that are needed at regular intervals. If this trend materializes the implication is that the small companies are poorly equipped to take advantage of the opportunities that e-public procurement offers. As mentioned above, there seems to be a general lack of IT and e-business related skills in SMEs, which require a certain amount of investments in time and resources on the part of the companies to eradicate, and such input factors are typically sparse in particular in the small companies with less than 20 employees.

Skills
It is likely that the demand for training in the field of e-public procurement from both public and private stakeholders will increase in the near future. The tendency seen today in the countries with relatively developed e-public procurement initiative is that national authorities and organization will provide different training programmes and awareness raising efforts. It seems therefore realistic to expect that more initiatives of this kind will be initiated at the national level across the member states.

2.4.3 Influence on electronic public procurement until 2010

Knowledge
Over the coming years both contracting authorities and SMEs will continue to demand concrete documentation of the business case for e-public procurement, since the present evidence is somewhat anecdotal. In interviews conducted for this study, this factor has been highlighted as the single most important precondition for the evolution of e-public procurement, and it was stressed that if this kind of documentation is not provided it can be expected that the willingness to engage in e-public procurement will develop slowly and incrementally.

Use of ICT and skills
As mentioned above, the skills needed to operate simple e-tendering procedures are limited. Moreover, the directives clearly states that an e-procurement system does not conform to the legislation if they represent a market access barrier, which is the case if systems operation exclude enterprises from participation in tenders.

The existing trends concerning the use of ICT and the relevant skills seem to point in the direction that may influence the development of e-public procurement positively until 2010: the general inflow of a new workforce with IT-skills on the labour market, combined with an on-going upgrading of the IT-skills of the existing work force, decrease the importance of the human resource skills barrier. A successful introduction of the new systems among the larger procurers will create experience with the use of electronic procurement that might be used by other contracting authorities. Such experience will feed the need for documentation of the benefits described above and create a certain snowball effect, but where the size of the snowball and its speed will depend on the ability to get the messages and evidence on e-public procurement across to the stakeholders. Furthermore, there will be an ongoing upgrading of computer skills in both the public and private sector which will follow in the wake of the general introduction of e-public procurement. Concerning the need to upgrade skills and knowledge in the public institutions it seems likely that national guidelines on the use of (advanced) electronic procurement, including the implications for institutions of the new legal framework are likely to emerge and thereby reduce the risks relating to the complex nature of the electronic procurement rules.

For more advanced e-procurement, there is a risk that in particular the small enterprises (with less than 20 employees) will not be able to participate in e-public procurement, especially in the phases that include two-way communication flows between buyer and supplier. This is due to a shortage of the relevant skills and knowledge in this segment of SMEs (including strategic skills), which is of a rather fundamental nature and therefore not likely to disappear.

These differences between the smallest companies on one side and larger companies on the other side might be reinforced as e-public procurement systems become more advanced with the proliferation of e.g. e-catalogues, e-auctions and dynamic purchasing systems and with the continuous development of e-procurement software.

2.5 Availability of technical solutions – supply and demand for e-public procurement solutions

The availability of technical solutions is an important driver for uptake of e-public procurement. The availability of cheap as well as well functioning, user-friendly systems is important to both buyers and suppliers. Thus, the cost-benefit (business case) of e-procurement is important for the up-take of the solutions.

2.5.1 Current situation

Five key aspects regarding the current status for the availability of technical solutions in e-public procurement are listed below:

- *Development of e-tendering systems:* Some development of e-tendering systems is taking place, but the pace is slow. Examples include eVergabe (Germany), Ixarm (Italy) and CAT365 (Spain).
- *Development of e-purchasing systems (ordering):* Some e-purchasing systems in the public sector have been established, but the development in this area is also slow.
- *Functionalities of e-procurement systems:* E-procurement is a part of integrated applications which offer a range of procurement functionalities.
- *Cost of e-public procurement:* The cost of the core e-procurement technology is decreasing, but the total cost of implementations is fairly stable.
- *Business case for e-public procurement:* The business case for e-procurement in the public sector: The business case (costs versus benefits) for buyers and suppliers of e-procurement applications is not evident today and innovative technical solutions and business models are needed to improve this and reach critical mass.

These five aspects are briefly described below:

Development of e-tendering systems:
A number of public institutions in Europe are currently implementing e-government portals or e-procurement systems, i.e. Catalonia (CAT365) and Bremen (GOVERNIKUS). Public portals for e-tendering can help facilitate the transformation from paper based to e-procurement processes.

In the survey of the member states (Part 1 report, section 3), 16 of the 25 respond that they have established an e-public procurement system of some form. It should be mentioned that this does not mean that e-procurement systems has been widely adopted in these Member States; only that some 'live' systems are operating. In 9 Member States important portals or e-marketplaces for public sector procurement have not been identified: Cyprus, Greece, Lithuania, Luxemburg, Poland, Portugal, Slovakia, Slovenia and Spain.

So far, most emphasis has been put on the first phase of e-tendering: Notification about tenders. Even though a number of Member States mention that download of tender documents is a functionality in some implemented systems today, it is the conclusion from the interviews that this is something that is very seldom used in tender procedures. The same is the case with the later stages of the e-tendering process (receipt of electronic tenders, evaluation of tender etc.).

Currently, the usage of the e-tendering systems in Europe is limited. The table below provide an overview of the usage of some of the relatively few 'live' systems in Europe.

Case box: Examples of current use of e-tendering portals in Europe

	No. of invitations to tender	Procurement volume published
eVergabe, Germany	n.a.	507 million EUR (2003)
Ixarm & Achats, France	Appr. 3,600	Appr. 10 billion EUR*
The Trading House Hansel, Finland	200 tenders	168 million EUR

* Calculated. Spending in military sector is 15 and 17 billion EUR per annum

Ixarm & Achats is by far the most used e-Tendering portal in terms of procurement volume published on the web page. The two other portals have a limited published procurement volume – i.e. when comparing the published tender volume on e-Vergabe with the total procurement volume in Germany.

Development of e-purchasing systems (ordering):
Before the burst of the dot com bubble, it was believed that business-to-business market places would be a successful business model, and according to estimates, 1.000-1.500 marketplaces was set up world wide[58]. Only few of these are continuing, and mostly in large industries such as metals, chemicals and cars, airplanes and retail, i.e. World Wide Retail Exchange (retail sector), Convisint (the automotive sector) or Aeroxchange (airline sector). Generally, the most successful market places are identified in sectors where orders are generated automatically (by stock management systems / supply chain management systems).

Examples of successful electronic market places in the public sector in Europe are few. Some of the better examples of a public sector electronic market place are Consip (Italy) and GCAT/SCAT (UK). Some of the relatively

[58] The Economist, May 15th-21st 2004: Special report: E-commerce takes off

large portals (in terms of investments) are mentioned below, but even these struggles in terms of achieving a sustainable amount of procurement.

Case box: Examples of current use of e-marketplaces (purchasing) in Europe

	No. of invitations to tender	Procurement volume	No. of trans-actions	Transaction volume
Consip, Italy			450 (2003-2004)	1.5 mills. EUR (2003-2004)
DOIP, Denmark			n.a.	6.4 mills. EUR (2003-2004)
GCAT, UK			n.a.	10 mills. EUR (2003-2004)

All the three e-ordering marketplaces have a limited number of transactions and transaction volume as compared to the total public procurement in the three countries. The figures clearly show that critical mass has not been reached at any of these ‘frontrunner’ e-market places. An example of the problems facing market places is the case of DOIP (Denmark), where the owner Gatetrade decided to sell off the operation in July 2004 after investments of approximately 30 million EUR over the past 4 years without achieving a sufficient amount of transactions and procurement volume.

The financing and business model of the portals and market places differ, and the following different business models can be identified:

- The system is entirely publicly financed. The buyers and suppliers can use the service for free (i.e. Consip in Italy).

- The portal or market place is financed by the buyer. The suppliers can use the service for free (i.e. Ixarm & Achats in France).

- The portal or market place is (mainly) financed by the users. Buyers and suppliers pay sign-on fees, subscription costs and transaction costs. (i.e. DOIP).

The experience so far is that initial and operating costs are barriers vis-à-vis use of the more advanced portals or market places by buyers as well as suppliers. Generally, public co-financing of public portals/market places is very important to reach critical mass, at least in the transition period.

Functionalities of e-procurement systems
The key e-procurement vendors offer e-procurement as part of integrated solutions with a number of procurement functionalities: e.g. / Ariba Procurement Solutions, Oracle E-Business Suite, PeopleSoft Enterprise eProcurement and mySAP Business Suite.

These solutions have separate applications for ordering (e.g. Ariba Buyer, Commerce One Buy and Oracle iProcurement) and sourcing (Ariba Sourcing and Oracle Sourcing), with functionalities such as auctions, negotiations, evaluation of tenders etc.

The new procurement procedures introduced with the new EU directives, E-Auctions and Dynamic Purchasing Systems, are, to some extent, already integrated in the e-procurement systems of the big vendors today, i.e. the Oracle iProcurement have integrated e-Auction functionality.

Cost of e-public procurement
The market for e-procurement solutions has matured in recent years from pilot/development projects to ‘live’, operating systems. In many areas of e-business, cheap standard systems and/or hosted solutions have emerged (e.g. the web shop market). The leading IT-vendors have developed e-business ‘solutions’, e.g. mySAP Business Suite and Oracle E-Business Suite. They are increasingly developing standardised out-of-the box solutions, even sector-specific, to reduce implementation cost of e-procurement systems. This is partly done to move ‘down’ marketwize in terms of company size and even the big IT-vendors are now targeting companies with less than 500 employees.

The cost of e-procurement technology / software has fallen during the last couple of years, but this element constitutes only approximately 10-20% of the total cost of an electronic procurement implementation[59]. Other cost elements are hardware and implementation, including business process re-engineering and back-end integration. The consequence is that the total price of electronic public procurement systems is relatively stable, and software vendors have focused on integrating more functionality into electronic procurement systems.

If electronic procurement is done via an intermediary (portal/market place) other key cost factors are registration fees, periodical fees and charges as a percentage of procurement is carried out.

Enterprises are faced with a number of different costs when implementing e-procurement, and the various cost elements can add up to a significant level altogether.

Software related requirements associated to simple e-tendering are primarily a word processor / spread sheet, internet browser and an e-mail system. In principle, free accessible open source software can be used for e-tendering (i.e. office suites, browsers and e-mail applications). For the later stages of e-procurement (i.e. e-catalogue management tools), open source software is not available. Generally, the software cost for suppliers in e-Tendering are limited, and issues such as update, support, learning resources etc. is to be considered carefully when it comes to specialized business software such as e-procurement.

Software applications are the core tool for suppliers in e-procurement, so access to user friendly, cheap solutions with the required functionality are very important for suppliers. Promotion of open source software in both stages of the procurement process could have an immediate impact on suppliers access to e-procurement. However, it is very uncertain if supporting open source software in the field of i.e. e-Catalogues is a cost-efficient policy action. Other issues such as update, support, learning resources etc. is a disadvantage in the open source software model when it comes to specialized business software as e-procurement.

[59] Although very dependent on the individual implementation. Source: Interview with IT-vendors, including Oracle and SAP.

Below is an illustration of the costs facing suppliers when entering into e-procurement with a public institution as buyer[60] with the purpose of exchanging business documents, i.e. orders or invoices? The example is based on evidence from Denmark, but the cost structure is largely the same as in other European countries, which have established public procurement marketplaces.

Case box: Cost of e-procurement (ordering) for suppliers. Example from Denmark.

Integration with financial system, picture databases etc.: from EUR 3,000 and upwards depending on system, automatisation level, functionalities etc.

Sign on fee, portals: EUR 1,500[61] (DOIP), EUR 800-2,400 (RAKAT)[62], and EUR 700 (KMD).

Annual fee: EUR 1,500 (DOIP[63]), EUR 800-2,400 (RAKAT)[64], EUR 700 (KMD).

Transaction costs: From EUR 0.03 (RAKAT) to 2% of turnover (DOIP).

In some cases, upgrading of the ERP system to a newer or more widely used software package can be a pre-requisite for automated and integrated e-procurement.

Total:
Implementation costs: from EUR 6,000 (excl. revisions in ERP system)
Annual costs: EUR 3,000 (fixed) + variable costs according to turnover and number of transactions

As evident from the table, implementation cost and running costs are considerable for an SME, especially when the use of the systems by public authorities is often limited.

Business case for e-public procurement
According to estimates[65], approximately 100 public institutions at national, regional or local level have implemented e-tendering or e-ordering procurement systems. According to another estimate, less than 1% of orders and 5% of procurement value are done electronically[66]. Whereas significant savings are possible, the implementation cost and cost of operation of e-procurement systems combined with the low up-take of e-procurement among buyers, makes it difficult to document significant savings from implementing advanced e-public procurement systems. The roll out of e-public procurement systems are slowed down because especially buyers face complex and resource intensive implementations.

The introduction of the EU directives is likely to improve the business case somewhat, e.g. by removing legal uncertainty and making it clear that the contracting authorities can require the use of electronic communication for accessing documents and for submission of offers.

[60] The example is based on evidence from the project conducted by Rambøll Management, 2003-2004: Implementation of e-commerce in 60 SMEs, Danish Ministry of Science, Technology and Innovation.

[61] If a framework contract has already been signed with a public institution, this fee is zero.

[62] EUR 800 per message format (order, order confirmation and invoice).

[63] 6-10 users, 1.001-5.000 catalogue lines.

[64] EUR 800 per message format (order, order confirmation and invoice).

[65] Rambøll Management estimate based on various sources (IT-vendors, portals and key contact points in member states)

[66] Interview with Oracle.

The development of e-procurement solutions is evolutionary rather than fundamental. However, to reach a significantly higher level of up-take, the development of innovative technical solutions and business models is needed.

2.5.2 *Trends*

The expected trends in the five key areas described in the section above may be summarized as follows:

Development of e-tendering systems:
E-portals for sourcing are still in the establishment phase. The trend is pointing upwards, with significant new portals expected to be launched within the next couple of years. This means that technology experience will be accumulated and the solutions further developed.

Development of e-purchasing systems (ordering):
E-purchasing systems and market places are also in a development phase, both in regard to the technology, but also the business model applied. Several market places and purchasing systems suffer from lack of turnover and lack of interest from buyer side (public institutions).

Functionalities of e-procurement systems
The market for e-procurement has changed in recent years. Customers are more reluctant towards buzz-words and smart features and more focused on sector references. The major IT-vendors have already developed support for most of the procurement procedures, including eAuction, dynamic purchasing systems etc. The development efforts of the major IT-vendors are directed towards getting the systems to work swiftly and better, and more integrated procurement solutions, making the shift between tendering, purchasing and payment easier.

Cost of e-public procurement
Historically, the cost of e-procurement technology / software has been decreasing along with development of more standardised solutions, but these represent only approximately 10-20% of the total cost of implementing and operating an e-procurement system. Other cost factors such as external IT-consultancy is not expected to drop, which means that the total cost of e-procurement implementations is fairly stable.

Concerning a possible emergence of open source solutions, this should mainly reduce the cost of the ‘core’ e-procurement technology, whereas consultancy related to implementation should remain at the same level as today. Thus, it is unlikely that open source systems would be significantly cheaper than ‘closed-core’ solutions as SAP and Oracle. It should also be kept in mind that the software cost for suppliers in e-Tendering are limited, and requirements are mainly related to simple tools such as a word processor / spread sheet, internet browser and e-mail system. Currently Open Source software of sufficient quality exists in these areas, but the use is very limited. For the later stages of e-procurement (i.e. e-catalogue management tools), open source software is not available.

The introduction of new procurement procedures and requirements related to security in the new public procurement directives is not expected to increase the cost of e-public procurement systems significantly, because the technology already exist and is integrated in many systems.

Business case for e-public procurement
Whereas the cost side of e-public procurement is not expected to change significantly, the benefit side is expected to improve along with an increasing up-take of e-public procurement. The important factor is reaching a critical mass of buyers and suppliers using e-tendering or e-procurement market-places.

2.5.3 *Influence on electronic public procurement until 2010*

Development of e-tendering systems:
E-portals for sourcing are still in the establishment phase. The trend is pointing upwards, with tendering portals being implemented in many Member States at the moment. This means that experience with the technology will be accumulated and the solutions further developed and optimised. The continued development of the e-tendering technology will facilitate the implementation of systems, thus contributing to the establishment of a more competitive and transparent public procurement market.

Development of e-purchasing systems (ordering):
The establishment of a number of national and regional and public sector market places (e.g. Consip in Italy and Zanzibar in UK) is expected to increase the penetration of market places in public sector procurement. Some of the major public procurement markets in Europe will reach a critical mass of suppliers, while reaching critical mass in smaller markets or in less technologically mature countries (including Eastern Europe) will be difficult. This development will delay that of more efficient public procurement markets in Europe.

Functionalities of e-procurement systems
The development in the field will move towards more integrated procurement solutions, integrated sourcing / tendering, ordering and payment systems. Functionalities such as dynamic purchasing systems and e-auctions are expected to be integrated in the major e-procurement systems by key IT-vendors in the market. However, lacking focus on this market from IT-vendors means that more fundamental innovation of systems and solutions is limited.

Cost of e-public procurement
The cost of an e-public procurement implementation is most significant at buyer side (public institutions). A maturing market for e-procurement solutions will provide more standard, out-of-the box solutions which will mean cheaper technology/software. While the cost of technology/software is expected to decrease from the current level, and the market is expected to offer cheaper, out-of-the-box solutions, the total cost of buy-side public procurement is not expected to be significantly lower level than the current, due to the fact that the cost of technology only constitutes a relatively small part (10%) of the total costs.

Thus, high implementation and operational costs of transition from paper-based to e-procurement regimes will continue to provide a barrier for e-public procurement, and SMEs will still be faced with a cost barrier regarding e-public procurement (in e-purchasing). The high level of investments required to implement e-public procurement is expected to slow down the up-take of electronic means in public procurement. Costs for suppliers related to obtaining advanced digital signatures for the participation in public call for tenders may impede cross-border trade/competition within the EU.

Business case for e-public procurement

Whereas the cost side of electronic public procurement is not expected to change significantly, the business case is expected to improve somewhat due to higher penetration of electronic public procurement among buyers and suppliers. It remains, however, to be seen in which markets (member states or sectors) e-public procurement will reach critical mass, and thus constitute a sound business case. Thus, in some smaller markets, the potential of increased competition, more transparent markets and more cross-border procurement will not be realized. However, if the development, acquisition and operational costs are partly or fully covered by national funding, the business case for the individual contracting authority and the individual supplier will improve considerably.

2.6 Uptake of e-public procurement and impact on the internal market

Based on the analysis of the above determinants in the field of e-public procurement up to year 2010, in this final section of the baseline scenario we summarize our estimate of the expected development regarding up-take of e-public procurement and the impact on the internal market *without* further policy action at European level.

The regulatory framework and the four driving forces will influence the uptake of e-public procurement. Furthermore, increased uptake of e-public procurement can have a positive impact on the internal market.

As illustrated previously in section 3, especially the publication of indicative notices and tender notices have an impact on the internal market, i.e. through increased competition and reduced consumer prices. Transforming of the remaining phases of e-tendering will mostly provide process savings, and not directly influence the advance of the Internal Market.

2.6.1 Uptake of e-public procurement

According to a study, the total public procurement market in the EU – i.e. the purchases of goods, services and public works by governments and public utilities - is estimated at about 16% of the Union's GDP or €1500 billion in 2002[67]. In 2002, 106,346 invitations to tenders and 58,513 contract award notices were published. The share of contract awards published in the official journal and subsequently also in the Official Journal (which is online via the TED database) has been growing steadily in recent years, from 8.4% in 1995 to 16.2% in 2002[68].

If establishment of procurement portals and market places are used as an indicator for the up-take of electronic public procurement, the trend is pointing upwards, but with large uncertainty regarding the development for electronic ordering. The establishment of e-tendering portals seems to be an increasing trend in Europe with 16 of the 25 Member States having established some sort of electronic procurement, most of these with focus on notification about tenders and publication of tenders.

[67] 03/02/2004: A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future.

[68] Ibid.

The main target group for e-procurement systems (both tendering and ordering) in Europe can be estimated at approximately 1,000 public institutions: the number of administrative divisions (states, provinces or regions) with a population of more than 200.000 in 2004 is 400[69]. On top of that figure come larger government institutions, health sector institutions (hospitals), education (Universities) and the utility sector. According to estimates, approximately 100 public institutions at national, regional or local level have currently implemented e-tendering or e-ordering procurement systems, equivalent to 10% of the total. The use of these systems remains unclear. According to another estimate, less than 1% of order transactions and less than 5% of order value of public procurement are conducted electronically today[70].

If we take a closer look on the supplier side, the following pattern appears:

In 2003, 19% of European companies made online sale (employment weighed figures)[71]. This activity includes all sale activities and not only electronic public procurement, but can be seen as an indicator on the 'e-maturity' in the supplier base of public procurement. There is virtually no difference in figures for online selling between small, medium and large enterprises: 16% (0-49 employees), 22% (50-249 employees) and 18% (250+ employees) [72].

Procurement online by companies is not directly linked to public procurement (where private enterprises are suppliers), but is also an indicator of the general e-maturity of the supplier base. The share of European companies that procure online ('procurement of at least some their direct or indirect production goods online') is considerably higher than the share for online sale: 50% in 2003 (employment weighed figures)[73]. The adoption by small enterprises is lower than large enterprises: 36% (0-49 employees) compared to 61% (250+ employees) [74].

It should be noted that these figures count for all companies that confirm that they procure/sell at least some of their goods online, and it does not necessarily mean that they have a substantial online procurement or sale. The implication is that a much lower number of companies have a substantial procurement/sale online. The level of online sale by these is still very low, and more than 40% of the companies estimate that the share of online sales is less than 5% (as % of their total sales) [75].

Diffusion of online selling in EU companies has increased year by year since 1993, from around 0% in 1993 to 17% in 2003. Even though this includes all online sale activities, and not only electronic public procurement, this is an indicator of an increasing 'e-maturity' in the supplier base of public procurement. However, according to various surveys, the upward trend for selling online slowed down in 2001-2003 (Eurostat, E-business Watch)[76].

[69] * Source: The World Gazetteer (http://www.world-gazetteer.com)
[70] Interview with Oracle
[71] E-Business Watch: The European e-Business Report – A portrait of e-business in 15 sectors of the EU economy, 2003 edition.
[72] Ibid.
[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] E-Business Watch: The European e-Business Report – A portrait of e-business in 15 sectors of the EU economy, 2003 edition.

As described in the baseline analysis, the uptake of e-procurement is concentrated in two phases today: sourcing (finding suppliers and products via internet) and payment[77]. A high level of automatisation of the sourcing process was a finding from the survey among member states (see Part 1 report, section 3.3). Payment is also done electronically to a large extent (via various national banking systems). Ordering is a very complex process to automate (see Part 1 report, section 3.3), because it involves a lot of communication and interaction between buyers and suppliers. Another factor explaining the level of automatisation in the various phases is the decentralized/centralized nature of decision making pertaining to the specific procurement process, as mentioned in the previous section on organization.

Actors are currently doing efforts to automate all phases of procurement, including sourcing, tendering, ordering and payment. In the medium and long term, this is expected to be reflected in an increased use of electronic means in all procurement phases. Increased benefits of e-public procurement and support of a more integrated procurement process are market factors that imply an increased penetration of electronic public procurement in all phases of the procurement cycle.

The trends in electronic public procurement point upwards, especially for e-tendering, whereas significant uncertainty remains as to the development in up-take of electronic purchasing in the public sector. According to estimate, 5-10% of orders (transactions) and 25% of value will be conducted online in 2010[78]. The nature of public procurement is also limiting the potential of electronic public procurement: the most successful electronic procurement systems are seen in large industries such as metals, chemicals and cars, airplanes and retail were orders that are generated automatically (by stock management systems / supply chain management systems). Another issue is regional differences and public institutions in some regions (e.g. in Eastern Europe) are busy implementing financial systems, whereas e-procurement is not high on the agenda.

As mentioned throughout the report the issue of the potential efficiency gains is at the core of the discussion concerning e-public procurement. The savings are roughly expected to occur in three main areas:

- Savings on the purchasing price
- Savings on the administrative costs for the buyers
- Savings on the administrative costs for the suppliers

However, to date only scattered and anecdotal evidence exist concerning the savings actually realized. The table below compiles some figures from various countries and e-public procurement operations. The table only includes data on savings on purchasing price and on administrative costs for buyers, as it has not been possible to identify any empirical data on the actual administrative savings for suppliers.

[77] Interview with Oracle.
[78] Interview with Oracle.

Table 2.3: Influence of e-procurement on purchasing prices and administrative costs

	Purchasing price (buyers)	Administrative costs (buyers)	Product price and administrative costs (suppliers)
E-tendering			
OGC buying Solutions, UK[79] (e-tendering)	20-25% estimated average savings when buying online*		
General Delegation for Armament, Ministry of Defence, France[80]		31% decrease in administrative costs[81]	
e-eVergabe, Germany			0% savings on prices and process[82]
E-purchasing			
OGCbuying Solutions, UK (e-purchasing)		28-90£ savings per procurement transaction	
New Zealand e-Business portal (e-purchasing)		36.67$ savings per procurement transaction	
CONSIP, Italy[83] (e-purchasing)	36% estimated average savings when buying online*		
NC E-Procurement @ Your Service[84] (e-purchasing) (Dec. 2003)	7.24 % decrease in price 3-23% realised savings from using term contracts (e-catalogues)		
Kaufhaus des Bundes, Germany	10 % savings on price of goods[85]		
E-auction			
DOIPEI e-auction, Denmark[86]	18% realised savings		85.7 % savings on process[87]
Pilot test e-auction in the framework of the National e-Procurement Program, Portugal (Dec. 2003)	25% savings in the purchase of paper for a month		
Essex Marketplace[88] (e-auction)	53 % realised savings resulting from e-auctions on goods 26% saving on IT consumables[89] 25% saving on stationery[90]		
NHS Purchasing and Supply Agency (e-auction, OGC G-Cat)	31% savings from IT hardware e-auction (total)		
Wales Health Supplies[91] (e-auction)	10% lowered purchase price*		

** expected savings*

[79] IDA Public eProcurement, State of the Art Report (May 2004)
[80] Based on interview with representatives from the French Ministry of Defence
[81] As a result of a reform programme which included enhanced use of ICT, new management tools, and the creation of a purchasing function
[82] Interview with Dr. Manfred Schömann, Beschaffungsamt
[83] IDA Public eProcurement, State of the Art Report (May 2004)
[84] Source: http://www.ncgov.com/eprocurement/asp/section/Executive_Summary_EP_Benefits_Analysis.pdf
[85] Figure based on successful tendering. Dr. Manfred Schömann, Beschaffungsamt
[86] See www.doip.dk
[87] Estimated maximum saving when shifting from manual to electronic document management. Interview with Mr. Joerg Paulus, Gatetade.net a/s
[88] Source: http://www.ogc.gov.uk/index.asp?docid=1001028
[89] Basildon District Council, source : http://www.paessex.gov.uk/content1.php?sectionID=101
[90] Basildon District Council, source : http://www.paessex.gov.uk/content1.php?sectionID=101
[91] Source: http://www.ogc.gov.uk/index.asp?docid=1001028

When the figures in the table above are used as a basis for estimating a conservative figure for the savings of introducing e-tendering, it is possible to estimate the total potential for annual public savings on the purchasing price and the administrative costs. In this context, e-tendering is online publication of prior notices and tender documents.

The table above shows that there are examples of savings in the range of 3% - 53% on the purchasing price and that there are examples of realized administrative costs savings of 31% per tender (and 40 EUR – 130 EUR for purchasing transactions). Based on the relatively conservative figures of 5% savings on the purchasing price and 50 EUR savings per invitation to tender the administrative costs are used in the calculations in the table below to estimate the potentials at the aggregated level for buyers (for EU15 only as there are not yet procurement statistics available for EU25).

Table 2.4: Estimated annual savings on purchasing price and administrative costs for buyers (based on 2002 figures for EU15) of introducing e-tendering

Savings on purchasing price	**Savings on administrative costs (buyers)**
▪ Total value of public procurement in the EU15: 1,500 Billion EUR ▪ Value of e-public procurement at a 25% level uptake in the public sector in EU15: 375 Billion EUR ▪ Range of savings realized today: Between 10% - 53% ▪ Conservative estimate for savings on purchasing price: 5% ▪ Estimated total savings calculation: 375 Billion EUR / 5%	▪ Total annual number of public procurement transactions in the EU (above and below threshold): 665,000 ▪ Estimated number of e-public procurement transactions at a 25% level uptake: 166,000 ▪ Savings per invitation to tender: 31% realized (40 EUR – 130 EUR per transaction) ▪ Conservative estimate for savings on administrative costs per transaction: 40 EUR ▪ Calculation for estimated total savings on administrative costs: 166,000 X 40 EUR
Estimated total savings on purchasing price: 19 Billion EUR per year (for EU15)	**Estimated total savings on administrative costs: 6.6 Million EUR per year (for EU15)**

The calculations above show that the potential savings seem to be considerable at the aggregate European level, even under a conservative estimate: Annual savings of introducing e-Tendering 19 billion EUR on the purchasing price and administrative costs savings of 6.6 million EUR. Please note that savings of introducing e-Ordering are not included in these figures.

It should, however, be noted that the figures should be considered a rough estimate, and especially the estimate for the savings on administrative costs is based on very few empirical data.

2.6.1.1 Summary of the up-take of e-procurement

The main target group for e-procurement systems in Europe can be estimated at approximately 1,000 public institutions. According to estimates, approximately 10% of these have currently implemented e-tendering or e-purchasing systems, but the use of the systems are so far limited. Even in the no-action scenario, the trend for e-procurement will point upwards, but until 2010, the penetration of e-procurement will be very uneven in the various steps of the procurement process. Based on the figures presented in the previous sections, we can expect the following situation in 2010:

Table 2.5: Assessment of the use of electronic means in the various procurement processes (above threshold)*

	Expected use in 2010	**Comment**
Notification about tenders	Generalised	E-notification of tenders is already significant in many Member States. E-publication in TED is expected to reach 25% of all procurement in 2010.
Publication of tender documents	Significant	Not very widespread in Member States today, used by some EU institutions. Documents may be made available relatively easy online.
Submission of tenders with digital signature	Some	Nearly no use today in Member States or EU institutions.
Evaluation of tenders	Low	Nearly no use today in Member States or EU institutions.
Ordering	Some	E-ordering represents less than 1% of transactions and less than 5% of value today. 5-10% of order transaction and less than 25% of volume will be electronic
Invoicing	Significant	E-invoice is only covered by very few e-procurement systems. Benefits of invoicing are high. E-banking is very widespread in companies Currently extensive focus on e-invoicing.

* Assessment based on data presented in the baseline analysis (e.g. table 3.7 and 3.8) and the baseline scenario.

The table illustrates that:

- The goal of generalised use of electronic means in public procurement is only expected to be reached in the notification phase. This means that contract opportunities will be advertised online, but not necessarily that the tender notices are distributed electronically by the contracting authority.
- A lower, but still significant, use of electronic means is expected in the publication of tender documents and invoicing.
- For the remaining phases, public procurement is not expected to reach critical mass.

Another aspect regarding up-take is the country dimension. In many smaller countries and markets, e-public procurement will not reach critical mass beyond the initial phases concerning notification about tenders and publication of tender documents, which is important if e-procurement is to constitute a sound business case. Thus, in many smaller markets, the potential of increased competition, more transparent markets and more cross-border procurement will not be realized.

As illustrated previously in table 3.1, increased up-take of e-public procurement can have a positive impact on the internal market, e.g. by increasing transparency, easy access to tender opportunities and decreased tender cost.

As described in the previous section, even without any further action at EU level, it is expected that the up-take of e-procurement will increase in all phases due to the on-going optimization of business processes. However, it is not expected that the current development is strong enough to ensure generalised use of e-procurement by 2010 besides from the initial notification of tenders (not including the work flow behind notification). Moreover, it is expected that the problems regarding nationally based solutions in areas such as digital signatures and e-invoicing will prevail in the no-action scenario.

2.6.2 *Impact on the internal market*

Based on the analyses presented in previous sections, we summarize our estimate of the impact on the internal market *without* further policy action at the European level.

The direct economic impact on the internal market of the trend concerning uptake will be that the potential savings of approximately 19 billion EUR on purchasing price (for EU15), due to a more transparent and efficient market for public procurement, will not be realised.

Below we describe the main trends related to the five driving forces in the conceptual model and their expected influence on the internal market. The description includes the impact on selected parameters which are important aspects of the evolution of the internal market, including the economic and the social impact on the internal market.

Regulation – impact on the internal market

- The new directives regulation of electronic means for communication in the procurement process eliminates the fundamental legal barriers inherent to the use of different regulation on electronic means in the procurement process in the Member States.
- Delays in transposition and application of the directive will cause legal uncertainty for economic operators, market fragmentation due to differences in legal regulation and slower development towards a single market for public procurement.
- Compliance problems of e-public procurement systems and processes to the requirements of the directives are likely to remain in relation to some contracting authorities.
- Cross-border procurement problems are likely to prevail, e.g. in the area of digital signatures and electronic invoicing. These are factors which have a negative influence on the electronic public procurement across borders in Europe, although a positive development within individual national markets may occur.
- Although certain fragmentation risks exist (from erroneous or differences in transposition and implementation) the new legal framework will contribute further to the harmonization of the framework for procurement in Europe.

- A coherent and uniform legal framework for e-public procurement across the EU will be beneficial for transparency and competition. The introduction of a legal framework, and the legal procedural guaranty regarding non-discrimination, will be beneficial for SMEs as well as for larger companies.

Organization, Stakeholders and Incentives – impact on the internal market

- The decentralized procurement structure means that it will be too costly for many small public entities to acquire their own e-procurement solutions. The potential procurement savings may not be exploited to their full potentials because of the decentralized procurement structure.
- Whether small public entities realize the potential for administrative savings depends on the availability of cheap and convenient electronic solutions which are made available by central authorities or coordinating bodies for users at the decentralized level. If such systems and solutions are not available, e-public procurement will not be attractive for many small institutions because the costs of acquiring, operating and maintaining systems will be too high compared to the potential gains.
- E-public procurement will not automatically entail cost savings for businesses: First, the decentralized procurement structure means that many contracting authorities will use different systems and formats to which companies must adapt, which will increase administrative costs and other transaction costs. Second, many, especially small, public institutions will continue to use traditional, paper-based procurement, which means suppliers must be able to operate both electronic and paper-based procedures in parallel
- Because the decentralized procurement structure might slow down the mainstreaming of e-public procurement, the trend towards increased competition and transparency is likely to be slowed down correspondingly

Interoperability, Standardization and Security – impact on the internal market

- The introduction of electronic means in the first phases of the procurement cycle will open the European market to more competition and make the market more transparent as information about business opportunities are more easily available. These phases will not, or only marginally, become influenced negatively by interoperability and standardization issues. Interoperability and standardization problems will be connected to more advanced processes of e-tendering and e-purchasing.
- Continued interoperability problems, in the more advanced processes, are lack of standards and lack of the use of existing standards, which will continue to be barriers for cross-border trade and European competitiveness. The problem is especially expected in fields such as product classification, digital signature, electronic catalogues, e-invoicing and legal tender documents.
- The slow progress in the field of interoperability and standardization will maintain high prices for e-procurement solutions for public institutions. There is lacking incentive for IT vendors in the market to converge around established standards. Moreover, interoperability and standardization is crucial for the level of administrative and transaction costs of companies.

- The existence and mainstreaming of established standards is of particular interest to SMEs as the smaller companies find it important to decrease sale and transaction cost related to the participation in public procurement.
- Security will remain an important issue in the future. Cases of security problems may create distrust towards systems and decrease confidence in e-procurement.

Human Resources and Knowledge - impact on the internal market

- Contracting authorities and suppliers have used for the introduction of e-procurement as a mean to streamline administrative business processes. They will look for this potential when they decide how and to what extent they should engage in e-public procurement. Lower cost of e-procurement will increase interest on both sides.
- There is a lack of management skills in relation to achieving administrative savings on the introduction of e-public procurement and using this as a tool to reengineer and streamline the organization of procurement processes.
- There is a lack of knowledge and documentation about the business case for e-public procurement and the possible benefits from e-public procurement which might impede or prevent the conversion to e-public procurement among buyers and suppliers.
- There is a risk that the segment of the smallest companies (less than 20 employees) will opt out of the general evolution of e-public procurement because participation is too cumbersome.

Availability of technical solutions – impact on the internal market

- The evolution of e-public procurement technology and solutions in the market will not entail significantly reduced total costs for public institutions as technology investments only account for 10-20% of the total of the introduction of e-public procurement.
- The major e-procurement vendors are targeting the larger government administrations (states, provinces or regions) or institutions, health sector institutions (hospitals), education (Universities) and the utility sector.
- It is expected that the e-public procurement systems and solutions become increasingly advanced and with improved functionalities, but no fundamental innovations are currently emerging.
- Some of the major public procurement markets in Europe will reach a critical mass of contracting authorities and suppliers using electronic means, while reaching critical mass in smaller market or in less technologically mature countries (including Eastern Europe) will be difficult. This development will delay the development of more efficient public procurement markets in Europe.
- Within some national markets where e-public procurement is likely to evolve faster than at the aggregated European level, there might be a positive influence on the competitiveness of the suppliers operating in those markets. Although such trends do include a risk of fragmentation of the European market, which would not be beneficial for the development of European competitiveness as a whole, there might also be a positive spill-over of inspiration and experiences from the front runner countries to other member states.

2.7 Conclusion for the Baseline Scenario

The basic assumption of the baseline scenario is to provide an assessment of the development of main trends and factors related to e-public procurement until 2010 as they would seem likely to unfold under the influence and dynamics resulting from the transposition of the new public procurement directives into national legislation across the EU member states, but without further policy action at the European level.

The purpose of the baseline scenario is to serve as a basis for assessing the potential results and impacts of the actions proposed in the draft action plan. The time horizon until 2010 is chosen in light of the stated objective from the European Commission that "Generalized e-procurement should be achieved by 2010".

According to estimates, the total value of public procurement in the EU – i.e. the purchases of goods, services, works and public utilities (incl. defence) - is about €1500 billion in 2002 or about 16% of the Union's GDP. These figures include procurement both above and below the EU procurement thresholds.

From 1995-2002, the share of public procurement published in the official journal / Tenders Electronic Daily as percentage of the total public procurement in EU-15 increased sharply from approximately 8% to 16%. If this development continues, the procurement published online in TED will reach approximately 25% of the total public procurement in 2010.

The theoretical literature concerning e-business and e-procurement and the empirical data collected for this study may be condensed into a number of factors which appear to function as the main driving forces that influence and determine the development of e-public procurement. The drivers identified are:

- Regulation
- Organization, Stakeholders and Incentives
- Interoperability, Standardization and Security
- Human Resources and Knowledge
- Availability of technical solutions

Regulation is the framework within which all economic operators must work. The next level of drivers is directly influencing the procurement activities in contracting authorities and suppliers and will thus influence uptake of e-public procurement. Finally, increased uptake of e-public procurement can have a positive impact on the internal market, i.e. through easier access to contract opportunities or lower transaction cost.

The conclusion on the main findings below is structured under the following headings:

1. Issues of importance for the implementation of the requirements set out in the EU legislation
2. Issues of importance for the achievement of generalized use of e-public procurement and for meeting the Lisbon objectives
3. Overall conclusion

The implementation of the basic legislative framework is the first important step and milestone for the future use and development of e-public procurement. A smooth transition to the new legislative framework will be beneficial for e-public procurement and is therefore a crucial short-term objective, while a slow implementation marred by erroneous interpretations by the EU member states will have the opposite effect.

The vision of the Lisbon objectives about bringing Europe to a leading position in the global economy is the overall and long-term development objective. E-public procurement has (through its potentially positive influence on efficient use of public funds and the development of the internal market) the possibility to contribute to this end and vision.

Issues of importance for the implementation of the requirements set out in the EU legislation

- There are indications that delays in transposition and application of the directive might occur. Delays will cause legal uncertainty for economic operators and market fragmentation due to differences in legal regulation.
- Compliance problems of e-public procurement systems and processes to the requirements of the directives are likely to remain in relation to some contracting authorities.
- Cross-border procurement problems can be expected to prevail, e.g. in the area of digital signatures and electronic invoicing.
- The introduction of e-public procurement is mainly driven from the national level in the EU member states while especially smaller regional and local levels are not yet actively involved all member states. Although e-pubic procurement generally seems to be part of national strategies, many member states have not yet taken concrete steps in the field, and many have not devoted funds to the introduction of e-public procurement.

Issues of importance for the achievement of generalized use of e-public procurement and for meeting the Lisbon objectives

- Lacking incentives and the decentralized procurement structure might slow down the transformation to generalized use of e-public procurement. The decentralized procurement structure means that it will be too costly for many small public entities to acquire their own e-procurement solutions.
- Interoperability and standardization problems will be connected to more advanced processes of e-tendering and e-purchasing. Interoperability problems are especially expected in fields such as product classification, digital signature, electronic catalogues, e-invoicing and legal tender documents. Formal requirements for paper-based certificates posed by contracting authorities etc. are important barriers for administrative efficiency gains.
- Security will remain an important issue in the future. Cases of security problems may create distrust towards systems and decrease confidence in e-procurement.
- There is a lack of management skills in relation to various areas, including reengineering and streamlining procurement processes and possible benefits from e-public procurement. There is a risk that the segment of the smallest companies (less than 20 employees) will opt out, or fall behind, of the general evolution of e-public procurement because of a lack of operational skills and knowledge about e-public procurement.

- The total cost of installing e-public procurement technology and solutions is likely to remain unchanged.
- It is expected that the e-public procurement systems and solutions become increasingly advanced and with improved functionalities, but no fundamental innovations are currently emerging.
- E-procurement vendors are targeting the larger government administrations (states, provinces or regions) or institutions, health sector institutions (hospitals), education (Universities) and the utility sector.
- Some of the major public procurement markets in Europe will reach a critical mass of contracting authorities and suppliers using electronic means, while reaching critical mass in smaller market or in less technologically mature countries (including Eastern Europe) will be difficult.

3. Scenario B: The Balanced Approach Scenario

3.1 Introduction

The balanced approach scenario is a scenario by a focused, and limited number of policy instruments are applied at the European level. The main objective is to ensure full and correct adoption of the new procurement directives at the national level in collaboration with the EU member states and to ensure that implementation of e-public procurement at national level across the EU does not conflict with the fundamental principles of the internal market. This scenario does not include policy instruments that go beyond this level.

The analysis includes:

- Identification of possible policy instruments. The impact assessment includes a range of possible policy instruments which were identified in the course of the study in the written data sources as well as in the consultations with the European Commission, member states representatives and other experts.
- The ability of the outlined policy instruments to address and overcome the problems and barriers identified in the baseline scenario.
- The potential impact of the outlined policy instruments. This assessment will take into consideration the associated costs and benefits as well as the policy instruments' potential contribution to the objectives described previously (correct implementation, compliance with internal market principles and contribution to improved competitiveness and Lisbon objectives).

Finally, the section will comment on the possible roles and influence of the main stakeholders (European Commission, Member States) and will conclude by presenting recommendations on the policy instruments to be prioritized at the European level based on an assessment of the most appropriate mix of policy instruments.

3.2 Identification of possible policy instruments and problems addressed

A range of policy instruments were identified during the course of the study and their potential impact will be assessed under this scenario. The table below gives an overview of how the policy instruments are linked to problems identified in the baseline scenario.

Overview of linkages between problems identified and policy instruments

Problems identified	Policy Instruments
Delays in transposition and application of the directive will cause legal uncertainty for economic operators, market fragmentation due to differences in legal regulation and slower development towards a single market for public procurement.	- Issuing of interpretive document on the new directives - Monitoring by the European Commission of implementation of the new directives in national legislation - Support from the European Commission to member states in the legal transposition process (consultations, information)
Compliance problems of e-public procurement systems and processes to the requirements of the directives are likely to remain in relation to some contracting authorities.	- Support from the European Commission to member states in the legal transposition process (consultations, information) - Establishment of European voluntary accreditation scheme which member states may use to ensure that their e-public procurement systems comply with the requirements of the new directives - Development of guidelines and evaluation tools to provide contracting authorities with dynamic and cost-efficient models to ensure that their e-public procurement systems comply with the requirements of the new directives
Certain fragmentation risks exist as a consequence of possible erroneous or differences in transposition and implementation of the new legal framework.	- Issuing of interpretive document on the new directives - Monitoring by the European Commission of implementation of the new directives in national legislation - Support from the European Commission to member states in the legal transposition process (consultations, information)

As indicated in the table, each of the problems identified in the baseline scenario would be addressed by different policy instruments, which would serve to provide different contributions to solving or alleviating the problems. The potential impact of each policy instrument on problems identified will be elaborated in the following section.

This mix of policy instrument are a combination of various support and control instruments which share the immediate objective of ensuring the timely and correct implementation of the new directives into national legislation and into the practices applied in the member states.

The survey among member states (described in the baseline analysis) shows that most member states expect to implement the new directives before the end of 2005, while six member states expect the directives to be implemented in 2006.

As pointed out in the baseline scenario, the six member states face a very tight implementation schedule as the deadline expires at the end of January 2006, but also for the other member states it remains to be seen whether the timely implementation, which member states generally seem to expect, also can be reached in practice. In this respect the general track record of the member states (as pointed out in the most recent issue of the Internal Market Scoreboard of July 2004) is not too promising as the transposition deficit remains significant and encompasses almost 9% of the internal market directives for the EU15 countries, only. This indicates that delay in the transposition of the new procurement directives is not only a theoretical risk but could well be the case also for the new procurement directives. On the other hand, electronic procedures have been used for some time in many of the member states, and the new directives do not regulate a completely new area but are adjustments to the existing procurement legislation and rules, which are factors that should ease the implementation process.

However, in this respect it is also important to distinguish between the formal implementation of the new directives into national legislation, and the implementation into the practice of procurement and e-public procurement, as pointed out in the baseline scenario: Although timely and correct formal transposition into national legislation is ensured by a member state, it is no guarantee for the practical application in day-to-day operations of contracting authorities if the legislation is not followed up by tools to support and enforce compliance by contracting authorities.

As regards the correct transposition of the directives into national legislation the statistics show that this remains a serious problem for the application of internal market legislation[92]. The number of infringement cases has not decreased nor has the time to solve the cases been reduced. These experiences concerning the transposition of internal market directives across the board show that a situation with erroneous implementation of the new procurement directives could easily occur.

Moreover, in respect of the aim of ensuring that all existing systems live up to the requirements of the directives, the baseline scenario referred to a review of a sample of e-public procurement systems (which according to IDA represent current ‘good practice’ in European context). This review showed that while these systems did meet a number of the requirements of the directives, there were also various aspects where they did not. As the sample represents the most advanced segment of existing solutions, the result of the review can be seen as an indication that others, less advanced, existing solutions across Europe will also encounter problems in this respect.

In sum, this indicates that in light of the existing and past experience with the implementation of the internal market directive into national legislation in the member states, it is not unlikely that delays and erroneous implementation will occur in the case of the new procurement directives. Seen from this perspective there is a rationale for the European Commission to take action in close collaboration with the member states, which are given a leading responsibility for the implementation of the legislative framework.

[92] European Commission, DG Internal Market, “Internal Market Scoreboard”, July 2004.

3.3 Assessment of potential impact on the Internal Market

Policy instruments: Interpretive document from the European Commission on the new directives and support to member states in the legal transposition process
Policy instruments that concern the dissemination of information and guidance of and to the various stakeholders in the member states seem to have the potential for immediate, short term impact: Improved level of information in the relevant target audience among the member states.

There is clearly a need to convey the contents of the new directives in an easily accessible style to the many different stakeholders in the private and public sector at regional and local levels for several reasons: To mobilize interest in e-public procurement, to ensure that public authorities in the member states, contracting authorities and private suppliers have sufficient information, to prevent errors and misinterpretations to the extent possible, and to promote alignment with the content of the directives among both existing and new e-public procurement system. The latter purpose would be an important mean to counter the existing opacity of e-public procurement systems which hinders accessibility.

In this respect, some of member states interviewed have underlined the potential value-added ???? of an interpretive communication that could bring further clarification into the field. Such clarification could e.g. be achieved by describing and explaining in very concrete and operational terms how the directives' rule that means of communication. Systems and tools used in operational systems are *non-discriminatory, generally available and interoperable* should be interpreted so that it becomes clear when these requirements are met in a satisfactory manner.

As regards the costs and benefits related to these policy instruments, it is our assessment that the associated costs seem to be very limited while the benefits are potentially significant:

The potential benefits are:

- The considerable size of the relevant target audience across Europe that could benefit from the clarification and information dissemination efforts, and, second, the saved costs that would result from avoiding errors in the legal transposition and the practical application of e-public procurement.

The potential costs are:

- The costs, which would mainly consist of working time by European Commission staff and experts and costs of development of various publications, are limited compared to the above mentioned benefits.

The potential impact on problems identified in the baseline scenario:

- Through the guidance of member states, an interpretive document could serve to prevent delays in transposition to national legislation which could be caused by errors in legal interpretation of the directive.
- The interpretive document could also contribute to legal harmonization between the member states and the prevention of potential fragmentation risks in the internal market caused by legal differences between the member states.

Policy instrument: Monitoring of implementation of the new directives in national legislation
The European Council have repeatedly pointed to the fact that correct and timely transposition of internal market directives into national law is a legal obligation for all member states, and that member states who do not adhere to these obligations deprive businesses and citizens of their rights and of the full economic benefits of a properly functioning internal market[93]. According to the European Council, the impact is that the competitiveness of the European economy as a whole will be weakened.

The implementation of the new procurement directives is only a first step in the process, and more significant barriers need to be overcome in order to make e-public procurement work as a real engine behind the development of a well-functioning and integrated internal market. But in view of the point made above by the European Council it is clear that correct and timely transposition of the directives it is a crucial step which, if it is missed, will have implications for the functioning of the internal market: The timely and correct implementation of the new procurement directives is a necessary, although not sufficient, precondition that needs to be in place in order to achieve progress in the field and make e-public procurement work as a tool that supports the evolution of the internal market. If the establishment of this basic precondition for e-public procurement turns out to be lengthy and problematic, it will put a brake on the evolution of the internal market. Moreover, if the listed policy instruments can contribute to a higher degree of alignment of existing and new e-public procurement policies, programmes and systems in the member states with the new directives, it will be supportive as a mean to promote coherence and harmonization and hinder the development of nationally fragmented markets for e-public procurement.

However, as a mean to counter these problems, the potential impact of monitoring the implementation process in the member states in order to ensure a timely implementation of the directives seems limited: Although it is evident that the European Commission should monitor the timely progress of the implementation at national level as part of the Commission’s obligations, there is, effectively, very little that the European Commission can do to speed up a lengthy and delayed transposition at national level, apart from applying soft measures such as raising the issue with its counterparts at the national level and publicize the status for the implementation of the directives across member states in order to motivate the laggards to follow suit.

In view of this perspective our assessment is that although it is an evident task for the European Commission to monitor the development in the member states and raise any issues with the particular member states, it does not seem realistic to expect that such an activity would have significant influence on the process of ensuring compliance in the member states. The European Commission would to a high extent rely on the information processed or made available by the member states, and is thus faced by an even greater information problem than the member states.

As regards the related benefits and costs, these may be summarized as follows.

The potential benefits are:

[93] Conclusions of European Council summits in Stockholm (March 2001), Barcelona (March 2002) and Brussels (March 2004).

- Monitoring could work as an early warning system with elements of national legislation conflicting with the requirements of the directives could be identified early on, clarified or eliminated. This could prevent situations of non-compliance of national legislation with the new public procurement directives as well as further delays.

The potential costs are:

- The costs of establishing a monitoring system and procedures appears to be limited as it would mainly consist of the working time of European Commission staff and government staff in the member states. However, the main concern here is not the magnitude of the related costs but rather whether it is at all possible for the European Commission to establish and conduct monitoring that would serve as a mean to realize the potential benefits described above.

The potential impact on problems identified in the baseline scenario:

- Monitoring of the implementation of the new directives in national legislation could give member states an incentive for timely implementation and thereby serve to prevent delays in transposition to national legislation.
- Monitoring could also feed information from member state level to the European Commission which could serve to prevent errors or misinterpretations of the directives.

Policy instrument: Establishment of a voluntary accreditation scheme

The costs connected to measures taken at member state level to ensure that the implementation of the directives' requirements beyond the mere legal implementation and into the e-public procurement systems and practices may be considerable: It seems realistic to expect that there will be legal compliance problems related to many existing e-public procurement solutions, although it is not possible to estimate to what extent these problems will be grave or minor violations of the legal requirements. Judging from the consultations with member states it seems to be a complicated matter to ensure that all existing e-public procurement solutions comply with the new directives. One of the difficulties faced in this area is that it is not the systems themselves but the way in which the systems are used that creates problems of compliance.

Even if national authorities at the central, governmental level wished to ensure that all existing solutions (and the following procurement practices) in the country were in compliance, central authorities (especially in the larger member states where many solutions exist at various levels of government and levels of technical sophistication) would face considerable barriers and costs in their attempt to do so: First, it will be laborious, at least in some member states, to identify all the existing solutions. Secondly, the resources needed to conduct a review of the level of compliance could be extensive and therefore difficult to mobilize. Thirdly, it will, especially in the large member states, be an extensive task to ensure and enforce compliance, which would also require considerable resources and in practice be very difficult.

In light of these barriers and costs, a likely and feasible approach for member states to follow would be to take a reactive rather than a proactive line of action. This includes publicizing and disseminating information about the legal requirements to relevant stakeholders and then addressing the problems in cases where they would be brought to the attention of the central authorities (e.g. through complaints).

The potential impact of the introduction of a voluntary accreditation scheme should be considered in this context. Moreover, there seems to be both potential benefits and potential costs related to the introduction of a European scheme for certifying compliance of e-public procurement tendering devices and systems with the new procurement directives.

The potential benefits are:

- An accreditation scheme might boost confidence in e-public procurement among buyers as well as suppliers. At present there seems to be some amount of uncertainty among e.g. public authorities responsible for e-public procurement solutions in the member states concerning the implications of the new procurement directives. The introduction of an accreditation scheme would provide national authorities with a tool to ensure compliance with the legal requirements when new solutions are developed.
- Increased transparency across the European market, provided that it is a European accreditation scheme – national accreditation schemes might be helpful within the national market but they seem unable to bring significantly more transparency to the European market as a whole.

The potential costs are:

- The present market size for e-public procurement may be too small to stir sufficient interest in an accreditation scheme among contracting authorities and take a long time to influence the development of e-public procurement.
- The experience from previous standardization efforts is that it typically takes a long time. The same might be the case for a voluntary accreditation scheme, which includes the risk that once the scheme is established it may be overtaken by the general technological and market development in the field which would make the scheme obsolete. Moreover, it can be difficult to obtain agreement concerning the more precise strategy and content of an accreditation scheme.
- There would be considerable costs involved in the establishing, marketing and day-to-day operation of a voluntary accreditation scheme. The exact costs would depend on the level of ambition and scope of the operation.

The potential impact on problems identified in the baseline scenario:

- An accreditation scheme could potentially help to alleviate and prevent compliance problems in existing and new e-public procurement systems and processes in the member states.

Policy instrument: Development of guidelines and evaluation tools to provide contracting authorities with dynamic and cost-efficient models to ensure that their e-public procurement systems comply with the requirements of the new directives

An alternative to the establishment of a voluntary accreditation scheme could be a set of detailed guidelines and evaluation tools for contracting authorities. The guidelines should address the practical operationalisation of the requirements in the directive related to interoperability, accessibility etc.

These should be continuously updated, thereby ensuring a dynamic and flexible minimum and non-binding ‘standard’ for e-public procurement systems. Evaluation tools could provide contracting authorities with a set of self-assessment questions that could indicate if a given e-procurement system fulfils the requirements of the directive.

These guidelines and evaluation tools could be developed either by the European Commission and then distributed among the member states or developed and distributed solely by the member states.

As mentioned in the previous section, the costs connected to measures taken at institutional level to ensure that the implementation of the directives' requirements beyond the mere legal implementation and into the e-public procurement systems and practices may be considerable.

Given the expected difficulties in ensuring that all existing e-public procurement solutions comply with the new directives, it is important to distribute clear and practical knowledge to contracting authorities about e-public procurement. The guidelines should be developed with the purpose of minimizing legal compliance problems related to many existing e-public procurement solutions.

The one-off cost involved in development of guidelines and evaluation tools would be relatively limited if these are developed centrally by the European Commission (depending on the concrete design). They would consist in research, development and draft of the guidelines and possible meetings and coordination with member states and other stakeholders. Likewise, the running cost involved in continuously updating the document would be limited if this is done by the European Commission. Both one-off and running costs would increase if each member states were to develop their own guidelines and evaluation tools.

The potential benefits are:

- The evaluation tools would provide national authorities with a tool to ensure compliance with the legal requirements when new solutions are developed.
- The guidelines and evaluation tools would quickly provide contracting authorities with hands-on, practical guidance on how to comply with requirements of directives.
- The guidelines and evaluation tools would minimize legal compliance problems related to many existing e-public procurement solutions.
- Guidelines could enable IT vendors and software developers with an opportunity to reduce the costs of developing electronic solutions as they would be able to follow outlined guidelines and models closely.
- Finally, they could help minimizing compliance costs for contracting authorities by avoiding misinterpretations and thus unnecessary investments and development costs.

The potential costs are:

- There would be costs involved in establishing, marketing and continuously updating guidelines and evaluation tools. The exact costs would depend on the level of ambition and scope of operation. Both one-off and running costs would increase significantly if all member states were to develop their own guidelines and evaluation tools and in addition it would be influenced by the interpretations of the individual member state.

The potential impact on problems identified in the baseline scenario:

- Similar to the accreditation scheme described above, the existence of guidelines and evaluation tools could potentially help alleviate and prevent compliance problems in existing and new e-public procurement systems and processes in the member states, but at a lower cost than the accreditation scheme.

3.4 Issues and barriers not addressed by the policy instruments

The previous analysis argues that the outlined possible policy instruments will address some of the issues and barriers identified in the baseline scenario. While the application of the policy instruments will play an important role as means to ensure that the legislation adopted in the member states do not conflict with the requirements of the directives and the fundamental principles of the internal market, there are a number of problems and issues that can be expected to remain as the outlined policy instruments will not exercise any significant influence, if any at all, on these issues and problems.

Overview of issues and problems not addressed by the policy instruments:

- **Barriers to cross-border procurement:** Cross-border procurement problems can be expected to prevail, e.g. in the area of digital signatures and electronic invoicing.
- **Need to include all levels of government in member states:** The introduction of e-public procurement is mainly driven from the national level in the EU member states while, especially, smaller regional and local levels are not yet actively involved in all member states. Although e-public procurement generally seems to be part of national strategies, many member states have not yet taken concrete steps in the field, and many have not devoted funds to the introduction of e-public procurement.
- **Lack of clear incentives:** Lacking incentives and the decentralized procurement structure might slow down the transformation to generalize use of e-public procurement. The decentralized procurement structure means that it will be too costly for many small public entities to acquire their own e-procurement solutions.
- **Interoperability problems will continue to exist:** Interoperability and standardization problems will be connected to more advanced processes of e-tendering and e-purchasing. Interoperability problems are especially expected in fields such as product classification, digital signature, electronic catalogues, e-invoicing and legal tender documents. Formal requirements for paper-based certificates posed by contracting authorities etc. are important barriers for administrative efficiency gains.
- **Security problems could undermine trust:** Security will remain an important issue in the future. Cases of security problems may create distrust towards systems and decrease confidence in e-procurement.
- **Barriers for small companies:** There is a lack of management skills in relation to various areas, including reengineering and streamlining procurement processes and possible benefits from e-public procurement. There is a risk that the segment of the smallest companies (less than 20 employees) will opt out of the general evolution of e-public procurement because it is considered too cumbersome.
- **No guarantee for cost reduction for public institutions:** The evolution of e-public procurement technology and solutions in the market will not entail significantly reduced total costs for public institutions.
- **Uneven development in the internal market:** Some of the major public procurement markets in Europe will reach a critical mass of contracting authorities and suppliers using electronic means, while reaching critical mass in smaller market or in less technologically mature countries (including Eastern Europe) will be difficult.

3.5 Stakeholders’ roles and potential influence

In conclusion, the following points concerning the roles and potential influence of the European Commission and the member states deserve to be highlighted:

- The European Commission can apply the policy options described above to facilitate the timely and correct implementation. However, beyond support and facilitation the possibilities of the European Commission to influence the process are relatively limited.

- The main responsibilities for implementation as well as main capacities to ensure the timely and correct implementation of the new directives lie with the member states. This concerns both the implementation of the directives into national legislation as well as the practical implementation of the requirements of the directives into the existing and new e-public procurement systems and into procurement practices.

3.6 Recommendations

The Consultant's overall assessment and recommendation of the policy instruments considered in this scenario is provided in the table below.

Summary of benefits and costs and recommendations

Policy Instrument	Potential Benefits	Potential Costs	Recommendation
Interpretive document and support (consultation, information) to member states	- Potentially very important as means to prevent errors and misinterpretations	- Very limited administrative costs (staff working time)	- Implement
Monitoring of implementation of new directives in the member states	- Prevent conflicting and non-compliant legislation - Avoid further delays	- Monetary costs are limited, but unclear if monitoring can be done effectively and serve the purpose	- Implement
Voluntary accreditation scheme	- Once established the scheme could increase transparency and boost confidence	- Relatively costly and long lead time until established	- Await development in the field to assess demand and need at later stage
Best practice examples and guidelines	- Quickly provide contracting authorities with hands-on, practical guidance on how to comply with requirements of directives	- Limited costs for establishment, marketing and updating of tools	- Implement

The overall assessment is that the various policy instruments considered (with the voluntary accreditation scheme as the notable exception) are necessary means supporting the legal and practical implementation of the requirements of the new directives.

In this respect the policy instruments which aim at supporting the legal and practical implementation throughout the member states appear to have a better chance of exercising a positive influence on the member states compared to controlling mechanisms such as monitoring. Together with the dynamic effects of the new directives these policy instruments would be able to make a positive contribution to the generalization of e-public procurement across the internal market in the 25 member states although they are clearly not a guarantee against future problems in terms of delays and legal and practical non-compliance.

However, given the importance of the range of significant issues and barriers which are not likely to be addressed by the policy instruments, this mix of instruments cannot be expected to sufficiently ensure that e-public procurement will work as a main contributor towards the realization of the Lisbon objectives by 2010.

In this context it should be noted that the time frame of 2010 might be too short for assessing all the potential benefits of the new directives and supporting policy instruments. The transformation of public procurement procedures and practices (including back-office and inter-organizational work flows) to an electronic platform is a very comprehensive task. It will, to mention just one example from the baseline scenario, require significant public funding from the member states to implement generalized use of e-public procurement in all phases of the procurement cycle. E-public procurement is thus almost by nature an area which will evolve slowly and incrementally. The policy instruments assessed in this scenario will not be able to change this fundamentally by 2010. This is not because the policy instruments are inefficient or because their implementation lack rationale, but because they are trying to influence a policy field where many different and complex driving forces determine the evolution and outcome, which only partially can be influenced through the application of policy instruments at European and national level.

4. Scenario C: The Extensive Effort Scenario

4.1 Introduction

The extensive effort scenario is a scenario, where a number of policy instruments are applied across the board by the European Commission in collaboration with the member states. The purpose is to ensure not only the full and correct adoption of the legal framework at the national level and the compliance of e-public procurement systems with the fundamental principles of the internal market, but also to promote the uptake of e-public procurement across the EU.

The impact assessment of the possible policy instruments applied under this scenario follows the structure and methodology used in scenario B and includes:

- Identification of possible policy instruments. The impact assessment includes a range of possible policy instruments which were identified in the course of the study in both the written data sources as well as through consultations with the European Commission, member states representatives and other experts.
- The ability of the outlined policy instruments is to address and overcome the problems and barriers identified by the baseline scenario.
- The potential impact of the outlined policy instruments. This assessment will take into consideration the associated costs and benefits as well as the potential contribution of the policy instruments' vis-à-vis the objectives described previously (correct implementation, compliance with internal market principles and contribution to improved competitiveness and the Lisbon objectives).

The impact assessment of the policy instruments follow the same logic applied in the baseline scenario: This means that four of the driving forces used in the baseline scenario provide the organizing principle for this scenario in order to ensure consistent linkages between the issues identified in the baseline scenario and the policy instruments considered under the extensive effort scenario.

4.2 Organization, stakeholders and incentives

4.2.1 Identification of possible policy instruments and problems addressed

During the course of the study two policy instruments were identified which would address the problems relating to the driving force concerning *organization, stakeholders and incentives.*

- Changing procurement instruments and processes to achieve simplification and efficiency gains
- Surveillance of the public procurement market in Europe

The table below gives an overview of how the policy instruments are linked to problems in the field that were identified by the baseline scenario.

Overview of linkages between problems identified and policy instruments

Problems identified	Policy Instruments
The decentralized procurement structure means that it will be too costly for many small public entities to acquire their own e-procurement solutions. The potential procurement savings may not be exploited to their full potential because of the decentralized procurement structure.	Changing procurement instruments and processes to achieve simplification and efficiency gains
E-public procurement will not automatically entail cost savings for businesses because many contracting authorities will use different systems and formats which will increase administrative costs and other transaction costs, and many, especially small, public institutions will continue to use traditional, paper-based procurement.	Changing procurement instruments and processes to achieve simplification and efficiency gains
Because the decentralized procurement structure might slow down the generalized use of e-public procurement, the trend towards increased competition and transparency is likely to be slowed down correspondingly	Surveillance of the public procurement market in Europe

The baseline scenario highlights the importance of the administrative costs for businesses caused by the public procurement procedures. Moreover, administrative costs and 'red tape' connected to the traditional paper-based public procurement procedures is not only considerable for the economic operators but also for the contracting authorities. A main point that arises from the baseline scenario is that e-public procurement will not – if no further policy instruments and actions are applied – automatically entail cost savings for businesses because many contracting authorities will use different systems and formats to which companies must adapt, and this will increase administrative and other transaction costs. In addition to this, many, especially small, public institutions will continue to use traditional, paper-based procurement, which means suppliers must be able to operate both electronic and paper-based procedures in parallel.

4.2.2 *Assessment of potential impact on the Internal Market*

Policy Instrument: changing procurement instruments and processes to achieve simplification and efficiency gains.
The present situation across Europe is that although there are many common general features about the existing procurement instruments and procedures (both above and below threshold) there are also many different procedures and formats to which economic operators must comply. The existence of these differences makes access to participation more cumbersome for businesses and entails administrative costs, not only in cross-border procurement but even within national boundaries. Changing and streamlining these instruments and procedures could, from a logical point of view, follow the steps below:

- Analysis of current procurement procedures, assessment of the value-added steps and formats in order to provide a baseline for reengineering and streamlining.

- Development of formats and descriptions of procurement processes to be used by all contracting authorities for procurement above and below threshold.
- Implementation in member states.

It should be stressed that all phases would need to be carried out in close collaboration between the European Commission and its member states. At the same time the leadership of the European Commission is required, as a centralized approach and solution is needed in order to bring real value from the streamlining and reengineering. The member states have a crucial role because the actions cannot be followed through without them, but the European Commission needs to define and lead the work aimed at increasing the efficiency of procurement processes, modernizing procurement instruments and administrative processes.

The European Commission is in a unique position to take action in the field as it will be able to initiate, lead and influence efforts in the field, which no single member state, or groups of member states, can carry through.

In order to ensure buy-in and subsequent implementation from the member states it is necessary to involve member states from the beginning and throughout this revision and streamlining process. An alternative solution would be that the European Commission carries out this process alone, or with a minimum of consultations with member states. However, while this solution would be quicker there is also a risk that it would weaken the solutions, as member states might not feel the same obligation to comply with these.

The vision for this policy instrument could be to ensure that any individual supplier would only need to develop the administrative, financial and other types of formal company information once and then this information could be reused from one tender to the next and would be available both in a paper version and an electronic format.

The potential impact would therefore consist of administrative savings and efficiency gains for businesses as well as for contracting authorities.

Moreover, initiatives in this field could serve to address the barriers for conversion to e-public procurement which are created by the generally decentralized organization of procurement across Europe, which was highlighted and analyzed by the baseline scenario: Simplified administrative procurement procedures and easy-to-use solutions and formats that are made available for local and regional contracting authorities at no or very limited costs by central authorities in the member states, or developed by the European Commission in collaboration with the member states, could play an important role in overcoming the lack of positive incentives of especially small public institutions as regards the conversion from paper-based procurement to e-public procurement. As pointed out by the baseline scenario the costs of acquiring, operating and maintaining e-public procurement solutions may easily be higher than the economic benefits for institutions with a small procurement volume. Efforts to simplify procurement procedures and practices and integrate electronic tools into new, updated procedures can potentially reduce costs for buyers, thereby making e-procurement more attractive and accessible to public institutions with a small procurement volume.

However, although the availability of such ‘plug-and-play’ solutions is a necessary precondition for overcoming the lack of positive incentives for decentralized users, it is not a guarantee for increased uptake among contracting authorities at the decentralized level (the experience from Italy, where Consip is an example of this type of solution, shows that use is so far limited, despite the free use of the tool).

While administrative savings are highly desirable in their own right, they might also have positive spill-over effects on the internal market: The reduction of administrative compliance costs related to participation in public procurement for companies would allow companies to spend a greater share of their resources on their core business. Such a development trend would allow companies with a professional administration to exploit the potential efficiency gains which would follow in the wake of the implementation of the above suggested actions, thereby making these companies more competitive compared to companies with relatively weak capacities in the administrative section[94].

Moreover, increased transparency and accessibility in the procurement market would be expected to lead to more competition as the number of participating economic operators is likely to increase. However, the paradox is that if such a process were unleashed it could lead to a situation where the increased transparency and competition also might lead to increase in the number of tenders submitted. This could increase the transaction costs of contracting authorities that are charged with handling the tendering procedure and the evaluation of tenders.

The potential benefits and costs are listed below. The overall assessment is that although there will be potential costs and work involved, the costs would be justified by the potential benefits and are relatively insignificant compared to the size of the public procurement market in the EU and the potential benefits.

The potential benefits are:

- Improved transparency and simplification of the public procurement market through the harmonization and streamlining of procurement procedures and practices.
- Improvement of the access for suppliers to public procurement opportunities, in particular for cross-border procurement.
- Administrative cost savings for suppliers and for contracting authorities.

The potential costs are:

- The work process related to the streamlining and reengineering could potentially turn out to be rather lengthy and time consuming as it will share similarities with standardization work
- There will information and marketing costs as the simplified procedures etc. would need to be introduced
- There will be one-off costs for contracting authorities to adjust their procurement procedures, templates etc.

[94] The general experience from the efforts undertaken in Denmark to reduce the administrative burdens on businesses that are caused by regulation shows that the more professionalized the administrative sections of the companies are, the easier it is for the companies to comply with the administrative requirements of the regulation. In other words, the administrative compliance costs are relatively smaller for companies with a professional and efficient administration.

The potential impact on problems identified by the baseline scenario:

- Changing procurement instruments and processes to achieve simplification and efficiency gains would to some extent address the problems with the high costs related to the acquisition of e-public procurement systems: Simplification and streamlining could potentially enable the emergence of cheaper solutions in the market due to the potential for scale economies that would be opened through the greater harmonization across countries in procurement instruments and processes.
- In a wider perspective simplification of procurement procedures and a resulting increase in use by contracting authorities of identical or e-public procurement systems that to some extent share harmonized features could have a positive influence on the problem identified concerning the lack of cost savings for companies.

Policy Instrument: Surveillance of the public procurement market in Europe

Improved competitiveness among the economic operators in Europe is an important objective of the internal market. Public procurement plays an important role in this respect as the fundamental philosophy of public procurement is to make the market transparent and accessible to all interested and capable economic operators and thereby ensuring that the suppliers are constantly exposed to competitive forces which in turn is expected to have a positive spill-over effect on their competitiveness. More competitive markets result in improved efficiency among enterprises, a rationalization of industrial structure and a setting of prices closer to the cost of production. In light of these potential benefits it is seems appropriate to monitor the evolution of the public procurement market in the wake of e-public procurement to better understand its practical impact on competition and identify any unintended, negative effects which call for action in order to counter and correct them.

Possible concrete actions in this field could include the definition of thematic studies and methodology for surveying the effects on competition, which would include the identification of monitoring indicators. Actions under this policy instrument would have to be undertaken in close cooperation between the European Commission and competition authorities of the member states because a coordinated effort would be needed (and it would be the task of the European Commission to ensure this) and the monitoring and surveillance would be most efficient if carried out by the national competition authorities.

Potential benefits are:

- Early information about unintended negative effects on competition would provide an opportunity for early and timely corrective action, e.g. before these effects become permanent or expand into large scale.

Potential costs are:

- Costs for monitoring activities carried out by the European Commission and competition authorities of the member states and studies conducted on a regular basis.

The potential impact on problems identified in the baseline scenario:

- Establishment of surveillance and monitoring mechanisms could provide more information about the potential problem concerning a slow, or no, progression towards increased competition in public procurement markets which was identified by the baseline scenario as a possible outcome of the decentralized procurement structure.

4.2.3 *Issues and barriers not addressed by the policy instruments*

The table below lists the issues and barriers identified by the baseline scenario which are not likely to be addressed by the policy instruments treated above. As it can be seen from the overview provided below, the issues which are not addressed are those closely linked to and caused by the decentralized procurement structure. In this respect it is important to stress that the decentralized procurement structure is a factor which is very difficult to address through policy instruments. This is partly because it is a very fundamental structural characteristic across Europe, but also because it serves another important objective namely the creation of budgetary responsibility at institutional level, as the decentralization of procurement responsibility to individual institutions goes hand in hand with the responsibility managing the institution’s budget and financial resources.

Overview of issues and problems not addressed by the policy instruments:

- **Lack of critical mass in the procurement volume undermines incentive for e-procurement aimed at small public institutions:** The decentralized procurement structure means that it will be too costly for many small public entities to acquire their own e-procurement solutions. The potential procurement savings may not be exploited to their full potential because of the decentralized procurement structure.
- **Availability of “plug-and-play” solutions for decentralized users will influence uptake level:** Whether small public entities realize the potential for administrative savings depends on the availability of cheap and convenient electronic solutions which are made available by central authorities or coordinating bodies for users at decentralized level. If such systems and solutions are not available, e-public procurement will not be attractive for many small institutions because the costs of acquiring, operating and maintaining systems will be too high compared to the potential gains.
- **Decentralized procurement structure likely to affect competition negatively:** Because the decentralized procurement structure might slow down the generalized use of e-public procurement, the trend towards increased competition and transparency is likely to slow down correspondingly.

4.3 Interoperability, standardization and security

4.3.1 Identification of possible policy instruments and problems addressed

The baseline scenario identified the following problems in the area of standardisation in relation to e-public procurement:

- Interoperability and standardization problems will be connected to more advanced processes of e-tendering and e-purchasing. The problem is especially expected in fields such:
  - Product classification
  - Digital signature
  - Electronic catalogues
  - E-invoicing and
  - Legal tender documents.

- Security will remain an important issue in the future. Cases of security problems may create distrust towards systems and decrease confidence in e-procurement.

Overview of linkages between problems identified and policy instruments

Problem identified	**Possible policy instrument**
Lacking interoperability in the field of product classification	Revise and promote the use of CPV vocabulary in EU and internationally
Lacking interoperability in the field of e-signatures	Promote interoperability and standards for different levels of electronic signatures
Lacking interoperability in the field of electronic catalogues	Promote interoperability and standards for electronic catalogues
Lacking interoperability in the field of e-invoices	Promote interoperability and standards for e-invoices
Interoperability of legal tender documents	- (Described under previous section "Organization, stakeholders and incentives")
Interoperability and standardization connected with the more advanced processes of e-tendering and e-purchasing	Provide funding for international standardization initiatives
Cases of security problems may create distrust towards systems and decrease confidence in e-procurement	Monitoring of the development in the area of security

4.3.2 Problems addressed by the policy instruments

As described in the baseline analysis and the baseline scenario, interoperability, standardisation and security are key issues in electronic public procurement to enable exchange of data between enterprises and public institutions. There is a lack of interoperability in various areas which represent a significant barrier to the use of electronic means in some procurement processes and creates obstacles to the free movement in the Internal Market.

Table 2.1 in the baseline analysis illustrates different requirements related to different e-procurement processes. Simple processes such as dispatch of information do not offer any interactivity between participants and complexity and requirements are relatively low. More advanced electronic tendering systems requires more advanced equipment.

Simple one-way communication such as online advertisement of tenders and publication of tender documents can be conducted on existing web pages and accessed through generally available software (browsers), whereas standards are particularly important in procurement processes with a significant exchange of business documents, e.g. purchasing and invoicing.

Below comments are made on each of the six problems and policy instruments mentioned in the table above.

Lacking interoperability in the field of product classification
Product classification is among other things used for searching and comparing offered products on markets and for statistical purposes. Thus, product classification systems are very important in e-procurement[95]. Revision and promotion of the use of CPV vocabulary in EU and internationally is a possible instrument in this area. A recent analysis from CEN/ISSS[96] promote the viewpoint that CPV makes it easier for potential suppliers to identify the procurement contracts and that CPV facilitates fast and accurate translation of contract notices for publication in the EC Official Journal.

The existence of the problem with lack of product classification standards has been confirmed by the analysis carried out in relation to the Baseline Analysis and the Baseline Scenario.

However, the question is whether the proposed instrument does in fact meet the problem with a lack of product classification standards? The situation today is that the update of CPV is too slow (the last update is from 2003). CPV is based on a tree structure comprising of codes of up to nine digits. To make the task of filling in notices easier, many contracting authorities choose to report notices with only a couple of digits, providing only information on the overall division of group products. This in consequence makes the search functionality for suppliers much less precise and useable. CPV is only providing classes, but no product attributes, so it can be used only to classify types of products and not for search based on product characteristics. UNSPSC is currently the preferred standard for electronic catalogues, but, like CPV, only provides classes, and not attributes (which are important for e-catalogues)[97]. Development of product attributes to CPV should be considered in relation to the promotion of CPV internationally.

Thus, for many reasons, CPV needs to become much more dynamic and updated if the use of it is to be increased. A fundamental revision of CPV is expected to be a very comprehensive task. Moreover, a secretariat needs to be established with the necessary resources to conduct continuous updates.

If it is possible to develop a CPV that meets the needs of e-procurement better, the next step *could* be to extend CPV with a set of product attributes. It is important that a development of attributes to CPV is conducted in close partnership with the international standardisation consortiums, so that the classification is shared with international business partners and increases the possibilities of use.

[95] CEN/ISSS WS/eCat: Multilingual catalogue strategies for eCommerce and eBusiness Combined report, Version 4.2 (2004)

[96] CEN/ISSS WS/eCat: Multilingual catalogue strategies for eCommerce and eBusiness Combined report, Version 4.2 (2004)

[97] CEN/ISSS WS/eCat: Multilingual catalogue strategies for eCommerce and eBusiness Combined report, Version 4.2 (2004)

Lacking interoperability in the field of e-signatures
There is a lack of cross-border interoperability of electronic signatures. This creates obstacles to the free movement in the Internal Market. Problems in this area are likely to prevail (and even increase as the use of digital signatures becomes more widespread) if no action is taken. It is therefore appropriate to promote interoperability and standards for different levels of electronic signatures.

Lacking interoperability in the field of electronic catalogues
There are a number of different formats in use in Europe when it comes to electronic catalogues. Although some advances are done in establishing an electronic catalogue based on UBL, the development in this area is very slow.

Lacking interoperability in the field of e-invoices
Tools for e-payment and e-invoicing are very much developed in a national context in Europe, i.e. because of the nationally based financial sector, different tax systems etc. Interoperability is far away in this area.

Interoperability and standardization connected with the more advanced processes of e-tendering and e-purchasing
It is very important that standardisation work in e-procurement is done in a broader international context by promoting international standards in all possible areas.

Development of a European interoperability framework should take into account the broader international aspect by promoting international standards in all possible areas (e.g. electronic catalogues), and promoting European standards where appropriate (e.g. digital signature, PKI or e-signatures).

Cases of security problems may create distrust towards systems and decrease confidence in e-procurement
Security will remain an important issue in the future. No IT system is 100% secure, and it is likely, especially with an expected increase in transactions, that problems will occur. Such cases will create distrust towards systems and decrease confidence in e-procurement. The development in this area changes from day to day, which means that it is also important that the situation is monitored closely, and that action is taken swiftly when needed.

4.3.3 Assessment of potential impact on the Internal Market

All actions listed in the table above address problems of lacking interoperability and standards in a number of key phases of the procurement cycle, from digital signature to e-payment and e-invoice, and will, if implemented, facilitate the exchange of data between enterprises and public institutions.

It would be a significant advantage to suppliers and buyers if standards were agreed upon and interoperability problems reduced (notably for advanced procurement processes). The main benefit for the individual company would be time savings and reduction of costs of e-procurement software. For buyers, benefits would especially be connected with increased competition and lower prices.

However, to agree on common standards at EU level and obtaining acceptance from all the different authorities and sectors and their specific needs and demands is very complicated. Thus, immediate impacts are generally not likely.

Even though the immediate impacts are limited due to the often very extensive time required to agree on standards, the potential (long term) advantages of the internal market could be significant and include:

- Increased motivation to participate in public procurement due to reduction of implementation and operation costs.
- Better access for companies in accessing and responding to public tenders
- Facilitation of cross border transactions leading to increased competition and lower prices.

The benefits of the effort are potentially significant, whereas the cost of defining standards is relatively modest.

The actions proposed to be undertaken by the EU Commission are primarily support and promotion of the *development* of standards, whereas the role of the Member States and industry is to implement these. It is important to emphasize the role of the Member States and Industry as the *implementation* of developed standards constitutes an important problem. Thus, in the area of e-procurement (e.g. EDI) standards have been developed without being supported sufficiently by main actors, which means that they will not have any impact.

Below comments are made on the individual policy instruments and the expected cost and benefits of the initiative.

Policy instrument: Revise and promote the use of CPV vocabulary in EU and internationally

The potential benefits are:

- Easier to identify procurement contracts which will lower search costs for suppliers and increase transparency of the public procurement market.
- Faster and more accurate translation of contract notices for publication in the EC Official Journal
- Improvement of procurement statistics and monitoring of the public procurement market.

The potential costs are:

- Revision of the vocabulary and ongoing management of a CPV secretariat. The cost depends upon he level of ambition (e.g. update frequency, development of product attributes etc.).
- The immediate impact is uncertain given the time needed to make CPV a dynamic tool in e-Tendering.

The potential impact on problems identified in the baseline scenario:

- If implemented correctly, the action may potentially reduce the confusion about different product classification standards, especially in the e-tendering phase, where CPV is dominating.
- Even though CPV is updated more frequently, a number of challenges will still remain (reporting of right and detailed CPV codes, expand the use to e-ordering etc.).

Policy instrument: Promote interoperability and standards for different levels of electronic signatures

The potential benefits are:

- Buyers and suppliers only need to support one signature standard or format.
- Lower transaction costs in the economy as a whole, as well as savings for individual businesses.
- Reduced integration cost and maintenance.
- The availability of an open signature standard or format can help avoid dependence of a single IT-supplier. The result is increased competition among IT-suppliers.
- Increased motivation to participate in public procurement due to reduction of implementation and operation costs.
- Facilitation of cross border transactions leading to increased competition and lower prices.

The potential costs are:

- Creation of the format or standard itself.
- Possible revisions in installed base of IT-systems.
- If the process of agreeing on a common standard or format is drawn out, there is a risk that the result is passed by the market development before published.

The potential impact on problems identified in the baseline scenario:

- The instrument addresses the two basic challenges in the area of interoperability and standardisation in relation to electronic signatures: Definition of formats or standards, mutual recognition of signatures and promotion of the use of these. The instrument will reduce the interoperability problem, but does not ensure a widespread use of a specific format or standard.

- The possibility of imposing defined formats and a system of mutual recognition should be considered, e.g. member state level or EU-level.

Policy instrument: Promote interoperability and standards for electronic catalogues

The potential cost and benefits of promoting interoperability and standards for electronic catalogues are very similar to electronic signatures.

The potential benefits are:

- Buyers and suppliers only need to support one catalogue standard or format.
- Lower transaction costs in the economy as a whole, as well as savings for individual businesses.
- Reduced integration cost and integration maintenance.
- The availability of an open catalogue standard or format can help avoid dependence on a single IT-supplier. The expected result is increased competition among IT-suppliers.
- Increased motivation to participate in public procurement due to reduction of implementation and operation costs.

- Facilitation of cross border transactions leading to increased competition and lower prices.

It should be added that for especially e-catalogues, it is very important that no specific European standard is developed, but that the initiative are based in the international organisations in the field (i.e. OASIS UBL).

The potential costs are:

- Creation of the XML-schema or standard itself.
- Possible revisions in installed base of IT-systems.
- If the process of agreeing on a common standard or format is drawn out, the risk is that the result is passed by the market development before published.

The potential impact on problems identified in the baseline scenario:

- The instrument addresses the basic problem in the area of interoperability in relation to electronic catalogues: definition of formats or standards and promotion of the use of these. The instrument will reduce the interoperability problem, but does not ensure a widespread use of a specific format or standard.

Policy instrument: Promote interoperability and standards for e-invoices

Generally, the same assessment as with interoperability or a standard for e-catalogues applies, but e-payments and e-invoicing is potentially an even stronger driver for e-procurement.

The potential benefits are:

- Buyers and suppliers only need to support one invoice format.
- Lower transaction costs in the economy as a whole, as well as savings for individual businesses.
- Reduced integration cost and integration maintenance.
- The availability of an open invoice standard or format can help avoid dependence on a single IT-supplier. The result is increased competition among IT-suppliers.
- Increased motivation to participate in public procurement due to reduction of implementation and operation costs.
- Facilitation of cross border transactions leading to increased competition and lower prices.

The potential costs are:

- Creation of the invoice format or standard itself.
- Possible revisions in installed base of IT-systems.
- If the process of agreeing on a common standard or format is drawn out, there is a risk that the result is passed by the market development before published.

The potential impact on problems identified in the baseline scenario:

- The instrument addresses the basic problem in the area of interoperability of e-invoices: definition of formats or standards and promotion of the use of these. The instrument will reduce the interoperability problem, but does not ensure a widespread use of a specific format or standard.

Policy instrument: Provide funding for international standardization initiatives

In general, increased interoperability of e-procurement would be a significant advantage to suppliers and buyers. Interoperability increases buyers' incentives to conduct e-procurement, which have a positive influence on cross-border procurement and free movement on the internal market.

The potential impact on problems identified in the baseline scenario:

- The instrument addresses the problem of possible different standards between EU-countries and other countries.

Policy instrument: Monitoring of the development in the area of security

Security will remain an important issue in the future. No IT system is 100% secure, and it is likely, especially with an expected increase in transactions, that attacks will occur. Such cases will create distrust towards systems and decrease confidence in e-procurement. The development in this area changes from day to day, which means that it is also important that the situation is monitored closely, and that action is taken swiftly when needed.

The potential benefits are:

- Early information about security problems would provide an opportunity for early and timely corrective action, e.g. before these problems is expanded into large scale and decrease trust in e-procurement.

The potential costs are:

- Costs for monitoring activities carried out by the European Commission and security authorities in the member states and studies conducted on a regular basis. The cost of this activity can be substantial.

The potential impact on problems identified in the baseline scenario:

- Monitoring of the security situation could serve to reduce security problems somewhat, but the dynamic development in the field makes it very difficult to estimate the impact of monitoring.

4.3.3.1 Issues and barriers not addressed by the policy instruments

The policy instruments address the two basic challenges in the area of interoperability and standardisation in relation to e-procurement: Definition of formats or standards and promotion of the use of these by IT-vendors and end users. Whereas the actions proposed will certainly reduce the problems of existence of different formats or standards, the use of these are still left to the individual member state, contracting authority and IT-vendor.

Once acceptable standards have been developed, the possibility of imposing these in public procurement on different levels should be considered, e.g. member state level or EU-institutions. Thus, implementing one format or standard in the various steps of the procurement process across EU-institutions would be a major step in the right direction. This could also be promoted as a possible standard for member state level.

Actors should be very careful that formats and standards do not impede competition and innovation and slow development.

4.4 Human Resources and Knowledge

4.4.1 Identification of possible policy instruments

During the course of the study two policy instruments were identified which would address the problems relating to the driving force concerning *human resources and knowledge.*

- Awareness and information dissemination activities targeted at economic operators (especially SMEs) and contracting authorities.
- Provision of training opportunities for economic operators and contracting authorities (including seminars, e-learning etc.)

The table below gives an overview of how the policy instruments are linked to problems in the field that were identified by the baseline scenario.

Overview of linkages between problems identified and policy instruments

Problems identified	Policy Instruments
There is a lack of management skills in relation to achieving administrative savings on the introduction of e-public procurement and using this as a tool to reengineer and streamline the organization of procurement processes.	- Awareness and information dissemination activities - Provision of training opportunities
There is a lack of knowledge and documentation about the business case for e-public procurement and the possible benefits from same which might impede or prevent the conversion to e-public procurement among buyers and suppliers.	- Awareness and information dissemination activities - Provision of training opportunities
There is a risk that the segment of the smallest companies (less than 20 employees) will opt out of the general evolution of e-public procurement because participation is too cumbersome.	- Awareness and information dissemination activities - Provision of training opportunities

As outlined by the baseline scenario, the availability of knowledge and technical/organisational capacity by contracting authorities as well as by companies constitutes an important factor in the development of e-public procurement. Efforts to improve the level of knowledge could include topics such as e-business strategy in general and e-procurement systems in particular, but also topics such as public procurement and regulation are important. Lack of knowledge or technical capacity could also lead to resistance to change, and thus barriers for uptake and implementation of e-public procurement.

One of the important conclusions from the baseline scenario is a lack of management skills in relation to various areas, including knowledge about reengineering and streamlining procurement processes and possible benefits from e-public procurement among both contracting authorities and economic operators.

As regards the economic operators, the baseline scenario highlighted a risk that the segment of the smallest companies (less than 20 employees) will opt out of the general evolution of e-public procurement because of lack of operational skills and knowledge about e-public procurement and because participation is, or appears to be, too cumbersome and costly.

Moreover, on the part of the contracting authorities, there is a vast number of procurement officials (the number of contracting authorities in the EU is estimated to be somewhere between 20,000 and 30,000) who need training in and information about e-public procurement in order to promote the use and uptake of e-public procurement in the generally decentralized procurement structure of Europe.

Another important conclusion from the baseline scenario is that there is a lack of knowledge and documentation about the business case for e-public procurement and the possible benefits which could impede or prevent the conversion to e-public procurement among contracting authorities and suppliers. Training and, in particular, awareness activities would therefore need to address this issue.

Given this context the possible policy instruments in the field of human resources and knowledge would seem to address a demand among economic operators, especially SMEs, as well as contracting authorities which would have to be met in order to move towards generalized use of e-public procurement.

4.4.2 Assessment of potential impact on the Internal Market

Policy instrument: Awareness and information dissemination activities targeted at economic operators (especially SMEs) and contracting authorities

Monitoring of SME participation would provide a first step in addressing the potential risk of excluding SMEs from the more advanced parts of e-public procurement and in this context assess the training needs and demands. The member states have a potentially important role to play in terms of raising awareness and knowledge within the SME business community. The member states and business associations are closer to the SME business communities in the 25 countries than the European Commission and they need therefore to play a main role in the field.

However, efforts in the field should preferably be taken in collaboration between the European Commission, member states and industry associations (who would play an important role as information “ambassadors” in a network based communication strategy) to ensure both effective outreach to the constituencies in the respective member states and a certain level of harmonization in the messages communicated to the SME community, e.g. concerning the use of standard e-procurement systems based on existing standards, in order to prevent fragmentation in the internal market.

The potential benefits are:

- Increased awareness among economic operators and contracting authorities which could have a potentially positive impact on the uptake of e-public procurement.

The potential costs are:

- Limited costs of designing awareness programmes, marketing activities and costs of implementing same.

The potential impact on the problems identified by the baseline scenario:

- The awareness raising activities will address the problems concerning lack of knowledge about the potential in e-procurement but it is evident that they cannot be expected to eradicate such problems completely.

Policy instrument: Provision of training opportunities for economic operators and contracting authorities (including seminars, e-learning etc.)

Training could be administrated at different levels, e.g. at EU, national or local level, and it could be implemented in various forms e.g. training of e-procurement users, train-the-trainers, training by e-learning, 1-1 consulting programmes where companies are provided with the opportunity to have individual guidance from professional service firms and experts.

A generic training programme targeted at companies (SMEs) to increase awareness and concrete knowledge of potentials with e-public procurement for SMEs could contain issues such as:

- Introduction to ”public procurement basics”
- E-business strategy
- E-tendering, electronic auctions, dynamic purchasing systems
- Establishing buyer profiles, using procurement portals and developing electronic catalogues
- Trends among contracting authorities in adopting electronic public procurement
- Available electronic procurement solutions – price, functionalities etc.
- Return on investment calculations
- Etc.

A generic training programme targeted at public authorities to support implementation of electronic procurement systems could contain issues such as:

- Regulation in the field of electronic procurement
- Standards
- E-tendering, electronic auctions, dynamic purchasing systems
- Using procurement portals vs. own electronic procurement system
- Available electronic procurement solutions – price, functionalities etc.
- Training in actual usage of electronic procurement systems
- Etc.

The potential benefits are:

- Increased knowledge within the European business community and within contracting authorities which is a precondition for exploiting the potentials of e-public procurement in terms of increased competition, public savings and reduced administrative costs.

- For suppliers, training programmes have the potential to translate into long term benefits such as:
  - Organisational change as a result of introduction of new systems/services
  - Increased market share in existing business areas
  - Increased productivity/efficiency
  - Reduction in operation costs
  - Increased product or service quality
  - Increased exposure to the European market
  - New skills and technical knowledge

The potential costs are:

- Costs of designing training programmes, marketing activities and costs of administrating and implementing the activities.

The potential impact on the problems identified in the baseline scenario:

- The awareness raising activities, the training programmes will address the problems concerning lack of knowledge, lack of management and operational skills and give small companies a more positive view on the possibilities in e-public procurement, but the training programmes cannot be expected to eliminate these problems.

4.4.3 Issues and barriers not addressed by the policy instruments

Assuming that the training and awareness activities are carefully designed and responds to the need of economic operators and contracting authorities, the policy instruments described would seem to cover the major issues identified in the field of human resources and knowledge. The most important remaining problem in this field would therefore be the effective outreach to relevant target groups, which is a major challenge, given the scale of the target groups. While carefully designed training and awareness activities would address the issues of information and content, it is in practical terms not possible to reach out to all parts of the relevant target groups. Information and training possibilities can be made available, but if for example economic operators are not aware that they have a need for information in the first place, it is difficult to bring the relevant information across to them.

4.5 Availability of technical solutions

4.5.1 Identification of possible policy instruments and problems addressed

The baseline scenario identified the following problems in the area of technical solutions in relation to e-public procurement:

- The major e-procurement vendors are targeting the larger government administrations (states, provinces or regions) or institutions, health sector institutions (hospitals), education (universities) and the utility sector.
- It is expected that the e-public procurement systems and solutions become increasingly advanced and with improved functionalities, but no fundamental innovations are currently emerging.
- Some of the major public procurement markets in Europe will reach a critical mass of contracting authorities and suppliers using electronic means, while reaching critical mass in smaller market or in less technologically mature countries (including Eastern Europe) will be difficult.

Overview of linkages between problems identified and policy instruments

Problem identified	Possible policy instrument
- The major e-procurement vendors are targeting the larger government administrations or institutions - It is expected that the e-public procurement systems and solutions become increasingly advanced and with improved functionalities, but no fundamental innovations are currently emerging.	- Develop a fully electronic system for the local processing and validation of notices - Support development and innovation of simple and cost-efficient electronic public procurement systems
- Some of the major public procurement markets in Europe will reach a critical mass of contracting authorities and suppliers using electronic means, while reaching critical mass in smaller market or in less technologically mature countries (including Eastern Europe) may be difficult.	- Improve functioning and user friendliness of TED and promote use of TED above and below threshold

4.5.2 Problems addressed by the policy instruments

As described in the baseline scenario, the availability of adequate and affordable technical solutions is an important driver for uptake of e-public procurement. The basic technology such as a PC, internet access, and digital signature is a pre-requisite for e-procurement, and to increase the up-take of e-procurement, it is important to spur development and innovation of new and innovative solutions.

The instruments suggested include improvement of TED, development of a fully electronic system for electronic processing and validation of notices and support development of simple and cost-efficient electronic public procurement systems.

The first policy instrument is the development of a fully electronic system for local processing and validation of notices. The action addresses the problem of high transaction costs and low efficiency associated with paper-based procedures. This issue has been described extensively in the baseline analysis and the baseline scenario and a number of cases show that e-procurement can result in significant savings in both purchasing prices and administrative costs. The problem is that electronic processing of notices is done to a limited degree today.

The second policy instrument, to support the development of simple and cost-efficient electronic public procurement systems, address the problem described in the baseline scenario that the development of e-tendering and e-purchasing systems is relatively slow compared with other types of IT-applications. Another problem is that the market for simple e-procurement systems, targeted at small institutions or small companies, is a focus area for the large IT-vendors (which represent the major part of IT-investments). Thus it could be argued that there is a market failure that could justify government intervention.

The third instrument deals with the problem of lacking functioning and user-friendliness of TED. As described in the baseline scenario, the current version needs improvement to provide users with a sufficient increase in convenience (or value-added), otherwise traditional means of communication will often be the preferred method.

4.5.3 Assessment of potential impact on the Internal Market

Software applications are the core tool for suppliers in e-procurement, so access to user friendly, cheap solutions with the required functionality are very important to suppliers. Development of simple solutions in the procurement process could have an immediate impact on supplier's access to e-procurement. However, it is uncertain if supporting development of solutions is a cost-efficient policy action. Issues such as update, support, learning resources etc. also need to be clarified.

Systematic publication in TED of procurement opportunities above and below the threshold values would be a step in opening the European procurement markets for competition beyond the national markets. For many SMEs tender opportunities below the threshold value are more accessible as the comparatively smaller sizes of the contracts make these easier to handle especially for the smallest segments of SMEs. Provided that the publication of procurement opportunities below threshold is accompanied by standardized procurement procedures, formats and administrative requirements, it will reduce administrative costs for companies. Such changes could in the long term also facilitate cross-border participation in tendering below the threshold values.

Policy instrument: Develop fully electronic system for the local processing and validation of notices

The potential benefits are:

- Lower development costs (software) of electronic public procurement system.
- Process savings, time reduction in handling of notices and reuse of information.
- Increased motivation to participate in electronic public procurement which could increase openness of European procurement markets for competition.

The potential costs are:

- Development of e-procurement system. These costs are moderate.
- Risk of market distortion resulting from EU or government support to development of IT-system.

The potential impact on problems identified by the baseline scenario is:

- The proposed instrument represents a step towards improving the increased availability of technological solutions.
- The instrument will reduce the cost connected with using or implementing e-procurement systems and help improve the profitability of IT-investments for the individual institution.
- If substantial resources are allocated, the initiative could catalyse innovation and development in the area, but it can not ensure an increased focus by major e-procurement vendors on smaller government administrations or institutions.

Policy instrument: support development and innovation of simple and cost-efficient electronic public procurement systems

The potential benefits are:

- Lower development costs (software) of electronic public procurement system.
- Increased motivation to implement electronic public procurement for contracting authorities and suppliers which could increase openness of European procurement markets for competition.

The potential costs are:

- EU or member state financing of development of a procurement system.
- Risk of market distortion resulting from EU or government support to development of IT-systems.

The potential impact on problems identified in the baseline scenario is:

- The proposed instrument represents a step towards improving the availability of technological solutions.

- The instrument will reduce the cost connected with using or implementing e-procurement systems and help improve the profitability of IT-investments for the individual institution.

- If substantial resources are allocated, the initiative could catalyse innovation and development in the area, but it can not ensure an increased focus from major e-procurement vendors on smaller government administrations or institutions.

Policy instrument: improve functioning and user friendliness of TED and promote use of TED above and below threshold

The potential benefits are:

- Process savings because of lower publication cost, especially for contracting authorities (who has the reporting obligation).
- Increased motivation to participate in electronic public procurement.
- Facilitation of cross-border participation in tendering.
- Opening the European procurement markets for competition beyond the national markets.

The potential costs are:

- Development of a new web-interface. These costs are relatively limited.

The potential impact on problems identified by the baseline scenario is:

- The instrument will first and foremost provide process savings.
- The problem regarding achievement of critical mass will also, to some extent, be addressed by the initiative, although it will not solve the problem without supplementary action.

4.5.4 Issues and barriers not addressed by the policy instruments

The availability of adequate and affordable technical solutions is an important driver for uptake of e-public procurement. To increase the up-take of e-procurement, it is important to spur development and innovation of new and innovative solutions. The proposed actions represent a step towards improving the increased availability of technological solutions.

The overall framework in which the application of these instruments will take place is that the business case for e-public procurement for some contracting authorities, as well as for some suppliers, is not sufficiently strong. Assuming that the policy instruments are carefully designed and responds to the need of contracting authorities and small companies, the policy instruments will reduce the cost connected with developing e-procurement systems, and thereby help to improve the profitability of IT-investments for the individual institution.

It should however be noted that even though public support can help increase the availability of cheap and well-functioning, user-friendly systems, the area is first and foremost driven by market forces and not government action, and the importance of action on the part of IT-vendors and other economic operators should thus be emphasized.

Finally, to avoid possible conflicts and market distortion, a possible intervention involving government support to development of e-procurement systems must be carried out very carefully.

4.6 Stakeholders' roles and potential influence

As the comments to the various possible policy instruments in the previous sections have showed, it is evident that the application and implementation of the policy instruments is not the sole responsibility of the European Commission: The actions and contributions of other stakeholders – associations in the European business community and the member states, standardization bodies – will also greatly influence, and in some areas determine, the outcome and effect of the future implementation of the policy instruments.

To complement this overall observation, some comments concerning the roles and potential influence to the possible policy instruments may be added. The comments are organized below under the four driving forces.

Organization, Stakeholders and Incentives

- Streamlining and simplifying procurement procedures and practices must have the European Commission in a leading role in order to adopt a harmonized and coordinated approach. The member states would need to be actively involved throughout the work process

- Surveillance of the evolution of the public procurement market in Europe with a special focus on competition issues could be carried out at country level by national competition authorities, but the monitoring and surveys should take place in a format defined by the European Commission in order to allow for comparative analysis at aggregated European level.

Interoperability

- Promotion of interoperability must have the European Commission in a leading role in order to adopt a harmonized and coordinated approach. The member states would need to be actively involved throughout the work process.

- IT –vendors and contracting authorities play a very important role in that of following and implementing standards, formats etc. These actors are crucial if the current inconsistent use of standards and formats should be reduced.

- It should, however, be noted that even though public support can help increase the availability of cheap and well-functioning, user-friendly systems, the area is first and foremost driven by market forces and not government action, and the importance of action on the part of IT-vendors and other economic operators should therefore be emphasized.

Human Resources and Knowledge

- Awareness raising activities should preferably be designed and implemented at member state level and should reach out to both existing and potential suppliers and to contracting authorities at all levels of government (national, regional, local). The European Commission could contribute to these activities through co-financing of seminars and conferences.

- As regards training opportunities and programmes the planning of the detailed content of the programmes would have to be done close to the operational level at national level, but could take its starting point in a generic training kit developed by the European Commission. A model for the financing of the training activities could be the co-financing from the European Commission of public or private institutions (e.g. business associations, professional associations for lawyers and others) that carry out the training activities. The most cost-efficient way to carry out the training activities would seem to be that national authorities responsible for public procurement and/or for information society programme activities take on a leading and coordinating role.

Availability of Technical Solutions

- This supply of technical solutions is an area which is largely driven by market forces.

- A targeted effort by the EU Commission and member states can increase the availability of cheap, well-functioning and user-friendly systems. The European Commission can coordinate action in the field and the member states would need to be actively involved.

- Even though public support can help increase the availability of cheap and well-functioning, user-friendly systems, IT-vendors and other economic operators are very important in this area.

4.7 Recommendations

The Consultant's overall assessment and recommendation for the policy instruments considered in this scenario is provided below.

Summary of benefits and costs and recommendations – Policy Instruments related to *Organisation, Stakeholder and Incentives*

Policy Instrument	Potential Benefits	Potential Costs	Recommendation
Changing procurement instruments and processes to achieve simplification and efficiency gains	- Key policy instrument for achieving administrative savings	- Depending on scope and level of ambition (which preferably should be high) costs and working time could be significant	- Implement
Surveillance of the public procurement market in Europe	- Early identification and prevention of competition issues and problems	- Monetary costs are limited if implemented e.g. as a basic, low cost semi-annual survey among national competition authorities	- Implement as a pilot activity and evaluate value-added after 1-2 years

Summary of benefits and costs and recommendations – Policy Instruments related to *Interoperability, standardization and security*

Policy Instrument	Potential Benefits	Potential Costs	Recommendation
Revise and promote the use of CPV vocabulary in EU and internationally	- Easier to identify procurement contracts which will lower search costs and increase transparency - Improvement of procurement statistics and monitoring of the public procurement market.	- Revision of the vocabulary and on-going management of a CPV secretariat.	- Implement
Promote interoperability and standards for different levels of electronic signatures	- Buyers and suppliers only need to support one standard or format. - Lower transaction costs in the economy as a whole, as well as savings for individual businesses.	- Development of the standard or format itself. - Possible revisions in installed base of IT-systems.	- Implement

Policy Instrument	Potential Benefits	Potential Costs	Recommendation
Promote interoperability and standards for electronic catalogues	- Buyers and suppliers only need to support one standard or format. - Lower transaction costs in the economy as a whole, as well as savings for individual businesses.	- Development of the standard or format itself. - Possible revisions in installed base of IT-systems.	- Evaluate current development and consider possible actions
Promote interoperability and standards for e-invoices	- Buyers and suppliers only need to support one standard or format. - Lower transaction costs in the economy as a whole, as well as savings for individual businesses.	- Development of the standard or format itself. - Possible revisions in installed base of IT-systems.	- Implement
Provide funding for international standardization initiatives	- Increased interoperability in e-procurement	- Funding of standardisation bodies	- Implement
Monitoring of the development in the area of security	- Prevention of possible security problems. - Increase trust in e-procurement.	- Relatively modest cost	- Implement

Summary of benefits and costs and recommendations – Policy Instruments related to *Human Resources and Knowledge*

Policy Instrument	Potential Benefits	Potential Costs	Recommendation
Awareness and information dissemination activities targeted at economic operators and contracting authorities	- Awareness raising is the first step towards increase in uptake of e-public procurement	- Some, but relatively limited, costs for conferences, seminars etc.	- Implement
Provision of training opportunities for economic operators and contracting authorities	- Improved knowledge (strategic and operational) which is an important precondition for increase in uptake of e-public procurement	- Financial costs will be significant as training activities would be rolled out in 25 countries - Generic training formats could promote cost-efficiency.	- Implement

Summary of benefits and costs and recommendations – Policy Instruments related to *Availability of technical solutions*

Policy Instrument	Potential Benefits	Potential Costs	Recommendation
Improve functioning and user friendliness of TED and promote use of TED above and below threshold	Process savings because of lower publication cost Facilitation of cross-border participation in tendering.	- Development of new web-interface. Costs are relatively limited.	- Implement
Develop fully electronic system for the local processing and validation of notices	- Process savings, time reduction in handling of notices and reuse of information.	- Development cost - Risk of market distortion	- Conduct feasibility study and consider pilot activity in the area
Support development and innovation of simple and cost-efficient electronic public procurement systems	- Lower cost (software and implementation) of electronic public procurement system	- Development cost - Risk of market distortion	- Conduct feasibility study and consider pilot activity in the area

5. Conclusion

Increased uptake of e-public procurement can have a positive impact on the internal market in a number of areas. First and foremost, the electronic notification of tenders will make it easier for suppliers to identify contract opportunities. This in turn will lead to increased competition and lower prices, because of an increased number of bidders for each tender, better price comparisons between suppliers, increased market transparency etc. is possible.

Moreover, using electronic means in the procurement process will enable a number of process savings for buyers and suppliers and lower transaction costs. This will increase the motivation to participate in public procurement due to reduction of tender costs.

The main target group for e-procurement systems in Europe can be estimated at approximately 1,000 public institutions. According to estimates, approximately 10% of these have currently implemented e-tendering or e-purchasing systems, but the use of the systems are so far limited.

5.1 Potential Impact of the Baseline Scenario (Scenario A)

Even in the baseline (no-action) scenario, the trend for e-procurement will point upwards, but until 2010, the penetration of e-procurement will be very uneven in the various steps of the procurement process. In 2010 it can be expected that:

- The goal of generalized use of electronic means in public procurement is only expected to be reached in the notification phase. This means that contract opportunities will be advertised online, but not necessarily that the tender notices are distributed electronically by the contracting authority.
- A lower, but still significant, use of electronic means is expected in the publication of tender documents and invoicing.
- For the remaining phases, public procurement is not expected to reach critical mass.

Another aspect regarding up-take is the country dimension. In some smaller countries and markets, e-public procurement will not reach critical mass, which is important if e-procurement is to constitute a sound business case. Thus, in these markets, the potential of increased competition, more transparent markets and more cross-border procurement will not be realized.

It is therefore expected that e-procurement will proceed to some extent in the public sector, but the pace of the conversion to e-public procurement will be incremental and slow and many contracting authorities will continue to use paper-based procurement.

The direct economic impact will be that the potential savings of approximately 19 billion EUR on purchasing price (for EU15) due to a more transparent and efficient market for public procurement will not be fully realized.

Given the combined effects of the current trends, e-public procurement in Europe does not seem to become a sufficiently powerful driver that can contribute to the realization of the Lisbon objectives, if no further action is taken.

5.2 Potential Impact of the Balanced Approach Scenario (Scenario B)

The policy instruments in the field of regulation are considered in view of their ability to ensure that the requirements set out in the EU legislation are met. The overall assessment is that the range of activities forms a useful mixture of support measures and control mechanisms undertaken by the European Commission. Based on the analyses made it seems likely that delays and compliance problems will occur in the member states. Although it is yet too early to predict the scope of this type of problems it is appropriate to establish measures early on that can push for timely implementation, prevent some compliance problems and promote harmonization.

Support to the implementation of the new procurement directives will contribute further to the harmonization of the framework for procurement in Europe. It will eliminate the fundamental legal barriers inherent to the use of different regulation on electronic means in the procurement process in the Member States. It will remove legal uncertainty for economic operators and decrease market fragmentation. The policy instruments will be beneficial for transparency and competition. The application of the instruments will be beneficial for SMEs as well as for larger companies as they will contribute to the speedy implementation of the new legal framework across the EU.

An important final point concerning the actions taken under this policy option is that the main responsibility for meeting the requirements of the legislation now lies with the member states.

5.3 Potential Impact of the Extensive Effort Scenario (Scenario C)

The overall assessment of the range of possible policy instruments is that they generally represent steps in the right direction in terms of achieving generalized use of e-public procurement in 2010. They are expected to support the uptake of e-procurement.

The range of instruments will significantly increase the pace of the conversion to e-public procurement. Increased uptake of e-public procurement can have a positive impact on the internal market in a number of areas. The policy instruments will contribute to the development towards a more open and transparent European market and make information about business opportunities more easily available. Moreover, the increased use of electronic means in the procurement process will enable a number of process savings for buyers and suppliers and lower transaction costs. This will increase the motivation to participate in public procurement due to a reduction of tender costs.

The evolution of e-public procurement is likely to follow the pattern known from previous waves of technology penetration. This implies that the growth pace will be incremental until it reaches a critical point after which the pace will increase and it will follow an exponential growth pattern. The policy instruments applied under this scenario are likely to contribute to this process so that the critical point is reached sooner than in the baseline scenario. From this perspective, the application of the policy instruments will make a contribution to the realization of the Lisbon objectives.

5.4 Comparison of the three scenarios

The main points from the three scenarios are condensed and summarized in the table below which serves as a tool for comparing the three scenarios on a set of central parameters.

Central parameters	Scenario A: Baseline Scenario	Scenario B: Balanced Approach	Scenario C: Extensive Effort
Main positive impact	The new procurement directives and general migration in the market will contribute to the uptake of e-public procurement.	Policy instruments will speed up legal and practical implementation in member states. Efforts will ensure that major compliance problems are avoided in the Internal Market.	The mix of policy instrument will address problems across the board. Efforts will speed up the process towards generalized use of e-public procurement.
Main negative impact	Many problems and barriers remain unresolved and uptake will be slow.	The policy instruments under this scenario will only make a marginal, however positive, difference to the already existing pace of evolution.	Some barriers and problems will remain, mainly because it is not possible to address all the problems due to their nature and structural characteristics.
Costs	No direct costs, but many indirect costs as potentials are not exploited and major barriers remain.	Limited direct costs to ensure legal and practical compliance with Internal Market principles.	The combined mix of policy instruments will entail considerable costs. However, in light of the potential benefits, the investment costs seem justified. Economies of scale can be achieved through concerted and coordinated effort at the European level.
Influence on main objective: Generalized use of e-public procurement as a contribution to the Lisbon objectives	The dynamics of the regulatory reform will make a contribution as electronic means are put on par with paper-based procurement. This will provide an incentive for uptake of e-public procurement. However, generalized use will not be achieved in Europe by 2010.	As in the baseline scenario, it is not likely that generalized use will be achieved by 2010. There will, however, be a positive contribution in terms of speeding up the establishment of the enabling legal framework in the Internal Market.	The mix of policy instruments will contribute to the pace in the uptake of e-public procurement. Although it is not certain, it is possible that generalized use could be achieved in Europe by 2010.

5.5 Recommendations for policy instruments

Based on the analyses carried out under the various scenarios, the Consultant recommends that the following mix of policy instruments are given priority in the European Commission's action plan for e-public procurement:

- Interpretive document and support (consultation, information to member states)
- Monitoring of implementation of new directives in the member states
- Best practice examples and guidelines
- Changing procurement instruments and processes to achieve simplification and efficiency gains
- Revise and promote use of CPV vocabulary in EU and internationally

- Promote interoperability and standards for different levels of electronic signatures
- Promote interoperability and standards for e-invoices
- Provide funding for international standardization initiatives
- Monitoring of the development in the area of security
- Awareness and information dissemination activities targeted at economic operators and contracting authorities
- Provision of training opportunities for economic operators and contracting authorities
- Improve functioning and user friendliness of TED and promote use of TED above and below threshold

Moreover, three policy options could be implemented as pilot activities, and the outcome of these activities should determine to what extent further activities under these policy instruments are launched:

- Surveillance of the public procurement market in Europe
- Develop fully electronic system for local processing and validation of notices
- Support development and innovation of simple and cost-efficient e-public procurement systems

Finally, two policy instruments could potentially be useful under specific circumstances in the future, but need further consideration in light of the future evolution of e-public procurement in Europe in order to consider their value added. It is therefore recommended that the following policy instruments are not applied in the first phase of the action plan but continue to be subject to consideration:

- Voluntary accreditation scheme at European level
- Promote interoperability and standards for different levels of electronic catalogues.

Annex 1: List of interviewed persons

List of EU member states representatives interviewed for the survey among member states

Winkler, Martina, Bundeskanzleramt (Austria)

Mertens, Michel, Federal ICT Service (Belgium)

Kotris, David, Ministry of Informatics (Czech Republic)

Kountouris, Steliosm, Public Procurement Department, Treasury of the Republic of Cyprus (Cyprus)

Larsen, Marianne K., Chief Counsellor, Danish Competition Authority (Denmark)

Kiisel, Märt, Chief Specialist, Ministry of Finance, State Aid and Public Procurement division (Estonia)

Aarla, Tarja, Ministry of Trade and Industry (Finland)

Alviset, Christophe, Sous-directour de l'Informatique et des Nouvelle Technologies, Ministère de l'économie, des finances et de l'industrie (France)

Moreau, Olivier, Représentant du Ministère de l'Economie, des Finances et de l'Industrie, Ministère de l'économie, des finances et de l'industrie (France)

Arlt, Annett, Bundesminsterium für Wirtschaft und Arbeit (Germany)

Spatharis, Panagiotis, Ministry of Development (Greece)

Tatrai, Dr. Tünde, Prime Minister's Office, E-government Center (Hungary)

Noone, Billy, The Department of Finance Public Procurement Policy Unit (Ireland)

Colaccino, Davide, Dipartimento per le Risorse strumentali Premier Office (Italy)

Bergs, Valdis, Information department, Procurement Monitoring Bureau of Latvia (Latvia)

Pumputis, Ainis, Public Procurement Office (Lithuania)

Nosbusch, Marc, Ingénieur-informaticien, Ministry of Public Works (Luxemburg)

Sluis, Sander J. van, Ministry of Economic Affairs of the Netherlands (Netherlands)

Dennis Attart, Principal, EU Unit, Department of Contracts (Malta)

Bartolo, Bernard, Principal Officer, EU Unit, Department of Contracts (Malta)

Piasta, Dariusz, director, Public Procurement Office, European Integration Department (Poland)

Mantas, Maria de Fatima, Consultora Juridica Assessora, Ministry of Finance (Portugal)

Camacho, Maria de Lourdes, Direcção-Geral do Património do Estado, Ministry of Finance (Portugal)

Malnárová, Rozália, Chairman, Office for Public Procurement (Slovakia)

Campa, Margit, Undersecretary, Ministry of Finance, Sector for Public Procurement and Concessions (Slovenia)

Matas, Saso, Ministry of Finance, Sector for Public Procurement and Concessions (Slovenia)

Mrzel, Matija, CVI, Ministry of Finance, Sector for Public Procurement and Concessions (Slovenia)

Rufo, Angeles Gonzales, Ministry of Finance (Spain)

Sundstrand, Andrea, Nämnden för offentlig upphandling (Sweden)

Andersson, Irena, Statskontoret (Sweden)

Killin, Mike, Assistant Director, E-Commerce Team, OGC - Office of Government Commerce (United Kingdom)

List of other specialists and experts interviewed

Benneth, Peter, OGC - The Office of Government Commerce (UK)

Cadic, Michel, Ministry of Defence (France)

Castrillejo, Emilio, European Commission, Enterprise Directorate-General Interchange of Data between Administrations (IDA)

Elschner, Fr., Bundesbeschaffungsamt (Germany)

Emig, Bjarne, Project manager, Danish Standard (Denmark)

Hesel, Winfried, Administration Intelligence AG (Germany)

Hoddevik, André, Projectmanager, Sekretariatet Ehandelsprogrammet, Ehandel.no (Norway)

Kountouris, Stelios, Public Procurement Department, Treasury of the Republic of Cyprus (Cyprus)

Lanaspa, Esther, project manager, Agency for the development of Electronic Administration

Mastrogregori, Luca, Direzione Acquisti in Rete della P.A., CONSIP S.p.A. (Italy)

Mortensen, Jens: Vice President Public Services & E-Government
Oracle Europe, Middle East & Africa, Oracle (Europe / EMEA)

Nielsen, Kim E. Sales Manager, Digital signature, TDC A/S (Denmark)

Paulus, Jørg, Business Manager, Gatetade.net a/s (Denmark)

Sabadell, José María, Senior Vicepresident Business Development Financial Services & Public Sector, SAP EMEA NorthEastWestSouth (Europe / EMEA)

Schömann, Dr. Manfred, Beschaffungsamt (Germany)

Serge, Novaretti, Le ministère de la culture et de la communication. (France)

Triantafyllidis, Nikolas, National IT and Telecom Agency (Denmark)

Vandereijk, Pim, Representation Europe, Organization for the Advancement of Structured Information Standards (Oasis, Europe)

Interactive Policy Making
Online consultations

Action Plan on Electronic Public Procurement

06/09/2004 - 15/11/2004

Section 1

Please indicate whether you are:

		%
a company	354	(85.7%)
a business association	59	(14.3%)

Please indicate your main sector of activity.

		%
Manufacturing	67	(16.2%)
Services	223	(54%)
Construction	36	(8.7%)
Trade	40	(9.7%)
Other, please specify:	47	(11.4%)

Please indicate whether your business association is:

		%
National	33	(8%)
European	9	(2.2%)
International	7	(1.7%)
Other, please specify:	6	(1.5%)

Please indicate the number of employees in your company.

		%
1 - 9	100	(24.2%)
10 - 49	74	(17.9%)
50 - 249	83	(20.1%)
> 250	92	(22.3%)

Please indicate in which country you are based.

		%
EU Member State	379	(91.8%)
European Economic Area (Norway, Iceland, Lichtenstein)	3	(0.7%)
Rest of Europe	14	(3.4%)
Asia	2	(0.5%)
North America	8	(1.9%)
Rest of the world	3	(0.7%)

Pleasy specify:

		%
Austria	11	(2.7%)
Belgium	17	(4.1%)
Cyprus	0	(0%)
Czech Republic	5	(1.2%)
Germany	65	(15.7%)
Denmark	3	(0.7%)
Estonia	0	(0%)
Greece	2	(0.5%)
Spain	14	(3.4%)
Finland	14	(3.4%)
France	74	(17.9%)
Hungary	6	(1.5%)
Ireland	5	(1.2%)
Italy	7	(1.7%)
Lithuania	0	(0%)
Luxembourg	1	(0.2%)
Latvia	4	(1%)
Malta	2	(0.5%)
Netherlands	31	(7.5%)
Poland	3	(0.7%)
Portugal	11	(2.7%)
Sweden	33	(8%)
Slovenia	2	(0.5%)
Slovak Republic	1	(0.2%)
United Kingdom	50	(12.1%)

Apart from your home country, in how many countries of the European Union do you regularly sell products and / or services?

		%
1 - 4	126	(30.5%)
5 - 10	46	(11.1%)
11 - 15	15	(3.6%)
> 15	11	(2.7%)
all Member States of the European Union	32	(7.7%)
none	107	(25.9%)

Do you do business electronically with other businesses?

		%
Never	38	(9.2%)
Considered the possibility only	23	(5.6%)
Occasionally	124	(30%)
Often	110	(26.6%)
Main way of doing business	42	(10.2%)

Which of the following do you use when doing business electronically? Please tick the appropriate box(es).

		%
Online search for business opportunities	278	(67.3%)
Electronic catalogues	211	(51.1%)
Electronic marketplaces	89	(21.5%)
Electronic auctions	87	(21.1%)
Downloading of specifications and business related documents	303	(73.4%)
Submitting of offers online	178	(43.1%)
Electronic signatures	80	(19.4%)
Receiving orders electronically	180	(43.6%)
Sending electronic invoices	118	(28.6%)
Electronic payments	207	(50.1%)
Exchange of data using XML standards	84	(20.3%)
Other EDI based applications	51	(12.3%)
I am not familiar with any of these tools	10	(2.4%)
Other	24	(5.8%)
Not applicable	16	(3.9%)

Section 2

Have you ever bid for public tenders in your home or in another Member State?

		%
Never	74	(17.9%)
Considered the possibility only	28	(6.8%)
Occasionally	104	(25.2%)
Often	150	(36.3%)
Main area of business	57	(13.8%)

In relation to public tenders using electronic means, which of the following aspects would you consider most important? Please tick the appropriate box(es).

		%
Fewer legal requirements than traditional paper based procedures	121	(29.3%)
Investment costs in IT tools must be reasonable	139	(33.7%)
The required IT tools must be generally available	177	(42.9%)
The required IT tools must be easy to use and reliable	258	(62.5%)
It must require less effort than traditional paper based means	264	(63.9%)
Confidence in the fairness of the contract awarding procedure	217	(52.5%)
Training of my staff	58	(14%)
A secure environment for transactions	204	(49.4%)
Transparency of the electronic tendering procedures	261	(63.2%)
Other	15	(3.6%)
I don't know	15	(3.6%)

Section 2.1

a. The online search for tender opportunities:

		%
is not useful	11	(2.7%)
makes no difference	19	(4.6%)
is useful	337	(81.6%)
I don't know	11	(2.7%)
I have no experience with this tool	34	(8.2%)

b. Electronic marketplaces:

		%
are not useful	14	(3.4%)
make no difference	31	(7.5%)
are useful	218	(52.8%)
I don't know	27	(6.5%)
I have no experience with this tool	119	(28.8%)

c. Electronic catalogues:

		%
are not useful	8	(1.9%)
make no difference	29	(7%)
are useful	285	(69%)
I don't know	21	(5.1%)
I have no experience with this tool	65	(15.7%)

d. Electronic auctions:

		%
are not useful	71	(17.2%)
make no difference	20	(4.8%)
are useful	136	(32.9%)
I don't know	26	(6.3%)
I have no experience with this tool	148	(35.8%)

e. The downloading of specifications and tender documents:

		%
is not useful	3	(0.7%)
makes no difference	11	(2.7%)
is useful	371	(89.8%)
I don't know	6	(1.5%)
I have no experience with this tool	17	(4.1%)

f. The submission of offers online:

		%
is not useful	18	(4.4%)
makes no difference	21	(5.1%)
is useful	293	(70.9%)
I don't know	10	(2.4%)
I have no experience with this tool	67	(16.2%)

g. Electronic signatures:

		%
are not useful	14	(3.4%)
make no difference	42	(10.2%)
are useful	216	(52.3%)
I don't know	17	(4.1%)
I have no experience with this tool	120	(29.1%)

h. The tracking of orders online:

		%
is not useful	11	(2.7%)
makes no difference	17	(4.1%)
is useful	279	(67.6%)
I don't know	16	(3.9%)
I have no experience with this tool	79	(19.1%)

i. Receiving orders electronically:

		%
is not useful	6	(1.5%)
makes no difference	27	(6.5%)
is useful	291	(70.5%)
I don't know	16	(3.9%)
I have no experience with this tool	69	(16.7%)

j. Electronic invoicing:

		%
is not useful	7	(1.7%)
makes no difference	36	(8.7%)
is useful	247	(59.8%)
I don't know	16	(3.9%)
I have no experience with this tool	99	(24%)

k. Electronic payments:

		%
are not useful	6	(1.5%)
make no difference	28	(6.8%)
are useful	289	(70%)
I don't know	19	(4.6%)
I have no experience with this tool	68	(16.5%)

l. Documents using XML standards:

		%
are not useful	6	(1.5%)
make no difference	12	(2.9%)
are useful	177	(42.9%)
I don't know	68	(16.5%)
I have no experience with this tool	140	(33.9%)

Section 3

Which, if any, significant problems or barriers have you encountered - or do you anticipate - when using electronic means whilst participating in public procurement in your own country? Please tick the appropriate box(es).

		%
Incompatible IT standards	123	(29.8%)
Inappropriate design of tendering systems	181	(43.8%)
Lack of IT skills	58	(14%)
Inappropriate security arrangements	106	(25.7%)
High adjustment costs	66	(16%)
Inadequate legal framework	97	(23.5%)
Insufficient commercial benefits	86	(20.8%)
My business is not suited for electronic trade	42	(10.2%)
The necessity of reorganising our company	35	(8.5%)
Other	21	(5.1%)
No barriers encountered	50	(12.1%)
I don't know	52	(12.6%)

Which, if any, significant problems or barriers have you encountered - or do you anticipate - when using electronic means whilst participating in public procurement in other EU Member States? Please tick the appropriate box(es).

		%
Incompatible IT standards	119	(28.8%)
Inappropriate design of tendering systems	135	(32.7%)
Lack of IT skills	52	(12.6%)
Inappropriate security arrangements	84	(20.3%)
High adjustment costs	53	(12.8%)
Inadequate legal framework	102	(24.7%)
Insufficient commercial benefits	54	(13.1%)
My business is not suited for electronic trade	31	(7.5%)
The necessity of reorganising our company	25	(6.1%)
Linguistic barriers	141	(34.1%)
Other	21	(5.1%)
No barriers encountered	14	(3.4%)
I don't know	121	(29.3%)

Which other factors do you think may limit the generalised use of electronic public procurement? Please tick the appropriate box(es).

		%
Different rules in Member States	248	(60%)
Lack of information on how electronic tendering works	193	(46.7%)
Complex rules in tendering procedures	212	(51.3%)
Unsatisfactory rules on the security of data transmission	121	(29.3%)
Lack of trust in electronic tools	118	(28.6%)
Risks involved in doing business electronically	104	(25.2%)
Fear of corrupt practices	131	(31.7%)
Other	16	(3.9%)
None of the above	15	(3.6%)
I don't know	20	(4.8%)

Are you aware that the recently adopted European Directives on public procurement introduce, for the first time, the use of electronic means in public procurement?

		%
Yes	221	(53.5%)
No	145	(35.1%)
I don't know	47	(11.4%)

Do you believe that the new rules on the use of electronic means in public procurement will resolve the concerns you mentioned earlier?

		%
Yes	48	(11.6%)
No	62	(15%)
I don't know	102	(24.7%)

In which fields do you think the European Commission should further undertake action in order to resolve the concerns you mentioned earlier? Please tick the appropriate box(es).

		%
Environment for secure transactions	142	(34.4%)
Standardisation of forms and documents	278	(67.3%)
Remove obstacles to crossborder transactions	127	(30.8%)
Interoperability between electronic procurement systems	167	(40.4%)
Standardisation of electronic tools	194	(47%)
Modernisation of the legal environment	182	(44.1%)
Promotion of simple and generally available tools for procurement	249	(60.3%)
I don't know	20	(4.8%)
Other	13	(3.1%)

Section 4

Do you think that using electronic means in public procurement will make it easier to do business with the public sector?

		%
Yes	291	(70.5%)
No	76	(18.4%)
No opinion	46	(11.1%)

In your opinion, are there any substantial differences between trading with businesses electronically and doing electronic procurement with the public sector?

		%
Yes	209	(50.6%)
No	127	(30.8%)
No opinion	77	(18.6%)

Section 4.a

level of service:

		%
worse	70	(16.9%)
more or less the same	53	(12.8%)
better	38	(9.2%)
No opinion	36	(8.7%)

procedures:

		%
more unfair	55	(13.3%)
more or less the same	72	(17.4%)
fairer	37	(9%)
No opinion	34	(8.2%)

costs:

		%
higher	56	(13.6%)
more or less the same	50	(12.1%)
lower	63	(15.3%)
No opinion	26	(6.3%)

level of trust:

		%
lower	55	(13.3%)
more or less the same	82	(19.9%)
higher	35	(8.5%)
No opinion	25	(6.1%)

tendering systems:

		%
complex to use	94	(22.8%)
more or less the same	41	(9.9%)
easy to use	28	(6.8%)
No opinion	35	(8.5%)

tendering systems:

		%
not reliable	36	(8.7%)
more or less the same	71	(17.2%)
reliable	35	(8.5%)
No opinion	53	(12.8%)

Section 4.1

a. The use of electronic means in public procurement makes the process:

		%
less transparent	42	(10.2%)
more or less the same	162	(39.2%)
more transparent	175	(42.4%)
No opinion	34	(8.2%)

b. Electronic means in public procurement provides:

		%
less security	57	(13.8%)
more or less the same	218	(52.8%)
more security	86	(20.8%)
No opinion	52	(12.6%)

c. The use of electronic means in public procurement:

		%
increases transaction costs	27	(6.5%)
more or less the same	82	(19.9%)
decreases transaction costs	266	(64.4%)
No opinion	38	(9.2%)

d. Using electronic means in public procurement makes the process:

		%
slower	9	(2.2%)
more or less the same	86	(20.8%)
faster	287	(69.5%)
No opinion	31	(7.5%)

e. The use of electronic means in public procurement makes it:

		%
harder to find information	26	(6.3%)
more or less the same	58	(14%)
easier to find information	300	(72.6%)
No opinion	29	(7%)

f. Using electronic means in public procurement will help:

		%
competition to increase	215	(52.1%)
more or less the same	136	(32.9%)
competition to decrease	25	(6.1%)
No opinion	37	(9%)

g. Using electronic means in public procurement creates:

		%
less business opportunities within the Internal Market	30	(7.3%)
more or less the same	131	(31.7%)
more business opportunities within the Internal Market	205	(49.6%)
No opinion	47	(11.4%)

h. Using electronic meas in public procurement:

		%
makes international co-operation more difficult	1	(0.2%)
more or less the same	33	(8%)
enhances international co-operation	77	(18.6%)
No opinion	10	(2.4%)

i. L'utilisation de moyens électroniques pour les marchés publics:

		%
limits access to new markets	22	(5.3%)
more or less the same	88	(21.3%)
allows easier access to new markets	272	(65.9%)
No opinion	31	(7.5%)

Section 4.2

How advanced is your country in the move from paper based means to electronic means in the area of public procurement?

		%
Procedures are all based on paper based means	56	(13.6%)
Electronic means are starting to be used in public procurement	262	(63.4%)
Electronic means are generally used in public procurement	35	(8.5%)
Procedures are all based on electronic means	3	(0.7%)
I don't know	57	(13.8%)

In what way do you think that electronic means should be introduced in public procurement within the EU?

		%
Immediately	128	(31%)
Progressively	246	(59.6%)
Maybe in 5 years..	12	(2.9%)
Never	8	(1.9%)
No opinion	19	(4.6%)

In which sectors do you think that the use of electronic means in public procurement will create most opportunities?

		%
Manufacturing	96	(23.2%)
Services	250	(60.5%)
Construction	103	(24.9%)
Trade	186	(45%)
No opinion	74	(17.9%)

In your opinion, how will a generalised use of electronic means in public procurement impact on SME's?

		%
SME's will have more opportunities to penetrate new markets	206	(49.9%)
The increase of competition will squeeze SME's margins	129	(31.2%)
SME's risk loosing long-term business relationships	116	(28.1%)
SME's are outcompeted by larger companies	89	(21.5%)
SME's will have lower bidding costs	151	(36.6%)
Other	10	(2.4%)
None of the above	12	(2.9%)
I don't know	67	(16.2%)

IP/04/1095

Brussels, 13th September 2004

Public procurement: Commission consults on how Europe can make the most of electronic procurement

The European Commission has launched an on-line consultation aimed at identifying opportunities and challenges in electronic public procurement. This is part of the process of drawing up an Action Plan to help make sure Europe's economy gets the maximum possible benefit from the implementation of the new provisions on electronic public procurement included in the legislative package of procurement Directives adopted in February 2004 (see IP/04/150) The deadline for responses is 15 October. Public procurement is a key sector of the EU economy accounting for about 16% of GDP. Modernising and opening up procurement markets across borders – including through the expansion of electronic procurement - is crucial to Europe's competitiveness and for creating new opportunities for EU businesses.

Internal Market Commissioner Frits Bolkestein said: "I ask all businesses with an interest in public procurement to respond to this consultation. Well organised electronic procurement can improve the business environment, save businesses' and contracting authorities' time and taxpayers' money and help Europe to meet the Lisbon objectives. We want to know about the views and experiences of those at the sharp end – the businesses which tender for public contracts - so that we can make sure the new Directives are implemented in a way that releases the full potential of electronic procurement."

The European Commission has identified electronic public procurement as an area where large gains can be achieved and encourages the use of electronic means. Using information technology appropriately can contribute to reducing costs, improving efficiency and removing barriers to trade, which will ultimately result in savings for taxpayers. The Directives adopted in February 2004 as part of the legislative package to modernise public procurement provide a legal framework aimed at boosting the development and use of electronic procurement.

The Commission intends to issue an Action Plan in order to help Member States to remove obstacles to electronic public procurement, increase efficiency and modernise public procurement markets. As part of its preparations, the Commission needs input from businesses on existing barriers, expectations and challenges in electronic procurement. For example: what are businesses' experiences of and views on searching online for tender opportunities, using electronic marketplaces, online access to tender documents and on the electronic submission and signature of offers?

The Commission invites all interested businesses and business organisations to respond to its survey. By using its Interactive Policy Making (IPM) consultation tool for this exercise the Commission is making it as easy and time efficient as it possibly can.

Stakeholders will find a presentation and links to the consultation questionnaire on the Commission's Your Voice in Europe site -
http://europa.eu.int/yourvoice/consultations -
a recently re-launched one-stop shop giving access to Commission consultations and their results across all policy areas.
For general information on EU policy and legislation on public procurement, please visit the Commission's Europa web site at:

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

Software simulators for eProcurement

Learning demonstrators – January 2005 (EN)

The objective of the learning demonstrators is to help software editors and contracting authorities in Europe to develop eProcurement systems in line with the EU legislative framework. The demonstrators show also the application of the Functional Requirements.

Two set of demonstrators have been developed:
- Static demonstrators. They are web pages with fixed scenarios to show a possible implementation of a compliant eProcurement system. They can be used on-line in this web site or downloaded and installed.
- Dynamic demonstrators. Software application with more flexible features than the static demonstrators to allow the experimentation in more real conditions. In order to be used they have to be downloaded and installed.

Download the supporting documents for the demonstrators

- User manual - (PDF)

  en [3845 Kb]

- Installation manual - (PDF)

  en [476 Kb]

- Physical database description - (PDF)

  en [305 Kb]

- Translation guide to localise the demonstrators in your language - (PDF)

  en [53 Kb]

Download the demonstrators

- Static demonstrators (ZIP)

  en [4666 Kb]

- Javadoc (ZIP)

  en [1449 Kb]

- Dynamic demonstrators - single file with all the demonstrators (JAR)

  en [75497 Kb]

- Instructions to download the dynamic demonstrators by chunks

  en [1 Kb]

- Utility to merge the demonstrators' chunks (Windows - DOS)

  en [1 Kb]

- Utility to merge the demonstrators' chunks (Unix)

  en [1 Kb]

- Dynamic demonstrators (part 1/11)

  en [7168 Kb]

- Dynamic demonstrators (part 2/11)

  en [7168 Kb]

- Dynamic demonstrators (part 3/11)

  en [7168 Kb]

- Dynamic demonstrators (part 4/11)

  en [7168 Kb]

- Dynamic demonstrators (part 5/11)

  en [7168 Kb]

- Dynamic demonstrators (part 6/11)

  en [7168 Kb]

- Dynamic demonstrators (part 7/11)

  en [7168 Kb]

- Dynamic demonstrators (part 8/11)

  en [7168 Kb]

- Dynamic demonstrators (part 9/11)

  en [7168 Kb]

- Dynamic demonstrators (part 10/11)

  en [7168 Kb]

- Dynamic demonstrators (part 11/11)

  en [3817 Kb]

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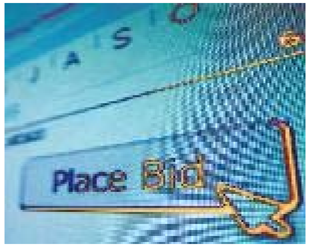
eProcurement



Public procurement by electronic means can improve and simplify the way government procurement operates. This will help enterprises to identify contract opportunities and to supply their goods and services across Europe's Internal Market, contributing to Europe's competitiveness and economic growth.

- What is IDABC eProcurement?
- eProcurement background studies
- Guidelines, standards and functional requirements for eProcurement
- Software simulators for eProcurement
- News, articles and related sites

- The Programme
- Projects
- Your Europe
- eProcurement
- eGovernment Observatory
- Open Source Observatory
- Resources
- IDABC Events

IDA eProcurement Workshop May 2004

The IDA eProcurement Workshop 'Paving the way for European Interoperability' took place in Brussels on May 11, 2004. The IDA Unit would like to thank the 140 workshop attendees for helping to make the day a success.

Paving the way for European Interoperability
An IDA eProcurement Workshop, May 11 2004

Representatives from the public and private sectors gathered for **IDA's eProcurement Workshop** in Brussels on May 11th to discuss past accomplishments and identify priorities for potential eProcurement actions in view of the Commission's eProcurement Action Plan.

The workshop focused on issues of interoperability and compliance that are central to the further development of eProcurement in Europe and shed light on experience gained from existing initiatives. The European Commission, and in particular representatives from the IDA Unit, DG Internal Market and DG Information Society, provided an introduction to interoperability issues and invited the Member States to disseminate examples and solutions in the afternoon session. In addition, Internet connections were made available during lunch and the afternoon coffee break for participants to conduct demonstrations.

For more information about the structure of the workshop, please see the Workshop Programme. The Workshop Presentations and Proceedings have also been made available below.

Workshop Presentations

Welcome Session

- Introduction by Mr. Pedro Ortún- European Commission/DG Enterprise (PDF)

en [13 Kb]

Session 1: Legal framework and Interoperability

- 1. Mr. Byron Karabakis - European Commission/ DG Internal Market (PDF)

en [123 Kb]

- 2. "The role of standards - a key pre-requisite for interoperability" Mr. John Ketchell - CEN/ISSS (PDF)

en [98 Kb]

- 3. "e-business without frontiers: the legal challenges ahead" Ms. Eva Gerhards - European Commission/ DG Enterprise (PDF)

en [131 Kb]

Session 2: Current Actions and Potential Solutions at European Level

- 4. "Paving the way for European Interoperability" Mr. Emilio Castrillejo and Mr. Serge Novaretti - European Commission/ DG Enterprise (PDF) en [417 Kb]

- 5. "Deploying Trans-European e-Services for all" Mr. Jean-François Junger - European Commission/ DG Information Society (eTEN) (PDF)

en [594 Kb]

- 6. "eProcurement interoperability and the role of certification" Mr. Scott Hansen - OPEN GROUP (PDF)

en [490 Kb]

Session 3: Interoperability Solutions in the Member States

- 07. Germany: "XML-based eProcurement: Lessons learned for interoperability in the case of Bremen" Mr. Martin Hagen -Free Hanseatic City of Bremen (PDF)

en [1018 Kb]

- 08. Sweden: "eTendering platforms" Mr. Martin Reinholtz - University of Lund (PDF)

en [1024 Kb]

- 09. United Kingdom: "The OGC Interoperability Model" Mr. Mark Leitch - OGC (PDF)

en [142 Kb]

- 10. United Kingdom/Scotland: "Using e-commerce standards to work together" Mr. Steve Murray - eProcurement Scotland (PDF)

en [240 Kb]

- 11. France: "Interoperability and massive take-up issues for e-Procurement in France" Mr. Michel Cadic and Mr. Romain Berline - Ministry of Defence (PDF)

en [281 Kb]

- 12. Norway: "The Norwegian eMarketplace ehandel.no - Experiences and Challenges on Interoperability" Mr. André Hoddevik - ehandel.no (PDF)

en [278 Kb]

- 13. Italy: "Interoperability: The Italian Scenario" Mr. Lorenzo Cerulli - CONSIP (PDF)

en [710 Kb]

Workshop Proceedings

Proceedings in PDF format

- IDA eProcurement workshop - proceedings (PDF)

en [60 Kb]

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http://europa.eu.int:80/idabc/en/document/2368

NEWS

25-FEB-05
The African Development Bank and the Nordic Development Fund have been included in joint website for e-GP.

25-FEB-05
The draft of the new

Welcome to the Multilateral Development Banks e-GP Website

Electronic Government Procurement (e-GP) solutions have been proven to produce transparency and significant savings for those countries able to implement them successfully.

e-GP is a very effective tool in the fight against corruption, the promotion of integration and the stimulation of greater productivity not only at government level, but also in small and medium enterprises.

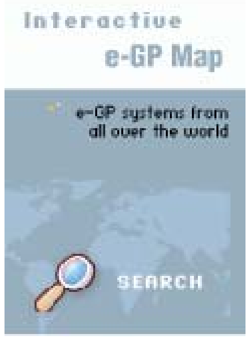
At the beginning of 2003, an e-GP working group was created under the Multilateral Development Banks (MDBs) Procurement Harmonization Process.Since then, the Asian Development Bank, the Inter-American Development Bank, and the World Bank have achieved a very high degree of harmonization in their approach to providing technical advice and support to their member countries in developing their e-GP strategies and solutions.

This website provides a single entry point to all the information developed and all the tools created under the e-GP Working Group.

We hope this resources serve you to plan your strategy and achieve the benefits that e-GP puts at hand.

Regards,

The e-GP Working Group.


Interactive
e-GP Map
e-GP systems from all over the world
SEARCH

26 th to 28 th October 2004
Manila , Philippines

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Public Procurement

Public Procurement Revision of the directives on review procedures

Revision of the Public Procurement Remedies Directives

- **Overview**
- **Public Consultations**
  - with companies, lawyers, professional associations and non-governmental organisations
  - with contracting authorities
  - European Business Test Panel Questionnaire
- **Background documents**

Overview

Legal and practical problems businesses and lawyers may be encountered when using national review procedures to challenge decisions made by public authorities awarding contracts. The aim of the revision of the Public Procurement Remedies Directives in 2004 is to make progresses in some areas. Providing clear and effective procedures for seeking redress in cases where bidders consider contracts have been unfairly awarded is crucial to making sure contracts ultimately go to the company which has made the best offer, and therefore to building confidence among businesses and the public that public procurement procedures are fair. EU law on public procurement aims to increase competition and transparency in order to create opportunities for businesses, better value and higher quality services for the taxpayer.

Public Consultations

With companies, lawyers, professional associations and non-governmental organisations

The European Commission has launched an eight-week Internet consultation on the legal and practical problems businesses and lawyers may encounter when using national review procedures to challenge decisions made by public authorities awarding contracts. The consultation uses three separate on-line questionnaires aimed at different target groups.

- Press release
- On-line consultation Closed (29.2.2004)
- Results of the consultations
  - of economic operators

- ○ of lawyers
- ○ of professional associations and non-governmental organisations

With contracting authorities

Consultation with the contracting authorities prior to revision of the "remedies" Directives in the field of public procurement - Closed (14.4.2004)

EBTP Questionnaire on Public Procurement - Remedies

European Business Test Panel Questionnaire

- Results de en fr

Background documents

Document	Title	Date	Reference
Directive	Remedies/Public Procurement in the Classical Sectors	30.12.1989	89/665/EEC
Directive	Remedies/Public Procurement in the Utilities Sector	25.02.1992	92/13/EEC
Internal Market Strategy	Priorities 2003-2006 Part B, Paragraph 5 entitled "Expanding procurement opportunities" (page 17)	07.05.2003	COM(2003) 238

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COMMISSION LAUNCHES CONSULTATIONS WITH INTERESTED CIRCLES ON OPERATION OF NATIONAL REVIEW PROCEDURES IN PUBLIC PROCUREMENT FIELD

IPM INTERACTIVE POLICY MAKING

So as to be able to evaluate the operation of national review procedures in the field of public procurement since the entry into force of the Directives concerned (**89/665/CEE** and **92/13/CEE**), the Commission is launching three on-line consultations in the eleven official languages of the European Union with the aim of gathering information from tenderers and their representatives.

These three on-line consultations will be accessible through the Commission portal **http://europa.eu.int/yourvoice** from 22.10.03 until 29.02.04.

The first on-line questionnaire is directed at companies which have tendered for public-procurement contracts in their Member State of origin or in other Member States and which, after encountering difficulties in the public contract award process, have considered initiating or actually have initiated review proceedings.
- **Questionnaire**

The second questionnaire for completion on-line is aimed at professional associations and non-governmental organisations representing the interests of economic operators established in the European Union and engaged in one or more sectors of activity. These associations and organisations are invited to complete a questionnaire for each Member State concerning which they are able to supply information.
- **Questionnaire**

The third on-line questionnaire is targeted at lawyers who, acting for their clients, have gained experience of national review procedures in the field of public procurement in one or more of the 15 Member States.
- **Questionnaire**

You should fill in just one of the three questionnaires, according to the category of interested party to which you belong. However, professional associations and non-governmental organisations should complete a separate questionnaire for each Member State concerning which they wish to provide comments on review procedures.

Filling in the companies' questionnaire will not take more than 15 minutes, and will enable you to make a concrete contribution towards improving Community legislation on reviews concerning public contract award procedures.

In the light of the results of these consultations, which will make it possible to take initial stock of the application of the "review" Directives, the Commission could present, in the second half of 2004, a proposal for an amending Directive aimed at improving the application of Community legislation on public procurement by clarifying and/or bolstering existing provisions.

If you would like to help promote this on-line consultation exercise, please include a link on your webpages.

This consultation is subject to a **Data Privacy Statement**.

IP/03/1455

Brussels, 27th October 2003

Public procurement: Commission consults on how rejected bidders can challenge decisions

The European Commission has launched an eight-week Internet consultation on the legal and practical problems businesses and lawyers may encounter when using national review procedures to challenge decisions made by public authorities awarding contracts. The consultation uses three separate on-line questionnaires aimed at different target groups. The aim is to assess what has been achieved so far in the operation of national review procedures and in which areas further progress is still needed, with a view to revision of the Public Procurement Remedies Directives in 2004. Providing clear and effective procedures for seeking redress in cases where bidders consider contracts have been unfairly awarded is crucial to making sure contracts ultimately go to the company which has made the best offer, and therefore to building confidence among businesses and the public that public procurement procedures are fair. EU law on public procurement aims to increase competition and transparency in order to create opportunities for businesses, better value and higher quality services for the taxpayer. Public procurement accounts for some 16% of EU GDP.

Internal Market Commissioner Frits Bolkestein said: "I would urge all businesses, associations and lawyers with an interest in public procurement to respond to this consultation. Both the strategy agreed by the March 2000 Lisbon European Council to make Europe more competitive and the Commission's Internal Market Strategy lay great stress on expanding cross-border public procurement opportunities and this consultation is a key part of that. We can only know where things are going wrong, and where necessary take measures to put them right, if those on the front line tell us about their experiences."

By using the Commission's Interactive Policy Making consultation tool for this exercise, and by providing specific sets of questions for each group of stakeholders, the Commission is making it as easy and time efficient as it possibly can for them to respond. The first on-line questionnaire is intended for enterprises which have tendered for public contracts and have faced difficulties in bringing legal actions against public authorities on the basis of the Remedies Directives. The second questionnaire is intended for business associations and non-governmental organisations representing the interests of tenderers. The third questionnaire is intended for lawyers who have experience of national review procedures.

This consultation is open to these three categories of stakeholders until 15 December 2003. The results will be taken into account in the revision of the Remedies Directives, which is scheduled to take place in the second half of 2004.

Business associations, chambers of commerce, Bar Associations and Law Societies and other interested parties are invited to reply to the relevant questionnaire and to inform their members about the consultation.

All replies to the questionnaires will be taken into account, in assessing what has been achieved so far in the operation of national review procedures and in which areas further progress is still needed to improve the effectiveness of remedies and therefore to improve the practical application of EU public procurement law in all Member States.

Stakeholders will find a presentation and links to the three questionnaires at:

http://europa.eu.int/yourvoice/consultations

The quick and user-friendly questionnaires use the Commission's Interactive Policy Making (IPM) tool (see IP/01/519), which aims to improve governance by using the Internet for collecting and analysing reactions.

The results will be published in March 2004 on the Commission's "Your Voice in Europe" Internet site

http://europa.eu.int/yourvoice/consultations

which is a recently relaunched one-stop shop giving access to Commission consultations and their results across all policy areas. The statistical reports on responses will be available by January 2004. More detailed qualitative analyses of the results will be available on the same site in May 2004.

The current Remedies Directives (89/665/EEC as amended by 92/50/EEC in the case of supplies, works and services and 92/13/EEC in the case of the water, energy, transport and telecommunications sectors) require Member States to ensure that review procedures are available at least to any person having or having had an interest in obtaining a given public contract and having been or likely to be injured by an alleged infringement. Decisions of the contracting authorities which are in breach of the law must be subject to effective and rapid remedies through courts and/or administrative bodies. In all Member States, such remedies must include, in particular, the possibility of taking interim measures (such as suspension of the award procedure in question), the setting aside of unlawful decisions and discriminatory technical, economic and financial specifications in the invitation to tender, and the compensation of injured parties.

Background documents for respondents

Directive No. 89/665/EEC (Remedies/Public Procurement in the Classical Sectors

http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31989L0665&model=guichett)

Directive No. 92/13/EEC (Remedies/Public Procurement in the Utilities Sector

http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31992L0013&model=guichett

Common Position (EC) No 33/2003 adopted by the Council on 20 March 2003 with a view to adopting Directive 2003/…/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/ce147/ce14720030624en00010136.pdf

Common Position (EC) No 34/2003 adopted by the Council on 20 March 2003 with a view to adopting Directive 2003/…/EC of the European Parliament and of the Council of … coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/ce147/ce14720030624en01370258.pdf

Internal Market Strategy – Priorities 2003-2006, Part B, Paragraph 5 entitled "expanding procurement opportunities":

http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003_0238en01.pdf

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Revision of the directives on review procedures in the field of public procurement

Economic operators

I. Information about the company (Background information)

Total Responses : 44 on 44

Country compulsory

DE - Germany	13
IT - Italy	10
FR - France	7
BE - Belgium	6
AT - Austria	2
FI - Finland	2
IE - Ireland	1
NL - Netherlands	1
PT - Portugal	1
UK - United Kingdom	1
DA - Denmark	0
EL - Greece	0
ES - Spain	0
LU - Luxembourg	0
SV - Sweden	0

Which sectors is your company engaged in? (please select one or more sectors from the following list) compulsory

construction	20
others (give details)	8
computer and related services	5
management consulting services and related services	4
engineering services and integrated engineering services	4
telecommunications services	3
insurance services	3
architectural services	3
maintenance and repair services	2
research and development services	2
urban planning and	

landscape architectural services	2
publishing and printing services on a fee or contract basis	2
capital and consumer goods industries	1
trade (supply of goods)	1
land transport services	1
accounting, auditing and book-keeping services	1
market research and public opinion polling services	1
related scientific and technical consulting services	1
advertising services	1
building-cleaning services and property management services	1
sewage and refuse disposal services sanitation and similar services	1
air transport services	0
transport of mail by land and by air	0
banking and investment services	0
technical testing and analysis services	0

II. Experience in the field of public procurement

Total Responses : 44 on 44

On average, how many public contracts a year does your company bid for in the Member State in which it is established? compulsory

more than 80	16
between 6 and 15	9
between 16 and 30	6
between 51 and 80	5
between 31 and 50	4
fewer than 5	3
don't know	1

Of this average, what percentage of public contracts exceeded the Community value thresholds laid down in the directives on public contracts (Directives 93/36/EEC, 93/37/EEC, 92/50/EEC, as amended by Directive 97/52/EC, and Directive 93/38/EEC, as amended by Directive 98/4/EC)? compulsory

more than 40 %	15
between 0 and 5 %	10
don't know	8
between 11 and 15 %	3

between 6 and 10 %	2
between 31 and 35 %	2
between 36 and 40 %	2
between 16 and 20 %	1
between 26 and 30 %	1
between 21 and 25 %	0

The requirement to provide the contracting authority with prior information

Total Responses : 44 on 44

This procedure allowed a settlement to be made in a dispute which you had with the contracting authority concerning the correctness of the award procedure, without recourse to litigation compulsory

not applicable	13
in a minority of cases	11
in no cases	9
in the majority of cases	5
don't know	5
in all cases	1

This procedure did not affect your entitlement to an effective pre-contractual review compulsory

not applicable	14
in all cases	8
in the majority of cases	7
in a minority of cases	6
in no cases	5
don't know	4

This procedure allowed the contracting authority to prevent an effective review before the contract was signed because of a "race to sign the contract" incentive effect compulsory

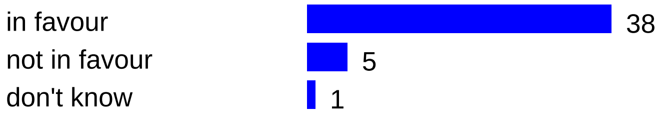
not applicable	14
don't know	9
in the majority of cases	7
in no cases	7
in a minority of cases	6
in all cases	1

New prerogatives concerning reviews in the general interest

Total Responses : 44 on 44

Are you in favour of a provision in national legislations for a national authority (already in existence or to be set up, but independent of the contracting authority) to have the power to bring matters before the court or the body specialised in review procedures, where an infringement of Community law on public procurement has been detected? Such a referral by this national

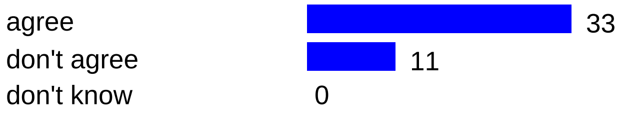
authority acting in the general interest could be made with the particular aim of having provisional measures applied, illegal decisions set aside or sanctions imposed which are effective, proportionate and have a deterrent effect (in the form of financial penalties). compulsory



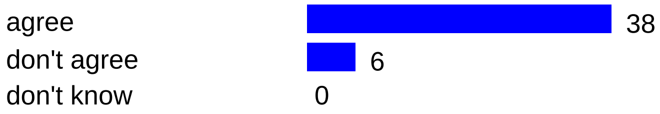
Advantages

Total Responses : 44 on 44

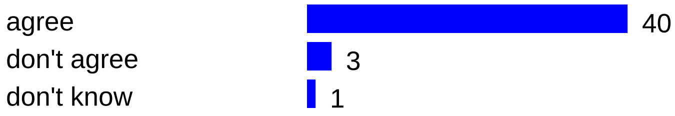
This authority (whatever its status in national law) could play a useful role for those persons who do not have a sufficient interest in acting and who could report to this authority infringements of Community law on public procurement detected by a contracting authority compulsory



This authority (whatever its status in national law) could play a useful role in the event of infringements which are difficult to detect by potential bidders (for example, the conclusion of a contract by direct agreement without publication of a notice in the Official Journal of the European Union) compulsory



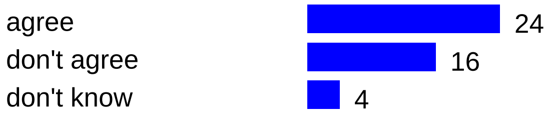
This authority (whatever its status in national law) could play a useful role in the event of repeated infringements by a contracting authority of Community law on public procurement or of serious infringements of Community law on public procurement (particularly where the contracting authority has intentionally violated such rules) compulsory



Disadvantages

Total Responses : 44 on 44

Risk of multiplying the number of review procedures, thereby impeding the carrying out of public contracts, to the detriment of successful bidders in particular compulsory



The complainant is not familiar with the procedure employed by the authority compulsory

agree	18
don't agree	13
don't know	13

The fear that decisions by this authority to institute or not institute proceedings in the general interest might be made on a discretionary basis compulsory

agree	20
don't agree	18
don't know	6

The brief period between the notification of an award decision and the signing of the contract

Total Responses : 44 on 44

Has your company already been faced with the situation of being deprived of the possibility of seeking a review to have interim measures taken (such as the suspension of the award procedure) and to have illegal decisions set aside, on the grounds that the contract had been signed, this without your having been notified previously by the contracting authority of the decision regarding the award of the contract and the rejection of your bid? (only one answer possible) compulsory

never	22
rarely	10
often	10
systematically	2

If you consider that a specific clause should be inserted in a directive, how long do you think the minimum period should be between the notification of an award decision and the signing of the contract, in order to strike a balance between the need to guarantee the effectiveness of the review and the concern not to unnecessarily delay the carrying out of public contracts? compulsory

between 15 and 30 calendar days	20
between 11 and 14 calendar days	17
10 calendar days	6
less than 10 calendar days	1
don't know	0

Taking into account your answer to the previous question, do you think there is a need for a shortened period in the case of accelerated procedures, due to a possible urgent need to sign the contract? compulsory

yes	22

no	20
don't know	2

What do you think this shortened period should be? field optional

10 calendar days	8
5 calendar days	5
8 calendar days	3
3 calendar days	1
don't know	1

The speed of applications for an interim order

Total Responses : 44 on 44

How do you assess the speed of applications for an interim order relating to award procedures for public contracts? compulsory

positive	26
negative	15
very negative	2
excellent	1

How long, on average, does it take to obtain an interim order in the case of reviews concerning public contract award procedures? compulsory

don't know	15
between 11 and 20 days	9
between 21 and 30 days	8
10 days or less	5
over 90 days	3
between 31 and 60 days	2
between 61 and 90 days	2

The suspensive effect of pre-contractual reviews

Total Responses : 44 on 44

If your national legal system does not provide for a review to have an automatic suspensive effect on the contract award procedure to which it refers, in the majority of cases involving your company, were the reasons for the court or the special review body refusing the suspension of the procedure based on: (several answers possible) compulsory

the consideration of the probable consequences of the suspensive measure on the public interest?	13
the consideration of the probable consequences of the suspensive measure on other interests which might suffer?	12

not applicable	11
procedural reasons?	9
don't know	9
other reason(s)	2

Do you think that a directive should provide for an automatic suspensive effect? compulsory

yes	22
no	18
don't know	4

What do you think would be a reasonable period of suspension? field optional

between 11 and 15 calendar days	8
between 21 and 25 calendar days	4
between 16 and 20 calendar days	3
more than 25 calendar days	3
don't know	2
10 calendar days or less	1

Why do you think that the directive should not provide for an automatic suspensive effect? field optional

This would result in an increase in dilatory and/or vexatious reviews and would unduly delay the carrying out of public contracts, to the detriment of the successful bidders and/or the public interest	12
An automatic suspension would be particularly detrimental to the successful bidder and/or the public interest where the review is manifestly inadmissible or unfounded	10
don't know	1
for other reasons (give details)	0

Claims for damages

Total Responses : 44 on 44

Have you already brought actions seeking damages? (only one possible answer) compulsory

never	26
sometimes	15
often	3

Why have you never brought actions seeking damages? (several answers possible) field optional

The high cost of court proceedings for damages, which is disproportionate to the actual amount of damages expected	12
The difficulty in proving that the company had good or very good chances of winning the contract	11
The fear of not being treated fairly in the event of future contract procedures	11
The low amount of damages awarded by the judicial or quasi-judicial authority	3
The obligation under your national legal system to obtain beforehand the annulment or the declaration of illegality of the contested decision made by the contracting authority	2
don't know	2
other reason (give details)	1

If you have occasionally or frequently brought actions seeking damages, have these actions been a success? field optional

partial success	8
total failure	8
total success	1

Why have these actions not been a total success? (several answers possible) field optional

The difficulty in proving that the company had good or very good chances of winning the contract	8
The fear of not being treated fairly in the event of future procurement procedures	8

The high cost of court proceedings for damages, which is disproportionate to the actual amount of damages expected	5
The obligation under your national legal system to obtain beforehand the annulment or the declaration of illegality of the contested decision made by the contracting authority	4
The low amount of damages awarded by the judicial or quasi-judicial authority	2
don't know	2
not applicable	2
other reason (give details)	2

The "remedies" directives authorise the Member States to limit claims for damages once the contract has been signed If your legal system provides for this limitation, are you satisfied with this system? compulsory

not applicable	22
no	16
yes	6

Please give your assessment of the possible advantages in limiting claims for damages once the contract has been signed Calling into question a signed contract would be contrary to the public interest and to the successful contractor because it would incur costs for interrupting or suspending the contract which are disproportionate to the interests of the bidder bringing the claim field optional

don't agree	17
agree	16
don't know	10

Reasons for dissatisfaction

Total Responses : 44 on 44

The chances of success of a claim for damages are more limited than those of a claim for suspension / annulment field optional

agree	9
don't know	4
don't agree	0

The amount of damages awarded is insufficient to offset the

damage suffered by the company and to cover the legal costs incurred field optional

agree	11
don't agree	1
don't know	0

The possibility of suspending or annulling an award procedure when the latter offers the possibility of obtaining the annulment or cancellation of the concluded contract would encourage contracting authorities to respect the Community law on public procurement field optional

agree	11
don't know	2
don't agree	0

Special sectors: a sanction consisting of the payment of a sufficiently large sum

Total Responses : 44 on 44

In the special sectors (water, energy, transport and telecommunications), some Member States have included the possibility of providing for the payment of a sufficiently large sum (a "fine"), as a protective measure and/or sanction, instead of the imposition of provisional measures and the annulment of illegal decisions If you have brought actions in those Member States which have opted for such a mechanism in the special sectors, have you found this mechanism to be (only one answer possible): compulsory

not applicable	21
don't know	15
impossible to answer because the number of reviews employing this mechanism is insignificant and/or your company has never had occasion to put it into practice	4
totally ineffective compared with the mechanism of imposing provisional measures and the annulment of illegal decisions?	2
as effective as the mechanism of imposing provisional measures and the annulment of illegal decisions?	1
less effective?	1

IV. Cross-border reviews

Total Responses : 44 on 44

Have you already attempted to seek a review in a Member State, other than the one in which your company is established, when

your company has bid for a contract being awarded by a contracting authority in this other Member State? compulsory

no	41
yes	3

What are the reasons your company has never sought a review in a Member State, other than the one in which it is established? (several answers possible) field optional

Your company has never bid for a contract being awarded by a contracting authority in another Member State	19
Your company did not have confidence in the national appeal procedures of the contracting authority's Member State, particularly regarding the impartial handling of your company's appeal	8
Your company did not possess sufficient knowledge of the national appeal procedures of the contracting authority's Member State	6
Your company had doubts regarding the effectiveness of the national appeal procedures of the contracting authority's Member State	3
don't know	3
other reason (give details)	1

In which Member State(s), other than the one in which your company is established, have you sought a review regarding public procurement? field optional

ES - Spain	2
DA - Denmark	1
AT - Austria	0
BE - Belgium	0
DE - Germany	0
EL - Greece	0
FI - Finland	0
FR - France	0
IE - Ireland	0
IT - Italy	0
LU - Luxembourg	0
NL - Netherlands	0
PT - Portugal	0

SV - Sweden	0
UK - United Kingdom	0

Austria

Total Responses : 44 on 44

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

Please indicate what situation your company found itself in in this Member State field optional

Your company was dissuaded or found it impossible to seek one or more reviews	0
Your company was completely successful as regards its initial demands	0
Your company was partially successful as regards its initial demands	0
Your company was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your company was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0
Your company did not obtain what you consider it was entitled to	0

Why was your company dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your company	0

of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	
Because you were not confident that your company's appeal would be handled impartially	0
Because you were not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your company would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your company obtain what you consider it was entitled to? field optional

The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your company did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0

The amount of damages awarded was insignificant compared with the damage which you believed you had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your company	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0
don't know	0

Greece

Total Responses : 44 on 44

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

Please indicate what situation your company found itself in in this Member State field optional

Your company was dissuaded or found it impossible to seek one	0

or more reviews	
Your company was completely successful as regards its initial demands	0
Your company was partially successful as regards its initial demands	0
Your company was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your company was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0
Your company did not obtain what you consider it was entitled to	0

Why was your company dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your company of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because you were not confident that your company's appeal would be handled impartially	0
Because you were not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your company would	

be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your company obtain what you consider it was entitled to? field optional

The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your company did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which you believed you had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your company	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0
don't know	0

Belgium

Total Responses : 44 on 44

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

Please indicate what situation your company found itself in in this Member State field optional

Your company was dissuaded or found it impossible to seek one or more reviews	0
Your company was completely successful as regards its initial demands	0
Your company was partly successful as regards its initial demands	0
Your company was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your company was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0
Your company did not	

obtain what you consider it was entitled to	0

Why was your company dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your company of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because you were not confident that your company's appeal would be handled impartially	0
Because you were not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the judgment	0
Because of the concern that your company would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your company obtain what you consider it was entitled to? field optional

The contract was signed before review was sought	0
The contract was signed after review was sought	

but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your company did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which you believed you had suffered	0
The contracting authority was not found to be responsible because of the difficulty of proving a causal link between the illegality of the award procedure and the damage suffered by your company	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of the applications for an interim order in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was field optional

10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0
don't know	0

Denmark

Total Responses : 44 on 44

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

negative	1
excellent	0
positive	0
very negative	0
don't know	0

Please indicate what situation your company found itself in in this Member State field optional

Your company did not obtain what you consider it was entitled to	1
Your company was dissuaded or found it impossible to seek one or more reviews	0
Your company was completely successful as regards its initial demands	0
Your company was partially successful as regards its initial demands	0
Your company was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your company was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0

Why was your company dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your company of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because you were not confident that your company's appeal would be handled impartially	0

Because you were not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your company would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your company obtain what you consider it was entitled to? field optional

The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	▌ 1
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your company	▌ 1
The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your company did not possess a sufficient interest in acting	0
The amount of damages	

awarded was insignificant compared with the damage which you believed you had suffered	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional

positive	1
excellent	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0
don't know	0

United Kingdom

Total Responses : 44 on 44

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

Please indicate what situation your company found itself in in this Member State field optional

Your company was dissuaded or found it impossible to seek one or more reviews	0
Your company was completely successful as regards its initial demands	0
Your company was partially successful as regards its initial demands	0
Your company was	

completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your company was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0
Your company did not obtain what you consider it was entitled to	0

Why was your company dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your company of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because you were not confident that your company's appeal would be handled impartially	0
Because you were not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your company would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0

don't know	0
other reason (give details)	0

Why didn't your company obtain what you consider it was entitled to? field optional

The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your company did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which you believed you had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your company	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

10 days or less	0

between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0
don't know	0

Finland

Total Responses : 44 on 44

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

Please indicate what situation your company found itself in in this Member State field optional

Your company was dissuaded or found it impossible to seek one or more reviews	0
Your company was completely successful as regards its initial demands	0
Your company was partially successful as regards its initial demands	0
Your company was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your company was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0
Your company did not obtain what you consider it was entitled to	0

Why was your company dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a	

contract by direct agreement without publishing a notice, thus depriving your company of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because you were not confident that your company's appeal would be handled impartially	0
Because you were not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your company would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your company obtain what you consider it was entitled to? field optional

The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your company did not possess a sufficient interest in acting	0
The body responsible for the review refused to	

annul the decisions of the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which you believed you had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your company	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0
don't know	0

Italy

Total Responses : 44 on 44

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

Please indicate what situation your company found itself in in this Member State field optional

Your company was dissuaded or found it impossible to seek one or more reviews	0
Your company was completely successful as regards its initial demands	0
Your company was partially successful as regards its initial demands	0
Your company was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your company was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0
Your company did not obtain what you consider it was entitled to	0

Why was your company dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your company of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because you were not confident that your company's appeal would be handled impartially	0
Because you were not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0

Because of the concern that your company would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your company obtain what you consider it was entitled to? field optional

The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your company did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which you believed you had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your company	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order

in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0
don't know	0

Sweden

Total Responses : 44 on 44

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

Please indicate what situation your company found itself in in this Member State field optional

Your company was dissuaded or found it impossible to seek one or more reviews	0
Your company was completely successful as regards its initial demands	0
Your company was partially successful as regards its initial demands	0
Your company was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your company was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0

Your company did not obtain what you consider it was entitled to	0

Why was your company dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your company of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because you were not confident that your company's appeal would be handled impartially	0
Because you were not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your company would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your company obtain what you consider it was entitled to? field optional

The contract was signed before review was sought	0

The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your company did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which you believed you had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your company	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0
don't know	0

Netherlands

Total Responses : 44 on 44

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

Please indicate what situation your company found itself in in this Member State field optional

Your company was dissuaded or found it impossible to seek one or more reviews	0
Your company was completely successful as regards its initial demands	0
Your company was partially successful as regards its initial demands	0
Your company was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your company was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0
Your company did not obtain what you consider it was entitled to	0

Why was your company dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your company of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because you were not confident that your	

company's appeal would be handled impartially	0
Because you were not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your company would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your company obtain what you consider it was entitled to? field optional

The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your company did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which you believed you had suffered	0
The contracting authority was not found to be	

responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your company	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0
don't know	0

Ireland

Total Responses : 44 on 44

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

Please indicate what situation your company found itself in in this Member State field optional

Your company was dissuaded or found it impossible to seek one or more reviews	0
Your company was completely successful as regards its initial demands	0
Your company was partially successful as regards its initial	0

demands	
Your company was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your company was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0
Your company did not obtain what you consider it was entitled to	0

Why was your company dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your company of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because you were not confident that your company's appeal would be handled impartially	0
Because you were not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your company would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after	0

the contract had been signed	
don't know	0
other reason (give details)	0

Why didn't your company obtain what you consider it was entitled to? field optional

The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your company did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which you believed you had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your company	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0
don't know	0

Luxembourg

Total Responses : 44 on 44

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

Please indicate what situation your company found itself in in this Member State field optional

Your company was dissuaded or found it impossible to seek one or more reviews	0
Your company was completely successful as regards its initial demands	0
Your company was partially successful as regards its initial demands	0
Your company was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your company was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0
Your company did not obtain what you consider it was entitled to	0

Why was your company dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0

Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your company of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because you were not confident that your company's appeal would be handled impartially	0
Because you were not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your company would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your company obtain what you consider it was entitled to? field optional

The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your company did not possess a sufficient interest in acting	0

The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which you believed you had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your company	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0
don't know	0

Portugal

Total Responses : 44 on 44

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

Please indicate what situation your company found itself in in this

Member State field optional

Your company was dissuaded or found it impossible to seek one or more reviews	0
Your company was completely successful as regards its initial demands	0
Your company was partially successful as regards its initial demands	0
Your company was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your company was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0
Your company did not obtain what you consider it was entitled to	0

Why was your company dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your company of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because you were not confident that your company's appeal would be handled impartially	0
Because you were not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the	0

appeal and the delivery of the judgment	
Because of the concern that your company would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your company obtain what you consider it was entitled to? field optional

The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your company did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which you believed you had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your company	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0
don't know	0

France

Total Responses : 44 on 44

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

Please indicate what situation your company found itself in in this Member State field optional

Your company was dissuaded or found it impossible to seek one or more reviews	0
Your company was completely successful as regards its initial demands	0
Your company was partially successful as regards its initial demands	0
Your company was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your company was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting	0

authority	
Your company did not obtain what you consider it was entitled to	0

Why was your company dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your company of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because you were not confident that your company's appeal would be handled impartially	0
Because you were not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your company would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your company obtain what you consider it was entitled to? field optional

The contract was signed before review was	0

sought	
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your company did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which you believed you had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your company	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0
don't know	0

Spain

Total Responses : 44 on 44

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

positive	1
negative	1
excellent	0
very negative	0
don't know	0

Please indicate what situation your company found itself in in this Member State field optional

Your company did not obtain what you consider it was entitled to	1
Your company was dissuaded or found it impossible to seek one or more reviews	0
Your company was completely successful as regards its initial demands	0
Your company was partially successful as regards its initial demands	0
Your company was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your company was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0

Why was your company dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your company of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0

Because you were not confident that your company's appeal would be handled impartially	0
Because you were not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your company would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your company obtain what you consider it was entitled to? field optional

other reason(s) (give details)	▌ 1
The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your company did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which	0

you believed you had suffered	
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your company	0
don't know	0

How would you rate the speed of applications for an interim order in this Member State? field optional

positive	▌ 1
negative	▌ 1
excellent	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

between 61 and 90 days	▌ 1
10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
over 90 days	0
don't know	0

Germany

Total Responses : 44 on 44

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

Please indicate what situation your company found itself in in this Member State field optional

Your company was dissuaded or found it impossible to seek one or more reviews	0
Your company was completely successful as regards its initial demands	0
Your company was	

partially successful as regards its initial demands	0
Your company was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your company was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0
Your company did not obtain what you consider it was entitled to	0

Why was your company dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your company of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because you were not confident that your company's appeal would be handled impartially	0
Because you were not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your company would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in	

national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your company obtain what you consider it was entitled to? field optional

The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your company did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which you believed you had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your company	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0
don't know	0

Thank you for your cooperation.

Total Responses : 44 on 44

Are you willing for the Commission services to contact you in order to obtain further details about the information you have given? compulsory

yes	37
no	7

What is your opinion of this questionnaire? compulsory

objectives met	39
objectives not met	5

Why field optional

content not pertinent	2
too difficult to understand	1
too general	0
too short	0
too technical	0
too long	0

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Revision of the directives on review procedures in the field of public procurement

Lawyers

I. Information about the law firm (Background information)

Total Responses : 57 on 57

Which Member State's law does your firm practise compulsory

DE - Germany	17
BE - Belgium	8
FR - France	8
UK - United Kingdom	5
IT - Italy	4
PT - Portugal	4
AT - Austria	3
SV - Sweden	3
ES - Spain	2
FI - Finland	1
LU - Luxembourg	1
NL - Netherlands	1
DA - Denmark	0
EL - Greece	0
IE - Ireland	0

II. Experience in reviews concerning public contract award procedures

Total Responses : 57 on 57

On average, how many reviews concerning public contract award procedures does your firm deal with per year in the Member State whose law it practises? compulsory

between 6 and 15	22
fewer than 5	14
between 16 and 30	10
more than 30	10
don't know	1

Of this average, what percentage of reviews concerning public contract award procedures public contracts exceeded the Community value thresholds laid down in the directives on public

contracts (Directives 93/36/EEC, 93/37/EEC, 92/50/EEC, as amended by Directive 97/52/EC, and Directive 93/38/EEC, as amended by Directive 98/4/EC)? compulsory

more than 40 %	46
between 0 and 5 %	4
between 36 and 40 %	2
between 11 and 15 %	1
between 21 and 25 %	1
between 26 and 30 %	1
between 31 and 35 %	1
don't know	1
between 6 and 10 %	0
between 16 and 20 %	0

The requirement to provide the contracting authority with prior information

Total Responses : 57 on 57

This procedure allowed a settlement to be made in a dispute which you had with the contracting authority concerning the correctness of the award procedure, without recourse to litigation compulsory

not applicable	22
in no cases	17
in a minority of cases	13
in the majority of cases	4
don't know	1
in all cases	0

This procedure did not affect your entitlement to an effective pre-contractual review compulsory

not applicable	23
in no cases	11
in a minority of cases	8
in all cases	6
in the majority of cases	6
don't know	3

This procedure allowed the contracting authority to prevent an effective review before the contract was signed because of a "race to sign the contract" incentive effect compulsory

not applicable	23
in a minority of cases	12
in no cases	12

in the majority of cases	5
don't know	3
in all cases	2

Interest in acting and injured rights of bidders

Total Responses : 57 on 57

Has your firm already been presented with one of these grounds for inadmissibility? compulsory

no	36
yes	19
don't know	2

Among the two grounds for inadmissibility mentioned above, a lack of interest in obtaining a contract has been cited: field optional

in a minority of cases	9
in the majority of cases	5
in no cases	4
in all cases	0

Among the two grounds for inadmissibility mentioned above, the fact of not having been victims or not risking being victims of an alleged infringement has been cited: field optional

in a minority of cases	10
in the majority of cases	5
in no cases	2
in all cases	1

Have one or more of your requests for review been declared inadmissible when they involved a contract awarded without prior notice or call for competition? compulsory

no	50
yes	7

In one or more of the cases in which your requests for review have been declared inadmissible when they involved a contract awarded without prior notice or call for competition, were the grounds based on (several answers possible): field optional

other reason (give details)	3
the fact that because your client did not produce an expression of interest in obtaining the contested contract, he was not interested in acting?	2
the lack of evidence demonstrating an interest in acting?	1

Please indicate why the reviews sought by your firm have never been declared inadmissible field optional

The body responsible for review procedures has always declared admissible your requests for review	21
You have never attempted to seek such a review	18
don't know	4

New prerogatives concerning reviews in the general interest

Total Responses : 57 on 57

Are you in favour of a provision in national legislations for a national authority (already in existence or to be set up, but independent of the contracting authority) to have the power to bring matters before the court or the body specialised in review procedures, where an infringement of Community law on public procurement has been detected? Such a referral by this national authority acting in the general interest could be made with the particular aim of having provisional measures applied, illegal decisions set aside or sanctions imposed which are effective, proportionate and have a deterrent effect (in the form of financial penalties). compulsory

in favour	35
not in favour	20
don't know	2

Advantages

Total Responses : 57 on 57

This authority (whatever its status in national law) could play a useful role for those persons who do not have a sufficient interest in acting and who could report to this authority infringements of Community law on public procurement detected by a contracting

authority compulsory

agree	37
don't agree	19
don't know	1

This authority (whatever its status in national law) could play a useful role in the event of infringements which are difficult to detect by potential bidders (for example, the conclusion of a contract by direct agreement without publication of a notice in the Official Journal of the European Union) compulsory

agree	39
don't agree	12
don't know	6

This authority (whatever its status in national law) could play a useful role in the event of repeated infringements by a contracting authority of Community law on public procurement or of serious infringements of Community law on public procurement (particularly where the contracting authority has intentionally violated such rules) compulsory

agree	44
don't agree	11
don't know	2

Disadvantages

Total Responses : 57 on 57

Risk of multiplying the number of review procedures, thereby impeding the carrying out of public contracts, to the detriment of successful bidders in particular compulsory

agree	29
don't agree	27
don't know	1

The complainant is not familiar with the procedure employed by the authority compulsory

don't agree	27
agree	25
don't know	5

The fear that decisions by this authority to institute or not institute proceedings in the general interest might be made on a discretionary basis compulsory

agree	31
don't agree	23
don't know	3

Administrative authorities which have powers of mediation/conciliation

Total Responses : 57 on 57

If, in the Member State in question, administrative authorities specialising in public procurement have been set up with powers to mediate/conciliate with the contracting authorities, have you had occasion to call on them to amicably resolve a dispute which your clients had with the contracting authority? compulsory

not applicable	22
no	18
yes	13
no opinion	4

How do you rate the effectiveness of these administrative authorities which have powers of mediation/conciliation? field optional

average	6
unsatisfactory	3
good	2
excellent	1

What advantages/disadvantages did you discover when you had occasion to call on such authorities? field optional

low cost of the procedure	9
a pragmatic solution resulting in a good compromise, in the interests of both the injured bidder and the contracting authority, without jeopardising the basic principles of Community law on public procurement	6
a swift process	5
the fact that decisions made by this type of authority are not of a	

binding nature does not encourage the contracting authorities to follow its recommendations, particularly in the case of politically sensitive issues	5
This system has not resulted in a resolution of most of the cases you have brought and in fact has led to a delay in settling disputes because it has been necessary to appeal to the body responsible for review procedures	4
the fact that these administrative authorities were not sufficiently independent of the contracting authority meant that satisfactory compromise solutions could not be found for the different interests in play	3
does not have a suspensive effect on review deadlines	3
a slow process	2

Why haven't you called on the specialised administrative authorities which have powers of mediation/conciliation? field optional

the fact that decisions made by this type of authority are not of a binding nature does not encourage the contracting authorities to follow its recommendations, particularly in the case of politically sensitive issues	8
does not have a suspensive effect on review deadlines	8
This system has not resulted in a resolution of most of the cases you have brought and in fact has led to a delay in settling disputes because it has been necessary to appeal to	5

the body responsible for review procedures	
other reason (give details)	4
the fact that these administrative authorities are not sufficiently independent of the contracting authority meant that satisfactory compromise solutions could not be found for the different interests in play	3

Advantages and disadvantages of judicial and non-judicial bodies

Total Responses : 57 on 57

If, in the Member State in question, the body which is responsible for reviews at first instance and entitled to take provisional measures and annul illegal decisions is an administrative authority without the status of a court, what disadvantages have you noted?

compulsory

not applicable	35
the administrative authority arrives at decisions rapidly but these are often contested and must therefore be referred to a higher level for review, thus slowing down the process for arriving at a useful decision	12
the administrative authority is not independent and may be inclined to make decisions of a political nature which have no legal basis	9
other reason(s) (give details)	8
the administrative authority does not scrupulously apply the adversarial principle	6
the administrative authority is not sufficiently competent in public procurement matters	3
the administrative authority does not arrive at decisions rapidly	2

If, in the Member State in question, the body which is responsible for reviews at first instance and entitled to take provisional measures and annul illegal decisions is an administrative authority without the status of a court, what advantages have you noted? (several answers possible) compulsory

not applicable	34
the review is handled rapidly	15
the authority is specialised	10
the costs of the procedure (including lawyer's fees) are not high	7
the review is handled impartially, respecting the adversarial principle	4
other reason(s) (give details)	2

If, in the Member State in question, the body which is responsible for reviews at first instance and entitled to take provisional measures and annul illegal decisions is a court, what disadvantages have you noted? (several answers possible) compulsory

the body is the ordinary court and not specialised in public procurement matters	21
a slow process	16
the costs of the procedure (including lawyer's fees) are too high	13
not applicable	13
other reason(s) (give details)	10
is influenced by considerations which are not of a strict legal nature	9
does not respect the adversarial principle	4
partiality	4
don't know	4

Please indicate the average time taken to handle the review field optional

between 20 days and 2 months	2
more than a year	1

between 2 and 6 months	0
between 6 months and a year	0

If, in the Member State in question, the body which is responsible for reviews at first instance and entitled to take provisional measures and annul illegal decisions is a court, what advantages have you noted? (several answers possible) compulsory

the review is handled impartially, respecting the adversarial principle	32
the review is handled rapidly	19
one or more specialised chambers or courts have been set up	18
not applicable	10
the costs of proceedings (including lawyer's fees) are not high	4

The brief period between the notification of an award decision and the signing of the contract

Total Responses : 57 on 57

Have you already been faced with the situation of being deprived of the possibility of seeking a review to have interim measures taken (such as the suspension of the award procedure) and to have illegal decisions set aside, on the grounds that the contract had been signed, this without your client having received prior notification from the contracting authority of the decision regarding the award of the contract and the rejection of your bid? compulsory

never	28
rarely	13
often	11
systematically	5

Do you think that the only solution which will allow injured bidders to initiate a pre-contractual review is to stipulate, by means of an amending directive, a minimum period between the notification of an award decision and the actual conclusion of the contract? compulsory

yes	47
no	7
don't know	3

Why? field optional

there are other possible solutions which result in a useful review	5
The Alcatel Judgment of the Court of Justice (Case C-81/98), which interpreted the "remedies" directives currently in force, is sufficient to oblige Member States to provide for a minimum period in their legislation	1

If you consider that a specific clause should be inserted in a directive, how long do you think the minimum period should be between the notification of an award decision and the signing of the contract, in order to strike a balance between the need to guarantee the effectiveness of the review and the concern not to unnecessarily delay the carrying out of public contracts? compulsory

between 11 and 14 calendar days	21
between 15 and 30 calendar days	20
10 calendar days	12
don't know	4
less than 10 calendar days	0

Taking into account your answer to the previous question, do you think there is a need for a shortened period in the case of accelerated procedures, due to a possible urgent need to sign the contract? compulsory

yes	32
no	22
don't know	3

What do you think this shortened period should be? field optional

5 calendar days	13
10 calendar days	7
3 calendar days	4
8 calendar days	4
don't know	1

The speed of applications for an interim order

Total Responses : 57 on 57

How do you assess the speed of applications for an interim order relating to award procedures for public contracts in the Member State in question? compulsory

positive	39
negative	10
excellent	8
very negative	0

How long, on average, does it take to obtain an interim order in the case of reviews concerning public contract award procedures? compulsory

10 days or less	15
between 11 and 20 days	15
between 31 and 60 days	11
between 21 and 30 days	6
don't know	5
over 90 days	4
between 61 and 90 days	1

The suspensive effect of pre-contractual reviews

Total Responses : 57 on 57

If your national legal system does not provide for a review to have an automatic suspensive effect on the contract award procedure to which it refers, in the majority of cases involving you, were the reasons for the court or the special review body refusing the suspension of the procedure based on: (several answers possible) compulsory

the consideration of the probable consequences of the suspensive measure on the public interest?	22
not applicable	19
the consideration of the probable consequences of the suspensive measure on other interests which might suffer?	16
other reason(s)	10
a bar to proceedings by virtue of the signing of the contract	9
don't know	5

the time limit?	4
the incompetence of the judicial or quasi-judicial authority	4

Do you think that a directive should provide for an automatic suspensive effect? compulsory

yes	31
no	23
don't know	3

What do you think would be a reasonable period of suspension? field optional

more than 25 calendar days	10
between 11 and 15 calendar days	7
between 21 and 25 calendar days	4
10 calendar days or less	3
between 16 and 20 calendar days	3
don't know	3

Why do you think that the directive should not provide for an automatic suspensive effect? field optional

This would result in an increase in dilatory and/or vexatious reviews and would unduly delay the carrying out of public contracts, to the detriment of the successful bidders and/or the public interest	17
An automatic suspension would be particularly detrimental to the successful bidder and/or the public interest where the review is manifestly inadmissible or unfounded	17
don't know	0
for other reasons (give details)	0

Claims for damages

Total Responses : 57 on 57

Have you already brought actions seeking damages for an injury arising from an irregularity in a public contract award procedure? compulsory

sometimes	27
never	20
often	10

Why have you never brought actions seeking damages? (several answers possible) field optional

The difficulty in proving that the company had good or very good chances of winning the contract (proof of a causal link between the illegality of the award procedure and the damage suffered)	10
The high cost of court proceedings for damages, which is disproportionate to the actual amount of damages expected	10
The fear of not being treated fairly in the event of future procurement procedures	10
The obligation under your national legal system to obtain beforehand the annulment or the declaration of illegality of the contested decision made by the contracting authority	4
Other reason (give details)	4
The low amount of damages awarded by the judicial or quasi-judicial authority	3
don't know	2

If you have replied "sometimes" or "often", have these actions been a success? field optional

partial success	28

total failure	8
total success	0

If applicable, why have these actions not been a total success? (several answers possible) field optional

The difficulty in proving that the company had good or very good chances of winning the contract	32
The high cost of court proceedings for damages, which is disproportionate to the actual amount of damages expected	15
The fear of not being treated fairly in the event of future procurement procedures	12
The low amount of damages awarded by the judicial or quasi-judicial authority	11
The obligation under your national legal system to obtain beforehand the annulment or the declaration of illegality of the contested decision made by the contracting authority	7
Other reason (give details)	5
not applicable	3
don't know	0

The "remedies" directives authorise the Member States to limit claims for damages once the contract has been signed If your legal system provides for this limitation, are you satisfied with this system? compulsory

not applicable	27
yes	16
no	14

Please give your assessment of the possible advantages in limiting claims for damages once the contract has been signed field optional

Calling into question a signed contract would be contrary to the public interest and to the successful contractor because it would incur costs for interrupting or suspending the contract which are disproportionate to the interests of the bidder bringing the claim	10
other assessment (give details)	5
don't know	0

Reasons for dissatisfaction

Total Responses : 57 on 57

The chances of success of a claim for damages are more limited than those of a claim for suspension / annulment field optional

agree	13
don't agree	2
don't know	1

The amount of damages awarded is insufficient to offset the damage suffered by the company and to cover the legal costs incurred field optional

agree	10
don't agree	5
don't know	1

The possibility of suspending or annulling an award procedure when the latter offers the possibility of obtaining the annulment or cancellation of the concluded contract would encourage contracting authorities to respect the Community law on public procurement field optional

agree	14
don't agree	1
don't know	1

According to the state of the work carried out in connection with the contract, it may sometimes be proportionate to obtain the annulment or termination of the contract concluded, in view of the

serious nature of the offence field optional

agree	13
don't agree	2
don't know	1

Post-contractual reviews: what alternative is there to calling into question the signed contract?

Total Responses : 57 on 57

Do you think that another solution would be to limit the possibility of calling the contract into question to and for a reduced period (from one to six months), following the signing of the contract? compulsory

no	31
yes	26

Special sectors: a sanction consisting of the payment of a sufficiently large sum

Total Responses : 57 on 57

In the special sectors (water, energy, transport and telecommunications), some Member States have included the possibility of providing for the payment of a sufficiently large sum (a "fine"), as a protective measure and/or sanction, instead of the imposition of provisional measures and the annulment of illegal decisions If you have brought actions in those Member States which have opted for such a mechanism in the special sectors, have you found this mechanism to be (only one answer possible): compulsory

not applicable	41
don't know	11
impossible to answer because the number of reviews employing this mechanism is insignificant and/or your company has never had occasion to put it into practice	4
as effective as the mechanism of imposing provisional measures and the annulment of illegal decisions?	1
less effective	0
totally ineffective compared with the mechanism of imposing provisional measures and the annulment of illegal decisions?	0

Special sectors: attestation and conciliation

Total Responses : 57 on 57

In the special sectors (water, energy, transport and telecommunications), have you had experience of contracts awarded by contracting authorities which benefitted from an attestation stating at a given time that their public contract awarding procedures are in accordance with the Community law in this field and with the national rules transposing this law? compulsory

no	30
Not familiar with this mechanism	25
yes	2

If you have had experience of this attestation mechanism, has it been shown that those contracting authorities which benefitted from it committed fewer irregularities in contract awarding procedures than contracting authorities which did not benefit from it? field optional

don't know	1
not applicable	1
yes	0
no	0

In the special sectors, have you already requested the use of the conciliation mechanism provided for in Articles 9 to 11 of Directive 92/13/EEC ? compulsory

no	52
don't know	4
yes	1

IV. Cross-border reviews

Total Responses : 57 on 57

Have you already attempted, directly or through a local representative or through a foreign firm which is part of your network, to seek a review in a Member State, other than the one whose law your firm practises, when one of your clients has bid for a contract being awarded by a contracting authority in this other Member State? compulsory

no	45
yes	12

What are the reasons you have never attempted to seek, directly or indirectly, a review in a different Member State from the one in which you practise law? (several answers possible) field optional

You have never been given a case requiring a cross-border review	37
You do not possess sufficient knowledge of the national appeal procedures of the contracting authority's Member State	4
other reason(s) (give details)	3
You have doubts regarding the effectiveness of the national appeal procedures of the contracting authority's Member State	2
You do not have confidence in the national appeal procedures of the contracting authority's Member State, particularly regarding the impartial handling of your appeal	1
don't know	1

In which Member State(s), other than the one whose law you practise, have you sought a review regarding public procurement? field optional

IT - Italy	3
AT - Austria	2
DE - Germany	2
EL - Greece	2
ES - Spain	2
FR - France	2
NL - Netherlands	2
UK - United Kingdom	2
BE - Belgium	1
IE - Ireland	1
DA - Denmark	0
FI - Finland	0
LU - Luxembourg	0
PT - Portugal	0
SV - Sweden	0

Austria

Total Responses : 57 on 57

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

positive	▮ 2
excellent	0
negative	0
very negative	0
don't know	0

Please indicate what situation your client found himself in in this Member State field optional

Your client did not obtain what you consider he was entitled to	▮ 1
Your client was dissuaded or found it impossible to seek one or more reviews	0
Your client was completely successful as regards his initial demands	0
Your client was partially successful as regards his initial demands	0
Your client was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your client was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0

Why was your client dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your client of	0

the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	
Because your client was not confident that his appeal would be handled impartially	0
Because your client was not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your client would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your client obtain what you consider he was entitled to? field optional

other reason(s) (give details)	▌ 1
The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your client did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of	

the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which your client believed he had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your client	0
don't know	0

How would you rate the speed of applications for an interim order in this Member State? field optional

positive	▌ 1
excellent	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0
don't know	0

Greece

Total Responses : 57 on 57

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

negative	▌ 1
very negative	▌ 1
excellent	0
positive	0
don't know	0

Please indicate what situation your client found himself in in this Member State field optional

Your client did not obtain what you consider he was entitled to	2
Your client was dissuaded or found it impossible to seek one or more reviews	0
Your client was completely successful as regards his initial demands	0
Your client was partially successful as regards his initial demands	0
Your client was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your client was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0

Why was your client dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your client of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because your client was not confident that his appeal would be handled impartially	0
Because your client was not confident that the national appeal procedures were	0

effective	
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your client would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your client obtain what you consider he was entitled to? field optional

The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	▮ 2
The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your client did not possess a sufficient interest in acting	0
The amount of damages awarded was insignificant compared with the damage which your client believed he had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award	0

procedure and the damage suffered by your client	
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional

positive	1
negative	1
excellent	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

between 61 and 90 days	1
10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
over 90 days	0
don't know	0

Belgium

Total Responses : 57 on 57

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

Please indicate what situation your client found himself in in this Member State field optional

Your client was dissuaded or found it impossible to seek one or more reviews	0
Your client was	

completely successful as regards his initial demands	0
Your client was partially successful as regards his initial demands	0
Your client was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your client was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0
Your client did not obtain what you consider he was entitled to	0

Why was your client dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your client of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because your client was not confident that his appeal would be handled impartially	0
Because your client was not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your client would be at a disadvantage in the event of future public	0

procurement procedures from the same contracting authority	
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your client obtain what you consider he was entitled to? field optional

The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your client did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which your client believed he had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your client	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order

in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0
don't know	0

Denmark

Total Responses : 57 on 57

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

Please indicate what situation your client found himself in in this Member State field optional

Your client was dissuaded or found it impossible to seek one or more reviews	0
Your client was completely successful as regards his initial demands	0
Your client was partially successful as regards his initial demands	0
Your client was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your client was	

completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0
Your client did not obtain what you consider he was entitled to	0

Why was your client dissuaded or found it impossible to seek one or more reviews in this Member State? field optional	
Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your client of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because your client was not confident that his appeal would be handled impartially	0
Because your client was not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your client would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your client obtain what you consider he was entitled to? field optional

The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your client did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which your client believed he had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your client	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0
don't know	0

United Kingdom

Total Responses : 57 on 57

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

excellent	1
positive	0
negative	0
very negative	0
don't know	0

Please indicate what situation your client found himself in in this Member State field optional

Your client was completely successful as regards his initial demands	1
Your client was dissuaded or found it impossible to seek one or more reviews	0
Your client was partially successful as regards his initial demands	0
Your client was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your client was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0
Your client did not obtain what you consider he was entitled to	0

Why was your client dissuaded or found it impossible to seek one

or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your client of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because your client was not confident that his appeal would be handled impartially	0
Because your client was not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your client would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your client obtain what you consider he was entitled to? field optional

The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0

The body responsible for the review considered that your client did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which your client believed he had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your client	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional

positive	1
excellent	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

between 61 and 90 days	1
10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
over 90 days	0
don't know	0

Finland

Total Responses : 57 on 57

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

Please indicate what situation your client found himself in in this Member State field optional

Your client was dissuaded or found it impossible to seek one or more reviews	0
Your client was completely successful as regards his initial demands	0
Your client was partially successful as regards his initial demands	0
Your client was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your client was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0
Your client did not obtain what you consider he was entitled to	0

Why was your client dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your client of the possibility of knowing in time of the existence	0

and/or the content of the contract which was likely to be contested	
Because your client was not confident that his appeal would be handled impartially	0
Because your client was not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your client would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your client obtain what you consider he was entitled to? field optional

The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your client did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages	

awarded was insignificant compared with the damage which your client believed he had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your client	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0
don't know	0

Italy

Total Responses : 57 on 57

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

negative	▌ 1
don't know	▌ 1
excellent	0
positive	0
very negative	0

Please indicate what situation your client found himself in in this Member State field optional

Your client did not obtain what you consider he was entitled to	▌ 1
Your client was dissuaded or found it impossible to seek one or more reviews	0
Your client was completely successful as regards his initial demands	0
Your client was partially successful as regards his initial demands	0
Your client was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your client was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0

Why was your client dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your client of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because your client was not confident that his appeal would be handled impartially	0
Because your client was not confident that the national appeal procedures were effective	0

Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your client would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your client obtain what you consider he was entitled to? field optional

other reason(s) (give details)	▌ 1
The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your client did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which your client believed he had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the	0

illegality of the award procedure and the damage suffered by your client	
don't know	0

How would you rate the speed of applications for an interim order in this Member State? field optional

don't know	▮ 2
excellent	0
positive	0
negative	0
very negative	0

The average time taken to obtain an interim order in this Member State was: field optional

don't know	▮ 1
10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0

Sweden

Total Responses : 57 on 57

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

Please indicate what situation your client found himself in in this Member State field optional

Your client was dissuaded or found it impossible to seek one or more reviews	0
Your client was completely successful as regards his initial	0

demands	
Your client was partially successful as regards his initial demands	0
Your client was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your client was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0
Your client did not obtain what you consider he was entitled to	0

Why was your client dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your client of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because your client was not confident that his appeal would be handled impartially	0
Because your client was not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your client would be at a disadvantage in the event of future public procurement procedures from the same	0

contracting authority	
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your client obtain what you consider he was entitled to? field optional

The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your client did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which your client believed he had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your client	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0
don't know	0

Netherlands

Total Responses : 57 on 57

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

negative	▌ 1
excellent	0
positive	0
very negative	0
don't know	0

Please indicate what situation your client found himself in in this Member State field optional

Your client was completely successful as regards his initial demands	▌ 1
Your client was dissuaded or found it impossible to seek one or more reviews	0
Your client was partially successful as regards his initial demands	0
Your client was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your client was completely or partially	

successful but was not able to win subsequent contracts awarded by the same contracting authority	0
Your client did not obtain what you consider he was entitled to	0

Why was your client dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your client of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because your client was not confident that his appeal would be handled impartially	0
Because your client was not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your client would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your client obtain what you consider he was entitled to? field optional

The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your client did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which your client believed he had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your client	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional

don't know	▌ 1
excellent	0
positive	0
negative	0
very negative	0

The average time taken to obtain an interim order in this Member State was: field optional

don't know	▌ 1
10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0

Ireland

Total Responses : 57 on 57

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

positive	▌ 1
excellent	0
negative	0
very negative	0
don't know	0

Please indicate what situation your client found himself in in this Member State field optional

Your client was partially successful as regards his initial demands	▌ 1
Your client was dissuaded or found it impossible to seek one or more reviews	0
Your client was completely successful as regards his initial demands	0
Your client was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your client was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0
Your client did not obtain what you consider he was entitled to	0

Why was your client dissuaded or found it impossible to seek one

or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your client of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because your client was not confident that his appeal would be handled impartially	0
Because your client was not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your client would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your client obtain what you consider he was entitled to? field optional

The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0

The body responsible for the review considered that your client did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which your client believed he had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your client	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional

positive	▌ 1
excellent	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

don't know	▌ 1
10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0

Luxembourg

Total Responses : 57 on 57

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

Please indicate what situation your client found himself in in this Member State field optional

Your client was dissuaded or found it impossible to seek one or more reviews	0
Your client was completely successful as regards his initial demands	0
Your client was partially successful as regards his initial demands	0
Your client was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your client was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0
Your client did not obtain what you consider he was entitled to	0

Why was your client dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your client of the possibility of knowing in time of the existence	0

and/or the content of the contract which was likely to be contested	
Because your client was not confident that his appeal would be handled impartially	0
Because your client was not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your client would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your client obtain what you consider he was entitled to? field optional

The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your client did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages	

awarded was insignificant compared with the damage which your client believed he had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your client	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional	
excellent	0
positive	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional	
10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0
don't know	0

Portugal

Total Responses : 57 on 57

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional	
excellent	0
positive	0
negative	0
very negative	0
don't know	0

Please indicate what situation your client found himself in in this Member State field optional	
Your client was dissuaded or found it impossible to seek one or more reviews	0
Your client was completely successful as regards his initial demands	0
Your client was partially successful as regards his initial demands	0
Your client was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your client was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0
Your client did not obtain what you consider he was entitled to	0

Why was your client dissuaded or found it impossible to seek one or more reviews in this Member State? field optional	
Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your client of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because your client was not confident that his appeal would be handled impartially	0
Because your client was not confident that the national appeal procedures were effective	0
Because of the	

considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your client would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your client obtain what you consider he was entitled to? field optional

The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your client did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which your client believed he had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your	0

client	
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional

excellent	0
positive	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0
don't know	0

France

Total Responses : 57 on 57

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

very negative	▌ 1
excellent	0
positive	0
negative	0
don't know	0

Please indicate what situation your client found himself in in this Member State field optional

Your client did not obtain what you consider he was entitled to	▌ 1
Your client was dissuaded or found it impossible to seek one or more reviews	0

Your client was completely successful as regards his initial demands	0
Your client was partially successful as regards his initial demands	0
Your client was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your client was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0

Why was your client dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your client of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because your client was not confident that his appeal would be handled impartially	0
Because your client was not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your client would be at a disadvantage in the event of future public procurement procedures from the same	0

contracting authority	
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your client obtain what you consider he was entitled to? field optional

The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	▌ 1
The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your client did not possess a sufficient interest in acting	0
The amount of damages awarded was insignificant compared with the damage which your client believed he had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your client	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional

positive	▌ 1
excellent	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

between 31 and 60 days	▌ 1
10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 61 and 90 days	0
over 90 days	0
don't know	0

Spain

Total Responses : 57 on 57

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

don't know	▌ 1
excellent	0
positive	0
negative	0
very negative	0

Please indicate what situation your client found himself in in this Member State field optional

Your client was completely successful as regards his initial demands	▌ 1
Your client was dissuaded or found it impossible to seek one or more reviews	0
Your client was partially successful as regards his initial demands	0
Your client was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your client was completely or partially	

successful but was not able to win subsequent contracts awarded by the same contracting authority	0
Your client did not obtain what you consider he was entitled to	0

Why was your client dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your client of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because your client was not confident that his appeal would be handled impartially	0
Because your client was not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your client would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your client obtain what you consider he was entitled to? field optional

The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review considered that your client did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which your client believed he had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your client	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional

don't know	1
excellent	0
positive	0
negative	0
very negative	0

The average time taken to obtain an interim order in this Member State was: field optional

don't know	▌ 1
10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0

Germany

Total Responses : 57 on 57

How would you rate the effectiveness of the reviews which you sought in this Member State? field optional

excellent	▌ 1
positive	0
negative	0
very negative	0
don't know	0

Please indicate what situation your client found himself in in this Member State field optional

Your client was dissuaded or found it impossible to seek one or more reviews	0
Your client was completely successful as regards his initial demands	0
Your client was partially successful as regards his initial demands	0
Your client was completely or partially successful but was not able to win the contract whose award procedure was contested	0
Your client was completely or partially successful but was not able to win subsequent contracts awarded by the same contracting authority	0
Your client did not obtain what you consider he was entitled to	0

Why was your client dissuaded or found it impossible to seek one

or more reviews in this Member State? field optional

Because of the high cost of the procedure (including lawyer's fees)	0
Because the contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving your client of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	0
Because your client was not confident that his appeal would be handled impartially	0
Because your client was not confident that the national appeal procedures were effective	0
Because of the considerable length of time elapsing between the presentation of the appeal and the delivery of the judgment	0
Because of the concern that your client would be at a disadvantage in the event of future public procurement procedures from the same contracting authority	0
Because of the ineffectiveness in national law of a review which was sought after the contract had been signed	0
don't know	0
other reason (give details)	0

Why didn't your client obtain what you consider he was entitled to? field optional

The contract was signed before review was sought	0
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0

The body responsible for the review considered that your client did not possess a sufficient interest in acting	0
The body responsible for the review refused to annul the decisions of the contracting authority which you considered illegal	0
The amount of damages awarded was insignificant compared with the damage which your client believed he had suffered	0
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by your client	0
don't know	0
other reason(s) (give details)	0

How would you rate the speed of applications for an interim order in this Member State? field optional

excellent	1
positive	0
negative	0
very negative	0
don't know	0

The average time taken to obtain an interim order in this Member State was: field optional

10 days or less	0
between 11 and 20 days	0
between 21 and 30 days	0
between 31 and 60 days	0
between 61 and 90 days	0
over 90 days	0
don't know	0

Thank you for your cooperation.

Total Responses : 57 on 57

Are you willing for the Commission services to contact you in order to obtain further details about the information you have given? compulsory	
yes	57
no	0

What is your opinion of this questionnaire? compulsory	
objectives met	56
objectives not met	1

Why? field optional	
too general	1
too short	0
content not pertinent	0
too difficult to understand	0
too technical	0
too long	0

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Revision of the directives on review procedures in the field of public procurement

Professional associations and non-governmental organisations

I. Information about the association/organisation (Background information)

Total Responses : 37 on 37

Country where the association / organisation is based compulsory	
DE - Germany	11
FR - France	5
BE - Belgium	4
SV - Sweden	4
AT - Austria	3
IT - Italy	3
NL - Netherlands	3
ES - Spain	2
LU - Luxembourg	1
PT - Portugal	1
DA - Denmark	0
EL - Greece	0
FI - Finland	0
IE - Ireland	0
UK - United Kingdom	0

Which sectors is your association / organisation engaged in? (please choose one or more sectors from the following list) compulsory	
non-profit-making association or other grouping	21
construction	18
engineering services and integrated engineering services	9
others (give details)	9
capital and consumer goods industries	8
maintenance and repair services	7
architectural services	7
sewage and refuse disposal services sanitation and similar	6

services	
land transport services	5
research and development services	5
management consulting and related services	5
urban planning and landscape architectural services	5
services relating to scientific et technical consulting	5
cleaning services for buildings and property management services	5
trade (supply of goods)	4
air transport services	4
courier services by land and air	4
insurance services	4
computer and related services	4
accounting and bookkeeping services	4
market studies and surveys	4
technical testing and analysis services	4
advertising services	4
publishing and printing services on a payment or contract basis	4
telecommunications services	3
banking and investment services	3

II. Member State in question

Total Responses : 37 on 37

In the context of this questionnaire, for which Member State can you provide information concerning the operation of national review procedures in the field of public procurement? compulsory

DE - Germany	11
FR - France	5
BE - Belgium	4
SV - Sweden	4
AT - Austria	3
IT - Italy	3
NL - Netherlands	3
ES - Spain	2
LU - Luxembourg	1
PT - Portugal	1
DA - Denmark	0
EL - Greece	0
FI - Finland	0

IE - Ireland	0
UK - United Kingdom	0

The requirement to provide the contracting authority with prior information

Total Responses : 37 on 37

The national legislation of certain Member States requires the person seeking a review to provide the contracting authority with prior information. If the legislation of your Member State provides for such a requirement, what, in your opinion, are the positive or negative effects? compulsory

not applicable	16
This procedure allows a settlement to be made in a dispute which the economic operator has with the contracting authority concerning the correctness of the award procedure, without recourse to litigation	9
This procedure did not affect the entitlement of the bidder to an effective pre-contract review	7
other positive or negative effects noted	6
don't know	1
This procedure allowed the contracting authority to prevent an effective review before the contract was signed because of the "race to sign the contract" incentive effect	0

Interest in acting and injured rights of bidders

Total Responses : 37 on 37

Have the members of your association/organisation already been presented with one of these grounds for inadmissibility? compulsory

yes	18
no	10
don't know	9

Among the two grounds for inadmissibility mentioned above, a lack of interest in obtaining a contract has been cited: field optional

don't know	7
in a minority of cases	5
in the majority of cases	3
in all cases	1
in no cases	1

Among the two grounds for inadmissibility mentioned above, the fact of not having been victims or not risking being victims of an alleged infringement has been cited: field optional

don't know	7
in a minority of cases	6
in the majority of cases	3
in no cases	1
in all cases	0

Have there already been cases in which reviews sought by your members have been declared inadmissible when they involved a contract awarded without prior notice or call for competition? compulsory

no	20
yes	17

In one or more of the cases in which reviews sought by your members have been declared inadmissible when they involved a contract awarded without prior notice or call for competition, were the grounds based on ... (several answers possible) field optional

don't know	6
the lack of evidence demonstrating an interest in acting?	5
other reason (give details)	5
the fact that because your members did not produce an expression of interest in obtaining the contested contract, they were not interested in acting?	3

Please indicate why the reviews sought by your members have never been declared inadmissible field optional

The body responsible for review procedures has always declared admissible your members' requests for review	7
To your knowledge, your members have never attempted to seek such a review	5
don't know	5

New prerogatives concerning reviews in the general interest

Total Responses : 37 on 37

Are you in favour of a provision in national legislations for a

national authority (already in existence or to be set up, but independent of the contracting authority) to have the power to bring matters before the body responsible for review procedures, where an infringement of Community law on public procurement has been detected? Such a referral by this authority acting in the general interest could be made with the particular aim of having provisional measures applied, illegal decisions set aside or sanctions imposed which are effective, proportionate and have a deterrent effect (in the form of financial penalties). compulsory

in favour	25
not in favour	12
don't know	0

Advantages

Total Responses : 37 on 37

This authority (whatever its status in national law) could play a useful role for those applicants who do not have a sufficient interest in acting and who could report to this authority infringements of Community law on public procurement detected by a contracting authority compulsory

agree	23
don't agree	13
don't know	1

This authority (whatever its status in national law) could play a useful role in the event of infringements which are difficult to detect by potential bidders (for example, the conclusion of a contract by direct agreement without publication of a notice in the Official Journal of the European Union) compulsory

agree	24
don't agree	13
don't know	0

This authority (whatever its status in national law) could play a useful role in the event of repeated infringements by a contracting authority of Community law on public procurement or of serious infringements of Community law on public procurement (particularly where the contracting authority has intentionally violated such rules) compulsory

agree	26
don't agree	11
don't know	0

Disadvantages

Total Responses : 37 on 37

Risk of multiplying the number of review procedures, thereby impeding the carrying out of public contracts, to the detriment of successful bidders in particular compulsory

agree	18

don't agree	18
don't know	1

The complainant or his lawyer is not familiar with the procedure employed by the authority compulsory

agree	18
don't agree	16
don't know	3

The fear that decisions by this authority to institute or not institute proceedings in the general interest might be made on a discretionary basis compulsory

don't agree	17
agree	15
don't know	5

Administrative authorities which have powers of mediation/conciliation

Total Responses : 37 on 37

If, in the Member State in question, administrative authorities specialising in public procurement have been set up with powers to mediate/conciliate with the contracting authorities, have your members had occasion to call on them to amicably resolve a dispute with the contracting authority? compulsory

not applicable	18
yes	13
no	3
no opinion	3

On the basis of your members' experience, how do you rate the effectiveness of these administrative authorities which have powers of mediation/conciliation? field optional

good	4
average	3
unsatisfactory	3
excellent	2

What advantages/disadvantages appeared when your members had occasion to call on such authorities? field optional

a swift process	6
the fact that decisions made by this type of authority are not of a binding nature does not encourage the contracting authorities to follow its recommendations, particularly in the case of	5

politically sensitive issues	
low cost of proceedings	4
does not have a suspensive effect on review deadlines	4
a pragmatic solution resulting in a good compromise, in the interests of both the injured bidder and the contracting authority, without jeopardising the basic principles of Community law on public procurement	3
This system has not resulted in a resolution of most of the cases brought by your members and in fact has led to a delay in settling disputes because your members have subsequently been obliged to appeal to the body responsible for review procedures	3
in the cases involving your members, the fact that these administrative authorities were not sufficiently independent of the contracting authority meant that satisfactory compromise solutions could not be found for the different interests in play	2
a slow process	0

Why don't your members call on the specialised administrative authorities which have powers of mediation/conciliation? field optional

the fact that these administrative authorities are not sufficiently independent of the contracting authority means that your members cannot find satisfactory compromise solutions for the different interests in play	1
the fact that decisions made by this type of authority are not of a binding nature does not encourage the contracting authorities to	1

follow its recommendations, particularly in the case of politically sensitive issues	
This system has not resulted in a resolution of most of the cases brought by your members and in fact has led to a delay in settling disputes because it has been necessary to appeal to the body responsible for review procedures	1
does not have a suspensive effect on review deadlines	1
other reason (give details)	1

Advantages and disadvantages of judicial and non-judicial bodies

Total Responses : 37 on 37

If, in the Member State in question, the body which is responsible for reviews at first instance and entitled to take provisional measures and annul illegal decisions is an administrative authority without the status of a court, what disadvantages have your members noted? (several answers possible) compulsory

not applicable	22
other reason(s) (give details)	7
the administrative authority arrives at decisions rapidly but these are often contested and must therefore be referred to a higher level for review, thus slowing down the process for arriving at a useful decision	5
the administrative authority is not sufficiently independent and may be inclined to make decisions of a political nature which have no legal basis	3
don't know	3
the administrative authority is not sufficiently competent in public procurement matters	1
the administrative authority does not arrive at decisions rapidly	0
the administrative	

authority does not scrupulously apply the adversarial principle	0

If, in the Member State in question, the body which is responsible for reviews at first instance and entitled to take provisional measures and annul illegal decisions is an administrative authority without the status of a court, what advantages have your members noted? (several answers possible) compulsory

the review is handled rapidly	16
not applicable	16
the authority is specialised	13
the review is handled impartially, respecting the adversarial principle	10
the costs of proceedings (including lawyer's fees) are not high	5
don't know	2
other reason(s) (give details)	2

If, in the Member State in question, the body which is responsible for reviews at first instance and entitled to take provisional measures and annul illegal decisions is a court, what disadvantages have your members noted? (several answers possible) compulsory

the costs of proceedings (including lawyer's fees) are too high	13
not applicable	10
other reason(s) (give details)	9
the body is the ordinary court and not specialised in public procurement matters	7
a slow process	6
don't know	3
is influenced by considerations which are not of a strict legal nature	1
partiality	1
does not respect the adversarial principle	0

Please indicate the average time taken to handle the review field optional

more than a year	3
between 20 days and 2 months	1
between 6 months and a	

year	1
between 2 and 6 months	0

If, in the Member State in question, the body which is responsible for reviews at first instance and entitled to take provisional measures and annul illegal decisions is a court, what advantages have your members noted? (several answers possible) compulsory

the review is handled impartially, respecting the adversarial principle	25
the review is handled rapidly	12
one or more specialised chambers or courts have been set up	11
not applicable	9
the costs of proceedings (including lawyer's fees) are not high	4
don't know	1

The brief period between the notification of an award decision and the signing of the contract

Total Responses : 37 on 37

Have your members already been faced with the situation of being deprived of the possibility of seeking a review to have interim measures taken (such as the suspension of the award procedure) and to have illegal decisions set aside, on the grounds that the contract had been signed, this without their having been notified previously by the contracting authority of the decision regarding the award of the contract and the rejection of their bid? (only one answer possible) compulsory

rarely	13
never	8
don't know	8
often	7
systematically	1

Do you think that the only solution which will allow injured bidders to initiate a pre-contractual review is to stipulate, by means of an amending directive, a minimum period between the notification of an award decision and the actual conclusion of the contract? (only one answer possible) compulsory

yes	30
no	6
don't know	1

Why? field optional

There are other possible solutions which result in	4

a useful review	
The Alcatel Judgment of the Court of Justice (Case C-81/98), which interpreted the "remedies" directives currently in force, is sufficient to oblige Member States to provide for a minimum period in their legislation	3

If you consider that a specific clause should be inserted in a directive, how long do you think the minimum period should be in order to strike a balance between the need to guarantee the effectiveness of the review and the concern not to unnecessarily delay the carrying out of public contracts? compulsory

between 15 and 30 calendar days	16
between 11 and 14 calendar days	13
don't know	5
10 calendar days	2
less than 10 calendar days	1

Taking into account your answer to the previous question, do you think there is a need for a shortened period in the case of accelerated procedures, due to a possible urgent need to sign the contract? compulsory

yes	18
no	14
don't know	5

What do you think this shortened period should be? field optional

10 calendar days	6
5 calendar days	4
8 calendar days	4
don't know	2
3 calendar days	1

The speed of applications for an interim order

Total Responses : 37 on 37

How do you assess the speed of applications for an interim order relating to award procedures for public contracts in the Member State in question? compulsory

positive	26
excellent	5
negative	5
very negative	1

In the experience of your members, how long, on average, does it take to obtain an interim order in the case of reviews concerning public contract award procedures? compulsory

10 days or less	12
between 31 and 60 days	6
between 11 and 20 days	5
don't know	5
between 21 and 30 days	4
over 90 days	4
between 61 and 90 days	1

The suspensive effect of pre-contractual reviews

Total Responses : 37 on 37

If the national legal system you are commenting on does not provide for a review to have an automatic suspensive effect on the contract award procedure to which it refers, in the majority of cases involving your members, were the reasons for the body responsible for review procedures refusing the suspension of the procedure based on: (several answers possible) compulsory

not applicable	14
a bar to proceedings by virtue of the signing of the contract	10
the consideration of the probable consequences of the suspensive measure on the public interest?	9
the consideration of the probable consequences of the suspensive measure on other interests which might suffer?	9
don't know	3
other reason(s)	2
the time limit?	1
the incompetence of the judicial or quasi-judicial authority	0

Do you think that a directive should provide for an automatic suspensive effect? compulsory

yes	18
no	11
don't know	8

What do you think would be a reasonable period of suspension? field optional

between 11 and 15 calendar days	6

more than 25 calendar days	5
don't know	3
between 16 and 20 calendar days	2
between 21 and 25 calendar days	2
10 calendar days or less	0

Why do you think that the directive should not provide for an automatic suspensive effect? field optional

This would result in an increase in dilatory and/or vexatious reviews and would unduly delay the carrying out of public contracts, to the detriment of the successful bidders and/or the public interest	9
An automatic suspension would be particularly detrimental to the successful bidder and/or the public interest where the review is manifestly inadmissible or unfounded	8
don't know	1
for other reasons, (give details)	0

Claims for damages

Total Responses : 37 on 37

Have your members already brought actions seeking damages for an injury arising from an irregularity in a public contract award procedure? (only one answer possible) compulsory

sometimes	19
often	10
don't know	8
never	0

Why have they never brought actions seeking damages? (several answers possible) field optional

The difficulty in proving that the company had good or very good chances of winning the contract (proof of a causal link between the illegality of the award procedure and the damage suffered)	0
The low amount of	

damages awarded by the judicial or quasi-judicial authority	0
The high cost of court proceedings for damages, which is disproportionate to the actual amount of damages expected	0
The obligation under the national legal system to obtain beforehand the annulment or the declaration of illegality of the contested decision made by the contracting authority	0
Your members' fear of not being treated fairly in the event of future procurement procedures	0
don't know	0
Other reason (give details)	0

If you have replied "sometimes" or "often", have these actions been a success for your members? field optional

partial success	28
total success	0
total failure	0

If applicable, why have these actions not been a total success? field optional

The difficulty in proving that the company had good or very good chances of winning the contract (proof of a causal link between the illegality of the award procedure and the damage suffered)	22
Your members' fear of not being treated fairly in the event of future procurement procedures	19
The high cost of court proceedings for damages, which is disproportionate to the actual amount of damages expected	12
The low amount of damages awarded by the judicial or quasi-judicial authority	8
The obligation under the national legal system to	

obtain beforehand the annulment or the declaration of illegality of the contested decision made by the contracting authority	8
don't know	2
Other reason (give details)	2

The "remedies" directives authorise the Member States to limit claims for damages once the contract has been signed If the legal system you are commenting on provides for this limitation, are your members satisfied with this system? compulsory

yes	12
no	10
not applicable	9
don't know	6

Please give your assessment of the possible advantages in limiting claims for damages once the contract has been signed field optional

Calling into question a signed contract would be contrary to the public interest and to the successful contractor because it would incur costs for interrupting or suspending the contract which are disproportionate to the interests of the bidder bringing the claim	9
other assessment (give details)	2
don't know	0

Reasons for dissatisfaction

Total Responses : 37 on 37

The chances of success of a claim for damages are more limited than those of a claim for suspension / annulment field optional

agree	8
don't agree	1
don't know	1

The amount of damages awarded is insufficient to offset the damage suffered by the company and to cover the legal costs incurred field optional

agree	6
don't agree	3

don't know	1

The possibility of suspending or annulling an award procedure when the latter offers the possibility of obtaining the annulment or cancellation of the concluded contract would encourage contracting authorities to respect the Community law on public procurement field optional

agree	7
don't know	2
don't agree	1

According to the state of the work carried out in connection with the contract, it may sometimes be proportionate to obtain the annulment or termination of the contract concluded, in view of the serious nature of the offence field optional

agree	8
don't agree	1
don't know	1

Post-contractual reviews: what alternative is there to calling into question the signed contract?

Total Responses : 37 on 37

Do you think that another solution would be to limit the possibility of calling the contract into question to contracts of the ongoing type and for a reduced period (from one to six months), following the signing of the contract? compulsory

no	20
don't know	9
yes	8

Special sectors: a sanction consisting of the payment of a sufficiently large sum

Total Responses : 37 on 37

In the special sectors (water, energy, transport and telecommunications), some Member States have included the possibility of providing for the payment of a sufficiently large sum (a "fine"), as a protective measure and/or sanction, instead of the imposition of provisional measures and the annulment of illegal decisions If your members have brought actions in those Member States which have opted for such a mechanism in the special sectors, have they found this mechanism to be: compulsory

not applicable	20
don't know	14
as effective as the mechanism of imposing provisional measures and the annulment of illegal decisions?	1
totally ineffective	

compared with the mechanism of imposing provisional measures and the annulment of illegal decisions?	1
impossible to answer because the number of reviews employing this mechanism is insignificant and/or your members have never had occasion to put it into practice	1
less effective	0

Special sectors: attestation and conciliation

Total Responses : 37 on 37

In the special sectors (water, energy, transport and telecommunications), have you had experience of contracts awarded by contracting authorities which benefitted from an attestation stating at a given time that their public contract awarding procedures are in accordance with the Community law in this field and with the national rules transposing this law? compulsory

no	37
yes	0

If you have had experience of this attestation mechanism, has it been shown that those contracting authorities which benefitted from it committed fewer irregularities in contract awarding procedures than contracting authorities which did not benefit from it? field optional

yes	0
no	0
not applicable	0
don't know	0

In the special sectors, have your members already requested the use of the conciliation mechanism provided for in Articles 9 to 11 of Directive 92/13/EEC ? compulsory

don't know	26
no	11
yes	0

Cross-border reviews

Total Responses : 37 on 37

What, in general, are the difficulties faced by the companies or interests which you represent, such as the case of a company seeking review in a Member State, other than the one in which the company is established, when it has bid for a contract being awarded by a contracting authority in this other Member State? compulsory

not applicable	21
In all or most of their reviews, they did not obtain what they consider they were entitled to	8
The bidders were dissuaded or found it impossible to seek one or more reviews	7
All or most of the reviews were partially successful as regards their initial demands	1
All or most of the reviews were completely successful as regards their initial demands	0
All or most of their reviews were completely or partially successful as regards their initial demands but it was not possible to win the contract whose award procedure was contested	0

What is/are the reason/reasons they were dissuaded or found it impossible to seek one or more reviews in this Member State? field optional

don't know	3
The contracting authority concluded a contract by direct agreement without publishing a notice, thus depriving them of the possibility of knowing in time of the existence and/or the content of the contract which was likely to be contested	2
They were not confident that their appeal would be handled impartially	1
The ineffectiveness in national law of a review which was sought after the contract had been signed	1
other reason(s) (give details)	1
They were not confident that the national appeal procedures were effective	0
The considerable length of time elapsing between the presentation of the appeal and the delivery	0

of the judgment

Why didn't they obtain what they should have obtained according to their analysis of the Community law applicable? field optional

don't know	4
The contract was signed before review was sought	2
The body responsible for the review considered that the bidder did not possess a sufficient interest in acting	2
The contracting authority was not found to be responsible because of the difficulty in proving a causal link between the illegality of the award procedure and the damage suffered by the bidder	1
The contract was signed after review was sought but before the body responsible for the review delivered judgment	0
The body responsible for the review refused to annul the decisions of the contracting authority which your members considered illegal	0
The amount of damages awarded was insignificant compared with the damage assessed	0
other reason(s) (give details)	0

Thank you for taking part in this survey!

Total Responses : 37 on 37

Are you willing for the Commission services to contact you in order to obtain further details about the information you have given? compulsory

yes	36
no	1

What is your opinion of this questionnaire? compulsory

Met my expectations	30
Did not meet my expectations	7

Why? field optional

too difficult to understand	■ 3
content not pertinent	■ 2
too general	0
too short	0
too technical	0
too long	0

IMPORTANT LEGAL NOTICES

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Public Procurement

Public Procurement Revision of the directives on review procedures Consultation with the contracting authorities

Consultation with the contracting authorities

prior to revision of the "remedies" Directives in the field of public procurement

- **Consultation**
- **Questionnaire**

Consultation

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The present consultation aims to collect the views of the contracting authorities (among which local municipalities or public bodies) on the operation of national review procedures and on proposals to improve the effectiveness of those procedures in the field of public procurement.

Directives 89/665/EEC *(review procedures / public supply and public works contracts in traditional sectors)* and 92/13/EEC *(review procedures / public contracts in the water, energy, transport and telecommunications sectors)* were designed to ensure effective implementation of the Directives on public procurement procedures. The opening up of public contracts to Community competition requires considerably stronger guarantees of transparency and non-discrimination, the effectiveness of which depends in particular on effective, rapid remedies at national level in the event of infringement of Community law on public procurement or of national rules transposing that law.

It has emerged, however, that not all public purchasers in the Member States are implementing Community law on public procurement procedures in a satisfactory manner. The fact that only a small percentage of calls to tender are published (16.2% for the European Union in 2002) and that the figure varies appreciably from one Member State, type of contracting authority and sector of activity to another (1), shows that the Directives are not yet fully effective. Clearly, it is not possible in this situation to take full advantage of genuine competition between potential tenderers throughout the Community.

Moreover, initial consultations launched by Commission departments with the Member States, economic operators and their representatives have revealed that the operation of national review procedures does not always make it possible to correct failures to respect Community law on public procurement effectively or quickly. It has also become apparent that the effectiveness of review mechanisms in the public procurement field varies appreciably from one Member State to another, which may discourage some economic operators from tendering for public contracts.

The process of revising the "remedies" Directives, which will not be launched until the ?public procurement? package is in force and the process of consulting all the interested parties is complete, will provide an opportunity to reassess and reinforce the effectiveness of the remedies provided for in Directives 89/665 and 92/13, as and where necessary.

At this early stage, the Commission departments feel that any amendments should merely adapt and improve certain provisions of the ?remedies? Directives, without altering the philosophy and principles which underlie them. For example, the principle of the Member States? procedural autonomy will not be called into question. Member States will, in particular, retain the power to select a court, tribunal or independent authority competent to hear challenges relating to Community law on public procurement in accordance with their national law. However, the unsatisfactory situation brought about mainly by the very heterogeneous operation of Member States? national review procedures, and recent developments in case law (2), require clarification of or greater precision in the existing legislative framework, in order to ensure that there are sanctions which are effective and proportionate and which have a deterrent effect on infringements of Community law on public procurement, especially the most serious infringements (direct award of contracts without prior notification).

Adoption of the "legislative package" coordinating public procurement procedures will require technical adjustments to the ?remedies? Directives, namely, references to the new Directives. Essentially, therefore, the proposal to amend the Directive, if adopted by the Commission, should clarify or strengthen the existing provisions.

Having exchanged views with the Member States? representatives in the Advisory Committee for Public Contracts, and the economic operators and their representatives (lawyers and professional associations) on several occasions since 2003 using the Interactive Policy Making (IPM) tool (3), the Commission departments would now like to know what lessons the contracting authorities (e.g. local authorities and bodies under public law) draw from the operational procedures and mechanisms provided for in Directives 89/665 and 92/13 since they came into force.

Questionnaire

The Commission departments have therefore drawn up a questionnaire (below) to enable the members to provide feedback, point by point. The contracting authorities are asked to complete the questionnaire and return it by 15 June 2004 (closed).

1. **Article 1(3), 1st sentence, of Directives 89/665 and 92/13** stipulates that review procedures should be available at least to any person having or having had an interest in obtaining a particular public contract (1st condition) and who risks or has risked being harmed by an alleged infringement (2nd condition).
   - If your national legislation restricts review procedures to this category of person, who must satisfy these two conditions, what lessons do you draw you from that restriction?
   - If your national legislation does not apply these two conditions, what advantages or disadvantages do you see in such a situation?

2. **Article 1(3), final sentence, of Directives 89/665 and 92/13** states: "In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review."
   - If your national legislation provides for prior information of this kind, what lessons do you draw from the operation of this provision? If your national legislation does not provide for such information, what are your views on a mechanism of this kind?

3. **Article 2(1.a) and (1.b) of Directive 89/665**
   - In the light of the Alcatel (4) judgment, in which the Court of Justice interpreted Article 2(1.a) and (1.b) of Directive 89/665, should the ?remedies? Directives explicitly provide for a minimum period between the notification of an award decision and actual conclusion of a public contract?
   - What should be the minimum period in which a contractor who has been harmed by an award decision can take action against it in order to have the signing of the contract suspended in good time?
   - Do you think there should be a shortened period for seeking review in the context of an accelerated procedure, given that the signing of the contract might be urgent?

4. **Article 2(1.c) and Article 2(5) and (6) of Directive 89/665 and Article 2(1.d) and final sentence of Directive 92/13** concern the award of damages.
   - In your view, are these provisions satisfactory?
   - What, in your opinion, are the main obstacles encountered by contractors harmed by decisions when they bring an action for damages?
   - Do you think it would be useful to lower/eliminate these obstacles?

5. Under **Article 2(3) of Directive 89/665 and Article 2(3) of Directive 92/13**, review procedures need not necessarily have automatic suspensory effects on the award procedures to which they relate.

   - If your national legal system provides for automatic suspensory effects, what lessons do you draw from the operation of this mechanism?
   - If your national legal system does not provide for automatic suspensory effects, what advantages/drawbacks do you see in giving the authority competent for review procedures the power to suspend or uphold the award procedure?

6. Under **Article 2(4) of Directive 89/665 and of Directive 92/13**, Member States may allow the competent authority, when it examines whether measures are appropriate, to take account both of the likely consequences of such measures for all parties liable to be harmed, and of the public interest, and to decide not to take such measures if their disadvantages might outweigh their advantages. A decision not to take interim measures is not prejudicial to other rights enjoyed by the person seeking those measures.

    - If your national legal system provides for such a limitation, how would you assess its application to reviews which concern you?

7. **Article 2(5) of Directive 89/665 (and Article 2(1), final sentence, of Directive 92/13)** allows for a contested decision by a contracting authority to be set aside (?set aside or declared illegal? in Directive 92/13).
    - If your national legal system provides for such a procedure, what advantages/disadvantages have you observed?

8. **Article 2(6), 2nd sentence, of Directive 89/665 and Article 2(6), 2nd sentence, of Directive 92/13** allow the Member States to limit remedies to the granting of damages once the contract has been concluded.
    - If your legal system provides for this limitation, how have you found it?
    - If your legal system makes it possible for injured parties to obtain the suspension or setting aside, or an injunction cancelling an unlawful public contract, what lessons do you draw from it?
    - If these possibilities are not offered by your Member State?s legislation, what do you think of them?

9. **Article 2(8) of Directive 89/665 and Article 2(9) of Directive 92/13** allows for the authorities competent for review procedures not to be judicial in character, provided that they justify the measures which they take in writing and that those measures may be the subject of review by a court or tribunal within the meaning of Article 234 of the EC Treaty.
    1. If your national legal system provides for or has, in the past, provided for obligatory prior administrative and/or hierarchical review, what lessons do you draw from it? If there is or has been such an obligation, how does/did it fit in with Article 2(1.a) of Directive 89/665, which provides for a review permitting interim measures to be taken at the earliest opportunity and by way of interlocutory procedures?
    2. If your national legal system involves independent authorities specialising in public contracts, what lessons do you draw from their operation?
    3. Do you think that authorities (independent of the contracting authority) which already exist in certain Member States (for example, an independent administrative authority, whether specialised or not, a Court of Auditors, Ombudsman, Public Prosecutor, Prefect etc.) or which might be created in future, should be given new prerogatives, so as to improve implementation of Community law on public procurement? These new prerogatives might, for example, consist in the power to refer a matter to a competent judicial or quasi-judicial authority for public procurement if there is an alleged infringement of the relevant Community law, particularly with a view to securing interim measures, the cancellation of unlawful decisions, or sanctions which are effective and proportionate and which have a deterrent effect.

    What do you see as the advantages and disadvantages of such a proposal?

10. **Other**

- What other limitations or difficulties have you encountered in the mechanism created by Directives 89/665 and 92/13?
- What improvements would you suggest?

[1] See the report entitled: "A report on the functioning of public procurement markets in the EU: benefits from the implementation of EU directives and challenges for the future?, 3 February 2004, available in English only

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[2] See, in particular, the following judgments: Alcatel (C-81/98), Krankenhaustechnik (C-92/00) and Universale-Bau AG (C-470/99).

[3] The results of the IPM consultations can be found on Your Voice in Europe

[4] Case C-81/98, CJEC, 28 October 1999

Mailbox

Last update on 11-05-2005

Høring af de ordregivende myndigheder forud for ændringen af direktiverne om klageprocedurer i forbindelse med offentlige kontrakter

Denne høring har til formål at indhente oplysninger om ordregivende myndigheders (lokale myndigheders og offentligretlige organers) holdning til, hvordan de nationale klageprocedurer i forbindelse med offentlige kontrakter fungerer, og forslag til, hvordan disse procedurer kan gøres mere effektive.

Direktiv 89/665/EØF (*klageprocedurer i forbindelse med offentlige indkøbs- samt bygge- og anlægskontrakter*) og 92/13/EØF (*klageprocedurer i forbindelse med offentlige kontrakter inden for vand- og energiforsyning samt transport og telekommunikation*) blev vedtaget med henblik på at sikre effektiv håndhævelse af direktiverne om fremgangsmåderne ved indgåelse af offentlige kontrakter. Adgangen til på fællesskabsplan at konkurrere om offentlige kontrakter har nemlig krævet en betydelig udvidelse af foranstaltningerne til at sikre gennemsigtighed og ikke-forskelsbehandling, hvis virkninger især afhænger af, om der findes effektive og hurtige klageprocedurer på nationalt plan i tilfælde af overtrædelse af fællesskabslovgivningen om offentlige kontrakter eller de nationale regler, der omsætter denne lovgivning.

Det har imidlertid vist sig, at ikke alle offentlige indkøbere i medlemsstaterne anvender fællesskabslovgivningen om fremgangsmåderne ved indgåelse af offentlige kontrakter på tilfredsstillende måde. Det forhold, at kun en ringe procentdel af alle udbudsbekendtgørelser offentliggøres (16,2 % på EU-plan i 2002), og at dette tal varierer betydeligt alt efter medlemsstat, ordregivende myndighed og sektor[1], viser, at direktiverne endnu ikke virker helt efter hensigten. Det er klart, at det i denne situation ikke er muligt at udnytte de fordele, der ville være til stede, hvis der var reel konkurrence mellem alle potentielle tilbudsgivere på fællesskabsplan.

Det fremgår desuden af Kommissionens første høringer af medlemsstaterne og de økonomiske aktører og deres repræsentanter, at den måde, hvorpå de nationale klageprocedurer fungerer, ikke altid gør det muligt at rette op på overtrædelser af fællesskabslovgivningen om offentlige kontrakter på en effektiv og hurtig måde. Det er endvidere blevet konstateret, at der er betydelig forskel i effektiviteten af klageprocedurerne i forbindelse med offentlige kontrakter fra den ene medlemsstat til den anden, og det kan betyde, at nogle økonomiske aktører måske ikke finder det fuldt betryggende at ansøge om tildeling af offentlige kontrakter.

I forbindelse med ændringen af direktiverne om klageprocedurer, der i givet fald først vil finde sted efter ikrafttrædelsen af lovpakken om offentlige kontrakter og høringen af samtlige berørte parter, vil der blive mulighed for at revurdere og styrke effektiviteten af de klageprocedurer, der er omhandlet i direktiv 89/665/EØF og 92/13/EØF, på områder, hvor det er nødvendigt.

[1] Jf. "*A report on the functioning of public procurement markets in the EU : benefits from the application of EU directives and challenges for the future*" af 3. februar 2004, der kun foreligger på engelsk, på følgende websted: http://www.europa.eu.int/comm/internal_market/en/publproc/general/public-proc-market-final-report_en.pdf

På dette indledende stadium er det Kommissionens opfattelse, at de ændringer, der skal gennemføres, kun bør sigte mod at tilpasse og forbedre visse bestemmelser i direktiverne om klageprocedurer uden at ændre det grundsyn og de principper, der ligger bag deres vedtagelse. Der vil således ikke blive sat spørgsmålstegn ved princippet om medlemsstaternes ret til at anvende deres egne processuelle regler. Medlemsstaterne vil bl.a. fortsat have mulighed for at afgøre, hvilken retsinstans eller uafhængig myndighed der i henhold til national retspleje skal kunne afgøre klagesager i forbindelse med fællesskabslovgivningen om offentlige kontrakter. Den utilfredsstillende situation, der især skyldes medlemsstaternes meget forskellige nationale klageprocedurer, og den seneste udvikling i retspraksis[2] gør det imidlertid nødvendigt at afklare og præcisere den eksisterende retlige ramme, så der kan pålægges effektive, rimelige og afskrækkende sanktioner for overtrædelse af fællesskabslovgivningen om offentlige kontrakter, især for de groveste overtrædelser (direkte tildeling af kontrakter uden forudgående offentliggørelse).

Herudover vil der i forbindelse med vedtagelsen af lovpakken om samordning af fremgangsmåderne ved indgåelse af offentlige kontrakter skulle foretages tekniske tilpasninger af direktiverne om klageprocedurer i form af henvisninger til de nye direktiver. Forslaget til ændringsdirektiv vil således – hvis Kommissionen beslutter at vedtage det - i alt væsentligt skulle udformes som en afklaring eller en styrkelse af de eksisterende bestemmelser.

Kommissionen ønsker nu, efter gentagne gange siden 2003 at have hørt og orienteret medlemsstaternes repræsentanter i Det Rådgivende Udvalg for Offentlige Aftaler samt de økonomiske aktører og deres repræsentanter (advokater og brancheorganisationer) ved hjælp af værktøjet interaktiv politikudformning[3], at vide mere om, hvilke erfaringer de ordregivende myndigheder (f.eks. lokale myndigheder og offentligretlige organer) uddrager af den måde, hvorpå de i direktiv 89/665/EØF og 92/13/EØF omhandlede klageprocedurer har fungeret, siden de trådte i kraft.

Med henblik herpå har Kommissionens tjenestegrene udarbejdet et spørgeskema (se nedenfor), der kan give den strukturerede oplysninger om hvert enkelt punkt. De ordregivende myndigheder bedes udfylde dette spørgeskema og returnere det til den kompetente tjenestegren i Kommissionen inden den 15. juni 2004 på følgende adresse:

Europa-Kommissionen
Generaldirektoratet for det Indre Marked
Kontor D1, Udbudspolitik I
B-1049 Bruxelles
E-mail: remediespublicprocurement@cec.eu.int

[2] Jf. bl.a. dommene "Alcatel" (sag C-81/98), "Krankenhaustechnik" (sag C-92/00) og "Universale-Bau AG" (C-470/99).

[3] Resultaterne af høringerne i forbindelse med den interaktive politikudformning findes på webstedet: www.europa.eu.int/yourvoice

SPØRGESKEMA

1/ **Artikel 1, stk. 3, første punktum, i direktiv 89/665/EØF og 92/13/EØF** bestemmer, at der skal være adgang til klageprocedurer i det mindste for personer, der har eller har haft interesse i at få tildelt en bestemt kontrakt (1. betingelse), og som har lidt eller vil kunne lide skade som følge af en påstået overtrædelse (2. betingelse).

Hvis den danske lovgivning har begrænset klageadgangen til denne kategori af personer, der opfylder disse to betingelser, hvilke erfaringer uddrager De da af denne begrænsning?

Hvis de to betingelser vedrørende personer, der indleder klageprocedurer, ikke er medtaget i den danske lovgivning, hvilke fordele eller ulemper har De da bemærket som følge heraf?

2/ **Artikel 1, stk. 3, andet punktum, i direktiv 89/665/EØF og 92/13/EØF** bestemmer følgende: "Medlemsstaterne kan navnlig kræve, at en person, der ønsker at anvende en sådan procedure, på forhånd har underrettet den ordregivende myndighed om den påståede overtrædelse og om, at vedkommende agter at indgive klage."

Hvis den danske lovgivning indeholder en sådan bestemmelse om forhåndsoplysning, hvilke erfaringer uddrager De da af den måde, denne bestemmelse fungerer på? Hvis der ikke er fastsat en sådan bestemmelse i den danske lovgivning, hvad mener De da om en sådan ordning?

3/ Bør der i direktiverne om klageprocedurer som følge af Domstolens dom i *Alcatel*-sagen[4] om fortolkning af **artikel 2, stk. 1, litra a) og b), i direktiv 89/665/EØF** udtrykkeligt fastsættes en minimumsfrist mellem meddelelsen af tildelingsbeslutningen og den faktiske indgåelse af en offentlig kontrakt? Hvor lang en frist bør den skadelidte virksomhed under alle omstændigheder råde over for at kunne klage over tildelingsbeslutningen, hvis den skal kunne nå at få suspenderet indgåelsen af kontrakten? Finder De det i den forbindelse nødvendigt med en kortere klagefrist som led i en fremskyndet procedure i tilfælde, hvor kontrakten skal indgås meget hurtigt?

4/ **Artikel 2, stk. 1, litra c), og artikel 2, stk. 5 og 6, i direktiv 89/665/EØF og artikel 2, stk. 1, litra d), og artikel 2, stk. 1, andet afsnit, i direktiv 92/13/EØF** indeholder bestemmelser om skadeserstatning. Finder De disse bestemmelser fyldestgørende? Hvilke hovedhindringer støder skadelidte virksomheder efter Deres mening på, når de anlægger sag med krav om skadeserstatning? Ville det efter Deres mening være hensigtsmæssigt at begrænse/fjerne disse hindringer?

5/ **Artikel 2, stk. 3, i direktiv 89/665/EØF og artikel 2, stk. 3, i direktiv 92/13/EØF** bestemmer, at klageprocedurerne ikke nødvendigvis skal have automatisk opsættende virkning for de udbudsprocedurer, som de vedrører. Hvis der i det danske retssystem er fastsat bestemmelser om en sådan automatisk opsættende virkning for visse procedurer,

[4] Jf. EF-Domstolens dom af 28. oktober 1999, sag C-81/98.

hvilke erfaringer mener De da der kan uddrages af den måde, disse bestemmelser fungerer på? Hvis der ikke er fastsat bestemmelser om automatisk opsættende virkning i det danske retssystem, hvilke fordele og ulemper finder De da der kan være forbundet med, at den instans, der er ansvarlig for klageprocedurerne, kan have beføjelse til at afgøre, om indgåelsen af kontrakten skal suspenderes eller ej?

6/ **Artikel 2, stk. 4, i direktiv 89/665/EØF** og i direktiv 92/13/EØF bestemmer, at medlemsstaterne kan foreskrive, at den ansvarlige instans, når den undersøger, om der skal træffes midlertidige foranstaltninger, kan tage hensyn til de sandsynlige følger af sådanne foranstaltninger for alle interesser, som vil kunne skades, samt til almenvellet, og beslutte ikke at give sit samtykke hertil, når de negative følger af sådanne foranstaltninger vil være større end fordelene. En beslutning om ikke at tillade midlertidige foranstaltninger berører ikke de øvrige rettigheder, som den person, der anmoder om disse foranstaltninger, måtte gøre krav på.

Hvis der i det danske retssystem er fastsat en sådan begrænsning, hvordan bedømmer De da den konkrete anvendelse heraf i forbindelse med de klagesager, der berører Dem?

7/ **Artikel 2, stk. 5, i direktiv 89/665/EØF** (og artikel 2, stk. 1, andet afsnit, i direktiv 92/13/EØF) giver medlemsstaterne mulighed for at gøre adgangen til klage med krav om skadeserstatning betinget af, at den anfægtede beslutning fra den ordregivende myndighed annulleres (i direktiv 92/13/EØF, at den annulleres eller erklæres ulovlig). Hvis der i det danske retssystem er fastsat en sådan procedure, hvilke fordele og ulemper har De da konstateret i den forbindelse?

8/ **Artikel 2, stk. 6, andet afsnit, i direktiv 89/665/EØF og artikel 2, stk. 6, andet punktum, i direktiv 92/13/EØF** giver medlemsstaterne mulighed for at bestemme, at klageadgangen efter indgåelsen af kontrakten begrænses til krav om ydelse af skadeserstatning. Hvis der i det danske retssystem er fastsat en sådan begrænsning, hvilke erfaringer uddrager De da heraf? Hvis det i det danske retssystem er muligt for den skadelidte part at få ulovlige offentlige kontrakter suspenderet, annulleret eller ophævet, hvilke erfaringer uddrager De da heraf? Hvis lovgivningen i Danmark ikke omfatter sådanne muligheder, hvad mener De da herom?

9/ **Artikel 2, stk. 8, i direktiv 89/665/EØF og artikel 2, stk. 9, i direktiv 92/13/EØF** bestemmer, at de myndigheder i første instans, der er ansvarlige for klageprocedurerne, kan være andre instanser end retsinstanser, forudsat at de foranstaltninger, som disse myndigheder træffer, begrundes skriftligt og kan indbringes for en instans, der er en ret som omhandlet i EF-traktatens artikel 234.

9-1 Hvis der i det danske retssystem er fastsat eller tidligere har været fastsat en forpligtelse til forudgående administrativ klageadgang, hvilke erfaringer uddrager De da heraf? I bekræftende fald, hvordan fungerer/fungerede denne form for klageadgang i forhold til artikel 2, stk. 1, litra a), i direktiv 89/665/EØF, i henhold til hvilken der kan træffes midlertidige foranstaltninger som hastesag?

9-2 Hvis der i det danske retssystem findes uafhængige forvaltningsorganer, der specielt beskæftiger sig med offentlige kontrakter, hvilke erfaringer uddrager De da af den måde, disse organer fungerer på?

9-3 Bør disse myndigheder (som er uafhængige i forhold til den ordregivende myndighed), der allerede findes i nogle medlemsstater (f.eks. specialiseret eller ikke specialiseret uafhængigt administrativt organ, rigsrevision, ombudsmand, offentlig anklager, amtmand osv.), eller som vil kunne etableres, efter Deres mening tildeles nye beføjelser med henblik på at forbedre håndhævelsen af fællesskabslovgivningen om offentlige kontrakter? Der kunne f.eks. være tale om beføjelser til at indbringe en sag for den kompetente domstol eller domstolslignende myndighed, hvis der konstateres overtrædelser af fællesskabslovgivningen om offentlige kontrakter, navnlig med henblik på midlertidige foranstaltninger, annullering af ulovlige beslutninger eller pålæggelse af effektive, rimelige og afskrækkende sanktioner.

De bedes anføre, hvilke fordele og ulemper der efter Deres opfattelse er forbundet med et sådant forslag.

10/ Hvilke andre begrænsninger eller vanskeligheder har De oplevet i forbindelse med den ordning, der blev indført med direktiv 89/665/EØF og 92/13/EØF? Hvilke forbedringer vil De foreslå?

A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future

03/02/2004

EXECUTIVE SUMMARY

Economic reforms pay off. This working document presents evidence of the positive impact of Internal Market rules on the performance of public procurement markets over the past ten years. Indicators show positive developments in market transparency, increased cross border competition and price savings derived from the implementation of public procurement directives.

Public procurement directives have effectively increased transparency. The number of invitations to tender and contract award notices published both doubled between 1995 and 2002. However, only 16% of the estimated public procurement is published. Transparency rates vary between Member States and for different government levels and sectors.

New data suggest that previous studies may have underestimated the actual dimension of cross-border procurement. In a sample of firms involved in procurement activities, 46% carried out some type of cross-border procurement. However, direct cross-border procurement remains low, accounting for just 3% of the total number of bids submitted by the sample firms. The rate of indirect cross-border public procurement is higher, with 30% of the bids in the sample being made by foreign firms using local subsidiaries.

It is important to note that domestic firms and foreign subsidiaries have similar rates of success when bidding for contracts in the country where they are located (30 and 35% respectively). This confirms the importance in Europe of bidding for contracts through subsidiaries.

The new evidence also suggests that public procurement prices paid by public authorities are lower when the directives are applied. Although price dispersion for homogenous products remains quite large, the application of procurement rules appears to reduce prices by around 30%. Case studies of "typical" public procurement goods show that in general, the directives helped to increase intra EU competition. Import and export prices of these goods converged over time. For instance, in the case of small iron and steel rails export price dispersion dropped from around 21% in 1988-92 to 7% in 1998-2002. However further savings are still possible (for the six case studies considered, the equivalent of almost 12% of the value of intra-EU trade in these goods could still have been saved in 1998-2002).

Given the economic importance of public procurement markets the importance of these improvements is clear. In 2002 the total EU procurement market was worth €1.5 trillion or over 16% of EU GDP. Further improvements would contribute to increase efficiency in public spending and budget deficit control.

In conclusion, there is overwhelming evidence that the current directives have actively contributed to reform in the public procurement markets. Remaining concerns about the significant costs of complying with procurement rules are addressed by the new legislative package and e-procurement offers new possibilities for cost reductions. Further performance improvements will be possible if these measures are effectively implemented.

INTRODUCTION

Public authorities are significant market players as buyers of goods and services. Before the creation of the Internal Market, national, regional and local authorities favoured domestic suppliers. This was not only incompatible with the Treaty provisions requiring the creation of a single Internal Market but also had negative macro and microeconomic implications for the European economy.

- As recently recalled in the report on the quality of public finances[1], competitive public procurement practices are essential for efficiency in public spending. Competitive, transparent procurement markets help public authorities acquire cheaper, better quality goods and services at lower costs. As a result both the value of taxpayers' money and the allocation of resources are improved.

- Open, non-discriminatory and transparent procedures can also help boost the competitiveness of firms operating in public procurement markets. Only firms confronted by foreign competitors at home will be able to perform efficiently and compete successfully in foreign markets and withstand foreign competition at home.

Over the years public procurement directives have been progressively implemented[2] but the monitoring of public procurement markets presents multiple difficulties. Nevertheless, "ad hoc" studies conducted in 1996 and 1999 together with the Cardiff reports on economic reform between 1999 and 2002 presented regularly updated indicators[3].

In this working document an account of the performance of public procurement markets is given using new indicators. This new evidence suggests that legislative changes introduced in public procurement markets over the last ten years have had their intended effect in increasing transparency and competition. In particular, quantitative information is presented on areas where it has been particularly scarce in the past such as price levels and cross-border procurement activities. The purpose of this document is to analyse and investigate the impact that existing economic reforms have had on the Internal Market. The document does not put forward any political initiatives, but concentrates instead on presenting results which, as will be seen, clearly show that economic reforms work, providing significant savings for the public purse.[4]

This new information is particularly useful on the occasion of the adoption of the new legislative package up-dating, streamlining and improving the existing directives. Prompt

[1] COM(2003) 283 final Communication from the Commission to the Council and the European Parliament - Public finances in EMU - 2003 (21.05.2003).

[2] Directives 92/50, 93/36, 93/37, 93/38 as amended by 97/52 and 98/4.

[3] Euro-Strategy consultants Application of Measurements for the Effective Functioning of the Single Market in the area of public procurement, 1999 and The Single Market Review, Sub-series III: Dismantling of Barriers, Volume II: Public Procurement, 1997 and http://europa.eu.int/comm/internal_market/en/update/economicreform/index.htm.

[4] For general policy considerations see the Internal Market strategy 2003-2006 COM(2003) 238 final and the Integrated Competitiveness strategy COM(2003) 704 final.

and appropriate implementation by Member States of the new legislative package will simplify procedures and cut administrative costs, building on the existing improvements and in turn further increasing transparency and competition and reducing costs and remaining inefficiencies in the public sector.

The document examines the expected impact of measures aimed at increasing competition in public procurement markets in their logical sequence. After a short section on the quantitative importance of public procurement in the EU, section three presents indicators showing the evolution of transparency in European procurement markets. Section four presents evidence suggesting that increased transparency has been followed by increased cross-border competition. Indirect cross-border procurement through subsidiaries appears more extensive and important than previously thought, suggesting that earlier figures on the importance of the EU's overall cross-border procurement activities were underestimated. However, more direct cross-border procurement is still possible. Section five presents evidence suggesting that, thanks to the directives on transparency and cross-border competition, public authorities are actually paying lower prices. The final section before the conclusion discusses additional dimensions of market performance including specific impacts on Small and Medium Enterprises (SMEs), environmental and social issues and transaction costs.

THE IMPORTANCE OF PUBLIC PROCUREMENT

According to Commission estimates, total public procurement amounted to €1500 billion in 2002 accounting for 16.3 % of the Union’s GDP. For the last eight years this share has remained stable. The importance of total public procurement by Member State varies significantly: from 11.9% of GDP in Italy to 21.5% in the Netherlands[5].

Not all public procurement is subject to the obligations established by EU directives. Some activities (e.g. the purchase of warlike material for the defence sector) are excluded and purchases below thresholds only need to meet the general rules of the Treaty, not the publication requirements included in the directives. Estimating the percentage of total public procurement subject to publication procedures is very difficult. However, only 16% of public procurement is published (see Table 2 on page 8). Thus, transparency still needs to increase in the future in order to improve market performance in public procurement markets.

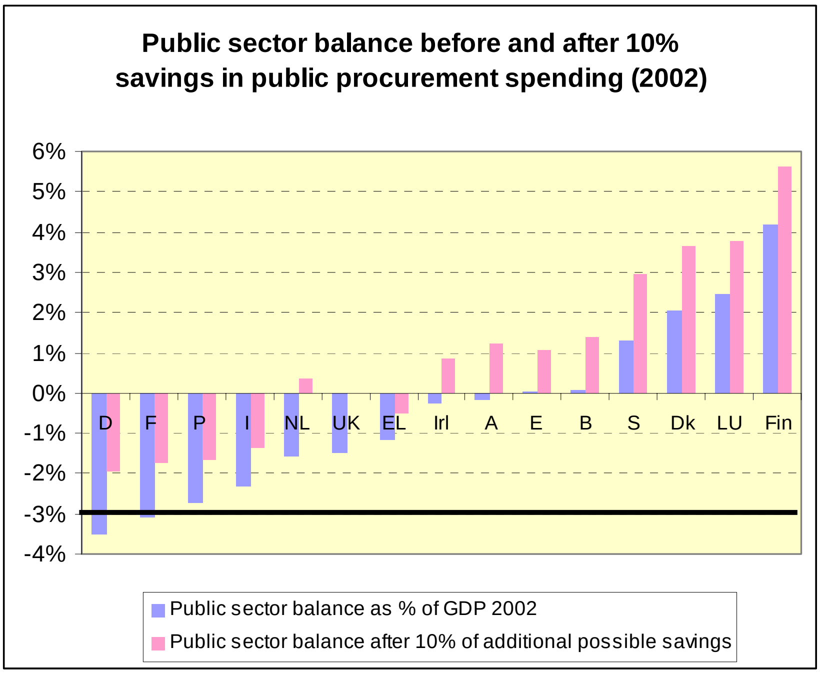
[5] Estimates of the total importance of public procurement for OECD economies and for the EU vary depending on the methodology used for their calculation and on the definition of public procurement used. A survey published by the OECD in 2001 (OECD, *Government procurement: A synthesis Report*, 2001) estimated government procurement for central, local and social entities at 9.24 % of GDP for the EU and 9.17% for OECD countries. If defence expenditure is deducted, the percentage is 8.03% for the EU and 7.57% for OECD countries.

Table 1	**Total Procurement as a Percentage of GDP**							
	1995	1996	1997	1998	1999	2000	2001	2002
Belgium	14,38	14,61	14,35	14,37	14,69	14,75	14,91	15,22
Denmark	16,27	16,26	16,51	16,94	17,26	17,39	18,40	18,76
Germany	17,98	17,99	17,45	17,19	17,15	16,99	17,01	17,03
Greece	13,62	12,92	12,69	13,00	12,71	13,55	12,98	12,62
Spain	13,84	12,81	12,76	12,97	12,94	12,73	12,75	13,02
France	17,26	17,32	17,26	16,49	16,35	16,52	16,35	16,62
Ireland	13,54	12,87	12,11	11,95	12,05	12,23	13,25	13,30
Italy	12,58	12,17	12,00	12,12	12,25	12,37	12,69	11,88
Luxembourg	15,49	16,01	14,89	14,43	14,38	13,11	14,25	15,48
Netherlands	20,84	20,51	20,27	20,12	20,21	20,12	20,68	21,46
Austria	18,36	18,15	17,70	17,69	17,77	17,05	16,22	16,46
Portugal	14,14	14,56	14,57	13,85	14,29	13,98	13,91	13,26
Finland	16,25	16,70	16,57	15,96	16,06	15,37	15,72	16,45
Sweden	22,14	20,97	19,99	20,48	20,27	19,40	20,01	20,49
UK	21,68	20,58	18,24	17,79	17,84	17,46	17,89	18,42
EU 15	**17,26**	**16,89**	**16,33**	**16,10**	**16,13**	**16,02**	**16,18**	**16,30**

Source: Internal Market Directorate General

It is important to have an idea of the magnitude of the potential savings that may result from improvements to the public procurement market. For example, if we assume that Member States could save 10% of their public procurement expenditure and look at the impact of these savings on the magnitude of government budget balances, we can see that these hypothetical savings would have a non-negligible impact, as shown in Figure 1[6].

Figure 1



Source: Internal Market Directorate General

[6] These figures are given to show the importance of public procurement in terms of size as compared to public deficits. The 10% figure, as will be shown later in the paper, is conservative, being well below the potential savings that recent studies suggest are possible. This figure has been applied on a country by country basis to the estimated public procurement expenditure which is currently not fully transparent. The purpose of this example is purely illustrative and is not meant to have any implications for public finance or budget policy issues.

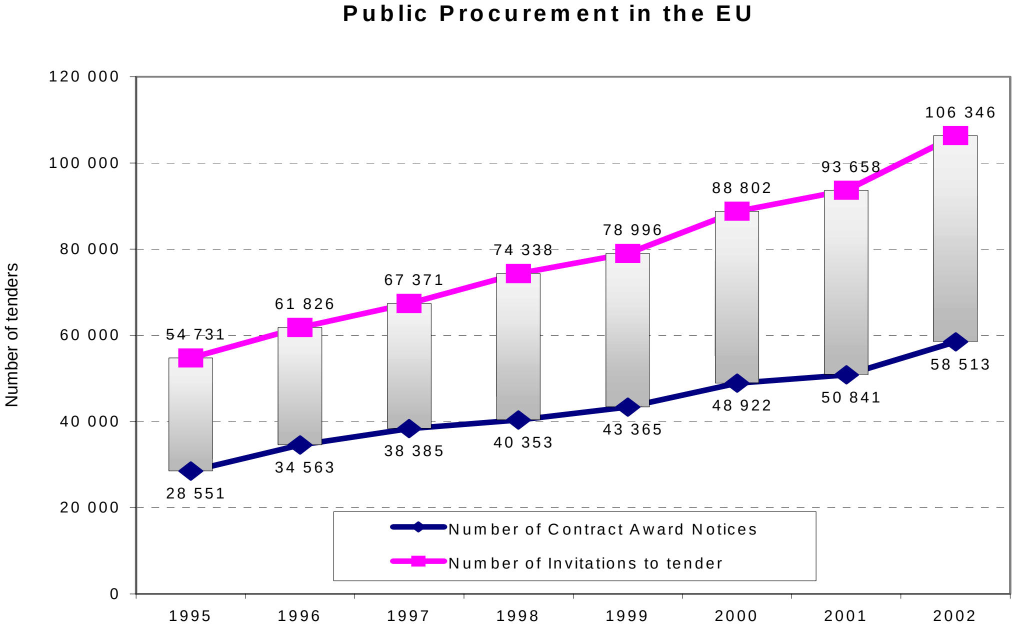
The results are quite remarkable: three countries would turn their budget deficits into surpluses and no euro zone Member State would run a public sector deficit that breaks the 3% limit.

INCREASING TRANSPARENCY IN PUBLIC PROCUREMENT MARKETS TO FOSTER COMPETITION

Transparent and predictable procurement procedures improve economic efficiency by promoting competition amongst domestic and foreign suppliers. They can also contribute to fostering private investment by lowering risk because transparency and predictability of market mechanisms are crucial factors influencing business decisions on how and where to invest and generate value added.

Transparency also enhances the competitiveness of local producers by establishing a market-launch base which is especially good for SMEs. Stronger competition brings down costs, improves quality and delivery terms and fosters the introduction of innovations. Conversely, in procurement environments closed to competition and dominated by vested interests, economic incentives disappear, "dominant" local players are relaxed about minimising costs and prices rise above competitive market clearing levels. Such local producers have no incentive to strive for a competitive edge and compete for contracts abroad.

Figure 2



Source: Internal Market Directorate General MAPP Database

EU public procurement directives give a prominent role to transparency, considering it fundamental to the elimination of distortions and discrimination in these markets. They require that invitations to tender with an expected contract value above established thresholds are published in the Official Journal.

Figure 2 clearly demonstrates the relationship between the introduction of EU directives and increased transparency in EU procurement markets. Between 1995 and 2002, the number of invitations to tender published in the Official Journal as required by the directives has almost doubled, while the estimated size of procurement markets has increased around 30%. The number of notices published has been growing at an annual rate close to 10%. In 2002, the number of invitations to tender published was 15% higher than the previous year.

Another important element of transparency is the publication of the final outcome of public procurement procedures. In a competitive environment, free of collusive practices, competitors can monitor the results of tendering processes and improve their future bids. This too puts downward pressure on prices over time. The number of contract award notices published in the Official Journal has been growing steadily in recent years. Although the number of contract award notices is around half the number of invitations to tender, it more than doubled between 1995 and 2002.

In 2002, 38% of contract award notices published in the Official Journal corresponded to supplies contracts, 37% were for services and public works accounted for only 19%. Local authorities published over 36,000 of the total 58,513 contract award notices. Central governments and utilities published over eight and six thousand respectively.

There is great variation in transparency rates[7] across countries, government levels and sectors. Transparency rates are significantly affected by differences in public institutions' and governments' administrative and organisational characteristics. For instance, increasing administrative decentralisation tends to produce more frequent and disaggregated tendering, which, in principle would tend to reduce the average value of each purchase. This might increase the share of public procurement falling below the thresholds and therefore not needing publication. However other factors linked to administrative practices and/or habits also play a part, and they could offset or reinforce this trend. Therefore a higher degree of administrative decentralisation is not necessarily more or less compatible with high levels of transparency – other government and administrative practices should also be taken into consideration.

As can be seen from Table 2, Greece, Spain and the UK have the highest transparency rates with 46, 24 and 21% of their public procurement published as a percentage of the estimated total procurement value (2002 figures). At the other end of the scale are Germany, the Netherlands and Luxembourg. Whilst some Member States appear to have more transparent markets than others, a high rate of transparency does not necessarily indicate that a Member State is consistently publishing at a high level. For example, this

[7] Transparency is defined here as the value of procurement published in the Official Journal as a percentage of estimated total public procurement.

measure is highly influenced by large fluctuations in a country's government spending – large public works projects (e. g. bridges, motorways, airports) can significantly increase the transparency rate for the years affected.

The average estimated share of the total procurement value actually published is 16.2%, equivalent to 2.6% of EU GDP. Although this rate has increased over the last ten years, further improvements are necessary.

Table 2 **Transparency Rates by Member State (%)**

	1995	1996	1997	1998	1999	2000	2001	2002
Belgium	6,9	7,6	10,9	13,8	15,6	15,6	18,6	15,8
Denmark	16,4	13,4	13,4	13,5	14,3	20,9	15,8	14,5
Germany	5,1	5,6	6,3	6,5	5,2	5,6	5,7	7,5
Greece	34,1	37,7	42,9	45,1	39,9	31,9	35,3	45,7
Spain	8,5	11,0	11,5	11,5	16,8	25,4	23,4	23,6
France	5,5	6,8	8,4	11,0	11,7	14,6	16,8	17,7
Ireland	11,4	16,3	19,3	16,1	16,8	21,4	19,3	18,0
Italy	9,8	9,9	11,3	10,7	13,2	17,5	15,3	20,3
Luxembourg	5,2	7,0	9,2	14,3	12,9	12,3	10,7	13,3
Netherlands	4,8	5,1	5,5	5,2	5,9	10,8	12,5	8,9
Austria	4,5	7,5	7,5	8,3	7,0	13,5	14,6	15,5
Portugal	15,5	17,7	15,1	15,5	14,6	15,0	17,7	19,4
Finland	8,0	9,2	8,2	9,2	9,8	13,2	15,1	13,9
Sweden	10,5	10,6	11,5	11,6	12,5	17,9	23,4	19,3
UK	15,0	15,6	17,9	16,9	15,1	21,5	21,5	21,1
EU 15	**8,4**	**9,2**	**10,7**	**11,1**	**11,2**	**14,9**	**15,4**	**16,2**

Source: Internal Market Directorate General

CROSS-BORDER PROCUREMENT: A MORE DETAILED PICTURE

Fostering cross-border activity in public procurement markets is a major challenge for Internal Market rules. Increased transparency would be pointless if it failed to make procurement markets more contestable especially by increasing the number of foreign bidders. Eliminating any kind of domestic bias and discrimination in favour of domestic producers and opening up markets to foreign firms is essential to foster more cross-border procurement activities. Ensuring similar chances of success to foreign and domestic bidders is the ultimate test of a level playing field.

Cross-border procurement can take place in different ways. Direct cross-border procurement occurs when firms operating from their home market bid and win contracts for invitations to tender launched in another Member State. Indirect cross-border activities arise when firms bid for contracts through subsidiaries, i.e. when their foreign affiliates bid for tenders launched by authorities of a country different from the home country where the firm has its headquarters or where the parent company is located.

Until now, procurement indicators to measure cross-border activity have been inadequate. Information collected from the Multidimensional public procurement data base (MAPP), built up using data from the Tenders Electronic Daily database (TED)[8], indicated very weak direct cross-border procurement activity (around 1,5%). A survey conducted in 1999 indicated that in approximately 10% of total procurement there was some form of indirect cross-border procurement.

Table 3 Previous Measurements of Cross-border Public Procurement

Sources	Direct cross-border procurement	Indirect cross-border procurement	Methodology – measurement
Eurostrategy Consultants 1999.	1.8%	8.5%	Survey of 2000 firms. Estimated import penetration in public sector consumption (data for 1998)
Single Market Review 1997	3%	7%	Survey – Estimated import penetration (data for 1994)

In a recent study[9], over 1500 firms actively involved in procurement were asked about the domestic or cross-border nature of their activities. These firms were asked if they only submitted proposals to public institutions in the country where they were located or if they also put in bids abroad. In the latter case, they were asked to say if they made bids abroad directly (without any sort of intermediary) or only through a subsidiary[10] or via both (i.e. with a subsidiary and directly)[11].

This gives the categories defined in Table 4. Cross-border activity occurs in the following cases:

[8] All public tenders exceeding specific contract values must be published in the Supplement to the Official Journal of the European Union. Since July 1998, the printed edition of the Official Journal S is no longer available. It is now available exclusively in electronic format and is accessible on the internet by accessing the 'TED' tender database ('TED internet application', 'TED' = Tenders Electronic Daily).

[9] COWI. "Monitoring Public Procurement in the European Union using Firm Panel Data". Lot 1. Final report July 2003. This study is based on questionnaires addressed to a sample of firms from Austria (60 firms), Belgium (60 firms), Denmark (60 firms), France (360 firms), Germany (450 firms), Ireland (40 firms), Spain (120 firms) and the UK (360 firms). The targeted sample of firms was drawn from nine economic areas corresponding to Common Procurement Vocabulary sectors 24 (chemicals), (29 (machinery), 30 (office equipment), 33 (medical products), 34 (motor vehicles), 50 (motor repair), 45 (construction), 74 (business services) and 90 (sewage). These sectors account for 66% of all published tenders.

[10] Firms were asked to identify themselves as "**domestic**" or "**subsidiary**" firms. Firms are identified as “**domestic**” if they are located in the country where their headquarters is based. “**Subsidiaries**” are firms located in a country different from where their headquarters or parent companies are based.

[11] A few firms answered saying that they only bidded abroad.

- first, whenever a subsidiary bids or is awarded a contract. This may occur in the country where the subsidiary is located, or in any other Member State. All such activities are considered indirect cross-border procurement;

- secondly, a procurement activity is considered to be cross-border if a firm that is not a subsidiary bids or is awarded a contract in a country other than the one in which it is based. In this case, cross border procurement may occur either directly - the firm bids from its home base - or indirectly - through a subsidiary located abroad.[12]

This allows the measurement of cross-border activity in terms of the number of firms bidding at home or abroad; the number of proposals made by domestic or by foreign firms; and the success rate of firms bidding in their own country of origin or abroad.

Table 4 Cross-border Public Procurement Activities of Firms Included in Study Sample

	Number of answers to this question from firms in the sample[13]	Number of proposals	Average number of proposals per firm	Share of total proposals
Firms submitting proposals to public institutions in the country where they are located only				
Proposals to home country by domestic firms	416	49 498	119	40%
Proposals to home country by foreign owned subsidiaries	98	13 984	143	11%
Firms submitting proposals to public institutions in the country where they are located AND/OR in other EU Member States DIRECTLY AND/OR through a SUBSIDIARY				
Proposals to home country by domestic firms	213	32 438	152	26%
Proposals to home country by foreign owned subsidiary firms	67	15 762	235	13%
Proposals to other EU Member States directly	207	4 155	20	3%
Proposals to other EU Member States through subsidiary	162	7 345	45	6%
Total		123 182		

Source: Internal Market Directorate General using COWI data

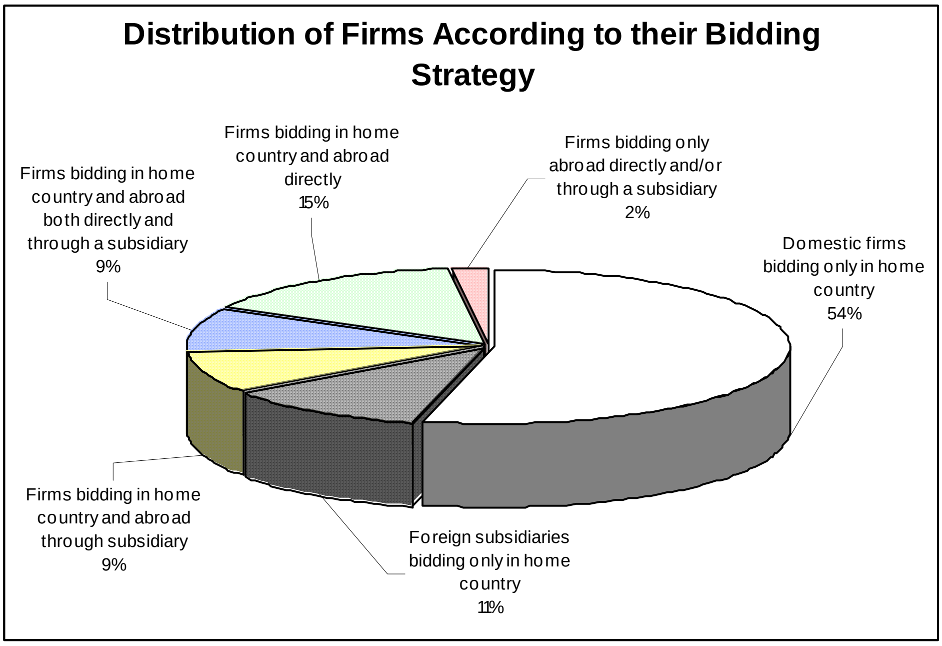
[12] Notice that we call home country the country where a firm is located, be it a subsidiary or not. This should be distinguished from the home base of the firm that is the country where the headquarters of the firm is located.

[13] The figures in this column relate to the number of times that a firm has submitted a proposal within a given category. So, if a firm has submitted more than one proposal it appears the corresponding number of times, making the total of this column greater than the number of firms who answered this question.

i. There are a considerable number of firms involved in cross-border procurement

Approximately 54% of all the firms in the sample are domestic firms bidding exclusively for contracts in their home country. This means that 46% of all firms in the sample carry out some sort of cross-border procurement activity, generally involving the use of a subsidiary. Only 15% of firms bid both at home and abroad directly. The relative extent of cross-border procurement, as reflected by the number of firms included in this sample, seems greater than suggested by the few previous surveys available until now. However, the number of firms involved exclusively in cross-border procurement is relatively low.

Figure 3



Source: Internal Market Directorate General using COWI data

Bidding abroad through subsidiaries is clearly a dominant strategy. Having a physical presence in the target market or access to some local expertise or inputs may be a necessity or an advantage if a firm wants access to public procurement markets. This would partially explain the high occurrence of this strategy. However, in so far as this is not the case, these figures would indicate that there is still considerable scope for the development of direct cross-border procurement.

The intensity of cross-border procurement is similar across sectors except for medical products and motor vehicles. International procurement activities in medical products are much more frequent than in other sectors and much less frequent in motor vehicles: 67% of firms in this sector bid for contracts in their base market only.

Across countries there are also some differences too, but they should be interpreted with caution. Table 5 shows that Spanish firms are more reluctant to bid abroad than the sample average. The share of foreign subsidiaries operating in the UK (19%) and France (16%) only is higher than average (11%), whilst in Germany it is relatively low (6%).

Table 5 Firms Submitting Proposals to Public Institutions - Compared across Countries

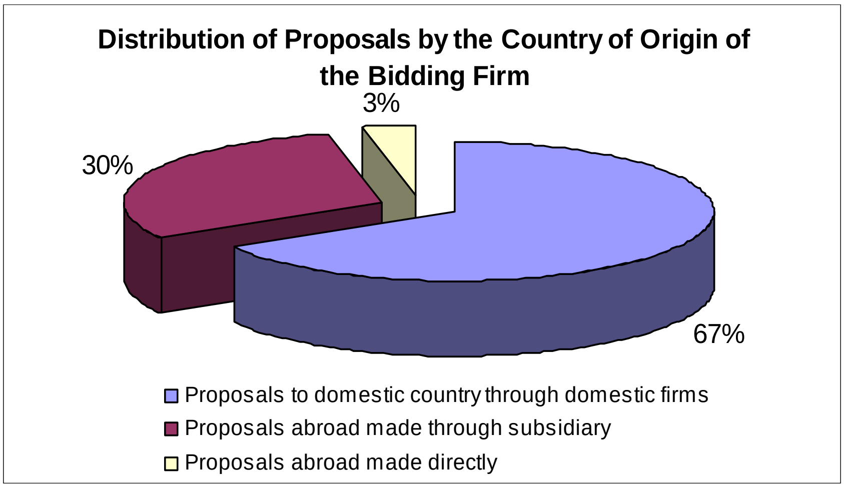
	In the Home Country		In other EU Member States
	Domestic firms	Foreign owned subsidiary firms	Both domestic and foreign owned firms bidding both at home and abroad directly and/or through a subsidiary
Austria	54%	2%	44%
Belgium	19%	12%	70%
Denmark	58%	6%	36%
France	56%	16%	29%
Germany	51%	6%	43%
Ireland	-	-	-
Spain	75%	11%	14%
UK	51%	19%	30%
Total	**54%**	**11%**	**35%**

Source: COWI Report

ii. Most proposals are still coming from domestic firms, but indirect bidding is significant

Most (67%) of the total number of bids submitted by firms in the sample are proposals submitted by "national" firms in their own home countries, 30% are proposals from subsidiaries in other countries and only 3% are direct cross-border procurement. Compared to the previous figures, these show greater "home bias", but they still reflect higher levels of cross-border procurement than previously recorded. This confirms the real importance in Europe of bidding for contracts through subsidiaries.

Figure 4



Source: Internal Market Directorate General using COWI data

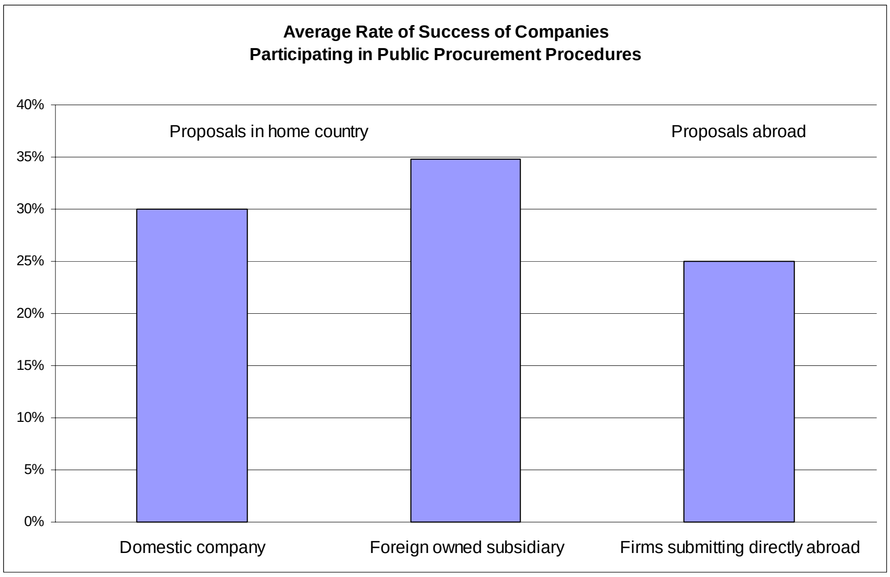
Further confirmation of this phenomenon is provided by the high bidding frequency of subsidiaries compared to domestic firms. On average, subsidiaries presented one and a half times as many proposals as domestic firms. However, when direct cross-border procurement is included, the bidding average of firms operating across borders drops significantly to around one third of the number of proposals submitted by domestic firms.

iii. There are minor differences in the success rates of domestic and foreign firms

A main objective of public procurement policy makers is to ensure a level playing field where bids from domestic and foreign firms have similar chances of success. Firms were asked to report the number of cases when they were awarded contracts after bidding. Dividing that number by the number of proposals submitted by each firm allows the calculation of the "average rate of success" for a given firm.[14]

The "average" rate of success in each category shows clearly that cross-border public procurement operations are not necessarily confronted with lower chances of success. Foreign subsidiaries bidding in the country where they are located tend to have a slightly higher rate of success than domestic firms bidding for contracts in their own home country. However, the rate of success is clearly lower for proposals submitted in a country different to the home base of the bidder. Once again, direct cross-border procurement seems to be at a disadvantage.

Figure 5



Source: Internal Market Directorate General using COWI data

All in all, these figures seem to suggest that public procurement markets are relatively open to foreign competition, especially from subsidiary firms located in countries launching invitations to tender. However, direct cross-border procurement from the home base of foreign companies is far less frequent.

[14] We then calculate the mean of those averages for each category of firms.

THE IMPACT OF PUBLIC PROCUREMENT RULES ON PRICES

The ultimate test of the effectiveness of public procurement legislation is the impact on prices actually paid for goods and services by public procurement authorities. If transparency and competition in the bidding process are increased but this does not result in lower prices and more value for money, discrimination may have been eliminated but the social benefits from more and fairer competition are insignificant.

Measuring the impact on prices of procurement rules is difficult[15]. Results from two exercises looking at the issue[16] are presented here. In both cases, the results seem to suggest that application of the procurement directives effectively reduces prices.

i. *The application of procurement directives effectively reduced the prices of goods and services purchased by a sample of 1000 public authorities*

In an exercise commissioned by the Internal Market Directorate General, 1000 contract awarding authorities were asked about the prices actually paid in 2002 for a list of carefully defined goods, services and works[17]. In practice, it was difficult to collect information about cases when EU procurement rules were effectively applied[18]. Therefore, it was decided that procurement directives would be considered to have been applied in those cases where an invitation to tender was published and at least one bidder replied. Equally, it was decided that they were not applied when there was a direct allocation of the contract without any tendering process.

A first look shows significant variation in the prices paid for the same products in different purchases by different authorities. For instance, in Figure 6, for the office supplies group of goods, 95% of prices vary from 0.5 to 5 times the EU average price. For services such as cleaning, the variation is also quite significant. Even for highly homogeneous products like fuel, the range of variation is quite large[19]. To what extent can the application of procurement directives explain these differences? And are prices effectively lower when the directives are applied?

[15] It requires collecting information on similar prices of goods actually paid by authorities (i.e. not simple catalogue prices) for comparable goods and services.

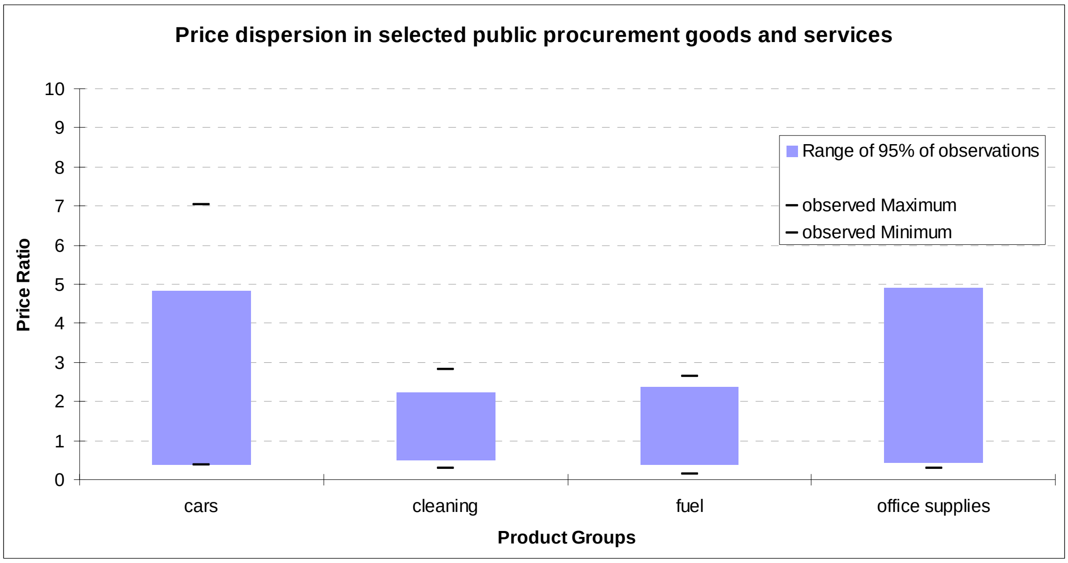
[16] The first one is based on a survey of approximately 1000 procurement authorities who were asked about the prices actually paid excluding VAT for a list of goods and services. The second one is based on intra EU trade in relatively homogeneous "typical" public procurement goods.

[17] COWI. "Monitoring Public Procurement in the European Union using Public Authorities Panel Data" Lot 2, Final report July 2003. The goods were carefully selected to avoid distortions in the measurement for prices due to qualitative differences. In addition, a quality variable was introduced to double check for quality differences.

[18] In order to isolate the impact of the application of Internal Market procurement rules, authorities were asked to indicate when EU procurement rules were applied and when national rules or no rules were applied. Respondents had difficulties in identifying exactly which rules were applied in each case. In practice, invitations to tender are always subject to compliance with national rules, whether the coordinating provisions of the Directives apply or not.

[19] It should be noted that price variation is observed not just across but also within countries.

Figure 6



Source: Internal Market Directorate General using COWI data

A first simple comparison of the means of price observations collected in this survey shows that the prices effectively paid in purchases where procurement rules were not applied were approximately 34% higher than prices when the rules are applied. This difference is statistically significant.

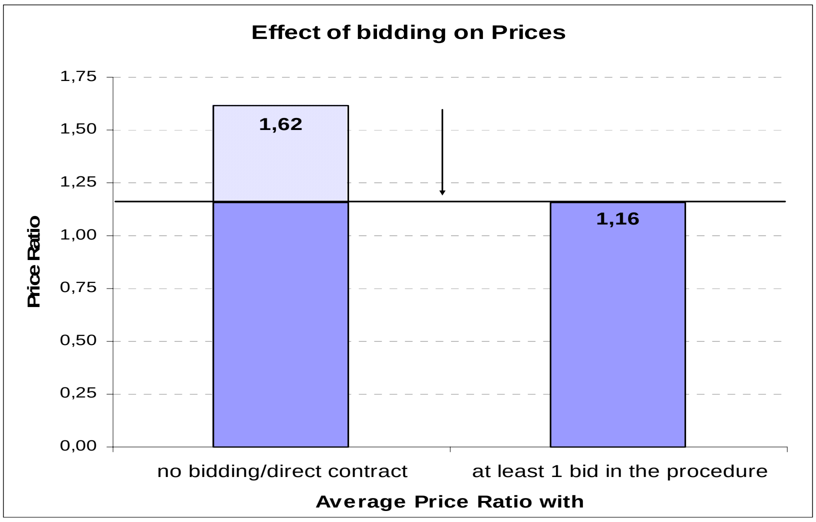
However this first evidence is not sufficient to conclude the positive impact of the procurement rules on prices. Other characteristics of the purchase have to be taken into account because they may have an influence on the price. For example, it is logical to assume that purchases of large quantities of goods lead to discounts or scale effects which may reduce the price paid per unit. Since the application of directives is compulsory for purchases above a given threshold, the lower price may be due to the larger average size of purchases when the directives are applied and not necessarily to more competition resulting from the application of the directives. Thus, a simple comparison of average unit prices may not be enough to conclude that the directives have had a positive impact on prices.

Econometric techniques have been used to control for possible interference from other factors. Several exercises conducted to isolate the impact of the application of public procurement directives suggest that the application of these rules by authorities in the sample has effectively reduced the price they paid. In addition, these exercises suggest that the price paid when the directives are not applied is around 40%[20] higher than when they are (see Figure 7). This result is statistically significant and controls for the impact of the quantity ordered and other factors. This means that even taking into account

[20] Depending on the calculation the prices paid without the directives are 40% higher than when the directives are applied (1.62/1.16); alternatively it can be said that the reduction due to the application of the directives is almost 30% (subtract 1.62 from 1.16 and divide the result by 1.62).

differences in the order of magnitude of the purchase, open competitive bidding for public procurement as required by the directives is, as expected, an effective cost-cutting measure.[21] Quantity also has the positive impact expected: public institutions which ordered an amount 25% larger than the average paid on average approximately 7% less per unit.

Figure 7



Source: Internal Market Directorate General using COWI data

The COWI study also includes an econometric exercise to identify the explanatory factors behind the differences in prices paid in procurement purchases within the same country[22]. The study concludes that:

- once again, prices are lower in those cases where there are one or more tenders than in those cases where there is a direct purchase;

- there seems to be a U-shape relationship between the prices paid and the level of government: local and national institutions pay relatively higher prices than regional authorities;

- the level of professionalism and the organisation of the purchases have an important influence on the prices that public institutions pay for goods and services. Public institutions with a purchasing department that centrally organises the public procurement for the institution pay on average slightly lower prices;

[21] The impact of having more than one bid on price reductions appears particularly significant in the acquisition of goods. Some country differences also appear to be significant in some econometric specifications, but this may be due to country specific factors not linked to differences in the application of procurement rules.

[22] The results reported above correlate number of bids, quantity and other possible explanatory variables with the dispersion in procurement prices with respect to the EU average price for each good and service. The COWI price dispersion is measured with respect to the national average price.

- firm size and the domestic or foreign nationality of the firm to which the contract is awarded do not seem to have any significant effect on the price actually paid.

A corollary: changing the thresholds

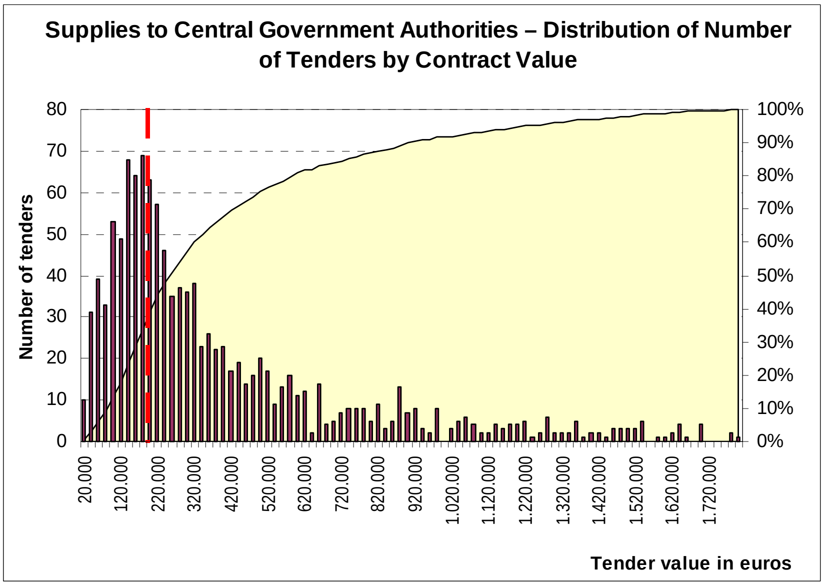
One of the features of the public procurement directives is that their application is compulsory when public authorities launch invitations to tender for contracts with an expected value above pre-established thresholds. Since 2004, these thresholds range between approximately €150.000 for public supplies and service contracts and roughly €6.000.000 for works. There are various justifications for the thresholds:

- first, procurement procedures entail compliance and administrative costs for the public institutions and tendering costs for the bidding firms. If the value of the contract is relatively low for the type of purchase in question, it is assumed that the potential benefits from greater competition do not compensate for those costs;

- in addition, increased transparency in procurement markets may not result in greater cross-border competition if the value of the contract does not make it worthwhile for foreign firms to tender and cover the additional costs that cross-border provision necessarily implies.

It has been argued that the current thresholds should be raised. Evidence presented above suggests that this will result in higher procurement prices especially if their mere existence has a significant effect on the procurement behaviour of public institutions launching invitations to tender. If public authorities do tend to organise tendering in ways that avoid the application of EU procurement rules, it seems unwise to increase thresholds as the 40% price mark-up could be applied to a large number of purchases.

Figure 8



Source: Internal Market Directorate General

Figure 8 shows that the threshold has an influence on the distribution of invitations to tender by value or size. Administrations and institutions tend to comply with the directives by concentrating a large number of purchases just below the threshold for each kind of operation and thereby avoiding procedural costs and publication. This suggests that if thresholds are raised less invitations to tender would be published and the prices paid by authorities for goods and services may be higher than necessary.

In addition the new legislative package and other Community initiatives in this area for the introduction of electronic procurement are intended to reduce compliance costs. In this context, claims to raise thresholds are hard to justify.

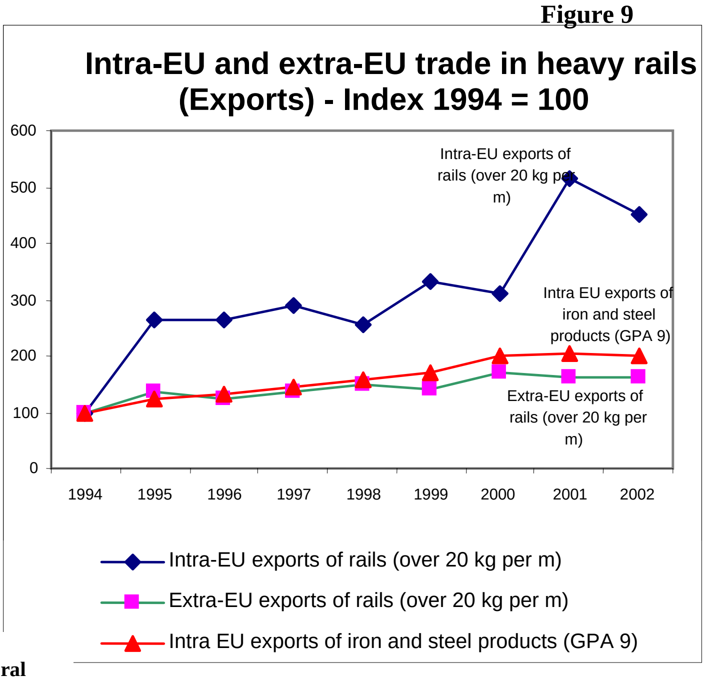
ii. Evidence shows that the export price of comparable procurement goods converged after the introduction of procurement directives

Analysis has also been undertaken of intra EU trade flows for seven goods that can be considered as "typical" public procurement goods, i.e. goods that are mainly purchased by public authorities. Relatively homogeneous goods were selected in order to facilitate price comparisons. These goods are preparations for X-ray examinations, iron or steel railway rails, smaller rails for trams, iron and steel seamless pipes of a kind used for oil or gas pipelines, fire fighting vehicles, railway tank wagons and syringes for medical usage.[23]

Apart from one case (syringes), the progressive introduction of directives since the mid 1990s seems to have had a similar effect on these goods. The graphs below illustrate the results for iron or steel railway rails (heavy rails).

- Although trade has varied depending on the evolution of sector specific factors, in general, intra-EU trade for these goods seems to have expanded relatively faster than extra-EU trade for the same product category and trade for related goods that are largely traded between private parties only. This would seem to suggest that the introduction of the procurement directives has contributed to foster trade in these products among Member States, effectivelv

Figure 9



Source: Internal Market Directorate General

[23] The analysis has been carried out using EUROSTAT COMEXT data for eight digit product categories CN 30063000, CN 73021031, CN 73021039, CN 73041090, CN 87053000, CN 86061000 and CN 90183110.

opening those markets to competition within the EU.

- Export and import prices[24] for these goods have converged over time eliminating price differences. In the case of heavy rails, this convergence has been fairly steady – from over 15% in 1988-92 to 12% in 1998-2002.[25] For small rails the price convergence was more pronounced – from 21% in 1988-92 to 7% in 1998-2002. This suggests that, at least for these products, the introduction of the directives has been followed by progressive cross-border market integration in these mainly public procurement markets.

Figure 10

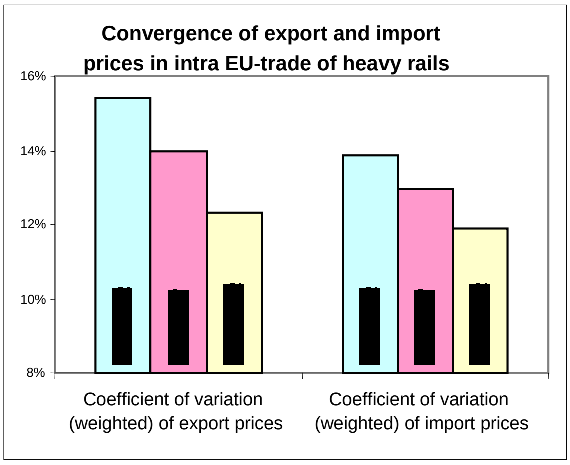
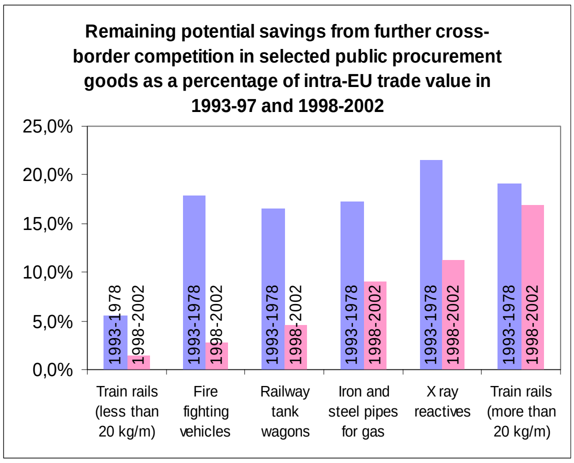


Figure 11



Source: Internal Market Directorate General

- In spite of this price convergence, the analysis of trade flows suggests that there are still further possibilities for savings in these markets. Figure 11 shows the potential savings as a percentage of the actual value of imports that could have been achieved if trade had occurred at the second lowest export price instead of the actual export price. For just these six goods, this could have accounted for almost 12% of the total value of intra-EU trade in these goods in 1998-2002 (over 400 million euros).

- Potential savings are much lower now than before the introduction of the directives and this is further evidence of their positive impact on the performance

[24] Actually, these are export and import unit values.

[25] Both weighted and unweighted coefficients of variation have been calculated to take into account the relative importance of exports to different EU destination from each Member State. The results hold with very minor variations in both cases. Bilateral differences in export and import unit prices have been calculated and they suggest that the possibilities for cross-country price discrimination have been reduced. Given that these are relatively homogenous goods, these results can hardly be explained by increased homogeneity in the composition of exports and imports.

of these markets. Nevertheless, the remaining potential savings are still quite important.

OTHER DIMENSIONS OF MARKET PERFORMANCE

The Commission also considers other dimensions of the performance of public procurement markets. These include access to these markets by SMEs; the consideration of environmental and social issues; and transaction costs.

i. Public procurement and SMEs

Most public procurement contracts are awarded to SMEs. Two recent Commission studies with different objectives and methodologies show similar results in this regard. A study conducted for the Enterprise Directorate General using TED-MAPP data shows that approximated 78% of the successful enterprises awarded contracts in 2001 were SMEs[26]. A study for the Internal Market Directorate General shows that the SMEs have a significantly higher success rate than large enterprises.

However, it is difficult to assess market performance in this area. Some may argue that although SMEs win a higher share of all public procurement contracts awarded, these firms represent a still higher share of the total number of firms in the market. Others may argue that although SMES represent 99.8% of the total number of firms in the Union, by the nature of their activities, they tend to be less active in procurement activities than in the economy as a whole.

For these reasons, it is more useful to present additional factual information on the situation of SMEs in public procurement markets here rather than to try and issue an overall assessment.

- Although the overall success rate of SMEs is higher, their chances of success in cross-border procurement are much lower. SMEs acting as subsidiaries of foreign firms still have a high rate of success but the difference with respect to large enterprises is not very significant in statistical terms. In the case of direct cross-border procurement it is not significant.

- Sectoral differences have an important influence on the access of SMEs to procurement contracts. They are particularly well represented in the construction sector and less so in the business services sector.

- As one would have expected, SMEs have relatively easier access to contracts with local authorities.

[26] European Commission "SMEs access to public procurement", Brussels 2003, published on the website http://europa.eu.int/comm/enterprise/entrepreneurship/craft/index.htm

ii. Environmental[27] and social issues

Environmental and social issues have been the subject of increasing attention in the context of public procurement rules. In 2002, two Communications provided detailed information on the views held by the Commission on the consideration that should be given to these important issues.

The recent studies commissioned by the Internal Market Directorate General[28] on the performance of public procurement markets shed additional light on these matters.

- First, firms included in the sample report that they find environmental clauses in the public tenders to which they submit proposals approximately 40% of the time. There are no perceptible differences across countries and this frequency does not seem to be affected by the application of EU directives.

- In addition, the analysis of prices reported by public authorities seems to suggest that introducing environmental clauses does not increase the prices actually paid for the supplies, services or works.

- Firms report that social clauses are less frequently found in tenders (around 20%). However, they are more frequently found in Denmark, especially when EU directives are applied.

- There is some evidence suggesting that the introduction of social clauses results in slightly higher prices actually paid by authorities.

iii. Transaction costs in public procurement markets remain significant

The above discusses the different sources of benefits found in public procurement markets as a result of the directives. However, any evaluation of market performance must also take into account the costs of operating in these markets for firms and authorities. There are costs associated with making procurement markets more transparent and competitive. Transaction cost minimisation is essential to ensure good market performance.

The two studies[28] recently carried out for the Internal Market Directorate General of the European Commission include comments from firms and authorities. These comments reflect concern for the relatively significant costs incurred by both firms and authorities in complying with procurement rules.

Although some firms reported an improvement in transparency in public procurement, many considered that their chances were still not equal when bidding from abroad. All firms emphasised that formal procurement procedures were costly due to the paperwork

[27] For additional information see the study commissioned by the Environment Directorate General to ICLEI "State of Play of Green Public Procurement in the European Union", Final report, Freiburg, July 2003, published on the website www.iclei.org/ecoprocura/network.

[28] See footnotes 9 and 17.

required when submitting a tender. In particular, they complained about the amount of non-bid related information required by the authorities.

There are some nuances on the comments depending on their nationality. German and Austrian firms were particularly negative. They complained about excessively strict specifications that effectively excluded some competitors from the process. They also argued that the importance given to price may be disproportionate and that in the long run, the cheapest bid could be more expensive for the purchasing institution, especially with regard to technical products.

British, Austrian and German firms were more aware of EU directives regulating procurement markets. British firms usually commented positively on environmental clauses, while firms from other countries had mixed views. Only Spanish firms complained about payment delays.

Comments varied significantly across firms of different size. Firms with 50 or more workers felt that electronic media and e-procurement were the solution to the heavy procedural costs involved in bidding. Very small firms did not mention electronic solutions as a way out of the problems they faced in these markets.

Authorities also found procurement procedures too complicated and relatively inflexible, particularly as regards price negotiations. Spanish authorities were relatively more positive towards EU procurement rules. Although some firms openly acknowledged that rules were "necessary in order to prevent manipulation and corruption", many considered that excessive procedural requirements resulted in "competitive formalism".

Some firms mentioned that the existence of different directives for different types of procurement activities (works, supplies, services) complicated tendering processes. They welcomed proposed changes in the new procurement legislation package.

Authorities in several member states also pointed out that the new legislative package was likely to contribute to solving many of the problems raised by firms and authorities in the surveys. The significant procedural simplifications that it will bring about and the important effort to consolidate rules should result in lower costs and cuts in red-tape.

In addition, Community efforts to improve the use of e-procurement in line with Internal Market rules should result in further cost reductions to firms and authorities. E-procurement can increase transparency and procedural efficiency without prejudice to competition. This should allow for easier cost comparisons and examination of tenders.

However, the costs associated with the introduction of e-procurement should not be underestimated either for firms or authorities. In particular, the up-front costs of shifting to an electronic procurement system may become an obstacle for smaller firms. Moreover, it is necessary to ensure that national uncoordinated e-procurement solutions do not "fragment" the market.

For these reasons, in 2004 the Commission will present an Action plan for the introduction of coordinated e-procurement in the EU aimed at reducing procurement costs and contributing to further integration in procurement markets.

Sector-specific measures: the case of the Healthcare sector

Sector-specific measures can contribute to improvements in the performance of some procurement markets. A recent paper by the CEN presents an analysis of the potential for savings and improved productivity in the use of resources in public tendering in the field of EU healthcare expenditure. This is the result of a workshop on hospital procurement and e-commerce for the Healthcare sector in January 2002.

EU Member States spend between 5% and 10% of GDP on healthcare. In absolute terms, this spending has been increasing for many years and all Member States are experiencing growing pressure on their health services. This trend is likely to continue in the future due to: demographic developments; the population's growing expectations of the quality of healthcare; and the complexity of new medical technology.

Although standardisation for purchasing and logistics systems across Europe could contribute to better control pricing and quality in all aspects of the purchasing cycle, it is only realistic to focus on a few processes within the cycle. Public tendering processes across Europe have much in common, as illustrated by the experiences of the European Generic Article Register project (EGAR) over the last year and a half. Tendering utilises significant resources and the project found the lack of standards to be universal[29]*.*

The potential for savings and improved productivity in the use of resources for public tendering is great. The EGAR project found that in Norway, the use of a generic register improved the tendering process and communications between purchasers and suppliers significantly. Lack of standards such as correct article descriptions and information, created a significant and often unnecessary workload for trading partners. Within the tendering processes significant benefits were obtained through the use of more automated tender solutions based on generic standards. Based on experience from Norway EGAR benefits should include:

- *workload reduction of more than 50% in creating and evaluating tenders;*
- *quicker responses to suppliers and shorter contract negotiations;*
- *price reductions between 10 and 25 % depending on product areas;*
- *more accurate basis for ordering systems;*
- *one generic number and article description relating to one or more actual articles from one or more suppliers;*
- *improved statistics based on the generic article level;*
- *significantly reduced transaction costs;*
- *greater compliance with EU rules by public purchasers; and*
- *a more open environment and improved interaction between hospital buying departments and suppliers due to the standardisation at generic level.*

[29] In a sense but on a different scale, the common procurement vocabulary (CPV) has the same purpose of reducing costs by standardising the nomenclature.

CONCLUSIONS

There is overwhelming evidence showing that the procurement directives have contributed to increased transparency in public procurement markets. The new evidence, based on a sample of firms and public authorities, suggests that increased transparency has effectively resulted in more cross-border competition, price convergence and lower prices for goods and services purchased by public authorities.

Therefore, it seems reasonable to conclude that when effectively implemented the current legislative public procurement package actually contributed to reform the public procurement environment.

Most importantly, this evidence shows that economic reforms work and pay off. It is important to show this in a clear and thorough manner at a time when new economic reform proposals are being discussed.

Of course, problems remain and the new legislative package should reduce transaction costs. E-procurement offers new possibilities for cost reductions. If promptly adopted and effectively implemented by Member States, these measures will contribute to improve still further the performance of our public procurement markets.

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- Environment
- Equal opportunities
- External relations
- Fisheries
- Food safety
- Foreign & security policy
- Humanitarian aid
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- Internal market
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Title & description	Policy field	Target group	Closing date
Adaptation to scientific and technical progress under Directive 2002/95/EC on the restriction of the use of certain hazardous substances in electrical and electronic equipment NEW - More information	Enterprise	Stakeholders	10.02.2006
Call for input on the forthcoming review of the EU regulatory framework for electronic communications and services, including review of the Recommendation on relevant markets NEW - More information	Information society	Public / Stakeholders	31.01.2006
Consultation on the Communication on Halting the Loss of Biodiversity by 2010 and beyond NEW - More information	Environment	• Experts on biodiversity and nature conservation • Experts on environmental issues • Stakeholders • The public	06.02.2006
Community Action Plan on Animal Welfare and Protection - More information	Food safety	Stakeholders	20.12.2005
i2010: Digital libraries - More information	Information society	Public / Stakeholders	20.01.2006
Public consultation on Postal Services	Internal	Public /	27.01.2006

■ **More information**	market	Stakeholders	
Greenpaper on energy efficiency External Actions through Thematic Programmes under the Future Financial Perspectives 2007-2013 ■ **More information**	Energy	Stakeholders	31.03.2006
Ten minutes to improve the business environment in the EU ■ **Questionnaire**	General and institutional affairs	Stakeholders	31.12.2005
Give us your opinion on 'Your Voice in Europe' Let us know what you think about this new website. ■ **Questionnaire**	N/A	Public	Ongoing

Closed consultations

Title & description	Policy field	Target group	Closing date	Results & follow-up
Consultation on Thematic Programme for co-operation with industrialised countries and territories (TPIC) under the future Financial Perspectives	External relations	Stakeholders	07.12.2005	**View**
Customs tariff and chemical classification: Five minutes to tailor our services to your needs	Customs	Economic operators	02.12.2005	**View**
Public consultation on "Airport capacity, efficiency and safety in Europe"	Air transport	Stakeholders	30.11.2005	**View**
Your voice on eGovernment 2010	Information society	Stakeholders	08.12.2005	**View**
Consultation on future policy orientations for publishing	Publishing	Stakeholders Public Member States	15.11.2005	**View**
Non-State Actors in development External Actions through Thematic Programmes under the Future Financial Perspectives 2007-2013	Development	Stakeholders	11.11.2005	**View**
A ‘European Institute of Technology’? Public consultation on the possible missions, objectives, added-value and structure of an EIT	Education	Stakeholders	15.11.2005	**View**
Young People in Europe: Promoting Active Citizenship and Implementing the European Youth Pact	Youth	Public	15.10.2005	**View**
Adaptation to scientific and technical progress under Directive 2002/95/EC of the European Parliament and of the Council on the restriction of the use of certain hazardous substances in electrical and electronic equipment for the purpose of a possible amendment of the annex	Environment	Stakeholders	28.10.2005	**View**
Reducing the risks of floods in Europe	Environment	Stakeholders	14.09.2005	**View**
GREEN PAPER ON THE ENHANCEMENT OF THE EU FRAMEWORK FOR	Internal market	Stakeholders	15.11.2005	**View**

INVESTMENT FUNDS				
Low Voltage Directive - Public Consultation on the possible impacts of various identified policy options for a potential amendment of the Low Voltage Directive (LVD) 73/23/EEC	Enterprise and Industry	Stakeholders	14.10.2005	**View**
Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/42/EEC of 14 June 1993 concerning medical devices	Enterprise and Industry	Public	26.06.2005	**View**
Green Paper "Confronting demographic change: a new solidarity between the generations"	Employment, Social Affairs and Equal Opportunities	Stakeholders	15.10.2005	**View**
The sustainable use of pesticides in Europe	Environment	Member States competent authorities, industry, environmental NGOs, consumers and farmers groups, citizens	12.05.2005	**View**
Requirements regarding contents of packages	Enterprise	Stakeholders	15.03.2005	**View**
Future guidelines for the new programme on establishment of an area of freedom, security and justice	Justice & home affairs	Public	31.08.2004	**View**
Reducing the climate change impact of aviation	Environment	Stakeholders	06.05.2005	**View**
Possible Technical Harmonisation Legislation addressing the Urban Rail Sector	Enterprise	Stakeholders	25.03.2005	**View**
Consultation on the future of EU Development policy	Development	Stakeholders	19.03.2005	**View**
The future Programme for active European Citizenship	Education	Stakeholders	15.02.2005	**View**
Public on-line consultation on a proposed COMMISSION COMMUNICATION on eAccessibility	Information society	Stakeholders	12.02.2005	**View**
EU Science and Technology Foresight in FP7	Research & technology	Stakeholders	15.11.2004	**View**
Air pollution - what do you think?	Environment	Stakeholders	31.01.2005	**View**
Strengthening the EU-US Economic Partnership	External relations Trade	Stakeholders	31.12.2004	**View**
Framework Programme for Competitiveness and Innovation	Enterprise	Stakeholders	07.02.2005	**View**
Action Plan on Electronic Public Procurement	Internal market	Business Business organisations	15.11.2004	**View**
Consultation of Stakeholders in the Shaping of small business policy at national/regional level	Enterprise	Business organisations - National/Regional Governments	30.09.2004	**View**
Green Paper on anti-discrimination and equal treatment	Employment & social affairs	Stakeholders	01.09.2004	**View**

Stakeholder consultation on the implementation of the EU Forestry Strategy	Agriculture	Stakeholders	22.09.2004	**View**
Consultation on the Review of the EU Sustainable Development Strategy	General and institutional affairs	Public Stakeholders	31.10.2004	**View**
Science and Technology, the key to Europe's future - Guidelines for future European Union policy to support research	Research	Stakeholders	15.10.2004	**View**
Consultation on board responsibilities and improving financial and corporate governance information	Internal Market - Accounting	All interested parties	04.06.2004	**View**
Green Paper on anti-discrimination and equal treatment	Employment & social affairs	Stakeholders	01.09.2004	**View**
Card Stop Europe Is there a need for a single European telephone number for notification of lost and stolen payment cards?	Internal Market	Public	30.04.2004	**View**
Transparency of regulations and standards in the area of services Amendment of Directive 98/34/EC with a view to extending the procedure for the provision of information in the field of technical standards and regulations to services other than information society services.	Internal Market - Enterprise	Stakeholders	15.07.2004	**View**
New Enterprise Programme The multiannual programme for Enterprise, Entrepreneurship and SMEs will expire by 31.12.2005.	Enterprise	Stakeholders	10.05.2004	**View** **Enterprise**
Mutual Recognition - Products Can the operation of the mutual recognition principle be improved?	Internal Market	Stakeholders	30.04.2004	**View**
Public consultation on the outline of the planned proposal for a European Parliament and Council directive on the cross border transfer of the registered office of a company	Company law - Internal Market	Stakeholders	15.04.2004	**View**
Effective remedies? The European Commission has launched an eight-week Internet consultation on the possible legal and practical problems enterprises and lawyers encounter when using national review procedures in the area of public procurement.	Internal Market	Stakeholders	29.02.2004	**Economic operators** **Lawyers** **Professional associations and non-governmental organisations**
Legal Problems in e-Business Has your enterprise met legal problems when doing e-commerce or using other e-business applications?	Enterprise	Stakeholders	18.11.2003	**View**
Internet Consultation on Draft Chemicals Legislation (the REACH System) Directorate Generals Enterprise and Environment are preparing draft legislation	Enterprise / Environment	Public	10.07.2003	**View** **Environment** **Enterprise**

to implement the ‘White Paper – Strategy for a Future Chemicals Policy’. Comments are invited on the workability of the proposed system, including the technical requirements.				
Towards a European Action Plan for organic food and farming In order to develop an 'Action Plan for organic food and farming', the Commission invites stakeholder organisations and citizens to give their opinion on the proposals made in a Commission working document as well as to submit further ideas.	Agriculture	Public	16.03.2003	**View**
Free or fixed pack sizes? Do you feel there is a need to fix the quantity of every pack, bottle or container on sale in supermarkets, chemists and do-it-yourself shops?	Enterprise	Consumers, retailers, producers	31.01.2003	**View** **Interactive discussion forum**
Protection of animals during transport To assist the development of the future European rules on animal protection during transport, it is important to know your views.	Food safety	Public	15.12.2002	**View**
Enlargement of the EU What do you think about it?	Enlargement	Public	15.11.2002	**View**
Cybersquatting Have you registered a domain name in good faith only to receive a threatening letter claiming that you are a "cybersquatter"?	Internal Market	Public	31.10.2002	**View**
Data Protection Do you think your employer should be allowed to read your e-mails?	Internal Market	Public Data Controllers	15.09.2002	**View** **View**
Towards a reinforced culture of consultation and dialogue Proposal for general principles and minimum standards for consultation of interested parties by the Commission	General and institutional affairs	Public	31.07.2002	**View**
Pan-European government e-services Identification of the needs and opportunities of EU enterprises and citizens in terms of pan-European Government e-services to assess policy options	Enterprise	Enterprises trading across EU-borders and citizens with cross-border interests	17.07.2002	**View**
Trust barriers for B2B e-marketplaces Follow-up of the e-Economy Communication and the need to promote fair trade in B2B	Enterprise	Associations/ chambers of commerce/ companies Trust operators/e-business platforms e-market operators	30.04.2002	**View** **View** **View**
Review of the New Approach Communication to review the New Approach after 15 years	Enterprise	Stakeholders, enterprises especially	31.03.2002	**View**

Governance Examining the responses to the White Paper on European Governance	General and institutional affairs	Public	31.01.2002	**View**
Modernising the Internal Market for industrial goods Identification of remaining obstacles to the free movement of goods in the EU. adapting regulatory tools to innovation and technological change	Internal Market	Stakeholders	30.12.2001	**View**

EBTP Questionnaire on Public Procurement - Remedies

543 replies

Indicate your main sector of activity

compulsory	*replies*	*% all replies*
D - Manufacturing	133	24,5
G - Wholesale and retail trade; repair of motor vehicles, motorcycles and personal and household goods	89	16,4
J - Financial intermediation	80	14,7
F - Construction	59	10,9
I - Transport, storage and communication	54	9,9
K - Real estate, renting and business activities	48	8,8
O - Other community, social and personal service activities	34	6,3
H - Hotels, restaurants and bars	19	3,5
N - Health and social work	15	2,8
E - Electricity, gas and water supply	7	1,3
C - Mining/Quarrying	5	0,9

Indicate in which EU/EEA countries your company is based?

compulsory	*replies*	*% all replies*
NL - The Netherlands	103	19
DA - Denmark	81	14,9
DE - Germany	70	12,9
UK - United Kingdom	67	12,3
NO - Norway	34	6,3
FI - Finland	33	6,1
PT - Portugal	29	5,3
AT - Austria	28	5,2
SV - Sweden	22	4,1
IE - Ireland	21	3,9
IT - Italy	21	3,9
BE - Belgium	12	2,2
FR - France	9	1,7
ES - Spain	8	1,5
IS - Island	3	0,6
EL - Greece	2	0,4
LU - Luxembourg	0	0

Number of employees in your company

compulsory	*replies*	*% all replies*
500 +	147	27,1
50-249	127	23,4
10-49	114	21
250-499	74	13,6
1-9	70	12,9
0	11	2

Apart from your country, in how many countries of the European Union do you regularly sell products and services?

compulsory	*replies*	*% all replies*	*% per question*
none	190	35	40,1
more than 5	122	22,5	25,7
2-3	71	13,1	15,0
1	55	10,1	11,6
4-5	36	6,6	7,6

Have you ever participated in public tenders in your home Member State?

compulsory	*replies*	*% all replies*
No	331	61
Yes	212	39

What is the average number of public contracts per year your company bids for in your home Member State?

field optional	*replies*	*% all replies*	*% per question*
Fewer than 5	75	13,8	36,2
More than 30	51	9,4	24,6
Between 6-10	44	8,1	21,3
Between 17-30	22	4,1	10,6
Between 11-16	15	2,8	7,2

If you have not participated in any public tender, why have you not done so?

field optional	*replies*	*% all replies*	*% per question*
My business does not have products or services usually sought by public authorities	244	44,9	66,3
Other, please specify:	46	8,5	12,5
Public procurement rules and procedures are too difficult to work with	22	4,1	6,0
My business does not have the resources to invest in submitting tenders	21	3,9	5,7
Insufficient advertising of calls for tender	19	3,5	5,2
I do not really believe that public contracts are awarded on a purely competitive basis	15	2,8	4,1
I have been unsuccessful in the past and am now no longer interested	1	0,2	0,3

As you have indicated that you participate in public contracts in your home Member State, could you tell us if you are satisfied with your results to-date?

field optional	*replies*	*% all replies*	*% per question*
Not (always) satisfied	87	16	41,6
Quite satisfied	84	15,5	40,2
Satisfied	38	7	18,2

If you are not satisfied, please tell us why?

field optional	*replies*	*% all replies*	*% per question*
I do not really believe that public contracts are awarded on a purely competitive basis	52	9,6	32,9
I have not been properly informed of the reasons why my application/bid has been unsuccessful/rejected	35	6,4	22,2
I found some or all of the rules and procedures too difficult to understand and/or to comply with	25	4,6	15,8
Other:	25	4,6	15,8
It is difficult to get information on/find out about calls for tender	21	3,9	13,3

Have you ever asked for review/made an appeal when you were dissatisfied with the outcome?

field optional	*replies*	*% all replies*	*% per question*
No	164	30,2	78,8
Yes	44	8,1	21,2

If Yes, what steps have you taken?

field optional	*replies*	*% all replies*	*% per question*
I have lodged a claim with the public procurement review body (Court/administrative body authorised to review and/or suspend decisions)	23	4,2	54,8
I have made a claim/complaint with the national contracting authority	12	2,2	28,6
I have made an appeal to a higher Court	7	1,3	16,7

If No, was it because of :

field optional	*replies*	*% all replies*	*% per question*
Fears that you might not win future contracts from the public authority whose decision you would have to challenge	54	9,9	25,5
Other:	41	7,6	19,3
No confidence in the system for reviewing decisions	37	6,8	17,5
No opportunity to appeal as the contract was already signed when I learned of the decision	24	4,4	11,3
The review system is too slow	21	3,9	9,9
Possible legal costs	18	3,3	8,5
The level of possible awards awards is insufficient to cover losses	17	3,1	8,0

Have you ever participated in public tenders in another Member State?

compulsory	*replies*	*% all replies*
No	504	92,8
Yes	39	7,2

In which other Member State(s) ?

field optional	*replies*	*% all replies*	*% per question*
BE - Belgium	11	2	10,9
DE - Germany	11	2	10,9
FR - France	11	2	10,9
UK - United Kingdom	9	1,7	8,9
NL - Netherlands	8	1,5	7,9
AT - Austria	7	1,3	6,9
DK - Denmark	7	1,3	6,9
IT - Italy	7	1,3	6,9
ES - Spain	6	1,1	5,9
EL - Greece	5	0,9	5,0
IE - Ireland	5	0,9	5,0
SV - Sweden	5	0,9	5,0
LU - Luxembourg	4	0,7	4,0
FI - Finland	3	0,6	3,0
PT - Portugal	2	0,4	2,0

What is the average annual number of public contracts you have bid for?

field optional	*replies*	*% all replies*	*% per question*
Fewer than 3	20	3,7	54,1
More than 8	10	1,8	27,0
Between 4-8	7	1,3	18,9

What are the main reasons why you have not participated?

field optional	*replies*	*% all replies*	*% per question*
My business does not have products or services usually sought by public authorities	264	48,6	43,1
Other reason:	111	20,4	18,1
I am not familiar with specific national rules applicable to tendering procedures	60	11	9,8
I have no or little time or resources to invest in trying to understand the rules and submitting a bid in another language	55	10,1	9,0
Discouraged by administrative requirements (documents, permits, certificates, etc)	38	7	6,2
Lack of / insufficient information on tenders	35	6,4	5,7
Insufficient advertising of calls for tender	34	6,3	5,5
I have little confidence in the fairness of the procedures followed in other Member States	16	2,9	2,6
I have been unsuccessful in the past and am now no longer interested	0	0	0,0

Procedures and rules are generally easy to follow

field optional	*replies*	*% all replies*	*% per question*
Disagree	19	3,5	51,4
Agree	15	2,8	40,5
No opinion	3	0,6	8,1

It is not difficult to comply with the rules

field optional	*replies*	*% all replies*	*% per question*
Disagree	20	3,7	54,1
Agree	14	2,6	37,8
No opinion	3	0,6	8,1

The awarding of public tenders is fair and non-discriminatory

field optional	*replies*	*% all replies*	*% per question*
Disagree	19	3,5	51,4
No opinion	13	2,4	35,1
Agree	5	0,9	13,5

It is not difficult to get information on/find out about calls for tender

field optional	*replies*	*% all replies*	*% per question*
Disagree	19	3,5	51,4
Agree	15	2,8	40,5
No opinion	3	0,6	8,1

As regards public supply or services contracts you have tendered for over the past 2 years, how many were for less than € 155,000?

field optional	*replies*	*% all replies*	*% per question*
Did not tender for any supply or services contract	189	34,8	54,9
1-5	77	14,2	22,4
More than 10	54	9,9	15,7
6-10	24	4,4	7,0

As regards public supply or services contracts you have tendered for over the past 2 years, how many were between €155,000 and €240,000?

field optional	*replies*	*% all replies*	*% per question*
Did not tender for any supply or services contract	204	37,6	62,2
1-5	68	12,5	20,7
More than 10	36	6,6	11,0
6-10	20	3,7	6,1

As regards public works contracts you have tendered for over the past 2 years, how many were for less than €6,200,000 ?

field optional	*replies*	*% all replies*	*% per question*
Did not tender for any public works contract	233	42,9	71,7
More than 10	47	8,7	14,5
1-5	38	7	11,7
6-10	7	1,3	2,2

As regards public works contracts you have tendered for over the past 2 years, how many were for more than €6,200,000 ?

field optional	*replies*	*% all replies*	*% per question*
Did not tender for any public works contract	271	49,9	85,0
1-5	24	4,4	7,5
More than 10	16	2,9	5,0
6-10	8	1,5	2,5

Do you intend to bid for public contracts in the Accession countries after enlargement in May 2004?

field optional	***replies***	***% all replies***	***% per question***
No	206	37,9	59,2
Not sure	101	18,6	29,0
Yes	41	7,6	11,8

Has your company ever been deprived of an opportunity to seek a review because the contract had already been signed?

field optional	***replies***	***% all replies***	***% per question***
No	281	51,7	87,8
Yes	39	7,2	12,2

On how many occasions has your company been deprived of an opportunity to seek a review because the contract had already been signed?

field optional	***replies***	***% all replies***	***% per question***
On 1-5 occasions	31	5,7	81,6
On more than 5 occasions	7	1,3	18,4

Why?

field optional	***replies***	***% all replies***	***% per question***
Other reason	162	29,8	83,5
Because national legislation provides for a reasonable standstill period	32	5,9	16,5

Do you think there should be a specific provision (in a Community Directive) which fixes a minimum period between the notification of an award decision and the signing of the contract?

field optional	***replies***	***% all replies***	***% per question***
Yes	221	40,7	74,9
No	74	13,6	25,1

If yes, how long should this period be?

field optional	***replies***	***% all replies***	***% per question***
Between 15 and 30 calendar days	98	18	45,8
Between 11 and 14 calendar days	90	16,6	42,1
Less than 10 calendar days	26	4,8	12,1

Have you ever applied for an interim order to review public contract awards?

field optional	***replies***	***% all replies***	***% per question***
No	294	54,1	93,3
Yes	21	3,9	6,7

If you have never applied for an interim order in the past, was it because...

field optional	***replies***	***% all replies***	***% per question***
Other:	124	22,8	52,3
I was not aware of this rule	84	15,5	35,4
The contract was already signed when I learned about a possible breach of the rules	21	3,9	8,9
National legislation provides for an automatic suspension of the award procedure	6	1,1	2,5
The deadline for applying had expired	2	0,4	0,8

If you have applied for an interim order (or several) in the past, how long on average did it take to get it?

field optional	*replies*	*% all replies*	*% per question*
Between 11 and 21 calendar days	9	1,7	45,0
More than 22 calendar days	7	1,3	35,0
Less than 10 calendar days	4	0,7	20,0

If you have applied for interim orders in the past, were your applications successful in :

field optional	*replies*	*% all replies*	*% per question*
The majority of cases	11	2	55,0
Only in a minority of cases	6	1,1	30,0
Never successful	3	0,6	15,0

How would you rate the operation of this rule in your Member State?

field optional	*replies*	*% all replies*	*% per question*
I have never heard of this rule	173	31,9	60,7
In general, the rule is applied in a satisfactory manner	50	9,2	17,5
It is not easy to apply the rule	26	4,8	9,1
The rule is not applied in a satisfactory manner	17	3,1	6,0
It is very difficult to apply	11	2	3,9
It works very well	8	1,5	2,8

Have you ever brought an action claiming damages or some other type of compensation?

field optional	*replies*	*% all replies*	*% per question*
Never	276	50,8	90,5
Once	16	2,9	5,2
On more than one occasion	10	1,8	3,3
Have always made a claim if I am dissatisfied with the outcome of my application(s)	3	0,6	1,0

If you have brought a claim(s), was the outcome...

field optional	*replies*	*% all replies*	*% per question*
Never successful	27	5	60,0
A partial success	14	2,6	31,1
A complete success	4	0,7	8,9

In your view, why have these claims not been a complete success?

field optional	*replies*	*% all replies*	*% per question*
Other:	34	6,3	43,6
The difficulty in proving that my company should have won the tender	23	4,2	29,5
Procedural difficulties - the prior obligation to get the decision of the awarding authority overturned before lodging a claim	10	1,8	12,8
The high cost of legal proceedings compared to damages awarded	9	1,7	11,5
The amount of damages awarded was too low	2	0,4	2,6

If you think that there are still problems with public procurement rules, how could these be best resolved? (more than one choice possible)

field optional	*replies*	*% all replies*	*% per question*
Through EU guidelines	102	18,8	24,3
By competent national supervisory authorities	85	15,7	20,2
By effective national review procedures	83	15,3	19,8
Through national guidelines	59	10,9	14,0
By national advisory bodies	43	7,9	10,2
Through mediation/conciliation	36	6,6	8,6
Other	12	2,2	2,9

Even if you are satisfied with how the current rules operate, we would like to have your opinions on a number of possible changes including possible new remedies.Would you favour the creation of an independent body in each Member State with the authority (or if there is one already in place, it should be given the authority) to bring proceedings in some cases of breach of public procurement rules?

field optional	*replies*	*% all replies*	*% per question*
In favour	209	38,5	69,0
Not sure	49	9	16,2
Not in favour	45	8,3	14,9

In your view, which of these proceedings should the independent body deal with? (please tick all that apply)

field optional	*replies*	*% all replies*	*% per question*
An application to set aside illegal decisions made by contracting authorities	170	31,3	37,2
Imposing sanctions for breaches of the rules	156	28,7	34,1
An application to suspend the awarding of a contract	131	24,1	28,7

This authority could act on information provided by persons/organisations who are not parties to public contracts.

field optional	*replies*	*% all replies*	*% per question*
Agree	177	32,6	57,8
No opinion	53	9,8	17,3
Disagree	48	8,8	15,7
Don't know	28	5,2	9,2

It could play a useful role in pursuing infringements which are particularly difficult for potential bidders to detect e.g. the conclusion of a contract by direct agreement without publishing a notice in the Official Journal of the European Union.

field optional	*replies*	*% all replies*	*% per question*
Agree	222	40,9	72,8
No opinion	44	8,1	14,4
Don't know	21	3,9	6,9
Disagree	18	3,3	5,9

It could play a useful role in the event of repeated or serious infringements by a contracting authority.

field optional	*replies*	*% all replies*	*% per question*
Agree	246	45,3	80,9
No opinion	30	5,5	9,9
Don't know	19	3,5	6,3
Disagree	9	1,7	3,0

It would simply add another layer to the review procedures and slow down decisions on public contracts.

field optional	*replies*	*% all replies*	*% per question*
Agree	119	21,9	38,6
Disagree	108	19,9	35,1
Don't know	45	8,3	14,6
No opinion	36	6,6	11,7

The complainant would have no influence over the steps taken by an independent authority.

field optional	*replies*	*% all replies*	*% per question*
Disagree	107	19,7	34,9
Agree	91	16,8	29,6
No opinion	56	10,3	18,2
Don't know	53	9,8	17,3

The authority might use a wide area of discretion when deciding to start or not to start proceedings.

field optional	*replies*	*% all replies*	*% per question*
Agree	140	25,8	45,6
Disagree	70	12,9	22,8
Don't know	57	10,5	18,6
No opinion	40	7,4	13,0

Is there any national regulation concerning conciliation mechanisms (in relation to public procurement) in your Member State?

field optional	*replies*	*% all replies*	*% per question*
Don't know	243	44,8	78,1
Yes	41	7,6	13,2
No	27	5	8,7

Would you agree that conciliation mechanisms are necessary?

field optional	*replies*	*% all replies*	*% per question*
No	12	2,2	44,4
Yes	11	2	40,7
Don't know	4	0,7	14,8

Public authorities continue to make direct awards which are difficult for a potential tenderer to challenge.

field optional	*replies*	*% all replies*	*% per question*
Agree	229	42,2	48,7
Don't know	189	34,8	40,2
Disagree	52	9,6	11,1

High costs associated with review/appeal procedures

field optional	***replies***	***% all replies***	***% per question***
Don't know	235	43,3	49,8
Agree	201	37	42,6
Disagree	36	6,6	7,6

The slow pace of review/appeal procedures

field optional	***replies***	***% all replies***	***% per question***
Agree	225	41,4	47,9
Don't know	218	40,1	46,4
Disagree	27	5	5,7

The limited chance of success when using review/appeal procedures

field optional	***replies***	***% all replies***	***% per question***
Don't know	249	45,9	52,9
Agree	183	33,7	38,9
Disagree	39	7,2	8,3

Did you encounter difficulties when completing this questionnaire?

compulsory	***replies***	***% all replies***
No	476	87,7
Yes	67	12,3

What difficulties did you encounter?

field optional	***replies***	***% all replies***	***% per question***
other:	33	6,1	46,5
Some questions were difficult to understand	16	2,9	22,5
Terms/explanations provided were not always clear	15	2,8	21,1
Difficult to follow the sequence of questions	4	0,7	5,6
The questionnaire was too long	3	0,6	4,2

COMMISSION OF THE EUROPEAN COMMUNITIES

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

Internal Market Strategy

Priorities 2003 - 2006

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Introduction

This Strategy sets out what the European Union needs to do over the next three years to derive maximum benefits from the Internal Market after enlargement. The Commission has already described the achievements of the Internal Market over the last decade[1]. This analysis shows the significant benefits that a properly functioning Internal Market can and does bring, but it also shows that the Internal Market does not yet function optimally in a number of ways and that sizeable benefits are therefore being missed. A fresh impetus is required to eliminate remaining weaknesses and allow the Internal Market to deliver its full potential in terms of competitiveness, growth and employment.

Part A : Context

1. The role of the Strategy in the EU's economic reform process

The European Council of 20 and 21 March 2003 recognised the importance of the Internal Market Strategy as one of the key economic policy co-ordination instruments at EU level, alongside the Broad Economic Policy Guidelines (BEPG)[2] and the Employment Guidelines (EG)[3]. The actions set out in the Internal Market Strategy must therefore be seen in conjunction with the actions suggested in the BEPG and the EG[4]. All three of these instruments have been streamlined and given a three-year perspective in order to ensure a more comprehensive, efficient and coherent approach to economic reform in the EU[5].

The Internal Market Strategy will be an important input into the new Competitiveness Council. In addition, the Commission is presenting a number of other policy documents which are relevant to competitiveness, including the Communication on Industrial Policy in an Enlarged Europe[6], the Green Paper on Entrepreneurship[7], the Communication on Innovation Policy[8], and "Investing in Research: an Action Plan for Europe."[9] This will allow the Competitiveness Council to consider the relationship between the different strands of its work and enable it to set the overall framework for competitiveness, as requested by the European Council.

[1] The Commission estimates that the Internal Market has delivered 2.5 million extra jobs and nearly €900 billion in extra wealth. See "The Internal Market – Ten Years without Frontiers", SEC(2002) 1417 of 7.1 2003.

[2] COM (2003) 170 final of 8.4.2003.

[3] COM (2003) 176 final of 8.4.2003.

[4] See particularly the section in the BEPG on "Economic reforms to raise Europe's growth potential" which includes general recommendations aimed at improving the functioning of the Internal Market.

[5] Commission Communication on streamlining the annual economic and employment policy co-ordination cycles, COM (2002) 487 final of 3.9.2002.

[6] COM (2002) 714 final of 11.12.2002.

[7] COM (2003) 27 final of 21.1. 2003.

[8] COM (2003) 112 final of 11.3.2003.

[9] COM (2003) 226 of 30.4.2003.

This Strategy should also be seen as a response to the European Parliament's recent report on the Internal Market Strategy[10]. This report stressed that improving the functioning of the Internal Market should be a top priority for the Union and called for a major new initiative to speed up the delivery of key reforms.

2. Why a new Strategy now?

The Commission sees **three main reasons why the EU needs to make a determined push now to improve the Internal Market**: -

– The sub-optimal performance of the Internal Market is one of the challenges that stands between the EU and the **realisation of the ambitious objective it set itself at Lisbon in 2000**. It is necessary to take decisive action quickly. We know that it can take several years before adopted measures produce real impacts on the ground. In order for the EU to become the most competitive and dynamic knowledge based economy in the world by 2010, the measures needed to create a genuinely unified and integrated market must be adopted very soon.

– It is urgent to develop an effective strategy to strengthen the Internal Market, because **enlargement is only a year away**. Enlargement offers unprecedented opportunities for both existing and new Member States, but it is not without risks. The Internal Market is perpetually vulnerable to fragmentation and enlargement will be a moment of heightened vulnerability, unless we strengthen all our key policy instruments and concepts so that they continue to work well, or better, in a Union of 25 countries[11]. Only then can the potential gains which enlargement offers be realised.

– The EU, in common with other parts of the world, is currently facing a slowdown in economic growth and job creation. This makes it all the more essential to press ahead with **structural reforms in order to increase the capacity of our economies to grow**. Removing the bottlenecks in the Internal Market will put Europe in a much better position to face up to the ever stiffer competition from emerging economies. It will also leave the Union better protected against future fluctuations in the economic cycle and provide it with a stronger economic basis to deal with the **huge challenges of an ageing population**.

3. A more focused approach

When adding a few extra floors to a building - which is what enlargement will do to the EU - it is essential to ensure that its foundations are sufficiently strong. The Strategy, therefore, **focuses very firmly on strengthening the "basics" or "fundamentals" of the Internal Market**; removing obstacles to trade in goods and services, ensuring that agreed rules are correctly implemented and effectively enforced, cutting red tape, tackling tax barriers, expanding procurement opportunities.

The problems to be tackled are in many cases old ones that have resisted earlier attempts to solve them. But covering familiar problems does not mean "business as usual". The Commission is putting forward some fresh ideas and calling for stronger political determination to deliver results for both business and consumers.

[10] Harbour Report, A5-0026/2003.

[11] 28 with the EEA countries.

Not all the proposed actions, of course, are new. Much vital work is already in the pipeline and in some cases already well advanced (for example, the Financial Services Action Plan, the political agreement on a Community Patent) and this Strategy calls for their early adoption or completion. Other proposed actions are outlined here but will need to be the subject of further examination and impact assessment before the Commission is able to make concrete proposals. Yet other actions are for the Member States themselves to implement. Further detail on all the proposed actions, including the timetable, can be found in the annex[12].

4. A shared agenda

As the Internal Market's regulatory framework takes shape, the emphasis is shifting towards the Member States who have to make the Internal Market work in practice – on a daily basis. The Internal Market belongs to them – not the Commission. It is they who must implement Internal Market law promptly and correctly, inform their citizens and businesses of their rights, and resolve problems as and when they occur. It is they who must act according to the letter and the spirit of the Internal Market, refraining from putting in place national laws which conflict with Internal Market principles. To fulfil their role successfully, they must co-operate more closely amongst themselves and with the Commission.

In order to be effective, therefore, this Strategy must be viewed not just as a Commission document, but as a shared agenda, behind which the Council, the European Parliament and the Member States (existing and new) can all throw their weight.

The new Constitutional Treaty, which will emerge from the Inter-Governmental Conference, will define the relationship between the different EU institutions and between the EU and the Member States. It is essential that this Treaty continues to provide a robust legal basis for the further development of the Internal Market, so that it can go on serving Europe's interests and empowering our citizens and businesses.

[12] The actions are classified in the annex according to three types: type 1: early adoption or completion; type 2: for further examination and discussion; and type 3: for Member States to implement.

Part B: Priorities

1. FACILITATING THE FREE MOVEMENT OF GOODS

a) Assessment

Trading goods across borders within the EU still remains more costly and complex than doing business within a Member State. When selling abroad, companies sometimes have to have their products re-tested or even modified in order to meet local requirements. The intensity of controls and market surveillance varies from Member State to Member State. Substandard products may slip through the net and be bought by consumers who have the right to expect high health and safety standards for all products on the market.

Free movement of goods (and services) in the Internal Market is above all based on confidence. Confidence of businesses that they can sell their products on the basis of a clear and predictable regulatory framework. Confidence of Member States' administrations that the rules are respected in practice throughout the EU and that the competent authorities in other Member States will take appropriate action when this is not the case. And, of course, consumers' confidence in their rights and that the products they buy are safe and respect the environment.

With the EU increasing in size and diversity after enlargement, confidence in the operation of the existing legal framework for the free movement of goods needs to be further strengthened. This can best be done by putting in place a number of disciplines which will make the rules more transparent and more predictable and which will encourage national authorities to have more confidence in each other's methods and assessments. This is not always glamorous work – but it must be done to foster intra-Community trade and harvest the advantages of economies of scale and specialisation.

Technical obstacles continue to frustrate cross-border trade in goods:

- Trade with third countries has been growing faster than trade between Member States in recent years and the convergence of prices between the Member States has more or less ground to a halt.[13]

- 75% of businesses think that removing technical barriers to trade in goods and services should be a top priority for the Union.[14]

- Almost one in five Swedish companies encounter barriers to trade. 85% choose to get round the problem by adapting their products to comply with the rules in the receiving country.[15]

- Technical regulations and conformity assessment are the biggest headache for Spanish businesses – accounting for half of all problems encountered.[16]

- The average time needed to adopt European standards increased from 4.5 years in 1995 to about 8 years in 2001[17]. Only 22% of the 600 standards needed to create a genuine Internal Market for construction products have been adopted more than a decade after the Construction Products Directive entered into force[18].

- Non-application of the mutual recognition principle cut trade inside the EU by up to €150 billion in 2000[19].

[13] 2001 and 2002 Reports on the functioning of Community product and capital markets, COM (2001) 736 of 7.12.2001 and COM (2002) 743 final of 23.12.2002.

[14] Internal Market Scoreboard No. 11, November 2002.

b) Actions

1. **Mutual recognition** is a corner stone of the Internal Market It enables products to circulate freely on the basis of conformity with the national laws in the Member State where the product is first marketed. The principle is that there are no specific procedural rules and no extra paperwork. This is its strength, but at the same time its weakness. When problems occur, there is little or no transparency, there is no commonly agreed approach to evaluating whether levels of protection are equivalent and there is no clear procedure for a company to challenge a negative decision. As a result, many companies decide to abandon certain markets or are forced to modify their products to comply with local requirements. Such responses risk becoming more widespread after enlargement.

The Commission, therefore, takes the view that specific rules are needed to give mutual recognition more structure so as to enhance transparency and to encourage national authorities to act more 'European'. The Commission believes this could best be achieved by means of a new Community Regulation establishing key principles. These could include mandatory notification in cases where mutual recognition is refused, the possibility for companies to demonstrate that the disputed product is indeed lawfully marketed elsewhere in the EU by means of a standard certificate and possibilities for appeal. Before making a proposal, the Commission will consult widely with the Member States, industry and other interested parties on the different options.

2. In more complex or sensitive areas, mutual recognition is not enough and the only way to remove barriers is to harmonise national rules at EU level. While this is sometimes achieved through detailed, technical legislation, in certain sectors, a simplified regulatory alternative is used, known as the **"New Approach."** Developed in 1985, this limits legislation to establishing the mandatory essential requirements that products must meet, leaving manufacturers free to choose to apply either the appropriate European standard or any other technical specifications which meet these essential requirements.

The New Approach has been a successful tool for the development of the Internal Market but some of its features need strengthening, particularly in view of enlargement. This includes improving conformity assessment procedures, strengthening administrative co-operation and market surveillance to ensure that effective action is taken when products do not meet the essential requirements and improving understanding of CE-marking. There may also be a case for expanding the use of the New Approach to sectors not yet covered as a means of improving and simplifying legislation.

These ideas are set out in a Commission Communication on "Enhancing the Implementation of the New Approach Directives", which is being issued in parallel with the Internal Market Strategy. One of the options being considered is the introduction of a common base Directive, including standard articles on horizontal issues common to all New Approach Directives. This

[15] Swedish National Board of Trade, Internal Market Division: Problems for free Movement on the Internal Market 16.9.2002 Dnr 100-111-2002.

[16] "Línea abierta para la identificación de problemas de la empresas espagñoles en el mercado único europeo, Fase IV" 2002, Ministerio de Economía and Confederación Espagñola de Organizaciones Empresariales.

[17] Internal Market Scoreboard No. 9, November 2001 (figures only cover CEN).

[18] See footnote 14.

[19] 2001 Report on the functioning of Community product and capital markets, COM (2001) 736 of 7.12.2001.

approach would strengthen consistency between New Approach Directives and ensure more effective implementation.

3. **European standards** play a particularly vital role in the implementation of New Approach Directives. Currently, it takes far too long to develop standards. The European standardisation organisations and industry must work together to speed up the process. There is also a need to ensure quality[20] in the production of standards and their uniform transposition into national standards, including in the new Member States. The promotion of European voluntary marks needs to be reinforced, since nationally controlled marks may have a fragmentary effect. The Commission will ensure implementation of these aims, in particular through partnership and performance contracts that it will sign with the European standardisation organisations in 2003. The aim is to link Community financial support for these organisations to clear performance criteria.

4. In order to ensure that economic development is **sustainable**, the EU has established minimum requirements for the quality of air and water and the reduction of waste. Clearly, success in meeting these requirements will depend on our ability to limit the impact of products on the environment – i.e. the impact of both their production and their use. The EU needs to provide industry with a coherent and flexible regulatory framework which does this effectively - and which at the same time is not detrimental to competitiveness and free circulation within the Internal Market. Otherwise Member States will seek to meet EU environmental requirements by adopting their own national technical rules which can create new barriers to trade.

In response to this challenge, the Commission has already adopted proposals to introduce environmental requirements into some items of Internal Market legislation[21]. In addition, it will shortly adopt an innovative proposal for a framework Directive on the Eco-design of products. These Directives will need to be adopted and implemented. They are in line with the principles of Integrated Product Policy[22] for which the Commission will set out the next steps shortly. Standardisation also has a role to play here. A better integration of environmental requirements in technical standards can help to reduce the impact on the environment of products and also reduce the development of national environmental legislation. A Communication on this issue is scheduled for adoption by the end of the year.

5. Consumer confidence in **product safety** relies on effective market surveillance and consistent enforcement across the EU by competent authorities, as well as fulfilment by producers and distributors of their obligations. The safety of consumer products is regulated by sectoral Directives and the General Product Safety Directive (GPSD), which has been recently revised and reinforced. The Commission will seek to ensure compliance with the requirements of this Directive, through the development and revision of European standards, and will report on its application by 2006. In addition, the Commission intends to present a legislative proposal on unfair commercial practices to improve consumer protection and the functioning of the Internal Market (for goods and services).

[20] There is also a need to increase the participation of all interested parties, particularly representatives of SMEs, in the drafting of standards.

[21] See, for example, the Commission proposal for a Directive of the European Parliament and the Council modifying Directive 94/25/EC on the approximation of laws, regulations and administrative provisions of the Member States relating to recreational crafts, COM (2000) 639 final, OJ C 62E, 27.02.2001, p.139.

[22] Green Paper on Integrated Product Policy, COM (2001) 68 final of 7.2.2001.

A more coherent European contract law would also facilitate intra-EU trade and will make it easier for consumers to reap the benefits of the Internal Market. Steps to promote convergence of national contract laws will be pursued through the Action Plan on European Contract Law.[23]

6. In the **automotive sector**, the EU Whole Vehicle Type-Approval system applies to both passenger cars and motor cycles on a mandatory basis. This system has a number of advantages. Once a car or a motor cycle is type-approved in one Member State, it can be registered and put on the market anywhere in the Community without further testing. This reduces costs for industry and prevents the re-emergence of barriers in the Internal Market. The system now needs to be extended to other types of vehicles, particularly trucks, vans and lorries.

[23] COM (2003) 68 final of 12.2.2003.

2. INTEGRATING SERVICES MARKETS

a) Assessment

Considerable differences in regulation from one Member State to the next – and the lack of confidence in each others' regulatory systems - are the main reason why free movement of services has so far been more a legal concept than a practical reality. Because of the complex and intangible nature of many services - and the importance of the know-how and qualifications of the service provider – they are generally subject to more wide-ranging and complex legal rules than goods.

The picture is not entirely bleak. In financial services, action is well underway – with 32 of the 42 measures foreseen in the Financial Services Action Plan (FSAP) already adopted. However, structural changes, new business models and constantly evolving risk patterns pose new challenges for financial regulators and supervisors. Furthermore, new regulatory bottlenecks have been uncovered, e.g. in the area of clearing and settlement, which constitute the arteries of the financial system. Particular attention will also need be devoted to identifying regulatory barriers which are acting as a brake on trade and competition in markets for those retail financial services which are tradable.

Many other services sectors – such as tourism, distribution, construction, engineering and consultancy, certification and testing services or employment agencies - have not been subject to a comprehensive Internal Market policy. There are different ways of providing these services. While some can be provided at a distance thanks to new information and communication technologies, many still require the permanent or temporary presence of the service provider in the Member State where the service is delivered. For some services, such as distribution, establishment in the target market remains the key commercial strategy. However, these different ways of service provision are all hampered by a variety of legal and administrative barriers[24].

These barriers affect all stages of the business process – from the initial establishment of the business and the use of inputs, such as labour and equipment – right through to promotion, distribution, sales and after-sales activities. They result in considerable extra costs for companies doing business between Member States. This leads to a waste of resources, limiting innovation and differentiation of services. Some companies are deterred from trading across borders at all – particularly SMEs – which are prominent in service industries. This limits competition and consumer choice and keeps prices higher than they need to be. And it prevents the full job creation potential of the service industries from being realised.

It is still very difficult to provide services across borders:

- Services account for for just 20% of trade in the Internal Market, which is less than a decade ago.
- There is an enormous growth potential in most of the Accession Countries where services represent between 56% and 70% of the economy[25] and 54% of total employment[26].

[24] See the report from the Commission to the Council and the European Parliament on the State of the Internal Market for Services (COM (2002) 441) presented under the first stage of the Internal Market Strategy for Services (COM (2000) 888).

[25] Data from the Commission's 2002 Regular Reports on the Candidate Countries' progress towards accession (the figure for Cyprus is 77%).

[26] Commission Report on "Employment in Europe 2002 – Recent Trends and Prospects".

- Nearly 90% of all SMEs in the EU are in service industries[27].
- 40% of business service providers say that eliminating barriers to cross-border trade would increase their sales by up to 20%[28].
- There is plenty of anecdotal evidence on the costs of barriers: one software company spent over €6 million p.a. on the administrative costs associated with moving its staff between Member States; a retail bank paid €19,000 in legal fees before it could run a promotional campaign in two Member States[29].
- In financial services, recent estimates show that further integration could add €130 billion to EU GDP over ten years and boost employment by 0.5%.[30]

b) Actions

1. The Council and Parliament should adopt the proposed **Regulation on Sales Promotion**, which will facilitate trans-European promotional campaigns, and the **Directive on the recognition of professional qualifications**. The latter aims to promote mobility of skilled professionals, including for temporary provision of services in the 'host state' on the basis of compliance with 'home state' rules, thus enhancing consumer choice and ensuring competitive pricing of professional services. Member States must then transpose it correctly and on time and ensure that it is properly applied and enforced.

2. The Commission will make a proposal for **a Directive on services in the Internal Market** before the end of 2003. This Directive will establish a clear and balanced legal framework aiming to facilitate the conditions for establishment and cross-border service provision. It will be based on a mix of mutual recognition, administrative co-operation, harmonisation where strictly necessary and encouragement of European codes of conduct/professional rules.

The Commission will also issue a Communication on the competitiveness of business-related services and their contribution to the performance of European enterprises, setting out non-legislative measures designed to complement the Directive. These will include the development of European standards and measures to improve the statistical coverage of services sectors.

3. Subject to the results of a feasibility study, the Commission intends to propose the **extension of the screening mechanism for draft national technical regulations**[31], to cover services, besides information society services (already covered). This is intended to act as a brake on the creation of new Internal Market barriers in services.

4. The Commission will ensure appropriate follow-up to its report on the **safety of services for consumers** which envisages the introduction of a legislative measure designed to monitor and support national policies and measures in this area.

[27] Highlights from the 2001 Survey, Observatory of European SMEs, 2002.

[28] From a survey on business services carried out for the Commission. See the statistical and technical annex to the 2002 Report on the functioning of Community product and capital markets.

[29] See footnote 24.

[30] "Quantification of the macro-economic impact of the integration of EU financial markets", London Economics study for DG Internal Market.

[31] This will require an amendment to Directive 98/34/EC.

5. The Council and Parliament should adopt the remaining FSAP measures, notably the **Prospectus Directive** and the **Investment Services Directive**, and conclude the first reading on the **Transparency Directive** before the end of the current legislature.

6. The Commission will make the final proposals provided for under the FSAP, including a new **Capital Adequacy Directive** (in early 2004).

7. The Commission will also publish a **Communication on clearing and settlement** in the second half of this year setting out the steps needed to achieve a single European payments area and to facilitate cross-border share trading. This Communication will raise the possibility of establishing an EU-level regulatory framework underpinned by Community legislation.

8. The Commission will consult widely on **completing and further developing the FSAP**, with particular focus on creating a single market in retail financial services. The Council and Parliament should adopt the **Consumer Credit Directive** to enable progress towards an effective single credit market.

3. ENSURING HIGH QUALITY NETWORK INDUSTRIES

a) Assessment

The "network industries" are vitally important for our quality of life and the well being of all EU citizens. They are also key inputs for EU industry and therefore have a determining effect on our international competitiveness.

Over the past ten years, there has been a significant degree of market opening in these sectors – driven partly by Community legislation and partly by market and technological developments. This has brought considerable benefits for both business and consumers.

The priority now is to complete the process of market opening by adopting existing proposals and making new ones where necessary. One area where new action may be required is the water sector – which remains fragmented and where there are potential gains to be had from modernisation. However, this will be the subject of further study. European policy on the question of ownership of water and water services will continue to be neutral. Further action is also foreseen to deliver a modern and dynamic postal sector.

All of the "network industries" are subject to specific public service obligations, e.g. relating to the provision of essential services to vulnerable groups in the population and those living in geographically remote areas. It is vital that these obligations continue to be met. The Commission will shortly publish a Green Paper looking at the EU's role in this area, which is intended to launch a wide-ranging debate on the issues involved.

Over the next few years, massive investment will be needed to raise the quality of our infrastructure, particularly in the Accession Countries. Given the tough budgetary constraints on governments, it is unlikely that public money alone will be enough to finance these needs. The private sector will play an increasingly important role in financing infrastructure and in modernising our vital services and ensuring that they are affordable and of the highest possible quality.

However, public-private partnerships raise certain legal issues. These issues must be clarified so as to create a predictable legal framework within which such partnerships can thrive. The Commission will seek to do this in two ways. First, it will clarify the impact of EU competition/state aids policy on services of general economic interest. Secondly, it will clarify how procurement rules apply to situations in which public-private partnerships are bidding for the provision of these services.

Market opening has benefited both consumers and business:

- Combined with technological developments, market opening has brought down prices for national telephone calls by 50% since 1998, and those for international calls by 40%[32].

- Prices of promotional airfares fell by 41% between 1992 and 2000[33]. The number of routes linking Member States has risen by 46% since 1992 – giving passengers more choice.

[32] Eighth Report on the Implementation of the Telecommunications Regulatory Package, European Commission, SEC (2002) 1329.

[33] Updating and development of economic and fares data regarding the European Air Travel Industry, 2000 Annual Report. Commissioned by DG Transport and Energy.

- Domestic consumers are paying 15% less for their electricity in liberalised markets than in closed markets. And they are paying 25% less for their gas in the UK where markets are 100% open.[34]
- Water is an important sector in the economy, with an estimated annual turnover of €80 billion, which is larger than the natural gas sector. But annual water charges vary from €350 in Berlin to €50 in Rome (with no charge at all in Ireland).[35]
- Infrastructure investment needs for the Accession Countries are estimated at €100 billion for transport alone.[36]

b) Actions

1. The Council and Parliament should rapidly adopt the **"second railway package"**, the proposal on **controlled competition for public transport,** the package designed to create a **Single European Sky** and the proposal on **access to port services**. The Council should give a mandate to the Commission to negotiate an **open skies agreement with the US**. The Commission will rapidly bring forward proposals for **passenger transport market opening** in order to complete the Internal Market in the railway sector.

2. The Council should rapidly adopt and effectively implement the **"energy package"** to open gas and electricity markets completely for non-household customers by 2004 and for household customers by 2007.

3. While European policy on the question of ownership of water and water services will remain neutral, the Commission services will undertake a review of the legal and administrative situation in the **water and waste-water sector**. This will include an analysis of the competition aspects, in full respect of Treaty guarantees for services of general economic interest and environmental provisions. All options will be considered, including possible legislative measures.

4. Member States must ensure full and timely transposition of the **postal services** Directive which will open up substantial sections of the market to competition in 2003 and 2006. The Commission will complete, in the course of 2006, a study assessing, for each Member State, the impact on universal service of full accomplishment of the Internal Market for postal services. Based on the results of this study, the Commission may make further proposals.

5. The Commission will continue its efforts to clarify the **application of the state aid rules to compensation for the costs of providing services of general economic interest**, in the light of forthcoming Court decisions.

6. The Commission will issue a Green Paper in the course of this year with a view to launching a debate on how best to ensure that **public-private partnerships** for major projects can be undertaken in conditions of effective competition and full legal clarity under procurement rules. If necessary, it will propose further (legislative) measures to facilitate such partnerships.

[34] SEC (2003) 448 of 7.4.2003.

[35] Charges for a family living in a house using 200 cubic metres per year. Study on the application of the Competition Rules to the Water Sector in the EC. Produced by WRc and Ecologic for DG Competition, December 2002.

[36] European Commission, DG Transport and Energy.

4. REDUCING THE IMPACT OF TAX OBSTACLES

a) Assessment

As the Internal Market matures, more and more companies are seeking to organise themselves at a European level. However, operating with up to 15 (and soon 25) different systems of corporate taxation adds a whole layer of complexity to doing business.

Companies face a multitude of difficulties, such as the time taken by tax authorities to agree transfer prices for cross-border transactions between two parts of the same group, limits on cross-border loss relief (which can lead to an enterprise with overall losses having to pay tax!) and the problems of double taxation.

Moreover, the current VAT system revolves around taxation in the country of consumption. The result is that many firms doing business across borders have to pay VAT in a Member State where they have no permanent establishment. This is difficult and costly, since the trader may not be fully acquainted with the language and legislation in that country. It is a major obstacle to the smooth functioning of the Internal Market, particularly for SMEs. The current system is also vulnerable to fraud which requires a strong, co-ordinated response by the Member States and the Commission.

Other aspects of tax policy cause problems to both industry and citizens. Some Member States, for example, impose a higher tax on cross-border dividends than on domestic dividends. This kind of tax discrimination acts as a strong disincentive to the cross-border holding of shares and slows the creation of pan-European equity markets.

Furthermore, because of differences in Registration Tax, car manufacturers have to produce different models (e.g. with different engine horse power) for different national markets. This deprives them of the full benefits of operating within the Internal Market. Moreover, people who move to another Member State sometimes end up paying Registration Tax twice on the same car.

Tax obstacles are a major headache for businesses in the Internal Market:

- UNICE stresses that the existence of 15 different tax administrations represents "a major burden to business and in particular to SMEs. "[37]

- 77 % of businesses say that national tax systems should be more closely aligned.[38]Europe's top companies have called for further harmonisation of tax systems across the EU.[39]

- Compliance costs related to company tax represent anywhere between 2% and 4% of total corporate income tax revenues[40] - i.e. between €4.3 billion and €8.6 billion for the EU as a whole.[41]

[37] UNICE reaction to the Commission Communication and Report on Company Taxation in the Internal Market.

[38] See footnote 14.

[39] UPS Europe Business Monitor, http://www.ups.com/europe/ebmxi/flash/index.html

[40] European Commission "Company taxation in the Internal Market", COM (2001) 582 final.

[41] CEPS estimate using Commission figures.

b) Actions

1. On **company tax**, the Commission will take the following steps to remove key obstacles:

- In the short term, it will propose a revision of the **Parent/Subsidiary Directive** which is designed to eliminate double-taxation within the EU and permit dividends to be paid between companies in the same group without deduction of withholding tax. It will also propose a revision of the **Merger Directive** which is designed to assist the re-organisation of companies by providing for the deferral of certain tax charges and avoiding double taxation. The plan is to extend the applicability of both Directives by relaxing some of the conditions they set and allowing more companies to benefit from them.

- In the longer term, it will propose steps to introduce a **common consolidated corporate tax base** at EU level. This could be achieved without harmonising corporate tax rates and would go a long way towards solving the problems faced by companies by reducing the compliance costs which arise from dealing with fifteen separate tax systems, providing cross-border tax relief and simplifying the existing tax complexities associated with transfer pricing.

2. On **VAT**, the Commission will issue a Communication setting out further steps to modernise and simplify the existing system. These could include the introduction of a single place of compliance for all businesses trading in Member States where they have no establishment. Such an initiative would decrease the administrative cost of VAT for companies and make it easier to do business across borders. It would benefit SMEs in particular.

3. On **vehicle taxation**, the Commission recommends that Registration Tax should be phased out over a transitional period of five to ten years. Member States should compensate by switching over to increased annual road taxes and fuel taxes. The latter would benefit the environment as well as the Internal Market. The Commission will present legislative proposals to remove the obstacles to the free movement of cars in the Internal Market.

4. On **dividends**, the Commission will publish a Communication on the effect of the case law of the European Court of Justice on the various types of dividend taxation systems and take action to ensure non-discriminatory treatment, if necessary by launching infringement procedures.

5. EXPANDING PROCUREMENT OPPORTUNITIES

a) Assessment

The European Union's public procurement market is not yet sufficiently open and competitive. Many public purchasers, particularly at local government level, are unaware of the full extent of the rules. Because of the multiplicity of rules and procedures at national level, many suppliers are reluctant to sell to the government, particularly in another Member State. With few exceptions, procurement still relies entirely on extensive paperwork, ignoring the significant benefits of electronic procurement.

All this translates into limited cross-border participation in contract award procedures, inefficiencies in public procurement markets, lost business opportunities and a reduced likelihood that the taxpayer will achieve value for money. The costs of inefficient procurement are staggering. Public procurement is simply too important to the European economy to allow this situation to continue. With government budgets under severe pressure, more efficient procurement is an obvious way of achieving more with less.

The adoption and effective implementation of the legislative package is essential for modernising Europe's public procurement systems. Without it, neither a Europe-wide "electronic" procurement market can be achieved, nor will we have a legal framework which is suited for complex contracts, such as those for Trans-European networks. But there is more to be done. As with other key areas in the Internal Market, the Member States will have to play a much bigger role in ensuring that rules, which they themselves have agreed, are effectively applied. They should also simplify their national rules, and standardise procedures as much as possible across procurement entities to make it easier for companies to participate in calls for tender. Steps should also be taken to ensure that public-private partnerships for major projects can be undertaken in conditions of effective competition and transparency under procurement rules.[42]

The Commission takes the view that Member States should appoint a national authority which would be responsible for the surveillance of contracting entities' compliance with procurement law. Some Member States have already done so. These authorities should have the possibility in the general interest to bring possible infringements before the courts, seeking the imposition of effective remedies against non-compliant contracting authorities. Stronger remedies would need to be complemented by more intensive administrative co-operation between Member States (based on the recently created European Procurement Network).

Part of achieving better compliance is to raise the professional standards of procurement officials. Those responsible for spending major sums of public money should be fully conversant with existing rules on competitive tendering. Member States should, therefore, ensure that their own procurement officials have access to training with a view to acquiring and developing the professional expertise which the importance of their job demands.

[42] See also section B.3.

Governments and taxpayers are not getting value for money:

- Procurement represents 16% of EU GDP in – i.e. €1.429 billion.[43]A five percent cost reduction as a result of more competitive and efficient public procurement markets would therefore save over €70 billion – i.e. more than four times the education budget for Denmark.[44]
- Only about 16% (in value) of public procurement was published on an EU-wide scale in 2001.[45]
- Cross-border procurement (including indirect procurement through affiliates in foreign countries) rose from 6%[46] in 1987 to 10%[47] in 1998 but has stagnated since then. This is considerably less than in the private sector where cross-border purchasing stands at about 20%.
- Electronic procurement in the EU beyond the posting of notices is negligible.

b) Actions

1. The Council and Parliament should adopt the **legislative procurement package**, which consolidates and modernises the current regime, and which creates the conditions for electronic procurement to take off. Member States must implement this legislative package into national law correctly and on time. This will provide an excellent opportunity for Member States to streamline and simplify their own legislation and standardise procedures.

2. The Commission intends to suggest that Member States confer onto an existing **national surveillance authority (**or onto another national body) the power to bring cases before a national review body or court, seeking effective remedies. Such bodies would have to be independent from contracting authorities and would have to ensure that major cases of non-compliance are effectively sanctioned. This could be achieved in the context of the revision of the Procurement Remedies Directives which is planned for 2004.

3. The recently established **Public Procurement Network** should be extended to include all Member States, EEA and Accession Countries. It should be adequately resourced by the Member States so that it can become the vehicle for resolving cross-border problems (in conjunction with the SOLVIT network), sharing best practices and improving SMEs' access to public procurement. It should also encourage Member States to develop training and ‘certification’ of required competencies, including knowledge of EU law, to improve professionalism.

4. Member States should ensure that all their operational **e-procurement** systems are in full compliance with the requirements of the legislative package by the time it enters into force (probably during the second half of 2005). They should aim at conducting a significant part of their procurement transactions (in value) on an electronic basis by the end of 2006. Generalised e-procurement should be achieved before 2010. The Commission will, next year, present an Action Plan (which will include both legislative and non-legislative measures) for a co-ordinated approach across the EU.

[43] 2002 Report on the functioning of Community product and capital markets, COM (2002) 743 final of 23.12.2002 (2001 figure).

[44] 2000 figure, Ministry of Education, Denmark.

[45] See footnote 43.

[46] The Single Market Review, sub-series III, Volume 2, Public Procurement, p.221.

[47] This figure is taken from an independent study carried out for the Commission. See OJ C 330 of 21.11.2000.

5. There is considerable scope for achieving greater efficiency in **European defence procurement**. This will in turn lead to a more competitive European defence equipment industry[48]. The European Court of Justice has produced some important rulings on the scope of Article 296 of the Treaty which covers exceptions for essential security interests in Member States. The Commission will publish an interpretative Communication by the end of 2003 on the implications of these rulings, inter alia for procurement. It also intends to present a Green Paper in 2004 to looking at any further initiatives in European defence procurement.

[48] See the Commission Communication on "European defence – industrial and market issues: towards an EU defence equipment policy", COM (2003) 113 final of 11.3.2003.

6. IMPROVING CONDITIONS FOR BUSINESS

a) Assessment

Action aimed at integrating markets by removing technical and fiscal obstacles to trade and cutting red tape is critical to improving the business environment, but will have its full effect only if we put in place the framework conditions which support creative, dynamic businesses. Small enterprises, in particular, are very sensitive to changes in the business environment. That is why the Feira European Council of June 2000 endorsed the European Charter for Small Enterprises.

The policy measures required to foster entrepreneurship and innovation are mainly within the direct control of Member States[49]. It is up to them to take the necessary action in these areas, drawing fully on exchanges of experience and best practice elsewhere in the European Union. This can be done by benchmarking using the Best Procedure projects[50] co-ordinated by the Commission and by making use of the information collected in the course of the reporting on the implementation of the Charter for Small Enterprises[51].

Beyond this, however, there are a number of areas where Internal Market policies are directly relevant to boosting entrepreneurship and innovation within what is an increasingly knowledge based economy. Europe is a rich source of creativity. But more action is needed to create the appropriate framework conditions in which that creativity can be transformed into investment and competitive economic activity.

Economic operators need to know that their investment in innovative ideas and products will be protected across the EU, including against piracy and counterfeiting[52]. There has already been a significant degree of Community level harmonisation in this area. But coherent enforcement of intellectual property rights across the EU has now become a key issue, particularly in the digital era, as the relevant goods and services can be easily copied and moved from one place to another. Enforcement issues will be even more crucial in an enlarged Internal Market. In addition, it is important to facilitate the cross-border marketing of copyright protected products, such as print products, films and CDs, so that everyone can share in the results of innovation.

Moreover, investors need the guarantee that, when making investment choices, they can rely on company accounts and reports. Firms need to be confident that they can compete on a level playing field (e.g. free from the distortionary effects of state aids), that they will be able to make cross-border strategic alliances and mergers in confidence, and that appropriate legal structures exist to allow all businesses, whatever their size, to operate effectively across the enlarged EU.

[49] See the Green Paper on “Entrepreneurship in Europe” COM (2003) 27 of 21.1.2003 and the Communication on “Innovation Policy: updating the Union’s approach in the context of the Lisbon Strategy”, COM (2003) 112 final of 11.3.2003.

[50] The Best Procedure was launched in the framework of the Multi-annual programme for enterprise and entrepreneurship (Council Decision 2000/819/EC of 20 December 2000). It provides a framework to support Member States’ efforts to identify and exchange best practices in areas of particular importance to enterprises.

[51] “Report on the implementation of the European Charter for Small Enterprises”, COM (2003) 21 final/2 of 13.2.2003.

[52] Efforts to enforce intellecutal property rights could be strengthened by the involvement of Commission services, especially the European Anti-Fraud Office (OLAF).

The EU must help to create an environment in which businesses can thrive:

- More than 17,000 legitimate jobs are lost annually through piracy and counterfeiting in the EU. [53]
- According to industry sources, 37% of software being used in the EU is pirated which represents revenue losses of €2.9 billion.[54] The music industry shows a 7.5% average overall downturn in sales in the EU in 2001.[55] 22% of sales of shoes and clothing are in pirated and counterfeit goods.[56]
- Currently, patent protection covering just 8 European countries costs around five times as much as in the US or Japan. The political agreement on the Community Patent will halve these costs and provide protection in 25 Member States – still more expensive than the US or Japan but very much better than the current situation.[57]
- The contribution made by copyright protected goods and services to EU GDP is significant (above 5%) and growing.[58]
- The overall volume of state aid for the EU as a whole was €86 billion in 2001 – or 0.99% of EU GDP.[59]
- 39% of mergers and acquisitions are now cross-border – up from 26% ten years ago. Over 40% of large companies have entered into co-operation agreements with companies in other Member States.[60]

b) Actions

1. The Council should rapidly finalise the Regulation providing for a legally secure and affordable **Community Patent.** Two other steps are also necessary to make the Community Patent operational: the 1973 Munich Convention must be revised so as to allow the European Patent Office to issue Community Patents; and a specialised Community Patent Court must be created.

2. The Council and the Parliament should rapidly adopt the Directive to strengthen the **enforcement of intellectual property rights** (vital in the fight against counterfeiting and piracy), and the Directive on the **patentability of computer-implemented inventions**.

3. The Commission will submit a **Communication on the Management of Copyright and Related Rights**. This Communication will identify measures to create a more favourable environment for the cross-border marketing and licensing of these rights.

4. Member States are urged to continue their efforts to further reduce the total amount of **state aid** while re-directing aid towards horizontal objectives of Community interest, such as environmental protection and research and development. Another priority is the final adoption

[53] Economic Impact of Counterfeiting in Europe, Global Anti-Counterfeiting Group, June 2000.

[54] 6th Global Report, Business Software Alliance, June 2002.

[55] IFPI International Federation of the Phonogram Industry figure.

[56] The Economic Impact of Trademark, Counterfeiting and Infringement, International Trademark Association 1998.

[57] http://europa.eu.int/comm/internal_market/en/indprop/patent/index.htm

[58] The economic importance of copyright and related rights protection in the EU will be assessed and further specified in a study commissioned by the European Commission. The results of the study will be available in Autumn 2003.

[59] European Commission, DG Competition.

[60] See footnote 14.

of the proposed reform of the mergers regime[61]. In addition, the Commission will propose a new block exemption Regulation relating to technology transfer agreements between companies.

5. A recently adopted Regulation requires all EU-listed companies to prepare their consolidated accounts in accordance with **International Accounting Standards** (IAS) from 2005. This will bring transparency and greater comparability between the consolidated financial statements of EU listed companies, hence better capital allocation and possibly a reduction in the cost of capital. IAS are established by the International Accounting Standards Board, an independent international accounting standard-setting organisation. In order to ensure appropriate political oversight, the Regulation stipulates that IAS to be applied in the EU will also have to be endorsed into Community law. Existing IAS will be endorsed during 2003, provided that, for some of them, the appropriate modifications are made.

In addition, it is important to consider the impact of the Regulation on SMEs. Since these are mainly non-listed companies, they are not obliged to switch to IAS. However, it may be in their interest to do so, in order to facilitate their access to capital markets. This will require certain steps on the part of Member States.

The Commission will soon issue a Communication setting out priorities for 2003 and beyond aimed at improving the quality of **statutory audit** in the EU. These will include: the modernisation and strengthening of the 8th Company Law Directive (which deals with access to and regulation of the audit profession); the creation of a European co-ordination mechanism for public oversight of the audit profession (which will aim to ensure proper oversight of the audit profession at national level and appropriate co-ordination at EU level); and the adoption of International Standards on Auditing in the EU from 2005.

6. The Commission will shortly adopt an action plan on company law and corporate governance in the EU setting out actions for the short term (2003-2005), the medium term (2006-2008) and the long term (2009 onwards). Shorter term actions will include proposals for a 10th Company Law Directive on **cross-border mergers** and a 14th Company Law Directive on **cross-border transfers of seat**. The **Take-over Bids Directive** should also be adopted without delay. These Directives will make it easier for companies to organise themselves more efficiently within the Internal Market.

7. The Commission intends to propose a Regulation on a **European Private Company Statute for SMEs** subject to the results of a feasibility study. This will allow SMEs to organise themselves more efficiently at European level (i.e. it will give them opportunities similar to those which the European Company Statute gives to bigger companies as from 2004).

[61] Proposal for a Council Regulation on the control of concentrations between undertakings, COM (2002) 711 final.

7. MEETING THE DEMOGRAPHIC CHALLENGE

a) Assessment

The ageing of the population will present major challenges for pension systems. The primary responsibility for meeting these challenges lies with the Member States. They will have to take some fundamental political decisions on the reform of public pensions.

However, the Internal Market can help by generating extra growth which should contribute to an improvement in public finances. It can also help to generate extra jobs, which is vital if the Union is to raise its employment rate (including by encouraging greater labour market participation by people over 55) and maintain a sustainable dependency ratio and the financial sustainability of pension systems.

There are also a number of very specific Internal Market measures which can play a useful role as regards occupational (or private) pensions which, in most Member States, will become more important in the future. The establishment of a prudential framework allowing pension funds to operate efficiently in the Internal Market while securing a high level of protection for pensions and the abolition of any sort of discriminatory tax treatment of cross-border occupational pension provision are important issues which need to be tackled urgently.

Over and above the pension problem, the ageing of the population will also have an impact on health services.[62] Member States are responsible for managing their health systems and so it falls primarily to them to meet this challenge. However, the Internal Market impacts on national health policies in a number of ways, particularly as regards cross-border provision of and access to treatments[63]. The only limitation is that this should not unduly impair Member States' ability to ensure sufficient access to high quality hospital treatment on their territory, to control expenditure and maintain high public standards. A well managed application of Internal Market rules to the health care sector has the potential to help both patients and providers by allowing the most efficient possible use of resources across the EU. What is needed now is a shared vision for health systems at a European level so that this potential can be fully exploited.

Ageing means fewer people of working age and more people above pensionable age::

- The number of people over 65 is expected to rise from 61 million in 2000 to 103 million by 2050 and those over 80 from 14 million to 38 million.[64]
- The ratio of people of working age to people above retirement ages (65+) will decline from 4 to 1 to less than 2 to 1 by 2050.[65]
- Only about half of Europeans aged 55-59 are still in employment and less than a quarter of people aged 60-64.[66]

[62] See the Commission's Communication on "Supporting national strategies for the future of health care and care for the elderly", COM (2001) 723 final of 5.12.2001.

[63] See European Court of Justice Decisions in Kohll (C-158/96), Decker (C-120/95), Smits and Peerbooms (C-157/99) and Vanbraekel (C-368/98).

[64] Commission Report to the Spring European Council “Choosing to grow: knowledge, innovation and jobs in a cohesive society”, COM (2003) 5.

[65] "Budgetary challenges posed by ageing populations: the impact on public spending on pensions, health and long-term care for the elderly and possible indicators of the long-term sustainability of public finances", Economic Policy Committee/ECFIN/665/01-EN final, 2001.

[66] European Commission, Eurostat, Labour Force Survey 2001.

- If unfunded pension liabilities were budgetised, in some Member States this would represent a debt of over 200% of GDP.

- Spending on public pension schemes will increase by between 3% and 5% of GDP in most countries over the coming decades.[67]

b) Actions

1. Member States should implement fully and on time the **Pension Funds Directive** which will increase both the security and the affordability of occupational pensions. It will also allow multi-national companies to run single EU-wide pension funds, thus facilitating intra-firm mobility across borders.

2. The Commission will launch the second stage consultation of the Social Partners on measures to ensure that people who change employment between Member States (including those who change jobs between different firms) do not suffer undue losses of occupational pension entitlements. Depending on the final outcome of this consultation, the Commission would examine the desirability of proposing a **Directive on portability of occupational pensions**..

3. The Commission will continue its determined action to tackle **tax discrimination** against pension funds established in other Member States: this is essential if we are to create a genuine Internal Market for occupational pensions.

4. In the area of **health services**, the Commission will work closely with Member States – particularly in the High Level Reflection Group on Patient Mobility – to develop a shared vision of the ways in which the Internal Market can support national health systems in full compliance with the relevant jurisprudence of the European Court of Justice. The consultation process, launched in July 2002, will be completed and the results presented to Member States as a basis for further discussion.

[67] See footnote 64.

8. SIMPLIFYING THE REGULATORY ENVIRONMENT

a) Assessment

A high quality regulatory environment is essential for competitiveness. That is why the Lisbon European Council put better and simpler regulation at the top of the Union's political agenda. To translate this political commitment into action, the Commission has presented a Better Regulation Action Plan[68] and a Simplification Rolling Programme[69] that address both the preparatory phases of new legislation and the improvement of the existing Community 'acquis'. The recent Brussels European Council once again emphasised the importance of improving the regulatory framework.

However, presenting an Action Plan is not enough – it must be made to work in practice. The Commission is beginning to impose new disciplines on itself (particularly in the area of ex-ante impact assessment and simplification of the EU's existing legal acts). It is now up to the Council and Parliament to do likewise, particularly when they introduce major changes to Commission proposals during the negotiations. Better regulation and simplification at EU level will always need to be accompanied by commensurate activity at Member State level, in particular during the sensitive phases of transposing Community legislation into national administrative provisions.

The quality of rules depends not only on making sure that the impacts of a measure have been checked before it is proposed and that it is well drafted, clear and proportionate to its objectives. Within the Internal Market, it also depends on choosing the right legislative technique or instrument – i.e. the one which will most effectively eliminate barriers to cross-border trade while serving public interests, such as health and safety and sustainable development, and respecting national diversity as far as possible.

This involves complex issues, such as the role of mutual recognition as opposed to harmonisation, and where harmonisation is necessary, the use of Regulations or Directives and the appropriate level of harmonisation. It is also necessary to establish the right balance between regulation by the public authorities and the co-regulation or self-regulation by the private sector through the elaboration of European standards and codes of conduct.

The Commission believes that this question of legislative technique or legislative architecture is an important part of the debate on better regulation and one which has not yet been fully explored. It will therefore enter into a wide-ranging consultation during 2003, taking into account developments in the Convention on the Future of Europe and ongoing discussions on a future Inter-Institutional Agreement on Better Regulation, with a view to making clear its views on these complex issues during the course of 2004.

Finally, the European Parliament has suggested[70] the introduction of an Internal Market "compatibility test" to be applied to all legislation adopted at national level. The Commission believes this to be an interesting proposal. Member States often adopt and implement rules as they see fit without considering the implications for the Internal Market. A "compatibility test" could be a very useful self-imposed discipline.

[68] COM (2002) 278 final of 5.6.2002.

[69] COM (2003) 71 final of 11.2.2003.

[70] Harbour Report, A5-0026/2003.

Business needs better rules – at national and EU level:

- Poor quality regulation costs European business at least €50 billion per year[71]. The total cost of regulation to society is in the region of 4 to 6% of GDP per year, or between €360 and €540 billion.[72]

- Member States are responsible for between 50% and 90% of rule-making[73]. A Swedish study estimated Brussels to be responsible for only about 10% of the regulatory burden[74]. A recent study in the UK estimated that about 60% of rules are made at national level[75].

- No fewer than 6,000 draft national technical regulations have been notified to the Commission since 1992[76]. While this shows that a screening at EU level is useful, the amount of rules in itself constitutes a serious threat to Europe's competitiveness.

- 87% of companies say that the most important priority is to have ONE set of rules, instead of 15 – soon to be 25.[77]

b) Actions

1. The Commission will launch a wide-ranging reflection and consultation on the **legislative architecture** of the Internal Market and issue its conclusions in 2004 taking into account developments in the Inter-Governmental Conference. The Commission could define certain criteria, which it will take into account, e.g. when deciding whether to pursue mutual recognition, "new" approach or more detailed harmonisation, as well as the conditions under which "home country" control should be applied. It will also address the involvement of the private sector and civil society in co-regulation or self-regulation initiatives, such as the elaboration and implementation of European standards and voluntary codes of conduct.

2. The Commission will work together with the European Parliament, the Council and the Member States to develop the idea of an Internal Market **"compatibility test"**. The purpose of this test would be to offer guidance to legislators at national level as to how best to reconcile the interests of free movement in a border-free Europe with other legitimate public policy objectives. If such a test were applied at an early stage – and at all levels of government – the risk of fragmentation could be considerably reduced. Together with existing preventive mechanisms, such as the notification of technical rules and regulations, such self-imposed discipline could prove a powerful tool to ensure that lawmakers take wider European interests into account when considering new measures.

3. The Council is invited to establish a horizontal working group on **"better regulation"** with whom the Commission can interact on a regular basis. This group could work on the implementation of the Better Regulation Action Plan, including on the implementation of the parts for which Member States are responsible. The Commission will also open a web site

[71] Survey on the quality of the regulatory environment, Internal Market Scoreboard No. 9, November 2001.

[72] Doorn Report A 50351/2000.

[73] Walker Opinion, ESC 304/2002.

[74] Swedish study : Confederation of Swedish Enterprise, Prof. Fredrik Sterzel: Simplifying EU Regulations – Lessons from Swedish Regulatory Experiences May 2001.

[75] "Do Regulators Play by the Rules? An audit of UK regulatory impact assessments." Report published by the British Chambers of Commerce, February 2003.

[76] Under the provisions of Directive 98/34/EC.

[77] See footnote 14.

where interested parties can bring to its attention examples of particularly complex rules or rules which may conflict with the Internal Market “compatibility test”.

4. The Commission will develop, in close co-operation with Member States, appropriate **indicators** to measure progress towards a higher-quality regulatory framework and lower administrative burdens, starting with the Internal Market. Monitoring of results is essential to keep the better regulation process on track and show to Europe’s businesses and citizens that their governments are serious about this.

9. ENFORCING THE RULES

a) Assessment

When Internal Market Directives are not implemented on time or not applied correctly in practice, EU citizens and businesses can be effectively deprived of their Internal Market rights. Many rights flow directly from the Treaty: if its provisions are ignored, this can also lead to failure and frustration. This self-inflicted damage causes wholly unnecessary harm to the European economy, and undermines the confidence citizens have in the European Union.

Ultimately, effective application and enforcement can only be achieved if Member States are prepared to play a much more active role in the day-to-day management of the Internal Market. It is up to them to ensure that the rules which they themselves have adopted are made to work in practice.

When things do go wrong, citizens and businesses currently have a choice between lodging a complaint with the Commission or going before a national Court. This is not entirely satisfactory. Litigation at national level can be slow and expensive and is therefore not always a viable option. Complaints lodged with the Commission can result in infringement procedures against the Member State concerned but these take a long time to resolve and do not offer the individual complainant the opportunity to seek damages. Moreover, the Commission cannot possibly intervene in each and every individual case of misapplication, particularly in an enlarged Union. Action is needed now to avoid a drift towards a situation where breaches of Community law go unchallenged and confidence in the operation of the Internal Market is undermined.

There are a number of possible solutions to these problems. Many are set out in the Commission's recent Communication on "better monitoring of Community law."[78] Possible ways forward could include a speeding up of the Commission's handling of infringement procedures and greater use of initiatives such as "package meetings"[79] to resolve more cases without the need for further legal action.

Beyond this, the Commission believes that it is important to develop alternative means of redress other than national litigation or infringement procedures. It will, of course, continue to pursue infringement procedures where this is the most effective way to achieve a solution or where important legal precedents are likely to be established. But for the majority of cases, alternative means of problems solving may be more effective and proportionate.

The use of complementary measures to infringement procedures is now beginning to take off. The SOLVIT initiative,[80] for example, is an attempt – through administrative co-operation between Member States - to make it easier to obtain redress in cases where the Internal Market rules are misapplied in practice. Another possible solution – which could even be integrated with SOLVIT – might be the designation of some kind of a mechanism in each of the Member States which would help to ensure the correct application of Internal Market legislation and relevant Treaty articles.

[78] COM (2002) 725 final of 11.12.2002.

[79] These meetings involve experts from Member States and the Commission coming together in order to discuss a "package" of cases being examined by the Commission for violation of Community law. Their purpose is to solve cases without the need for further legal action.

[80] COM (2001) 702 of 27.11.2001, Commission Recommendation of 7.12.2001 OJ L331/79 15.12.2001, http://europa.eu.int/solvit/

Such mechanisms could provide citizens and businesses with a means of redress located in their home Member State. This would be a tangible step towards bringing the enlarged European Union closer to the citizen. They could deal with problems which, although technically breaches of Community law, are really administrative or technical in nature, rather than legal. This would allow the Commission to concentrate on the most serious cases with the most far-reaching implications. Clearly, this suggestion raises a number of important questions to which the Commission would have to find satisfactory answers before taking any initiative.

Better enforcement is equally important as far as consumer interests are concerned. Each Member State has developed an enforcement system adapted to its own national situation. These systems are, however, not always sufficiently adapted to the challenges of cross-border shopping within the Internal Market. Consumers need to be confident that governments have the ability to deal effectively with cross-border fraud or other fly-by-night operations, if they are not to be reluctant to buy from suppliers in another Member State.

Late transposition and ineffective enforcement remains a serious problem:

- The average transposition deficit stands at 2.4%. In other words, Member States are late in notifying over 550 national legislative measures transposing EU Directives[81].
- The number of open infringement cases has gone up from 700 in 1992 to nearly 1600 today[82]. This indicates that large numbers of Directives are not being correctly implemented and properly applied at national level.
- Two thirds of infringement cases which go to the Court of Justice take longer than four years to resolve.[83]
- Assuming that the new Member States behave in the same way as the existing ones, the number of infringement cases will rise by more than 40% by 2007, unless there is a change of policy.
- Only about half of companies say that they can easily get help from their national authorities when they run into an Internal Market problem[84].

b) Actions

1. Member States should commit themselves to setting and respecting more ambitious **transposition targets** at each Spring European Council. This has already happened over the past few years but it should now be put on a permanent footing[85]. It is vital to maintain the political pressure on transposition in order to avoid fragmentation of the Internal Market in a Union of 25 countries.

2. The Commission will issue a **Recommendation setting out a number of "best practices"** which should be applied consistently throughout the Union to ensure better and faster transposition, e.g. the development of transposition "timetables" and the need to discuss the transposition performance regularly with national and regional parliaments. It will also intensify its work with Member States during the transposition phase **("preventive dialogue").** This dialogue will focus particularly on measures of greatest economic importance and those which, because of their nature, may be more difficult to transpose.

[81] Internal Market Scoreboard No. 12, May 2003.

[82] See footnote 1.

[83] Internal Market Scoreboard No. 8, May 2001.

[84] Internal Market business survey, Flash Eurobarometre 106, September 2001.

[85] This year's Spring European Council reaffirmed the existing target of a 1.5% deficit overall and a zero deficit for Directives more than two years past their transposition date.

3. The Commission believes that there may be a case for introducing a **legal instrument** to make certain implementation aspects mandatory. These could include the obligation to notify measures electronically and the requirement to provide the Commission with “concordance” tables clarifying where provisions have been implemented in national law. Without these tables, checking that the transposition measures adopted in 25 Member States fully conform to the requirements of the particular Directive will become a real paper chase. This instrument could also provide a legal underpinning for SOLVIT.

4. The Commission invites Member States and the Parliament to define a **standard transposition period** (2 years), from which departures should only be possible when they can be justified by the volume or complexity of the measure to be transposed. Similarly, the Commission wishes to hear views about inserting **standard sanctions clauses** into Directives as well as **standard clauses** to put **administrative co-operation** on a stronger footing.

5. Member States are invited to maximise their efforts to “clean up” their infringements, so that as many as possible of the outstanding cases can be resolved. The Commission believes that many of the currently active cases can be easily resolved if the will to do so is there. The aim should be for each Member State to **reduce the number of Internal Market infringements by at least 50% by 2006**. The Commission will also promote better follow-up to Court judgements, particularly by Member States who are not directly targeted by the case at hand.

6. The Commission will undertake a **study** examining the different options for improving the enforcement of Internal Market law. This would look, *inter alia*, at the desirability and feasibility of designating enforcement mechanisms in the Member States.

7. The Commission will set up a special section on the home page of the EUROPA web site describing the various **procedures available to citizens and businesses seeking to defend their rights** under Community legislation. Essentially, it will describe the most effective ways of obtaining relief, which will most often involve alternative ways of settling problems, such as through the SOLVIT network. The aim is to solve problems more quickly and limit resort to infringement procedures to the most serious breaches of Community law. In all cases, estimations of the time and costs involved will be provided.

8. To ensure more **uniform enforcement of consumer protection** legislation throughout the Union, the Commission will propose a Regulation (at around the same time as the Internal Market Strategy) which will establish a network of public enforcement authorities throughout the European Union. In contrast to "Internal Market Authorities", which would monitor the behaviour and decisions of national and local administrations, the focus in consumer protection would be on behaviour in the private sector.

10. PROVIDING MORE AND BETTER INFORMATION

a) Assessment

For the Internal Market to deliver its full potential, it is not enough to put a legal framework in place and to enforce the rules. Citizens and businesses also need to know about their Internal Market rights and opportunities and some will need practical information on how to exercise these rights in practice. This is in addition to the general need to explain Internal Market policies to the public and stakeholders as part of building the public and political support needed to take the Internal Market forward.

Information policy is thus not just an optional extra or an opportunity to generate publicity for the EU's activities. It is an integral part of the efforts to create a fully functioning Internal Market.

There is still a great deal to do. General awareness of Internal Market rights remains low. Those who run into problems when trying to exercise their rights often do not know where to find a solution. Service providers face particular problems, since services are subject to a wider range of more complex rules and authorisation regimes than exporters of goods. And citizens need to be informed about their rights as consumers, particularly as consumers of services. The information deficit in the Accession Countries is even greater than in the existing Member States.

If we are to close this gap, we need a step change in the scale of the information effort. In the first place, the Member States and the Accession Countries must fully assume their responsibility for informing their citizens and invest the necessary resources.

EU citizens and businesses still do not know about their Internal Market rights:

- A recent Commission survey revealed that less than half of EU citizens consider themselves to be well informed about the Internal Market. When asked, for example, 49% thought that they needed a work permit when working abroad and only 29% were aware that they were entitled to vote in local and EP elections when living in another Member State.[86]
- Less than half of the businesses questioned said that they felt well informed about their company's rights in the Internal Market. The figure fell to 41% for small and medium-sized companies.
- Nearly 20% of businesses who are not currently exporting said that they might do so if more and better information were available.
- A 2002 survey showed that less than 10% of companies in Slovenia feel fully informed about the obligations and benefits of the Internal Market[87].

b) Actions

1. Member States should develop **national plans** to raise general awareness of Internal Market opportunities among their own citizens and businesses. Progress will be monitored in the Internal Market Scoreboard and by the Internal Market Advisory Committee (IMAC) meeting at Director General level.

[86] See footnote 14.

[87] Electronic survey carried out by Eurochambres and the Slovenian Business and Research Association.

2. The needs of business and consumers in the **new Member States** for information on the EU and its Internal Market will require special attention and the development of an overall Communication Strategy in those Member States. The Commission will take account of these needs in the 2005 review of its Communication Strategy, following the conclusion of the current PHARE-funded strategy for the Accession Countries at the end of 2004. It should build on existing and planned initiatives and make effective use of the media and of appropriate relay organisations, particularly those which have already played a role in the lead up to accession

3. Commission initiatives, such as the **Dialogue with Citizens and Business** and the **Citizens Signpost Service**, will be progressively extended to the new Member States. The Commission will improve the Dialogue web site so that citizens and businesses have better access to practical and useable information. In addition, Member States should take more responsibility for the quality of the information which is made available through the Dialogue.

4. The Commission will establish a top class **information portal** bringing together existing initiatives, including the Dialogue with Citizens and Business[88], the Citizens Signpost Service[89], SOLVIT[90], European Consumer Centres[91], Fin-net[92] and EEJ-Net[93], and giving citizens and business access to a wide range of practical information and advice on Internal Market rights and opportunities[94]. Citizens and businesses can also contact Europe Direct – a service with a single number across Europe (00800 67891011) which provides answers to questions on all aspects of the EU and can direct people to the site/information source most suited to their needs. Clearly, both the portal and the Europe Direct number must be widely promoted.

5. Within the ongoing initiative to make the EUROPA web site clearer and more accessible, the more specialised audience (journalists etc) will be catered for by a new **Internal Market portal** bringing together information about policy and legislative developments relating to the Internal Market, irrespective of the Commission department responsible.

6. The **Euroguichet network** needs to be extended so that there is at least one European Consumer Centre in each Member State. The main task of these centres is to provide information to consumers on their rights in the Internal Market and to assist and advise them on dispute resolution mechanisms and legal aid when a problem arises.

[88] http://citizens.eu.int/

[89] http://europa.eu.int/citizensrights/signpost/front_end/signpost_en.htm

[90] See footnote 75.

[91] http://europa.eu.int/comm/consumers/redress/compl/euroguichet/index_en.htm

[92] http://europa.eu.int/comm/internal_market/en/finances/consumer/adr.htm

[93] http://www.eejnet.org/

[94] Advice on ways of solving the problems they have encountered will be made available via the special section on the home page of the EUROPA web site referred to in section B9.

Part C: Getting the Best out of the Enlarged Internal Market

a) Assessment

The Accession Countries have taken important strides forward in recent years. However, incorporating the Community *acquis* and progressively building up their institutions to apply and enforce Internal Market rules is no small task. Naturally, there is much work left to do and efforts to support these countries should continue up to accession and beyond.

Existing Member States will also have to adapt to the new situation after enlargement. Above all, they must ensure that all of their competent authorities are well informed and ready to accord full Internal Market rights to the new Member States.

There will inevitably be some teething problems in the initial post-accession period. In particular, more work is needed in those areas which are covered by Treaty provisions alone[95] – i.e. those areas where there is no EU secondary legislation. More generally, there are bound to be problems with compliance and enforcement[96]. Market surveillance authorities, in particular, need to be further strengthened. It is important to solve these problems at an early stage so that the integrity of the Internal Market is maintained and the need to invoke the Internal Market safeguard clause[97] can be avoided.

In the end, success in an Internal Market of 25 countries will depend on mutual trust and confidence. The key is administrative co-operation and understanding between officials in competent authorities leading to ways of finding practical solutions to problems. This can only develop over time – there is no magic solution. But there are a number of actions, which taken together, can produce positive results.

b) Actions

1. Support for **institution-building activities** will continue over the period 2004-2006 through the Transition Facilitiy[98]. This will provide appropriate resources for further building up the capacity of the new Member States to enforce Internal Market legislation. The Commission will step up the monitoring process and produce a comprehensive monitoring report six months before accession.

2. The Commission will make it possible for Accession Countries formally to **notify their implementing measures before accession**. These will then of course not have to be re-notified after accession. This will make for a more orderly process of notification and checking of conformity with Community law. The Commission will also establish pre-notification agreements with regard to draft national technical regulations [99]

[95] Treaty articles 28-30 (goods), 39 (workers), 43 (establishment), 49 (services) and 56 (capital and payments).

[96] See also section B9.

[97] The safeguard clause can be used by the Commission until 1 May 2007 if it establishes that a new Member State, by not meeting its negotiation commitments, has caused a serious breach of the functioning of the Internal Market. In that case, the Commission can take appropriate measures. The clause can also be invoked in cases where there is an imminent risk of such a breach.

[98] See COM (2002) 700 final of 9.10.2002.

[99] These are notified in accordance with Directive 98/34/EC.

3. In order to eliminate barriers to free movement of goods and services, the Accession Countries are urged quickly to complete the **screening of their legislation** in the light of Articles 28, 43 and 49 of the Treaty and to repeal any national, regional or local rules and regulations which discriminate against citizens or companies from other Member States.

4. The process of negotiating, concluding and implementing **Protocols to the Europe Agreements on Conformity Assessment and Acceptance of Industrial Products** (PECAs) will continue insofar as they can operate for a reasonable period before the date of accession (2007 in the case of Bulgaria and Romania). PECAs are a particular form of agreement covering the reciprocal recognition of conformity assessment of industrial products based on the adoption by the Accession Countries of Community legislation on such products and the creation of the appropriate implementing infrastructure. They are useful instruments for integrating these countries into the Internal Market.

5. Accession Countries and Member States administrations will be requested to demonstrate that they have taken steps to **inform competent authorities and enforcement officials of the implications of enlargement**, so that full rights are conferred on citizens and business consistent with Membership, subject to any transitional arrangements.

6. Many of the existing Member States are prepared to offer **short-term traineeships** to Internal Market officials from the Accession Countries. The Commission will set up a database to facilitate this type of exchange. Multi-country co-operation (including joint training, resource sharing, common problem solving and benchmarking) could also be envisaged.

Part D: Building the Internal Market in an International Context

a) Assessment

Following enlargement, a major challenge for the EU is to start developing closer relationships with our “new neighbours” – Russia, Ukraine, Moldova, Belarus and the Southern Mediterranean countries. In exchange for better access to our markets, these countries will be asked first to align progressively their regulations as closely as possible with ours. This has a number of benefits: it will make trading between the EU and these countries significantly easier, thus benefiting both sides. It will also provide the "new neighbours" with a “ready to use” regulatory framework, suited to the needs of a market economy.

In today’s highly globalised economy, the impact of legislation/regulation adopted thousands of miles away is increasingly felt in the EU. We have already seen evidence of this in policy areas ranging from financial reporting to electronic commerce and the protection of personal data. The result is that our regulators have to be much more systematic about talking to their counterparts in our major trading partners so that problems can be avoided as far as possible.

In some cases, discussions between regulators can best take place in global fora, such as the World Trade Organisation (WTO), the OECD, the World Intellectual Property Organisation (WIPO), the Basle Committee for banking capital standards or the International Accounting Standards Board.[100] In the automotive sector, the EU is a contracting party to two international agreements concluded under the auspices of the United Nations Economic Commission for Europe (UN/ECE). Global regulatory convergence is particularly important in this sector where commercial relations are becoming increasingly international.

In other cases, bilateral dialogues may be more appropriate. For example, last year the Commission services developed a set of overall Guidelines for Regulatory Co-operation and Transparency with services of the US Government for product regulations. There are also sector-specific bilateral dialogues, such as those with US financial regulators and supervisors in the context of the EU-US financial markets dialogue or the EU-Japan Regulatory Reform Dialogue. The aim of these dialogues is not just to defuse existing problems. They should also help to make future conflicts less likely. Exchanging information and both sides providing each other with an opportunity to comment on rules before they are adopted are essential to ensure that dialogues are productive.

The globalised economy also presents major challenges for customs services. They are being asked to maintain the impermeability of the EU’s external frontier while the volume of international trade is increasing all the time. Following enlargement, much of the burden will fall on the new Member States. Action is needed to ensure that measures to protect European citizens, the consumer and the environment from dangerous or unsafe products from third countries continue to be applied equally effectively at all points along the EU's external frontier. A well-managed external frontier is essential for confidence within the Internal Market.

[100] See section B6.

b) Actions

1. To implement the **“new neighbours"** concept, the aim is to conclude new agreements supplementing, where necessary, the Partnership and Co-operation Agreements and Association agreements which the EU already has with these countries. These new agreements can only be concluded once they have aligned their rules with ours and shown themselves to be capable of enforcing the rules effectively.

2. The Commission will continue to promote and defend the EU's regulatory approach within international bodies, such as the WTO and WIPO. In the automotive sector, **convergence between EU legislation and UN/ECE Regulations** will be encouraged as far as possible.

3. The Commission will strengthen ongoing regulatory dialogues, notably the **EU-US financial markets dialogue**. It will also assess whether it would be in the EU’s interest to initiate new dialogues in other policy areas or with other countries and report about this to Council and Parliament.

4. The Commission will seek to **improve controls at the external frontier** via a common risk management approach. It also proposes creating teams of customs experts in the Member States to provide rapid specialised support at the external frontier. These issues will be covered in a Commission Communication on “the role of customs at the external frontier” which will be launched soon. A second Communication on a "simple and paperless environment for customs and trade” will look at ways of laying down the basis for a computerised exchange of information needed for customs purposes.

Part E: Monitoring

Systematic monitoring and evaluation will be crucial to the success of the Internal Market Strategy. There is little point in setting out policy priorities and leaving the rest to chance. It is vital to check that the proposed actions are actually being implemented and that they are producing the desired effects.

The Strategy will therefore be monitored on three levels. The **first task** will be to make sure that the proposed measures have been adopted on time. This will allow pressure to be exerted on decision makers whenever delays occur. The **second task** will be to ensure that the measures are being properly enforced. Once again, remedial action can be taken if problems are detected. **Finally**, the impact of the measures on the ground must be measured, i.e. their effect on markets, businesses and other economic operators.

Monitoring the impacts on the ground is particularly challenging. It requires the development of a comprehensive set of indicators which in turn depends of the availability of the relevant statistics for all Member States. It is important to start developing these indicators as soon as possible, even though monitoring itself can only be carried out once a particular action has been fully implemented and has had time to produce its effects. Fortunately, we are not starting from zero. The Commission has already developed indicators to measure the effectiveness of its policies in specific sectors, such as telecommunications and energy. In procurement, two panels have been set up - one made up of business representatives, the other of public authorities - as a means of monitoring levels of cross-border tendering and its impact on prices. The Commission has also developed the Internal Market Index - a composite indicator tracking the ‘real world’ benefits of the Internal Market in general[101].

Thought must also be given to the form in which indicators are presented and the vehicles used to do it. The Commission currently produces a number of monitoring instruments, including the Implementation Report on the Internal Market Strategy, the report on the functioning of product and capital markets (Cardiff Report), the Competitiveness Report and the different Commission Scoreboards. The relationship between these different instruments now needs to be considered. There is undoubtedly scope for a degree of rationalisation.

[101] The index score has been published in the November Internal Market Scoreboard since 2001.

Conclusion

This Internal Market Strategy represents a comprehensive package of actions designed to improve the performance of the Internal Market in an enlarged Union.

Some of these actions are already well advanced as proposals make their way through the legislative process. Others will need to be further examined and developed over the coming months before the Commission can make proposals. A number of actions are for the Member States themselves to implement.

In light of the stage of preparation of the different actions, Council (in the form of a Resolution prepared by the Competitiveness Council) and Parliament are requested to:

- Endorse the general orientation set out in the Internal Market Strategy;

- Commit themselves to adopting existing (or forthcoming) proposals within the suggested deadlines[102];

- Support the Commission's intention to explore the different options for tackling particular obstacles with a view to making proposals at a later stage[103];

- Call on the Member States to play their full part in improving the operation of the Internal Market in areas under their own control[104].

[102] These actions are classified as type 1 in the annex.

[103] These actions are classified as type 2 in the annex.

[104] These actions are classified as type 3 in the annex .

Type 1: early adoption or completion
Type 2: for further examination and discussion
Type 3: for Member States to implement

ANNEX

1. FACILITATING THE FREE MOVEMENT OF GOODS

ACTION	TYPE	DESCRIPTION	TIMING
1	2	The Commission to make a proposal for a Regulation on mutual recognition to facilitate its correct application. This will take account of the results of a wide consultation with Member States, industry and consumer organisations on possible options. Council Decision 3052/95, which requires Member States to inform the Commission of any cases where mutual recognition has been refused, and which is not achieving its objectives, will either need to be amended or incorporated into the Regulation.	12/2004
1	1	The Commission to adopt a Communication on the correct implementation of the mutual recognition principle. Its aim is to clarify, in anticipation of the Regulation, the current rights and obligations of economic operators and national administrations when products are to be marketed in a Member State where its legislation imposes different technical rules.	06/2003
2	2	The Commission may propose a Common Base Directive, taking into account the discussions and possible Council conclusions on the Communication on the New Approach. Such a Directive could cover a number of horizontal issues common to all New Approach Directives, including measures needed to support administrative co-operation and 'standard' articles that would provide for a more homogeneous implementation of these Directives.	12/2004
3	1	The Commission to sign partnership and performance contracts with European standardisation organisations to speed up the production of standards, particularly in fields where standardisation has proceeded at a too slow pace, and improve their quality. One major standardisation body (CEN) has already committed itself to reducing the average time needed to prepare standards from eight to three years.	12/2003

3	1	The Commission to undertake a comprehensive study on voluntary marking at national and European level. In the light of the results, the Commission to consider ways of enhancing their positive effects and reducing the risk of market fragmentation and confusion on the part of consumers.	06/2004
4	1	The Commission to issue a Communication setting out the next steps for the application of Integrated Product Policy (IPP). IPP focuses on the different phases of products' life-cycles with a view to improving their overall environmental performance. Doing this at Community level should reduce the pressure to adopt national measures, which because of their divergence may lead to the erection of new barriers to the free movement of goods.	06/2003
4	1	The Council and European Parliament to adopt the framework Directive on the integration of environmental aspects into product design. This initiative is based on New Approach principles, i.e. the basic elements and design parameters with respect to the environmental aspects are specified in the framework directive, while specific product eco-design requirements will be established through Commission implementing measures supported by voluntary standards. While this is good for the environment, it should also considerably facilitate trade in these products within the Internal Market.	06/2004
4	1	The Commission to issue a Communication on the integration of environmental aspects into the standardisation process, inviting the standardisation organisations, national authorities and stakeholders to take greater account of environmental considerations at all stages of the standardisation process at both national and European levels.	12/2003
5	1	The Commission to give mandates to European standardisation bodies for the development of new standards or the revision of existing ones to ensure compliance with the requirements of the General Product Safety Directive. The references of the relevant standards will also be published in the Official Journal. The Commission to monitor implementation of the Directive over the period of the Strategy and prepare a report on its application, including an assessment of market surveillance and enforcement in the Member States, by 2006.	06/2004

5	1	The Commission to propose a Directive on unfair business to consumer commercial practices. This will be a framework Directive harmonising national rules governing unfair business-to-consumer commercial practices. It will be based on mutual recognition in order to allow a fully functioning Internal Market, while delivering a high level of consumer protection in order to promote consumer confidence.	06/2003
6	1	The Commission to propose a recasting of the framework Directive on motor vehicles and their trailers (Directive 70/156/EEC). One of the main aims will be to extend EC whole vehicle type approval to vans (optional for new types within 12 months of the entry into force of the new Directive, compulsory for new types from 1 January 2007 and compulsory for existing types from 1 January 2009) and trucks and lorries (optional for new types within 12 months of the entry into force of the new Directive, compulsory for new types from 1 January 2008 and compulsory for existing types from 1 January 2010).	09/2003

2. INTEGRATING SERVICES MARKETS

ACTION	TYPE	DESCRIPTION	TIMING
1	1	The Council and European Parliament to adopt the draft Regulation on Sales Promotion in the Internal Market which will allow SMEs, in particular, to use sales promotions to draw attention to their products in new markets. Large firms will be able to offer a single EU-wide promotion instead of 15 (or 25) different campaigns. Consumers will benefit from increased competition and transparency of information about sales promotions offered.	12/2003
1	1	The Council and European Parliament to adopt the draft Directive on the recognition of professional qualifications. The proposed Directive seeks to clarify and simplify the rules in order to facilitate the free movement of qualified people between Member States, particularly in view of an enlarged Europe.	03/2004
2	1	The Commission to make a proposal for a Directive on Services in the Internal Market. The proposal will seek to remove barriers and reduce costs for companies arising from red tape while maintaining high levels of consumer protection. This would benefit all services which, as soon as they cross a Member State border, are affected by multiple application of different legal regimes and a duplication of administrative requirements. The Commission will also issue a Communication on the competitiveness of business-related services setting out non-legislative measures designed to complement the Directive. These will include the development of European standards and measures to improve the statistical coverage of service sectors (this is very important since these statistics are currently almost entirely lacking and, without them, it very difficult to analyse what is actually going on in service industries).	12/2003
3	1	The Commission, subject to the results of a feasibility study, to propose an extension of Directive 98/34/EC, which concerns notification by Member States of national technical rules and regulations, to services (besides information society services). The results of the feasibility study will be published by the end of the year.	12/2004

4	2	In light of the Council and European Parliament's response to the Commission's report on the safety of services for consumers, the Commission to decide whether to make a proposal for a legislative framework aimed at monitoring and supporting national policies and measures in this area. This could, for example, cover the systematic collection of data on accidents, injuries and risks (currently available data is inadequate), procedures for the exchange of information on national policy and regulatory developments and procedures for the establishment of European standards where necessary.	12/2004
5	1	The Council and European Parliament to adopt the Prospectuses Directive which should make it easier for companies to raise money on an EU-wide basis while at the same time providing adequate provision for investors.	09/2003
5	1	The Council and European Parliament to adopt the Investment Service Directive. The proposed Directive will replace the existing one which has been in place since 1993 and is being proposed against the background of major structural changes in EU financial markets over the past five years. The proposal will offer investment firms an effective "single passport" which would allow them to operate across the EU while at the same time providing investors with a high level of protection when using the services of investment firms.	06/2004
5	1	The Council and European Parliament to conclude 1st reading on the Transparency Directive. This Directive has been proposed in order to increase the quantity of information (e.g. on shareholding and changes of shareholding) investors have about publicly quoted companies. Apart from safeguarding investors' interests, the proposal should help to further integrate Europe's securities markets and increase the availability of funds for investment.	06/2004

6	1	The Commission to propose a new Capital Adequacy Directive. This Directive will provide a more modern and flexible capital requirements framework for banks and investment firms. The overall aims are to maximise the effectiveness of capital requirement rules, ensure continuing financial stability, maintain confidence in financial investment and protect consumers. The new regime is also designed to ensure that capital requirements for lending to small and medium-sized enterprises are appropriate and proportionate.	03/2004
7	1	The Commission to publish a Communication on clearing and settlement. This Communication will provide a firm indication of the Commission's views as regards the need for and content of legislative actions to facilitate inter-connected and efficient cross-border clearing and settlement as a basis for discussion with authorities and market participants.	09/2003
8	1	The Commission to consult widely on completing and further developing the FSAP, with a particular focus on creating a single market in retail financial services.	12/2003
8	1	The Council and Parliament should adopt the Consumer Credit Directive to enable progress towards an effective single credit market.	03/2004

3. ENSURING HIGH QUALITY NETWORK INDUSTRIES

ACTION	TYPE	DESCRIPTION	TIMING
1	1	The Council and European Parliament to adopt proposals on: the Single European Sky for air traffic control management (this should help to reduce airport delays which currently cost around €3 billion p.a.); and access to port services.	06/2003
1	1	The Council and European Parliament to adopt the second package of measures to revitalise European railways. This includes a number of proposals, particularly on safety, interoperability, the European Railway Agency and freight market opening. It should result in more competition and better quality services for business. The Council and the European Parliament to adopt the proposal on controlled competition for public transport. The Commission will also come forward with proposals for passenger transport market opening to complete the Internal Market in the railway sector.	12/2003
1	1	The Council to give a mandate to the Commission to negotiate an open skies agreement with the United States. The current system, based on bilateral agreements between individual Member States and the US, which the Court of Justice has ruled are incompatible with Community law, places a significant brake on restructuring in the EU air transport industry and hinders the functioning of the Internal Market.	06/2003
2	1	The Council and European Parliament to adopt the "energy package" which will completely open up gas and electricity markets for non-household customers by 2004 and for household customers by 2007. Business, particularly SMEs, and consumers will benefit from lower prices, as their counterparts already do in those Member States which have liberalised autonomously.	06/2003

3	2	A study on the water sector has already been carried out for the Commission by external contractors. The Commission intends to build on this by gathering further information from Member States, industry and consumers. At a later stage and depending on the results of the information gathering exercise, the Commission services could produce a working paper reviewing the legal and administrative situation in the sector, including the competition aspects, in full respect of Treaty guarantees for services of general economic interest and environmental provisions. Interested parties would be invited to comment on this paper. Based on their reactions, the Commission would decide on appropriate follow-up measures. All options will be considered, including possible legislative initiatives. This work will take full account of the Green Paper on Services of General Economic Interest and the Green Paper on Public-Private Partnerships.	12/2004
4	1	The Commission will complete a study assessing, for each Member State, the impact on universal service of full accomplishment of the Internal Market for postal services. Depending on the results of this study, the Commission may make proposals to achieve full market opening. The target date for full market opening is 2009.	12/2006
5	1	The Commission to continue its efforts to clarify the application of the state aid rules to compensation for the costs of providing services of general economic interest, in the light of forthcoming Court decisions. These will decide whether compensation paid providers of services of general economic interest should be treated as state aid.	12/2003
6	1	The Commission to issue a Green Paper on public-private partnerships, which should trigger a wide-ranging debate on the best ways of ensuring that partnerships for major projects can be undertaken in conditions of effective competition and full clarity under procurement rules. Subject to the results of the consultation, the Commission will propose (legislative or non-legislative) initiatives to enhance legal certainty and remove unjustified obstacles to public-private partnerships.	12/2003

4. REDUCING THE IMPACT OF TAX OBSTACLES

ACTION	TYPE	DESCRIPTION	TIMING
1	1	The Commission to propose revisions of the Parent/Subsidy Directive. The main aim of the Directive is to eliminate double taxation within the EU by permitting dividends to be paid between certain groups of companies (subject to certain conditions) without deduction of withholding tax. Revision will focus on extending the scope of the Directive so that more companies can avail of its provisions thus paving the way towards reducing double taxation risks and compliance costs.	06/2003
1	1	The Commission to propose a revision of the Merger Directive. Currently, this Directive helps companies to organise their operations on a cross-border basis by deferring payment of certain tax charges subject to certain conditions. As more and more companies re-organise their activities (on a cross-border basis) to increase efficiency and to take advantage of Internal Market trading opportunities, the scope of the provisions of the Directive need to be extended.	06/2003
1	1	The Commission to issue a Communication setting out the results of its technical discussions with Member States and stakeholders concerning different options for providing companies with a consolidated tax base for their EU-wide activities. A consolidated tax base would *inter alia* reduce compliance costs and simplify existing complexities. The Communication will report on progress on two issues in particular: the “Home State Taxation” pilot scheme for SMEs; and the possible use of International Accounting Standards as a starting point for a common EU tax base.	12/2003
2	1	The Commission to issue a Communication setting out further steps to modernise and simplify the VAT system. A crucial point to be developed in the Communication will relate to a modification of the rules governing the place of supply of services, whereby the reverse charge mechanism would become the general rule for trade between taxable persons established in different Member States.	12/2003

2	2	The Commission is actively considering making a proposal to introduce a single place of compliance for all businesses trading in Member States where they have no establishment. Such an initiative would decrease the administrative cost of VAT for companies. It would benefit SMEs in particular. This will be one of the initiatives announced in the Communication on VAT (see above). A consultation of European companies is on-going on this issue on the web-site “Your Voice in Europe.” Discussions with tax administrations are also being carried out.	12/2004
3	2	The Commission to present legislative proposals to remove the obstacles to the free movement of cars in the Internal Market.	12/2004
4	1	The Commission to publish a Communication on the effect of the case law of the ECJ on the various types of dividend taxation systems. An analysis of ECJ case law will help towards the design of non-discriminatory dividend taxation systems and allow the Commission to take action, possibly through infringement proceedings, to ensure non-discriminatory tax treatment of cross-border dividends.	12/2003

5. EXPANDING PROCUREMENT OPPORTUNITIES

ACTION	TYPE	DESCRIPTION	TIMING
1	1	The Council and European Parliament should adopt the legislative procurement package in both the classic and utilities sectors. The legislative package has two broad objectives. The first is to simplify and clarify the existing Community Directives, and the second is to adapt them to modern administrative needs in a changing economic environment. The three existing Directives are being consolidated into one measure which also contains a number of provisions facilitating the use, by public authorities, of information technologies in public procurement.	12/2003
1	3	The Member States to implement the public procurement package by the agreed deadline and, while doing so, streamline/simplify their own legislation and standardise their procedures. They should report on progress to the Commission.	06/2005
2	2	The Commission to propose amendments to strengthen the Procurement Remedies Directive, possibly including the strengthening of the powers of national surveillance authorities on which it will conduct a prior consultation.	12/2004
3	3	The Member States should strengthen administrative co-operation in order to resolve cross-border procurement problems, notably through the further development of the fledgling European Public Procurement Network (EPPN) established on the initiative of the Danish authorities. The network needs to be expanded to all existing and new Member States. Member States should ensure that the EPPN is sufficiently well funded so as to be able to meet its ambitions.	06/2004
3	3	The Member States should stimulate and develop procurement training (possibly using the Internet), particularly to raise the awareness of European rules amongst procurement officials at all levels of government. Best practices could be exchanged through the EPPN.	12/2004

4	2	The Commission to develop an Action Plan on e-procurement with a view to allowing a substantial part of procurement to be carried out electronically by 2006. The first step will be to translate the legal provisions of the public procurement package into functional requirements. The Commission will also give mandates to European standards organisations, where necessary, to develop technical standards for e-procurement.	06/2004
5	1	The Commission to publish an interpretive Communication setting out the implications of recent Court judgements regarding the scope of Article 296 of the Treaty (which concerns exceptions for essential security interests of Member States).	12/2003
5	2	The Commission to publish a Green Paper looking at any further initiatives in European defence procurement.	12/2004

6. IMPROVING CONDITIONS FOR BUSINESS

ACTION	TYPE	DESCRIPTION	TIMING
1	1	The Council to adopt the Regulation on the Community Patent (based on the political agreement reached in the Competitiveness Council of March 2003).	06/2003
1	1	The Council to adopt the proposal to create a Community Patent Court and to take the necessary steps to allow the European Union to accede to the European Patent Convention.	12/2006
2	1	The Council and European Parliament to adopt the Directive on the enforcement of intellectual property rights which will bolster the fight against counterfeiting and piracy.	12/2003
2	1	The Council and European Parliament to adopt the Directive on the patentability of computer-implemented inventions which will stimulate innovation and benefit both software developers and suppliers as well as the users of patentable technology.	12/2003
3	2	The Commission to adopt a Communication on the management of copyright and related rights in the Internal Market which will identify the measures necessary to create a more favourable environment for the cross-border marketing and licensing of these rights.	09/2004
4	1	The Council to adopt the proposed reform of the merger regime to ensure the continuing effectiveness of merger control in the context of globalisation and enlargement. The reform proposal focuses on a revision of the turnover thresholds and jurisdictional and procedural issues.	06/2004
4	1	The Commission to adopt a new block exemption Regulation to facilitate technology transfer agreements between companies.	06/2004
4	3	The Member States to continue their efforts to further reduce the total amount of **state aid** while re-directing aid towards horizontal objectives of Community interest, such as the environment, research and development and SMEs. The Commission will continue to monitor and publish results in the State Aid Scoreboard.	ongoing

5	1	Legal endorsement of existing International Accounting Standards (IAS), provided that, for some of them, the appropriate modifications are made. A recently adopted Regulation requires all EU-listed companies to prepare their consolidated accounts in accordance with IAS from 2005. IAS are established by the International Accounting Standards Board (IASB), an independent international accounting standard-setting organisation. To ensure appropriate political oversight, the IAS Regulation establishes a new EU mechanism to endorse IAS for use within the EU. Decisions will be taken by the Commission on the basis of the opinion of the Accounting Regulatory Committee – which is composed of representatives of the Member States – and considering the advice of the European Financial Reporting Advisory Group - which is composed of accounting experts from the private sector in several Member States.	09/2003
5	1	Legal endorsement of new IAS	ongoing
5	2	The Commission to offer a platform (or forum) to Member States to allow them to discuss ways of facilitating the uptake of IAS by non-listed companies, including SMEs (e.g. by uncoupling tax reporting and financial reporting in respect of individual accounts).	06/2004
5	1	The Commission to issue a Communication setting out priorities for 2003 and beyond aimed at improving the quality of statutory audit in the EU.	06/2003
5	1	The Commission to make a proposal to modernise the 8th Company Law Directive (access to and regulation of the audit profession).	12/2003
5	1	The Commission to set up a European co-ordination mechanism for public oversight of the audit profession. This will aim to ensure proper oversight of the audit profession at national level and appropriate co-ordination at EU level.	03/2004
5	2	Adoption of International Standards on Auditing for all audits conducted in respect of EU companies. Auditing standards are crucial to providing high quality audits. At present there are no agreed auditing standards in the EU. There is general agreement that any initiative in the field of standards should be based on the International Standards on Auditing (ISA). Over the next two years, the Commission and Member States will work towards the creation of a supervisory framework based on the ISA.	03/2005

6	1	The Council and European Parliament to adopt the Take-over bids Directive which will help business development and restructuring while maintaining essential protection for shareholders.	12/2003
6	1	The Commission to propose a 10th Company Law Directive on cross-border mergers and a 14th Company Law Directive on cross-border transfers of the registered office.	12/2003
7	2	The Commission is undertaking a feasibility study in order to assess the practical need for and possible obstacles associated with the creation of a European Private Company Statute. This legal form would serve the needs of SMES carrying out business in more than one Member State. If the results of the study are positive, the Commission will propose a Regulation.	12/2006

7. MEETING THE DEMOGRAPHIC CHALLENGE

ACTION	TYPE	DESCRIPTION	TIMING
1	3	The Member States to implement and enforce the Pension Funds Directive which proposes a prudential framework to provide security of pensions and a high level of protection for future pensioners. It will also provide institutions with the flexibility to develop effective investment policies.	06/2005
2	2	The Commission to examine the desirability of proposing a Directive on portability of occupational pensions, subject to the outcome of the second stage of the consultation of the Social Partners which is about to be launched.	06/2004
3	1	The Commission to continue its action to tackle tax discrimination against pension funds established in other Member States. The Commission will vigorously pursue any cases which come to its attention and ensure that the relevant ECJ jurisprudence is complied with throughout the EU.	ongoing
3	3	Prior to the entery into force of the Pension Funds Directive, the Member States to adjust their national rules to ensure non-discriminatory treatment of pension funds established in other Member States.	06/2005
4	1	The Commission to ensure full compliance with the jurisprudence of the Court of Justice, in order to realise the potential of the Internal Market in helping to tackle the challenge faced by Member States' Health Systems. In this connection, discussions with Member States have been launched, including through the High Level Reflection Group on Patient Mobility. As a basis for these discussions, the Commission will present the results of its consultation process on patient mobility.	12/2003

8. SIMPLIFYING THE REGULATORY ENVIRONMENT

ACTION	TYPE	DESCRIPTION	TIMING
1	2	The Commission to develop a coherent approach to the question of legislative technique and the choice of legal instrument in the Internal Market. This concerns issues such as when to rely on mutual recognition, the "New Approach", co-regulation or voluntary agreements; the level of harmonisation and the possible insertion of Internal Market clauses; and when Regulations should be given priority. The Commission will consult Council, the European Parliament, industry and other stakeholders. The approach to be adopted could be set out in a short Commission Communication under the Commission's Governance Initiative/Better Regulation Initiative.	06/2004
2	1	The Commission to draw up an "Internal Market compatibility test" following consultations with the European Parliament and Member States. The test would act as guidance for national legislators at all levels of government to ensure that their actions do not inadvertently impinge on the free movement principles of the Treaty. This test could be endorsed by means of a Council resolution. The Commission also recommends that Member States involve non-nationals more in the development of any measures and that, once measures have been adopted, they should be made easily available to non-nationals (e.g. by putting them online).	03/2004
3	1	The Commission to set up a web-site where interested parties can report on particularly complex rules or rules which may fail the "Internal Market compatibility test".	09/2003
3	1	The (Competitiveness) Council is invited to to establish a working group on "better regulation." This group could draw up national simplification plans, which would mirror activity at Community level.	06/2003

4	2	Commission to develop with the Member States indicators to measure progress towards a higher quality regulatory framework for the Internal Market, particularly, but not exclusively, as a result of the Commission's Better Regulation Action Plan of June 2002. These indicators should consist of both input indicators (e.g. have the announced measures been taken on time?) and impact indicators (e.g. have they resulted in lower administrative burdens?). The results of the Commission's project on Indicators of Regulatory Quality, undertaken in the framework of the Multi-annual Programme for Enterprise and Entrepreneurship, will provide a basis for this work.	06/2004

9. ENFORCING THE RULES

ACTION	TYPE	DESCRIPTION	TIMING
1	3	The Member States to commit themselves to setting and respecting more ambitious transposition targets at each Spring European Council. In response to a request from the European Parliament, the Commission will undertake a feasibility study to examine whether it is methodologically and practically possible to put a figure on the cost of late transposition. Existing instruments, such as the Inter-active Policy Making feedback mechanism, can also be used to gauge the costs to business of both late transposition and misapplication of EU Directives.	03/2004
2	2	The Commission to issue a Recommendation setting out "best practices" to speed up and improve the quality of transposition of Internal Market Directives. These could include: a) ensuring that the expertise of officials' built up during negotiations can be fully used during the transposition phase; b) planning ahead by developing transposition "time tables" (i.e. with target dates for first draft implementing text, envisaged date for approval by the competent minister(s), starting date of the parliamentary process, etc.); c) limiting the transposition to what is absolutely necessary without adding other elements which only complicate the law or its implementation (this is usually referred to as "gold plating"); d) urgent intervention by the "state" in cases where deadlines risk being missed (i.e. because of delays at regional/provincial level in federal/decentralised Member States); e) regular submission of transposition progress reports to national and regional parliaments to keep up the pressure.	03/2004
2	1	The Commission will regularly identify those Directives which should be subject to "preventive dialogue" – i.e. ongoing dialogue between the Commission and the Member States, starting immediately after the Directive is adopted, with the aim of ensuring better and faster transposition. The Directives chosen will be measures of particular economic importance and/or those which by their nature may be more difficult to transpose. In addition, the Commission will: a) systematically write to all Member States one month after the adoption of a Directive to inquire *inter alia* about	09/2003

		their planning schedules; b) organise bilateral meetings with Member States to discuss any transposition problems; c) whenever appropriate, raise transposition at expert meetings with a view to detecting problems at an early stage; d) prepare guidance to assist the Member States in the transposition of particularly complex pieces of legislation.	
2	1	The Commission to produce statistics on the average time taken to implement Directives, which it will report on regularly in the Internal Market Scoreboard.	06/2003
3	2	The Commission to propose a legal instrument to make certain implementation aspects, such as electronic notification of implementing measures and the use of concordance tables, mandatory. This will help to improve the transparency and efficiency of the checking of conformity.	09/2004
4	2	The Commission proposes that a standard or a transposition period should be set within the Inter-Institutional Agreement on Better Regulation, from which departures are only permitted if this can be justified by the complexity of the measure. The Commission will also seek the views of the Member States and the European Parliament on: a) the inclusion of standard sanctions clauses in Directives (i.e. a clause to provide for effective, proportionate and dissuasive sanctions in case of violations of the obligations flowing from the Directive); and b) a standard clause to provide a stronger legal base for the promotion of active administrative co-operation.	12/2004
5	3	Member States to maximise their efforts to reduce the number of their infringements by at least 50% by 2006. This can be achieved by a combination of early settlement of disputes, the use of alternatives to formal infringement proceedings (e.g. SOLVIT) and preventive action. This needs to be implemented progressively on a year by year basis. The Commission will report on progress made by existing Member States in the Internal Market Scoreboard. The Commission would welcome it if this "infringements reduction" target were confirmed by the Spring European Council alongside the transposition targets.	12/2006

6	1	The Commission to publish the results of a study on the different options for improving the enforcement of Internal Market law. This study will look, *inter alia,* at the desirability and feasibility of designating some kind of a mechanism in each of the Member States which would help to ensure the correct application of Internal Market legislation and the relevant Treaty articles.	12/2004
7	1	The Commission to set up a special section on the home page of the EUROPA web site setting out the various procedures available to citizens and businesses seeking to defend their rights under Community legislation (including the SOLVIT network and, as a last resort, infringement procedures). In all cases, estimations of the time and costs involved will be provided.	12/2003
8	1	The Commission to propose a Regulation on co-operation between national authorities responsible for the enforcement of consumer protection laws. These authorities should be given a minimum of common investigation and enforcement powers. The Regulation will provide for a framework of mutual assistance rights and obligations for enforcement authorities to use when dealing with rogue traders committing cross-border infringements.	06/2003

10. PROVIDING MORE AND BETTER INFORMATION

ACTION	TYPE	DESCRIPTION	TIMING
1	3	Member States to produce national plans to raise general awareness of Internal Market opportunities among their own citizens and businesses.	03/2004
1	2	The Commission to organise discussions on the preparation and implementation of national plans in the Internal Market Advisory Committee (IMAC) meeting at Director General level to ensure that there is adequate commitment at the highest level.	12/2003
1	2	The Commission to monitor the implementation of national plans and to report on it in the Internal Market Scoreboard.	12/2004
2	1	The Commission to review its overall Communication Strategy, taking account of needs in the new Member States.	12/2005
3	2	The Commission to improve the Dialogue web-sites to provide better access to practical information.	03/2004
3	2	The Commission to extend the Citizens Signpost Service to the new Member States.	06/2004
3	2	The Commission to extend progressively the Dialogue with Citizens and Business to new Member States.	12/2005
3	3	Member States to adopt a more pro-active approach and take full responsibility for the quality of the national-level information made available through the Dialogue.	12/2003
4	2	The Commission to set up a top-class information portal bringing together the Dialogue and the Signpost Service with other related initiatives, such as SOLVIT, European Consumer Centres, Fin-Net and EEJ-Net.	12/2004
5	2	The Commission to create a new Internal Market portal bringing together information about policy and legislative developments relating to the Internal Market, irrespective of the Commission department responsible.	12/2005
6	2	The Commission and Member States to extend the Euroguichet network (the European Consumer Centres). The aim is to have at least one European Consumer Centre in all Member States.	12/2004

GETTING THE BEST OUT OF THE ENLARGED INTERNAL MARKET

ACTION	TYPE	DESCRIPTION	TIMING
1	1	The Commission to produce a comprehensive monitoring report on each Accession Country six months before accession. These reports will focus, *inter alia*, on the capacity of the country concerned to implement all commitments and requirements arising from accession negotiations. The conclusions of the reports will identify any problem areas, delays and remedial action which needs to be taken.	12/2003
2	1	The Commission to make it possible for Accession Countries to notify their implementing measures before accession by establishing a system for prior notification.	06/2003
2	1	The Commission to negotiate a series of bilateral agreements with Accession Countries to facilitate the notification of their draft technical measures within the scope of Directive 98/34/EC. Proposed technical measures will be examined by the Commission and Accession Countries will be notified as to whether such measures conform to Community rules.	12/2003
3	3	The Accession Countries to produce screening reports of their legislation in the light of Articles 28, 43 and 49 of the Treaty - free movement of goods, right of establishment and the free provision of services. These reports will help to establish if there are any potential obstacles to the full implementation of these articles and, where necessary, will propose the removal of these obstacles.	06/2004
4	1	Extension, implementation and conclusion of PECAs (Protocols to the Europe Agreements on Conformity Assessment and Acceptance of Industrial Products) with Accession Countries. PECA agreements are a particular form of mutual recognition based on the adoption of Community legislation on industrial products and the creation of the appropriate administrative infrastructure in Accession Countries. This facilitates trade between these countries and the EU. PECA agreements are already in force with four Accession Countries. Two others have signed agreements and negotiations are underway with a further three.	12/2003

4	1	Conclusion of PECAs with Romania and Bulgaria. PECA negotiations with Romania and Bulgaria will continue with the aim of concluding and implementing agreements covering the maximum number of sectors well in advance of the expected accession date of 2007.	06/2006
5	3	The Accession Countries and the Member States to report back to the Commission on the specific steps which they have taken to inform competent authorities and enforcement officials of the consequences arising from the full implementation of the Internal Market following enlargement.	06/2004
6	1	The Commission to set up a database to facilitate targeted exchanges for Candidate Countries' Internal Market officials.	06/2004

BUILDING THE INTERNAL MARKET IN AN INTERNATIONAL CONTEXT

ACTION	TYPE	DESCRIPTION	TIMING
1	2	The Commission to work towards the conclusion of new agreements with the "new neighbours." Negotiation of these agreements can only begin once these countries have made sufficient progress in terms of legislative approximation and the development of enforcement capacity. Annual action plans will therefore be developed for each country. These plans will contain benchmarks which will be used to determine whether or not the country concerned has implemented the plan satisfactorily.	ongoing
2	2	The Commission to work towards regulatory convergence between the EU and international bodies in the automotive sector. In parallel with the codification of the three EU framework Directives in the automotive sector, the Commission to continue to be involved in codification exercises of UN/ECE Regulations. EU Directives should increasingly make use of the technical prescriptions included in the UN/ECE Regulations.	ongoing
3	2	The Commission to assess the desirability of extending regulatory dialogues to other policy areas and countries and to report on the outcome of this review to the Council and European Parliament.	12/2004
4	1	The Commission to publish a Communication on "the role of customs at the external frontier." This will focus on ways of ensuring protection against unsafe products and the merits of introducing a modern risk-based customs control system. The latter would involve agreeing, with Member States, the priorities to be pursued by customs services and the means of addressing the related risks and would be supported by the computerised exchange of information between customs services.	06/2003
4	1	The Commission to publish a Communication on "a simple and paperless environment for customs and trade." The main thrust here is to make it possible for businesses to use the proposed computerised information exchange system thereby reducing their costs and accelerating customs procedures.	06/2003

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Draft Commission interpretative communication on concessions under Community law on public contracts

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Brussels, 24 February 1999

Public contracts: Commission launches consultation round on concessions

The European Commission has decided to launch a round of consultations on how the Single Market rules should be applied to partnerships involving public bodies and the private sector and in particular concessions. The consultation will be based on a draft interpretative communication which seeks to explain how the principles of the EU Treaty concerning such issues as non-discrimination, freedom of establishment and freedom to provideservices, and the Directives on public contracts, should be applied to concession and similar forms of public/private partenariats. In March 1999, following consultations with all the interested parties, the Commission will adopt the final version of the interpretative communication, which will be published in the Official Journal.

Mr Mario Monti, the Member of the Commission responsible for the Single Market, has said: "Cooperation between the public and private sectors is growing in all the Member States, because it can be a very effective response to the need for public investment. It is essential, however, to provide a framework for public/private partnerships in the context of the Single Market which is transparent and open to competition."

Concessions and other similar forms of public/private cooperation are of considerable economic importance, with a total value almost equal to that of more conventional public contracts (11% of the European Union's GDP). It is therefore appropriate to examine the extent to which Community businesses can benefit from free access to these types of contract and to check that Community law is being implemented in full by Member States as regards the attribution of these contracts.

The draft interpretative communication which the Commission is submitting for consultation is in two parts. The first defines the general problems associated with concessions and analogous forms of public/private partnership. The second part deals with the relevant rules.

Definition of "concession"

The Commission notes that the manner in which public authorities invite the private sector to perform public services varies from one Member State to another. Nevertheless, the key criterion for distinguishing between a concession and other forms of public/private partnership is the exploitation risks.

The draft communication therefore addresses situations in which a public authority entrusts a third party (by means of a contract or a unilateral measure which has the consent of that party) with the overall or partial management of works or services which are normally the authority's responsibility and for which the third party in essence assumes the operating risk. The activities in question must be economic ones (e.g. the operation of motorways or the supply of water). We are not concerned here with situations in which a public body entrusts a third party with work which is part of a public service function (e.g. notarial services, as in some Member States) or grants an authorisation or licence to perform an economic activity (e.g. the running of dispensing chemists or petrol stations, as in some Member States).

Rules applying to concessions

Differences in definition aside, public contracts, concessions and similar forms of public-private partnership all concern the performance of economic activities and are consequently subject to the same rules of the Treaty and the principles which emerge from the case law of the Court of Justice, such as non-discrimination on grounds of nationality, freedom to provide services, freedom of establishment, transparency, mutual recognition and proportionality.

The principle of equal treatment implies, among other things, that all bidders are familiar with the rules of the game, and that the rules apply equally to all. As regards transparency, the Commission notes that in Member States there are often rules or administrative practices which ensure a certain degree of transparency in the attribution of concessions.

The principle of proportionality means that any measure chosen by the awarding authority must be necessary and appropriate for the attainment of its goals. Finally, the principle of mutual recognition implies that Member State where the service will be provided must recognise the technical specifications and controls undertaken in another Member State.

Apart from the rules and principles contained in the Treaty and case law, the draft points out the relevant provisions of the Directives, especially the Directive on public works contracts (Directive 93/37/EC). It also states that the consequences of the application of Treaty rules for concessions in special sectors, such as energy and transport, are subject to the same rules as other concessions.

The communication is the first in a series of measures implementing the action plan which the Commission outlined in its communication on public contracts of 11 March 1998 (IP/98/233). It will be published in the Official Journal and on the Commission's Europa website, as of 26 February, at the following address: http://simap.eu.int

IMPORTANT LEGAL NOTICES

Public Procurement

Green Paper on Defence Procurement

- **Communication on the results of the consultation launched by the Green Paper on Defence Procurement and on the future Commission initiatives**
- **Green Paper on defence procurement**
- **Report on Public consultation**
- **Background useful links**

Communication on the results of the consultation launched by the Green Paper on Defence Procurement and on the future Commission initiatives

Following the public debate on the Green Paper on defence procurement (see below), the Commission adopted on 6 December 2005 the Communication on the results of the consultation.

The contributions all welcomed the Green Paper and supported the objective of the Commission to contribute to overcoming market fragmentation and to increasing intra-European competition.

A majority considered useful an Interpretative Communication clarifying the existing law and in particular the principles governing the use of the derogation in Article 296.

A majority of stakeholders found that a defence directive, providing new and more flexible rules for the procurement of arms munitions and war material not concerning essential security interests, would also be useful.

This Communication therefore presents the future Commission initiatives.

The Commission will adopt in 2006 an “Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement.”

The Commission considers that a directive coordinating national procedures for the procurement of defence goods (arms, munitions and war material) and services, would also be an appropriate instrument. In accordance with the principle of better regulation, such a directive will be subject to the results of the relevant impact assessments, which will be completed in 2006, prior to the presentation of a possible proposal.

- Press Release
- Frequently asked questions
- Communication - COM(2005)626 de en fr

Green Paper on defence procurement

1. The context

The Green Paper on Defence Procurement forms part of the European Commission's initiative to provide a contribution to the progressive establishment of a European Defence Equipment Market.

It is one of the seven initiatives [1] announced in the Communication "Towards a European Union defence equipment policy", adopted by the European Commission on 11th March 2003 (COM (2003) 113 final). The purpose of these initiatives is to reinforce the industrial and technological base of European defence and to improve the quality of public expenditure on defence equipment.

One of these initiatives is the launch of a debate on the desirability of adapting the rules for awarding defence contracts in Europe in order to permit a greater opening-up of these markets between the Member States, in a way consistent with the special nature of the sector.

The fragmentation of national markets, partly caused by the lack of a single regulatory framework, increasingly compromises the competitiveness of the European industrial base and the establishment of a European Defence Equipment Market.

2. The state of defence markets

Defence markets remain very fragmented between the Member States, which at the moment raises many difficulties, for:

- the competitiveness of European industries, which is particularly affected by the limited size of the national markets in Europe, often insufficient to absorb the increase in the Research and Development costs of new programmes,
- the armed forces of the Member States: the lack of effectiveness of acquisition systems and procedures make the necessary modernisation of their equipment too expensive,
- the European taxpayer who pays the high price of limited scale of production.

The debate on adapting the acquisition rules has to take account of the specific characteristics that distinguish defence procurement from other procurement:

- as a customer, sponsor and regulator, the state plays a leading role, because of the very nature of the products, which are often very sensitive and connected with sovereignty and national security,
- given the political and strategic importance of weapon systems, security of supply and confidentiality play a much more important role than in civil markets,
- Added to this, the complexity of defence programmes, the high development costs, the long lifetime of many programmes, and the major commercial risks involved.

Article 296 of the EC Treaty and the Directives on public procurement, allow Member States to derogate from rules on public procurement, according to conditions defined in this legislation, as clarified by the Court of Justice. In practice, however, most national authorities make extensive use of exemptions. Consequently, the majority of defence contracts are awarded according to strictly national rules, which differ from one Member State to another and are very diverse, in particular as far as publication and the openness of competition are concerned. This lack of homogeneity constitutes a major obstacle for non-national suppliers and limits the opening-up of markets. Intergovernmental attempts to remedy these obstacles have not yielded satisfactory results as they are not legally binding.

3. The objectives of the Green Paper

By means of this Green Paper, the Commission aimed to contribute to the debate on the advisability of adapting the European regulatory framework for the procurement of defence equipment in order to contribute to facilitating the industrial production and make public expenditure more effective. The Green Paper opened a debate on the opportunity of undertaking a Community action to solve the difficulties identified.

4. The preparatory phase

The Commission already worked closely with stakeholders in preparing the Green Paper, from January to April 2004.

A working party of national technical experts designated by the ministries concerned, and a group of industry representatives met in January, March and April 2004. These work sessions aimed in particular to collect technical information necessary for the development of the Green Paper, to determine the expectations of the various parties concerned and to provide the Commission information.

- Press release
- Green paper- COM(2004)608
  cs da de et el en es fr it lv lt hu mt nl pl pt sk sl fi sv

Report on public consultation

On 23 September 2004, the Commission launched a public consultation and invited all interested parties to send their observations on the questions raised in the current Green Paper.

During the six-months consultation period, a series of bilateral meetings, seminars and working group meetings were held which allowed the Commission to explain its initiative and to gain a clearer idea of stakeholders' interests and concerns. At the end of the consultation, the Commission had received 40 contributions from 16 Member States, Institutions and industry. Given the sensitivity of the issue and the relatively small number of actors involved, the Commission considers this to be a good level of participation.

Contributions to the Green Paper consultation authorised for publication

- Member states and third countries
- Undertakings and professional organisations
- Experts, think tanks and other organisations and individuals
- Agencies of the Council
- European Economic and Social Committee

Background useful links

Legislative Package

- Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (30.04.2004)
- Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (30.04.2004)

Communications of the Commission

- Communication COM (1996)10 - "The challenges facing the European defence-related industry, a contribution for action at European level" (24.1.1996)
  de en fr
- Communication COM (1997)583 - "Implementing European Union strategy on defence-related industries (12.1.1997)
  en fr
- Communication COM (2003)113 "European Defence Industrial and Market Issues - Towards an EU Defence Equipment Policy (11.03.2003)

1. Standardisation, monitoring of defence-related industry, intra-Community transfers, competition policy, export control of dual-use goods, research

Contacts

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 06 December 2005
COM(2005)626

COMMUNICATION FROM THE COMMISSION

to the Council and the European Parliament on the results of the consultation launched by the Green Paper on Defence Procurement and on the future Commission initiatives

COMMUNICATION FROM THE COMMISSION

to the Council and the European Parliament on the results of the consultation launched by the Green Paper on Defence Procurement and on the future Commission initiatives

The purpose of this Communication from the Commission is to report on the contributions by stakeholders to the consultation launched by the Green Paper on defence procurement[1]. Commission also presents the actions it intends to take as a follow-up to the Green Paper.

I. BACKGROUND

1. Political context

In connection with the development of the European Security and Defence Policy (ESDP), Member States have started to use the European Union as a framework to improve the coordination of military capabilities, achieve better cost-effectiveness of defence expenditure and enhance the competitiveness of the European industrial and technological base in the area of defence. The establishment of the European Defence Agency (EDA) in July 2004 was an important step towards achieving these objectives.

In March 2003, in parallel with the Member States' efforts, the European Commission launched an initiative towards a common European Defence Equipment Market (EDEM)[2], which included a number of actions in areas where the Community has competence (for example procurement, intra-Community transfers, standardisation, research).

The activities in the field of defence procurement are thus part of an overall initiative, being carried out at both Community and intergovernmental level.

2. Defence market characteristics

Defence equipment markets are specific markets.

Member States' combined defence budgets are worth about EUR169 billion, which includes around EUR82 billion for procurement. 85% of defence spending and 90% of the EU's industrial capabilities are concentrated in the six major arms-producing countries[3].

Defence markets cover a broad spectrum of products and services, ranging from non-war material, such as office material and catering, to weapon system and highly sensitive material, such as encryption equipment or nuclear, biological and chemical equipment (NBC). Many weapon systems are complex and integrate sophisticated technologies. Developed for the specific demands of a very small number of customers, they often have long development and life cycles and high non-recurring costs. This, in turn, makes it necessary for governments of producing countries to bear an important part of research and development costs. The sensitivity of defence equipment for Member States' security interests can vary depending on

[1] COM (2004) 608, 23 September 2004

[2] Communication of the Commission "Towards an EU Defence Equipment Policy", 11 March 2003.

[3] UK, FR, DE, IT, ES, SV

political and military circumstances. In general, however, its sensitivity is proportional to its technological complexity and strategic importance.

Due to the specificities of many defence products, governments play a predominant role both as customers and regulators. At the same time, they maintain a traditionally close relationship with their suppliers, with confidentiality and security of supply being particularly important features.

Since the organisation and operation of defence markets are closely related to the security and defence policy of Member States, defence markets in the EU remain fragmented at the national level. Fragmentation is in fact the main feature of both Europe's demand side (25 national customers) and its regulatory framework (25 different sets of rules and procedures).

3. The legal framework on defence procurement and its application

Public procurement law, and especially its application, is also an important feature of the market fragmentation in Europe. The Green Paper and the present Communication are focused on this particular aspect of the problem.

According to existing EU law, defence contracts fall under internal market rules. Thus, Directive 2004/18/EC[4] for public procurement of goods, works and services ("the PP Directive") applies to public contracts awarded by contracting authorities in the field of defence, subject to Art. 296 of the Treaty ("Article 296"[5]). The latter allows Member States to derogate from Community rules for the procurement of arms, munitions and war material if Member States' essential security interests are concerned. By contrast, the contracts for the procurement of items other than arms, munitions and war material, as well as for arms, munitions and war material not concerning essential security interests, are covered by Community rules.

However, since the concept of essential security interests is rather vague, implementation of Article 296 has been always very difficult. Under paragraph 2 of that article, a list of arms, munitions and war material covered in principle by the derogation was adopted by the Council in 1958. However, this list is rather generic, and it is therefore not always clear which rules should apply to which defence contracts.

At one end of the spectrum, non-war material is not included in the list based on Article 296 and (normally) does not concern essential security interests; as a result, the PP Directive applies. At the other end, highly sensitive defence equipment is included in the list of 1958 and clearly concerns essential security interests; in these cases, the use of Article 296 is legitimate. However, Member States also procure equipment which has the specific features

[4] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. As from 31 January 2006 this Directive will replace Directives 92/50/EEC, 93/36/EEC and 93/98/EEC. The exception concerning Article 296 will remain unchanged in substance.

[5] According to paragraph 1 of that Article:*"(a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security; b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes."*

of defence material but which is not (necessarily) essential for their security interests. This category forms a major "grey area" where the use of Article 296 is less clear.

In practice, most Member States make almost automatic use of the possibility of exempting nearly all defence procurement contracts from Community rules, often without taking into account the conditions defined by the Treaty and the Court for the use of Article 296[6]. The rate of publication by Ministries of Defence amounts to only 10%, while the average publication rate of central governments is about 20% (25% excluding defence)[7]. As a consequence, most defence contracts are awarded on the basis of national procurement rules, which have widely differing selection criteria, advertising procedures, etc. Member States do this partly because they consider the PP Directive not always suited to the procurement of defence material.

It is generally acknowledged that the fragmentation of national procurement rules and their practical application have the effect of limiting transparency and competition on defence markets. This, in turn, has brought negative consequences for the efficiency of public spending, for Member States' military capabilities and, finally, for the competitiveness of Europe's Defence Industrial and Technological Base (EDITB).

The Green Paper sought to identify options for action at the Community level in order to improve this situation.

4. The Green Paper

From January to April 2004, the Commission organised several workshops with government experts and industry representatives in order to collect technical information for the preparation of the Green Paper and to determine the expectations of the various parties concerned.

On 23 September 2004, the Commission adopted the Green Paper and launched the public consultation, inviting all interested parties to comment on how to improve the EU Defence Procurement Regulation. The Green Paper put forward proposals for those parts of the market which are not covered by Article 296 and thus come under Community rules.

The Commission suggested two possible Community initiatives:

- An interpretative communication, clarifying the existing law and in particular the principles governing the use of the derogation in Article 296.

- A directive providing new, more flexible rules for the procurement of arms, munitions and war material not concerning essential security interests. These new rules should take into account all the specificities of such defence contracts.

The two solutions were presented as not being mutually exclusive. Moreover, the Commission has made it clear that, in every possible scenario, Member States would always have the right to invoke Article 296, provided that the conditions established in the Treaty (and confirmed by the case law of the ECJ) are strictly met.

[6] See *Johnston*, case 222/84; *Commission v. Spain*, case C-414/97

[7] Source : TED data base

At the same time, the two options would only concern defence procurement by national authorities inside the European internal market. Arms trade with third countries would continue to be governed by WTO rules, and in particular by Article XXIII of the Government Procurement Agreement (GPA), which allows Members to derogate from the Agreement itself, when essential security interests are at stake.

II. THE RESULTS OF THE CONSULTATION

1. Participation

During the six-months consultation period, a series of bilateral meetings, seminars and working group meetings were held which allowed the Commission to explain its initiative and to gain a clearer idea of stakeholders' interests and concerns. At the end of the consultation, the Commission had received 40 contributions from 16 Member States, Institutions and industry[8]. Given the sensitivity of the issue and the relatively small number of actors involved, the Commission considers this to be a good level of participation.

2. Opinions

The contributions all welcomed the Green Paper and supported the objective of the Commission to contribute to overcoming market fragmentation and to increasing intra-European competition via an appropriate set of rules for defence procurement.

The vast majority of stakeholders shared the Commission's assessment of the Green Paper. They acknowledged the widespread misinterpretation of Article 296 and considered the existing PP Directive often ill-suited for defence procurement, despite the recent adaptations. The main obstacles mentioned were the following:

- open tendering procedures based on publication in the Official Journal of the European Union are not compatible with confidentiality requirements;

- the use of negotiated procedure - which is the only appropriate procedure - is too restricted and not properly defined;

- the selection criteria are based solely on technical, economical and financial aspects, and key conditions for selecting tenderers in the defence sector - such as security of supply, confidentiality and urgency - are missing;

- the rules on technical specifications, time limits and follow-up contracts are inappropriate.

Almost all stakeholders supported a Community initiative in the field of defence procurement and ruled out the "no action" option. As for the instruments presented as possible solutions, stakeholders expressed a variety of opinions:

2.1 Interpretative Communication

[8] All the contributions received are published in their original language, see http://www.europa.eu.int/comm/internal_market/publicprocurement/dpp_en.htm

(1) **A majority considered an Interpretative Communication to be useful. The arguments put forward in favour of an interpretative communication are as follows:**

- As a non-legislative measure, it could be prepared quickly;

- By spelling out in detail the principles defined by the Court for the use of Article 296, it could reduce the risk of legal misinterpretation and thus ensure better application of existing law by Member States (and more regular use of tendering procedures);

- Absent any further legislative action, the Commission would have a clearer and stronger legal basis for applying procurement rules.

(2) **Only a minority of stakeholders were sceptical about or opposed to a communication. The arguments against a communication are the following:**

- As it would do nothing to change the existing legal framework, it would not contribute to a more homogeneous regulatory framework.

- The principles defined by the Treaty and the relevant case law are sufficiently clear and should be well-known to all stakeholders; additional clarification is therefore unnecessary.

- A communication would clarify only how Article 296 is to be used, but it would not be able to specify for which contracts, since it could neither clarify the concept of essential security interests nor elaborate on the list of 1958 (both of these actions fall under the Member States' prerogatives). The uncertainty about the scope of Article 296 would thus remain.

- The decision on whether or not defence contracts concern essential security interests is a political rather than a legal one. A purely legalistic and rigid approach to a problem of political definition might create even greater confusion and increase the number of legal disputes on the borderline of Article 296.

- An Interpretative Communication would not dispel Member States' reluctance to use the existing PP Directive for defence procurement. Its impact in terms of transparency and competition would therefore be limited mainly to non-war material. This might generate some cost savings at the margins of defence markets, but would miss the main target of the initiative (i.e. to enhance the cost-effectiveness of defence markets and the competitiveness of the EDITB).

2.2 Defence Directive

The general picture with regard to a defence directive is more complex:

(1) **A majority of stakeholders found that a defence directive would be useful. Its main advantages would be the following:**

- By coordinating national rules in certain parts of the defence markets, a directive would contribute to a more homogeneous regulatory framework in the EU;

- As it is legally binding, a directive would have the capacity to enhance transparency, non-discrimination and equal treatment in certain parts of the defence market.

- It could offer new, more flexible and more suitable rules for procurement of defence contracts, which are not covered by Article 296 and for which the existing Directive may be too rigid and inappropriate.

- It could take into account the specific features of defence contracts which are not addressed or not adequately dealt with by the current PP Directive, such as:

  - An appropriate centralised system of publication;

  - General use of the negotiated procedure (which would allow contracting authorities, after a call for tenders, to consult and negotiate contract terms with the selected companies);

  - Scope for contracting authorities to use the negotiated procedure without prior publication of a tender notice in certain defined cases, such as urgency for military purposes;

  - New specific selection criteria to be applied in assessing tenders, such as confidentiality and security of supply;

  - Clauses to ensure adequate competition throughout the supply chain, in particular to improve market access for SMEs;

  - Clauses to harmonise offset practices.

- A Directive would not remove the difficulty of defining the borderline of Article 296, but it could be flexible enough to become a credible alternative to national procedures. In this case, the Directive could defuse the issue of choosing between Community rules and Article 296.

(2) **Among those who find the Directive useful, however, there are varying opinions as regards timing and conditions:**

- some stakeholders suggested that the work should be started;

- others favoured waiting to see whether or not the clarification of current legislation is sufficient;

- some argued that political and economic conditions in other areas (for example, the structure of the industrial base, or the mentality of buyers) must be met in order to create a level playing field for non-national suppliers before starting work on a directive;

- others argued that work on the directive could serve as a catalyst for reforms in these related areas.

(3) **Only a few stakeholders were explicitly against a directive, and put forward widely differing arguments:**

- As a legislative measure, it is unlikely to be achieved quickly;

- The existing Directive is sufficiently flexible and there is therefore no necessity for a new legislative instrument that would add extra regulation;

- It would have only a limited impact, either because it would take too long to be developed and implemented, or because it would not apply to high-value contracts (which usually concern essential security interests and would therefore remain covered by the Article 296 derogation);

- It would create three separate procurement processes with new boundaries between the various market segments. This could involve a limitation of the right to use Article 296 and make it difficult to demarcate the respective scope of the civil and the defence Directives.

To sum up, even if it is very difficult to draw a general conclusion or a single general trend, it does appear that a majority of stakeholders are in favour of an interpretative communication, and not against a directive. There is some disagreement about the timing of the latter.

Preferences for an interpretative communication or a directive, also as far as timing is concerned, do not follow the traditional dividing lines between big and small, producing and non-producing Member States. The same is true for industry, with differences being seen between European and national associations and between defence industry associations and non-defence industry association. The European Parliament expressed clear support for a comprehensive approach combining an interpretative communication and a new directive adapted to the specificities of defence (combined with the development of an intergovernmental code of conduct - see below).

All stakeholders asked the Commission to be closely associated with and to participate actively in the development and implementation of the solutions they support.

3. Broadening of the debate

During the consultation period, several stakeholders put forward options beyond those mentioned in the Green Paper.

- Many saw a need for greater transparency and competition, including in the area covered by Article 296. Partly as a response to this, Ministries of Defence mandated the European Defence Agency (EDA) to explore the possibilities of drawing up an intergovernmental Code of Conduct to foster intra-European competition in this area of the market too. Such a Code would be a political but not a legally binding instrument, which would complement Community instruments and pursue the same objective in a different segment of the defence market. It could also include a notification system on the use of Article 296.

- Others considered an intergovernmental instrument as an interim solution/intermediate step on the way to a Community directive. Although the two instruments would cover different market segments, it would be advisable, from this point of view, to foster the convergence of national procurement policies before coordinating national procurement rules.

- Some, however, believe that an intergovernmental instrument of this kind can be an alternative to Community initiatives. From this point of view, a directive would only be acceptable if the Code proved ineffective.

In addition, almost all stakeholders underlined that procurement was just one aspect of an EDEM construction. They highlighted the necessity for any Community initiatives in the field of procurement law to be accompanied by actions in other areas; this was seen as a necessary precondition for an efficient internal defence market and for the creation of a level playing field for industry. In this context, stakeholders mentioned arrangements for security of supply, transfers and transits, harmonisation of export policies, state aid, offset practice and the full privatisation of all European defence firms.

Stakeholders also expressed their concerns about the conditions of access to the EU market, particularly in view of the unbalanced situation with certain third countries. They expected all measures taken at EU level to favour reciprocal access, in particular with the US, and stressed the need to strengthen the competitiveness of EU industries on world markets.

III. COMMISSION ASSESSMENT AND FUTURE INITIATIVES

The whole consultation process shows that the current legislative framework on defence procurement is not functioning properly, in practice, for the different reasons listed above. The appropriate initiatives therefore have to be taken, in order to improve a situation which is almost unanimously regarded as unsatisfactory. The Commission is ready to play its role in pursuit of this objective.

(1) On one hand, the dividing line between defence acquisitions concerning essential security interests according to Article 296 and defence acquisitions which do not concern essential security interests is not clear, or at least is not perceived in the same way by all Member States. As a consequence, the application of the derogation remains problematic.

The Commission will therefore adopt in 2006 an “Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement.” This Communication will recall the principles governing the use of the derogation, in the light of the case law of the Court of Justice, and will clarify the criteria on the basis of which Member States have to decide when the conditions for the application of the derogation are met and when they are not.

While providing additional legal certainty and guidance for Member States, an Interpretative Communication will not alter the current legal framework. It will simply clarify the existing one, with the objective of making its implementation more uniform.

In line with the principle of better regulation, the Interpretative Communication will be accompanied by a proportionate impact assessment, aimed at verifying whether it is actually likely to bring benefits.

As the Interpretative Communication will also concern issues related to free movement of goods, it could have further consequences e.g. on intra-EU transfers for defence goods. This will be duly taken into account in the drafting of such Communication.

(2) On the other hand, a simple clarification may be insufficient. The consultation also confirmed that the current PP Directive, even in its revised version, may be ill-suited to many defence contracts, since it does not take into account some special features of those contracts.

The Commission therefore considers that a directive coordinating national procedures for the procurement of defence goods (arms, munitions and war material) and services, would be the appropriate instrument to improve the situation described. This directive could take into account all the specific needs of defence procurement, and offer new, more flexible rules for defence procurement, to be followed in cases where the derogation in Article 296 does not apply.

In accordance with the principle of better regulation, such a directive will also be subject to the results of the relevant impact assessments, which will be completed in 2006, prior to the presentation of a possible proposal.

The Commission will also follow with great interest the development of the Code of Conduct under preparation by the EDA. This code, voluntary and non binding would aim at increasing transparency and competition also in a different segment of the market, since it would apply in cases where the conditions for the application of Articles 296 are met. This kind of intergovernmental initiative would usefully complement the initiatives taken at Community level.

IP/05/1534

Brussels, 6 December 2005

Public procurement: new Commission initiatives on more open and efficient defence procurement

The European Commission has outlined its proposals for future initiatives to improve cross-border competition in defence procurement. In 2006, the Commission will adopt an 'Interpretative Communication' clarifying when Member States can derogate from EU law requiring competitive procurement with regard to supplies, works and services intended for specifically military purposes and crucial to essential security interests. In parallel, preliminary work will begin towards a possible Directive that would coordinate procedures for defence procurement in cases where the derogation under Article 296 EC is not applicable or a Member State chooses not to take advantage of it. These initiatives are based on the results of the consultation launched in September 2004 by the Green Paper on how to open defence public procurement to greater transparency and efficiency, compatible with the specific features of this sector (see IP/04/1133). They follow the recent supportive opinion issued by the European Parliament (see Wuermeling report).

Internal Market and Services Commissioner Charlie McCreevy said: "The response to the consultation is clear . Action to clarify and improve EU law on defence procurement is imperative. We must now put our foot on the gas . The future of Europe’s defence industry is at stake. To deliver real benefits we are almost certainly going to have to go beyond a code of conduct and an interpretative communication"

Proposed initiatives

Pending the outcome of an extended impact assessment on a Directive, in 2006 the Commission will adopt an 'Interpretative Communication' on the application of Article 296. This will be a non-legislative measure that reduces the risk of legal misinterpretation and thus ensures better application of existing law by Member States. It will recall the principles governing the use of the derogation in the light of European Court of Justice case law, and will clarify the criteria on the basis of which Member States have to prove when the conditions for the application of the derogation are met.

However, this Communication is unlikely to be sufficient to resolve the inadequacy of the existing public procurement Directive with regard to the specific features of defence procurement. Therefore the option of a specific Directive will now be vigorously pursued. . In line with the principle of Better Regulation, any proposed Directive will be accompanied by an impact assessment which will assess its possible costs and benefits.

Results of the consultation

The Commission received 40 responses to the Green Paper consultation: from institutions (the European Parliament), industry and 16 Member States. All respondents welcomed the Green Paper and supported the Commission's objective of overcoming market fragmentation and increasing intra-European competition through an appropriate set of rules for defence procurement.

European Defence Equipment Market (EDEM)

The development of the EDEM is even more important given the advances in European Security and Defence Policy and the creation of the European Defence Agency (EDA). The work of the EDA and the Commission initiative concern two different segments of the defence market. The two initiatives are complementary and the Commission and the EDA cooperate closely.

The contributions to the consultation are available at:
http://europa.eu.int/comm/internal_market/publicprocurement/dpp_en.htm

(See also MEMO/05/467)

MEMO/05/467

Brussels, 6 December 2005

Frequently asked questions - New Commission initiatives on more open and efficient defence procurement

(see also IP/05/1534)

What are the benefits of creating a European Defence Equipment Market (EDEM)?

A European Defence Equipment Market (EDEM) would complement work currently being carried out by Member States under the European Security and Defence Policy (ESDP). The first step under the ESDP is for Member States to identify the military capacities that will be necessary in the future. The second step is for Member States to work together to meet that need, by building an EDEM.

Competition within the EU, competitiveness of European industry and efficiency of public spending could all be improved. Current fragmented national markets are no longer sustainable, given the budgetary situation in Member States, continuing increases in research and development costs for major defence programmes and the competitive advantages currently enjoyed by non-European industries. This is why EU-level initiatives on the regulation of defence procurement markets are needed.

Why are there special EU rules for the defence procurement market?

Public procurement Directives are applicable in principle to all sectors, including defence. However, certain defence products are very specific in nature. Defence industries are strategic and governments play a crucial role as customers, sponsors and regulators. Given the political and military sensitivity of defence systems, secrecy, confidentiality and security of supply are particularly important.

Exceptions to general public procurement rules are therefore provided for in the EC Treaty, as it is not always possible to use for defence contracts the procedures set down in the Directives - for example, open tendering processes based on publication in the Official Journal of the European Union.

What is defence procurement as an estimated proportion of EU GDP?

According to Eurostat estimates, total defence expenditure by the 25 EU Member States in 2003 represented € 169 billion (1.7% GDP) which included € 82 billion on defence procurement (0.8% GDP), of which € 30 billion on defence equipment (0.3% GDP).

Which Member States have the largest defence industries?

The most important arms-producing countries with the highest turnover in the EU are: UK, France, Germany, Italy, Sweden and Spain. They represent approximately 90% of defence equipment production in the EU-25. These countries also represent 80% of EU defence procurement expenditure.

The four largest producers - UK, France, Germany and Italy - represent approximately 80% of defence equipment expenditure.

Are defence markets completely closed?

Member States' combined military expenditure is considerable but it remains mainly split into national markets.

Some progress has been made as a result of the increase in European armaments cooperation. However, even in that context, cross-border procurement remains limited mainly by the principle of "juste retour" which means that work is split up between suppliers based on national industrial policy criteria.

As far as national procurement decisions are concerned, the degree of openness of defence markets varies greatly between Member States. Since information on defence markets is fragmented and incomplete, it is not possible to present a comprehensive picture. In general, countries which do not themselves produce military supplies on a large scale naturally have more open defence markets than those that do. In general, however, the share of contracts awarded by competitive procedure is still low and national suppliers still tend to be awarded most of the contracts.

Why is it necessary to intervene in defence markets? Is there a need to resolve a critical situation in this sector?

The contributions to the Green Paper from stakeholders express concern about the critical situation of defence markets. The lack of transparency and competition in Member States' procurement practices hinders the competitiveness of European industry and increases the cost of military equipment. This is no longer sustainable for public spending and also for the quality of equipment needed for European Security and Defence Policy efforts.

The absence of a European market is disadvantageous for all stakeholders: governments pay extra costs for a non-competitive market; armed forces may not get the best equipment; and industries pay extra overhead costs (if they participate in foreign bids), suffer from short production runs (if they stick to their home markets) and see their competitiveness compromised (in both cases).

Does the Commission want to abolish the derogation of article 296 in the long term?

No. Article 296, according to which MS can derogate from the application of Treaty rules for defence products concerning their "essential security interests", will remain fully applicable when the conditions of its application are met, regardless of the outcome of this debate.

What would be the impact of more open defence procurement in terms of competitiveness?

As the Commission indicated in its March 2003 Communication "Towards an EU defence equipment market" (see IP/03/355), the EU needs a competitive Defence Technological and Industrial Base (DTIB) to realise the full potential of the ESDP. Such a competitive base, given the large size of the sector, is also crucial to economic growth and to the overall competitiveness of the European economy and will be a factor in achieving the goals set out in the Lisbon strategy.

The currently fragmented regulatory framework often makes it difficult for companies to adjust to the different national approaches within the EU.

What are the advantages of more open defence procurement?

The advantages of a more open European defence market, adapted to the specific nature of the sector, are generally acknowledged. It would allow companies, especially SMEs, to tender more easily in other EU Member States and thus widen their access to business opportunities within a much larger “home” market. Longer production runs would allow economies of scale. This, in turn, would help to reduce costs and lead to lower prices. The final beneficiary of that would be the taxpayer. Everybody in Europe should in the end also benefit from the greater economic prosperity created by the improved global competitiveness of European industry, especially given the growing dual use potential of technologies (military and civilian). A more open market would also boost industrial restructuring across national boundaries to reduce duplication.

What was the objective of the Green Paper?

In September 2004 the Commission issued a Green Paper to consult stakeholders on possible Community initiatives to improve transparency and competition in this field, without putting into question the article 296 derogation. The objective was to assess whether it was necessary to:

- clarify (with an Interpretative Communication) the current regulation in order to help Member States to distinguish between defence contracts to which Internal Market rules apply and those for which a derogation under Article 296 is justified;

- improve the existing regulation, by introducing more appropriate and flexible rules, better suited to the specificities of the sector (via a new specific Directive).

How will an Interpretative Communication address the special nature of defence procurement markets?

The Green Paper has opened a debate on how to improve cross-border competition in certain types of defence procurement. The Interpretative Communication will help Member States to establish when defence contracts can derogate from Internal Market rules and therefore from the current Directives, on the basis of essential security interests and according to the conditions of application of article 296 of the EC Treaty.

The interpretation of the article 296 derogation is different in various Member States. This situation has resulted in the fragmentation of the defence equipment market. The existing legal framework is not satisfactory and creates legal uncertainty. An Interpretative Communication will help to clarify the situation.

What will be the impact of the Interpretative Communication?

An Interpretative Communication interprets existing law and is adopted by the Commission under its own responsibility. The proposed Interpretative Communication will therefore take into account the existing legal framework, plus recent developments in the relevant case law of the Court of Justice, and clarify that legal framework by announcing the way the Commission would interpret and apply it in the future.

As regards its content, the Interpretative Communication will provide criteria to be used in order to help Member States to establish more clearly when the conditions for the application of article 296 – allowing for defence contracts to derogate from general public procurement law – are met and when they are not. In the latter case, normal procurement rules will be applicable.

Would a possible new Directive represent an additional regulatory layer?

No. Legislation on defence procurement already exists: public procurement Directives already apply to defence contracts when they are not covered by article 296. A new defence Directive would replace the existing Directives, considered by stakeholders to be ill-suited to this market, in order to take into account the specific nature of the defence sector. This would mean more flexible and better adapted rules.

What would be the impact of a Directive?

A Directive would be adopted by the Council and European Parliament and would constitute new law to be applied throughout the EU. The derogation provided for in article 296 would remain fully applicable, according to the same conditions as today. But a Directive could establish specific and more appropriate (i.e. more flexible) rules for the award of contracts which are not covered by the derogation, and which today should be awarded on the basis of the existing public procurement Directives. It could also improve the classification of contracts, on the basis of different possibilities on which the Green Paper aims to stimulate discussion: a general definition of the categories of military equipment covered by the Directive and/or a list of such categories.

If there were to be a Directive along the lines identified in the Green Paper, how would it differ from the existing general public procurement Directives?

The potential advantage of a new Directive is precisely that it would take into account the specific nature of the defence sector and introduce greater flexibility suitable for that sector. Transparency and non-discrimination would remain the cornerstone of the new regime, just as they are the basis for the general procurement Directives. But a special set of rules to be defined with Member States could be envisaged including:

wider information on the relevant defence contracts through a centralised system of publication

general use of the negotiated procedure (which would allow contracting authorities, after a call for tenders, to consult and negotiate contract terms with the selected companies)

scope for contracting authorities to use the negotiated procedure without the prior publication of a tender notice, in certain defined cases

new specific selection criteria to be applied in assessing tenders, such as confidentiality and security of supply.

What is the relationship between the Commission and the European Defence Agency?

The EDA is an agency of the Council. The EDA tasks cover mainly the development of military capabilities and armaments, which are areas for which Member States are solely responsible. But the EDA also has roles - in research and technology, the defence industry and markets - which interact with Commission competences. The Joint Action establishing the EDA indicates that the agency “should fulfil its missions in full respect of the competences of the European Community”.

As far as market issues are concerned, but also on other issues, the Commission and EDA work in close cooperation.

What is the relationship between the Commission initiative and the Code of conduct which has been adopted by the European Defence Agency?

The initiatives of the Commission in the field of defence procurement come under the 'first pillar' of the EU's competence and concern defence contracts which are to be procured under EC Treaty rules pertaining to the Internal Market. In contrast, the EDA's Code of Conduct, which is voluntary and non binding, comes under the 'intergovernmental pillar' and concerns another segment of the defence market, namely contracts which can derogate from EC Treaty rules pertaining to the Internal Market when the conditions for the application of article 296 ("essential security interests") are met. These two initiatives are therefore complementary and can be carried out in parallel.

What would be the impact on the transatlantic defence market of more open defence procurement at EU level, especially via a possible Directive?

The possible EU initiatives referred to in the Green Paper would aim to foster intra-European rather than international competition. International trade markets will remain governed by WTO rules which provide under article 23 of the Government Procurement Agreement that defence products are excluded. In consequence, Member States will still have the possibility, as is the case today, to buy their defence equipment from tenderers – such as US companies - not established in the EU, EU, or to decline to do so.

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 23.09.2004
COM(2004)608 final

GREEN PAPER

Defence procurement

(presented by the Commission)

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INTRODUCTION

This Green Paper is one of the measures announced by the European Commission in its Communication "Towards a European Union defence equipment policy", adopted on 11 March 2003[1]. Through these measures, the Commission intends to contribute to the gradual creation of a European defence equipment market (EDEM) which is more transparent and open between Member States and which, whilst respecting the sector's specific nature, would increase economic efficiency.

Moving towards a truly European market is crucial for strengthening the competitiveness of European industry, improving the allocation of defence resources and supporting the development of the Union's military capabilities under the European Security and Defence Policy (ESDP).

The establishment of the European Defence Agency with its responsibilities in the field of defence capabilities, research, acquisition and armaments, makes the development of such a market even more important.

Creating an EDEM would require a set of complementary initiatives, including the establishment of an appropriate regulatory framework for the procurement of defence equipment. The opening up of defence markets, which are currently fragmented along national lines, would increase the commercial opportunities for European companies in the sector, including SMEs, and contribute to their growth and increase their competitiveness.

The purpose of this Green Paper is to develop the debate on these issues, bearing in mind the principle of subsidiarity[2]. For this purpose the Commission set up two working parties consisting of representatives of the Member States and European industry to contribute to the preparatory stages of the Green Paper.

In the first part, the Green Paper identifies the reasons for specific action by giving a summary of the current state of defence procurement markets, their numerous special characteristics and the existing regulatory framework. In the second part, on the basis of this analysis, it considers possible lines of action.

I. REASONS FOR ACTION IN THE FIELD OF DEFENCE PROCUREMENT

Defence expenditure constitutes a large part of Member States' public spending, to the order of €160 billion for the 25 Member States, one fifth of which is used for the procurement of military equipment (acquisition plus research and development)[3].

Defence procurement is currently characterised by the fragmentation of markets along purely national lines (point 1), by the specific features which distinguish it from other types of public procurement (point 2) and by a complex legal framework (point 3).

[1] COM(2003) 113 final.

[2] Work of the Council Working Party on Armaments Policy (POLARM), the Western European Armaments Group (WEAG), and the *Agency Establishment Team* responsible for establishing the European Defence Agency.

[3] Sources: NATO (North Atlantic Treaty Organisation) and SIPRI (*Stockholm International Peace Research Institute*) 2002.

1. FRAGMENTED DEFENCE MARKETS

Although Member States' combined military expenditure is considerable, it remains split into national markets. This fragmentation poses a major problem for all Member States with defence industries. Following budgetary reductions and the restructuring of the armed forces, the size of national markets – including those of the large states – is no longer sufficient to allow for production volumes that can offset the high R&D costs of arms systems. This situation, along with the fragmentation of R&D spending in Europe, increases the cost to the taxpayer and damages both the competitiveness of the European defence industry and its ability to meet the requirements of the ESDP. Given the growing dual use potential of technologies (military and civilian), the global competitiveness of European industry is also affected.

Some progress has been made in the last ten years, particularly as a result of the increase in European armaments cooperation and an initial opening-up of national markets to European competition. These initiatives have had modest success, but have not resulted in the creation of a European defence market. As regards cooperative programmes, the still frequent use of the principle of fair return on investment ("juste retour") generally limits any opening-up to the participating countries and implies a distribution of work based on purely national industrial policy criteria. As for national procurement, the share of contracts awarded by competitive procedure is still low. Irrespective of the procedures used, national suppliers are still generally awarded most of the contracts.

2. SPECIFIC FEATURES OF DEFENCE MARKETS

Defence markets have particular characteristics because of the very nature of military products and related services. These characteristics are not only economic and technological; they are also related to the security and defence policies of each Member State[4]. Defence industries are therefore of a strategic nature and have special relations with the state.

2.1 Dominant role of the state

Following privatisations and efforts to optimise procurement policies in recent years, the role of the state has been reduced, but it still remains dominant. As sole clients, states determine demand for products on the basis of military needs linked to their strategic objectives and thus define the size of the market. They participate, to varying degrees depending on the country, in the financing of R&D, thus influencing the technological know-how and long-term competitiveness of industry. As regulators, they control the arms trade by means of the licences which exporters must have, including for the delivery of equipment within the European Union, and the granting of authorisations to tender for contracts. State control also extends to industrial restructuring, although to a more limited degree, and even to the level of shareholding.

2.2 Security of supply and confidentiality requirements

The nature of defence requires sources of supply to be guaranteed for the entire duration of an arms programme from the time the equipment is designed until it is withdrawn from service,

[4] See the document of the POLARM Working Party of the Council, annexed to communication COM(1997) 583 of 4.12.1997.

at times of peace and at times of war. States may, therefore, see fit to set up special supply guarantees. The maintenance of a purely national industrial capacity for defence may seem a reliable way of being able to respond to strategic interests and emergency situations (military operations).

The nature of defence may also require states to have equipment that guarantees the technological superiority of their military forces. This superiority depends, in particular, on the confidentiality of programmes and their technical specifications. The obligation to protect this confidential information means companies must have special national security clearances.

2.3 Complexity of arms acquisition programmes

Arms development programmes are complex. Since production volumes are limited and the risk of commercial failure high, state support is required. Equipment often consists of new systems which incorporate both military and civilian technologies. It has also a long life cycle: the time between the expression of an operational need and the end of a system's life may be as long as 50 years. The quality/price ratio and risk management must be guaranteed throughout this period. States must, therefore, have access to adequate industrial and technological capacity throughout the life cycle of a system and maintain lasting, reliable relations with suppliers.

In addition to this, "off-the-shelf[5]" arms purchases are often subject to offset arrangements. This allows the purchasing country to require a return on investment that may exceed 100% of the value of the contract. Such offsets may be direct, in the form of orders for local companies or transfers of know-how and technology related to the original contract. Offsets may also be indirect and concern industrial sectors other than the one covered by the contract in question, even non-military ones.

3. LIMITS TO THE EXISTING LEGAL FRAMEWORK

3.1 Community exemption system

The special nature of the defence sector has been recognised ever since the establishment of the Community through an exemption system laid down in Article 296 EC of the Treaty. According to paragraph 1 of that Article:

"*(a)* *no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;*

[5] Finished equipment already developed and available for purchase.

(b) *any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes."*[6]

Given its wide scope, this article may also apply to public procurement.

As recently clarified in Article 10 of Directive 2004/18/EC, Community rules on public procurement apply to contracts awarded by the awarding authority in the field of defence, subject to Article 296 EC of the Treaty. Consequently, Community rules also apply in principle to the defence sector, but Member States may derogate from them in the circumstances and subject to the conditions set out in the Treaty. In any event, the possibility of a derogation provided for under Article 296 EC cannot apply either to civilian goods or to those not intended for specific military purposes, even if they are purchased by national defence ministries.

The Case Law of the Court has interpreted the conditions of use of this derogation restrictively, stating that[7] :

– its use does not constitute a general, automatic exemption, but should be justified case by case. States thus have the possibility of secrecy regarding information which would undermine their security and the option of invoking an exemption to internal market rules for the arms trade. They are also obliged to assess whether or not each individual contract is covered by the derogation;

– use by states of national derogation measures is justified only if it is necessary for achieving the objective of safeguarding the essential security interests invoked;

– burden of proof lies with a Member State that intends to make use of the derogation;

– such proof is to be supplied, if necessary, to the national courts or, where appropriate, the Court of Justice, to which the Commission may refer the matter in the performance of its duties as guardian of the Treaty.

As a general rule, Member States may, therefore, derogate from the rules of the Treaty and Community directives, but only in well defined circumstances. Nevertheless, several difficulties of implementation arise:

– in the absence of a precise interpretation of these provisions, there is quasi-systematic use of the derogation in the area of public procurement. Despite the Court's clarifications, the low number of publications in the Official Journal of the European Union appears to imply that some Member States believe they can apply the derogation automatically;

[6] In accordance with paragraph 2 of this Article, a list of products to which the provisions of paragraph 1 apply was adopted by the Council in 1958.

[7] See among others: Johnston judgment, Case 222/84, Commission v. Spain judgment, Case C-414/97. Although the latter concerned VAT, it is applicable to public procurement.

– since the concept of essential interests of security is not defined either in Community Law or in the Case Law of the Court of Justice, in practice states allow themselves wide discretion in determining which contracts could damage them;

– the list drawn up in 1958[8] is not an appropriate reference for defining the scope of Article 296 EC, since it has never been officially published or revised since then.

Defence procurement is still, therefore, to a large extent covered by purely national legislation.

3.2 Differing national legislation

For defence procurement most national legislation provides for exemptions to the application of public procurement rules, with differing degrees of transparency. This constitutes a potential difficulty for non-national suppliers.

- The **publication of contract notice**, if it happens at all, is in special national publications, the content, frequency and method of dissemination of which vary from state to state.

- The potential for **non-publication** provided for in national legislation is vast and differs depending on the country.

- **Technical specifications** are often very detailed and based on widely differing standards.

- The **criteria for selecting** suppliers take into account, in some states, the ability of offering industrial offsets, and for most states, confidentiality and security of supply, the definition of which remains vague and the assessment of which does not take account of the same requirements, sometimes referring to the origin of the product or the nationality of the supplier.

- **Tendering** is mainly through negotiated procedures which do not all follow the same rules, particularly as regards the extent of the negotiations and the possibilities for changing the subject of the contract.

- In the **award** of contracts priority is given to best value for money. However, in some states security of supply and offsets are again taken into account at this stage.

Because of these obstacles some Member States have undertaken, under an inter-governmental political agreement of the Western European Armaments Group (WEAG)[9], to harmonise the content and publication of their national gazettes and to follow more open tendering rules. Although based on relevant principles, this system has produced limited results regarding both transparency and competition, because it is not legally binding.

[8] See Footnote 6.

[9] The 16 member countries, including 14 EU Member States (BE, DK, DE, EL, ES, FR, IT, LU, NL, PT, UK, AT, FI, SE), adopted guidelines on open competition in 1990 and updated them in 1999.

3.3 Special procedures for cooperation programmes

Alongside national systems, *ad hoc* rules laid down in intergovernmental agreements are used for purchases related to joint arms programmes[10]. Generally speaking, because of the heavy investment agreed by the countries participating in these programmes, it is the principle of fair industrial return ("juste retour") that determines who is awarded the contract.

To offset the high costs resulting from this practice, the transnational agency OCCAR[11] was set up in 1996 and given legal personality in 2000. Its contractual rules are more competition-based and provide for replacing the system of a "juste retour" per programme by an "overall juste retour" covering several years and several programmes. However, the success of this system will depend on the number of new programmes managed by OCCAR.

Since these efforts have failed to achieve satisfactory results, the Member States recently created a European Defence Agency under the authority of the Council within the single institutional framework of the European Union, which will have the remit, among other things, to contribute, in consultation with the Commission, to the setting up of a competitive European defence market[12].

II. DEFINING ACTION AT EU LEVEL – ISSUES FOR CONSIDERATION

The above considerations relating to defence procurement show that a number of obstacles limit the access of European industries to Member States' defence markets and hence restrict their growth opportunities.

The Commission therefore proposes pursuing the debate on the case or Community action in the field of defence procurement. So far the Commission has identified two possible instruments, one limited to clarifying the existing legal framework (point 1) and the other aimed at establishing specific rules in the field of defence, taking into account the sector's characteristics (point 2).

These instruments would not prejudice any complementary measures taken by the Member States in the appropriate fora. Indeed, they could not provide exhaustive answers to all the specific aspects of defence markets. This is the case in particular for security of supply, a concept bound to change with the growing convergence of national security interests in the context of European foreign, security and defence policy. The gradual development of a common approach in this field could facilitate application of Community instruments. Equally, these instruments would constitute a useful tool for the success of cooperation between Member States.

[10] These contracts are usually awarded by ad hoc agencies or NATO agencies acting on behalf of the states participating in the programmes in question.

[11] Joint Organisation for Armaments Cooperation; open - subject to certain conditions - to all the Member States; at present only five states belong to it (DE, BE, FR, IT, UK).

[12] Joint action to set up a European Defence Agency (EDA) adopted by the Council on 12 July 2004.

1. CLARIFICATION OF THE EU'S EXISTING LEGAL FRAMEWORK

The legal framework could be clarified by a non-legislative instrument, such as an interpretative Communication from the Commission. This instrument would aim to explain existing Community legislation in order to facilitate application by the competent authorities and to improve the operators' understanding of it. An interpretative Communication could be adopted relatively quickly. By its very nature it could only confirm existing law.

The Commission would give a further explanation of the principles defined by the Court on the interpretation of Article 296 EC, in particular their application to public procurement, to make it easier, in practice, to distinguish between contracts covered by the exemption and those which are not. As regards the latter, the normal rules - public procurement directives- would remain applicable.

The Communication would not be legally binding as such, but it would explain the principles and rules which are. Consequently, the Commission would be obliged to abide by this interpretation in the performance of its functions as guardian of the Treaty. The Commission would also have to draw all the operational conclusions resulting from the adoption of such a clarification of existing law.

Questions

1. Do you think it would be useful/necessary/sufficient to explain the existing legal framework in the way presented?

2. Are there other aspects of the Community system in question that should be clarified?

2. SUPPLEMENTING THE EU'S LEGAL FRAMEWORK WITH A SPECIAL INSTRUMENT

2.1. Objectives

The EU's legal framework could be supplemented by a new specific legal instrument for defence procurement (goods, services and work), such as a directive to coordinate the procedures for awarding such contracts[13]. The directive would establish a special set of rules for contracts falling within the scope *ratione materiae* of Article 296 EC, but for which use of the derogation is not justified (conditions defined by the case law of the Court). It would apply to defence procurement currently falling within the scope of existing directives but it would contain rules better suited to their specific nature.

[13] This would be a similar approach to that taken in 1990 to accommodate the specific nature of procurement in the water, energy and transport sectors, by means of a special directive (which became 93/38 and was amended by Directive 2004/17/EC of 31 March 2004).

It would pursue three main objectives:

- greater legal certainty, since it would improve the classification of contracts: (a) those covered by current directives; (b) those covered by the new directive; and (c) those excluded from any Community rules;
- more information at Community level on the contracts in question, and therefore greater opening of the markets, which would allow European defence industries to participate equally in calls for tender in all the Member States;
- the introduction of the necessary flexibility for the award of these contracts by the creation of a body of rules suited to the specific features of such contracts.

Such an instrument could also serve as a reference point should a Member State decide not to make use of the Article 296 EC derogation even when it would have been entitled to do so.

2.2 Content

- The **field of application** could be determined on the basis of a general definition of the category of military equipment covered and/or a list. The list could be that of 1958 or another more accurate, updated list such as that of the Code of Conduct on arms exports[14].
- There would be a provision modelled on directives in other sectors stating that the directive would not prejudice the possibility of invoking Article 296 EC under the conditions defined by the Court. It would also identify cases in which the conditions for application of the **exemption** were clearly fulfilled (e.g. nuclear equipment).
- The **awarding authorities** would be the ministries of defence and agencies acting on their behalf and other ministries buying military equipment. Application of the directive to other bodies, such as the new Defence Agency, would have to be determined by the appropriate fora.
- Implementation of the directive would not prejudice the possibility of exemptions conferred on the Member States under **WTO** agreements such as the Government Procurement Agreement.
- The **procedures** should ensure observance of the principles of transparency and non-discrimination, bearing in mind the specific characteristics of these contracts. The rule could be general use of the negotiated procedure with prior publication of a contract notice. Use of an unpublished negotiated procedure could be envisaged in certain cases determined on the basis of exemptions laid down in existing directives and, where appropriate, other cases based on national legislation.
- **Publication** could be through a centralised system at Community level using a harmonised publication bulletin. The subject of the contract could be described in terms of technical performance in order to prevent potential discrimination between suppliers.

[14] Annexed to the Council Declaration of 5 June 1998 (8675/2/98, CSFP) which sets up a mechanism for transparency of arms export policies.

- The **selection criteria** approved should ensure non-discrimination and equal treatment of companies and take account of the specific features of defence contracts, such as confidentiality, security of supply. They should also take into consideration the clearance necessary under defence secrecy rules.

- The **award** of the contract would take place on the basis of defined criteria. This would require a discussion on the gradual elimination of practices such as direct and indirect offsets.

Questions

3. Do you consider the rules of existing directives suited/unsuited to the specific characteristics of defence contracts? Please give your reasons.

4. Would a specific directive be a useful/necessary instrument for creating a European defence equipment market and strengthening the industrial and technological base of European defence?

5. What is your opinion regarding the use of a possible directive for purchases by other bodies, such as the European Defence Agency?

6. Procedures: do you believe the negotiated procedure with prior publication to be suitable for the specific needs of defence procurement? In what situations should use of the negotiated procedure without publication be allowed?

7. Scope: what would be the most appropriate way of defining the field of application? A general definition? If so, what? A new list? If so, what? A combination of a definition and a list?

8. Exemptions: do you think it would be useful/necessary to define a category of products that would be excluded categorically from the directive?

9. Publication: do you think a centralised publication system would be appropriate, and, if so, how should it function?

10. Selection criteria: what criteria do you think should be taken into account in addition to those already laid down in existing directives to take account of the specific features of the defence sector? Confidentiality, security of supply, etc.? And how should they be defined?

11. How do you think offset practices should be handled?

CONSULTATION ARRANGEMENTS

This Green Paper is the start of an official consultation process lasting four months from the date of publication. It will be managed by the Internal Market Directorate-General of the Commission.

Green Paper

Consultation process

End of consultation: four months from the date of publication of the Green Paper

The parties concerned are invited to send their answers to the questions asked and any comments or suggestions to the following address:

c/o European Commission, Internal Market DG
Consultation "Green Paper on defence procurement"

Av. de Cortenbergh/Kortenberglaan 100 (1/100)

B-1049 Brussels

or by email to:

(MARKT-C3-DPP@cec.eu.int)

The Green Paper is also available at:

http://europa.eu.int/comm/internal_market/consultations

NB: Any contribution may be made public, unless the author specifically asks for it to remain confidential.

IP/04/1133

Brussels, 23rd September 2004

Public procurement: Commission consults on more open and efficient defence procurement

The European Commission has published a consultative Green Paper on how to improve cross-border competition in certain types of defence procurement in a way consistent with the special nature of the sector. EU law (Article 296 EC) does not require competition in procuring supplies, works and services intended for specifically military purposes and crucial to national security. However, the Commission wants to help Member States to get better value in the €30 billion plus EU market for defence procurement and to help EU defence industries to be more competitive, by providing guidance on how EC Treaty exceptions and requirements should be interpreted.

Internal Market Commissioner Frits Bolkestein said: "This is a win-win-win situation: more efficient defence procurement, new opportunities for SMEs and more competitive EU industry. Defence cannot be lumped in under general procurement rules. But contracts for supplies such as boots and food often do not raise national security issues. With the exception of obviously sensitive areas, this is probably true of much other military equipment. We are exploring how to extend the benefits of more open procurement to those contracts."

The Green Paper assesses how the Commission might clarify in a Communication the criteria to establish when procurement of military equipment, services and works can be exempted from competitive procurement requirements and when they cannot. It would take into account the existing legal framework and case law.

The Green Paper also asks whether the Commission should propose a Directive coordinating procedures for defence procurement, in cases where the exemption under Article 296 EC is not applicable or a Member State chooses not to take advantage of it. For such contracts, it would introduce new, flexible, EU-wide rules in line with the special nature of the sector;

The Commission has worked closely with Member States and industry to prepare the Green Paper, announced in the March 2003 Communication "Towards an EU defence equipment market" (see IP/03/355).

Background

The development of a European defence market is even more important given advances in European Security and Defence Policy (ESDP) and the recent creation of the European Defence Agency. Currently, procurement for multinational defence programmes is often carved up along national lines. For national procurement, contracts are usually handed to national suppliers.

Article 296 of the EC Treaty stipulates that a Member State may take such measures "as it considers necessary for the protection of the essential interests of its security". But Article 296 EC also states that measures connected with the production or trade of arms, munitions and war material must not adversely affect competition in the market for "products not intended for specifically military purposes."

According to European Court of Justice case law, Article 296 EC does not permit automatic exemption for all defence procurement. But in practice, most national authorities make extensive use of the exemption. Contract notices are published, if at all, only at national level, technical specifications are based on differing standards and criteria for awarding contracts are vague.

The Green Paper is available at:

http://europa.eu.int/comm/internal_market/consultations/index_en.htm

Interested parties are invited to respond by 31st January 2005.

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20 January 2005

European Commission
Av. De Cortenbergh/Kortenberglaan 100(1/100)
B-1049
Brussels
BELGIUM

Attention: Internal Market DG Consultation "Green Paper on defence procurement"

EUROPEAN COMMISSION 2004 GREEN PAPER ON DEFENCE PROCUREMENT

I welcome the opportunity provided by the Green Paper on Defence Procurement (Brussels, 23.09.2004, COM (2004) 608 final) to offer a viewpoint from the Australian Defence Materiel Organisation (DMO).

The DMO is responsible for the acquisition and sustainment of defence equipment used by the Australian Defence Force (ADF). The DMO currently expends about A$3 billion annually on acquiring new military equipment and a similar amount on the sustainment of equipment already in service.

The DMO has a strong and enduring relationship with a number of EU Member States on matters of Defence Procurement. We have, or will be acquiring substantial amounts of European military hardware including air-to-air refuelling aircraft (France, Spain, UK and Germany), the two types of Eurocopter (France), electronic warfare equipment (Germany) and possibly military vehicles (various European companies). The willingness of European defence companies and European government agencies to engage with the Australian government and industry on defence procurement matters has been a major factor in the success of a number of European bids.

The Australian defence market also offers significant opportunity to European companies, both through direct investments in Australian industry and in the supply of defence equipment. Through their Australian subsidiaries, European companies such as Thales, SAAB and BAE Systems, have established a sound reputation in Australia, underpinning a strong sales effort into the Australian defence market.

For its part Australian defence industries have benefited from defence exports into Europe. Australian niche defence technologies have formed part of the military inventory of a number of European countries, and Australian-made defence equipment is currently being evaluated by EU Member States for their respective defence forces. However we note that the defence trade balance over the last five years and anticipated for the next few years has substantially been in favour of Europe.

Against this background the DMO supports the overall framework of the paper namely a European defence market that it transparent, open and economically efficient. However we would be concerned if the Green Paper's focus on EU Member States alone could unintentionally disadvantage Europe's traditional defence allies and trading partners, such as Australia, through the possible imposition of restrictions on non-European access to the European market. Australian defence decisions are made on a value for money basis, which should encourage mutually open markets.

I look forward to the continued strong and mutually beneficial relationship between Australia and the European Union in defence industrial matters and to continued fair and open access to each of our defence markets.

Yours faithfully

Steve Gumley.

DR STEPHEN GUMLEY
Chief Executive Officer
Defence Materiel Organisation

REPUBLIK ÖSTERREICH
BUNDESKANZLERAMT

An die
Europäische Kommission
Generaldirektion MARKT/C
Zu Handen Herrn Dir. CARSIN und
Herrn BASSI

100, Ave Corthenberg
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Betrifft: Grünbuch „Beschaffung von Verteidigungsgütern“; Stellungnahme der Republik Österreich

Die Republik Österreich erlaubt sich zum Grünbuch der Kommission „Beschaffung von Verteidigungsgütern“, KOM(2004) 608 endg. vom 23.9.2004 wie folgt Stellung zu nehmen:

1. Einleitende Bemerkungen zu den Ausführungen:

Auf Seite 11 des Grünbuches ist festgehalten, dass eine „Richtlinie … einen besonderen Rechtsrahmen schaffen [würde], der bei Verträgen Anwendung findet, die *ratione materiae* in den Anwendungsbereich des Artikel 296 EG-Vertrag fallen …“. Diese missverständliche Passage wurde zwischenzeitig von Vertretern der Kommission mehrfach dahingehend kommentiert, dass damit zum Ausdruck gebracht werde, dass der Anwendungsbereich des Art. 296 EG durch eine derartige Richtlinie nicht berührt werden würde. Die Richtlinie solle vielmehr allein jenen Bereich regeln, der bereits bisher dem Gemeinschaftsrecht (und damit auch der nunmehr geltenden einschlägigen Vergaberichtlinie 2004/18/EG) unterliegt.

Die nachfolgenden Ausführungen der Republik Österreich basieren auf dem soeben dargelegten Ausgangspunkt, wonach eine allfällige Richtlinie allein jene Beschaffungen zum Gegenstand hätte, die bereits derzeit dem Vergaberegime unterliegen.

2. Zu einzelnen Aussagen im Grünbuch

Auf Seite 8 des Grünbuches hält die Kommission fest, dass die „Liste von 1958 … keine geeignete Bezugsbasis für die Einschränkung des Anwendungsbereichs des Artikels 296 EG-Vertrag [ist], da sie weder jemals offiziell veröffentlicht noch aktualisiert wurde." Die Republik Österreich teilt diese Aussage aus folgenden Gründen nicht: Es ist einerseits darauf hinzuweisen, dass die Relevanz der genannten Liste **primärrechtlich** (!) verankert wurde (vgl. Art. 296 Abs. 2 EG). Insofern stellt sie gerade im Hinblick auf die Auslegung des Art. 296 Abs. 1 EG einen wesentlichen Auslegungshinweis dar, der nicht ignoriert werden kann. Darüber hinaus ist es aus rechtlichen Gründen verfehlt, aus der mangelnden Aktualisierung einer Liste auf deren Eignung bzw. Nicht-Eignung als Bezugsbasis zu schließen. Letztlich ist es ferner auch kein rechtliches Argument, dass diese Liste niemals „offiziell veröffentlicht" wurde. Die Republik Österreich weist darauf hin, dass auch der Beschluss 1/80 des Assoziationsrates EWG - Türkei niemals „offiziell veröffentlicht" wurde und trotzdem gemäß der Rechtsprechung des EuGH (vgl. dazu Rs C-192/89, *Sevince*, Slg 1990, I-03461) unmittelbar anzuwenden ist!

Zum Fragenkatalog der Kommission:

Frage 1: *Glauben Sie, dass es nützlich/notwendig/ausreichend ist, den derzeitigen Rechtsrahmen gemäß den dargelegten Modalitäten zu erläutern?*

Nach Ansicht der Republik Österreich wäre es sehr zu begrüßen, den bestehenden Rechtsrahmens durch eine Mitteilung der Kommission näher zu erläutern. Wie die Kommission ausführt, sollten darin die vom Europäischen Gerichtshof dargelegten Prinzipien in Zusammenhang mit Artikel 296 EG-Vertrag aber auch die bestehenden Gemeinschaftsvorschriften (insbes. daher die Richtlinie 2004/18/EG) behandelt werden, um ihre Anwendung durch die zuständigen Behörden zu erleichtern und sie für die betroffenen Wirtschaftsteilnehmer verständlicher zu machen. Im Rahmen dieses Ansatzes sollten nach Auffassung der Republik Österreich verschiedene Probleme/Konzepte/Begriffe im Zusammenhang mit der Beschaffung von

Verteidigungsgütern näher erläutert werden: dazu zählen etwa die „Versorgungssicherheit“, „Geheimhaltungserfordernisse“, „Wahrung der wesentlichen Interessen der Staatssicherheit“, zulässige Technische Spezifikationen iZm Verteidigungsgütern, Behandlung von F&E, Veränderung des Auftragsgegenstandes bei langen Vertragslaufzeiten und anderes mehr.

Die Republik Österreich weist jedoch darauf hin, dass dieses rechtlich nicht verbindliche Instrument aus ihrer Sicht durchaus nützlich und notwendig ist, für die zukünftige Entwicklung eines Europäischen Verteidigungsmarktes und die Transparenz der Beschaffungen jedoch als nicht ausreichend erachtet wird.

Es ist evident, dass durch dieses Instrumentarium kurzfristig Rechtsklarheit über die Position der Kommission gewonnen werden könnte. Gleichzeitig ist aber auch evident, dass eine Auslegende Mitteilung für sich genommen keine Harmonisierung der unterschiedlichen Regelungen auf nationaler Ebene bewirken könnte. Nach Aussage der Kommission (S. 8 des Grünbuches) stellen aber gerade die nicht homogenen nationalen Gesetzgebungen auf diesem Gebiet ein Problem für ausländische Unternehmen dar.

Frage 2: *Gibt es andere Aspekte des einschlägigen Gemeinschaftsrechts, die einer Erläuterung bedürfen?*

Der Republik Österreich sind – sofern der Themenbereich der Auslegenden Mitteilung weit genug gezogen wird und die Auslegende Mitteilung somit alle im Zusammenhang mit der Beschaffung von Verteidigungsgütern auftretenden Fragen behandelt - derzeit keine anderen aktuellen Aspekte des einschlägigen Gemeinschaftsrechtes bekannt, die einer Erläuterung bedürften.

Sollte sich hingegen die Mitteilung auf die Auslegung des Art. 296 EG beschränken und lediglich den Versuch einer Abgrenzung zwischen den dem Gemeinschaftsrecht unterliegenden und den dem Gemeinschaftsrecht nicht unterliegenden Aufträgen beinhalten, so wären insbesondere folgende zusätzliche Aspekte klärungsbedürftig: Wahl des Vergabeverfahrens, die Berücksichtigung der „Versorgungssicherheit“ im Vergabeprozess (als Eignungs-/Auswahl-/Zuschlagskriterium), die mögliche Berücksichtigung eines „Geheimhaltungserfordernisses“, Auslegung des Begriffes

„Wahrung der wesentlichen Interessen der Staatssicherheit“, zulässige Technische Spezifikationen iZm Verteidigungsgütern, Behandlung von F&E - Aspekten im Vergabeprozess, Veränderung des Auftragsgegenstandes bei langen Vertragslaufzeiten, Off-sets und anderes mehr.

Frage 3: *Erscheinen Ihnen die Bestimmungen der bestehenden Richtlinien den Besonderheiten der Verteidigungsaufträge angemessen/nicht angemessen? Erläutern Sie warum.*

Die Bestimmungen der bestehenden Gemeinschaftsrichtlinien sind den Besonderheiten der Verteidigungsaufträge nicht angemessen. Insbesondere die Tatbestände für die zulässige Inanspruchnahme des Verhandlungsverfahrens sind für Beschaffungen im Verteidigungsbereich nicht adäquat festgelegt. Auch die Bestimmungen über Eignungs- und Auswahlkriterien, die Regelungen über Technische Spezifikationen und die Fristenbestimmungen sind nicht den Besonderheiten für Beschaffungen im sicherheitsrelevanten Bereich entsprechend festgelegt.

So ist etwa nicht festgelegt, dass im Falle einer (spezifischen, jedoch keinen Mitgliedstaat der Gemeinschaft betreffenden) Sicherheitskrise das Verhandlungsverfahren ohne vorherige Bekanntmachung für die Beschaffung von für den Einsatz erforderlichen Materials zulässig wäre (z.B. kurzfristige Beschaffungen für Polizeieinheiten/Streitkräfte für Einsätze außerhalb Europas). Die Regeln über Technischen Spezifikationen erlauben nur ausnahmsweise eine produktbezogene Ausschreibung: bei Nachfolgebeschaffungen (Rüstungsprogramme, langfristige Rüstungsgüter wie Panzer, Fluggerät usw.) ist es aber in der Regel so, dass nur ein Anbieter in der Lage ist, den Beschaffungsbedarf so zu erfüllen, dass die Einsatzbereitschaft der Armee/der Sicherheitskräfte gewährleistet ist. Die Regeln über die Transparenz im Vergabeverfahren berücksichtigen nicht die Sensibilität und das Geheimhaltungserfordernis im Verteidigungsbereich.

Daneben sind auch die Publikationserfordernisse (s. dazu insbes. die Anhänge) und die Rechtsschutzinstrumente (d.h. der Beurteilungsmaßstab) der Richtlinien mit einer im Bereich der Rüstungs- und Verteidigungsindustrie unbedingt erforderlichen und unabdingbaren Vertraulichkeit schwer in Einklang zu bringen.

Frage 4: *Wäre eine spezifische Richtlinie sinnvoll/notwendig, um einen europäischen Markt für Verteidigungsgüter zu schaffen und die rüstungsindustrielle und –technologische Basis Europas zu stärken?*

Der gemeinschaftliche Rechtsrahmen sollte aus der Sicht der Republik Österreich durch ein spezifisches Instrument, wie etwa eine „Richtlinie zur Koordinierung der Verfahren zur Auftragsvergabe im sicherheitsrelevanten Bereich und bei der Beschaffung von Verteidigungsgütern“ ergänzt werden. Durch diese (verbindlichen) Regelungen (die die Berufung auf den Ausnahmetatbestand des Art. 296 EG wohl erschweren würde), würde unbestreitbar – zumindest im Bereich der nicht-sensiblen Rüstungsgüter - die Transparenz und der Wettbewerb gesteigert werden. Da in diesem Bereich nach Aussage der Kommission die Ausnahmeregelung des Art. 296 EG derzeit des öfteren ungerechtfertigt in Anspruch genommen wird, würde eine Richtlinie unbestreitbar den Europäischen Markt für Verteidigungsgüter stärken. Evident ist aber auch, dass dies nicht gleichzeitig auch zu einer Stärkung des Europäischen Marktes hinsichtlich jener Verteidigungsgüter führt, für die die Ausnahme des Art. 296 EG legitimer Weise in Anspruch genommen wird. Die Impulse für den Europäischen Markt für Verteidigungsgüter hängen daher unmittelbar davon ab, wie weit die Ausnahme des Art. 296 EG reicht.

Zusätzlich sollte von Seiten der Kommission auch die Erarbeitung einer aktualisierten „Artikel 296er - Liste“ angestrebt werden.

Frage 5: *Sollte die mögliche Richtlinie auch auf Beschaffungen anderer Einrichtungen, wie beispielsweise die Europäische Verteidigungsagentur, Anwendung finden?*

Die Europäische Verteidigungsagentur (EDA) hat ihre Tätigkeit bereits aufgenommen. Insbesondere im derzeitigen „Anlaufstadium“ der EDA muss aus der Sicht der Republik Österreich insbesondere darauf geachtet werden, dass es im Zusammenhang mit der vorliegenden Aktivität der Kommission mit der Intention der Schaffung eines offenen und transparenten Verteidigungsmarkt zu keinem präjudiziellen Vorgriff auf die Tätigkeiten der EDA kommt.

Aus diesem Grund wäre jedenfalls zu untersuchen, ob – und gegebenenfalls welche – Auswirkungen eine Richtlinie auf das Tätigkeitsfeld der EDA hätte. Sofern man zu dem

Ergebnis käme, dass die EDA sich in einer mit einem Mitgliedstaat vergleichbaren Position befindet, so spräche nach Auffassung der Republik Österreich nichts dagegen auch die Beschaffungen der EDA der zukünftigen Richtlinie zu unterwerfen (die ökonomische Argumentation wäre ja ident). Die Richtlinie könnte allerdings nur insoweit Anwendung finden, als die EDA Beschaffungen von Rüstungsgütern tätigt, die in den Anwendungsbereich des Gemeinschaftsrechtes fallen. Sofern die EDA Beschaffungen im Anwendungsbereich des Art. 296 EG tätigen würde, wären diese Beschaffungen – wie bei Mitgliedstaaten – ausgenommen.

In diesem Zusammenhang wären aber auch noch folgende Probleme/Fragen zu klären: Bei welcher Rechtschutzinstanz wären die Rechte nach der Richtlinie 89/665/EWG bei Beschaffungen der EDA geltend zu machen? Wie wäre das Verhältnis der Richtlinie zu Beschaffungen von anderen Organisationen gestaltet (z.B. OCCAR)? Wie wäre ein Gleichklang mit (allenfalls bestehenden) anderen internationalen Verpflichtungen gewährleistet (z.B. Beschaffungen gemäß NATO-Regeln)? Wäre ein differenziertes Regime (z.B. gemeinsame EDA Beschaffungen für neutrale Staaten und NATO-Mitglieder) sachgerecht?

Frage 6: *Verfahren: Erscheint Ihnen das Verhandlungsverfahren mit vorheriger Bekanntmachung den Besonderheiten der Verteidigungssaufträge angemessen? In welchen Fällen sollte der Rückgriff auf Verhandlungsverfahren ohne Bekanntmachung möglich sein?*

Das „Verhandlungsverfahren mit Bekanntmachung“ als Standardverfahren wird von der Republik Österreich im Zusammenhang mit Verteidigungsaufträgen als angemessen und zielführend erachtet.

Darüber hinaus sollte aber das „Verhandlungsverfahren ohne Bekanntmachung“ über die in den allgemeinen Richtlinien vorgesehenen Fälle hinaus zulässig sein. Dies sollte zumindest aus folgenden Gründen möglich sein: Geheimhaltung, bei Nachfolgeaufträgen (Vertragsadaptionen) im Zusammenhang mit langfristigen Kooperationsverhältnissen, bei Nachfolgeaufträgen nach einer F&E – Beauftragung.

Frage 7: *Anwendungsbereich: Wie könnte der Anwendungsbereich am besten definiert werden? Eine allgemeine Definition, und wenn ja, welche? Eine neue Liste und wenn ja, welche? Eine Kombination aus Definition und Liste?*

Aus der Sicht der Republik Österreich erscheint eine Kombination aus einer allgemeinen Definition in Verbindung mit einer demonstrativen Liste am erfolgversprechendsten. Dadurch würde einerseits die erforderliche Flexibilität für zukünftige Entwicklungen gewährleistet (allgemeine Definition) als auch transparent gemacht werden, welche Güter (zu einem bestimmten Zeitpunkt) nach Ansicht des Gemeinschaftsgesetzgebers diese Kriterien erfüllen würden. Diese Liste könnte die Basis für eine intrasystematische Interpretation betreffend den sachlichen Anwendungsbereich der Richtlinie darstellen (d.h. sie würde eine Auslegungshilfe hinsichtlich jener Güter bzw. Dienstleistungen bieten, die dem Vergaberegime unterliegen sollen).

Frage 8: *Ausnahmen: Wäre es Ihrer Meinung nach sinnvoll/notwendig, eine Kategorie von Gütern zu definieren, die nicht unter die Richtlinie fallen?*

Nach Ansicht der Republik Österreich wäre es notwendig, Kategorien von Gütern zu definieren, die nicht in das Richtlinienregime fallen. Basis dafür sollte eine aktualisierte Neuauflage der Artikel 296er – Liste sein, die dann einer intrasystematischen Interpretation hinsichtlich jener Güter (insbes. für zukünftige neue, derzeit noch nicht absehbare Waffensysteme) und Dienstleistungen zugänglich wäre, die jedenfalls nicht der Richtlinie unterliegen sollten. Als Beispiel könnte die Aufnahme der Beschaffung von Waffen auf der Basis von Nukleartechnologie dienen, die auch (im Wege der intrasystematischen Fortentwicklung) die Beschaffung von Waffen auf der Basis von Fusionstechnologie umfassen würde.

Für diese Kategorie der so genannten „echten Ausnahmen“ könnten darüber hinaus noch die spezifischen Voraussetzungen für die Inanspruchnahme der Ausnahme dargelegt werden.

Frage 9: *Veröffentlichung: Erscheint Ihnen ein zentrales Bekanntmachungssystem geeignet und wenn ja, unter welchen Modalitäten?*

Ein zentrales europäisches Bekanntmachungsmedium – etwa analog dem „Amtsblatt der Europäischen Gemeinschaften“ – wird durchaus als geeignet für Veröffentlichungen im Rahmen eines – anhand der künftigen Richtlinie noch zu definierenden –

Beschaffungsverfahrens angesehen. Dieses Medium sollte als vollelektronisches Publikationsmedium (Datenbank) ausgestaltet sein.

Es müsste in diesem Zusammenhang dafür Vorsorge getroffen werden, dass keine generelle Veröffentlichungsverpflichtung besteht, sondern im Einzelfall über die Veröffentlichung zu entscheiden ist. In diesem Zusammenhang wären insbesondere Geheimhaltungsinteressen zu berücksichtigen.

Frage 10: *Auswahlkriterien: Welche Kriterien sollten Ihrer Meinung nach neben den in den aktuellen Richtlinien vorgesehenen Kriterien berücksichtigt werden, um den Besonderheiten des Verteidigungsbereichs Rechnung zu tragen? Die Vertraulichkeit, die Versorgungssicherheit, etc.? Wie sollen diese definiert werden?*

Als Kriterien, die in einem eigenen Abschnitt der noch zu schaffenden Richtlinie zu definieren wären, sollten jedenfalls Bereiche wie

- Vertraulichkeit,
- Versorgungssicherheit und
- Referenzwerte (etwa in Sinne eines Benchmarking zur Einführung bei anderen Armeen)

normiert werden.

Als (erste) Arbeitsdefinition könnte etwa für den Bereich der Versorgungssicherheit folgender Wortlaut dienen:

> *„Versorgungssicherheit ist die einseitige und unbedingt abgegebene Garantie des Unternehmens, auf Ersuchen des Auftraggebers diesem die in einem Vertrag festgelegte Leistung jederzeit bzw. für einen bestimmten, im Vertrag fixierten Zeitraum zu erbringen, wobei gegen das Ersuchen des Auftraggebers keine Einrede des Unternehmens zulässig ist.“*

Hinsichtlich der Definition der „Vertraulichkeit“ wird auf einschlägige Definitionen in den Mitgliedstaaten verwiesen, die ihrerseits auf internationalen Dokumenten beruhen (z. B: LOI). Diese Definitionen wurden der Kommission bereits im Rahmen der Vorarbeiten zum Grünbuch zur Verfügung gestellt. Es wird daher davon Abstand genommen, die einschlägigen Unterlagen nochmals zu übermitteln.

Frage 11: *Wie sollte Ihrer Meinung nach die Praxis der Kompensationsgeschäfte behandelt werden?*

Dieser Bereich ist aus Sicht der Republik Österreich besonders sensibel und relevant, da Kompensationsgeschäfte für Staaten mit einem sehr kleinen Verteidigungsetat – wie etwa auch Österreich – eine Möglichkeit darstellen, notwendige Rüstungsbeschaffungen auf nationaler Ebene auch politisch durchsetzen und auch (budgetär) finanzieren zu können.

Österreich hat sich in den letzten Jahren an keinem Großprojekt im Bereich der europäischen Rüstungskooperation beteiligt, weshalb aus österreichischer Sicht (als derzeit ausschließlicher „Käuferstaat") nur die Variante „Offsets/Kompensationsgeschäfte" in Betracht kommt. [Für Teilnehmerstaaten an Rüstungskooperationsprogrammen kann demgegenüber das „Just Retour-Prinzip/Prinzip einer angemessenen Rendite" zum Tragen kommen.]

Aus den oben erwähnten Gründen ist es für die Republik Österreich unabdingbar, dass diese beiden Möglichkeiten der Kompensationsmaßnahmen im Rahmen von Großprojekten der Rüstungskooperation auch in Zukunft erhalten bleiben. Dies auch vor dem Hintergrund, dass derartige Kompensationsmaßnahmen eine weltweit gängige Praxis darstellen und eine einseitige Abschaffung zum Nachteil der Gemeinschaft und ihrer Mitgliedstaaten gereichen würde.

Die Republik Österreich verweist abschließend noch auf ihre Stellungnahmen im Rahmen der Vorbereitung des Grünbuches und ersucht die Verspätung der Stellungnahme zu entschuldigen.

25. Februar 2005
Für den Bundeskanzler:
Michael FRUHMANN

Elektronisch gefertigt

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Brussels, 31st January, 2005

c/o European Commission, Internal Market DG
Consultation „Green Paper on defence procurement"

Ave de Cortenbergh 100 (1/100)
1049 Brussels

Dear colleagues,

You will find attached the Czech position to the „Green Paper on defence procurement". The position was addopted by the Parliament of the Czech Republic in January 27, 2005.

This document was sent to your e-mail address: MARKT-D2-DPP@cec.eu.int.

Yours sincerely,

Madejova Jarmila
Jarmila Madejova
Defence Advisor

Annex: 1

MoD ARMAMENTS DIVISION
GREEN PAPER – DEFENCE PROCUREMENT

Position of the Czech Republic

Czech Republic welcomes steps leading to increased transparency and effectiveness of defence market within the EU. Therefore, we support initiatives designed to help in solving problematic issues. From our viewpoint, the Green Paper – Defence Procurement contains a high-quality analysis of the current status and identifies major shortfalls in the European defence procurement area.

The second part of the document offers two possible solutions to existing shortfalls for a discussion. It is proposed, as a minimum option, (1) to pursue clarification and single interpretation of the existing EU legal framework, or (2) supplement the EU legal framework with a specific legal instrument specifically regulating European defence procurement.

Czech Republic supports issuance of an interpretative communication by the European Commission, which would clarify the existing legal framework of the Communities, i.e. especially "across-the-board" interpretation of Art. 296 EC Treaty and its application to EU's secondary legal acts and in national legislations. It cannot be ruled out that it will be useful in the future to support development of a new legal instrument.

The issues of armaments and making the European Defence industry and market more effective closely relate to the required defence capabilities. The EU Military Staff, together with the nascent European Defence Agency (EDA), will share the work to define the capabilities. European Defence Agency, parameters of which are yet to be specified, will then take over the full responsibility for armaments issues, issues of the Defence Technology Industrial Base (DTIB) and those of the European Defence Equipment Market (EDEM). We believe that development of a new legal instrument should be initiated by EU Member States, for example in relation with EDA.

One of the main reasons for fragmentation of defence equipment market, in the Czech Republic's opinion, is the fact that individual EU States make use of their own funds for defence development. Such investments are closely scrutinized by tax payers of each country and it is critical that each state make sure at least part of the investments returns in the form of national suppliers' share in contracts at hand.

Replies.

1. Do you think it would be useful/necessary/sufficient to explain the existing legal framework in the way presented?

Interpretation of the existing legal framework appears to be too loose, despite taking into account the clarification by the Court. Therefore, we regard the offered approach of "interpretative communication from the Commission" as useful for interpretation of the framework.

2. Are there any other aspects of the Community system in question that should be clarified?

An interpretative communication by the Commission would, in the Czech Republic's opinion, do away with the indefinite interpretation of key terms, such as "essential security interests of Member States", "necessary" measures to protect the "essential interests", "specifically military purposes" e.t.c. Such interpretative guideline should also reflect the decision of the European Court on this area.

3. Do you consider the rules of existing directives suited/unsuited to the specific characteristics of defence contracts? Please give your reasons.

In the Czech Republic's opinion, the existing rules of Community law focus on interpretation, observing and control of free trade, while defence contracts are not

specifically addressed. Despite that, the Czech Republic considers it necessary to unambiguously define (and restrict to the greatest extent) possible exemptions from the existing legal framework. To define unambiguously, under what circumstances a contract can be awarded to national suppliers, or possibly specify what type of weight criterion may be accounted in favour of national suppliers and to what extent. There are numerous sectors, where the vehicle of non-competitive bidding may be used, for example in areas of unique technology and the like.

4. Would a specific directive be a useful/necessary tool for creating a European defence equipment market and strengthening the industrial and technological base of European defence?

The current status that enables a loose interpretation of the Agreement for establishment of special regime for defence procurements is not satisfactory. However, it does not positively imply an urgent need to establish a new legal instrument that would regulate defence trade rules within the EU. As pointed out in answers to the previous questions, an interpretative communication by the Commission would currently be appropriate and sufficient. Nevertheless, it is not unlikely in the long-term that there will be the need to establish a legal instrument, which would shape defence trade in Europe towards European defence equipment market (EDEM). This instrument should cover supranational practices only, binding for all European States without exemption and thereby it would help reduce the prevailing fragmentation of defence markets.

5. What is your opinion regarding the use of a possible directive for purchases by other bodies such as the European Defence Agency?

The Czech Republic is of the opinion, that the possible legal instrument should also regulate acquisitions performed by other entities. Consequently, this legal instrument should also apply to those entities. Czech Republic is not convinced that EDA, in its current set-up, is fully qualified for acquisition of defence equipment, including the life cycle support and the security of supply.

6. Procedures: do you believe the negotiated procedure with prior publication to be suitable for the specific needs of defence procurement? In what situations should use of the negotiated procedure without prior publication be allowed?

Contractors/manufacturers are the primary carriers of know-how. Therefore, consultations with them are desirable to the effect of precise definition of projects, development of marketing analyses, or projecting focus for research and development, life cycle costs analyses, tender specifications and the like. In this respect, it is necessary to consult already before an order is publicised. Good information is critical during the developing stage of a tender, as submitting of bids and bids assessment can be carried out under stricter conditions including public bidding publication. All situations should allow for using consultations without a public bidding publication. Similarly, we are of the opinion that it is necessary to consult without publication in case the bidding applies to classified technology (NBC Defence). The whole order should be capped with a resulting protocol on a single carrier, solver and subsequently a supplier of such order.

The Czech Republic is of the opinion that the negotiated procedure with prior publication accommodates the specifics of defence procurements.

7. Scope: what would be the most appropriate way of defining the field of application? A general definition? If so, what? A new list? If so, what? A combination of a definition and a list?

The Czech Republic is of the opinion, that the scope of application is to be defined through a combination of definition and a list.

8. Exemptions: do you think it would be useful/necessary to define a category of products that would be excluded categorically from the directive?

The Czech Republic regards as useful to set up a database of materials, which would be unambiguously excluded from application of the legal instrument. In our opinion, this is particularly the question of the category of nuclear items, chemical weapons and arms components, cryptographic equipment and equipment that requires certain level of classification as well as unique patented items (e.g. nanotextiles), which may be abused for launching terrorist attacks (for example production of substances, which will not be effectively stopped even by nanotextiles).

9. Publication: do you think a centralised publication system would be appropriate, and, if so, how should it function?

The Czech Republic regards a centralised publication system as a critical requirement (perhaps on special website) while maintaining the set rules and principles and without exemptions for any items, cases or States. Such system of publication system should allow for a transparent presenting and assessment of bids, including announcement of the winning bid and filing of possible appeals. The centralised publication system should have a standard format and firmly set criteria and principles.

10. Selection criteria: what criteria do you think should be taken into account in addition to those already laid down in existing directives to take account of the specific features of the defence sector? Confidentiality, security of supplies, etc.? And how should they be defined?

In the Czech Republic, the selection criteria are subject to the terms of public tenders. It is possible to develop an universal list of criteria applicable to certain domain of acquired equipment, although such criteria may vary case by case.

Confidentiality is definitely one of the key requirements. A bidder may prove it with valid certificate issued by National Security Agency of the company's domicile. The required level of security clearance may vary, but the system is ready for operational issuance of NATO certificates. This system can be adopted.

Other selection criteria:

Stability of supplies of spares and services after guarantee period within life-cycle;
Guarantee of supplies under state of emergency;
Delivery price and life cycle cost;
Quantity of subcontractors.

11. How do you think offset practices should be handled?

The Czech Republic regards offsets as an important tool, which furnishes know-how and allows access to advanced technology. The Government of the Czech Republic recently specified conditions for implementation of offset conditions into international tenders - indeed for the whole spectrum of acquired materials, not only for defence equipment. Offset policy is also an instrument for maintaining or increasing rate of employment.

It is not likely that other states would abandon application of offset policy.

As a regulation of compensations, it is possible to stipulate minimum and maximum criteria for compensations, or possibly regulate areas where compensations could be provided. At the same time, the Commission could actively observe regions in individual Members States, industrial and other sectors and help to direct compensations into such sectors. The envisaged legal instrument could incorporate a standard form of basic offset agreement.

DANMARKS FASTE REPRÆSENTATION
ved den Europæiske Union
Bryssel

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Kommissionens grønbog om offentlige indkøb af forsvarsmateriel (KOM(2004) 608 endelig)

Vedlagt fremsendes skrivelse af 25.april 2005 fra Danmarks økonomi- og erhvervsminister, Bendt Bendtsen vedr. Kommissionens ovennævnte grønbog om offentlige indkøb af forsvarsmateriel.

Med venlig hilsen

Jens Oddershede

ØKONOMI- OG ERHVERVSMINISTERIET

Europa-Kommissionen
DG Indre Marked
Høring om "Grønbogen om offentlige indkøb af forsvarsmateriel (KOM(2004) 608 endelig)"

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25 APR. 2005

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Kommissionens grønbog om offentlige indkøb af forsvarsmateriel (KOM(2004) 608 endelig)

Den 28. oktober 2004 publicerede Kommissionen sin grønbog om offentlige indkøb af forsvarsmateriel, KOM(2004) 608 endelig. Formålet med grønbogen er at iværksætte en debat om, hvorvidt og i givet fald i hvilken form der skal ske en fællesskabsindsats for at sikre, at der skabes klare retlige rammer for offentlige indkøb af forsvarsmateriel.

I grønbogens første del belyser Kommissionen de forhold, der kan begrunde et behov for iværksættelse af specifikke foranstaltninger på området for offentlige indkøb af forsvarsmateriel. Her analyserer Kommissionen markedet for forsvarsmateriel, dets specifikke forhold samt den eksisterende lovgivning for offentlige indkøb.

På baggrund af denne analyse opstiller Kommissionen i grønbogens anden del to løsningsmodeller, som skal sikre at de retlige rammer for offentlige indkøb af forsvarsmateriel klargøres. Derudover indeholder denne del en række spørgsmål, som Kommissionen ønsker besvaret.

Økonomi- og Erhvervsministeriet har på vegne af den danske regering følgende kommentarer til grønbogen:

Fra dansk side kan man tilslutte sig, at der skabes størst mulig klarhed over de retlige rammer for offentlige indkøb af forsvarsmateriel, således at der sikres et mere gennemsigtigt og åbent fælleseuropæisk marked til gavn for den europæiske industris konkurrenceevne.

Offentlige indkøb på forsvarsområdet er i udgangspunktet omfattet af det eksisterende udbudsdirektiv for offentlige kontrakter (2004/18/EF). Alene forsvarskontrakter, der falder ind under EF-traktatens artikel 296 er undtaget fra udbudspligten efter direktivet. Den eksisterende fællesskabslovgivning indeholder således de nødvendige rammer og instrumenter for gennemførelse af udbud af forsvarskontrakter. Hertil kommer, at udbudsreglerne, efter den for nylig gennemførte revision af direktiverne, er kendetegnet ved større fleksibilitet. De nye moderne og mere fleksible regler giver efter dansk opfattelse i tilstrækkelig grad mulighed for at tage højde for de specifikke forhold, der karakteriserer forsvarskontrakterne.

Der er således ikke i udgangspunktet behov for ny regulering på dette område. Der kan derimod være behov for, at Kommissionen bidrager til at tydeliggøre retstilstanden.

Fra dansk side finder man, at den fornødne klarhed over de retlige rammer for offentlige indkøb af forsvarsmateriel bør opnås ved udstedelse af en fortolkningsmeddelelse. Denne type meddelelser har tidligere haft god effekt på forståelsen af komplicerede områder (fx vedrørende sociale- og miljøhensyn) og kan på samme måde være nyttig på området for forsvarskontrakter. Udstedelse af en fortolkningsmeddelelse kombineret en effektiv håndhævelse af de eksisterende regler må således efter dansk opfattelse være første skridt til at sikre en effektiv åbning af markedet for forsvarsindkøb samt bedre og mere lige konkurrencevilkår for EU's forsvarsindustri. Fra dansk side finder man det væsentligt, at udarbejdelsen af en fortolkningsmeddelelse gives høj prioritet med henblik på hurtig udstedelse.

Man er dog tillige åben for en drøftelse af behovet for at indføre særlige regler for indkøb på forsvarsområdet, såfremt udviklingen viser, at indførelse af sådanne sektorregler vil være det bedste instrument til at sikre et bedre fungerende og åbent marked for forsvarskontrakter.

Hvad angår indholdet af en fortolkningsmeddelelse bør Kommissionen bidrage til at afklare anvendelsesområdet for undtagelsesbestemmelsen i EF-traktatens artikel 296, således at det bliver lettere i praksis at skelne mellem kontrakter, der er omfattet af undtagelsen og kontrakter, der ikke er. Denne afklaring kan ske ved, at Kommissionen redegør for de principper, som EF-Domstolen har lagt til grund ved fortolkningen af EF-traktatens artikel 296, herunder hvordan de anvendes på offentlige indkøb.

Fra dansk side lægger man vægt på, at de kategorier af forsvarskontrakter, der er undtaget fra udbudspligten efter udbudsdirektivet, begrænses mest muligt. Undtagelsesbestemmelsen i artikel 296 bør derfor fortolkes restriktivt, således at der sker størst mulig konkurrenceudsættelse af offentlige kontrakter på forsvarsområdet.

I forbindelse med afgrænsningen af anvendelsesområdet for artikel 296 bør Kommissionen endvidere søge at afklare begrebet "væsentlige sikkerhedsinteresser". En fast og ensartet fortolkning af begrebet er en væsentlig forudsætning for, at artikel 296 anvendes på samme måde i alle medlemsstater. Herved hindres, at artikel 296 systematisk bringes i anvendelse på alle forsvarskontrakter og derved misbruges.

Fra dansk side finder man det desuden hensigtsmæssigt, at Kommissionen i fortolkningsmeddelelsen redegør nærmere for, hvilke muligheder ordregivere har for på de forskellige trin i udbudsprocessen at tage højde for de specifikke forhold omkring forsvarskontrakter. Som eksempel kan nævnes mulighederne for i forbindelse med udvælgelsen at tage sikkerhedspolitiske hensyn, såsom fortrolighed, forsyningssikkerhed i hele produktets levetid og kvalitetssikring.

Endvidere kan det være nyttigt at sætte særlig fokus på rammerne for at anvende udbud efter forhandling. I den forbindelse bemærkes, at man fra dansk side lægger vægt på, at der i forbindelse med udbud af forsvarskontrakter sikres størst mulig gennemsigtighed. Udgangspunktet bør derfor være, at anvendelsen af udbud efter forhandling fortsat er begrænset til kun at gælde i undtagelsestilfælde.

Endeligt skal den danske regering bemærke, at man generelt er af den opfattelse, at systemet med kompensation(modydelser) for forsvarskontrakter ikke harmonerer med EU's konkurrencepolitik, og ikke medvirker til fri bevægelighed af varer og tjenesteydelser inden for det indre marked. Den danske regering mener derfor principielt, at kompensationssystemet på sigt bør afvikles, forudsat at dette sker samtidigt i alle medlemslande.

Imidlertid er det den danske opfattelse, at denne afvikling ikke kan ske øjeblikkeligt. Fra dansk side finder man det derfor vigtigt, at så længe der findes kompensationsmuligheder, bør reglerne herom være så klare og gennemskuelige som muligt. Herved sikres, at medlemsstaternes administration bliver mere ensartet og gennemsigtig, at konkurrencen ikke forvrides, og at små lande ikke stilles ringere end EU-lande med stor og tung forsvarsindustri.

Kommissionen bør desuden tage højde for, at anskaffelse af forsvarsmateriel tillige foregår på det globale marked, hvorfor afskaffelsen af kompensationskøb inden for EU alene vil være til skade for den europæiske forsvarsindustri. Kommissionen bør derfor overveje, hvordan det kan sikres, at kompensationsforpligtelserne på det globale marked afvikles samtidigt med eventuel afskaffelse af kompensationssystemet inden for EU.

Efter dansk opfattelse er der behov for, at Kommissionen foretager en analyse af medlemsstaternes administration af kompensationsområdet, og også på dette område præsenterer en grønbog med henblik på fremsættelse af forslag til, hvordan området bør administreres.

Med venlig hilsen

Bendt Bendtsen

Bendt Bendtsen

MINISTRY OF DEFENCE OF FINLAND

FI.PLM.6734

Helsinki 31 March 2005 963/3030/2004

EUROPEAN COMMISSION
Internal Market DG
Directorate C3

markt-c3-dpp@cec.eu.int

Consultation "Green Paper, Defence Procurement (COM (2004)608 final)

FINNISH REPLY IN CONSULTATION PROCESS

Dear Sirs,

We have the pleasure in enclosing the comments of Finland.

Finland considers the on-going dialogue necessary to explore the regulatory aspects of the defence procurement. Finland shares the opinion that the European defence industrial base has to be improved. There should be more co-operation in the defence market, and the procurement practises should be made more efficient and transparent.

Finland considers that improving the current defence procurement practises in Europe is an important step to develop the European Security and Defence Policy. This means added transparency and consistency in the member states' application of article 296, and also, if and when agreed, also more open procedures within procurements under the article 296.

Finland is in support of gradual and reciprocal measures to open defence markets within Europe and to improve the efficiency of the European defence market. In the long term Finland supports the creation of European Defence Equipment Market.
Also creating a more common understanding of the application of article 296 is necessary both for the industries and procurement authorities.

Considering regulatory alternatives and the development of regulations, in our opinion it is necessary to take duly into account the specificity of the defence procurements, and also the differing premises of the various member states. There are member states that belong to a military alliance, while others have stayed militarily non-aligned. For Finland, the defence solution is credible defence, as quite recently stated in the Government White book to Finnish Parliament: Defence and Security Policy 2004 (6/2004).

Finnish defence solution is based on credible national defence. One component of the Finnish defence solution is material preparedness, requiring certain national defence industrial know how and industrial capacity. However, the defence solution has not meant a closure of the Finnish defence market. The Finnish defence market has been fairly open for foreign bidders, save in those defence procurements where essential defence imperatives have required a domestic procurement solution (article 296). Currently, Finland is active in the European defence materiel co-operation in European Defence Agency and shares its goals.

The invocation of article 296 into procurements of defence varies between the member states. In our opinion guidance towards correct application should be formulated carefully and constructively, not jeopardizing the aims for more European co-operation in the defence materiel arena. Therefore, eventual common regulation, legally binding or merely interpreting the current law, should be developed in very close co-operation with the member states, commission, industry and other stakeholders.
The expanding security needs within Europe might also call for clarification to define the optimal procurement procedures for these procurements.

The newly established European Defence Agency could be used as a tool to collect data and build up the required measures and practises (we also takes note of the initiatives within the European Defence Agency to launch timely work towards more common guidelines that would be applicable to defence procurement within article 296 of the Treaty).

In spite of the already fairly open Finish defence market, certain national defence prerequisites must be taken into account. As a non-aligned nation we place a strong emphasis on the aspect of security of supply and security of delivery. It is foreseen, that the new European constitutional treaty and the increasing European co-operation in the field of armaments will positively impact the security of supply at the European level. Finland, however, sees it problematic that security of supply measures at the European union level are currently at their early stage. Finnish national security of supply measures can be reconsidered in due time, providing that European improvements in this area reach an acceptable level (the term security of supply is understood in a wide meaning i.e. the Finnish law on security of supply seeks to guarantee, in times or crisis, the essential economic functions of national economy and defence industry and livelihood of the citizens, and therefore defence security of supply is only one area of the general security of supply of Finnish society).

These prerequisites play a vital role and impact the point of view of Finland in the article 296 application and eventual opening up of further product categories, and may also influence the point of view regarding the procurement procedures in an eventual directive regulation (for instance, the off-centre geographical position of Finland far away from European industrial centres cause the necessity of certain products and services to be available from industry/servicesupplier with an in-country presence in the Finnish territory. This could also require certain adjustments in the procurement procedures in an eventual regulation).

For the same military preparedness and security of supply reasons, Finland also considers it essential to maintain the industrial participation (especially direct programme related industrial participation) in connection of her major defence procurements from foreign suppliers.

The Finnish Government reply has been prepared within the Ministry of Defence, with written statements from relevant stakeholders and views on the matter obtained from the Finnish Parliament.

We also propose that an impact assessment would be made in due course on the commission proposals.

Finland would also like to be able to include eventual further views at a later stage.

Finland would like to propose active co-operation in this matter with commission and other stakeholders.

In addition to the above, we have the pleasure in enclosing the reply to the requested specific questions (Annex 1).

MINISTER OF DEFENCE Seppo Kääriäinen

Senior Government Secretary Jouko Tuloisela

ANNEX 1

Question 1: Do you think it would be useful/necessary/sufficient to explain the existing legal framework in the way presented?

It is possible that in the short term a renewed interpretation of the article 296 could be of assistance to guide the practises towards a more common application within the member states. The specificity of the defence procurement and the varying premises of the member states should be taken into account in connection of the formulation of an eventual interpretative communication. It is recommended that member states would be given the possibility to participate into the development of such an interpretation.

As already proposed, one alternative would be to establish a common approach on the application of the art. 296 by the defence authorities themselves. European Defence Agency could be used as a catalyst in this.

In the procurements by the defence authorities in Finland, the application of art. 296 has been quite well established and clear. The application of article 296 is governed by Finnish national legislation including the relevant application guidelines by the defence authorities. In the Finnish system the application whether a procurement will be deemed a procurement of defence goods or services shall be decided by the Ministry of Defence of Finland. The Ministry has defined the product list in 1995, taking into account the military list from the year 1958, which was also compared with the applicable export licensing lists (when the procurement is under art.296, a separate decree is used).

Finnish final position in comparison of the various regulatory alternatives can only be made when the concrete proposals are at hand.

Question 2: Are there other aspects of the Community system in question that should be clarified?

Being general in its nature, the article 296 has sometimes caused uncertainty of the application of the European union regulation into various activities in the field of defence.

Question 3: Do you consider the rules of existing directives suited/unsuited for the specific characteristics of defence contracts? Please give your reasons.

The new and improved procurement directives, with their quite innovative and improved methods, are currently being incorporated into Finnish national legislation and entering into force next year. Therefore it is premature to draw conclusions on how well the new directives would be suited for procurements close to art. 296. Evidently, certain amendments would still have to be made before these new directives could optimally suit defence procurements and the related security of supply considerations.

Question 4: Would a specific directive be a useful/necessary instrument for creating a European defence equipment market and strengthening the industrial and technological base of European defence?

Finland favours gradual and reciprocal measures in development of the regulation.
The Finnish interim position rather prefers a more flexible regulatory mechanism. A directive could possibly be suitable only in the long term. On the other hand the preparation of a directive would possibly duly take into account smaller nations needs and be more reciprocal. A special directive could be considered if and where other regulatory measures have not been sufficient, or in the case that reciprocity has not been reached.
A directive would also require a clear group of products for its coverage.
However, a special directive may not be ruled out, but would entail a long process.

Question 5: What is your opinion regarding the use of a possible directive for purchases by other bodies, such as the European Defence Agency?

In our opinion this cannot be ruled out. The applicability of a directive would have to be considered taking into account the nature of the procurements in question. In our understanding the agency already nowadays applies public procurement directives in their day-to day operations (furnishing, cleaning, computers, etc.) It is not out of question that the agency, in rather short term, could serve as a "laboratory" of this kind of directive.
(The expanding security needs in Europe might also require a set of rules better applicable to these type of procurements).

Question 6: Procedures: do you believe the negotiated procedure with prior publication to be suitable for the specific need of defence procurement? In what situations should use of the negotiated procedure without publication be allowed?

The proposed method is considered suitable. Also the possibility for direct non-public procurement is necessary, for instance in procurements from other governments (there is also an increasing amount of second-hand procurements between governments, where publicity might not serve its purpose), or procurements that are secret.

Question 7: Scope: what would be the most appropriate way of defining the field of application? A general definition? If so, what? A new list? If so, what? A combination of a definition and a list?

In the Finnish view the best choice would be a general definition assisted with a non-exhaustive, renewable list.

Question 8:Exemptions. Do you think it would be useful/necessary to define a category of products that would be excluded categorically from the directive?

It is very difficult to evaluate this without knowing the products that the directive would cover. Each member state is ultimately vested with the authority to apply article 296 if the member states essential security needs so require. For Finland, the credible defence solution and security of supply requirements are factors that shall be taken into account in this respect.
Finland has attempted to bring security of supply aspects into wider European discussion. Security of supply elements should in the Finnish view be included in the European union policy. At the same time, Finland has defined her national security of supply objectives.
Procurements relating to security, intelligence, command and control and cryptography would have to be excluded (list non-exhaustive).

Question 9: Publication: do you think a centralised publication system would be appropriate, and, if so, how should it function?

Finnish Defence Forces publish an electronic defence bulletin. It would presumably be a fairly simple task to incorporate the member states' electronic bulletins into a centralised databank or bulletin.

Question 10: Selection criteria: what criteria do you think should be taken into account in addition to those already laid down in existing directives to take account of the specific features of the defence sector? Confidentiality, security of supply, etc.? And how should they be defined?

In public procurement directives it is normally not possible to require or prefer a solution that is linked to the geographical location of the supplier or the service provider. However, for security of supply reasons, and taking into account the Finnish geographic position, a requirement for products and services to be available in the Finnish territory might be required. This kind of an in-territory requirement would possibly mean a higher price and industrial setting-up, but would not necessarily be discriminatory, while all bidders would have the same requirement (see also the remarks on the question 11., offset.)

Certain additional requirements for bidders are often necessary. Quality control requirements, security/secrecy and special data-protection levels may be named as examples. Bidders might in certain cases be required to sign secrecy/non-disclosure agreements prior to being able to take part in bidding.

Question 11. How do you think offset practises should be handled?

Taking into account the closed defence market, offset is used in connection of major defence procurements also by Finland (especially direct participation to the programmes for the security of supply and military preparedness needs). The threshold is currently 10 million Euros. The placing of the obligation is based on the requirement set by the Finnish Parliament when authorizing the funds for defence materiel procurements.

Such an obligation would not be distortive (in a procurement from several foreign candidates the same offset rules are applied for all). Placing a direct offset obligation in a program may mean a deviation from the most effective industrial/economical solution. Buyers electing to use direct offset will pay a higher premium, but on the other hand might gain security of supply or other advantages like technology transfer programmes.

There is scope for certain streamlining of the offset rules in Europe. Also, in view of collaborative defence programmes, adjustments to the rules may be necessary.

ASSEMBLÉE
NATIONALE

RÉPUBLIQUE FRANÇAISE
LIBERTÉ - ÉGALITÉ - FRATERNITÉ

DÉLÉGATION
POUR L'UNION EUROPÉENNE

Le Président

D441/EM/VM

DESTINATION MARKT/D/2
ADC 95656
Action GB/SM/CD
DATE 03. 12. 2004
In
Visa

Paris, le 25 novembre 2004

Monsieur le Directeur général,

La Commission européenne a publié, le 24 septembre dernier, un Livre vert concernant les marchés publics de la défense. Ce document invite toutes les parties intéressées à transmettre leurs observations concernant les onze questions posées avant le 23 janvier 2005.

La Délégation de l'Assemblée nationale pour l'Union européenne a souhaité participer à ce débat. Au cours d'une réunion tenue ce matin, j'ai présenté à mes collègues les réponses que la Délégation pouvait envisager de donner aux questions formulées dans le Livre vert. Les propositions finalement retenues ont été consignées dans un document séparé.

Le document vous est déjà parvenu par la voie électronique, avec l'indication que nous vous donnions notre accord pour que cette contribution soit placée sur le site web du Livre vert.

Vous voudrez bien en trouver aujourd'hui ci-joint la version papier.

Je vous prie de croire, Monsieur le Directeur général, à l'assurance de ma haute considération, et cordiale

Pierre LEQUILLER

C/o Commission européenne
DG Marché Intérieur
Consultation « Livre Vert sur les marchés publics de défense »
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ASSEMBLÉE
NATIONALE

RÉPUBLIQUE FRANÇAISE
LIBERTÉ - ÉGALITÉ - FRATERNITÉ

DÉLÉGATION
POUR L'UNION EUROPÉENNE

Le Président

Réponses aux questions du Livre vert

Question 1. Estimez-vous utile/nécessaire/suffisant d'expliciter le cadre réglementaire actuel selon les modalités présentées [communication interprétative] ?

Comme le précise le Livre vert lui-même, une communication interprétative ne peut par définition ajouter au droit existant. L'instrument juridique proposé serait donc loin de présenter nécessairement toutes les caractéristiques d'une clarification, puisqu'il se superposerait aux arrêts de la Cour de justice pour en proposer une interprétation non dépourvue d'autorité, mais sans valeur décisive.

Nul n'est censé ignorer la loi et la jurisprudence de la Cour de justice est par elle-même assez claire pour des spécialistes. Or le droit des marchés publics de la défense ne concerne que des professionnels. Qu'une communication interprétative puisse être adoptée plus rapidement qu'une directive ne paraît pas en soi un argument suffisant pour rendre nécessaire sa publication.

Question 2. Y a-t-il d'autres aspects du régime communautaire en question qui mériteraient d'être clarifiés ?

Il est possible de formuler les mêmes réserves sur cette question.

Question 3. Les règles des directives existantes vous paraissent-elles adaptées/inadaptées aux spécificités des marchés de défense ? Précisez pourquoi.

Les règles de la concurrence ne sont pas applicables telles quelles aux marchés publics de défense pour deux raisons.

D'abord, même si la sécurité des approvisionnements et le secret des informations sont trop souvent invoqués dans le secteur, ce sont, pour certains types de contrats, des exigences compréhensibles qu'il faut respecter, ce qui suppose des aménagements de la réglementation de la concurrence.

En second lieu, les dispositions du droit européen en matière de contrôle des concentrations paraissent inadaptées au secteur. Certes, les grands groupes européens ne doivent pas se soustraire aux dispositions anti-trust. Mais la position relativement avantageuse d'une entreprise sur un segment du marché mondial n'empêche pas nécessairement qu'elle reste de manière générale la proie de la concurrence. Si l'intention est de créer une base industrielle solide, il faudrait que la réglementation communautaire, pour définir un abus de position dominante dans le secteur, prenne non seulement en compte le marché européen, relativement étroit, mais l'ensemble du marché mondial. La Commission et la Cour de Luxembourg suivent déjà des analyses similaires dans le domaine de l'aéronautique civile.

Question 4. Une directive spécifique serait-elle un instrument utile/nécessaire pour mettre en place un marché européen des équipements de défense et renforcer la base industrielle et technologique de défense européenne ?

L'adoption d'une directive spécifique paraît à la Délégation pour l'Union européenne de l'Assemblée nationale un instrument indispensable pour en finir avec le cloisonnement excessif des marchés nationaux de la défense en Europe. Le morcellement de la demande et la multiplicité des canaux qu'elle emprunte se sont révélés jusqu'à présent un obstacle considérable au développement d'une industrie européenne à la hauteur du potentiel économique de l'Union européenne. La Délégation pour l'Union européenne estime qu'une directive spécifique, rédigée dans le respect de l'article 296, est une condition *sine qua non* au renforcement de la base industrielle et technologique de défense européenne.

Question 5. Quelle est votre opinion concernant l'utilisation de cette éventuelle directive pour les acquisitions effectuées par d'autres organismes, tels que l'Agence européenne de défense ?

Il apparaît que cette directive devrait par définition s'appliquer à un organisme comme l'Agence européenne de défense. Si elle vaut pour les États membres, elle doit en effet s'appliquer *a fortiori* aux organismes communautaires. Quant à savoir de quels crédits disposera éventuellement l'Agence pour passer ses propres marchés, c'est cependant une autre question.

Question 6. Procédures : la procédure négociée avec publicité préalable vous semble-t-elle être adaptée aux spécificités des marchés de défense ? Quelles sont les situations qui devraient permettre le recours à la procédure négociée sans publicité ?

Il est opportun d'ouvrir au maximum la palette des procédures définies par le droit européen, pour dissuader les États de ne suivre que les leurs. La procédure négociée avec publicité préalable apparaît une bonne procédure de droit commun pour les marchés de défense, dans la mesure où elle allie à l'ouverture de la transaction la possibilité d'exercer une certaine liberté d'appréciation dans le choix de ses fournisseurs.

Seuls des secteurs très sensibles comme l'électronique de renseignement devraient pouvoir permettre le recours à la procédure négociée sans publicité.

Question 7. Champ d'application : quel serait le moyen le plus approprié pour définir le champ d'application ? Une définition générique et dans ce cas laquelle ? Une nouvelle liste et dans ce cas laquelle ? Une utilisation combinée d'une définition et d'une liste ?

La technique de la liste a déjà fait la démonstration de ses limites. La liste adoptée en 1958 n'a jamais été révisée depuis cette date, malgré les évolutions considérables du matériel militaire. En renvoyant la définition de son champ d'application à une annexe, la directive courrait le risque de se voir vidée de sa substance, à force de négociations ne parvenant pas à aller au-delà du plus petit dénominateur commun. Les progrès rapides de la technologie auraient au demeurant tôt fait de rendre caducs les compromis obtenus.

L'utilisation combinée d'une liste et d'une définition paraît une technique législative non moins contestable. Si la liste retenue doit rester ouverte, le juge peut la compléter ultérieurement par analogie avec les matériels expressément visés. Sous une apparence pratique et concrète, la liste propose donc en fait une définition abstraite dont les contours ne seront tracés par le juge qu'au fil du temps. Une définition générique serait un instrument plus stable, qui paraît beaucoup plus recommandable. Cette réserve étant formulée du point de vue de la technique législative, il appartient autrement aux gouvernements de fixer entre eux la teneur de la définition.

Question 8. Exemptions : la définition d'une catégorie de biens qui seraient exclus de manière manifeste de la directive vous semble-t-elle nécessaire ?

Définir des exemptions paraît de prime abord un moyen d'apporter certaines garanties aux États. Si la définition générique évoquée sous la question 7 est suffisamment précise, elle tracera cependant par défaut les contours des matériels qui seront hors de son champ d'application. En voulant les définir pour eux-mêmes, une directive européenne finirait ainsi par proposer deux interprétations possibles d'une même ligne de démarcation, ce qui paraît au mieux superflu et au pire inopportun.

Question 9. Publication : un système centralisé de publication vous semblerait-il approprié ? Si oui, selon quelles modalités ?

La nécessite d'un système centralisé de publication s'impose avec la force de l'évidence. En pratique, les avis de passation des marchés pourraient être simplement publiés au *Journal officiel de l'Union européenne.*

Question 10. Critères de sélection : quels critères vous sembleraient devoir être pris en compte en plus de ceux déjà prévus dans les directives actuelles afin de tenir compte des particularités du secteur de la défense ? La confidentialité, la sécurité des approvisionnements, etc. ? Et de quelle manière les définir ?

L'application de la réglementation nouvelle ferait naître plusieurs sous-catégories de marchés, notamment pour les procédures avec ou sans publicité. Pour chaque sous-secteur, un critère unique aisément contrôlable devrait être retenu, qui corresponde à la nature de la sous-catégorie définie, par exemple la confidentialité de l'information pour les procédures sans publicité.

Il appartient aux gouvernements des États membres de définir ces critères de telle manière qu'un contrôle juridictionnel sur leur application soit possible, y compris en mettant à la charge des acquéreurs de prouver que les informations à fournir en cas de publicité des avis auraient été confidentielles.

Question 11. Comment considérez-vous devoir être traitée la pratique des compensations ?

Les compensations sont un moyen de paiement supplémentaire, qui consiste à faire construire sur le territoire de l'État acquéreur une partie de la commande qu'il a passée, ou à y développer une production industrielle d'un volume équivalent. Les considérations qui favorisent cette pratique ne sont pas exclusivement économiques, mais sont principalement des préoccupations immédiates d'emploi et de politique industrielle nationale.

Dans cette mesure, elles faussent souvent le libre exercice de leur décision économique par les gouvernements. Telle quelle, la pratique des compensations perpétue ainsi le cloisonnement de la production et l'éparpillement industriel, ce qui justifierait à tout le moins un encadrement juridique en cette matière.

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RÉPUBLIQUE FRANÇAISE

REPRESENTATION PERMANENTE
DE LA FRANCE
AUPRES DE L'UNION EUROPEENNE

Bruxelles, le 25 février 2005

Service Industrie

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Objet : Livre vert sur les marchés publics de la défense

P.J. : Une note des Autorités françaises

Monsieur le Directeur Général,

J'ai l'honneur de vous faire parvenir, ci-joint, une note relative à l'objet cité en référence.

Je vous prie d'agréer, Monsieur le Directeur Général, l'expression de ma considération la plus distinguée.

Jean-Marc Dessapt

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Note à la Commission européenne

Objet : Livre vert sur les marchés publics de la défense

Les autorités françaises se félicitent de la parution du Livre vert sur les marchés publics de la défense et remercient la Commission pour la qualité du travail d'analyse contenu dans ce document.

Ce Livre vert constitue une base de réflexion utile pour améliorer l'efficacité économique de la dépense de défense en renforçant la base industrielle et technologique de défense (BITD) et sa compétitivité. Cette réflexion ne peut toutefois être dissociée de l'ensemble des questions soulevées dans la Communication « Vers une politique de l'Union européenne en matière d'équipements de défense » du 11 mars 2003, telles que la souveraineté des Etats, la sécurité d'approvisionnement et la sécurité de défense.

Tout en s'inscrivant dans le cadre de la consolidation du marché intérieur, cette initiative devrait aussi contribuer aux objectifs de la Politique européenne de sécurité et de défense (PESD).

Il est en effet certain que des pratiques d'acquisition plus harmonisées, plus transparentes et plus ouvertes sont souhaitables. Il convient néanmoins de garder à l'esprit les spécificités des besoins de défense et de souveraineté . L'équilibre des compétences entre l'Union européenne et les Etats membres en matière de sécurité, tel qu'il résulte du traité instituant la Communauté européenne et du traité sur l'Union européenne, doit être respecté.

La définition d'un cadre adapté, harmonisant les pratiques légitimes des Etats en matière de marchés publics de défense, doit être envisagée en tenant compte des spécificités de ce secteur. Il pourrait être étendu à l'acquisition de l'ensemble des biens concourant à la sécurité et à la souveraineté de l'Union européenne et de ses Etats membres, y compris dans le domaine spatial.

L'adoption d'une communication interprétative sur l'article 296 du traité instituant la Communauté européenne n'apporterait aucun élément nouveau permettant d'atteindre l'objectif visé qui est d'accroître l'efficacité des dépenses de défense et de renforcer la BITD européenne.

L'adoption d'une directive ne permettrait d'atteindre l'objectif visé d'une amélioration de l'efficacité économique de la dépense de défense qu'à condition qu'elle soit précédée d'une convergence préalable des politiques d'acquisition des Etats. Cette convergence ne peut être obtenue qu'à travers un instrument de nature politique.

En conséquence, et parce qu'elle appelle de ses vœux une politique globale, cohérente et déterminée de tous les acteurs européens, la France estime préférable, dans un premier temps, de faire porter l'effort sur un outil intergouvernemental et expérimental de rationalisation du marché. A cet effet, un code de conduite pourrait être conçu et mis en œuvre dans le cadre de l'Agence européenne de défense (AED) avec l'appui des Etats membres et de la Commission. Il ouvrirait la voie, sur des bases réalistes, à une convergence des pratiques d'acquisition, qui pourraient dès lors permettre d'envisager la mise en place de futurs instruments juridiques, sans préjudice de l'article 296 CE. Les principes directeurs du code de conduite tel que proposé par la France sont exposés en annexe.

La France poursuit toutefois sa réflexion et reste ouverte à toute proposition qui tiendrait compte de ses observations dans les réponses au Livre vert que les autorités françaises ont l'honneur de présenter à la Commission.

Elle souhaite par ailleurs que sur ce sujet, l'Agence se positionne comme un forum privilégié d'échanges entre les Etats membres et les autres institutions de l'Union.

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- **Question 1 : Estimez-vous utile/nécessaire/suffisant d'expliciter le cadre réglementaire actuel selon les modalités présentées ?**

Le cadre réglementaire actuel comprend :

- en droit communautaire, la directive générale marchés publics (directive 2004/18/CE[1]) et les dispositions de l'article 296 du traité instituant la Communauté européenne ;

- en droit français, le code des marchés publics transposant la directive ci-dessus et un décret spécifique à la défense, organisant le recours national à l'article 296 CE.

Les autorités françaises partagent en bonne part le constat préalable de la Commission (point I du Livre vert). La réglementation mériterait d'être adaptée du fait des spécificités propres au secteur de la défense qui ne sont pas prises en compte dans la législation communautaire actuelle.

Elles seraient favorables, sur le principe, à une action qui décloisonnerait les marchés nationaux et renforcerait la base industrielle et technologique de défense européenne.

Une communication interprétative ne pourrait avoir pour seul objet que de formaliser et de préciser les principes dégagés par la jurisprudence de la Cour de justice des Communautés européennes sur l'interprétation de l'article 296 CE. Un tel outil, qui ne ferait que reprendre le droit existant sans accroître l'efficacité des dépenses de défense et renforcer la BITD, n'est pas adapté à l'objectif recherché.

La France soutient dès lors l'élaboration d'un ou plusieurs instruments de l'Union européenne dans le cadre juridique adapté, prenant en compte les spécificités du secteur de l'armement. Il pourrait s'agir, dans un premier temps, d'un instrument expérimental (par exemple, un code de conduite comme cela a été fait pour les exportations d'armement).

A cet égard, l'AED qui réunit les Etats membres, avec la participation de la Commission, constitue une enceinte privilégiée pour son élaboration. Elle peut, avec la Commission, contribuer à l'atteinte de l'objectif visé d'améliorer l'efficacité économique de la dépense de défense.

- **Question 2 : Y a-t-il d'autres aspects du régime communautaire en question qui mériteraient d'être clarifiés ?**

De façon générale, il convient de noter que le cadre juridique dans lequel s'exerce l'activité de production et de commerce des matériels de guerre est plus vaste que le seul sujet des marchés publics. Il constitue un ensemble dont la cohésion ne peut être obtenue par une communication interprétative isolée sur les marchés publics.

- **Question 3 : Les règles des directives existantes vous paraissent-elles adaptées/inadaptées aux spécificités des marchés de défense ? Préciser pourquoi.**

[1] Cf. article 10 de la directive 2004/18/CE du Parlement européen et du Conseil du 31 mars 2004 relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services, JO L 134, 30 avril 2004.

Les règles de la nouvelle directive 2004/18/CE du Parlement européen et du Conseil du 31 mars 2004 présentent aujourd'hui des avancées intéressantes par rapport aux trois anciennes directives Travaux, Fournitures et Services.

Il faut notamment citer :

- la possibilité de recourir dans certains cas à la procédure flexible qu'est le dialogue compétitif. Celui-ci permet de prendre en compte la réalisation de projets particulièrement complexes (article 29 de la directive 2004/18/CE) ;
- la possibilité d'établir les spécifications techniques en termes de performances et d'exigences fonctionnelles (article 23 de la directive 2004/18/CE).

Cependant, cette directive reste largement inadaptée pour les marchés de défense.

En effet, outre les éléments précédemment explicités dans le Livre vert, on peut mentionner notamment les points suivants :

1. Elle ne prend pas en compte la complexité des acquisitions de défense, qui, s'étendant sur de longues durées, doivent intégrer tant l'évolutivité des besoins que celle des technologies, particulièrement dans le domaine de l'information, des communications ou des composants électroniques ;

2. Elle ne prévoit que des cas trop restrictifs justifiant le recours à la procédure négociée, avec ou sans publication d'un avis de marché. Aussi, elle ne permet pas toujours de répondre aux objectifs fixés, à savoir principalement : la maîtrise des coûts, des délais, l'atteinte des performances spécifiées, le respect de la confidentialité, et une meilleure prise en compte des contraintes industrielles liées aux achats de défense ;

3. Elle ne permet pas de répondre à la difficulté qu'ont les prescripteurs à déterminer à l'avance avec exactitude les besoins, en particulier pour les marchés de maintien en condition opérationnelle.

Ainsi, pour donner quelques exemples concrets :

- il n'est pas prévu de phases pour les marchés de fournitures et services mettant en œuvre des technologies évolutives ; le système des phases permet de définir en cours de marché de nouveaux moyens à mettre en œuvre ou des objectifs à définir pour la phase suivante en vue de réaliser l'opération ;
- il n'est pas prévu de recours exclusif à des composants ou sous-systèmes de même origine que ceux retenus lors de la qualification du matériel principal, alors que la sécurité d'emploi ou le souci d'éviter des adaptations coûteuses le justifieraient ;
- il n'est pas prévu d'exigences en matière de mise en concurrence des sous-traitants et de vérification des conditions dans lesquelles ceux-ci sont choisis par le titulaire du marché ;
- il n'est pas prévu de part provisionnelle de prestations pour les marchés de fournitures et de services ayant pour objet des prestations complexes et pouvant présenter des aléas techniques importants.

Par ailleurs, se pose un problème d'équilibre dans nos rapports avec certains pays tiers.

Dans le cadre de l'Organisation mondiale du commerce (OMC), l'accord sur les marchés publics (AMP) exclut les matériels de guerre. Les Etats tiers imposent donc en toute légalité aux entreprises européennes des conditions d'accès à leurs marchés qui vont bien au-delà d'une exigence d'établissement, alors que la directive 2004/18/CE ne permet d'imposer aucune condition d'accès au marché européen, pas même une exigence d'établissement. Ces disparités entraînent des distorsions de concurrence au détriment des entreprises européennes.

- **Question 4 : Une directive spécifique serait t-elle un instrument utile/nécessaire pour mettre en place un marché européen des équipements de défense (EDEM) et renforcer la BITDE ?**

La réponse à cette question est largement fonction du contenu possible de cet instrument, ainsi que des délais nécessaires à son adoption.

L'EDEM et le renforcement de la BITD européenne doivent donner à l'Union et à ses Etats membres la faculté d'acquérir de façon autonome, aujourd'hui et dans un avenir prévisible, au meilleur prix, les équipements nécessaires à l'exercice de leur sécurité et de leur souveraineté, et incorporant la technologie souhaitée (mesurée relativement à celle de pays tiers).

Une directive qui fournirait des procédures adaptées aux spécificités tant techniques que de souveraineté des achats de défense, sans préjudice de l'article 296 TCE, apporterait une dose de transparence et d'ouverture des marchés propre à améliorer l'efficacité des dépenses de défense. Le mouvement de concentration observé dans le secteur de l'industrie européenne de défense milite d'ailleurs pour que des règles plus formalisées de relation clients-fournisseurs se mettent en place au niveau européen.

Elle faciliterait également l'amélioration de la compétitivité des industriels européens dans le secteur des armements, et plus généralement dans les secteurs de la sécurité et de la défense.

Il conviendrait cependant qu'elle ne se traduise pas par une situation déséquilibrée de nos entreprises sur le marché mondial.

Pour autant, la détermination précise des critères permettant de recourir à telle où telle procédure adaptée est sans doute une gageure dans l'état actuel de fragmentation du marché, et de différences entre les politiques étrangères et de sécurité des Etats.

De ce fait, un projet trop ambitieux pourrait ne pas déboucher, ou à une date incompatible avec ses objectifs. A contrario, s'il se limitait à fixer isolément des règles suffisamment souples pour que l'appréciation souveraine des Etats puisse encore largement s'exercer, son efficacité en serait fort amoindrie.

C'est pourquoi une directive spécifique ne peut être envisagée qu'à condition que de façon préalable et coordonnée, des avancées significatives soient également recherchées par d'autres moyens, dont certains relèvent de la compétence de la Communauté, et d'autres de l'Union européenne et de ses Etats membres.

C'est dans cet esprit que les propositions françaises incluent la mise en place d'un outil expérimental, sous la forme d'un code de conduite, permettant d'aborder les questions complexes relatives aux acquisitions de défense et de faire partager les méthodes et solutions employées, en vue de définir un instrument réglementaire européen.

- **Question 5 : Quelle est votre opinion concernant l'utilisation de cette éventuelle directive pour les acquisitions effectuées par d'autres organismes, tels l'Agence européenne de défense ?**

La question de l'utilisation d'une directive communautaire pour les acquisitions effectuées par d'autres organismes ne s'est pas posée jusqu'à présent. En effet, les organisations intergouvernementales

comme l'Organisation conjointe de coopération en matière d'armement (OCCAR), créées en dehors du cadre de l'Union européenne, ne sont pas soumises au droit communautaire.
Quant à l'Agence européenne de défense, elle n'entre pas dans le champ défini par la directive marchés publics.

Le droit existant (directive 2004/18/CE) ne permettrait au demeurant pas de répondre aux spécificités de certains marchés passés par l'Agence. Si une directive adaptée devait être finalement adoptée, il appartiendrait aux Etats participant à l'Agence de se prononcer en fonction de son contenu sur l'opportunité d'appliquer tout ou partie de ses dispositions à ses opérations d'acquisition.

- **Question 6 : Procédures : la procédure négociée avec publicité préalable vous semble-t-elle être adaptée aux spécificités des marchés de défense ? Quelles sont les situations qui devraient permettre le recours à la procédure négociée sans publicité ?**

La procédure négociée s'avère la seule procédure véritablement adaptée aux spécificités des marchés de la défense. En effet, elle permet une meilleure prise en compte, selon les cas, d'un ou de plusieurs des paramètres suivants : montant, durée d'exécution, complexité technique ou juridique, techniques mal maîtrisées, urgence opérationnelle, offres insuffisantes en nombre et qualité pour garantir le jeu normal de la concurrence, aléas sur les coûts ou sur le volume des besoins, existence de droits de propriété intellectuelle et savoir faire, sécurité des approvisionnements.

Dans le cadre de cette procédure, la publicité et la concurrence doivent rester le principe général.

La procédure négociée sans publicité mais avec concurrence s'avère nécessaire par exemple lorsque la protection du secret ou des contraintes particulières de sécurité sont en cause.

La procédure négociée sans publicité et sans concurrence doit également être autorisée, notamment quand la protection des droits de propriété intellectuelle l'exige ou lorsque le marché ne peut être attribué à un autre prestataire que le titulaire pour des raisons tenant à des nécessités techniques, à des investissements préalables importants, à des installations spéciales, à la sécurité des approvisionnements, à un savoir-faire particulier ou à la nécessité de développer une technologie innovante à l'origine de laquelle se trouve ce prestataire.

- **Question 7 : Champ d'application : quel serait le moyen le plus approprié pour définir le champ d'application ?**
  - Une définition générique et dans ce cas laquelle ?
  - Une nouvelle liste et dans ce cas laquelle ?
  - Une utilisation combinée d'une définition et d'une liste ?

Si l'élaboration d'un instrument juridique était envisagée, la question de la définition de son champ d'application serait déterminante.

Les spécificités des marchés de défense et de souveraineté ne résultent pas des seules caractéristiques des matériels sur lesquels ils portent. Le champ d'application de cette directive ne devrait donc pas être défini *ratione materiae*, ni renvoyer par exemple à une liste de matériels.

L'application d'un éventuel instrument spécifique sera par ailleurs sans préjudice de la possibilité pour les Etats d'invoquer, dans les conditions prévues, l'article 296 CE.

Sous réserve de son contenu, la France estime donc souhaitable que les dispositions spécifiques qu'il prévoirait puissent s'appliquer à l'ensemble des achats répondant à une finalité de sécurité, de défense ou de souveraineté.

- **Question 8: Exemptions : la définition d'une catégorie de biens qui seraient exclus de manière manifeste de la directive vous semble-t-elle utile/nécessaire ?**

Des exemptions ne sont ni utiles ni nécessaires dans la mesure où la directive ne saurait restreindre les cas d'invocation de l'article 296 CE.

- **Question 9 : Publication : un système centralisé de publication vous semblerait-il approprié ? Si oui, selon quelles modalités ?**

Un système centralisé de publication, permettrait une meilleure transparence et une meilleure accessibilité aux marchés de défense à l'échelle de l'Union européenne. Cela éviterait des distorsions dans l'application des règles de publicité entre les pays. Il convient à cet égard d'assurer l'égalité de traitement entre soumissionnaires.

Il semble qu'une transmission des avis de publicité par voie électronique soit la meilleure solution pour permettre, notamment, une réduction des délais en matière de procédure. La mise en place d'un site électronique central au sein du réseau composé des sites nationaux existants mérite d'être considérée.

A cet égard, la France a mis en place un Portail de l'armement qui permet une publication des avis de publicité sur le site Internet «www.ixarm.com ».

- **Question 10 : Critères de sélection : quels critères vous sembleraient devoir être pris en compte en plus de ceux déjà prévus dans les directives actuelles afin de tenir compte des particularités du secteur de la défense ? la confidentialité, la sécurité des approvisionnement, etc. Et de quelle manière les définir ?**

Les spécificités dérivant de la nature des biens (armement) ou de la finalité de sécurité et de souveraineté de leur acquisition sont essentiellement les suivantes :

- Sécurité d'approvisionnement : l'Etat acheteur doit veiller d'abord à ce que pendant toute la durée d'exécution du contrat (quelquefois très longue), mais aussi souvent pendant la durée d'utilisation des équipements, non seulement le co-contractant aura la capacité technique de satisfaire son besoin, mais aussi que l'interférence politique d'un pays tiers ne mettra pas en péril cette capacité. Cela peut nécessiter de favoriser le développement maîtrisé de technologies jugées stratégiques et le maintien des capacités industrielles indispensables. Il est à noter que cette sécurité d'approvisionnement peut être également nécessaire pour assurer la liberté de la politique d'exportation d'un équipement intégrant des composants importés.

- Secret et confidentialité : pour l'Etat, cette exigence intervient au niveau de l'expression du besoin (afin d'éviter de dévoiler à l'adversaire potentiel une éventuelle faiblesse, ou pour garantir sa supériorité future), et dans la conduite du marché, pour protéger les informations relatives au niveau technique ou technico-opérationnel atteint.

- Caractère impératif de la satisfaction du besoin : dans certains cas, l'Etat acheteur peut vouloir refuser tout risque de défaillance d'un candidat retenu, et donc réaliser une sélection si rigoureuse des soumissionnaires qu'elle paraisse porter atteinte au jeu normal de la concurrence.

- Recherche de la supériorité technologique : idéalement, l'armement acquis doit permettre d'obtenir la supériorité sur un adversaire potentiel ; c'est donc un besoin essentiellement relatif, qui doit tenir compte de l'état de l'art et d'une estimation du progrès technologique, au regard des moyens financiers éventuellement disponibles. Le besoin final ne peut donc souvent résulter que d'un dialogue approfondi avec les fournisseurs potentiels, tout en étant fortement contraint par des préoccupations opérationnelles.

Une directive adaptée pourrait se fixer l'objectif raisonnable de fournir un éventail de procédures en mesure de répondre à des spécificités prises parmi celles figurant sur une liste inspirée des considérations ci-dessus. A cet effet, l'expérience acquise par la mise en œuvre du code de conduite expérimental relatif aux acquisitions d'armement serait précieuse.

En revanche, il paraît irréaliste qu'elle puisse à ce stade déterminer les conditions concrètes, répondant à toutes les situations possibles, autorisant un acheteur à retenir telle ou telle de ces procédures, au-delà de l'obligation de proportionnalité des moyens à l'objectif recherché.

- **Question 11 : Comment considérez-vous devoir être traitée la question des compensations ?**

Les compensations, comme c'est souvent le cas, conduisent à accroître les duplications au sein d'une BITD européenne déjà à l'évidence sur-capacitaire. Elles vont ainsi à l'encontre de l'objectif visé d'améliorer sur un plan global l'efficacité économique de la dépense de défense en Europe et la compétitivité de son industrie, et ne constituent donc pas un mécanisme à encourager.

Cependant, dans de nombreux cas, elles sont présentées comme la moins mauvaise solution disponible pour garantir une certaine sécurité d'approvisionnement nationale, ou pour légitimer une dépense de défense, en terme d'emploi et d'activité économique.

Même s'il s'agit fréquemment d'un leurre, ces motivations sont légitimes et nécessitent que des mécanismes alternatifs y apportant une réponse soient adoptés avant toute mesure contraignante.

Un appui de la Communauté, dans le cadre de sa politique structurelle et de compétitivité industrielle, s'appuyant sur les enseignements du code de conduite évoqué plus haut, pourrait être utile dans cette phase de transition. A cet égard, des mesures propres au soutien des PME mériteraient d'être considérées.

ANNEXE

Propositions d'éléments constitutifs d'un code de conduite

Ce code, qui serait mis en œuvre par l'Agence européenne de défense, est un outil expérimental qui rechercherait les objectifs suivants :

- augmenter globalement l'efficacité de la dépense de défense relative à l'acquisition d'équipement de défense,
- contribuer au renforcement de la BITD européenne et de sa compétitivité.

Pour remplir ces objectifs, il viserait, tout en satisfaisant aux obligations de confidentialité, à :

- inciter au décloisonnement des marchés,
- inciter à promouvoir des solutions européennes,
- se donner des garanties mutuelles de sécurité d'approvisionnement et de libre accès aux technologies critiques,

L'identification des difficultés par l'expérience acquise et la convergence des pratiques des Etats parties prenantes au code devraient permettre d'envisager à terme la définition d'un instrument réglementaire européen. Au nombre des difficultés, l'exclusion des matériels de guerre de l'accord sur les marchés publics dans le cadre de l'OMC permet à chaque Etat de prendre des mesures particulières d'accès à son marché et de commerce de ces matériels. La disparité de ces mesures entraîne des distorsions de concurrence particulièrement au détriment des sociétés européennes, qui se voient par ailleurs restreindre l'accès au marché de certains Etats tiers à l'Union européenne.

Il pourrait être établi selon les principes et modalités suivants :

Principes généraux

1. Le code rassemble tous les Etats membres de l'Agence, hormis ceux qui déclarent ne pas en faire partie (régime opt out),
2. Les Etats signataires conviennent du domaine, expérimental, d'application du code,
3. Les Etats signataires mènent leur processus d'acquisition et leur politique d'exportation des matériels de guerre selon leur droit positif et s'engagent à le faire évoluer à la lumière de l'expérience acquise, dans les limites du droit communautaire et en particulier de l'exception prévue par l'article 296 CE,
4. L'Agence recherche selon des modalités à définir les conditions d'un partenariat avec la Commission pour exploiter les données recueillies dans le cadre de ce code de conduite,
5. Les Etats signataires s'engagent à autoriser la fourniture d'articles et services de défense à tout Etat partie prenante à ce code qui en exprimerait la demande auprès de ses fournisseurs pour répondre aux besoins de ses forces, dans les limites de son domaine d'application.

Principe de liberté d'accès

1. Dans le domaine considéré, les Etats conviennent que tous leurs appels à propositions ouverts à la compétition le sont aux fournisseurs établis dans les Etats signataires, et reconnus comme membres de l'EDEM,
2. La compétition est recherchée tout au long de la chaîne contractuelle, et notamment, en ce qui concerne la sous-traitance, suivant les modalités définies dans un plan d'acquisition qui est partie intégrante du contrat avec le maître d'œuvre,
3. Les Etats signataires s'engagent à mettre à court terme leur droit positif en accord avec ces principes.

Principe de transparence et d'égalité de traitement

1. Les Etats signataires, informent l'Agence du déroulement de leurs procédures d'acquisition. et de leurs résultats,
2. Les Etats signataires facilitent l'accès à leur réglementation nationale et à la compréhension de leurs processus d'acquisition, en particulier par la communication à l'Agence, pour diffusion, de leurs référentiels réglementaires, de la description de leurs procédures de passation des marchés et ainsi que des voies de recours,
3. La sélection doit être menée sur la base de critères d'admissibilité clairement définis et communiqués par avance aux soumissionnaires, en particulier ceux relatifs à la satisfaction de la sécurité d'approvisionnement.

Principe de justification

1. Au delà d'un seuil à définir, les Etats indiquent à l'Agence après passation du marché les raisons ayant présidé au choix de la procédure retenue,
2. Dans les cas particuliers suivants, les Etats s'engagent à justifier auprès de l'Agence leurs choix :
   - d'absence de mise en concurrence,
   - de limitation à certains fournisseurs par suite d'impératifs de sécurité nationale,
   - de recours aux compensations.
3. Le chef de l'Agence peut demander des explications complémentaires sur les justifications fournies par un Etat membre.

Principe d'évaluation

L'Agence publie de manière régulière des statistiques commentées concernant les données recueillies, en nombre et en montants :

- actes passés dans l'EDEM et ceux passés hors EDEM,
- actes ayant fait l'objet d'une publication par rapport au total des acquisitions.

Stellungnahme der Regierung der Bundesrepublik Deutschland zu dem Grünbuch über die Beschaffung von Verteidigungsgütern

Die Regierung der Bundesrepublik Deutschland beehrt sich, zu dem Grünbuch der Europäischen Kommission über die Beschaffung von Verteidigungsgütern wie folgt Stellung zu nehmen:

A. Grundsätzliches

Die Bundesregierung begrüßt die Initiative der Kommission, einen transparenteren, effektiveren und offeneren europäischen Rüstungsmarkt zu schaffen mit dem Ziel der Stärkung der europäischen wehrtechnischen Industrien. Die Bundesregierung teilt die Darstellung im Grünbuch, dass die Beschaffungsmärkte für Verteidigungsgüter gegenwärtig weitgehend national definiert sind, weil der Staat überwiegend der einzige Nachfrager nach Verteidigungsgütern ist. Ebenso teilt die Bundesregierung die Aussage im Grünbuch, dass aufgrund der begrenzten Verteidigungshaushalte vieler Mitgliedsstaaten auf den nationalen Märkten einzeln keine kostendeckenden Produktionsmengen mehr zu erreichen sind. Dies erhöht den Druck auf die wehrtechnischen Unternehmen. Auch die Anwendung der Ausnahmeregelung des Art. 296 EG-Vertrag durch die EU-Mitgliedsstaaten erfolgt zu unterschiedlich. Dies führt auch aus Sicht der Bundesregierung zu Wettbewerbsverzerrungen.

Die Bundesrepublik Deutschland beschafft ihren Rüstungsbedarf sowohl unterhalb als auch oberhalb der maßgeblichen Schwellenwerte grundsätzlich nach den für alle Güter und Dienstleistungen geltenden Regeln des Vergaberechts. Eine Berufung auf Art. 296 EG-Vertrag erfolgt lediglich im Rahmen der sicherheitspolitisch begründeten Ausnahmefälle und stellt auch statistisch eine Ausnahme dar.

In dem Grünbuch schlägt die Kommission zwei Möglichkeiten vor, um das vorgegebene Ziel zu erreichen:

1. die Erarbeitung einer Auslegenden Mitteilung
2. den Erlass einer spezifischen Richtlinie für die Fälle, in denen eine Berufung auf Artikel 296 EG-Vertrag nicht zulässig ist und die die Besonderheiten des Rüstungsmarktes berücksichtigt.

...

Zu diesen beiden Vorschlägen, in deren Verfolgung sich die Initiative der Kommission nach Ansicht der Bundesregierung aber nicht erschöpfen sollte, nimmt die Bundesregierung wie folgt Stellung:

Eine **Auslegende Mitteilung** kann den Mitgliedstaaten die wesentlichen Rechtsgrundlagen einer Anwendung des Art. 296 EG-Vertrag nur erläutern. Sie wird daher an den jetzigen Verhältnissen im Kern nichts ändern. Allerdings könnten die in einer Auslegenden Mitteilung durch die Kommission interpretierten und aufgeführten Fälle oder sogar Urteile des EuGH zu weiteren Fragen und Unsicherheiten bei den Mitgliedstaaten führen, ohne dass sich in einem überschaubaren Zeitraum an dem eigentlichen Anwendungsproblem des Art. 296 EG-Vertrag etwas ändert. Um tatsächlich Klarheit über den Anwendungsbereich des Art. 296 EG-Vertrag zu bekommen, wäre es notwendig, dass sich die Mitgliedstaaten auf eine klare Definition derjenigen Güter einigen, die unter die Ausnahmeregelung fallen, bzw. klare Abgrenzungskriterien formulieren. Insofern würde eine Auslegende Mitteilung nicht nur Probleme lösen, sondern auch neue Probleme aufwerfen.

Bei der vorgeschlagenen **Richtlinie** denkt die Kommission nicht an eine Regelung, die den Bereich des Art. 296 EG-Vertrag abdeckt, sondern vielmehr an ein neues Regelungsinstrument, das speziell auf Verteidigungsaufträge (Liefer-, Dienstleistungs- und Bauaufträge) zugeschnitten ist. Damit wäre nur der Teil (wenn auch kein unbedeutender) des europäischen Rüstungsmarktes betroffen, bei dem die Ausnahme des Art. 296 EG-Vertrag ohnehin nicht greift. Grundsätzlich steht die Bundesregierung dem Erlass sektorspezifischer Richtlinien ablehnend gegenüber. Sie führen langfristig zu einer Zersplitterung des Rechtes des öffentlichen Auftragswesens. Dort wo die Ausnahmeregelung des Art. 296 EG-Vertrags nicht eingreift, sollte aus Sicht der Bundesregierung nach den allgemeinen vergaberechtlichen Bestimmungen beschafft werden. Die in der Bundesrepublik Deutschland bei der Beschaffung von Rüstungsgütern geübte Praxis zeigt, dass dies auch möglich ist. Um eine solche verteidigungsspezifische Richtlinie zu erarbeiten, bedarf es nach Ansicht der Bundesregierung zudem eines Zeitraumes von mehreren Jahren.

Problematisch stellt sich eine Richtlinie insbesondere vor dem Hintergrund der gegenwärtig existierenden unterschiedlichen Marktbedingungen in den Mitgliedstaaten dar.

Voraussetzung für einen durch eine Richtlinie zu regelnden Rüstungsmarkt wäre nach Ansicht der Bundesregierung nämlich, dass zunächst die notwendigen rechtlichen und tatsächlichen Vor-

...

aussetzungen für einen unter gleichen Wettbewerbsbedingungen agierenden europäischen Rüstungsmarkt geschaffen werden. Dies könnte nach Auffassung der Bundesregierung durch ein „Aktionsprogramm für den Rüstungsmarkt“, ähnlich dem „Programm zur Binnenmarktvollendung 1993“, geschehen. Ein solches Aktionsprogramm sollte zum Ziel haben, dass die auf dem europäischen Rüstungsmarkt bestehenden ungleichen Wettbewerbsbedingungen u.a. durch folgende Maßnahmen beseitigt werden:

- Privatisierung der wehrtechnischen Industrien

  Beseitigung der Wettbewerbsverzerrungen zwischen staatlichen/staatlich beeinflussten und privaten wehrtechnischen Unternehmen durch Überführung der Verteidigungsindustrien in den Mitgliedstaaten in private Strukturen und möglichst vollständige Ablösung von staatlichem Einfluss.

- Harmonisierung der Rüstungsexportgenehmigungspraktiken der Mitgliedsstaaten

  Wettbewerbsverzerrungen entstehen auch durch die unterschiedliche Auslegung der Mitgliedsstaaten des EU Code of Conduct von 1988 beim Export von wehrtechnischem Gerät. Daher ist ein einheitliches und verlässliches Vorgehen der Mitgliedsstaaten beim Rüstungsexport anzustreben. Die Überlegungen der LoI-Nationen zu einer genehmigungs-freien Zone für innergemeinschaftlichen Transfer von Rüstungsgütern könnten als hilfreiches Beispiel dienen.

  Für die deutsche wehrtechnische Industrie ist es von Bedeutung – auf der Basis der Politischen Grundsätze der Bundesregierung für den Export von Kriegswaffen und sonstigen Rüstungsgütern – ein gewisses Maß an Planungssicherheit über mögliche Rüstungsexporte zu haben.

- Kontrolle des Verbots unzulässiger Beihilfen im Rüstungsbereich

  In einem gemeinsamen europäischen Rüstungsmarkt haben Beihilfen anwehrtechnische Unternehmen zum Verlustausgleich keinen Platz, da dies zu nicht hinnehmbaren Wettbewerbsvorteilen gegenüber privat organisierten Betrieben führt.

- Keine Kompensationsgeschäfte

  Die Bundesregierung lehnt aus grundsätzlichen Erwägungen Kompensationsgeschäfte ab, weil sie den Wettbewerb erschweren, Beschaffungen verteuern und generell gegen die Grundsätze einer freien Marktwirtschaft verstoßen.

- Einrichtung eines zentralen Bekanntmachungssystems für alle von den Mitgliedsstaaten beabsichtigten Rüstungsvorhaben ab einem bestimmten Schwellenwert
  Der Vorschlag im Grünbuch zur Bekanntmachung der Beschaffungen von Rüstungsgütern in einem vereinheitlichten Mitteilungsblatt wird von der Bundesregierung befürwortet. Mit dem von der WEAG praktizierten ähnlichen Verfahren wurden positive Erfahrungen gemacht.

- Einbeziehung wehrtechnischer Forschung & Entwicklung in die EU-Forschungsförderungsprogramme
  Zur Zeit liegt der Schwerpunkt der EU-Sicherheitsforschung auf Dual-Use-Gütern und im IT-Bereich. Die Bundesregierung würde es in diesem Zusammenhang begrüßen, wenn in den Forschungsförderungsprogrammen der Europäischen Union auch Maßnahmen der wehrtechnischen Forschung und Entwicklung berücksichtigt würden.

Als **Ergebnis** ist festzustellen:

Solange gleiche Teilnahmebedingungen für alle Marktteilnehmer nicht erreicht sind, könnte – trotz der angeführten Bedenken- eine rechtsunverbindliche Auslegende Mitteilung, welche über eine Situationsbeschreibung der derzeitigen Beschaffungspraxis der Mitgliedsstaaten hinausgeht und die Voraussetzungen, unter denen die Berufung auf Art. 296 EG-Vertrag angebracht ist, konkretisiert, eine sinnvolle Maßnahme zur Verfolgung des angestrebten Ziels eines transparenteren und offeneren europäischen Rüstungsmarktes sein. Erst wenn die Ausgangsbedingungen für alle Teilnehmer am europäischen Rüstungsmarkt weitgehend gleich und damit fair sind, könnte darüber nachgedacht werden, ob eine Richtlinie den geeigneten Rechtsrahmen für die Einhaltung der entsprechenden Regeln und Verfahren bilden könnte.

B. Beantwortung der Fragen

1. *Glauben Sie, dass es nützlich/notwendig/ausreichend ist, den derzeitigen Rechtsrahmen gemäß den dargelegten Modalitäten zu erläutern?*

Bis eine Harmonisierung der Teilnahmebedingungen für den europäischen Rüstungsmarkt erreicht ist und alle Marktteilnehmer gleiche Bedingungen vorfinden, kann das Instrument der

Auslegenden Mitteilung einen Kompromiss darstellen. Eine Auslegende Mitteilung sollte allerdings über eine aktuelle Situationsbeschreibung und Darstellung der Rechtsprechung des EuGH hinausgehen und auch die unterschiedliche Handhabung der Auslegung des Art. 296 EG-Vertrag in den Mitgliedsstaaten sowie die daraus resultierenden Schwierigkeiten darstellen.

2. *Gibt es andere Aspekte des einschlägigen Gemeinschaftsrechts, die einer Erläuterung bedürfen?*

Die Bundesregierung sieht derzeit keine solchen anderen Aspekte.

3. *Erscheinen Ihnen Bestimmungen der bestehenden Richtlinien den Besonderheiten der Verteidigungsaufträge angemessen/nicht angemessen? Erläutern Sie, warum.*

Die Bundesregierung ist der Auffassung, dass die bestehenden Richtlinien für die Besonderheiten der Verteidigungsaufträge hinreichenden Raum lassen, da in Fällen nationaler Sicherheitsinteressen der Rückgriff auf die Ausnahmeregelung des Art 296 EG-Vertrag möglich ist.

4. *Wäre eine spezifische Richtlinie sinnvoll/notwendig, um einen europäischen Markt für Verteidigungsgüter zu schaffen und die rüstungsindustrielle und –technologische Basis Europas zu stärken?*

Zum jetzigen Zeitpunkt befürwortet die Bundesregierung keine spezifische Richtlinie. Eine solche Richtlinie könnte überhaupt erst dann erst sinnvoll sein, wenn nach Schaffung gleicher Teilnahmebedingungen für alle Marktteilnehmer am Rüstungsmarkt ein tatsächliches Regelungsbedürfnis bestünde. Nach den Ausführungen der Kommission im Grünbuch ist noch unklar, welchen Anwendungsbereich eine solche Richtlinie überhaupt hätte.
Die Formulierung, sie solle für Verträge gelten, die „rationae materiae in den Anwendungsbereich des Art. 296 EG-Vertrag fallen, für die aber die Inanspruchnahme der Ausnahmeregelung nicht gerechtfertigt ist“, ist zu unbestimmt. Eine besondere Richtlinie für Rüstungsgüter würde allenfalls dann Sinn machen, wenn sie einen einheitlichen, eindeutig bestimmbaren Anwendungsbereich hätte, wofür jedoch zunächst eine Angleichung der Wettbewerbsbedingungen, wie oben unter A dargestellt, erforderlich ist. Die Bundesregierung geht davon aus, dass dies Anstrengungen voraussetzt, die einen erheblichen Zeitraum in Anspruch nehmen werden und deren Erfolg im Moment noch nicht absehbar ist.

. . .

Die Fragen **5. – 10.** stehen im Zusammenhang mit einer spezifischen Richtlinie. Da die Bundesregierung eine solche zur Zeit nicht befürwortet, erübrigt sich die Beantwortung dieser Fragen.

11. *Wie sollte Ihrer Meinung nach die Praxis der Kompensationsgeschäfte behandelt werden?*

Wie bereits dargestellt, lehnt die Bundesregierung aus wettbewerbspolitischen Erwägungen Kompensationsgeschäfte grundsätzlich ab. Sie ist der Auffassung, dass Kompensationsgeschäfte gegen die in den vergaberechtlichen Richtlinien niedergelegten Prinzipien und Regeln verstoßen und daher im Binnenhandel zwischen den Mitgliedsstaaten kein Platz dafür ist.
Die Bundesregierung regt daher an, dass die Kommission solche Geschäfte auf ihre Vereinbarkeit mit dem Vergaberecht hin überprüft und hierzu in der Auslegenden Mitteilung ebenfalls Stellung nimmt.

Executive Summary
# of the Greek contribution to the Commission
Green Paper on Defence Procurement

Hellas supports in principle the European Commission's initiative to promote actions with the scope to increase the transparency and the economic efficiency of this specific sector of defence procurements. Of course, the need for supplement the EU's legal framework with a special instrument for defence procurement, the principle of fair return on investment ("juste retour"), the state shareholding to the industrial restructuring, the re-interpretation of the Art.296 of the EC Treaty and the appliance of the member-states to its derogations, are items that should further examined, considering that any initiative taken by the Commission or the EDA in this particular field, should be without prejudice to the competency of member-states upon defence acquisitions and that will not affect the member-state's national security, giving the right to fluctuate in exceptional cases from the Green Paper orientations.

As the Minister of National Defence of the Hellenic Republic pointed out, in his letter (dated 11 Jan 05) concerning the creation of the European Defence Equipment Market, Hellas is favoring a holistic approach, which will offer the necessary political, legal and technical guarantees, and contribute to member-states efforts to coordinate the procedures for awarding defence contracts, under a clear, trustworthy and transparent way, while respecting their national specificities.

Hellas believes that the explanation of the existing legal framework, through an interpretative communication, might be useful but also insufficient. Moreover, it hides the risk to create uncertainties/confusions between the supply and the demand side in a very sensitive field as the defence procurements are. Hellas considers that the rules of existing directives are in general suited to the specific characteristics of defence contracts, taking into account that the specificities and sovereignty needs-related to the national defence and security-are preserved and the balance of these prerogatives-set by the European or Community treaties-is not affected. From the Hellenic point of view, a new specific directive could only apply to the smaller part of EDEM, where exemptions of art.296 do not apply. We should also keep in mind that the provisions of this specific article are still remaining in the new Constitution of the EU.

Moreover, we are not of the opinion that, at this stage, a new specific directive could strengthen the industrial and technological base of European Defence. We mention that for the small-medium countries, the consolidation of the defence industries is a paramount priority, before they deal with the challenge of the international competition. In this environment, we should identify the role of Small Medium Enterprises (SMEs) with an essential contribution to the manufacture of dual-use and military products for defence and security users, and helping them by means and measures to face successfully the vulnerabilities and the competition.

Following the above and recognizing that the drafting and the endorsement of a new specific directive by the Commission and Member-States needs time, we conclude that this exercise has to considered in the future, based mainly in the Member-States political will, while pending consensus among them on a number of sensitive issues responding to the defence specificities. Although Hellas is not in favor of an interpretative communication and/or a specific directive at this stage, it could participate to the discussions for a "general definition for the field of application and for the list of the need of military goods that need to be excluded".

Finally as the offset practices as concern, we would like to reiterate our position that Hellas is in favor of a possible reorientation of offsets economic logic towards a collaborative industrial approach, which would respond to a number of important challenges, such as:

-Improvement of the Security of Supply (SoS) through a systematization of the existing interdependencies. Security of Supply cannot only be solved through commercial arrangements; it also requires a strong political cornerstone.

-Identification of role of Small-Medium Enterprises and their armor by vulnerabilities of the new environment, which will increase competitiveness into the European defence industrial sector.

PERMANENT REPRESENTATION OF THE REPUBLIC OF HUNGARY
TO THE EUROPEAN UNION

REPRESENTATIVE TO THE POLITICAL AND SECURITY COMMITTEE

DESTINATION MARKT/D/2
ADO: 1839.C
Action NSM + Scan
DATE: 27. 01. 2005
Info
Visa

European Commission – DG Internal Market
Consultation "Green Paper on Defence Public Procurement"

C100 01/100
1049. Bruxelles

Bruxelles, le 26 janvier 2005

Monsieur, Madame,

Nous avons l'honneur de vous envoyer la réponse de la République de Hongrie concernante les questions formulées dans le « Green Book on Defence Procurement » .

Veuillez agréer, Monsieur, Madame, l'expression de mes sentiments les plus distingués.

Banai

Károly Banai
Ambassadeur COPS

Annexe: réponse

Answers of the Republic of Hungary to the questions formulated in the "Green Book on Defence Procurement" of the European Commission

1. It is necessary to interpret the existing regulation (Article 296 of the Treaty, Directive 2004/18/EC) in the field of defence procurement, with special regard to defining the concept of "essential national security interest".

2. It is necessary to clarify the relation of the defence procurement regulation of the EU to that of NATO.

3-4-5. The existing Community public procurement directives have no specific rules pertaining to defence procurement, only general rules that apply for defence procurement as well, in case it does not come under the scope of exceptions defined in Article 296. The specific features of defence procurement are regulated by nations. These rules are to be observed in the sphere of defence procurement for national objectives.

We consider it important to introduce a few, professionally sound, specific rules in the field of defence procurement, which would allow for more flexible procedures. This could take the form of a directive on defence procurement, but also the modification of existing directives. Public procurement done by the European Defence Agency will be regulated by rules made by the Steering Board, without prejudice to relevant Community rules. Thus Community rules will apply to EDA procurement.

6. If essential national security interests exclude the application of the negotiation procedure with prior publication, the exception rule says that the national regulation is to be applied, not the Community regulation. These cases of the present regulation fall under points (1) e)-k) of para 56 of the Government Decree 228/2004 (VII. 30.). Nationally a yearly average of 30-35 % of the procurements falling under this Government Decree are made using the negotiation procedure with prior publication. For the publication of these procurement tenders the national regulation, in line with the Community regulation, should be used.

7-8. The field where the regulation for defence procurement applies should be defined both by a general definition and a list. The 1958 list about the application of Article 296 of the Treaty, mentioned by the Green Paper, should serve as a starting point. It is also necessary to define those products for which the present regulation of procurement cannot be applied.

9. A unified system has to be used for publication, in order to satisfy the requirements of transparency and publicity. The question is whether the publication of defence procurement tenders can also be made through the existing central publication system of the EU.

We continue to think it is important to emphasize that in certain cases the essential security interests of the state can justify using procurement procedures that are not public.

10. The Treaty, the Directive mentioned and our national regulation all contain the Community principle of national treatment. We do not consider it a limitation of competition that the reliability of the sub-contractor and having a security clearance are among the conditions for

participation, as this can be justified by the essential national security interests of the state. Defining the conditions of participation should remain a national authority.

11. Some forms of offset practices, which generally characterize the practice of defence procurements (as covert state subvention) probably distort the market. It might be considered to analyse these phenomena in detail, and to scrutinize the possibilities of regulating it at the Community level.

Rappresentanza Permanente d'Italia
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Rappresentanza Permanente d'Italia
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Il Rappresentante Permanente Aggiunto

Prot. 3259

Bruxelles, 15 marzo 2005

Oggetto: "Position paper" italiano sull'industria europea della difesa-Risposta al Libro Verde della Commissione sugli appalti per la difesa.

Signor Direttore Generale,

ho il piacere di trasmetterLe l'allegato contributo italiano in materia di Industria Europea della Difesa.

Con i miei migliori saluti,

Alessandro Pignatti
(Alessandro Pignatti)

Signor Alexander SHAUB
Direttore Generale
Direzione Mercato Interno
Commissione Europea
Bruxelles

IT Considerations on the Green PAPER on Defence Procurement

1. Introduction

The progressive building of a more effective and comprehensive ESDP, shows inter alia the need to consolidating a long term convergence on military doctrines, capabilities (leading to common requirements, projects and eventually programs), planning among the MS.
One of the useful tools towards the achievement of this ultimate and desired goal relates to the on-going progress focusing on the most appropriate ways and conditions to create a more competitive EDEM, to better operate in the international framework, taking into account its specificities, national security interests, safeguarding and reinforcing the European defence industries.
The goal of a more transparent and open European defence market among Member States, aimed at increasing economic efficiency in the industrial sector as well as ensuring a better allocation of the limited budget resources available in the EU, has to be seen in the frame of the process of political, economical, financial and legal integration presently ongoing within the EU.

The defence industrial sector is reacting to this new scenario mainly by a series of mergers and acquisitions in order to better face an increasing competition. This process was monitored, and in some cases promoted, by National Governments.

According to the Green Paper, the next step of this evolutionary process appears to fall within the responsibility of the Governments, consisting specifically in a revision of the procurement approach that would guarantee moving from many separate national defence markets towards the integration into a single European Defence market.

The document under review, prepared by the DG Internal Market, provides an analysis of the current scenario of the EU defence market as well as some possible options for the future, to be agreed by MS.

2. Analysis of the GREEN PAPER scenario

The scenario outlined in the paper is characterised by the following concepts:

- Member States' combined MoD expenditure constitutes a large part of Member States public spending;
- such expenditure remains split into national markets;
- the shrinking size of national markets is no longer sufficient to allow for production volumes that can offset the high costs of R, T&D;
- this situation impacts negatively even the civilian sector, given the growing dual use potential of technologies;
- the various initiatives undertaken to this day have had a various range of successes.

With regard to the above the following comments are provided:

- as far as the demand of military goods is concerned, the progressive convergence of the national defence markets is directly tied to the progressive harmonization of the foreign policies of the MS. Such different policies determine a situation in which each member state has different requirements in terms of military forces and systems. Consequently the demand of military goods within the EU is fragmented by national needs and requirements of systems which, as similar as they might be, may still have unique technical specifications tailored for the specific national requirement. In order to accompany the process aimed at developing a better level of cooperation some EU MS have created the inter-governmental organization OCCAR and subsequently the Council established the European Defence Agency. The role of these bodies is to support the process of harmonization of the defence needs and requirements of the Member States in order to reach as much as possible a unified demand of defence goods within the EU. This is going to be a lengthy process and it is too early to reach a conclusions on their success;
- besides the implications of NATO membership for a large number of them, many the EU Member States, in pursuing their foreign policies, rely to a different degree on national industrial basis, not dependent on other nations, able to guarantee the supply of defence goods, even in times of crisis. The process of mergers and acquisitions in the defence industrial sector, still under way at different pace among sectors and the EU Member States, creates an unbalanced situation related to

defence industries that may encourage dominant positions which would be detrimental to the creation of an open market.

In order to appropriately deal with such an issue, some EU Member States have agreed, under the LoI, to a set of measures, including the principle of security of supply, consisting in a commitment to support the performance of contracts by the respective industries with respect the other signatories. The extension of the application of these principles is instrumental to a successful EDEM.

- the statement that "*although Member States combined military expenditure is considerable, it remains split into national markets*" does not seem to recognise that all procurement for civil use goods falls under the normal EU directives procurement rules and, on such basis, it is accomplished by open competition and not limited to national markets. Furthermore the statement does not take into account the considerable amount and volume of the existing cooperative initiatives among EU MS, which increasingly catalyze public investments and priorities, with positive effects on industrial consolidation and integration, in a more coherent playing field.
- an effective reform of the defence procurement system would require also a harmonization of the EU rules and regulations governing issues such as the transit of defence materials within the Union, the technical regulations, security of supply ed the EU Code of Conduct for military exports.

3. Defining action at EU level

The document suggests two alternatives as a possible means towards an evolution of the present situation, and more specifically:

- an interpretative communication from the Commission, giving an explanation of the principles for the interpretation of Article 296 EC, to distinguish between contracts covered by the exemption and those which are not:
- a new directive, establishing a special set of rules for the military market.

With regard to the above, we provide the following comments:

- any development of the Green Paper should take into account that the defense industry has a specific significance for Nations, relating to the control of sensible technologies, safeguarding the manufacturing capacities of systems, since they represent essential elements to satisfy National Security needs.

- within EU there is a inhomogeneous and unbalanced situation relating to the defense industries, partly due to historical reasons and to different allocation of national resources. This situation may determine the creation of dominant positions which, at the time of the opening of the market, would be an obstacle to competition and actually hamper the creation of an EDEM.
- the interpretative communication is not able to solve an issue which may seem of a procurement/contractual nature but in truth is of a political nature. It would increase conflicts between the national procurement agencies, industry and the European Commission while bringing no positive effect on the opening of the markets;
- the Directive option which, in compliance with EU principles, cannot rule on the area covered by article 296, could be a viable solution but it should be harmonized with EDA's intergovernmental activities in the field of EDEM;
- OCCAR rules and regulations should be appropriately taken into account for further work in this domain;
- programs managed by NATO Agencies, should not fall under the EC Directive, mainly because the commitment to NATO by the NATO Member Countries is autonomous from the EU procurement regulations, which are obviously not applicable to non-EU NATO Members. Furthermore NATO Programs foresee an R, T&D phase for which further considerations apply;
- a special regime should also be foreseen for R, T&D contracts. These contracts are usually awarded to companies possessing the required know-how and expertise in a specific field with the aim of furthering such expertise towards the development of a new process/item/tool to be used for further development or for production. In these cases, in order to accomplish successfully the scope of the contract, the contractor has to possess a given level of technology, determined by the bidder, which is often of a proprietary nature. In such a case a procurement approach involving competition does not appear compatible with the purpose of R, T&D;
- Security of Supply, Security of Information and Urgency are key points in defence procurement and must be completely covered by any new regulation. Specifically the concept of urgency can be linked to situations of crisis in order to allow specific procedures for such occurrences;

- one more specificity of the Defence market that has to be considered in drafting the relevant rules and regulations is the concept of Standardization/Commonality of the logistic life cycle. This means that since each system has its own logistic support, the fielding of more than one system for similar requirements doubles the logistic support in terms of spares, training, personnel and, of course, cost. Any new regulation should allow procurement of equipment/systems, already fielded, for similar requirements, even relative to different branches of the Administration, without competition;
- the various proposals highlighted in the document concerning the procedures to be used for procurement could all be considered, taking into consideration the progress of the ESDP process with regard to the establishment of a common defence policy;
- the so called "Homeland Security" systems' and materials' specificity should also be recognized. when appropriate, together with the defence once, in drafting a procurement directive;
- although the offset practices are still a common feature to be taken into account, they should evolve without having a negative impact on the opening of the defence market. Therefore a common reflection must be developed in the appropriate fora, including the drafting of a directive as well as in the transatlantic dialogue.

Questions

1. Do you think it would be useful/necessary/sufficient to explain the existing legal framework in the way presented?

   With regard to the explanation of the existing legal framework, the interpretative communication is not able to solve an issue which may seem of a procurement/contractual nature but in truth is of a political nature. It would increase conflicts between the national procurement agencies, industry and the European Commission while bringing no positive effect on the opening of the markets.

   As stated in the introduction, a reference to the ESDP process is also useful with regard to the establishment of a common defence policy.

2. Are there other aspects of the Community system in question that should be clarified?

   As stated in the introduction, all procurement for civil use goods falls under the normal EU directives procurement rules and, on such basis, it is accomplished by open competition and not limited to national markets. Moreover an effective reform of the defence procurement system would require also a harmonization of the EU rules and regulations governing issues such as the transit of defence materials within the European Union, the technical regulations, security of supply and the EU Code of Conduct for military exports.

3. Do you consider the rules of existing directives suited/unsuited to the specific characteristics of defence contracts? Please give your reasons.

   The current Directives regulating the public sector do not suit the specificities and requirements of the defence market. In fact the exceptions in the Directives pertaining to the public procurement do not cover all the foreseeable cases in defence/dual use procurement that may require exceptions to the standard open competition procedures.

4. Would a specific directive be a useful/necessary instrument for creating a European defence equipment market and strengthening the industrial and technological base of European defence?

   The Directive option which, in compliance with EU principles, cannot rule on the field of application of article 296, could be a viable solution to be harmonized with EDA's intergovernmental activities in the EDEM.

   The implementation of the directive has to be performed avoiding that, within EU, a inhomogeneous and unbalanced situation related to the defense industries could encourage dominant industrial positions which, marketing a more open market, would be an obstacle to competition and actually hamper the creation of an EDEM.

5. What is your opinion regarding the use of a possible directive for purchases by other bodies, such as the European Defence Agency?

   The principles of a possible "non art. 296 area" directive could be applied to programs managed by the EDA and other bodies.

6. Procedures: do you believe the negotiated procedure with prior publication to be suitable for the specific needs of defence procurement? In what situation should use of the negotiated procedure without publication be allowed?

   The negotiated procedure with prior publication is suitable for the specific needs of defence procurement together with a set of exceptions allowing negotiation without publication in predetermined cases.

7. Scope: what would be the most appropriate way of defining the field of application? A general definition? If so, what? A new list? If so, what? A combination of a definition and a list?

   In the "non art. 296 area", a specific list and a definition would be the most appropriate approach.

8. Exemptions: do you think it would be useful/necessary to define a category of products that would be excluded categorically from the directive?

   A new directive should recognize the specificity of goods and services, characterized by a particular national security connotation (e.g. homeland security). and not covered by art. 296.

9. Publication: do you think a centralized publication system would be appropriate, if so, how should it function?

   Yes, a centralized publication system is necessary.

10. Selection criteria: what criteria do you think should be taken into account in addition to those already laid down in existing directives to take account of the specific features of the defence sector? Confidentiality, security of supply, etc.? And how should they be defined?

    Confidentiality and Security of Supply are relevant as selection criteria. With regard to the reform of the procurement approach, other aspects require special attention. As stated in the introduction, programs managed by NATO Agencies should also not fall under the EC Directive, mainly because the commitment to NATO by the NATO Member Countries is autonomous from the EU procurement regulations, which are obviously not applicable to non-EU NATO Members. Furthermore a special regime should also be foreseen for R, T&D contracts. In these cases the contractor has to possess a given level of technology, determined by the bidder, which is often of a proprietary nature. In such a case a procurement approach involving competition does not appear compatible with the purpose of R, T&D;

    Security of Supply, Security of Information and Urgency are key points in defence procurement and they have to be completely covered by any new regulation.

One more peculiarity of the defence market that has to be considered in drafting the relevant rules and regulations is the concept of the Standardization/Commonality for the Logistic life cycle. Since each system has its own logistic support, the fielding of different systems for similar requirements doubles the cost. The new directive should allow procurement of systems, already fielded, for similar requirements, even relative to different governmental branches, forgoing competition.

11.How do you think offset practices should be handled?

Although the offset practices are still a common feature to be taken into account, they should evolve without having a negative impact on the opening of the defence market. Therefore a common reflection must be developed in the appropriate fora, including the drafting of a directive as well as in the transatlantic dialogue.

Questions

1. Do you think it would be useful/necessary/sufficient to explain the existing legal framework in the way presented?

   In our opinion it would be ***sufficient*** *to explain the existing legal framework through an interpretative communication of the Commission*.

2. Are there other aspects of the Community system in question that should be clarified?

   It is important that communication accepted by Commission would allow to make distinctions between the contracts covered by the exemption and those which are not. The best way would be to distinguish procurements with the applied exeptions according the detailed list.

3. Do you consider the rules of existing directives suited/unsuited to the specific characteristics of defence contracts? Please give your reasons.

   The existing directives are unsuited to the specific characteristics of defence contracts, related to the security interests.

4. Would a specific directive be a useful/necessary instrument for creating a European defence equipment market and strengthening the industrial and technological base of European defence?

   It is difficult to decide in advance if specific directive would be a useful instrument for creating a European defence equipment market and strengthening the industrial and technological base. In any case, it is not unique. Well prepared interpretative communication could reach the same goals.

5. What is your opinion regarding the use of a possible directive for purchases by other bodies, such as the European Defence Agency?

   If specific directive would be accepted, it should be applied to such organizations like European defence agency as well.

6. Procedures: do you believe the negotiated procedure with prior publication to be suitable for the specific needs of defence procurement? In what situations should use of the negotiated procedure without publication be allowed?

Negotiated procedure with prior publication is suitable for the specific needs of defence procurement. Only in some cases (e.g. in procurement of standard goods) practice of costs questioning could be used as well.

Procurement procedures without prior publication could be used in the following cases:

a) Low value procurements;
b) When the procured goods can be supplied only by specific supplier and without other alternative;
c) When procurement must be accomplished very promptly due to the unforeseen circumstances, which by no means depend on the purchasing organization;
d) When purchasing organization according to the former procurement contract from the supplier had bought goods and determined that it is purposeful to by additional goods from the same supplier, if the former procurements were effective, the prices and other conditions will not change, alternative procurement is unacceptable;
e) When used military equipment is procured;
f) When procurements are not related with classified information

7. Scope: what would be the most appropriate way of defining the field of application? A general definition? If so, what? A new list? If so, what? A combination of a definition and a list?

Combined use of definition and list would be the most appropriate way of defining the field of application.

8. Exemptions: do you think it would be useful/necessary to define a category of products that would be excluded categorically from the directive?

Yes, that would be purposeful.

9. Publication: do you think a centralised publication system would be appropriate, and, if so, how should it function?

Yes, centralized publication system would be appropriate. It could be implemented the same way as publication system about public procurements.

10. Selection criteria: what criteria do you think should be taken into account in addition to those already laid down in existing directives to take account of the specific features of the defence sector? Confidentiality, security of supply, etc.? And how should they be defined?

Confidentiality and security could be the foreseen section criteria.

11. How do you think offset practices should be handled?

Offset practices should be handled to the national law regulation field.

COM (2004)608 DEF.

GROENBOEK

OVERHEIDSOPDRACHTEN OP DEFENSIEGEBIED

(REACTIE NEDERLAND)

DEEL I: ALGEMEEN

1. De Nederlandse overheid hecht veel belang aan de geleidelijke totstandkoming van een transparante en voor alle lidstaten toegankelijke Europese markt voor defensiematerieel en is, mede gezien vanuit de positie van de Nederlandse defensiegerelateerde industrie, voorstander van verdere liberalisering van de Europese markt voor defensiegoederen. De komst van het Groenboek wordt door de Nederlandse overheid dan ook verwelkomd en de initiatieven die de Commissie met het Groenboek over overheidsopdrachten op defensiegebied tracht te bereiken worden ondersteund.

2. De Nederlandse overheid onderschrijft de analyse van de Commissie over de redenen die ten grondslag liggen aan het op nationaal niveau afschermen van defensiemarkten en is het met de Commissie eens dat voor het tot stand brengen van een Europese markt voor defensiematerieel aanvullende initiatieven moeten worden genomen. De defensiemarkt onderscheidt zich immers van andere markten doordat veel defensie-industrieën in beginsel de eigen nationale overheid als enige klant hebben. Voorts moeten bij de uitvoering van defensieopdrachten vaak bijzondere veiligheidsmaatregelen in acht worden genomen en hebben militaire projecten vaak een vertrouwelijk karakter. Defensieopdrachten worden bovendien gekenmerkt door lange looptijden en bijzondere selectiecriteria die onder meer samenhangen met zekerheid van bevoorrading (*'security of supply'*).

3. Met het Groenboek heeft de Commissie een tweetal voorstellen aangedragen, namelijk het verduidelijken van de huidige communautaire wet- en regelgeving door middel van een interpretatieve mededeling en het uitwerken van een specifieke op de kenmerken van de defensiesector toegesneden richtlijn. De Nederlandse overheid onderkent dat zowel een interpretatieve mededeling als - voor de langere termijn - een specifieke richtlijn een bijdrage kunnen leveren aan de geleidelijke totstandkoming van een transparante en voor alle lidstaten toegankelijke Europese markt voor defensiematerieel. In deze reactie zal hierop verder worden ingegaan.

4. De Nederlandse overheid wil alvast wel benadrukken dat met de voorstellen van de Commissie alleen niet een transparante en open Europese defensiemarkt zal worden bereikt. Ook

voor andere verstorende effecten op de marktwerking, zoals onder meer het onderscheid tussen staats- en private ondernemingen, marktafschermende maatregelen zoals nationale preferentiestelling, compensatie, staatssteun en wapenexportbeleid, zal de Commissie met aanvullende voorstellen moeten komen. Wil een Europese defensiemarkt op termijn daadwerkelijk tot stand komen dan dient bij de lidstaten de bereidheid te bestaan ook deze effecten op politiek niveau te bespreken en vervolgens de daaruit voortvloeiende consequenties te aanvaarden. Zo niet, dan zullen de uitkomsten van de discussie die de Commissie met het Groenboek tracht te bereiken naar verwachting niet verder reiken dan de beperkte resultaten die na jarenlang overleg op dat gebied binnen onder meer WEAG, Occar en LOI zijn bereikt.

5. Daarnaast zal ook de Europese defensie-industrie tot verdere herstructurering moeten overgaan. In zijn geheel is deze industrie nog steeds te nationaal georiënteerd, die afgezet tegen een Europese markt nog te sterk is gefragmenteerd en waarin duplicaties optreden op het gebied van ontwerp-, ontwikkel- en productiecapaciteiten. Hierdoor kan moeilijk in concurrentie worden getreden met onder andere de Verenigde Staten en landen in het verre oosten. Op dit moment is in Europa slechts sprake van een verzameling van nationale defensie technologische industriële bases (DTIB) en is allerminst duidelijk hoe deze nationale DTIB's in een gemeenschappelijke Europese DTIB moeten integreren.

6. Hoewel het primaat voor de totstandkoming van een gezonde Europese DTIB bij de industrie zelf ligt, zullen de grote Europese landen, waarin het merendeel van de Europese systeembouwers van de defensie-industrie is gevestigd, bij het hervormingsproces een doorslaggevende rol spelen. Voor de kleinere Europese landen is van belang dat de positie van bedrijven, die zich technologisch onderscheiden met sub-systemen en componenten en behorend tot het midden- en kleinbedrijf[1] (MKB), hierin zal worden zeker gesteld. Tevens is aandacht nodig voor een concurrerende inschakeling van deze bedrijven in de 'supply chain'. Dit kan onder meer worden bereikt als leveranciers van hoofdwapensystemen voor de gehele logistieke keten opdrachten in concurrentie aanbesteden bij defensie gerelateerde industrieën.

7. Gezien de omvang en samenstelling van de Nederlandse defensie-industrie zal Nederland slechts een beperkte rol spelen in de ontwikkelingen die zich op Europees niveau voordoen. Nederland kent, met uitzondering van de marinebouw, geen leveranciers van hoofdwapensystemen en slechts een beperkt aantal bedrijven dat in staat is zelf kleinere wapensystemen te ontwikkelen. Waarschijnlijk zullen de meeste defensie gerelateerde bedrijven een rol spelen als gespecialiseerde toeleverancier bij grote multinationale ondernemingen. Het beleid van de Nederlandse overheid voor de nationale defensie gerelateerde industrie heeft dan ook tot doel een Europese DTIB tot stand te brengen, waarbij ontwikkelings - en productieopdrachten worden gegund via het marktmechanisme dat wordt gekenmerkt door een *"level playing field".* Dat betekent echter niet dat hierdoor alleen maar sprake zal zijn van *"buy European"*. Behoud van materieelverwervingsvrijheid is voor Nederland een essentiële randvoorwaarde van een *"level playing field"*. Ook zullen transatlantische

[1] "Small and medium enterprises" (SME's)

samenwerkingsverbanden en leveringsrelaties nodig zijn voor de ontwikkeling van het modernste defensiematerieel.

8. Een competitieve omgeving is noodzakelijk voor het verbeteren van de kwaliteit van de Europese defensie-industrie en leidt tot een open en transparante defensiemarkt. Militaire aanschaffingen geschieden op onvolmaakte markten waar de mechanismen van de vrije markt niet of slechts gedeeltelijk werken. Een belangrijke oorzaak hiervoor is terug te vinden in de wijze hoe lidstaten met artikel 296 EG-verdrag omgaan. Vele lidstaten beschermen de nationale defensie-industrie door grensoverschrijdende concurrentie (*'cross-border competition'*) te limiteren met een beroep op dat artikel.

9. Het Groenboek stelt artikel 296 EG-verdrag niet inhoudelijk ter discussie. Pogingen hiertoe in het verleden hebben (nog) niet tot resultaten geleid. Volgens de Nederlandse overheid zijn het in veel gevallen vooral nationaal economische belangen die hieraan ten grondslag liggen. Dit kan er toe leiden dat lidstaten defensie-opdrachten uitsluitend of voornamelijk plaatsen bij de eigen nationale industrie. Daarnaast is van invloed het blijven bevorderen van de betrokkenheid van de nationale industrieën bij opdrachten die bij buitenlandse leveranciers worden geplaatst door middel van het compensatie-instrument. Voor vele bedrijven is compensatie een noodzakelijk instrument om op de internationale markt orders te kunnen verwerven. Buitenlandse leveranciers worden verplicht gesteld tegenorders te plaatsen bij het nationale bedrijfsleven. Compensatie is niet toegestaan bij aanschaffingen die volgens de Europese aanbestedingsrichtlijnen worden aanbesteed, maar wel als artikel 296 EG-verdrag kan worden ingeroepen. Lidstaten worden hierdoor in de verleiding gebracht aanschaffingen eerder onder artikel 296 EG-verdrag te brengen. Hoe om te gaan met de nationale preferentiestelling en het compensatie-instrument zal dan ook prominenter op de politieke agenda van de lidstaten moeten worden geplaatst.

10. Het eventueel wegvallen van het compensatie-instrument zal tot gevolg hebben dat voor vele bedrijven defensieorders deels of volledig zullen verdwijnen. Uit signalen van de markt kan echter worden opgemaakt dat voor een ander deel van het bedrijfsleven, en mede afhankelijk van het soort project, een verschuiving van compensatie naar participatie een verbetering zou zijn. Bij participatie worden bedrijven vanaf de ontwikkelingsfase bij het project betrokken.

11. De Nederlandse overheid is van mening dat voor het openen van de Europese defensiemarkt voor industrieën uit zowel de Europese lidstaten als daarbuiten er sprake moet zijn van een Europees en - indien mogelijk - een wereldwijd *"level playing field"*. Nederland is gebaat bij een zo ongehinderd mogelijke toegang tot andere markten (waaronder die van de Verenigde Staten). In dit licht streeft de Nederlandse overheid in Europees verband naar open concurrentie zowel bij aanbestedingen als in de 'supply chain'. Dit zal vervolgens leiden tot het overbodig worden en het afschaffen van het compensatiebeleid bij militaire aanschaffingen.

12. Volgens de Nederlandse overheid bestaat er bij vele lidstaten, waaronder Nederland, de behoefte aan een meer uniforme en consequente toepassing van artikel 296 EG-verdrag. Mede op grond van bestaande analyses en op basis van de uitspraken van het Europese Hof van Justitie

zou de Commissie met een interpretatieve mededeling de randvoorwaarden kunnen aangeven voor een beroep op artikel 296 EG-verdrag. Ook zou hierin een uitwerking van het nationale veiligheidsbelang kunnen worden opgenomen. De aanwezigheid van een nationaal veiligheidsbelang is immers één van de criteria voor een beroep op artikel 296 EG-verdrag. Zolang de Commissie niet schriftelijk vastlegt wat onder dergelijke veiligheidsoverwegingen moet worden verstaan, blijft de discrepantie in interpretatie van lidstaten van deze veiligheidsoverwegingen bestaan. Hierdoor kunnen zich dus ook in de toekomst situaties voordoen dat lidstaten economische belangen aanmerken als bescherming van de wezenlijke belangen van de nationale veiligheid. Het creëren van een Europese defensiemarkt houdt daarom ook het harmoniseren van essentiële veiligheidsoverwegingen van de lidstaten in.

13. Vooral ook de nieuwe lidstaten hebben herhaaldelijk aangegeven behoefte te hebben aan duidelijkheid over artikel 296 EG-verdrag. Hoewel een interpretatieve mededeling niet juridisch bindend is en ook andere aspecten niet inhoudelijk zal kunnen veranderen, zoals bijvoorbeeld de bij artikel 296 EG-verdrag behorende lijst uit 1958, zal volgens de Nederlandse overheid hieruit op termijn toch een zekere gedragslijn en toetsingskader kunnen worden afgeleid. Naar verwachting zal het aantal aanbestedingen volgens de reguliere Europese aanbestedingsrichtlijnen hierdoor kunnen toenemen.

14. Evenals in de ‘oude’ aanbestedingsrichtlijnen blijft in de nieuwe richtlijn 2004/18/EG[2] de hoofdregel dat ook overheidsopdrachten op defensiegebied aanbestedingsplichtig zijn. Defensieopdrachten die onder artikel 296 EG-verdrag vallen blijven in theorie de uitzondering op de regel. In de Nederlandse Defensienota van 2000 is onder meer vermeld dat het ministerie van Defensie een strikte toepassing van de Europese aanbestedingsregels voorstaat. Dit betekent dat civiele- en ‘dual-use’- goederen met in achtneming van deze regelgeving worden aanbesteed. Van ‘dual-use’ wordt gesproken indien het goederen en technologie betreffen die in beginsel voor de civiele markt zijn ontworpen, maar die ook kunnen worden gebruikt voor militaire applicaties, dan wel voor de productie van wapens. Civiele aanschaffingen betreffen producten en diensten die verkrijgbaar zijn op open, transparante markten waar de principes van de vrije markt gelden.

15. Uit het Groenboek kan worden opgemaakt dat de Commissie zelf twijfelt of de reguliere aanbestedingsrichtlijnen in voldoende mate tegemoet komen aan de specifieke kenmerken van de defensiemarkt. Aan de lidstaten wordt immers de vraag voorgelegd of er behoefte bestaat aan een nieuwe aanbestedingsrichtlijn die meer met deze kenmerken rekening zal houden. Naast flexibelere procedures en bijzondere selectiecriteria zouden onderwerpen zoals zekerheid van bevoorrading *(‘security of supply’)*, grensoverschrijdende overdrachten en exporten *(‘intra-community transfers and exports’)* etc. hierin kunnen worden geadresseerd. Vanwege de bijzondere situatie bij de ontwikkeling en productie van defensie-materieel, namelijk het beperkte aantal producten en afnemers, zijn voorts specifieke bepalingen nodig voor concurrentiestelling bij toeleveranciers.

[2] Artikel 10 van de richtlijn 2004/18/EG (PB 31 maart 2004) betreffende de coördinatie van de procedures voor het plaatsen van overheidsopdrachten voor werken, leveringen diensten.

16. De Nederlandse overheid staat niet afwijzend tegen een dergelijke richtlijn, waarin tevens minder stringente procedures worden voorgesteld, maar is niet overtuigd dat alle verstorende effecten op de marktwerking bij defensieopdrachten met alleen een specifieke defensierichtlijn kunnen worden weggenomen. Met een defensierichtlijn zal meer rekening kunnen worden gehouden met de specifieke kenmerken van de defensiemarkt, maar hiervoor is dan wel vereist dat consensus wordt bereikt tussen alle lidstaten over een aantal politiek gevoelige onderwerpen, zoals *'security of supply'*, compensatie en open concurrentie in de *'supply chain'*.

17. Het proces dat uiteindelijk zal moeten leiden tot een aanbestedingsrichtlijn voor defensieopdrachten zou mogelijk als aanjager kunnen gaan dienen voor het tussen de lidstaten bespreekbaar maken van alle overige verstorende effecten op het tot stand brengen van een Europese defensiemarkt.

DEEL II: BEANTWOORDING VRAGEN

Vraag 1.
Zou een toelichting op de bestaande wet- en regelgeving in de voorgestelde vorm volgens u nuttig/noodzakelijk/afdoende zijn?

Met een interpretatieve mededeling over de bestaande rechtsregels, waaronder artikel 296 EG-verdrag kan een uniforme en consequente toepassing van deze regels worden nagestreefd. Op grond van bestaande analyses en op basis van de uitspraken van het Europese Hof van Justitie kunnen hiermee voor de lidstaten de randvoorwaarden worden aangegeven voor het inroepen van artikel 296 EG-verdrag. Conclusie: nuttig maar niet afdoende.

Gezien het specifieke karakter van defensieopdrachten is wel van belang dat de lidstaten bij het opstellen van deze mededeling intensief worden betrokken. Nederland is bereid hieraan een positieve bijdrage te leveren.

Vraag 2.
Zijn er andere aspecten in de desbetreffende regelingen van de Gemeenschap die volgens u nader moeten worden toegelicht?

De mogelijkheden en onmogelijkheden van steunverlening aan nationale industrieën en –instituten zouden nader kunnen worden toegelicht.

Vraag 3.
Zijn de voorschriften van de bestaande richtlijnen volgens u toegesneden/niet toegesneden op het specifieke karakter van overheidsopdrachten op defensiegebied? Gelieve uw antwoord toe te lichten.

De bestaande aanbestedingsrichtlijnen zijn niet in alle gevallen afdoende toegesneden op het specifieke karakter van defensieopdrachten. Zo wordt onvoldoende rekening gehouden met nieuwe technologische ontwikkelingsprogramma's en de hieruit opeenvolgende contractsluitingen waarvoor niet altijd een volledige concurrentiestelling kan worden doorgevoerd, de lange doorlooptijden van defensieprojecten, vertrouwelijkheid en essentiële veiligheidsoverwegingen die vaak zijn verbonden aan defensiematerieel en defensieprogramma's, het hoge technologische karakter en de vaak politiek gevoelige aspecten die aan het nemen van gunningsbeslissingen zijn verbonden. Daarnaast houden de huidige richtlijnen geen rekening met de structuur van de defensiemarkt waardoor de toepassing ervan geen additionele concurrentie zal meebrengen. Dit zal moeten worden geregeld door concurrentie in de ‘supply chain’ mogelijk te maken. Verder ontbreken specifieke selectiecriteria, die samenhangen met onder andere ‘security of supply’, en (spoed) procedures.

Vraag 4.
Is een specifieke richtlijn volgens u een nuttig/noodzakelijk instrument voor de totstandbrenging van een Europese markt voor defensiematerieel en de versterking van de industriële en technologische basis voor de defensie in Europa?

Het is een nuttig instrument, voorzover het ten opzichte van de huidige klassieke aanbestedingsrichtlijnen in voldoende mate tegemoet komt aan de specifieke kenmerken van de defensiemarkt. Voor een groot aantal onderwerpen is wel vereist dat politieke consensus tussen de lidstaten wordt bereikt. Bovendien is voor het versterken van de DTIB een specifieke richtlijn alleen niet voldoende. Ook voor andere knelpunten, zoals het onderscheid tussen staats- en private ondernemingen, nationale preferentiestelling, compensatie, staatssteun en wapenexportbeleid, zal de Commissie met aanvullende voorstellen moeten komen die vervolgens door lidstaten op politiek niveau worden besproken.

Vraag 5.
Bent u van mening dat een dergelijke richtlijn ook van toepassing moet zijn op aanschaffingen van andere organisaties, zoals het Europees Defensie Agentschap?

In beginsel zou een dergelijke richtlijn ook voor het EDA van toepassing kunnen zijn, hoewel de lidstaten bij de oprichting van het EDA hebben afgesproken dat verwervingsactiviteiten die door andere instanties, zoals OCCAR, worden verricht niet zullen worden gedupliceerd. Het toepassingsbereik van een dergelijke richtlijn zal voor het EDA hierdoor beperkt zijn.

De reguliere aanbestedingsrichtlijnen zijn voor OCCAR niet van toepassing op grond van de uitzonderingsbepaling dat andere procedureregels gelden die worden geplaatst volgens de specifieke procedure van een internationale organisatie. Tegen het eventueel ook op OCCAR van toepassing verklaren van een specifieke defensierichtlijn bestaat in beginsel geen bezwaar, maar dit zal op gespannen voet kunnen staan met voornoemde uitzonderingsbepaling.

Vraag 6.
Procedures: zijn onderhandelingsprocedures met voorafgaande bekendmaking van een aankondiging van een opdracht volgens u toegesneden op het specifieke karakter van overheidsopdrachten op defensiegebied? In wat voor situaties kan volgens u gebruik worden gemaakt van onderhandelingsprocedures zonder voorafgaande bekendmaking van een aankondiging van opdracht?

De omstandigheden waaronder de onderhandelingsprocedures met voorafgaande bekendmaking kunnen worden ingeroepen zijn niet in voldoende mate toegesneden op het specifieke karakter van defensieopdrachten. De recent in de richtlijn EG/2004/18 geïntroduceerde 'competitieve dialoog' zal in een aantal gevallen hieraan tegemoet kunnen komen.

In aanvulling op de omstandigheden die reeds in de aanbestedingsrichtlijnen zijn genoemd zou voorts gebruik moeten worden gemaakt van de onderhandelingsprocedure zonder voorafgaande bekendmaking, indien sprake is van essentiële nationale veiligheidsbelangen of indien de specifieke kenmerken van defensieopdrachten dit verder met zich meebrengen.

Vraag 7.
Werkingssfeer: welk middel lijkt u het meest geschikt om de werkingssfeer van de richtlijn vast te leggen? Is dat volgens u een algemene definitie en zo ja hoe moet die definitie er dan uitzien? Moet er met een nieuwe lijst worden gewerkt en zo ja met wat voor lijst. Of moet er volgens u worden gekozen voor een combinatie van een definitie en een lijst?

Een algemene definitie kan als nadeel hebben dat de uitleg hiervan voor meerdere interpretaties vatbaar is. Daarom zal een definitie moeten worden aangevuld met een productenlijst. Een dergelijke lijst dient dan ook als uitgangspunt te worden genomen. Dit betekent wel dat procedures moeten worden opgesteld voor het up-to-date houden en evalueren van deze lijst.

De lijst van 1958 kan nog steeds als basis worden gebruikt. Wel zou deze lijst kunnen worden geëvalueerd. Het voorstel uit het Groenboek om eventueel andere lijsten te introduceren, zoals de "wapenexportlijst", is te voorbarig, omdat op voorhand niet duidelijk is of de uitgangspunten die aan deze lijst ten grondslag liggen ook voor defensieaanschaffingen geschikt zouden zijn.

Een optie zou ook kunnen zijn om eerst alle bestaande lijsten met elkaar te vergelijken en de voor- en nadelen tegen elkaar af te wegen. Vervolgens kan in overleg met de lidstaten worden bezien of een reeds bestaande lijst kan worden gebruikt of dat de voorkeur toch uitgaat naar een "nieuwe" lijst die mede gebaseerd is op de producten uit de reeds bestaande lijsten. De lidstaten dienen in het laatste geval hierbij wel intensief te worden betrokken.

Vraag 8.

Vrijstellingen: is het volgens u nuttig/noodzakelijk om een categorie producten vast te stellen die onmiskenbaar niet onder de richtlijn valt?

Indien al wordt gekozen voor één lijst van producten waarmee de werkingssfeer van artikel 296 EG-verdrag wordt beperkt dan is het niet opportuun om daarnaast nog een lijst in te voeren van categorieën die onmiskenbaar niet onder de richtlijn vallen.

Vraag 9.

Bekendmaking: is een centraal bekendmakingssyteem volgens u op zijn plaats? Zo ja, wat voor modaliteiten moet dat systeem volgens u krijgen?

Een centraal en geharmoniseerd systeem heeft de voorkeur. Echter, eerst moet de haalbaarheid worden onderzocht of aansluiting kan worden gevonden bij reeds bestaande publicatiemogelijkheden.

Vraag 10.

Selectiecriteria: met welke criteria moet volgens u gezien de bijzondere kenmerken van de defensiesector naast de criteria uit de huidige richtlijnen ook nog rekening worden gehouden? Met vertrouwelijkheid, levenszekerheid, enz.? En hoe moeten die criteria volgens u worden gedefinieerd?

De criteria in de klassieke aanbestedingsrichtlijnen zouden in beginsel als uitgangspunt kunnen dienen, met dien verstande dat bij de nadere invulling hiervan meer rekening zal moeten worden gehouden met de specifieke kenmerken van defensieopdrachten. Zo zouden de selectiecriteria bijvoorbeeld op een aantal punten verder moeten worden opgerekt, waarbij rekening moet worden gehouden met security of supply en de lange doorlooptijd van defensiecontracten. Het afgeven van een verklaring over de behaalde omzet zal in dat geval betrekking moeten kunnen hebben op meerdere jaren dan de voorgeschreven 3 jaren volgens de huidige aanbestedingsrichtlijnen.

De wijze van definiëren zal in overleg met de lidstaten tot stand moeten worden gebracht.

Vraag 11.

Hoe moet volgens u worden omgegaan met de gewoonte om met compensaties te werken?

Voor het openen van de Europese markt voor industrieën uit zowel de Europese lidstaten als daarbuiten zal er eerst sprake moeten zijn van een Europees en - indien mogelijk - een wereldwijd *"level playing field"*, niet alleen op systeem-niveau maar zeker ook in de 'supply chain'. Ook Nederland is gebaat bij een zo ongehinderd mogelijke toegang tot andere markten (waaronder die van de VS). Compensatie kan "value for money" tegenhouden en leidt tot inefficiënte industrieën. Mede in dit licht en afhankelijk daarvan streeft de Nederlandse overheid in Europees verband naar afschaffing van het compensatiebeleid bij militaire aanschaffingen.

MISSION OF NORWAY TO THE EUROPEAN UNION

	Our Date	Our Reference
	21.02.05	200500163-3 TNT/ev
Enquiries to Tore N. Thomassen	Your Date	Your Reference

European Commission
DG Internal Market
Consultation "Green Paper on Defence Public
Procurement"
C100/01/100
B- 1049 Brussels

Norwegian Comments – the Green Paper on Defence Procuremnt COM (2004) 608 Final

Please find enclosed letter from the Norwegian Ministry of Modernisation with the Norwegian Comments on the Green Paper on Defence Procurement.

Yours sincerely,

Elin Vikane
for Tore N. Thomassen
Counsellor, Industrial Affairs

DESTINATION MARKT/C/3
ADO: A 3793
Action SM | CD
DATE: 24. 02. 2005
Info
Visa

NORWEGIAN COMMENTS - THE GREEN PAPER ON DEFENCE PROCUREMENT COM (2004) 608 FINAL

Norway welcomes the public consultation on the Defence Procurement Green Paper. The issues that are raised in the Green Paper are of great importance. Please find our comments to the Commissions questions below.

Executive summary

Norway is generally positive towards the initiative from the EU that aims to establish a more transparent and open European defence market. In order to achieve this objective, it is imperative to provide better guidance to the legal framework and how exemptions from the Treaty and the procurement directive should be interpreted and enforced. This challenge should primarily be solved with an interpretive document, but Norway does not rule out the need for more suitable regulation of the procurement procedures for procuring defence equipment. In this respect, it should be acknowledged that it is more the rule than the exception, that procurement of defence equipment and R&D services relies on compound national long-term security and defence interest and faces more complex strategic considerations than other public procurements.

Any possible new directive should take into account that the achievement of comprehensive transparency and non-distortion of competition also depends on state financing/aid programs of national defence industries. In this connection, we have some concerns if the immediate effect is that countries with small and relatively transparent economies will pay the costs of being exposed to greater competition and a more transparent regime. Thus, it is our opinion that the suggested adjustments in the European defence market presupposes that certain elements are in place in order to provide smaller players with a chance to obtain a fair market access. A new directive that provides some temporary solutions, in terms of national discretion, should be considered when countries with larger industries have an unbalanced advantage at the expense of the smaller countries.

Furthermore, with reference to the statement in the Green Paper that national suppliers are generally awarded most of the defence contracts, it should be noted that these findings are not applicable for Norwegian procurements of defence equipment. Only 45% of Norwegian defence procurements are awarded Norwegian industry. The remaining 55% is awarded foreign industry. In addition, almost all Norwegian procurements of defence equipment are in some way published and awarded by competitive procedure.

Questions

1. Do you think it would be useful/necessary/sufficient to explain the existing legal framework in the way presented?

An interpretive document that elaborates Article 296 EC, is necessary to clarify the existing legal framework and helpful in order to achieve a more homogeneous national practice within the European Economic Area (EEA).

In the area of procurement of defence equipment, the correlation between Article 296 EC and Article 14 ("Secret contracts and contracts requiring special security measures") of the new directive for the Classical sector also needs to be elaborated. A paper that contributes to a better understanding of the consequences for procurements in accordance to these two different regimes will be of significant practical value for achieving a more harmonized European practice for these procurements.

3. Do you consider the rules of existing directives suited/unsuited to the specific characteristics of defence contracts? Please give your reasons.

Both current directives and the new directive for the Classical Sector maintain a high threshold for applying procurement procedures that include dialogue at all stages in the process.

However, procurements of defence equipment are often complex in nature not only due to technical requirements, but also Member States' current security policy and long-term strategies affect the procurement process. For instance, may even procurements of "off - the- shelf" products require that both supplier and the procuring entity obtain final approval from appropriate officials, in order to award the contract. Such approvals may include a concrete assessment of political and security issues at the time of award of the contract, and vary from contract to contract. Under such circumstances the Classical Directives, will not provide for the needed dialogue between the supplier and the contracting authority, since appropriate measures only can be identified in the award phase and will vary from supplier to supplier.

Likewise, procurements of "off-the-shelf" military equipment may raise logistical and strategic challenges that are particular to the military field, which need to be addressed and negotiated for each supplier individually. Such factors may affect the terms for the award of the contract. The need for a pre-award dialogue is therefore greater in this field than for ordinary procurements.

4. Would a specific directive be a useful/necessary instrument for creating a European defence equipment market and strengthening the industrial and technological base of European defence?

After an interpretive document is developed, it is reasonable to work out a specific directive for defence equipment. However, it is important that a new directive does not favour large suppliers within the European defence equipment market at the expense of smaller suppliers from other countries. A new directive should ensure small suppliers an appropriate position within and reasonable access to the European defence equipment market.

Norway welcomes better institutionalised collaboration between the EU Member States, like the collaboration in the Western European Armaments Group (WEAG). An institutionalised collaboration that adopts legally binding principles may augment both transparency and competition within the defence market. In this relation, Norway, as an EEA Member State, emphasises the importance of having a close collaboration with the new European Defence Agency (EDA) that presumably will make valuable contributions to the shaping and practicing of the EEA Member States' defence policy.

In our opinion, a specific directive alone will not be sufficient to achieve the objectives set described in the Green Paper, and thereby increase economic efficiency. However, a specific directive may be an effective step in the right direction, as long as the EU Member States agree upon a common European Union defence equipment policy and create incentives in this direction.

5. What is your opinion regarding the use of a possible directive for purchases by other bodies, such as the European Defence Agency?

It is our presupposition that other bodies, such as the EDA, should follow the same directive as the EU Member States.

6. Procedures: do you believe the negotiated procedure with prior publication to be suitable for the specific needs of defence procurement? In what situations should use of the negotiated procedure without publication be allowed?

With regard to the first part of the question, we believe that the negotiated procedure with prior publication is the appropriate procedure for the majority of military equipments procurements. Therefore this procedure should be optional. The Utility Directive (2004/17/EC) may be a useful model for establishing such legal framework. A possibility to establish a multi- use qualification list should also be considered.

Standard Publication Forms must also take into account the needs for different confidentiality levels required in many defence procurements.

With regard to the second part of the question, we believe that a specific directive should give a greater opportunity to use negotiated procedure without publication in specific situations, such as complementary and supplementary procurements, purchase of spare parts, related R&D services, etc. In addition, it is our comprehension that the procedure of direct procurements should be an opportunity in sole supplier situations.

Norwegian defence procurements are mainly awarded on strictly competitive bases. However, optimal competition for certain procurements is not always a question of publication or unlimited number of contenders. In some programmes it may be sufficient to restrict invitation to the appropriate number of contenders (both domestic and foreign) to a competition.

In very few cases, it may be necessary to place a contract directly to one supplier. Such an approach will mainly be used in a sole supplier situation, or where vital national defence interests are affected. For example where the procurement is connected to Electronic Warfare Systems, these systems require interoperability and have to incorporate highly sensitive defence intelligence information.

7. Scope: what would be the most appropriate way of defining the field of application? A general definition? If so, what? A new list? If so, what? A combination of a definition and a list?

There is a need for clarity; however, a new list will probably be unsuitable since it may be difficult to keep it up to date. In our opinion, the field of application of defence procurements in a specific directive outside the scope of Article 296 EC is best defined by a general definition.

In addition to a general definition the directive may state specific criteria and guidelines on how the criteria are to be interpreted. The use of specific criteria will give Member States a possibility of discernment.

8. Exemptions: do you think it would be useful/necessary to define a category of products that would be excluded categorically from the directive?

We think it will be useful to define categories of defence products that are excluded. A list of categorically excluded products will provide further clarification.

However, it may be difficult to define a category of products, such as a certain technology, that is important of national security interests for all Member States and therefore should be excluded categorically. The considerations of national importance of products may vary within the different member states. A category of products that are excluded will still contribute to a clarification and a better understanding of the interpretation of Article 296.

9. Publication: do you think a centralised publication system would be appropriate, and, if so, how should it function?

A centralised publication system may contribute to a transparent and efficient procurement process, and may be founded on and develop the publication rules of the WEAG.

10. Selection criteria: what criteria do you think should be taken into account in addition to those already laid down in existing directives to take account of the specific features of the defence sector? Confidentiality, security of supply, etc.? And how should they be defined?

It is reasonable that a directive provides possibilities for the Member States to define selection criteria that relate to special national conditions dependent on security needs and strategy. A possibility to operate with additional criteria that allow for special national conditions should be added to the criteria that are already laid down in existing directives.

Given the complexity of arms procurements, with focus on quality, security of delivery and long term perspective, we suggest that the Commission also considers the possibility of using relevant selection criteria as criteria in the process of award, in addition to common criteria such as price, technological solution, and other award criteria.

11. How do you think offset practices should be handled?

The practice of offset is relevant to Norway, where almost 55 % of the defence procurements are awarded foreign industry.

Norway regards offset as an important tool to allow the Norwegian defence industry to access foreign markets, which otherwise would be closed. In "closed" markets, offset becomes an important tool to secure vital defence industry development and engagement. However, Norway normally declines requirements for offset when we participate in international armaments cooperation where the authorities and industry from the participating parties all contribute in a rough accordance with their investment. This has been successful in several projects.

Norway does not oppose the abolishment of offset as such, provided that other countries do the same. In this context, countries with small defence industry will be particularly exposed when implementing non-offsets policy. Our concern is that the practise of offset and "juste retour" varies from country to country, and countries that do not have offset requirements have similar mechanisms that favour their national industries. For example, some countries operate with requirement for "national content" in addition to having defined certain market areas that are exclusive to national suppliers. It is our opinion that such arrangements also must be set-aside in order to achieve a transparent and well functioning market. The practice of offset should therefore be subject to a closer and periodic evaluation.

POLISH POSITION

on the European Commission proposals formulated in the Green Paper
on Defence Procurement.

I. GENERAL REMARKS:

1. Poland shares the view that the present situation on the European Defence Equipment Market demands initiatives on the community level in order to overcome its fragmentation and increase competitiveness. Taking into consideration the EDEM specific character, initiatives undertaken by the European Commission should be of evolutionary character and should be implemented gradually.

2. Two options proposed by the Commission in the Green Paper on Defence Procurement are of the complementary character and do not exclude each other. It allows for their progressive realisation. First option postulates are to be realised at the introductory phase. The elaboration of the Interpretative Communicate on art. 296 of the EC Treaty does not create a new law but contributes to the unification of its implementation by the Member States.

3. As the art. 296 of the EC has essential meaning from the national security interests point of view, the Commission's interpretative communicate should not undermine its provisions. Nevertheless, it ought to define clearly the scope of possible derogation based on the cited article, in the light of European Court of Justice judgements.

4. After issuing interpretative communication, the Commission should evaluate its influence on practices used by the Member States in the area of defence procurement. The elaboration of a specific directive on defence procurement should be regarded as one of the possible future actions on the community level. The directive should include the level of readiness of the Member States to its implementation as well as avoid creation of the "Europe of two speeds".

5. Keeping in mind that one of the principal goals of these initiatives is increasing the competitiveness on defence market, there is a necessity for parallel to other regulations state aid for defence industry companies (e.g. through financing research and development programmes). The solutions cannot deteriorate the position of enterprises from countries where defence industry is supported by the state on lower level.

6. Initiatives undertaken on the community level should include promotion of multinational programmes in the context of creating co-operative ties serving as an element of building EDEM.

7. Superiority of national security interests over the creation of the common market, which is reflected by the art.296 of the EC, implies that actions (both homogenous interpretative communication and these of regulatory character)

taken by the community must reflect EDEM characteristics, like ensuring the security of supplies (in the whole chain) or possible necessity of short-term purchases in emergency situations.

8. Transparency in the field of defence procurement will be limited by the national information security demands.

II. SPECIFIC ANSWERS:

1. *Do you think it would be useful/necessary/sufficient to explain the existing legal framework in the way presented?*

The explanation of existing legal framework in the area of defence procurement is necessary. Interpretative communication should precisely define the conditions necessary to apply a derogation on the basis of art. 296 of the EC and make wide use of European Court of Justice judgements.

At present, the elaboration of interpretative communication is sufficient. Further work on the specific directive should be undertaken after the period necessary for the evaluation of the communication influence on practices used by the Member States.

Interpretative communicate should also include products and services procured by the final deliverer on the basis of contracts with his subcontractors. All the actions undertaken on the community level should be aimed at stimulating development of small and medium enterprises and not to favour the big multinational companies tending to monopolise the market.

2. *Are there other aspects of the Community system in question that should be clarified?*

The following aspects should be considered during discussion on new initiatives:

- state aid for defence industry companies and its influence on competition in this sector, as well as methodology of evaluation of the state aid influence on public tender offers;
- necessity to ensure the security of supply and growing mutual interdependence between the Member States in this regard;
- possibility to make exemptions for urgent purchases in emergency situations;
- security of information connected to national security.

The elaboration of interpretative communicate should be combined with the publication of a compendium of national regulations concerning the defence procurement in force in particular Member States. The compendium should indicate the way for abroad companies to present their offer in tenders on defence equipment together with other specific requirements like offset, certification and licensing, etc.

3. *Do you consider the rules of existing directives suited/unsuited to the specific characteristics of defence contracts? Please give your reasons.*

   There is a lack of clear definition of national security interest in the Community law. In the context of defence procurement, such definition may allow to precise the border between state procurement with and without making recourse to art. 296 of the EC. Drawing such border should include the type and designation of the purchased goods, but also its possible applications and recipients (including civilian institutions). In the light of terrorist threats, the definition of national security interest should not be based solely on its military aspects.

   General character of existing law provisions is conducive to its free interpretation and facilitates building of national closed and fragmented markets.

4. *Would a specific directive be a useful/necessary instrument for creating a European defence equipment market and strengthening the industrial and technological base of European defence?*

   The specific directive would be a useful tool for the creation of EDEM. Nevertheless, it should be undertaken in the second phase to facilitate making use of the experience gathered by the Commission after the publication of the interpretative communicate.

   As the market is not only the recipient, the directive is to include the necessary regulations concerning the producer, ex. making use (at various levels of production) of state aid and its influence over the competitiveness of a given firm, implementation of the community rules at all levels of the production chain (including contracts for subcontractor) and the equation of competitive possibilities of small and medium enterprises.

5. *What is your opinion regarding the use of a possible directive for purchases by other bodies, such as the European Defence Agency?*

   The directive should be used in the realisation of all orders in the field of international programmes in the UE, including those realised by The European Defence Agency.

6. *Procedures: do you believe the negotiated procedure with prior publication to be suitable for the specific needs of defence procurement? In what situations should the use of the negotiated procedure without publication be allowed?*

   The negotiated procedure with prior publication suitable for the specific needs of defence procurement.

The negotiated procedures without publication should be permitted but limited to strictly defined situations which derive from the necessity to undertake the action of an emergency interventional purchase or the need of information protection.

7. *Scope: what would be the most appropriate way of defining the field of application? A general definition? If so, what? A new list? If so, what? A combination of a definition and a list?*

   The scope of application should be defined by the appropriation and purpose of the purchase (defining national security interest) combined with the list of products. It is possible to create two lists – the first one containing products believed by all countries to **be** important for national security, and the second one – containing products which **may be** important for national security, but their purchase with the use of exclusion in accordance to the art. 296 of the EC should be reasonable. The list from 1958 or the compilation of existing national lists together with the list from 1958, can serve as the basis for their evaluation.

   On the one hand, describing the scope of application of the directive only on the base of the definition may raise the possibilities of its free interpretation. On the other, a very detailed definition would require its systematic verification because of the dynamic development of technology.

8. *Exemptions: do you think it would be useful/necessary to define a category of products that would be excluded categorically from the directive?*

   Defining a category of products that would be excluded from the directive would be necessary. The basis for such an exclusion should be defined in detail and derive from the strategic interest of national security.

9. *Publication: do you think a centralised publication system would be appropriate, and, if so, how should it function?*

   The construction of a centralised publication system is a means which permits an access to the orders, but most of all, is a condition to clarity guarantee in the field of application of the directive. This system may be a part of, already functioning in the UE, system of public orders.

10. *Selection criteria: what criteria do you think should be taken into account in addition to those already laid down in existing directives to take account of the specific features of the defence sector? Confidentiality, security of supply, etc.? And how should they be defined?*

    Among the criteria illustrating the specific character of the orders from the defence sector, there are:

    - security of the delivery during the whole product's "cycle of life" (in the whole chain of supply);

    - the demands of information protection;

- reliability of the contractor in the future perspective;
- fulfilment of high quality demands;
- the need of unification of the armament and military equipment.

11. *How do you think offset practices should be handled?*

The offset practices are one of the instruments allowing Poland upgrading the technological level of own industry and its gradual accommodating to the conditions of the European market. In a further perspective, there is a possibility of reducing its employment, especially in the frames of the European market. One of means to achieve it is to promote cooperation between the institutions of defence industry from “old” and “new” countries in the UE. The creation of such technological cooperation between the producers from the UE may result in the creation of capital and proprietary relationships. Such a process is a desired action in the direction of enlarging productivity which would mean enlarging the competitiveness of European defence industry and creating an economic base for the common European defence market. The directive concerning orders in the defence field should unify not only the rules of its application but also the definition of the offset itself which would be accepted by the Member States.

S. R.

REPRESENTAÇÃO PERMANENTE
DE PORTUGAL
JUNTO DA UNIÃO EUROPEIA
BRUXELAS

Bruxelas, 28 JAN. 2005

Proc.

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Direction MARKT/C N° 1850
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Senhor Director,

Tenho a honra de junto enviar a V. Ex.a a contribuição portuguesa para a consulta relativa aos Contratos Públicos/Defesa – Livro Verde.

Queira aceitar, Senhor Director, os protestos da minha alta consideração.

P O Representante Permanente

Ex.mo Senhor
Bertrand CARSIN
Director
Direcção-Geral Mercado Interno
Direcção C
Comissão Europeia
BRUXELAS

Anexo
MJF/tdr

PORTUGUESE COMENTS ON THE GREEN PAPER "DEFENSE PROCUREMENT"

Ref:Brussels, 23.09.2004. COM(2004)608 final

Question 1. Do you think it would be useful/necessary/sufficient to explain the existing legal framework in the way presented?

1. It would be useful and necessary but not sufficient. The development of an interpretative communication, as a first step, would increase harmonization of rules and procedures and so increasing the necessary transparency and competitiveness, among the Member-States, within the Defence area.
   The use of the same tools, clearly identified, would decisively lead to a better cooperation environment, in order to achieve the final goal, i.e. the implementation of a common directive, legally binding to all States.

Question 2. Are there other aspects of the Community system in question that should be clarified?

2. The definition of the goals to be achieved through an European Security and Defence Policy, to be translated in a common directive must include not only a clear set of rules and procedures, but also a definitive distinction among equipments, services or public works to be considered as Defence "items", plus a list of categories not to be considered under its "umbrella".

Question 3. Do you consider the rules of existing suited/unsuited to the specific characteristics of defence contracts? Pleas give your reasons

3. The rules of existing directives must be seen as unsuited, otherwise the Green Paper would make no sense. We consider that the European Defence and Equipment Market (EDEM) does not exist yet. We do have a fragmented market or a group of markets, whereby nations act, under national interests, not linked by integrated strategic behaviours.

Question 4. Would a specific directive be a useful/necessary instrument for creating a European defence equipment market and strengthening the industrial and technological base of European defence?

4. Yes. The implementation of a specific directive would contribute decisively for the creation of an EDEM and the strengthening of the industrial and technological base of the Member-States. Common rules and procedures are basic tools to increase cooperation, transparency and competitiveness.

Question 5. What is your opinion regarding the use of a possible directive for purchases by other bodies, such as the European Defence Agency (EDA)?

5. The EDA must be regarded as the leading body to develop the arrangements to achieve an EDEM. On the other hand, EDA must not jeopardize experience and know how already achieved through others international *fora.*

Question 6. Procedures: do you believe the negotiated procedure with prior publication to be suitable for the specific needs of defence procurement? Inwhat situations should use of the negotiated procedure without publication be allowed?

6. It is suitable for the specific needs of defence procurement, under a regular political environment. Should those conditions evolve to a scenario of crisis or calamity, then the non-publication is justified. Also strategic R&D programs could be considered for non-publication.

Question 7. Scope: what would be the most appropriate way of defining the field of application? A general definition? If so, what? A combination of a definition and a list?

7. The combination of a clear definition together with updated list of equipments to be considered and to be excluded is the best path to define the field of application. As a first step, the development of an interpretative communication is considered necessary to create the conditions to achieve an agreement through a common directive.

Question 8. Exemptions: do you think it would be useful/necessary to define a category of products that would be excluded categorically from the directive?

8. As mentioned above, no doubt about it. Clear definitions, easily understood by all, are a basic principle to "invite" Member-States to their acceptance and compliance.

Question 9. Publication: do you think a centralised publication system would be appropriate, and, if so, how should it function?

9. Yes. EDA official bulletin/website or other specific websites are good choices.

Question 10. Selection criteria: what criteria do you think should be taken into account in addition to those already laid down in existing directives to take account of the specific features of the defence sector? Confidentiality, security of supply, etc? And how should they be defined?

10. Apart from those already listed in the existing directives, we consider that the security of supply criteria is the most important to be retained. We define it as the assurance that the procurement of Defence related equipment (acquisition and life cycle support) does not depend on political, security or economical factors that might impact, at any stage, the delivery of equipments already under contract. Additionally, the non-disclosure of customer's specific requirements must be observed.

Question 11. How do you think offsets practices should be handled?

11. In general, as they are now. In a "closed environment" whereby few nations rule 90% of the Defence related transactions, offsets are, for the vast majority of the European countries, paramount to help developing their own Defence industries and to gain know-how.

MINISTERIO
DE DEFENSA

SECRETARÍA DE ESTADO DE DEFENSA

DIRECCIÓN GENERAL DE ARMAMENTO Y MATERIAL

SUBDIRECCIÓN GENERAL DE RELACIONES INTERNACIONALES

SPANISH MINISTRY OF DEFENCE ANSWERS TO

GREEN PAPER. DEFENCE PROCUREMENT

Brussels, 19.7.2004

Com(2004) 608 FINAL

Madrid, 14th of March 2005

PREAMBLE

The Spanish Ministry of Defence welcomes the Commission Green Paper on Defence Procurement, that is instrumental in the development of the Commission Communication 2003, 113 final (11MAR03) on European Defence-Industrial and Market Issues.

As it is shown in the Commission Communication, the “Industrial and Market Issues” embrace different linked topics, which need a holistic approach. In this sense, the Green Paper raises the conditions of procurement as a necessary step to reach the opening up of European Defence Market (EDEM).

European Defence Technological Industrial Base (EDTIB) is a main topic related to EDEM, and inseparable from it as the offer side of EDEM. It is not possible to avoid the offer side when considering a realistic approach to EDEM.

This Defence Technological Industrial Base has wide implications in the Internal Market -First Pillar- of the European Union.

On the other hand, Defence Policies of the Member States have a much wider scope than the European Security and Defence Policy (PESD), which is the mission assigned to the European Defence Agency (EDA) (Article 2 of the Council Joint Action 2004/551/CFSP, on the establishment of the EDA).

Based on the previous premises, the Spanish Ministry of Defence expects a collaborative initiative of the Commission, EU Member States and EDA on EDTIB, aiming at the creation of a non-protected European-wide open market, internationally competitive and geographically balanced, as a main tool towards a widening and higher integration of the Second Pillar of the European Union.

Spanish Ministry of Defence supports the implementation of the Green Paper initiative in an Interpretative Communication of the European Commission. From the Spanish Ministry of Defence there are important reasons to adopt this option:

- Regulations affecting the defence procurement are disperse, and there is not a similar degree of fulfilment by each Member State. A clear scenario for everyone will help to know the real need of a new regulation to add to the populated collection of European directives.

- Procurement is just one aspect of the complex scheme where the defence procurement is carried out. Complex due to the different institutional actors involved (European Commission, Council-EUMC-EDA, Member States), and varied interests affected (industries with any degree of relation with defence/dual use, R+T community, international organizations related to defence).

- The Defence Procurement -as well as the Defence Exports and all aspects of Defence Policy- touches the core attributions of the State, and by this reason, it’s closely related with the Foreign Affairs of the Member States.

The Green Paper Questionnaire, attached below, was answered with the previous rationale.

SPANISH MOD ANSWERS

THE ANSWERS TO THE QUESTIONNAIRE MUST BE READ ON THE BACKGROUND THAT SPAIN SUPPORTS THE INTERPRETATIVE COMMUNICATION OPTION

1.- Do you think it would be useful/necessary/sufficient to explain the existing legal framework in the way presented?

The regulations affecting the defence market in the European Union are disperse. It is obvious that a clarification is necessary and, as a consequence, useful.
After taking place a clarification of the existing legal framework, we will be able to state if a new directive is necessary or not.
Working in a clearer legal scenario will help us to make up our mind about the necessity of a new regulation, or not.
If the result is affirmative, and a new regulation issued by the Commission is needed, the lacks of the current legal framework will be focussed, and the scope and range proposed for the new legal tool will be much more precise.
Due to the reasons above, Spain supports an interpretative communication as first approach to this subject.

2.- Are there other aspects of the Community system in question that should be clarified?

As the Green Paper points out, defence systems have long lasting life cycles. An important part of the procurement is related to in service support, with a lot of know-how transfer. Maybe, this is a good occasion to clarify the EU legal framework in relation with transfer of technology for defence services.

3.- Do you consider the rules of existing directives suited/unsuited to the specific characteristics of defence contracts? Please give your reasons.

From the Spanish point of view, it's clear that for the procurement out of the 296 exception -this means: inside the internal market- the existing directives are too rigid and a more flexible approach is required.
For those cases in which the 296 exception is in force, the instrument to be applied must be well adapted to the specificities of the national defence procedures. In the case of Spain, the existing EU instruments are applied in a way that becomes a useful tool for SP defence contracts.
The defence policies are national policies as is well known. A small part of them are agreed under the ESDP (art. 17 par. 2 EU Treaty) and, as a consequence, it is difficult to formulate a general statement embracing the 25 Member States.

4.- Would a specific directive be a useful/necessary instrument for creating a European defence equipment market and strengthening the industrial and technological base of European defence?

From the Spanish point of view, the European integrated defence market will be achieved as a result of the integration of the European defence industries, and this latter event will be the output of a process of integration of Member States defence policies. A directive will help to clarify procedures, but not to integrate the defence market; mainly due to pure economic criteria are not most weighted ones in defence procurement (security of information, security of supply…), even when they are very important.

5.- What is your opinion regarding the use of a possible directive for purchases by other bodies, such as the European Defence Agency?

In the case of European Defence Agency (EDA), the Joint Action 2004/551/CFSP foresees in the point 3.2.3 that the EDA will manage specific programmes through OCCAR or other programme management arrangements, so in most of the cases the procurement will be regulated by an international treaty and derived agreements. As a consequence of the previous, a careful evaluation of the utility of such a directive should be done.
If the implemented option were a Directive, the range of application should embrace all the agents operating in the EDEM (also International Organizations). In other case, the “regulatory framework” raised by the Green Book will not be a well-adjusted tool for creating an EDEM.

6.- Procedures: Do you believe the negotiated procedure with prior publication to be suitable for the specific needs of defence procurement? In what situation should use of the negotiated procedure without publication be allowed?

The negotiated procedure with prior publication is well suited to defence procurement. The use of the negotiated procedure without prior publication is the main option where the defence interest is closer to the security of information, or to the security of supply, or just in complex cases when a tested reliable contractor is required.

7.- Scope: what would be the most appropriate way of defining the field of application? A general definition? If so, what? A new list? If so, what? A combination of a definition and a list?

The List written in 1958 has already been included in the Treaty for the Constitution for Europe, so it has to be considered. A definition, taking into account the planned use and the circumstances of the procurement for defence and complementing the List, looks the best solution.

8.- Exemptions: do you think it would be useful/necessary to define a category of products that would be excluded categorically from the directive?

With the rationale of question 7, the exclusions should be those included in the 1958 list (article 296 ECT, Treaty for European Constitution III-436).

9.- Publication: do you think a centralised publication system would be appropriate, and, if so, how should it function?

Yes, it would be a good option. There is a variety of technical options for this. An electronic contracting tool would be very useful. Anyone accessible for all possible suppliers is a good solution, if it doesn't raise a more complex bureaucracy or makes the terms for contracting longer.

10.- Selection criteria: what criteria do you think should be taken into account in addition to those already laid down in existing directives to take account of the specific features of the defence sector? Confidentiality, security of supply, etc? And how should they be defined?

Security of information, security of supply and the related export procedures are important criteria for procurement, which were carefully studied in other European fora. If it is done, the treatment of these subjects must be coherent with the outputs reached in those fora.
As told before, the overall defence policy is not an EU policy. So the defence procurement will not be tied to the European sphere. As a consequence, the criteria used to select the contractors must not constitute an excuse for an European-wide protected market for defence products and services.

11.- How do you think offset practices should be handled?

Offset –considered as the industrial participation linked to defence procurement- is a tool to guarantee security of supply of technologies and services along the life cycle of the purchased system (maintenance, technical support for operation…), as well as some parts, as a consequence of the former.
From this point of view, it is a defence service acquired with the defence products in the contract, or in a different contract related to a principal one.
The mutual industrial relations, that appear as a consequence of the industrial participation, create the necessary conditions to cooperate in the process of consolidation of European DTIB.
At the same time, Defence Companies gain mutual access to markets, cooperating to get a competitive EDEM.

2005-03-30 Fi2004/4841

Finansdepartementet

Rättssekretariatet

Europeiska kommissionen
GD Inre marknad
Konsultation – ”Grönbok om
försvarsupphandlingar”
B-1049 Bryssel

Den svenska regeringens synpunkter på Europeiska kommissionens grönbok om försvarsupphandlingar (KOM (2004) 608 slutlig)

Europeiska kommissionen presenterade den 23 september 2004 en grönbok om försvarsupphandling. Genom grönboken avser kommissionen att bidra till en stegvis uppbyggnad av en europeisk marknad för förvarsmateriel (*European Defence Eqiupment Market*, EDEM) med mer insyn och större öppenhet mellan medlemsstaterna.

Allmänt

Den svenska regeringen välkomnar kommissionens initiativ att söka bidra till utvecklingen av en europeisk marknad för försvarsmateriel.

Regeringen konstaterar att kommissionen i grönboken inte föreslår någon ändring av medlemsstaternas möjlighet att göra undantag från gemenskapsrätten med stöd av artikel 296 i EG-fördraget. Svaren på frågorna nedan är avgivna under den förutsättningen att medlemsstaternas möjlighet att göra sådana undantag kommer att vidmakthållas oavsett vilken av de i grönboken angivna handlingslinjerna som kommer att väljas. Om och när åtgärder vidtas för att utveckla möjliga handlingslinjer enligt grönboken förutsätts att medlemsstaterna ges möjlighet att bidra till processen.

Regeringen anser att frågan om uppbyggnad av EDEM kräver ytterligare åtgärder på andra viktiga områden än dem som anges i grönboken, såsom ökad konsolidering på köparsidan. Detta bredare synsätt måste iakttas vid bedömningen av vilka åtgärder som är de mest angelägna.

Regeringen stöder uppfattningen att EU:s försvarsbyrå (*European Defence Agency*, EDA), såsom ansvarig för frågor om försvarsresurser, forskning, anskaffning och försvarsmateriel, ges en aktiv roll i skapandet av EDEM.

Vidare vill Sveriges regering framhålla betydelsen av att undvika åtgärder som hindrar möjligheter till samarbete länder emellan, inklusive samarbete med tredje länder. Det finns också anledning att resa frågan om en definition av omfattningen av ”försvar” i förhållande till det bredare begreppet ”säkerhet” med hänsyn till den ökade betydelse EU och dess medlemsstater lagt på säkerhet.

Svar på grönbokens frågor
1) Är det lämpligt/nödvändigt/tillräckligt att förtydliga den rättsliga ramen på det sätt som beskrivs i grönboken?

Ett tolkningsdokument såsom det beskrivs i grönboken skulle kunna bidra till att förtydliga den rättsliga ramen för de upphandlande myndigheterna och för leverantörerna. Ett förtydligande kan åstadkomma en mer harmoniserad tillämpning av artikel 296 i EG-fördraget.

Enbart ett tolkningsdokument är dock troligen inte ett tillräckligt medel att uppnå de syften som grönboken anger. Som angetts ovan torde upprättandet av EDEM kräva andra kompletterande åtgärder än dem som berörs i grönboken. Vidare bör de ökande problemen med att dra en tydlig gräns mellan frågor som rör försvar å ena sidan och frågor som rör säkerhet å andra sidan uppmärksammas. Den svenska regeringen anser att det är nödvändigt att EDA involveras i frågan.

2) Finns det andra delar av gemenskapssystemet på det här området som skulle behöva klarläggas?

Frågor där ett förtydligande av den rättsliga ramen skulle kunna bidra till utvecklingen av EDEM:

- tillämpningen av rättsmedelsdirektivet (89/665/EEG) för försvarsupphandlingar,
- effektivisering av mellanstatliga transferregler för dokument, komponenter och produkter,
- konsekvenser av olikheter i marknadsförutsättningar (statligt ägda vs privata försvarsmaterielföretag),
- exportpolicies,
- möjligheter till ökad standardisering.

3) Är bestämmelserna i de befintliga direktiven lämpliga eller olämpliga med hänsyn till försvarsupphandlingarnas särdrag? Precisera varför.

Direktivens bestämmelser är inte lämpliga, eftersom de inte i tillräcklig grad tar hänsyn till försvarsmaterielupphandlingarnas särdrag och inte heller medger nödvändig flexibilitet.

4) Är ett specifikt direktiv lämpligt/nödvändigt för att upprätta en europeisk försvarsmaterielsmarknad och stärka den industriella och tekniska basen för EU:s försvar?

Ett särskilt direktiv som samordnar upphandlingsförfarandena på försvarsmaterielmarknaden och är anpassat till försvarsmaterielupphandlingarnas särdrag kan vara en lämplig åtgärd för att främja en öppnare europeisk marknad för försvarsmateriel.

En förutsättning för att ett eventuellt direktiv skall få effekt är att den rättsliga regleringen tillämpas på ett enhetligt och transparent sätt av medlemsstaterna. Efterlevnaden av reglerna måste kunna följas upp effektivt.

5) Vad anser ni om att tillämpa ett sådant direktiv på anskaffningar som görs av andra organ, som t.ex. EDA?

Lika regler för anskaffning bör gälla för nationella anskaffningsorganisationer såväl som för eventuella sådana inom EU:s ram.

6) Förfaranden: Är förhandlat förfarande efter publicering lämpligt med hänsyn till försvarsupphandlingarnas särdrag? I vilka situationer bör man kunna tillämpa ett förhandlat förfarande utan föregående publicering?

Förhandlat förfarande efter publicering bör kunna användas fritt som standardförfarande som alternativ till öppet och selektivt förfarande. Försvarsmaterielsystem kan innehålla mycket komplicerad materiel med stort utvecklingsinnehåll och olika möjliga alternativa lösningar. Förhandlat förfarande skapar utrymme för en utvecklad, kostnadseffektiv upphandling i samband med att krav ställs på materielens sammantagna funktion vid upphandlingar i motsats till krav på kvalitet hos enskilda produkter/komponenter. Mer övergripande funktionskrav på materielen motiverar således kravet på förhandlat förfarande.

Förhandlat förfarande utan föregående publicering bör lämpligen kunna användas i de undantagsfall som anges i direktivet om offentlig upphandling samt, beroende på omständigheterna, i vissa andra undantagsfall.

7) Tillämpningsområde: Hur kan man bäst definiera tillämpningsområdet? Skall det vara en allmän definition, och hur skall den i så fall se ut? En ny förteckning, och vad skall den i så fall innehålla? En kombination av en definition och en förteckning?

En beskrivning av tillämpningsområdet bör innehålla såväl definitioner som en exemplifierande förteckning. Förteckningen måste uppdateras löpande. Det bör inte bara vara typen av produkt som är bestämmande. Det bör övervägas om också upphandlingens syfte skulle kunna vara styrande för tillämpningen av direktivet.

8) Undantag: Är det lämpligt/nödvändigt att definiera en varukategori som uttryckligen undantas från direktivet?

Det är inte nödvändigt att definiera en sådan varukategori, eftersom det faller inom medlemsstaternas kompetens att undanta upphandlingar med hänvisning till artikel 296.

9) Offentliggörande: Är det lämpligt att ha ett centraliserat system för offentliggöranden? Om ja, hur skall den se ut?

För största möjliga öppenhet bör ett centraliserat system för offentliggöranden upprättas.

10) Urvalskriterier: Utöver de kriterier som redan föreskrivs i direktiven om offentlig upphandling, vilka ytterligare kriterier bör tas med för att beakta försvarets särskilda ställning? Sekretess, tryggad försörjning etc ? Hur skall de definieras?

Utöver de kriterier som föreskrivs i direktiven om offentlig upphandling bör sekretess och leveranssäkerhet tas med som godtagbara kriterier.

11) Hur bör sedvanan med att begära kompensationer hanteras?

Krav på motköp eller andra kompensationsåtaganden kan fördröja en effektiv arbetsfördelning och därmed bidra till att bevara en fragmenterad marknad. Emellertid kan sådana krav på kompensationer, för det enskilda köparlandet, bidra till bl.a. teknologiöverföring. Det ökande inslaget av gemensamma materielprojekt innebär dock i sig färre tillfällen att begära kompensationsåtaganden. En harmonisering mellan medlemsstaterna i hur krav på kompensationsåtaganden tillämpas bör eftersträvas.

Det skulle kunna övervägas att på sikt avskaffa sedvanan att begära kompensationer. Detta behöver emellertid studeras närmare.

Med vänliga hälsningar

Lilian Wiklund
Expeditions- och rättschef

Kopia till:
Riksdagens kammarkansli

The Permanent Representative
Sir John Grant KCMG

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Permanent Representation
To the European Union

Avenue d'Auderghem 10
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15 February 2005

c/o European Commission, Internal Market DG
Consultation "Green Paper on Defence Procurement"
Avenue de Cortenbergh/Kortenberglaan 100 (1/100)
B-1049 Brussels

UK GOVERNMENT RESPONSE TO THE COMMISSION GREEN PAPER ON DEFENCE PROCUREMENT

Further to the invitation for comments on the Commission Green Paper on Defence Procurement, please find enclosed the response of the UK Government.

Attached are a covering letter, specific answers to the questions posed in the Green Paper and a copy of the UK's non-paper on a European Defence Equipment Market.

A copy of these documents was forwarded electronically on Friday 11 February 2005.

John Grant
Permanent Representative of the United Kingdom
of Great Britain and Northern Ireland

DESTINATION MARKT/C/3
ADO: A 3073
Action SM/CD
DATE: 17. 02. 2005
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Reply to the European Commission

GREEN PAPER ON DEFENCE PROCUREMENT

1. I am writing in response to the Green Paper on Defence Procurement that was published by the Commission on 23 September 2004.

2. The British Government would like to start by welcoming this important initiative. As the Commission indicates in its paper, there is considerable fragmentation of defence markets within the Union. This hampers the global competitiveness of European defence industry and puts at risk our ability to meet cost-effectively the capability requirements of the European Security and Defence Policy. We consider that improving the transparency and openness of defence procurement in Europe will be a significant step towards both improving the defence capabilities of the Member States and, by providing industry with better access to the overall European defence market, potentially achieving better value for money for taxpayers. The need for action to improve EU public procurement, including in the defence sector, was also clearly highlighted in the recent report to the UK Government by Alan Wood of Siemens plc entitled "*Investigating UK Business Experiences of Competing for Public Contracts in Other EU Countries.*" (the Wood Review). We therefore believe that this initiative provides a good opportunity to debate the means by which the European Union might improve the effectiveness of the defence equipment market in Europe.

3. As the Commission acknowledges, defence has a number of unique characteristics that need to be taken fully into account when developing any new proposal to improve the defence equipment market. In this regard, the UK Government notes that the Commission has no plans to alter the exemption from the EC public procurement rules afforded by Article 296 of the Treaty of the European Community (TEC). Equally, while Member States continue to have full responsibility for all EU defence and security policy issues (and I note that the Commission accepts this), we believe that there may be merit in examining in due course the range of dual-use goods that could be more widely competed within Europe. We similarly believe that this could be achieved without adverse effect on Member States' national security.

4. The Commission offered two suggestions to help us with this aim. First, the issue of an Interpretative Communication which would seek to clarify the EU's existing legal framework and, secondly, the development of a Directive which might co-ordinate procedures for defence procurement in cases where exemptions are not applicable, and in lieu of (or complement) the existing EC Public Procurement Regulations. We note that such a Directive would be tailored to the specific nature of the defence procurement sector.

5. Before setting out views on the Commission's ideas, it is perhaps appropriate to remind ourselves that the regulatory mechanisms relating to defence procurement are already in place. Essentially, defence procurement is covered by the EC Public Procurement Regulations unless exempted by application of Article 296 TEC. Moreover, the EU Council's list of items defining the scope of Article 296 TEC (the "1958 list") continues to provide, in our view, a reasonably good benchmark as to what constitutes warlike defence goods. As such, it could be argued that there is little need to take any formal action. Nevertheless, it is apparent that there are different views on the application of Article 296 TEC, and that the defence equipment market in Europe is not as open and transparent as it could be, and as it needs to be, if Europe is to succeed in enhancing its military capability.

6. In the circumstances, therefore, the UK considers that our attention should be focussed primarily on examining the prospect of enhancing the effectiveness of the existing mechanisms rather than developing new measures. In this respect, we think that the use of an Interpretative Communication might be useful in highlighting the current Community legal framework relevant to defence procurement. Such a communication could have a role in ensuring a more consistent application of existing EC legislation by Member States. It could also enhance the ability of the Commission to monitor those procurements that have been exempted from the public procurement rules through the application of Article 296 TEC. Indeed, we suggest that this role is given a much higher profile than it has in the past, noting that the Commission already has the ability to perform a monitoring and examination function through Article 298 TEC. This function could be aided by the Commission having sight of the information that we envisage Member States providing in response to the reporting requirements under the proposed voluntary Code of Conduct for goods exempted under Article 296. This concept is covered in more detail in paragraph 9. In line with the need for streamlined procedures, and the aim to eliminate unnecessary bureaucracy, we would not support the Commission developing its own reporting process in this regard. Given the inevitable linkage and

possible overlap with the European Defence Agency, and the need for carefully thought through proposals, we strongly urge that the Member States are directly and inclusively involved in the preparation of any Interpretative Communication.

7. From the foregoing, it follows that we have less appetite for a new directive covering defence procurement, even one that does not cover those items exempted by Article 296 TEC. Clearly, we would be opposed to any regulation that impinges upon the use of Article 296 TEC (or that seeks to regulate it), and where it affects matters within the competence of Member States.

8. While we can understand the potential benefits of new regulation outside of Article 296 TEC, not least that it might develop specific and perhaps more flexible rules, we perceive that the drawbacks would more than offset this. In particular, the creation of a new directive might mean that Member States' defence procurement organisations would have to have a detailed knowledge of at least three separate procurement processes and make assessments, on each occasion, as to which process to apply. We do not believe that this supports our aim to make defence markets ever more efficient and effective. Additionally, a new directive would inevitably require the negotiation of and agreement to an additional boundary between those goods falling under the scope of the more general public rules and the new directive. This, and the attendant need to develop the scope of the directive between the Member States, is unlikely to be achieved quickly. Accordingly, the UK does not favour the development of a new directive at this stage.

9. In parallel with the Green Paper's examination of the defence equipment market outside of Article 296 TEC, the UK has been considering what improvements could be made to the marketplace for goods that are covered by this Article. In this regard, the UK has proposed a voluntary Code of Conduct, which we have circulated to other EU Member States and relevant international organisations; a copy was passed informally to the Commission in November 2004. We envisage that the Code would require Member States to commit to the principles of transparency and openness, to accept and apply a set of rules to improve market access, and to create a level playing field for competition. Member States would need to endorse fully the Code and its aims from the outset, and be prepared to accept oversight of their equipment procurement decisions by an independent third party. This role, which would include implementing the Code and developing a rigorous and effective reporting and monitoring system, might usefully be undertaken by the European Defence Agency. We believe that this approach, which could feasibly be implemented in a relatively short timescale, is a pragmatic step forward to improving the

current conditions of the marketplace for goods that are exempt from the EC Public Procurement Regulations. I have included with this letter a further copy of our non-paper, which sets out these ideas in more detail. If the concept proves to be acceptable to the EU Member States, we would see the Code being developed during the course of 2005. Again, should the European Defence Agency be tasked to take this work forward, we would envisage close consultation with the Commission.

10. In sum, we need to ensure that we all work towards improving the transparency of the European defence equipment market, and the creation of a level-playing field for those competing for defence contracts across Europe.

11. We consider that the most appropriate course of action to achieve this aim is to enhance the effectiveness of existing mechanisms in the field. This could include an Interpretative Communication prepared in conjunction with Member States. This could work in tandem, and potentially to good effect, with the concept of a Code of Conduct covering defence goods procured under Article 296 TEC. We do not consider that there is a need, at this stage, for a specific defence directive. However, we do accept that there might be a need to consider a directive in the future should the necessary improvements in the markets not transpire.

12. Finally, the Green Paper set out eleven specific questions on the use and applicability of an Interpretative Communication and a Directive. Our detailed response to these questions, which build on the themes explored in this letter, is attached.

13. I am copying this letter to the Permanent Representatives of the EU Member States and to the Head of the European Defence Agency.

EUROPEAN COMMISSION GREEN PAPER - QUESTIONS

Q1. Do you think it would be useful/necessary/sufficient to explain the existing legal framework in the way presented?

A1. An Interpretative Communication might help to outline the existing Community legal framework relevant to defence procurement. Such a communication would need to take into account those European Court of Justice judgements that relate to the interpretation of Article 296 of the European Community Treaty (TEC) where these can be shown to be relevant to defence procurement. In confirming existing Community law, and clarifying the use of Article 296, a communication could have the effect of leading to a more consistent application of legislation by Member States and assist the Commission's ability to monitor procurement under Article 298 TEC. Given the unique nature of defence procurement, Member States must be afforded the opportunity to contribute fully to the development of such an interpretation. The UK would be happy to contribute positively towards this process .

During the Green Paper's preparatory stages, the Commission mentioned the idea of Member States notifying the Commission on the occasions that Article 296 TEC was invoked for the procurement of defence goods. Such a process would provide the Commission with greater visibility and, in tandem with an Interpretative Communication, would strengthen the Commission's monitoring role under Article 298. However, we would need to ensure that it worked seamlessly, and with no added bureaucracy, with any complementary measures that might be developed by the Member States to monitor more closely those procurements that fall under Article 296 TEC. In this respect, we refer to the UK's proposal to develop a Code of Conduct, which would voluntarily require Member States to publish widely defence procurement opportunities, and subsequently report their observance of the Code's criteria to an independent body. We believe that the European Defence Agency (EDA) should take an active part in this process in conjunction with the notification system for the Commission.

Q2. Are there other aspects of the Community system in question that should be clarified?

A2. We are not aware of any other aspects of the Community system that needs to be clarified.

Q3. Do you consider the rules of existing Directives suited/unsuited to the specific characteristics of defence contracts? Please give your reasons.

A3. The existing Public Procurement Directives, including the new Consolidated Directive (2004/18/EC), covering supplies, services and works, are, for the most part, suitable for defence contracting. Nevertheless, these directives are not particularly suited for use on major new technology development programmes, which are commonplace within defence procurement, and which are often contracted for in successive stages. The requirement under the existing directives to undertake in most cases a full re-competition at each stage would be a significant impediment to the successful and timely completion of the programme to the extent that it might become non-viable. However, this limitation is mitigated by the fact that, in the main, these types of procurement are usually undertaken for equipment that falls properly under Article 296 TEC.

Q4. Would a specific Directive be a useful/necessary instrument for creating a European defence equipment market and strengthening the industrial and technological base of European defence?

A4. The UK agrees that there is a fundamental need to improve the transparency and openness of the Europe defence equipment market. We therefore consider that measures that help to open up the European defence equipment market, and improve the competitiveness and efficiency of European defence industry, have the potential to bring significant benefit.

With regard to a possible new directive, we welcome the Commission's confirmation that any proposals would not affect the exemptions provided for under Article 296 TEC, and that this exemption would remain fully applicable according to the conditions of today. We believe that a new directive that has been specifically tuned to the needs of defence procurement might introduce regulations that are better suited to the characteristics of the market. Nevertheless, it is clear that this domain is already regulated by the current EC Public Procurement Regulations, and that these rules are generally satisfactory for the procurement of goods not covered by Article 296 TEC. In addition, by definition, a new directive would create a new series of regulations for, and new boundaries within, the defence equipment market. We believe that this is unlikely to be conducive to greater efficiency, even if we were able clearly to define the line between the existing public procurement rules and the defence procurement directive and which itself is likely to be extremely difficult and subjective.

In the circumstances, therefore, the UK considers that it would be preferable to gauge the affect of an IC on the procurement patterns of the Member States before launching the development of a directive. In this respect, we believe that there is scope for an IC, as already described, in tandem with a Code of Conduct for those procurements falling under Article 296 TEC, to provide a greater degree of coherence and transparency to the European defence equipment market.

We recognise, of course, the possibility that these initial measures may not provide all of the results that we are looking for. Should this transpire, then the UK would not rule out the need to develop a new directive in the longer term.

Q5. What is your opinion regarding the use of a possible Directive for purchases by other bodies, such as the EDA?

A5. The scope of procurement activities by the EDA will be a matter for the Member States involved with the organisation, although it has already been established that the Agency will not replicate procurement management services provided by others, such as OCCAR. The scope for using any new directive might therefore be limited. Nevertheless, we would have no objection to its use by the EDA, should it be decided, more widely, to develop a directive.

As OCCAR is an international organisation run under the OCCAR Convention, it has the ability to develop its own processes and rules, and it has done this based on an amalgam of best practice from the OCCAR Member States. Again, in general terms, we would not object in principle to OCCAR following any defence directive. However, it should be stressed that OCCAR's mandate is to manage co-operative programmes, and that, by their nature, they are all (and are likely to be) goods that fall properly within the scope of Article 296.

Q6. Procedures: Do you believe the Negotiated Procedure with prior publication to be suitable for the specific needs of defence procurement? In what situations should use of the Negotiated Procedure without publication be allowed?

A6. In general, both the existing Negotiated Procedure and the Competitive Dialogue Procedure (as outlined in Article 29 of Directive 2004/18/EC dated 30 April 2004 and due for implementation in the Member States by 31 January 2006) are suitable for the needs of defence procurement.

Use of the Negotiated Procedure without publication should be allowed in those cases already provided for in the existing Directives and additionally where the retention of capabilities within the national industrial base is essential for national security reasons, or which are militarily essential to retain.

Q7. Scope: What would be the most appropriate way of defining the field of application? A general definition? If so, what? A new list? If so, what? A combination of a definition and a list?

A7. We consider that the 1958 List of military equipment covered by Article 296 of the European Community Treaty provides a reasonably satisfactory definition of general scope and that accordingly it is still suitable for use. Nevertheless, there are certain areas within the list that might benefit from further clarification in due course. However, in view of the diverse defence equipment market (eg ostensibly simple goods such as paint can be rendered strategically important once it has camouflage properties), such work would need to be undertaken carefully. Consequently, we do not feel that it would be appropriate for an IC to deal with this area of work in detail; not least because of the amount of time that it might take to make any changes to the list. In the same vein, and because it seems that the 1958 list has been taken as the benchmark by many countries, we do not believe that a general definition would add anything to the process.

Q8. Exemptions: Do you think it would be useful/necessary to define a category of products that would be excluded categorically from the Directive?

A8. The exemptions permitted under the WEAG arrangements might be suitable for use in this context. The full range of exemptions under the WEAG arrangements is as follows:

- Requirements already subject to the EC Supplies and Services Directives;
- Nuclear weapons and nuclear propulsion systems;
- Warships (excluding their systems);
- Toxic and radioactive agents;
- Cryptographic equipment;
- Requirements covered by Memoranda of Understanding whose provisions do not provide for publication of such requirements;
- Emergency requirements;
- National security;
- National imperative.

It should be noted that this list of exemptions should not prejudice Member States' ability to exempt certain procurements from the EC Public Procurement Regulations by the application of Article 296 TEC and the 1958 list.

Q9. Publication: Do you think a centralised publication system would be appropriate, and, if so, how should it function?

A9. We would not object, in principle, to the use of a centralised publication system in the specific context of a directive for defence procurement should one be developed. However, given the relative maturity of our current publication system, we would not wish to subscribe to a central system in the absence of such a directive.

Our current process is based on contracting out the production and publication of the Ministry of Defence Defence Contracts Bulletin. This commercial contract has several more years to run, and would need to come to a natural close before the UK Ministry of Defence could sign up to any centralised system.

In terms of the method of publication, we have found that the Defence Contracts Bulletin is optimised by making it available in hard copy, on CD-ROM, and on the Internet. We would not wish any centralised procedure to be more bureaucratic or less efficient than this system.

Q10. Selection criteria: What criteria do you think should be taken into account in addition to those already laid down in existing directives to take account of the specific features of the defence sector? Confidentiality, security of supply, etc? And how should they be defined?

A10. Confidentiality is an important criterion in that, for contracts involving secret matter, potential suppliers must possess, and be able to demonstrate that they possess, the necessary accreditation and approval to handle such material before being invited to tender or awarded a contract.

Security of supply is also important and we would wish to see it provided for in the selection criteria. It is the ability to guarantee and to be guaranteed the supply of goods or services that are critical to military operations to prosecute a Government's foreign and security policy. It is particularly important where legitimate defence interests require the maintenance of a strategic defence capability within the national industrial base, where competition is lacking or where suppliers are constrained by stringent export controls.

We would also wish to see provision made for the selection of the supply chain to be taken into account in selection criteria, where this is judged to be a material matter in assessing value for money and fairness in the competition. In exceptional circumstances, suppliers may be required to establish a sub-contract competition for specified capabilities and the contracting authority will require sufficient insight into the procedures being used, to be satisfied that a fair competition will be conducted.

Q11. How do you think that offsets should be handled?

A11. There are many different views towards the importance of offset. Nevertheless, it is universally agreed that the use of offset does influence the market and, in many cases this is to the detriment of efficiency and cost effectiveness. The objective should be to abandon the use of offset, at least within Europe and with European suppliers, as a means to satisfy national workshare demands. However, we recognise that this would be difficult to achieve now, in advance of an effective European Defence Equipment Market (EDEM). In the circumstances, therefore, the UK considers that it is likely that the existing arrangements will continue to prevail in the near to medium terms, but that work to re-examine this, in the light of progress with the EDEM, should take place at the appropriate time. We also recognise that, notwithstanding our view that offsets should be abandoned once demonstrable mutual access to markets has been achieved, it may still be necessary to allow offset to be used by European Government's in contracting with non-

European suppliers based in countries which have policies that have the effect of restricting access to their defence equipment market.

A EUROPEAN DEFENCE EQUIPMENT MARKET (EDEM) - A NON-PAPER BY THE UNITED KINGDOM

Introduction

1. The European Commission's communication on defence equipment policy issued in March 2003[1] set out its interest in creating a more efficient defence market in Europe. This led, *inter alia*, to the Commission's consultative Green Paper[2] on Defence Procurement published in September 2004, which has the aim of opening the debate on the desirability of adapting the rules for awarding defence contracts in Europe in order to open up the market to all Member States. As part of this debate, the paper assesses how the Commission might clarify in a Communication the existing legal framework and case law surrounding defence procurement. It also poses the question as to whether the Commission should propose a Directive to co-ordinate defence procurement procedures in cases where Article 296 of the Treaty is not applicable. The Commission envisages that such a proposal, if implemented, would be linked with new, flexible EU-wide regulations, which would take into account the specific nature of the defence sector. The consultative process with Member States and other interested bodies is currently underway.

2. At the same time, the European Defence Agency (EDA) is in the process of being established, with the aim of being operational by the end of 2004. The EDA aims to develop defence capabilities in the field of crisis management, to promote and enhance European armaments co-operation, strengthen the European defence industrial and technological base and create a competitive European defence equipment market (EDEM).

3. The UK supports these initiatives. They have the potential to deliver improvements in co-operative practices, reduce market distortions, which is a key aim of the UK's Defence Industrial Policy, and produce greater market access and improve transparency. This paper does not address the specific ideas raised in the Green Paper. Rather, it considers the relative merits of the various ways of creating a viable EDEM, focussing particularly on the options of a fully regulated market and a non-regulated marketplace, and exploring possible means of implementing the latter approach. It is intended as a contribution to the wider debate opened by the publication of the Green Paper. But this is not to ignore, or discount the potential benefits of, other options that may exist between the two ends of the regulated/non-regulated spectrum.

A European Defence Equipment Market

4. Currently we do not have an EDEM. We simply have a group of national markets that do not have any policies that govern behaviours between them (with the exception of some provisions of the Letter of Intent (LoI) Framework Agreement that recognise certain interdependencies). In creating an EDEM we need to consider the various ways of constructing a market and, in particular, decide whether a set of regulatory procedures, enforced under Community law, is preferable to voluntary or self-regulation by Member States.

[1] "Towards a European Union Defence Equipment Policy" COM(2003) 113 dated 11 March 2003

[2] Green Paper on Defence Procurement issued on 23 September 2004

What Type of Market?

5. As set out in the Green Paper, a fully regulated market could comprise of a body of regulations, perhaps based on specific Defence Procurement Directives, agreed by Member States and applied by the European Commission. This approach would lay down certain common mandatory procedures and rules, the application of which would necessarily enjoy some national discretion (e.g. national contracting terms) and some exclusions (e.g. nuclear or black programmes). It might have a number of other consequences, for instance, modifying the 1958 list of military equipment that is annexed to Article 296.

6. The regulated approach has a number of attractions. First, through the use of European law, it would enhance transparency, non-discrimination and equal treatment, and offer the potential to create a level playing field for defence companies competing for business within the wider EU. It might also encourage the harmonisation of procurement practices and contract terms, where this is beneficial, which may provide the conditions for more effective equipment co-operation within the EDEM.

7. But a fully regulated marketplace also has a number of disadvantages. In particular, it would require the negotiation and agreement, by the 25 Member States, of a series of binding rules and procedures. Such negotiations would, by dint of their subject matter, be complex and protracted and, in view of previous reluctance by Member States to follow Community regulation in this area, may not succeed in developing truly useful improvements to defence procurement practice. Previous experience indicates that regulation would take at least seven years to implement. Such an approach would not therefore enhance near or medium term improvements to the efficiency of the European defence equipment market.

8. An alternative is to use a non-regulated marketplace. But this approach does not mean that we continue with existing practice and procedure: there is plenty of evidence to show that there is a stark need for Europe to improve significantly its efforts to set up a clear and European-wide defence market. Against this background, a non-regulated marketplace would require Member States to commit to the concept of transparency and openness, and to accept and apply, *voluntarily,* a set of rules to improve market access and create a level playing field for competition. Member States would also need to accept oversight of their equipment procurement decisions by an independent third party. The EDA seems well placed to undertake this work.

9. Under a non-regulated EDEM, Member States would open the generality of their procurements above certain thresholds to international competition. They would then report to the nominated independent body promptly after announcement of contractor selection on the management of each competition and the selection criteria employed. The nominated body would be entitled to express a view as to whether the letter and spirit of the market rules had been respected, and to publish periodic reports on behaviours exhibited. Although the non-regulated approach has no effect in law, nor gives any entitlement to appeal by unsuccessful bidders, it would encourage good practice amongst the Member States through publication and peer pressure.

10. The non-regulated option offers many of the benefits of a regulated market. It has the potential to increase transparency, open up national markets, and create more efficient defence markets. Moreover, it also offers the advantage of significantly earlier implementation and, by dispensing with need for Commission regulations, avoids the potential for confrontation over Commission competence in the area of defence procurement (although as the Green Paper suggests there may still need to be discussion about the precise scope of Community and Member State competence). In terms of

disadvantages, the non-regulated approach might risk non-compliance, if it is ineffectively introduced and monitored. The challenge will therefore be in ensuring that all Member States robustly support the scheme from the outset, and that they recognise the possibility of having to turn to regulation should the non-regulated approach prove unsuccessful.

11. The UK believes that a non-regulated EDEM offers a pragmatic, practical and relatively swift first step towards delivering the sought after improvements to transparency and market access. Successful governance could be achieved through a voluntary Code of Conduct agreed by Member States. Such a code is analogous to the EU Code of Conduct on Arms Exports, where Member States have agreed a set of criteria to which they each intend to adhere in the award of export licences. Each country publicly reports on its observance of the criteria. But, there is nothing that legally binds them to follow the criteria, and they may give reasons as to why, in particular cases, they have elected to depart from them.

Code of Conduct on Defence Procurement - What Might it Look Like?

12. The EDEM would comprise those Member States that agree to abide by its guiding rules and principles, as set out in the voluntary Code. It is envisaged that the Code might be drawn up by the Member States, in conjunction with the EDA, and that its subsequent implementation and use could be monitored by the nominated body, again the EDA appears well placed to do this. The Code would cover:

a. Market Scope: Member States will be expected to exercise responsible discretion as to what is included in the voluntary market. It should cover all defence equipment, except that which Member States exclude on specific national security grounds, and of course, those goods already covered by the EC Public Procurement Regulations. But this should not be based on political convenience. Programmes excluded for national security reasons (such as nuclear and very highly classified programmes, etc) might be generically listed for monitoring purposes, summarising the amount of national expenditure, and whether it is related to R&D or production. Other than for those programmes in the categories above, which would be the subject of blanket exemption from the Code, an intention not to apply the Code of Conduct to a defence equipment procurement should be a matter for consultation orchestrated through the EDA.

b. The Scope of International Competition: In line with existing WEAG rules, a minimum requirement would be that invitations to tender for business should be made available to industry in the EDEM nations. More importantly, equality of information for all potential industrial participants must be ensured in the EDEM perimeter, and proposals from all such participants must be considered eligible and treated fairly. These conditions must apply throughout the supply chain, unless the customer State specifies that, for national security reasons, it requires a specific sub-system to be delivered nationally. Again, this should be the subject of consultation or a letter of explanation.

It should be a matter for each customer State to decide whether it wishes to invite tenders from companies outside of the EDEM or the EU. However, to enable monitoring of procurement process, Member States should report such decisions.

Notions of *juste retour* and offset have no place in an efficient internal market. However, in defence markets worldwide, there is an important link between defence investment and national economic return: in some countries this can be characterised as protectionism favouring national industry and technology. In the UK, the mechanism is offset-based. The UK welcomes imported technology solutions providing that new development and product build might be conducted indigenously, and encourages overseas companies to invest in the UK to form part of the national competitive industrial base and/or deliver the offset obligations of the parent company. The UK's market model is therefore founded more on economic considerations than on factors relating to the Defence Technological Industrial Base (DTIB) (see "Security of Supply" below). However, it will be important to recognise that these elements are not entirely separable in the context of EDEM. For example, dismantling economic barriers to cross-border competition would stimulate a rationalisation of the supply base. This has effects on the DTIB that would require responsible management. For instance, the de-localisation within EDEM of certain activities from the territory of one customer State should not then cause that State to favour acquisition of comparable products from a non-EDEM based supplier who is offering in-country offset.

c. Security of Supply: The UK believes that the principal objective of defence equipment procurement should be the supply of the best military capability. Although security of supply is a key issue, the UK does not consider it essential that a single country needs to develop and sustain within its borders all of the technologies needed for the delivery of military capability. Indeed, for each country to do so is in contrast to the growing recognition that European industry needs to rationalise to compete in the global market. Moreover, industry is already rationalising to the extent that multi-national companies (which have footprints stretching over many countries) are becoming ever more commonplace. In such circumstances, it now seems inappropriate for Member States to insist on ownership of a company being a relevant consideration in procurement decisions. Rather, we should develop specific agreements with the companies concerned that satisfactorily assure security of supply for the customer State.

d. State Aid: State aid prevents the level playing field necessary for an effective marketplace. Currently, it is possible for Member States to use Article 296 to allow levels of State Aid in the defence sector that might not otherwise be permissible. We therefore believe that the Code of Conduct should include an undertaking that Member States should report all instances of State Aid that come under the scope of Article 296, setting out their reasons for so doing in a letter of explanation submitted to fellow Member States through the independent body monitoring the Code. However, this arrangement is not intended to alter the basis of funding for defence research, which is permitted at rates higher than international trade agreements in the civil sector would otherwise allow.

e. DTIB: The creation of an effective EDEM could prompt further rationalisation of industrial capacity and hence specialisation of the industrial capability in any one nation. Although the capabilities within Europe's borders might not decrease, and arguably could increase due to greater pooling of demand, it is likely that it would be necessary to develop a defence industrial policy to take into account the changing dynamic. This fresh focus on the European DTIB would again appear to fall to the Agency, following on from its task "*to identify ... policies and measures aimed at strengthening the European defence and technological base*".

Conclusion

13. The creation of an effective EDEM will deliver significant benefits to Member States and European defence capability and presents the opportunity to develop further the global competitiveness of the European defence industry. It should be taken forward as a matter of priority. Although the use of centrally developed regulation offers certain

benefits, this approach is hampered by its complex legal characteristics, and the time it would take to negotiate and implement, at which time changed circumstance might render the regulations less beneficial. Accordingly, a less radical but more pragmatic approach is recommended, based on the creation of a voluntary Code of Conduct. This form of internal governance would be designed to stimulate cross-border competition and trade. By using reporting arrangements developed by the Member States and the EDA, and by using an independent body, such as the EDA, in a monitoring and guarding role, a non-regulated approach could provide a good first, and relatively swift, step towards the opening up of the defence equipment market in Europe.

14. We recommend that the work to develop such arrangements should be taken forward by the EDA, consulting with the Member States.

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Abstract:

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i ☑	American Chamber of Commerce to the European Union (AmCham EU)		63K	1.0	EN (English)	19/04/2005
i ☑	Belgian Security & Defence Industry (BSDI)		17K	1.0	EN (English)	19/04/2005
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AMCHAM EU
AMERICAN CHAMBER OF COMMERCE
TO THE EUROPEAN UNION

February 22nd, 2005

Position paper response to the European Commission's Green Paper on Defence Procurement

Executive Summary

In response to the September 23rd European Commission's Green Paper on Defence Procurement from the Directorate-General Internal Market, the American Chamber of Commerce to the European Union submits the following comments for your consideration:

- AmCham EU welcomes the European Commission's initiatives in clarifying the EU's defence procurement rules and recognising, for example, that many dual use items and technologies may no longer be entitled to the protection from competition afforded by Article 296.

- However, AmCham EU highlights that the Green Paper does not attempt to place the trends in the European defence industry and the European defence equipment market in the broader context of the global market for defence.

- Given the increasingly integrated and globalised nature of the defence industry, AmCham EU believes that it is would be beneficial to develop European standards and technologies related to transatlantic or global standards. Such an approach would make European industry more efficient and globally competitive.

- As it is widely recognised that European industry needs better access to the U.S. technology base and to the U.S. market, AmCham EU stresses that Europe's own market must therefore remain open to participation by the global defence industry if European firms are themselves to increase their competitiveness.

- AmCham EU considers that interim steps of "consolidating Europe first" may, in fact, impede the adjustments required for Europe's industries to attain and maintain their global roles. Indeed, the defence market is global, not regional, and efforts to improve market efficiency must take this reality into account.

Background

The European Commission has published a Green Paper on Defence Procurement as part of an ongoing effort by the Commission to encourage creation of what is termed a "European Defence Equipment Market". The paper explicitly recognises that the current European defence marketplace is highly fragmented on both the supply and demand sides. Procurement decisions remain the prerogatives of national governments. Defence industries are widely distributed and often protected or subsidized by governments. The result is overcapacity and an inability to achieve efficient rates of production.

The reduction in total defence expenditures following the end of the Cold War, combined with the fragmentation of the European market, have made it difficult for European defence industries to invest in new technologies and to maintain viable production rates. Economies of scale are virtually impossible to achieve at the national level, and European multilateral or cooperative programs have so far not been especially numerous or notably successful.

That the European defence market has been slow to adapt to changed market conditions can be attributed to several unique aspects of defence markets, as recognised in the Green Paper: the dominant role of the state as customer, source of research funds, and sometimes as owner; the special needs for classified information and security of supply; the long product life cycle of defence equipment. These unique features have exempted the defence sector from the rules governing open competition, procurement, and state aid in the EU. These exemptions are codified in Article 296 EC of the Treaty. These exemptions create a number of legal uncertainties for suppliers in contrast to common EU standards. Among other questions, the Green Paper asks whether the EU should clarify or modify its legal framework with an aim toward clarifying exemptions and procedures under Article 296. An interpretive Communication or an EU Directive on procedures are two options identified.

Discussion

The aim of the Green Paper is to encourage the creation of a "European" market for defence equipment, ostensibly to create more efficient spending and to make European industry more competitive. Implicitly, the assumption is that the problems of overcapacity and fragmentation in industry will be overcome if national barriers to competition are removed and markets are "opened" to competition – at least a limited type of Europe-wide competition. Inevitably, this will mean that the industry reorganises itself around a small number of first-tier prime contractors that are globally competitive and supported by a broad network of second- and third-tier suppliers. Reference in the Green Paper to the benefits to SME's of market "opening" can be interpreted to mean that suppliers will have access to a broader range of opportunities with prime contractors, although this is not stated explicitly.

The Green Paper does not attempt to place the trends in the European defence industry and the European defence equipment market in the broader context of the global market for defence. At a time when globalization and the internationalization of many key defence programs are important characteristics of the global market, this omission is notable. The assumption appears to be that the European marketplace can be "opened" within Europe and consolidated on a Europe-only basis without regard to these larger trends.

AmCham EU Comments

The fundamental objective of creating a more unified defence equipment market should be to provide better value for money for the governments that purchase the equipment. Reducing national barriers or consolidating industry are means to this end, not ends in themselves. If the European industry is to be able to supply the leading edge capabilities required, it must be able to draw from and access the international marketplace and to develop and maintain the capacity to be globally competitive.

The absence of harmonised operational military requirements and a cooperative (or centralised) procurement authority currently present obstacles to efficient military procurement. In the absence of these conditions, "opening up of defence markets" and breaking down national barriers to procurement are likely to remain empty goals. If the decision making responsibility remains at the national level, only a process of harmonising requirements (and agreeing on common standards) can produce cross-national efficiencies. This harmonisation process could occur in the European Defence Agency or it could occur through NATO consultative processes or some other mechanism, but it should be explicitly addressed as a first step toward a more unified market. The Green Paper's impact and authoritativeness could be enhanced by addressing this point in detail.

European militaries are adapting to the changing strategic environment of the 21st century. Many countries are giving up some of their traditional military missions. Many explicitly accept in their military strategies that territorial Defence is no longer the primary military mission of the armed forces. As forces shift to more deployable and sustainable configurations, in virtually all cases it is assumed that the forces will be operating with coalition partners, whether of the European Union's Battle Groups or the NATO Response Force. These military requirements place an even higher premium on the ability to operate with other allied forces and to have compatible doctrine, technologies, and logistics. The more demanding the military task, the greater the importance of interoperability. While this argues for a more integrated European approach to defence equipment, it also argues for transatlantic involvement and global competitiveness for European industry.

Given the increasingly integrated and globalised nature of the defence industry, it is not feasible to develop European standards and technologies unrelated to transatlantic or global standards. Such an approach would not make European industry more efficient or globally competitive. Since the United States spends more on defence research and development and procurement than all of Europe, European industry needs access to the U.S. technology base and to the U.S. market. Transatlantic industrial cooperation and transatlantic programs that include U.S. and European partners will increase the capabilities of European industry and can be important contributors to the health of the defence industry on both sides of the Atlantic. Europe's own market must therefore remain open to participation by the global defence industry if European firms are themselves to become or remain competitive.

Many of the key technologies for future military capabilities are already being developed with the participation of transatlantic industrial teams. It is neither conceptually nor empirically necessary for a period of European consolidation to occur prior to the opening of the marketplace to global participation. Indeed, events in the global marketplace are moving faster than high-level policy in this regard, in order to deliver the high-performance network-enabled systems required by government customers. Customers should and will demand competitive prices and the best globally available technology in addressing the national and international security requirements of the twenty-first century.

No amount of codification of procurement rules, market restructuring, or industry consolidation can, in the long run, overcome inadequacies of the resource base. The defence industry needs programs and funding to survive and prosper. While greater efficiencies in spending and regulatory clarity could certainly help and would be welcome, the absolute level of military spending in Europe today is not sufficient to meet the identified and agreed military needs. Reforms of procedures will not, by themselves, assure a robust defence technology base in the future at current levels of funding.

Clarifying the EU's defence procurement rules and recognizing, for example, that many dual use items and technologies may no longer be entitled to the protection from competition afforded by Article 296, are initiatives to be welcomed and supported. Indeed, all defence equipment suppliers would benefit from EU defence procurement rules based on more consistency between EU Member States (easier to make investment decisions) and more transparency (better legal clarity). By themselves, however, these initiatives will not address the underlying causes of insufficient investment and inefficient procurement that characterize the market today. A move to an open and globally competitive marketplace, where European industry takes its rightful place as part of a global industry, must be the objective. Interim steps of "consolidating Europe first" are not necessary and may, in fact, impede the adjustments required for Europe's industries to attain and maintain their global roles.

* * *

The American Chamber of Commerce to the European Union (AmCham EU) is the voice of companies of American parentage committed to Europe towards the institutions and governments of the European Union. It aims to ensure an optimum business and investment climate in Europe. AmCham EU facilitates the resolution of EU – US issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Total US investment in Europe amounts to $850 billion, and currently supports over 3.5 million jobs.

* * *

AeroSpace and Defence
Industries Association of Europe

SECRETARY GENERAL
ROGER W HAWKSWORTH

21st January 2005
RWH/dlt/091

European Commission, Internal Market DG
Consultation « Green Paper on Defence Procurement »
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Ladies and Gentlemen,

Please find attached the Response of the AeroSpace and Defence Industries Association of Europe (ASD) to the analysis, suggestions and questions that you have presented in your « Green Paper on Defence Procurement » (COM(2004) 608 final, Brussels 19.7.2004).

The issues that you raise are fundamental to the health and competitiveness of the industry in Europe. They are therefore an important ingredient for building European capabilities commensurate with the overall objectives of the European Security and Defence Policy.

Our industry will continue to support the consultation process that you have started. We also anticipate that the European Union Member States will want to play a strong role in the required transformation process, the implementation of which will require concerted political determination.

It is in this latter context that, while our membership collectively supports initiation of early and concrete action to achieve a rapid improvement in defence market conditions, a minority view has been expressed by part of our German membership favouring a prior political initiative to address the most blatant distortions, before any new regulatory reform[1].

Our Response is focussed on making early and substantive progress. Time is of the essence, and we consider that the advent of the European Defence Agency offers a new opportunity and potentially new means to address relatively quickly the challenge of improving procurement practice within the Art 296 exemption. We consider that this opportunity, which is not explored in the Green Paper, needs to be given proper weight in future deliberations.

[1] BDI Position Paper, transmitted independently

Our detailed argumentation and proposals, together with answers to the specific questions posed in the Green Paper, are set out in the enclosed Response. We are of course at your disposal for further explanation and study of particular issues.

Sincerely yours,

Roger W Hawksworth

Attachments: Executive Summary, Response & Annex A

AeroSpace and Defence
Industries Association of Europe

21st January 2005

RESPONSE TO THE EUROPEAN COMMISSION'S GREEN PAPER ON DEFENCE PROCUREMENT

Executive Summary

(1) ASD welcomes the initiative taken by the Commission in publishing this Green Paper, making a case for a new approach to regulating defence procurement in the European Union. The creation of a European Defence Equipment Market (EDEM) is an overarching objective which industry fully shares. We agree that this will strengthen the competitiveness of the European industry and believe that it would offer wider economic and military benefits. Indeed, the elimination of obstacles that limit the access of European industries to Member States' defence markets at all levels of the supply chain is overdue and now a matter of urgency. Time to implementation is therefore a critical factor.

(2) This objective should apply across the full range of defence supply (with certain exceptions only for equipment of the highest military sensitivity). The objective therefore relates to both that area of the market which is subject to the Art 296 exemption and that which is not. While industry recognises that there are difficulties of interpretation of Art 296 in the field of defence procurement, it does not consider their resolution needs to be a near-term priority for public policy - especially if the process of re-interpretation distracts from what should be the primary objective of policy, which is the early creation of a competitive EDEM in the high value and high technology part of the market that lives, under any reasonable definition, within the Art 296 exemption.

(3) We have welcomed the creation of the European Defence Agency, and we attach very high importance to its task to create a well functioning and efficient EDEM. We note that, as an inter-governmental body, it is the only Community institution able to address both the introduction of new market disciplines within the Art 296 exemption and the consolidation of demand.

(4) We have given serious consideration to the proposal for a Defence Directive. Our conclusions are, first, that a Defence Directive is not sufficient to the tasks of regulating the whole market and of catalysing greater consolidation of demand; and second, that the time required for its preparation is well beyond that which industry would wish to see in the context of the wider market; but, third, that a Directive would have a place in the structure of market regulation in the medium term and that work on its preparation could usefully now be started.

(5) The sequencing and interaction of new measures to improve the performance of EU defence markets is critical to success and will require a pragmatic approach. Our recommendation is that the focus of near term efforts should be devoted to the preparation and implementation of a EDEM Code of Conduct, under European Defence Agency supervision, benefiting as appropriate from the Commission's experience in market regulation, covering the *de facto* Art 296 exemption area of the market. In view of its voluntary and non-legally binding nature, we anticipate that this can be prepared much more quickly than a Directive. We consider that this approach should produce the greatest material benefit in the shortest available timeframe.

(6) However, a Code does not offer a complete solution in two important respects: it is not legally binding and it does not clarify the interpretation of Art 296. Industry would therefore see opportunity for action in the medium term, and in the light of the performance of the Code, to agree on a consensual basis between Member States and the Community institutions both a new understanding of Art 296 as it applies to defence procurement and a Defence Directive on the lines described in Section II.2 of the Green Paper, operating outside the area covered by the Art 296 exemption as then defined.

(7) We consider this proposal to offer a pragmatic, sequential and coherent way forward that can secure the principal economic and military benefits from improved defence procurement procedures in a timely and comprehensive manner.

ASD **AeroSpace and Defence**
Industries Association of Europe

21st January 2005

RESPONSE TO THE EUROPEAN COMMISSION'S GREEN PAPER ON DEFENCE PROCUREMENT

(1) ASD welcomes the initiative taken by the Commission in publishing this Green Paper, making a case for a new approach to regulating defence procurement in the European Union. We were pleased to work with the Commission in the industry working party during the preparatory stage of the Green Paper.

(2) Our commentary and response below broadly follow the structure of the Green Paper. We conclude with a proposal for action. Our answers to the specific questions posed in the Paper are given in Annex A.

Introduction

(3) The creation of a European Defence Equipment Market (EDEM) is an overarching objective which industry fully shares. We agree that this will strengthen the competitiveness of the European industry and believe that it would offer wider economic benefits and support a more efficient build-up of military capabilities.

(4) We have welcomed, and have indeed over many years pressed for, the creation of the European Defence Agency. All its missions are important, and we attach very high importance to its task to create a well functioning and efficient European Defence Equipment Market.

I. Reasons for Action in the Field of Defence Procurement

I.1 Fragmented Defence Markets

We share the Green Paper's analysis in this Section.

We would, however, note the following additional points:

a) (5) The market and the industrial and technology base it supports are not uniform across the Union. If the average of EU Member States' equipment procurement spending as a proportion of their total defence expenditures is in the order of 20%, the corresponding figure for the highest spending Member States is around 50%. Furthermore, over 75% of defence procurement expenditure in the EU, and over 90% of defence research and development expenditure, is concentrated in the six Member State signatories of the Framework Agreement (Letter of Intent) Treaty – DE, ES, FR, IT, SE, UK. Despite these disparities, European defence industries are able to produce advanced technology and competitive products as demonstrated by several export successes.

b) (6) The European Defence Market suffers from a lack of reciprocity with the US Defence Market. The sheer size of the US market creates economies of scale and supports much higher levels of equipment spend and of R&T, which is critical to the long term. Moreover, in general, the practical barriers to entry for EU-owned and controlled firms seeking to enter the US market are structurally much higher than for US-owned and controlled firms seeking to sell their goods to countries within the EU.

c) (7) Inter-governmental collaborative defence programmes have been in existence for forty years. While the management of these programmes may not have been fully optimal in an economic sense, they have served to reduce the fragmentation of demand and have generally delivered to the participant governments lower prices than could have been obtained (or even afforded) nationally. In many cases, they have also enabled Europe to maintain and develop indigenous technological capabilities and products which otherwise would have been bought 'off the shelf' from elsewhere. It is important to note that these benefits are at root the result of political will, rather than the product of market mechanisms or regulation; and that, both now and for a foreseeable future, it is inter-governmental co-operation that can deliver these benefits.

d) (8) Fragmented demand has other consequences on the industrial supply base. It is notable that defence industrial consolidation across national borders in Europe has occurred primarily in the air, electronics and guided weapons sectors which have pioneered co-operative activity; it has been less in evidence in the land and naval sectors where political constraints and lack of market incentives have made the restructuring process more difficult to engage.

e) (9) Fragmented demand carries costs for industry. Responding separately to near-identical requirements in different Member States is costly, and impacts European industry competitiveness not only in Europe, but also when competing for third countries' requirements. However, that is a fact of a market that is composed of nation states who generally procure defence equipment on an individual basis; market regulation alone does not, of itself, change that fact.

I.2 Specific Features of Defence Markets

Again, we share the Green Paper's observations and would add the following points:

f) (10) The inter-governmental Framework Agreement, embodied in a Treaty between the six "LOI nations" identified above, addressed on a legally binding basis a number of the issues touched upon in the Green Paper. While the Agreement seeks expressly to facilitate the restructuring and operation of the European Defence Industry, a number of its provisions are of direct relevance to the market – in particular those concerning security of supply, the transmission of classified information between governments and industry, and treatment of commercially sensitive information. Additionally the Agreement makes provisions for the management of export licences. While industry does not consider the Framework Agreement to offer comprehensive solutions to these matters, and its application is in any case limited to six Member

States only, it highlights the fact that these actual or potential restraints to cross-border free trade in defence equipment and technology can only be resolved at the inter-governmental level. We note that the Council Joint Action of 5 July 2004 invites the European Defence Agency to pursue an EU-wide application of the relevant rules of the Framework Agreement.

g) (11) To the extent that Member States wish to preserve and develop competitive and indigenous industrial capability in Europe in support of ESDP, this is a national or inter-governmental matter, action on which can be orchestrated through the European Defence Agency.

h) (12) The introduction to the Green Paper makes general reference to "a set of complementary initiatives" (in addition to the regulatory framework). We would consider that the subject matter of the Framework Agreement should form part of those initiatives, and that further attention would need to be given to policies and instruments in relation to defence trade and exports, the treatment of offsets as well as national policies towards investment in high technology and knowledge-based employment. Such policies are an inherent part of defence procurement practices in national markets.

I.3 Limits to the Existing Legal Framework

(13) We note the Commission's legal analysis in Section 3.1. We query the argument that the list drawn up in 1958 is now an inappropriate reference for defining the scope of Article 296EC. We would incline to the view that, having been agreed in Council, the list is the only valid and available reference.

(14) We recognise the Green Paper's descriptions of differing national procedures and of procedures for co-operative programmes in Sections 3.2 and 3.3.

(15) Regarding the observation (3.2) on the WEAG initiative to harmonise tendering procedures, we agree that this has produced limited results. We would not, however, agree that the cause of this outcome lies only in the non-binding nature of the political agreement. WEAG had neither the organisational infrastructure nor the political visibility and authority to coax and secure voluntary enforcement. These deficiencies, along with others in the WEAG, have been recognised by Member States. We believe they can in large part be overcome through the creation of the European Defence Agency.

II Defining Action at EU level

Objectives and Priorities

(16) Industry fully shares the Commission's objective of eliminating obstacles that limit the access of European industries to Member States' defence markets. Indeed, industry considers that achieving this objective is overdue and now a matter of urgency. Time to implementation is therefore a critical factor.

(17) Industry also considers that the objective should apply to all levels of contracting – from prime contracts through sub-system contracts to component suppliers – and hence throughout the industrial supply chain. Where regulatory instruments available to public authorities will not suffice to attain this objective, industry is willing and has previously expressed its position to complement the action by a "supply chain Code of Practice"[1]. Furthermore, it should apply across the full range of defence supply (with certain exceptions only for equipment of the highest military sensitivity). The objective therefore relates to both that area of the market which is subject to the Article 296 exemption and that which is not. However, we would draw attention to the fact that the high value part of the defence market falls inside the area which, under any reasonable definition of the scope of Art 296, is covered by the exemption. We therefore consider that this is the priority area for action.

(18) The ability to guarantee security of supply is an important condition for opening national Member State defence markets. A voluntarist industrial policy, strongly supported by all Member States, aiming at reinforcing the European Defence Technological and Industrial Base (DTIB) is therefore a correlated requirement.

(19) We do, of course, recognise that there is a boundary issue in relation to the Art 296 exemption. While it is not for industry to enter a jurisdictional debate to which it is not party, we would stress our concern that resolution of jurisdictional issues should be achieved in a non-conflictual way. New uncertainty about jurisdiction, or an environment in which jurisdiction is developed by reference to the Court, would be damaging to efforts to improve market mechanisms in the area covered by the Art 296 exemption.

An Interpretative Communication

(20) We are, therefore, highly sceptical as to the value and appropriateness of an Interpretative Communication. In an environment where:

- Member States are accorded certain rights under the Treaty;
- Council has agreed a list of military equipments covered by Art 296;
- case law is sparse in relation to the issue of defence procurement itself (as opposed to ancillary issues); and
- a Joint Action has just created the European Defence Agency with a mandate to create a competitive EDEM,

we are concerned that focussing on a legalistic interpretation of the boundary would prove conflictual and ultimately unproductive. As described below, we believe that there is a better and progressive approach to resolving the boundary issue while at the same time improving market procedures inter-governmentally in the area covered by the Art 296 exemption. In so doing, action would concentrate on the high value end of the market and the fundamental

[1] EDIG proposed Code of Practice for Supply Chain, October 2002, produced for POLARM, and the UK's Code of Practice (Annex B to MOD/Industry Commercial Policy Group Code of Practice, [http://www.ams.mod.uk/ams/content/docs/toolkit/buttons/modind/cpg/guidelines/no5_defence_acquisition.htm] are relevant examples.

issues that affect the European Defence Technological and Industrial Base (DTIB) and the longer term prosecution of ESDP.

Demand-side Consolidation

(21) The Green Paper focuses on the issue of market regulation, and hence on mechanisms to achieve a proper interaction of supply and demand. But while this can remove fragmentation of procedure, it does not reduce fragmentation of demand. Yet, as suggested at point (c) above, harmonisation and consolidation of demand is a major driver of market efficiency. Open publication of invitations to tender by individual Member States and transparent procedures would be highly beneficial, but they can be substantially more beneficial if they reflect the demand of Member States acting in concert, so enlarging the volume of demand with all the associated economic and operational benefits.

This can only be catalysed in an inter-governmental forum. This task would fall naturally to the European Defence Agency.

An Inter-Governmental Approach

(22) Although the Green Paper is not explicit on the point, we understand and assume that, in the discussion of a possible new Defence Directive, it is not the Commission's intention that this should apply to the area covered by the Art 296 exemption (however that may be defined). Yet, as argued above, this is the priority area for action; and, again, the European Defence Agency is the proper forum to take forward the EDEM agenda.

(23) Industry therefore sees great potential in the Agency acting both to better harness demand and to develop and supervise new rules to deliver best practice in procurement procedures and behaviours in Member States. Industry would favour the introduction of a voluntary inter-governmental Code of Conduct to achieve these ends, and believes that, with goodwill from Member States and the Commission, this could be put in place in a relatively short time frame – certainly more quickly than a new Directive.

(24) We consider that the experience of the Code of Conduct on Arms Exports is instructive. This Code is not binding upon Member States and so has no legal force. But, by having Member States sign up to its principles and obligations, with arrangements for reporting on performance under the supervision of the Council, and other reporting arrangements put in place nationally by Member States, the Code has achieved a new discipline at European level in an area of genuine political and economic sensitivity.

(25) We consider that comparable success could be achieved by assigning to the European Defence Agency, acting under the authority of Defence Ministers and the Council, responsibility for :

- drafting a Code of Conduct for EDEM, in those areas covered by the Art 296 exemption, that reflect best market practice, benefiting as appropriate from the Commission's experience in market regulation
- supervising its implementation – desirably including rights to interrogate Member States about their performance against the Code and rights to report on performance and compliance
- initiating and supervising active procedures that would assist in the co-ordination of Member States' demand for common or near-common equipments and services

(26) The EDEM Code of Conduct should lay down principles and requirements for implementation by participating Member States in areas such as :

- policy concerning access to and publication of information
- policy in regard to cross-border competition at prime and sub-contract levels
- nature and general principles of technical standards called for in a competitive tender
- handling of secrecy / classification / confidentiality issues
- criteria for contractor eligibility and selection (including security of supply)
- the need for a level playing field and the avoidance of abusive state supports that could distort competition
- award procedures

Scope

(27) We recognise that this approach still begs the question as to the scope of the Art 296 exemption. In our view, if Member States endorse an approach on these lines, the issue of scope becomes secondary in the near term to the main thrust of the policy to introduce better defence procurement practice right across the board. The public policy objectives of greater transparency and openness in procedures, and of opportunity and competitiveness for the industrial base, would be met.

(28) To ensure early implementation of a Code of Conduct, it would in our view be impractical and unfruitful to enter the complex and lengthy process of redefining, on a consensual basis, the ambit of the Article 296 exemption. Such process is not required to implement a Code of Conduct which could operate for the time being in that area of the market that is treated *de facto* as falling within the Art 296 exemption.

A Defence Directive

(29) All this said, we recognise the potential benefits, as described in Section II.2.1 (Objectives) of the Green Paper, of introducing a Directive to regulate those defence goods and services which may be finally judged not to fall within the exemption. We further recognise that a Directive would have legally binding force that is not available in a Code of Conduct, and that it would be open to Member States to use its provisions if they so wished for procurement of articles falling within Art 296.

(30) The problem to be solved is one of timing. The prerequisites for introducing a Directive are substantial, including definition in binding legal terms of its scope of application with respect to both the Article 296 exemption and the EU Public Procurement Directive, an impact assessment, and agreement on the handling of a set of highly complex policy issues (eg security of supply; a regime for industrial offsets). This imposes a substantial time penalty. We do not consider that the benefits accruing from a Directive applicable outside the area of the Art 296 exemption are sufficient or timely enough to justify its being the first priority for public policy. However, recognising these time factors and the benefit that a legally enforceable regime could bring in the area not covered by the Art 296 exemption, we would support the initiation of work to prepare the ground for introduction of a Defence Directive, providing this does not distract from the priority task of putting in place an Inter-governmental Code of Conduct.

(31) We would observe also that a number of the specific issues relating to defence markets will be common to procurements falling both within and outside the exemption. There would clearly be benefit in developing a common intellectual approach to these issues between the Commission, the Agency and Member States for both regimes.

III Conclusions and Proposal

(32) Industry is fully supportive of introducing common disciplines and best practice in Member States' defence procurement activities, which also need to take into account the specific features of defence markets identified in the Green Paper. Industry is also keen to encourage greater consolidation of demand between Member States, such that suppliers and customers can each secure scale benefits.

(33) For this and many other reasons, we have welcomed the creation of the European Defence Agency; and we have welcomed its missions to develop a competitive EDEM. Within the area of the Art 296 exemption, the Agency, working inter-governmentally, is the only Community institution that is able to address both the introduction of new market disciplines and to catalyse a consolidation of demand. At the same time, it can pursue its mission to strengthen Europe's Defence Technology and Industrial Base in order to master at European level strategic key technologies.

(34) While industry recognises that there are difficulties of interpretation of Art 296 in the field of defence procurement, it does not consider their resolution needs to be a near-term priority for public policy - especially if the process of re-interpretation distracts from what should be the primary objective of policy, which is the early creation of a competitive EDEM in the high value and high technology part of the market that lives within the Art 296 exemption. Indeed, under both the Interpretative Communication and Directive proposals, the possible tensions and disagreements that might arise from an attempt now to re-interpret Art 296 could be seriously damaging to this objective.

(35) We have given serious consideration to the proposal for a Defence Directive. Our conclusions are, first, that a Defence Directive is not sufficient to the tasks of regulating the

whole market and of catalysing greater consolidation of demand; and second, that the time required for its preparation is well beyond that which industry would wish to see in the context of the wider market; but, third, that a Directive would have a place in the structure of market regulation in the medium term and that work on its preparation could usefully now be started.

(36) The sequencing and interaction of new measures to improve the performance of EU defence markets is critical to success and will require a pragmatic approach. Our recommendation is that the focus of near term efforts should be devoted to the preparation and implementation of a EDEM Code of Conduct, under European Defence Agency supervision, benefiting as appropriate from the Commission's experience in market regulation, covering the *de facto* Art 296 exemption area of the market. In view of its voluntary and non-legally binding nature, we anticipate that this can be prepared much more quickly than a Directive. We consider that this approach should produce the greatest material benefit in the shortest available timeframe.

(37) However, we recognise that while a Code's coverage of defence markets can be wide, it does not offer a complete solution in two important respects: it is not legally binding and it does not clarify the interpretation of Art 296. Industry would therefore see opportunity for action in the medium term, and in the light of the performance of the Code, to agree on a consensual basis between Member States and the Community institutions both a new understanding of Art 296 as it applies to defence procurement and a Defence Directive on the lines described in Section II.2 of the Green Paper.

(38) Finally, we note that it would also be open to Member States in the fullness of time to convert the Code into a legally binding inter-governmental agreement, operating within a redefined *de jure* Art 296 exemption

(39) We consider this proposal to offer a pragmatic, sequential and coherent way forward that can secure the principal economic and military benefits from improved defence procurement procedures in a timely and comprehensive manner.

21st January 2005

ANNEX A

Green Paper on Defence Procurement

These answers to the specific questions raised in the Green Paper should be read in conjunction with ASD's "Response to the European Commission's Green Paper on Defence Procurement", to which they are appended.

1. Do you think it would be useful/necessary/sufficient to explain the existing legal framework in the way presented (i.e. via an interpretative communication from the Commission)

As explained in our Response, we are highly sceptical as to the value and appropriateness of an Interpretative Communication.

- An Interpretative Communication is adopted by the Commission without the involvement of any other body within the EU, in particular Member States and the newly created European Defence Agency.
- An Interpretative Communication is bound by existing texts and case law, which is sparse in relation to defence procurement. It would not be able to address properly the dynamics of the new market and industrial environment heralded by the creation of the Agency.
- Furthermore, apart from the possible derogation provided for under article 296, the existing public procurement framework is not suited to the specificities of the defence market.
- In conclusion, under present circumstances, an Interpretative Communication would be neither useful nor sufficient; nor would it be timely. Any issues concerning the scope of application of the Art 296 exemption should be addressed by all interested parties in the context of a wider policy approach to defence markets, as recommended in our Response.

2. Are there other aspects of the Community system in question that should be clarified?

Not by an Interpretative Communication at this stage.

3. Do you consider the rules of existing directives suited/unsuited to the specific characteristics of defence contracts? Please give your reasons.

The rules of existing directives are unsuited to the characteristics of defence contracts since they do not provide for, *inter alia*, the need to maintain a permanent security of supply and to procure technical superiority for our armed forces. Nor do they offer Member States the means to take the necessary measures in order to strengthen a European DTIB, which should master critical identified key technologies, to secure permanent access, when required, to state of the art technical-operational capabilities and technologies.

Furthermore, the specificities of the market, discussed in Part 2 of the Green Paper, are such that the customer/supplier relationship in this domain is not the same as that in a purely civil single market, the customer(s) being, at the same time, the regulator.
Additionally, the corresponding remedy directive would need to be revisited to take into account the specificities of the Defence market.

4. Would a specific directive be a useful/necessary instrument for creating a European defence equipment market and strengthening the industrial and technical base of European defence?

Our Response recognises that a Directive could be a useful instrument but, for the reasons set out in the Response (see Section "A Defence Directive" on p.6) and because the high technology and defence-specific market essentially falls within the Art 296 exemption, a Directive would have little impact on the industrial and technical base for European defence. It would also have little direct impact on fragmentation of demand. Our Response has therefore argued that priority should be given to implementing a voluntary Code of Conduct under the supervision of the Agency but benefiting from the Commission's experience as appropriate. In particular, we consider it important to develop a common intellectual framework on issues specific to defence markets. The preparation and implementation of a Code should in itself facilitate the process of developing a specific directive.

5. What is your opinion regarding the use of a possible directive for purchases by other bodies, such as the European Defence Agency?

Much of the work of the EDA will fall within the Art 296 exemption, for which it will need to develop its own rules very soon: It cannot afford to wait for the implementation of a specific directive. If in due course a directive is introduced, the rules governing its use would naturally apply to procurements falling outside the exemption by the Agency and other European defence procurement bodies.

6. Procedures: do you believe the negotiated procedure with prior publication to be suitable for the specific needs of defence procurement? In what situations should use of the negotiated procedure without publication be allowed?

Due to the complexity of certain defence programmes, flexibility in the use of the award procedures is welcome and competitive dialogue or negotiated procedures are the most appropriate solutions. But it is mandatory that the negotiation process be strictly governed, in order to avoid endless "Best And Final Offer" requests.
Negotiated procedure without prior publication should be allowed in a certain number of situations, such as:

- emergency requirements
- research, development and procurement in the most highly classified (black) technologies that need to be protected

Additionally and non-exhaustively, non-publication may be allowed in certain other closely specified circumstances relating to:

- Utilisation of specific large private sector investments
- special facilities to be used
- follow-on equipment orders where a change of supplier would cause non-compliance with the original equipments (or compliance at an excessive cost of use or maintenance)
- need to use a specific know-how (IPRs) ,

7. Scope: what would be the most appropriate way of defining the field of application? A general definition? If so, what? A new list ? If so , what? A combination of a definition and a list?

The scope of application for a specific directive would fall between, on one hand, procurements falling within the scope of the Art 296 exemption and, on the other, procurements covered by standard public procurement directives. Industry is not a party to these definitions, but we consider that, schematically, a body of proof, combining several criteria, is relevant to defining the field of application of defence-specific rules and regulations:

- a general definition, describing the main specificities of defence equipment and services;
- existing lists (up-dated) such as the Munitions list or Wassenaar Arrangement list, or national ones;
- end-use (military purpose)

8. Exemptions: do you think it would be useful/necessary to define a category of products that would be excluded categorically from the directive?

Generally, we consider this issue needs to be addressed by the Member States and institutions concerned by Art 296. More specifically, European co-operative programmes run under intergovernmental structures may need to be the subject of a derogation.

9. Publication: do you think a centralized publication system would be appropriate, and, if so, how should it function?

Publication under a directive could certainly help to foster intra-European competition. It should be dedicated to defence activities, and offer a solution to the translation problems that potential bidders are confronted with when they try to have access to the national publication sites. (Centralized publication would also be a key element of a Code of Conduct as described in our Response).

10. Selection criteria: what criteria do you think should be taken into account in addition to those already laid down in existing directives to take account of the specific features of

the defence sector? Confidentiality, security of supply, etc? And how should they be defined?

Looking across the totality of Defence markets (within and without Art. 296), various features of the defence sector justify the use of specific criteria, firstly for eligibility and secondly for selection.

For eligibility we can foresee:

- capability to manage confidential information and to handle classified materials
- capability to work with some specific technical standards and/or technologies
- ownership and/or control of IPRs
- etc.

For selection:

- contribution to the strengthening of European DTIB , especially the mastering by Europe of critical identified key technologies
- the type of technology to be used,
- appropriate security of supply for the product or technology concerned for national needs and exports
- etc.

11. How do you think offset practices should be handled?

Again looking across the totality of the defence market, this very complex subject cannot be addressed without reference to the openness of national markets outside the EU and to international practice where, generally, direct or indirect offset is required or encouraged by customer governments. While this practice continues, a number of factors need to be taken into account, among which:

- It would be inequitable for EU customer governments not to require suppliers from non-EU countries themselves practising offset to provide appropriate local content in the execution of defence contracts. In the context of a Directive, it would seem impracticable on first analysis to establish one offset regime for competitive procurements where non-EU companies were involved and another regime for exclusively intra-European competition. Consequently, therefore, a single regime permitting offset would need to be established. (In any event, a system which permitted offset proposals from non-EU suppliers but disallowed them from EU suppliers would distort competition and disadvantage European industry.)

- Sophisticated defence goods, which as discussed in our Response would generally be covered by the Art 296 exemption, have high technology content and high value-added. In the case of procurement from a supplier based in another EU or non-EU country, direct offset (eg through sub-contracting) is attractive to the EU customer government and hence a tool of competition for suppliers. To the extent that this maintains a competent, competitive and diversified indigenous supplier base in Europe, in particular among SMEs, this may be considered an asset, although it may in some circumstances also be a cause of over-capacity.
- Additionally, and certainly within the Art 296 exemption, military and industrial considerations relating to technology transfer may have a legitimate bearing on offset requirements.
- Different factors may apply to indirect offset practices, but these also have to be addressed in the wider international context.
- Any offset regime regulated by a Directive should provide for transparency of rules and their application.

BDI

Bundesverband der Deutschen Industrie · 11053 Berlin

Mr Ugo Bassi
EUROPEAN COMMISSION
DG Internal Market – Section D
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Öffentliches Auftragswesen/ Verteidigungswirtschaft

Unser Zeichen
Sd/Ln – III/3 -

Datum
25. Februar 2005

Seite
1 von 1

Umfrage zum Grünbuch über die Beschaffung von Verteidigungsgütern

Sehr geehrter Herr Bassi,

anbei übersenden wir Ihnen die BDI-Position vom 9. Dezember 2004 zum Grünbuch über die Beschaffung von Verteidigungsgütern.

Für ein erläuterndes Gespräch stehen wir Ihnen jederzeit gern zur Verfügung.

Mit freundlichen Grüßen

Timm R. Meyer

Sebastian Seidel
Dr. Sebastian Seidel

Anlage

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Position Paper

Public Procurement / Defence Industry

Date
9 Dezember 2004

BDI Position Paper

on the Green Paper of the European Commission on Defence Procurement

BDI welcomes the European Commission initiative to continue the debate on the step-by-step establishment of a more transparent and open European market for defence equipment with concrete proposals for its implementation.

The Commission is right to say that efforts made in this direction so far, such as the WEAG Agreement, the establishment of OCCAR and the LoI Framework Agreement recently signed by the six largest arms-procuring Member States, have not led to a comprehensive cross-border opening up of the defence equipment market within the Union. We also share the urgency with which the Commission views the need to overcome the still existing national fragmentation through cooperation programmes, to create an internationally competitive European defence market, strengthen the European industrial and technological defence base, increase the interoperability of the armed forces, and therefore enable better use to be made of the budgets that the EU Member States provide for defence tasks.

However, we do think that the Commission proposals would result in the second step being taken before the vital first. The procurement of defence equipment, as is repeatedly emphasised in the Green Paper, has a number of special features. There is no arms "market" with free competition and numerous buyers, but a buyer structure which is defined by the monopolies of national contracting authorities. The special feature on the supply side, which is only implied in the Green Paper, is the division between private sector industries on the one hand, and state-owned or state-influenced defence industries on the other. The arms procurement is also subject to political influences through the national parliaments on contract award decisions, and through the governments on the authorisation of arms exports. The obstacles that arise through this cannot be effectively countered by the Commission proposals for an Interpretative Communication on the existing regulatory framework, especially Art. 296 EC Treaty, and/or specific directives.

In the opinion of BDI, the first step must be a political show of strength on the part of the Member States. A guiding example of the sort of action necessary could be the programme initiated in the mid 80s to open up the civil markets for the "1993 Completion of the Internal Market," in order to create a "Completion of the Internal Market for Defence Equipment." Whether it is on the basis of such a programme or in a different binding way, the necessary preconditions must be created to open up the defence equipment market for competitive contract awards. To achieve this, the absolute priority is to:

- Remove the distortions to competition between state-run or state-influenced and private sector defence companies by privatising all defence industries in the Community and separating them from any kind of staff control;

- Abolish competition distortions due to differences in export opportunities by harmonising the arms export authorisation practice of all EU Member States; this cannot be achieved through the current EU Code of Conduct on Arms Exports;
- Break down the obstacles for the exchange of all arms-related documents, components and products within the Community;
- Apply and monitor the ban on impermissible subsidies in the arms sector;
- Ban on compensation deals (juste retour, offset).

These measures can only – we repeat – be achieved through concerted political action. If the Member States are not willing to take such steps, this is a clear signal that secondary measures such as the Interpretative Communication and/or specific directives proposed by the Commission will achieve no more fundamental changes than the prior initiatives named above (WEAG, OCCAR, LoI). These fundamental changes include – both part and consequence of the political show of strength – the recognition by the Member States of the "single source" principle related to the surrender of redundant capacities, and the willingness to also purchase defence equipment directly from foreign or transnational corporations, as well as the willingness to accept changes in the ownership structures of defence companies. Here, the issue must also be clarified how companies can effectively respond if violations of a cross-border competitive award of contract arises.

Further elements that could be helpful in the establishment of a European defence market, and which could be incorporated into the suggested "Completion Programme of the Internal Market for Defence Equipment" or implemented as individual measures are for example:

- Incorporation of defence R&D in the EU Research Promotion Programs or – much more effective still – drawing up a defence research promotion program with corresponding funds;
- Call for European standards for defence equipment, also through the provision of funds;
- Establishment of a centralised publication system as already addressed in the Green Paper, for all defence contract awards planned by the Member States above a certain threshold value;
- Support of all efforts to build up the European Defence Agency into an authority that provides support in the initiation and implementation of pan-European defence projects;
- Establishment of a high-profile panel composed of representatives from the Commission, the European Parliament, the Member States and the defence industry with the aim of promoting the development of a European defence equipment market through political initiatives.

An issue which has so far not been addressed, but would be vital for an internationally competitive European defence market, is an initiative on the part of the Commission and the Member States to achieve unlimited reciprocity in opening up the markets for arms in transatlantic trade. The creation of a two-way street of free mutual competitive access to arms contracts has been discussed for years with the USA, but nothing has been achieved in this direction so far. The US arms industry, with the political support of the US Government, has made several attempts to get a foothold in the European market, some of which have been successful. But what is lacking is a corresponding sustained European advance to break down the legislative, administrative and factual barriers that are blocking the competitive opening up of the US arms market for European companies.

BDI is well aware that this position paper demands resolutions from the Member States and much commitment on the part of the Commission to leap over what are admittedly high hurdles. But we are confident that the measures we have outlined are those which the Community of EU States must finally decide upon to make the competitive European defence market a reality, and not just the stuff of interesting debates that ultimately effect no real change, a category in which we would include a debate on the scope of application of the procurement directives and Art. 296 of the EC Treaty.

In the opinion of BDI answering the list of questions does, at present, not help in achieving the goals. As long as the basic conditions have not been established the questions posed here cannot be usefully discussed.

In response to the Commission's publication on 23 September 2004 of its Green Paper on defence procurement, we are passing on to you the comments of the Belgian Security & Defence Industry (BSDI), the association of the Defence related industry in Belgium.

Introduction

Our association helped to draw up the memorandum you were sent by the European association ASD (Aerospace and Defence Industries Association of Europe) on 21 January 2005. Our association believes that a Commission Directive setting out rules applying to defence contracts would not resolve key issues such as Harmonisation of Demand, handle European Cooperation, Security of Supply and involvement of industries from small and medium sized countries (SMCs). Faced with this situation, our association fully supports the ASD's initiative proposing to start with a Code of Conduct.

However, BSDI hereby wishes to bring to the attention of the Commission and the major industrial actors, the specific characteristics of a defence related industry in a small EU Member State.

Specific characteristics and recommendations

1. The Belgian defence industry primarily consists of small and medium sized enterprises (SMEs), some of which enter into direct negotiations with ministries of defence, though most of them are second or third-level suppliers for prime contractors. Furthermore, Belgian companies cannot benefit from the knock-on effect of having a large national prime contractor unlike their counterparts in other European countries.

2. Very broad competition between European companies to join the network of prime contractors' suppliers should lead to the establishment of a basket of companies, which are more competent and more competitive. Belgian industry has restructured its industrial capacity and developed know-how that is now recognised as centres of excellence. These niches ought to be known by the major integrators so that all the EU Member States can help to meet the needs of a more open and transparent European Defence Market.
   The European preference does imply participation by all.

3. If the Belgian industry is to gain a foothold in this market, it must:

   a. Have access to information on future national procurement and co-operative programmes involving EU Member States.
      In this respect a transparent and uniform system of publishing defence procurement opportunities should be created and coordinated either by the EDA or by the Commission.

   b. Have access to future projects right from the earliest possible stage so that it can play a part in the definition of the specifications phase of the projects.

   c. Have simple, but efficient procedures for ensuring the intra-community transits and transfers of articles and related services delivered to European main integrators. A solution to these problems has been sought for nearly 10 years by UNICE and the members of the Letter of Intent (LOI) group.

4. Our industry recognises the key role played by the six LOI countries bearing in mind their defence budget and the large amount of money they invest in Research and Development.
   The inclusion of our Defence related industry in the supply chain of the major players and/or integrators remains a concern. In this connection, we believe that the supply chain Code of Practice, proposed by EDIG in October 2002, and examined by the

POLARM working group, ought to be 'revisited' and incorporated into the Code of Conduct proposed by ASD.

5. Industrial participation – we prefer this term to 'offset' – has played a significant role in maintaining and developing Belgian industry's technological know-how. It constitutes a crucial lever for the introduction of our Belgian companies in the European Defence Business and particularly in co-operative programmes. We believe this policy must continue to prevail until such time as a genuine, effective European Defence Equipment Market has been set up within the Union. That tool would enable to maintain, in Europe, diversified, competent and competitive suppliers, particularly companies situated in small and medium sized countries.

6. The legislation on defence market used by the US Department of Defence includes the "Small Business Act ". This law governs the participation of American SMEs in defence procurement. Today, the implementation of that policy is still proving extremely successful. The Commission should draw some inspiration from that efficient tool to set up a flexible arrangement that could be benefit to all SMEs in Europe.

EUROPEAN COMMITTEE FOR STANDARDIZATION
COMITÉ EUROPÉEN DE NORMALISATION
EUROPÄISCHES KOMITEE FÜR NORMUNG

European Commission - DG Internal Market
Consultation “Green Paper Defence Public Procurement”
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Ref: SG/11126 6th December 2004

Re: **CEN response to the EC Green Paper on Defence Procurement**

Dear Sir or Madam,

We noted with interest the document COM (2004) 608 final dated 2004-07-19. We see it as an important initiative on the way to the realisation of the European Defence Equipment Market.

CEN is convinced that Standardization can contribute in supporting the process and rules for awarding defence contracts in Europe and the opening of this Market. Standardization was mentioned as one of the initiatives announced in the Communication “Towards a European Union defence equipment Policy” (March 2003).

At this stage, CEN does not wish to comment on details of the paper but we wish to highlight CEN’s contribution to solve one of the mentioned difficulties, namely that “technical specifications are often very detailed and based on widely differing standards” *(see item 3.2 on page 8 of the COM)*.

CEN has established a technical-strategic forum on “Standardisation for Defence Procurement” in the form of a Working Group of the Technical Board (CEN/BT/WG 125). In BT/WG 125 we enjoy a wide membership: WEAG (Western European Armaments Group) and Defence Ministries (MoD), CEN National Members, NATO Standardisation Agency, ASD (Industry), CENELEC and ETSI.

Experts meet in the CEN Workshop 10 (WS 10) for preparing, with financial support from the Commission (DG ENTR), an Agreement on a “Standardisation for Defence Procurement - European Handbook”. This CEN Workshop that started in May 2002, gathers 110 experts from 10 different countries, with a representation of 60% industry - 40% MoD. The “Handbook” (to be first delivered in 2005) will recommend, extracted from relevant national, European, NATO or world wide standards, those standards which are considered most useful.

Further can be mentioned the CEN Workshop on “Network Enabled Abilities”, which will provide both military and civilian applications.

We would like to reiterate that representatives of interested DGs of the Commission are most welcome to participate in the meetings of these bodies.

Yours sincerely,

G. MICHAUD	J-M. BARDOT	R. RUSSELL
CEN	EADS	BAE Systems
Acting Secretary General	Chairman CEN WS 10	Chairman CEN BT/WG 125

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DANSK INDUSTRI

DI

Confederation of Danish Industries Confédération des Industries Danoises Hauptverband der Dänischen Industrie

European Commission
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Subject: Consultation on EC Green Paper on Defence Procurement

The Confederation of Danish Industries, DI, and the Danish Defence & Aerospace Industries Association in Denmark, FAD, established under the DI, appreciate the initiative of the European Commission to further the establishment of a European Defence Equipment Market highlighting the specific features of defence procurement and proposing mechanisms to enhance the effort. We also appreciate the opportunity for interested parties to comment on the Green Paper and the proposed way forward.

We anticipate that the European Commission will receive numerous comments and much additional information during the consultation process, among others from the UNICE, Union of Industrial and Employers' Confederation of Europe. We support the draft version of UNICE comments, which has been made available to us in advance.

Thus we choose not to elaborate on the in depth information already included in the Green paper, but we should like to add comments that we find of particular importance from a Danish standpoint.

Several attempts have been initiated over time to harmonise defence equipment requirements, as yet with little progress, the processes still being a national prerogative. As long as nations within the community maintain sovereignty in safeguarding national interests, military as well as industrial, initiatives to change become mainly theoretical efforts.

The restructuring and consolidation of the European defence and aerospace industry has progressed fairly rapidly primarily at main contractor level within the past decade with a view to limiting duplication and enhancing the competitiveness of the European defence technological industrial base. These efforts have been mainly market driven and not necessarily the result of political will.

Still, the driving mechanisms for the defence markets are the customer requirements, i.e. the defence equipment requirements of the national armed forces, as yet on a national basis. The defence equipment procurement procedures for each nation in the Community differ greatly, including the funding mechanisms for research and technology development and the national focus on maintaining defence industrial capabilities in country. Security of supply is another feature adding to the specificities of the defence market.

The focus of the Green Paper seems to be on defence procurements that are not covered by Article 296 EC, in which case Community rules on public procurement apply.

In order to achieve progress and efficiency in the opening of the defence equipment market and full and open competition it will be necessary to take all contracts for defence equipment into consideration, i.e. contracts not covered by Article 296 EC, contracts that fall under the Article 296 and even contracts covered by the exemption from Article 296. This effectively means that Member States will have to commit to the process by abolishing national exemptions of Community rules, i.e. abolishing the Article 296 EC of the Treaty.

Additionally competition at all levels in the supply chain should be ensured, i.e. at prime as well as at subcontracting level. One single Community instrument may not be sufficient to achieve this goal.

If all issues within the area of defence equipment procurements are not included in the process of opening the market for defence equipment any effort including the proposed Community instruments will only be of a limited and provisional nature.

The same applies concerning the implementation of any instrument that is not legally binding. Any measure on a non binding character, i.e. an interpretative document or a Code of Conduct, may contribute to converging the behaviour of the nations, but is not likely to lead to true and open competition for all defence contracts at all levels. As long as recourse to exemptions under Article 296 concerning security of supply and maintenance of national competencies prevail an efficient European Defence Equipment Market will not become a reality.

The creation of a European Defence Equipment Market is not only dependant on opening to competition but also on harmonising military requirements and procurement schedules in order to achieve the economic efficiency and benefits from larger production volumes. It is obvious that the process calls for commitment from Member States and political will and power and thus will be a lengthy process.

In the short term various measures may be proposed to create greater transparency concerning defence equipment procurements. But there is a risk that such efforts may diverge attention from the real issues, i.e. the long term goals of abolishing Article 296 and the opening of the national markets on a reciprocal basis.

The above comments are in essence a response to the various questions raised by the Commission under the consultation process. One question remains that require specific attention, i.e. the handling of offset practices.

Some might be tempted to exercise efforts by introducing changes on some of the areas that are specific to the defence sector in order to show some progress in the short term. One such area might be proposing abolishing Member States' demand for offset in connection with defence equipment procurements. This would, however, effectively leave Member States without large defence contractors in the position that large investments/tax payers money is spent on defence procurements without the benefits to the national economy of having the national industry become involved in the international defence industry cooperation where offset agreements may serve as an entry as long as open competition is not introduced.

← Concordu PB

The offset issue cannot be addressed in isolation from the entire defence equipment process. Member States apply different guidelines concerning offset agreements or Industrial Cooperation Agreements, and offset is often considered an obstacle that may lead to duplication and inefficiencies. If handled in a professional manner offset agreements or Industrial Cooperation Agreements serve as a mechanism to involve small and medium size enterprises, SMEs, in the supply chain. SMEs in the defence related area represent innovative, flexible, cost efficient and competitive assets in the supply chain, most often offering outstanding and competitive solutions in high technology niche areas. The nature of SMEs, however, necessitates cooperation with the large defence contractors, and as long as defence procurements are not open to competition offset agreements or Industrial Cooperation Agreements may serve the purpose of an entry into the defence cooperation.

The smaller nations of the Community consider offset agreements or Industrial Cooperation Agreements of utmost importance under the present circumstances in order to achieve balance and to maintain some development and production capabilities in country as long as defence equipment procurements are not open to competition at all levels.

Referring to the above comments concerning the introduction of Community instruments for defence equipment procurements the majority of

SMEs would not benefit from non binding instruments, if prime contractors do not open up to competition.

Lastly a next step in considerations concerning the opening of the defence equipment market will be to include discussions on reciprocity in the Transatlantic defence cooperation and access to the US defence equipment market. This subject is not within the scope of the European Commission's Green Paper on Defence Procurement, but certainly a subject of much attention within the European defence industry.

We support the continued efforts in creating transparency and competition in defence equipment procurements and are available for further comments in the future.

Yours faithfully,

Jørgen K. Hansen
Deputy Director General, DI

Ena Bjerregaard
Director, Defence & Aerospace Industries
Association in Denmark, FAD

CONSULTATION ON THE
EUROPEAN GREEN PAPER ON
DEFENCE PROCUREMENT

INPUT BY THE DEFENCE MANUFACTURERS ASSOCIATION (DMA)
OF THE UNITED KINGDOM

JANUARY 2005

INTRODUCTION

The DMA welcomes consultation on the European Commission's Green Paper on Defence Procurement. The DMA represents some 420 companies in the UK Defence Industry. Its membership ranges from prime contractors to SMEs, at all levels in the defence supply chain in the UK, and includes manufacturers and service providers active in air, land and maritime defence environments. All members are UK based, but not necessarily UK owned. The DMA is a member of ASD.

THE UK DEFENCE INDUSTRY

The UK Defence Industry is, arguably, the largest in Europe and certainly amongst the most efficient. It is wholly privately owned and includes large manufacturing and service sectors. Some 60% of its business is with the UK MoD and 40% with export customers globally. The export figure gives the UK Industry an annual average of 20% to 25% available market share (excluding NATO), which is certainly the largest of any EU nation. It benefits from the fact the UK MoD devotes a larger proportion of its overall Defence Budget to procurement than most of its European partners.

The Industry has strong links with some of its EU partner Industries through collaborative projects and industrial mergers and acquisitions. It maintains equally strong links with US Industry, reinforced by the reality of a greater degree of defence research, peacetime military and joint operational cooperation between the UK and the US than with its EU partners. Further, whilst, as the Green Paper notes, the US defense market is hard to penetrate, the UK does secure a 50% share of what the US does import. Excluding its involvement in collaborative projects, the UK Defence Industry exports more goods and services to the US than to Europe.

In our view the UK already has the most open defence market in Europe. Open, international, competitive procurement is the main instrument of UK MoD defence acquisition policy. All opportunities are widely advertised. "Value for money" is the key criteria in procurement decisions and processes are relatively transparent. The MoD also makes considerable use of innovative procurement techniques such as Private Finance Initiatives (PFI), Leasing, Public Private Partnerships (PPP) and, increasingly, is outsourcing support activities to Industry, even on operations.

All these factors have led to significant flexibility in and globalisation of the UK Industry. Thales of France has become the second largest defence contractor in the UK, largely through acquisitions. European joint venture defence contractors (EADS, MBDA, AgustaWestland, etc) have a large UK presence. US major primes (Lockheed Martin, Boeing, Raytheon, Halliburton, etc) are also strongly established in the UK – largely by inward investment rather than acquisition. UK companies invest heavily in the US. UK owned BAE Systems is the fourth largest defence contractor in the US. The UK is a large importer of US defence equipment, but its Industry supply chain benefits significantly from the offset opportunities that are thus created. All the UK's incoming defence offset arrangements must be defence related and UK offset thresholds are only £10m for US companies compared to a much more favourable £50m for French and German companies. These factors help the UK to penetrate the US market.

REACTIONS TO THE GREEN PAPER

It follows from the above that the DMA welcomes the Commission's wish, as expressed in the Green Paper, to improve the transparency and openness of defence procurement in the European Union. We believe that the UK's MoD is already well advanced in implementing the procurement arrangements that the Commission advocates. The current competitiveness of the UK Industry suggests that this is, in large part, due to these arrangements. The competitiveness of Defence Industries, EU wide, could therefore benefit from them being more widely applied. Certainly, UK Industry believes it would benefit from a "levelling of the playing field" in what it sees as an unbalanced European market at present. It would welcome reciprocal levels of access.

A particular concern for the UK, and, presumably the Commission, is that any changes that are implemented do not jeopardise existing links between the UK and US Defense Industries. If defence market access within the EU is to be widened then it must be made available to all EU based and registered companies irrespective of their ultimate ownership. For the UK particularly, this must include those that are US owned.

PROPOSED ACTIONS

Clarification of the existing legal frame work would be useful though would probably, of itself, be insufficient to alter the behaviour of all States in the practical implementation of their procurement policies.

A Directive, would be more effective, however, we recognise that it is likely to be more difficult to achieve and secure agreement upon in the short term.

We believe it is reasonable for national Governments to take into account issues related to confidentiality, security of supply and requirements specific to the needs of their own Armed Forces, their size, operational doctrine, structures, levels of training, etc, when making acquisitions. UK Industry is comfortable with this so long as it is applied reasonably, is fair, open and such influences are made clear at the beginning of the procurement process. Thus clarification of (by means of a Communication), reinforced by a Code of Conduct related to, procurement under A296 would be appropriate. For other procurement we favour a Directive.

We offer a final comment related to privatisation. Competition decisions are more likely to be distorted when customer Governments are themselves owners, part owners or shareholders in bidding companies. There are also particular difficulties for private companies when considering cross border joint ventures, mergers or acquisitions with companies part owned by Government. The Commission should, therefore, encourage and incentivise full privatisation of the Defence Industry in Europe in whatever way it can.

SUMMARY

The DMA welcomes the Commission's initiative on EU Defence procurement. There are particular circumstances related to the UK Defence Industry arising from the UK's open market, the UK MoD's procurement policies, its wholly private and global structure and its particular relationship with the US.

We would be pleased to see an early emphasis of the current legal framework for procurement within the terms of A296, ideally supplemented by a Code of Conduct and, most importantly, increased transparency. Cover by a Directive is appropriate for all other defence procurements and would be an acceptable, long term aspiration for items covered by A296.

(1,017 words)

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Sehr geehrter Damen und Herren,

in der Anlage erhalten Sie die Antworten der IG Metall auf die 11 Fragen des Grünbuchs der Kommission der Europäischen Gemeinschaften, betreffend Beschaffung von Verteidigungsgütern.

Mit freundlichen Grüßen

IG METALL
FB Gesellschaftspolitik/Grundsatzfragen

Dr. Peter Schaaf

Anlage

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IG Metall –
Gewerkschaft für Produktion
und Dienstleistung im DGB

Peter Schaaf
FB Gesellschaftspolitik/
Grundsatzfragen

Frankfurt, 7. Dezember 2004
01//HM
Tel. 2898

Antworten auf die Fragen des Grünbuches

Frage 1:

Glauben Sie, dass es nützlich/notwendig/ausreichend ist, den derzeitigen Rechtsrahmen gemäß den dargelegten Modalitäten zu erläutern?

Antwort:
Die Erläuterung des derzeitigen Rechtsrahmens ist auf keinen Fall ausreichend, da die ersatzlose Streichung des Artikels 296 unverzichtbar für die von der Kommission aufgelisteten Probleme ist. Solange jedoch die ersatzlose Streichung des Artikels 296 politisch nicht durchsetzbar ist, wäre die vorgeschlagene Erläuterung sinnvoll und notwendig.

Frage 2:

Gibt es andere Aspekte des einschlägigen Gemeinschaftsrechts, die einer Erläuterung bedürfen?

Antwort:
Wir möchten darauf hinweisen, dass unter die neue Vergaberichtlinie grundsätzlich alle Rüstungsgüter fallen, auch die des Artikels 296, der ja keine Bereichsausnahme, sondern nur in einem Einzelfall anwendbarer Rechtfertigungstatbestand ist. Nur wenn und soweit dessen Voraussetzungen gegeben sind (die Nichtanwendung der Richtlinie eine verhältnismäßige Maßnahme zum Schutz von Sicherheitsinteressen ist), sind Abweichungen von der Vergaberichtlinie zulässig. Im Übrigen sollte darauf hingewiesen werden, dass auch das primäre Gemeinschaftsrecht grundsätzlich für die Vergabe von Rüstungsgütern Anwendung findet, insbesondere auch jene, die unter Artikel 296 fallen. Das bedeutet, dass vor allem die Grundfreiheiten der Unternehmen und das Beihilferecht betroffen sind, deren Beeinträchtigung nach Artikel 296 wiederum nur im Einzelfall gerechtfertigt ist.

Frage 3:

Erscheinen Ihnen die Bestimmungen der bestehenden Richtlinien den Besonderheiten der Verteidigungsaufträge angemessen/nicht angemessen? Erläutern Sie warum.

Antwort:
„Wesentliche Sicherheitsinteressen“ für Verteidigungsaufträge innerhalb Europas sind heute aufgrund von Nato, GASP und ESVP nicht mehr begründbar und deshalb nicht angemessen. Dies gilt nicht nur für Stiefel- und Bauaufträge, sondern auch für Elektronik, Avionik und andere sicherheitsrelevante Higtech-Güter. Auch auf anderen strategischen Märkten, wie z.B. für Energie oder Wasser, gibt es schließlich „Besonderheiten“ und das Problem der „Versorgungssicherheit“, ohne dass diese Märkte deshalb von der Binnenmarktliberalisierung ausgenommen werden. Die Grundsätze des europäischen Vergaberechts lassen sich daher auch auf den Verteidigungssektor anwenden. Die bereits bestehenden und allgemein geltenden Ausnahmeklauseln für den Geheimschutz und den Schutz der nationalen Sicherheit genügen auch für den Rüstungssektor.

Frage 4:

Wäre eine spezifische Richtlinie sinnvoll/notwendig, um einen europäischen Markt für Verteidigungsgüter zu schaffen und die rüstungsindustrielle und technologische Basis Europas zu stärken?

Antwort:
Eine spezifische Richtlinie kann das Ziel, einen europäischen Markt für Verteidigungsgüter zu schaffen, nicht erreichen, solange der Artikel 296 Bestand hat. Sie wäre nur als Notbehelf sinnvoll, um den systematischen Missbrauch zu unterbinden. Sie wäre ein kleiner Schritt in die richtige Richtung. Allerdings wäre hierfür eher eine Verordnung notwendig, die jedoch bei den Mitgliedsstaaten kaum durchsetzbar scheint. Richtlinien können bei ihrer Umsetzung in nationales Recht lange verzögert werden. Dennoch würde eine eigene Richtlinie u.U. mit der bisherigen Praxis der weitgehenden Ignorierung des Gemeinschaftsrechts brechen und wäre insoweit zu begrüßen. Die Gefahr besteht allerdings darin, dass sich die Mitgliedsstaaten hier auf ein Harmonisierungsniveau einigen, das weit hinter dem im übrigen Vergaberecht zurückbleibt und auch die Vorgaben des Primärrechts in Vergessenheit geraten ließe. Zudem würden Abgrenzungsprobleme geschaffen, welche Güter unter welche Richtlinie fallen.

Frage 5:

Sollte die mögliche Richtlinie auch Beschaffung und andere Einrichtungen, wie z.B. die europäische Verteidigungsagentur, Anwendung finden?

Antwort:
Dies wäre wünschenswert. Gerade wenn man die europäische Verteidigungsagentur im Nachlass der ersten Säule der Union, also der intergouvernmentalen Zusammenarbeit verortet, muss es Ziel sein, auch die Agentur an die Standards des Gemeinschaftsrechts zu binden.

Frage 6:

Verfahren: Erscheint Ihnen das Verhandlungsverfahren mit vorheriger Bekanntmachung den Besonderheiten der Verteidigungsaufträge angemessen? In welchen Fällen sollte der Rückgriff auf Verhandlungsverfahren ohne Bekanntmachung möglich sein?

Antwort:
Eine vorherige Bekantmachung erscheint uns den Besonderheiten der Verteidigungsaufträge generell angemessen, Gründe für Ausnahmen sehen wir nicht. Regelmäßig sind Rüstungsprojekte als solche nicht geheim (sondern in parlamentarischen Gremien in aller Öffentlichkeit beschlossen), so dass Geheimschutz den Verzicht auf eine vorherige Bekanntmachung nicht rechtfertigen kann.

Frage 7:

Anwendungsbereich: Wie könnte der Anwendungsbereich am ehesten definiert werden? Eine allgemeine Definition, und wenn ja, welche? Eine neue Liste, und wenn ja, welche? Eine Kombination aus Definition und Liste?

Antwort:
Einer Definition sollte eine Liste mit beispielhaften Fällen angefügt werden. Die bestehende Liste zu Artikel 296 ist in der Weite der Formulierungen ein Gewinn gegenüber einer Definition. Eine Liste müsste also sehr viel konkreter sein, und der Druck auf die Mitgliedsstaaten, die Liste aktuell zu halten, erhöht werden. Dies könnte erreicht werden, indem man die Regel aufstellt, dass alle nicht gelisteten Güter der allgemeinen Vergaberichtlinie unterliegen. Eine Definition sollte an der speziellen Konzeption des Gutes für den militärischen Bereich anknüpfen, um Dual-Use-Güter auszuschließen. Hierbei sollten unwesentliche Veränderungen eines Dual-Use-Gutes außer Betracht bleiben.

Frage 8:

Ausnahmen: Wäre es Ihrer Meinung nach sinnvoll/notwendig, eine Kategorie von Gütern zu definieren, die nicht unter die Richtlinie fallen?

Antwort:
Es wäre sinnvoll, in Ergänzung zur Definition des Anwendungsbereiches auch Kategorien für Güter zu definieren, die nicht unter die Richtlinie fallen. Man sollte drei Güterklassen auseinanderhalten: Güter, die unter das allgemeine Vergaberecht fallen (insbesondere Dual-Use-Güter), klassische Rüstungsgüter, die unter die spezielle Richtlinie fallen, letztlich solche, die gar nicht erfasst werden sollten: Atomwaffen etwa. Wichtig wäre eine Normierung, wonach nicht gelistete/nicht unter die Definitionen fallende Güter der allgemeinen Vergaberichtlinien unterliegen.

Frage 9:

Veröffentlichung: Erscheint Ihnen ein zentrales Bekanntmachungssystem geeignet, und wenn ja, unter welchen Modalitäten?

Antwort:
Ein zentrales Bekanntmachungssystem halten wir für notwendig, um Transparenz herzustellen. Die Erfahrungen bei der IEPG sprechen jedoch auch für die Notwendigkeit einer verbindlichen Rechtsgrundlage mit Sanktionsmechanismus.

Frage 10:

Auswahlkriterien: Welche Kriterien sollten Ihrer Meinung nach neben den in den aktuellen Richtlinien vorgesehenen Kriterien berücksichtigt werden, um den Besonderheiten des Verteidigungsbereichs Rechnung zu tragen? Die Vertraulichkeit, die Versorgungssicherheit usw.? Wie sollen diese definiert werden?

Antwort:
Das Kriterium Vertraulichkeit sollte auf Ebene der Vergabeentscheidung selbst keine Rolle mehr spielen; vielmehr sollten jene Anbieter, die die Standards nicht erfüllen, bereits nicht zum Vergabeverfahren zugelassen werden. Ihre Ablehnung sollte begründungspflichtig und gerichtlich kontrollierbar sein. Die Versorgungssicherheit ist ein leistungsspezifisches Auswahlkriterium unter anderen, es sollte nicht in der Richtlinie überbetont werden, da in den meisten Fällen eine nationale Vergabe kaum sicheren Zugang zu den Gütern/Ersatzteilen verspricht als eine europäische, da erstens die Mitgliedsstaaten Rüstungsexporte untereinander zum Eigenbedarf regelmäßig nicht verhindern, zweitens durch zunehmende internationale Verflechtung sowohl auf Anbieter- als auch auf Abnehmerseite rüstungstechnologische Autarkie unvorstellbar ist.

Frage 11:

Wie sollte Ihrer Meinung nach die Praxis der Kompensationsgeschäfte behandelt werden?

Antwort:
Kompensationsgeschäfte innerhalb Europas sollten im Rüstungsbereich eben so wenig angewendet werden wie im zivilen Sektor. Für den Import von automobilen oder zivilen Hightech-Gütern werden auch keine Kompensationen gefordert. Schon jetzt sind Off-Set-Praktiken und Juste-Retour-Prinzip gemeinschaftsrechtlich bedenklich, weil die hierdurch beabsichtigte finanzielle Entlastung der Mitgliedsstaaten (bzw. der Verteidigungshaushalte) kein wesentliches Sicherheitsinteresse nach Artikel 296 der europäischen Verfassung ist.

NIID

Stichting Nederlandse Industriële Inschakeling Defensieopdrachten

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European Commission – DG Internal Market
Consultation "Green Paper on Defence Public Procurement"
Ave de Gortenbergh C100 (01/100)
B-1049 BRUSSEL

Subject	Reference	Date
Green Paper	JJ55D1	9 March 2005

Dear Sir,

It is our pleasure to forward the position of the defence related industry in The Netherlands concerning the EU Green Paper on Defence Procurement. The defence related industry in The Netherlands welcomes the initiative of the Commission. The importance of this paper has been well understood and as member of ASD we support the response of ASD sent to you by letter of 21st January 2005. We feel, however, that the specific interest of industries in small and medium sized countries need more emphasis. Measures to create a level playing field for all companies in the supply chain have to be an integral part of new procedures.

In the Green Paper the European Commission is pointing at the still existing nationalism and protectionism. In fact, industries in the smaller countries have no free access to the defence markets in Europe, which are currently fragmented along national lines. One of the biggest hurdles to be taken by industries in the supply chain is crossing national borders. For a true European Defence Equipment Market (EDEM) it is essential to also open the possibility to include competitive companies within smaller countries in the supply chain of defence programs in Europe. Such industries should get a fair chance to link as a subcontractor with prime companies/system integrators all over Europe. The result will be that the best innovative and competitive technology and other vendor items will be included and that the client will get the lowest price for the best there is in Europe.

We believe that binding legal rules in a European Directive are needed to achieve a true EDEM. For this reason the industry in The Netherlands is in favor of a Directive as described in the Green Paper. In addition to this directive we support the proposal of ASD to initiate a Code of Conduct. However, our support to the ASD proposal for a Code of Conduct is based on the inclusion and implementation of a Code of best practice for the supply chain. The MOD/Industry policy group in the UK published such a code. It is our proposal to include the substance of this MOD/Industry paper in the Directive as well as the Code of Conduct.

EDA is probably in the best position to come forward with the Code of Conduct, including a Code of best practice for the supply chain, since they will have to operate on the defence market according European rules. For the detailed answers to your questions we refer to the ASD response. We are at your disposal for any further explanation you may wish.

Kind regards,
Association NIID

van Vliet

Cent van Vliet
Managing Director

Contribution au Livre vert sur les marchés publics de la défense

Dans le domaine textile & habillement, les marchés publics concernent les entreprises qui fournissent des vêtements (uniformes, équipements de protection) pour les personnels de la Défense, les grands corps de l'Etat et les entreprises publiques (Armée, Police, Pompiers, Collectivités locales, Transports…) et représentent à eux seuls avant élargissement plus de 100 000 emplois en Europe et 5 millions d'utilisateurs dans les services civils et militaires. Les marchés publics textile dans le secteur de la Défense représentent une part significative pour laquelle toute une catégorie de produits peut être considérée comme des produits sensibles dont le savoir-faire technologique doit être protégé en Europe.

PROMPTEX est composé des Fédérations professionnelles nationales du secteur textile et habillement regroupant ainsi les industriels de « l'amont » (producteurs de matières premières : fibres, tissus…) et de « l'aval » (fournisseurs d'articles textiles confectionnés pour l'habillement et l'équipement) :

- **AESMIDE** (Asociación de Empresas Contratistas con las Administraciones Públicas de España)/ Espagne
- **APITMA** (Asociaçao Portuguesà dos Industriais Textois para os Mercados Administrativos) /Portugal
- **FEBELTEX** (Fédération du Textile Belge) /Belgique
- **FACIM** (Fédération Nationale des fabricants de fournitures administratives civiles et militaires) /France

La Commission part du constat que le niveau des échanges intra-communautaires d'équipements de défense est étonnamment faible par rapport aux acquisitions totales des Etats membres. Ce secteur présente certes des particularités par rapport aux marchés publics lato sensu, en ce sens que la confidentialité des informations militaires sensibles est vitale pour les intérêts nationaux, et donc pour les intérêts de la Communauté (article 296 TCE[1]). La Commission reconnaît dès lors que cette particularité peut être une source de contraintes au niveau de la concurrence et pour les relations entre consommateurs et fournisseurs, qui sont plus étroitement liés que d'ordinaire. Cependant, la pratique a conduit dans certains Etats à une interprétation extensive de la dérogation prévue à l'article 296 du TCE.

Les marchés défense du secteur textile et habillement doivent en principe être soumis aux règles de la directive 2004/18/CE qui doit être transposée dans les Etats membres. **Cependant, une certaine catégorie d'articles spécifiques dits de protection contre les matériels de guerre ou encore qui concerne la protection individuelle des forces armées devrait bénéficier de règles plus adéquates**. En ce sens, PROMPTEX soutient cette initiative lancée par la Commission européenne afin de construire un véritable marché de la défense et est favorable à la mise en place d'une directive dans le secteur de la défense prenant en compte les spécificités du secteur textile&habillement.

[1] *« Tout Etat membre peut prendre les mesures qu'il estime nécessaire à la protection des intérêts essentiels de sa sécurité et qui se rapportent à production ou au commerce d'armes, de munitions et de matériel de guerre. »*

1) **Estimez-vous utile/nécessaire/suffisant d'expliciter le cadre réglementaire actuel selon les modalités présentées ?**

La pratique qui découle du régime dérogatoire actuel n'a pas permis d'assurer l'objectif de la protection des intérêts essentiels de la sécurité des Etats en ce que cette pratique est devenue dans certains pays la règle.

Le recours général et non justifié aux dérogations de l'article 296 pénalise certaines entreprises européennes qui ne peuvent donc pas soumissionner dans d'autres pays européens qui recourent abusivement à cette dérogation en y incluant tous types d'articles qui devraient en principe relever des règles générales sur les marchés publics. (Cas des textiles courant) Il n'y a pas d'homogénéité des pratiques.

Certains Etats ont cependant appliqué cette possibilité de déroger, par exemple la France, en annexant au code des marchés un décret défense. (n° 2004-16 du 7 janvier 2004)

- Celui-ci prévoit en-effet de déroger aux règles sur les marchés publics pour *« les marchés de fournitures et de services qui ont pour objet la conception, l'essai, l'expérimentation, la réalisation, l'acquisition, le maintien en condition opérationnelle, l'utilisation ou la destruction des armes, munitions et matériels de guerre* »
- Ce décret n'a, à notre avis pas été assez loin car il aurait été souhaitable d'inclure dans la dérogation certains matériels propres à la protection de l'individu.

Une clarification à l'échelon européen est donc nécessaire pour définir ce qu'on entend par « *production d'armes, de munitions et de matériel de guerre ».* La catégorie matériel de guerre doit s'entendre aussi dans le sens de la protection de l'individu.

Il conviendrait, en tout état de cause, d'utiliser davantage la possibilité de dérogation offerte par cette disposition pour éviter, dans toute la mesure du possible, le recours abusif à des entreprises qui sous-traitent totalement dans des pays situés hors U.E. afin de préserver au mieux les critères essentiels tels que les délais de livraison, la sécurité des approvisionnements et la transparence de la fabrication des produits.

La possibilité de dérogation de l'article 296 TCE devrait pouvoir jouer pour les biens destinés à un usage militaire dans les conditions définies par la jurisprudence et, dans les cas où le recours à l'exception ne serait pas justifié, la directive s'appliquerait. [1]

- Une liste pourrait définir précisément ces biens.
- Une communication de la Commission pourrait rappeler les conditions d'application de la jurisprudence donnant aux pouvoirs adjudicateurs des éléments définissant la notion de protection des intérêts essentiels.

Les produits destinés aux forces armées qui ne sont pas à usage militaire, seraient couverts, par la directive marchés publics classique. (Articles textiles courants…)

[1] Une communication Commission 14 décembre 1997 proposait déjà une distinction entre 3 catégories de produits : produits à usage militaire hautement sensibles (article 296 TCE) / produits destinés aux forces armées et à usage militaire mais ne constituant pas des équipements de défense hautement sensibles (un ensemble de règles assez souples pourrait être défini) / produits destinés aux forces armées mais pas à usage militaire (directive marchés publics)

2) **Y a t-il d'autres aspects du régime communautaire en question qui mériteraient d'être clarifiés ?**

Concernant cette question, les éléments qui nous semblent les plus importants pour notre secteur ont été cités à la question précédente.

3) **Les règles des directives existantes vous paraissent-elles adaptées/inadaptées aux spécificités des marchés de défense ? Précisez-pourquoi.**

Les règles des directives existantes **ne sont pas adaptées à certains types de matériel et notamment certains articles textiles qui sont des articles de protection contre les matériels de guerre tels que les *casques de protection balistique, gilets pare-balles, tenues NBC…*** requérant une technologie particulière ne devant pas être diffusée sur le net.

On peut en effet aujourd'hui imaginer les risques pour la sécurité des forces armées de rendre accessible à un autre Etat les spécifications techniques d'un produit, lui donnant ainsi la possibilité de calibrer son arme de guerre à un niveau supérieur aux standards de protection des individus. Ceci est encore plus vrai aujourd'hui au moment où les risques ont évolué et deviennent chimiques, bactériologiques…

4) **Une directive spécifique serait-elle un instrument utile/nécessaire pour mettre en place un marché européen des équipements de défense et renforcer la base industrielle et technologique européenne ?**

Une directive spécifique nous paraît utile à la mise en place d'un marché européen et ferait naître ainsi des conditions de concurrence plus efficaces, plus adaptées et plus transparentes.

Les articles cités au point 3) (*casques de protection balistique, gilets pare-balles, tenues NBC)* pourraient rentrer dans le champ d'application d'une directive spécifique au secteur de la défense si la protection des intérêts essentiels des Etats ne justifie pas le recours à la dérogation de l'article 296 TCE.

Afin de vérifier que de tels produits destinés aux forces de défense et de sécurité sont effectivement à usage militaire, les pouvoirs adjudicateurs pourraient utiliser des critères objectifs, tels que l'existence de notices spécifiques élaborées par les services techniques acheteurs, ou l'emploi exigé de matériaux dotés de qualités particulières (par exemple, résistance au feu, protection balistique, protection NBC (nucléaire-biologique-chimique) ou articles à réflectance infra-rouge spécifique.

Une telle directive ne serait en effet utile que si elle insiste sur les critères clefs pour ces marchés européens des équipements de défense : la sécurité des approvisionnements, du service après vente, des délais de livraison, et de la transparence du recours éventuel à des sous-traitants.
Dans l'hypothèse de sous-traitants situés dans des pays hors U.E, les offres devraient être, soit écartées, soit affectées de coefficients de pondération négatifs, dès lors que la sécurité des approvisionnements, des délais de livraison et du service après-vente ne sont pas garantis.

5) **Quelle est votre opinion concernant l'utilisation de cette éventuelle directive pour les acquisitions effectuées par d'autres organismes, tel que l'Agence européenne de défense ?**

Concernant cette question, la faible quantité d'articles issus des fabricants entrant dans le champ d'application ne permet pas d'apporter de réponse concrète.

6) **Procédures : la procédure négociée avec publicité préalable vous semble-t-elle être adaptée aux spécificités des marchés de défense ? Quelles sont les situations qui devraient permettre le recours à la procédure négociée sans publicité ?**

La procédure négociée avec publicité préalable nous semble effectivement être une solution adaptée à la spécificité des articles textile & habillement ainsi cités. (cf. Question 3)

L'absence de publicité devrait être limitée au cas d'urgence, de recherche, d'essai dont la diffusion technologique doit être limitée.

7) **Champ d'application : quel serait le moyen le plus approprié pour définir le champ d'application ? Une définition générique et dans ce cas laquelle ? Une utilisation combinée d'une définition et d'une liste.**

Le moyen qui nous semble le plus approprié serait d'établir une liste qui viendrait compléter une définition générique qui pourrait porter sur le cadre suivant « *les marchés publics portant sur les armes, munitions, matériels de protection et de guerre* » qui « *sont des produits destinés aux forces armées à usage militaire* ».

Un matériel qui protège l'individu a droit au même niveau d'exigences qu'un matériel offensif. « *les articles textiles de protection individuelle contre les matériels de guerre* » devrait donc présenter une garantie adaptée.

- Par exemple, les tenues de protection étanches et filtrantes aux agents toxiques de guerre et industrielle qui sont essentielles à la protection de l'individu devraient être adaptées au niveau des standards du matériel de l'agresseur.

La catégorie de matériel militaire couvert par la directive mériterait d'être plus précise que la liste de 1958 qui donne une liste des armes, munitions et matériels de guerre. Elle concerne plus spécifiquement l'armement et non les articles de protection contre les matériels de guerre.
Celle-ci mériterait d'être complétée mais sur cette base on peut estimer :

- que, s'appliquant en outre, au matériel de protection contre les agents toxiques ou radioactifs (point 7.c), il conviendrait de considérer que, le matériel de protection aux armes à feu portatives et automatiques, le matériel de conduite de tir à usage militaire (point 1 et 5), soit également pris en considération et ce au même titre que la protection NBC. Il s'agirait en l'espèce de matériel tels que : le camouflage, réflectance infra-rouge…
- qu'un éclairage technique serait utile à la définition du point 13 (« autres équipements et matériels »)

Une disposition prévoyant que la directive ne préjugerait pas de la possibilité d'invoquer l'article 296 CE sous les conditions définies par la Cour serait conforme au Traité.

8) **Exemptions : la définition d'une catégorie de biens qui seraient exclus de manière manifeste de la directive vous semble-t-elle utile/nécessaire ?**

La définition d'une catégorie de biens exclus de manière manifeste de la directive (cas du nucléaire) peut être utile et éviter ainsi toutes les interprétations auxquelles a conduit l'article 296 TCE.

9) **Publication : un système centralisé de publication vous semblerait-il approprié ? Si oui, selon quelles modalités ?**

Un système centralisé de publications serait approprié avec un bulletin de publication harmonisé. La possibilité de définir l'objet du marché en termes de performances techniques en vue d'éviter une discrimination potentielle des fournisseurs est également intéressante.

10) **Critères de sélection : quels critères vous sembleraient devoir être pris en compte en plus de ceux déjà prévus dans les directives actuelles afin de tenir compte des particularités du secteur de la défense ? La confidentialité, la sécurité des approvisionnements, ect. ? Et de quelle manière les définir ?**

Dans ce contexte, il est essentiel, pour les marchés publics passés dans le secteur de la sécurité défense, de prendre tout particulièrement en considération **des critères tels que les délais de livraison, la sécurité des approvisionnements et la transparence absolue du recours éventuel à des sous-traitants.**

Plusieurs événements nous rappellent qu'un soumissionnaire qui ferait réaliser son produit textile dans un Etat non membre de la Communauté européenne, pourrait voir ses approvisionnements cesser du jour au lendemain dans le cas où le lieu de fabrication se situerait dans un pays ennemi potentiel.

« *Bundeswehr lässt Kampfanzüge in Jugoslavien nähen* »

Il est apparu qu'en 1998 des uniformes de combat pour l'armée allemande étaient fabriqués en Serbie. En effet, une entreprise allemande, qui devait livrer l'habillement militaire à la suite d'un marché public, aurait chargé une société yougoslave de cette production en qualité de sous-traitant. Si aucune disposition légale ne fut violée en cette occasion, plusieurs voix se sont élevées, à juste titre, pour critiquer les contradictions des autorités allemandes, qui, d'une part, étaient prêtes à s'engager dans une action militaire sous l'égide de l'OTAN contre le Président serbe M. Milosevic, tout en appuyant, d'autre part, le régime de celui-ci par le versement d'importantes sommes d'argent dans le cadre de marchés publics dans un secteur aussi sensible que l'habillement des troupes militaires.

Après cet incident, le service d'approvisionnement de l'armée fédérale allemande a été invité à ne plus passer aucune commande impliquant des firmes serbes. De plus, les autorités devraient veiller, de manière plus générale, à signaler tous contrats faisant intervenir des acteurs en dehors de la zone OTAN.

(Source : Süddeutsche Zeitung, 3 mars 1998, « Serben stellen Uniformen für die Bundeswehr her »; Der Spiegel 37/1998 : « Bundeswehr- Anrüchiges Geschäft ».)

Dans ce domaine spécifique, il est donc essentiel que les pouvoirs adjudicateurs vérifient les indications des soumissionnaires concernant la fabrication des matières, et tout particulièrement le lieu de cette fabrication.

Il est conseillé de limiter les soumissionnaires à ceux déjà inscrits sur des listes officielles de fournisseurs agréés et, avant d'admettre des nouveaux candidats fournisseurs, d'exiger d'eux la fourniture d'échantillons significatifs et des indications très précises concernant les lieux de fabrication éventuels de leurs matières ainsi que la mise aux normes exigées dans les procédures d'agrément, de leur outil de production.

11) Comment considérez-vous devoir être traitée la pratique des compensations

Concernant cette question, la faible quantité d'articles issus des fabricants entrant dans le champ d'application ne permet pas d'apporter de réponse concrète.

* *
*

Simmons & Simmons

Defence Procurement Green Paper

January 2005 www.simmons-simmons.com

Simmons & Simmons organised a defence sector meeting to discuss the Green Paper on 13 January 2005. In attendance were representatives from EU governments and the defence industry, including legal and financial advisors. The themes emerging from the meeting are set out in this response.

Article 296 EC Treaty

Whilst respecting the fundamental EC Treaty principles and acknowledging that the derogations from such principles are to be construed narrowly, there is a continuing conviction that Member States legitimately retain a considerable degree of competence in the area of defence procurement given the need to maintain control over highly sensitive confidential information, ensure security of supply and, in certain instances, to ensure that certain strategic skills and competencies are retained within national boundaries. There is clear support for encouraging the development of a European defence equipment market, but some doubt that a revision of the procurement regime in relation to defence, and in particular the introduction of a Directive applicable specifically to defence procurement, is likely, on its own, to make a significant contribution to that goal.

Nevertheless, there is scope for an instrument to clarify the applicability of Article 296. Greater intervention on the part of the Commission would also be helpful to prevent clear abuses of the Treaty derogations.

The Current Procurement Regime

There is a view that the current procurement Directives do not cater for some of the more complex types of defence procurement. The new public sector Directive may be insufficiently flexible in this respect. In particular, there is an increasing number of innovative "partnering" contracts which involve industry working closely with national defence ministries to achieve, adapt and improve solutions on a long-term basis. These are generally considered not suitable for award on the basis of the evaluation of bids against a defined specification.

Much of the more complex defence procurement consists of finding a solution to a given requirement. This may involve comparing quite different products and technologies. It is generally the case, therefore, that Member States need for strategic reasons to retain the ability to enter into negotiations with potential suppliers directly in order to explore how their respective technologies and products may be used to provide a solution to the security need. There is also quite legitimate concern on the part of industry in such circumstances that their valuable IP rights cannot be expropriated and shared with their competitors. The above does not of course preclude a contract being advertised, but it does suggest that the negotiated procedure must be available for this type of procurement.

New Directive

There was clear consensus that the Commission's review of defence procurement should not result in the existing rules becoming more difficult to apply, nor in their simply being supplemented with a third tier of regulation, adding complexity. This is seen as a particular risk in the event of the introduction of a new Directive dealing exclusively with defence procurement since, as the Commission acknowledges, it is unlikely to provide exhaustive answers to all the specific aspects of the defence markets. There are already difficult issues in reconciling the procurement Directives (in particular following the Telaustria judgment of the European Court of Justice) with Article 296 jurisprudence. The addition of a new legal instrument which sits alongside the procurement Directives and which applies to certain defence contracts and not others, would be likely to lead to less rather than greater clarity.

Importantly, the particular concerns of Members States in this area, and in particular security of supply and respect for their national defence interests, are inherently matters which do not permit detailed definition and are constantly evolving, which the Commission acknowledges. Attempting to define or circumscribe these issues in a Directive risks either being simply inappropriate to the sector, or at the very least inflexible to developments and changing requirements.

Given the legitimate interests that Member States have in this sphere, it is almost certainly the case that any new Directive will have to permit governments a reasonable margin of appreciation in relation to many aspects of procurement. This, and other practical obstacles which may be expected to affect the timetable for passing a new Directive mean that it cannot be seen as a timely solution to current problems.

There was support for the introduction of, at most, a non-binding measure, along the lines of a voluntary code of conduct under the auspices of the EDA, which would provide a suitable framework within which an appropriate approach to defence procurement could be refined over time. Alongside an interpretative Communication, it would permit Member States to work together to develop an appropriate framework of binding rules, respecting the principles of the Treaty and also Member States' retained authority in this area and allowing industry and government to adapt to a more open regime. It would also be more flexible in the context of a constantly evolving market place and changing requirements of Member States in this sensitive area.

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The code of conduct would set out principles of best practice. Such principles might include that defence contracts be advertised (whether or not in the OJEU) except where Article 296 applies (there is consensus that advertising promotes transparency and, therefore, competition) and a reporting requirement, where Member States notify the use of Article 296 to each other and the Commission (to attempt to combat systematic reliance). It might also usefully establish a basic procedure to be followed, respecting the basic EC Treaty principles of transparency and non-discrimination save in exceptional, appropriate circumstances.

A review of the operation of such a code over the next few years would be useful in informing the debate as to whether a new, specific legal instrument is in fact required and, if so, the appropriate boundaries of such a Directive.

Interpretative Communication

A Communication setting out the ECJ's jurisprudence in relation to Article 296 and thus clarifying the scope of that derogation could yield more positive results. The function of the communication should be limited to clarification, and not seek to narrow or circumscribe the reasonable application of Article 296. Member States' involvement in the preparation of such a Communication will be crucial to its utility in practice. It is also more likely to be achievable in a reasonable timeframe.

Alongside this, however, it is agreed that it is important, if the full benefit of any Communication is to be realised, for the Commission to be seen to be enforcing the strict and legitimate use of Article 296 against those Member States who have perhaps sought to rely on it as a matter of course as an exemption for all defence-related contracts. Centralised enforcement is particularly important in view of the very small number of procurement law challenges brought by disappointed bidders, particularly in the defence sector, which suggests that few contractors are prepared to risk their relationship with national defence ministries (who will be their largest customers in most cases) in any but the most flagrant cases.

Whilst it is acknowledged that any communication would not be binding as a matter of law, it is hoped that the Commission's reliance upon it in infringement proceedings against Member States before the ECJ, may result in Court endorsement of the principles it contains (which should not be controversial) and that this would thereby lend the Communication additional weight.

Simmons & Simmons
21 January 2005

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The contribution of Snecma and Sagem to the European Commission's Green Book on Defense procurement[1]

1 Introduction

1.1.1 Snecma and Sagem welcome the publication of the European Commission's Green Book on Defense acquisitions within the Union and between its member States. The analysis it puts forward is relevant. It recognizes the central role of public authorities, the need for sustainable procurement security, as well as the necessary confidentiality and the complexity of the programs that lead to long-term relations between public authorities and their suppliers.

1.1.2 Most of the parties involved in the debate on the Green Book have noted that public defense purchases today, in Europe, are the responsibility of the member States. They have therefore proposed various mechanisms designed to improve the coordination of government policies. According to this approach, the member States will voluntarily comply with a Code of conduct, under the aegis of the European Defense Agency.

1.1.3 Snecma and Sagem support this proposal, which is notably that of the Aerospace & Defense Industries Association of Europe (ASD) which has our full support and backing.

1.1.4 Over and above the requisite convergence between government policies, we wish to discuss in this paper the progress that can be made, in parallel, at the level of the European Union (i.e. the Council, Commission and Parliament).

2 The Defense market in Europe

2.1 A major characteristic: the monopoly of Public authorities.

2.1.1 In Europe, only public authorities are responsible for guaranteeing the safety of citizens. To do so, it has the monopoly on the use of force. Within this framework, it must prepare to apply the law (police force assignments) or to manage external crises (defense missions), and must provide itself with the means to prevail should these occur. These missions require on-going research into operational and technological superiority that prevent any third parties from jeopardizing that superiority. For the public customer, this results in monopolistic and secrecy requirements backed by specific legislation, as well as democratic control of the use that the public authorities make of that monopoly.

2.1.2 This context is therefore radically different from that of the other public markets (including product and service markets such as energy and transport). The industrial and R&T activities involved in defense are completely subordinated to the needs, budgets and command of the public authorities. In this respect, it is worth noting that the four types of circulation in the Single Market (goods, services, people and capital) are generally subject to prior explicit authorization from the public authorities.

The creation of a European defense policy and the gradual abolition of internal borders will no doubt never lead to a laissez-faire policy with regard to the circulation of defense-related goods, services, capital or personnel.

[1] Com (2004) 608 final

2.1.3 We are delighted to note that the Green Book recognizes the need for specific legislation, which cannot be a modified version of the general legislation applicable to the civilian Single Market.

2.2 Public space markets and public security markets.

2.2.1 By and large, space activities in Europe reply to the same criteria as those applicable to the defense sector: Public financing, public monopoly of the circulation of goods and services, non-disclosure of military technologies (missiles, satellites), and security of supply to prevent being subservient to the demands of non-European powers. However, there is a common executive body, which is not yet part of the Union. This body, the European Space Agency, functions within the framework of specific rules which are neither national laws (under TEU art. 296), nor European laws. The discussions on the future legislative framework for actions by the Union must take into account the needs of the European Space Agency (ESA).

2.2.2 The future security R&T program controlled by the European Commission also replies to the same criteria. Unlike the civilian section of the RDFP, it should not be a question of subsidizing industry but of carrying out a public technology acquisition policy, in the interest of our fellow-citizens. The priorities are defined by the public authorities and the circulation of the results is under their full control. There is no contradiction in the fact that the acquisition is carried out by the Commission and that the future use of the technologies acquired is the responsibility of the member States or their agencies, nor does that change anything about the principle. It will require a suitable legislative framework, at a European and not a national level, which today has yet to exist.

2.3 The logical consequence: a fragmented situation.

2.3.1 The operational and technological superiority sought by the public authorities in defense, security and space depends to a large extent on the industrial base as well as the research and testing facilities on which they can safely rely. There is no public procurement in the Defense sector which can act independently of the strategy of suppliers, their qualities, their capacity to guarantee the security of supply for the customer, the technologies they control, and former public investments in R&T.

2.3.2 In the past, the specific characteristics of Defense markets have resulted in the creation of national scientific, technological and industrial means among the leading military powers. Other States, which have not had the opportunity to acquire the financial and industrial wherewithal for such a policy, have been led to rely on allied countries to satisfy their requirements in terms of Defense systems. The result is that the range of Defense industries within Europe is fragmented, as is public demand.

2.3.3 In the field of public defense procurement, we support the findings in the Green Book concerning the consequences of the fragmentation of demand in Europe between twenty-five customers and the interior barriers to competition. The civilian markets in open competitions account for 74% of the sales turnover of Sagem and Snecma. Within the bounds of the European Union, heightened competition between European suppliers will be of benefit to public customers and to competitive industrialists.

2.3.4 The legislative framework for public defense and security procurement in Europe is also fragmented:

- Each member State has its own legislation, which is not subordinated to the legislation of the Union (exemption under TEU art. 296).
- OCCAR and ESA operate in accordance with rules which are enacted neither at the national level (under art. 296), nor at the Community level. In legal terms, these agencies are "elsewhere”.
- Dual industries are subject to Community legislation, particularly in terms of competition. The existing legislation does not take into account the specific needs of the

defense sector (confidentiality, monopoly of the customer, security of supply for the customer).

- Acquisitions by and/or on behalf of the European Defense Agency, technology acquisitions in particular, will take place within a legislative framework that is at present poorly defined. In any event, the European Financial Regulation for acquisitions such as office furniture appears inappropriate to us.
- Technology acquisitions by the Commission within the framework of the future security program will be carried out on the basis of a specific legislative environment that has yet to be constructed.

2.3.5 We find that the internal borders of the Union are, in terms of defense and security, less permeable than the external borders.

Independent of the national legislations under art. 296, in our opinion it is therefore necessary to construct a European legislative framework to take joint action (not national). This framework must be consistent, effective and legally established.

3 Three findings; three proposals:

Thirty years ago, the founders of the Europe space effort understood that member States should not be forced to give up their space policies but rather should supplement them. Common European activities have enabled us to obtain results which no State alone could have attained. The States that wished to do so, have continued to implement national space policies.

3.1.1 Similarly, we feel that the European defense policy will be built neither against, nor in place of individual State policies, but will add to them.

From this point of view, the Green Book puts forward proposals to put an end to the abuses committed by certain States under cover of article 296, proposals associated with possible outlooks for a European legislative framework specific to the defense sector. In political terms, the association is not very productive and we suggest the two action plans be disconnected, although both are equally necessary:

- To fight against manifest abusive use of article 296, without calling its principle into question, while at the same time reconciling national acquisition practices through a code of conduct, in accordance with the proposals of the ASD, which we helped draw up.
- Independently of national legislation which will continue to function under article 296, to create a Community legislative framework suitable for joint action.

3.1.2 Europe has ascertained, and it must be accepted as a political fact, that executive power, in terms of common defense, cannot (yet) be exerted by the Commission. As a matter of fact, its High Representative, until the next Constitution, is placed under the authority of the Council alone. The same applies to the European Defense Agency, which is a body of the common defense executive. At the level of the legislative initiative on the other hand, the Commission has the central role. It seems to us that the future action plan must take this into account. The Commission could take legislative initiatives, i.e. make proposals to the Council and Parliament.

3.1.3 The Single market in the civilian sector was not built with only one legislative instrument. In our opinion, it is unlikely that the future legislative framework for common industrial defense projects will consist of only one European law. We ought more to consider a series of laws. Some could be subject to quick consensus while others will require years of negotiations. The Commission would have everything to gain in calling upon the existing skills within OCCAR, EDA, ESA and the officers in charge of the security R&T program in the DG Enterprise to examine the legislative tools that these bodies will need in order to carry out their assignments with legal surety within the Union. The ASD, our industrial association, holds itself at the disposal of the public authorities to contribute towards this work.

POSITION PAPER UNICE THE VOICE OF BUSINESS IN EUROPE POSITION PAPER

30th March 2005

UNICE COMMENTS ON THE EUROPEAN COMMISSION'S GREEN PAPER ON DEFENCE PROCUREMENT

On 23rd September 2004, the European Commission adopted a Green Paper on Defence Procurement. The purpose of this Green Paper in the Commission's own words is "to develop the debate on these issues"[1].

UNICE is the leading independent organisation representing European business. We speak for more than 20 million companies, the vast majority of which are small and medium-sized. Altogether, these companies provide employment for more than 110 million people and have a total turnover of around €18,000 billion. UNICE's constituents are the major value drivers in the European economy. When commenting on this Green Paper UNICE is focusing its comments on what primarily and generally directly affects its constituents, and thus the European economy, the most.

UNICE welcomes this European Commission initiative. As the Green Paper states "Defence expenditure constitutes a large part of Member States' public spending, to the order of €160 billion for the 25 Member States, one fifth of which is used for the procurement of military equipment (acquisition plus research and development)"[2]. It is our hope that this Commission initiative will contribute positively to the establishment of a more transparent and open European market that caters to this segment of Member States' public spending.

SPECIFIC COMMENTS ON THE DETAILS OF THE GREEN PAPER

UNICE has a number of comments regarding the Commission Green Paper. The first of these comments is that European business and industry acknowledges the extreme complexity of the issue. It is not for nothing that this significant area of Member States' public spending has remained distinct from other normal procurement. The special qualities and considerations which arise when this issue is discussed guarantee complexity, warrants caution and requires prudence in approach and clarity in purpose.

With regard to the two instruments outlined, UNICE would like to state the following.

Clarification of the legal framework by a "non-legislative instrument, such as an interpretative Communication"[3] could be helpful in establishing the boundaries of *Article 296* (of the EC Treaty) exemption. Such clarification could seek to establish what constitutes 'provisions / materials / supplies' to which *Article 296* applies. It should seek to establish the boundaries of the exemption, explicitly where it was intended to apply and to close the loophole whereby 'provisions / materials / supplies' that cannot seriously be justified as "necessary for the protection of the essential interests of its security"[4] are still exempted with reference to *Article 296* in some Member States. Such an interpretative communication must be prepared by the

[1] Green Paper on Defence Procurement, European Commission, Brussels, 23 September 2004, Page 3.
[2] *Ibid*. page 4.
[3] *Ibid*. page 10.
[4] EC Treaty, article 296, paragraph 1, section b.

Commission in close cooperation with EU Member States (and non-Member States to whom this would apply[5]). Without this, the goals of such an interpretative communication cannot be achieved and Europe will be no closer to achieving change in this important sector.

UNICE is not convinced that the second option put forward in the Green Paper (that the EU's legal framework "be supplemented by a new specific legal instrument for defence procurement, such as a directive"[6]) has been shown to be the right way to proceed. As far as European industry and business is concerned, legislation which applies to provisions that do not fall under the scope of *Article 296* already exists (i.e. the recently restructured Public Procurement rules that currently apply to the classical sector – 2004/18/EC – the "New Classical Directive").

The New Classical Directive simplifies the way procurement is conducted and introduces new elements (competitive dialogue, negotiation with or without a call for tender, frameworks, confidentiality) which help to make procurement more flexible and in tune with modern requirements. These are the rules to which non-*Article 296* defence related procurement should be subject.

It must fall on the Commission and Member States to ensure that the public authorities and the industries and sectors which are active in procuring and supplying military related 'provisions / materials / supplies' are made aware of the scope of current procurement legislation and how it can be applied to non-*Article 296* provisions. A good way of doing this would be to include clarification of the possibilities which the New Classical Directive provides in the proposed interpretative communication.

It is possible that at some future date cases (which have not as yet been identified) might arise relating to 'provisions / materials / supplies' that might no longer fall under *Article 296* but which may perhaps require some form of specific legal instrument to coordinate procedures for the award of contracts. To head off further difficulties from this possible development we believe that the European Commission, the defence sector and wider industry should enter into a dialogue to determine the as yet un-identified specificities in the defence markets which might fall outside the *Article 296* exemption and the extent to which these are already taken care of by the New Classical Directive.

This debate should test in detail how well the New Classical Directive can respond to defence-specific factors such as military security of supply, international trade restrictions, absence of defence from international trade restrictions, absence of defence from international trade agreements and NATO standards. UNICE would welcome involvement in any legislative adapations of the New Classical Directive which may become necessary as a result of these discussions.

SPECIFIC COMMENTS ON *ARTICLE 296* AND RELATED ISSUES

The most problematic aspect of defence procurement is of course related to the procurement of weapon systems, materiel and services to which *Article 296* genuinely applies. Rules for procurement in this sphere do not exist due to the exemption which *Article 296* provides. We are aware that there is support in the European defence industry for dealing with this issue in the short term through a voluntary intergovernmental 'code of conduct' under the auspices of the European Defence Agency. We hope that approach proves fruitful, but we also

[5] The EEA Member States' Norway, Iceland and Liechtenstein.

[6] Green Paper on Defence Procurement, European Commission, Brussels, 23 September 2004, Page 11.

recognise that it will be a lengthy, difficult and time consuming process to achieve the desired results and see them properly implemented. This will however, in all likelihood, be true whatever option is chosen. A step by step approach to political and industrial cohesion in this field therefore seems most likely to succeed.

European industry believes that the ultimate goal of the current debate should be to see an internationally competitive European defence industry; for that, a competitive European market is a necessary prerequisite. To achieve this all Member States must be serious in wanting to reach a consensus and demonstrate a willingness to open up the areas potentially covered by *Article 296*. It is obvious that a genuine debate on *Article 296* cannot limit itself just to procurement related aspects. It will also have to deal with related issues that currently have a great impact on defence procurement such as:

- ❑ Differing national security and defence policies;
- ❑ The distortion of competition that exists between public and private defence industries;
- ❑ The dominant role of the state in this sector;
- ❑ The distortion of competition that exists in exports markets;
- ❑ Obstacles to the exchange of arms-related documents, components and products within the Community;
- ❑ Discriminatory state aid and subsidies, and;
- ❑ Lack of harmonisation of military requirements and procurement schedules.

It would be prudent that in the debate due consideration be also given to additional elements which could prove significant to the eventual outcome such as:

- ❑ How to ensure genuine consultation between the various stakeholders (i.e. the Commission, the European Parliament, Member States' and the defence industry);
- ❑ Support for the European Defence Agency;
- ❑ The establishment of a centralised publication system as already addressed in the Green Paper, for all defence contract awards planned by the Member States above a certain threshold value;
- ❑ European standards for defence equipment;
- ❑ Defence related R&D;
- ❑ How to ensure the continued existence of healthy defence industries in smaller Member States;
- ❑ How to improve the position of SMEs active in the defence equipment market, and;
- ❑ How to foster transparency in public procurement procedures.

These issues must be dealt with if a genuine defence procurement industry in Europe which can compete globally, is to be created.

Therefore, in the opinion of UNICE answering the list of questions does, at present, not help in achieving the aforementioned goals. As long as the basic conditions have not been established the questions posed by the Commission cannot be usefully discussed.

* * *

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EU DEFENCE PROCUREMENT

RESPONSE TO THE EUROPEAN COMMISSION GREEN PAPER: "DEFENCE PUBLIC PROCUREMENT"

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A submission on behalf of Brethren in Britain

in response to the

Commission Green Paper on Defence Procurement

1st February 2005

EU DEFENCE PROCUREMENT

Introduction

We are believers on the Lord Jesus Christ and well known to the UK government as taking a keen interest in Government affairs at national and European Union level.

We are thankful for the Commissions' recognition of the subsidiarity principle early in the Green Paper. We respectfully draw the Commission's attention to the fact that we have come to the conclusion, based on Holy Scripture, that the sovereignty of nations states is inviolable, national defence being probably the single most important feature of this principle. It is for this reason we have stressed below the issue of subsidiarity. This submission is based on the Commission commitment to its relations with civil society.

The Internal Market.

We are in full support of the principles of the Internal Market and appreciate the benefits which it has brought to industry right across the European Union. The harmonisation of technical standards required by the Single Market and the introduction of the Single Currency has brought substantial benefits to the prosperity of businesses across the EU.

However, it must be recognised that every industry has its own specific characteristics and constraints in respect of its needs. It is likely that any Member State which has a defence industry will wish to confine the award of defence contracts to its own defence contractors, based on security of confidentiality, the sensitivity of the issue of national defence and the promotion of national employment. It is for this reason that we consider that the principle of **subsidiarity** should be prominent in all considerations.

The European market in defence procurement is very considerable although restricted to a relatively small number of Member States. Even though this may be considered to be fragmentary, in terms of national prosperity it is significant. Defence contracts, once placed, contribute to national GDP and maintains an essential pool of skilled labour and therefore maintains employment levels.

We do not agree that the "gradual creation of a European defence equipment market......would increase economic efficiency."

National defence.

Economic efficiency would be at the expense of national prosperity. Cross-border co-operation within the industry may be acceptable in limited circumstances but sensitive defence technology must remain the preserve of the Member State. In proposing a convergence programme for harmonisation of defence equipment, the Commission should focus on standard equipment and maintain Members States integrity in respect of their individual requiements. Every nation has its own responsibility for its specific defence needs and the necessary capabilities required to protect its citizens and to defend itself and hence its borders from violation from aggressors

We do not agree with the budgetary reductions and the reduction of the armed forces which is taking place at present in the UK. Defence capability is one of the last areas of sovereignty remaining and lies at the very core of our national identity.

(2)

Green Paper Questions

Answers/observations.

1) We agree that the existing legal framework should be strengthened, but it would only be effective if defined by clear and unequivocal definitions, with particular emphasis on

1) the **subsidiarity** principle
2) derogation as provided for by Article 296 (EC)
3) the provisions of Article 297 (EC) should be strengthened to protect Member States vital defence and internal security interests.

2) It is essential to clarify provisions of confidentiality in communications in order to provide unambiguous guidance to Member States.

3) We agree with the ECJ judgement (Case C-414-97). However the need for case by case consideration leads to uncertainty and variation of interpretation by Member States with the consequences that the derogations provided may be circumvented. This kind of uncertainty is clearly illustrated in the Code of Conduct on Arms Export.

Differing national legislation may be seen to be a problem, but we consider that it is justified on the principle of **subsidiarity**, especially if it protects national defence industries from being lost due to fragmentation of work on innovative defence technology from standard equipment which may provided the main earnings of the defence contractors.

4) We consider a specific directive would be useful, provided it did not prejudice Member States from determining their own requirements. Particular attention would have to be paid to Article 297 (EC)

5) It is imperative that there are clear rules governing the purchases of defence material by bodies other than Member States,providing they are not more advantageous, but simply complement the overall market, and do not distract from each Member State's responsibility at home and abroad.

6) Negotiated procedure with prior publication may be suited standard equipment purchases and would promote an open market within the constraints imposed by the need for confidentiality and national security. However, where there is the potential for national defence procurement programmes to include high security technology from third countries such as the USA,it is imperative that adequate protection is given to these suppliers by withholding publication

7) A combination of a definition and a list.

8) The definition of excluded products within the directive is essential. At present, there is too much scope for mis-application of the existing arrangements.(eg. The Code of Conduct and The Arms Embargo on China).

9) How wise is a centralised publication system within the context of national and EU security?

10) The selection criteria must take adequate account of the suppliers ability to
1) maintain confidentiality,
2) security of supply and long term back-up,
3)

11) No comment

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GREEN PAPER ON DEFENCE PROCUREMENT

Submission to DG Internal Markets

By Tony Edwards
Visiting Professor, Royal Military College of Science
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Former Head of UK Defence Exports (DESO)

1. Background

If the EU is to develop an effective Foreign Policy it must at the same time develop supportive and compatible Defence, Defence Industrial and Procurement Policies. In effect, the investment in research and technology, technology demonstrators and defence equipment programmes today will determine directly Europe's options for Foreign Policy tomorrow.

2. Current situation

The end of the cold war resulted in European countries taking a 'peace dividend' which affected both armed forces and funding for defence related R&T investment. The 'peace divided' has hastened the inevitable process of industrial consolidation in Europe and the USA. US R&T investment has resulted in a situation where US equipment, at the top end, is now barely compatible with European equipment, leading to interoperability issues.

The US spends roughly twice as much on Defence as Europe with only half the number of troops. In other words the US invests at least four times as much per troop as Europe and the technology/capability gap is widening. EU regulations already, in theory, allow for Europe-wide R&T and Defence Equipment programmes. However, in practice, key countries regularly exploit the exemptions to pursue ‘national’ interests. The tragic result is a plethora of expensive, untimely and wasteful programmes (e.g. three European third generation fighter aircraft: Swedish Gripen; French Rafale and Anglo/German/ Italian/ Spanish Eurofighter together with imports by the UK and The Netherlands, etc of the US JSF!) The European taxpayer is being served badly.

3. National Strategies

The test of a strategy is what interested observers think it is.

The European situation can be understood by examining only two countries: France and the UK. France has pursued a consistent national Defence Industrial policy since WWII and to a very large extent, has ‘gone it alone’ with only occasional assistance from the UK and US in terms of technology and equipment. By so doing, France is now the leader in Europe in terms of Defence and Aerospace industrial capability. This has been achieved by exploiting the various exemptions to EU Regulations necessary to protect and nurture the national Defence and Aerospace industry. One of the keys has been the intelligent exploitation of dual-use technologies by the French Government in collaboration with EADS (effectively French controlled), Airbus, Snecma and Thales.

At the same time, the UK without an explicit, effective and funded Defence Industrial Policy and Strategy has relinquished its lead, first to the US and latterly to France. It will be recalled that in the 1940s/50s the UK led the world in virtually all important defence and aerospace technologies. But since 1957 (no more manned aircraft) and the sixties (cancellation of TSR2, HS681, P1154 and the pulling out of the Airbus programme by the UK Government) the UK has 'shared' its technologies and funding with various partners. The UK has opened up its defence equipment market to the whole world (JSF's from the US to uniforms from The PRC) while relentlessly pursuing a procurement policy based on the belief that value for money only comes from competition. (The only nation in the world to do so).

In this environment, UK-owned companies have chosen to sell themselves to the highest bidders (usually US, French, German or Canadian). At the same time the UK Government has relinquished its grip on the industry and has abdicated to market forces. The UK maintains its capability to project power by an extraordinary reliance on the US for technology, equipment, support and intelligence.

4. Implications for EU Defence Procurement

Ironically, the acceptance of a single regulatory framework will prove to be easier for France than the UK. For the former, it will involve a natural evolution of its current policy and strategy but on an EU-wide basis. The French Government can be counted on to work closely with the industries of Europe once French leadership is accepted. However, acceptance will be a major problem for the UK. It will entail letting go of the various strands of the 'special' relationship with the US, and acceptance of the EU supporting its evolving Foreign Policy with European defence equipment procured through French companies symbiotically linked to the French Government.

A window is opening up for such a transition because the UK is becoming increasingly disenchanted with its treatment by the US post Gulf War II, especially related to technology transfer. The UK Government is already retaliating (from a weak position) with a series of actions unfriendly to the US. At the same time George W Bush MkII probably would welcome the emergence of a stronger European partner capable of supporting his global imperialistic ambitions.

5. Conclusion

If the EU is to develop a credible Foreign Policy it will need supportive Defence, Defence Industrial and Technology policies and strategies. The funds required are at least double the current EU-wide spending in order to achieve and maintain a rough equivalence in capability with the US. The key will be persuading the UK to let go of its special relationship wit the US and instead accept French leadership of the European-wide Defence and Aerospace Industries. The UK Government has three options: *a)* accept the French-led EU alternative described above, *b*) increase the current MoD budget by at least 25-30% in order to continue muddling through by riding both horses (Atlantic and Europe) or *c*) rely almost entirely on US technology and equipment and thereby accept that UK Foreign Policy becomes synonymous with that of the US.

The desirability of adapting the rules for awarding defence contracts in Europe depends directly on the desirability, or otherwise, of a European Foreign Policy.

GREEN PAPER ON DEFENCE PROCUREMENT

Contribution to the Consultation process for the establishment of a European Defence Equipment Market

Dr. Aris GEORGOPOULOS, Lecturer in Law, School University of Dundee

N.B.: All the questions of the Green Paper are addressed in detail in my **Doctoral Thesis** entitled ***European Defence Procurement Integration: Proposals for Action Within the European Union*** and submitted at the University of Nottingham, January 2004. Moreover a number of forthcoming articles of the author deal with specific matters raised by the Green Paper.

(Any information provided here can be made public, attributed to the author)

1. Do you think it would be useful/necessary/sufficient to explain the existing legal framework in the way presented?

[This question is dealt in considerable depth and length by the author in the article **“Defence Procurement Regulation and EU Law” forthcoming in *European Law Review***]

The presented interpretation of Article 296 EC is **partially** correct.

It is true that Article 296 EC does not introduce an *ipso jure* exemption for armaments trade.

Nevertheless Article 296 (1b) EC ***is not*** subjected to the **classic proportionality** test (i.e. examination of the **suitability** and **necessity** of the national measure) like other Treaty exemptions. In other words the Court **does not examine whether there is a *less***

restrictive measure to address the proclaimed aim i.e. the protection of the essential interest of National security.

The opposite hypothesis would mean that **the intensity of scrutiny** under Article 296 EC would be the same as Article 30 EC. What would be the ***effet utile*** of Article 296 in that case?

The Court in C-222/84 Johnston ruled that Treat exemptions, including should be interpreted strictly.

However this does not mean that the Court equalised the scrutiny of Article 296 EC with that of the other Treaty exemption. The meaning of *Johnston* is that Treaty exemptions should be interpreted restrictively **within the teleological boundaries of each provision.** In the case of Article 296 EC it is undeniable that the Community Legislator intended a far **more relaxed scrutiny** than in the case of the other Treaty exemptions. This is supported by

a) the *ratio legis* of Article 296 and the “vote of confidence” it received in all amendments of the Treaties

b) its position in the systematic economy of the Treaty, namely in under the *General and Final Provisions*

c) its wording [every Member State may take such measures as *it* [Member State] considers necessary.

So what is the meaning of the narrow construction of Article 296 EC?

I believe that the wide margin of discretion, which was awarded purposefully by the Community Legislator to the Member States **is not unconditional**. The discretion surpasses its teleological boundaries, and therefore is unjustified, when the national decision or measure is ***manifestly unsuitable*** for attaining the aim of protection of the essential interests of security.

That was the case in C-414/97 *Commission v. Spain* where the Court found that: “24… the Spanish Government has not established that the *abolition of the exemption* from the VAT on imports and acquisitions of armaments,…, constituted a measure which could *undermine the protection* of the essential interests of security …".

N.B. An example of a measure that is ***manifestly unsuitable*** for the protection of the essential interests of security is the ***indirect offsets*** or in other words industrial compensations that are **not related to the defence sector**. (That would be the case of the obligation of the foreign defence company to purchase **"civil"** products or services from domestic companies).

2. Are there other aspects of the Community system in question that should be clarified?

The answer to this question is found in the previous discussion, namely the ***manifest unsuitability test*** as opposed to the proportionality test**.**

The following brief presentation highlights the differences between the scrutiny of the Court under Article 30 EC and Article 296 (1b) EC:

- *Article 30 EC (proportionality test):*

1. Examination of the *suitability* of the national measure.
2. Examination of the *necessity* of the national measure (The Court asks this question: Is there a *less restrictive measure* to the internal market that could address the same aim?)
3. Balance of interests between the aim of the smooth functioning of the internal market and the aims of the national measure.

- *Article 296 (1b) EC (manifest unsuitability test)*

1. Examination as to whether the national measure is ***manifestly unsuitable*** for the achievement of the proclaimed aim of the protection of the essential interests of security.

It is important to underline that the manifest unsuitability test is *negative* in nature. The Court does not examine the suitability of the measure but whether it is manifestly unsuitable. This is the essence of *Commission v. Spain (*see the negative construction of the conclusion of the Court in paragraph 24 mentioned above under the answer to the Question 1).

As already mentioned the most obvious example of a manifestly unsuitable measure for the protection of the essential interests of security is the ***indirect offsets*** **(as opposed to the *direct offsets*).**

3. Do you consider the rules of existing directives suited/unsuited to the specific characteristics of defence contracts? Please give your reasons.

I think that the new rules on *framework agreements* can prove a useful tool in an open European defence procurement market for addressing the requirement for *security of supplies.* The defence contracting authority could diversify the risk by concluding a framework agreement with more than one economic operators especially in areas where the need for security of supply is deemed fundamental. (It should be mentioned however that the guarantee of security of supply often lies beyond the sphere of influence of the defence contractor since the export licences are controlled by the Home State (as correctly suggested by the Green Paper p. 5)

In addition the *negotiating procedure with prior publication* and the *competitive dialogue* could be useful ***provided that they become the ordinary procedures*** (not extraordinary as they are under the European public procurement rules).

4. Would a specific directive be a useful/necessary instrument for creating a European defence equipment market and strengthening the industrial and technological base of European defence?

In principle the answer is affirmative. The adoption of a directive that would eventually lead to the creation of an European Defence procurement market would have many beneficial effects.

First of all it would create a “home” market for the European Defence companies, a “critical mass” that would enable them to compete on better terms with their competitors from USA, Japan, Russia, etc.

This in turn would have beneficial effects on the competitiveness of the European Defence Industrial Base and thus support the *credibility of the ESDP*.

In addition it would iron out differences in the regulation of defence procurement procedures in the various Member States which constitutes a *serious source of discrepancies*. I think that as opposed to the public procurement market, which is characterised by an unlimited number of contracting authorities and economic operators, the defence procurement market has *a limited number of buyers and suppliers* –at least at the prime contractor level-. Thus the establishment of a standardised set of rules will be even more useful than in the case of civil procurement.

BUT

The previous assertions are based on a **necessary condition:** Member States **must be in favour of such development**. The current circumstances are more auspicious than the ones a decade ago. Nevertheless the consent of the Member States for the regulation of defence procurement by a first pillar instrument is far from assured.

5. What is your opinion regarding the use of a possible directive for purchases by other bodies, such as the European Defence Agency?

In an ideal world the answer would be affirmative. But in the case of European Defence Market Integration **a sense of realism is necessary**.

The subordination of the European Defence Agency under the Second Pillar is not fortuitous. Member States clearly want the regulation of defence collaborative projects to remain outside the first pillar.

The coverage of defence collaborative by the directive would have the following result. Based on the principle of non discrimination defence companies from Member States that do not participate in a defence collaborative project -namely they do not share the financial risks and burdens - would be able to take part on an equal footing in the award procedures with defence companies of the participating Member States.

Although that this would be a welcome development it would be unrealistic to expect the Member States involved in such projects -especially some of the large country producers to agree.

In addition not only would such a clause be unrealistic but also ***detrimental*** to what could be called as **"substantial integration".** Collaborative projects as opposed to off-the-self procurement have the following important characteristics.

Firstly they involve the harmonisation of underlying key factors of defence production such as operational requirements and specifications. Thus while harmonisation ***in off-the-shelf pr*****ocurement** refers to the procedures **"How and what defence equipment Member States buy"**-, ***collaborative projects*** focus on an earlier stage namely the one before the production of defence equipment **–"What defence equipment Europe produces"**. Thus collaborative projects seem to have a more far-reaching impact to European defence procurement integration.

In addition they involve approximation of procurement cycles and concentration of financial resources in defence R&D thus evading unnecessary duplication and leading to better planning of defence spending. Moreover such combined efforts promote innovation.

Therefore it seems that collaborative projects are a form of integration that should be encouraged. The application of the directive to collaborative projects **at this point** would only minimise the incentives for Member States to participate.

6. Procedures: do you believe the negotiated procedure with prior publication to be suitable for the specific needs of defence procurement? In what situations should use of the negotiated procedure without publication be allowed?

In the answer to question 2 I mentioned that the inclusion of the negotiated procedure with prior publication as a regular procedure in a Defence Procurement Directive would be positive.

Concerning the **conditions for the negotiation without prior publication** the following remarks are relevant:

A) It is submitted that the first of these grounds should be **extreme urgency**. If the acquisition of some defence equipment is so urgent that observance of the publicity requirement was potentially detrimental the security of a Member State, then it would seem appropriate for the contracting authority to be able to deviate from standard procedures.

This is more likely to occur in the case of **spare parts**, **subsystems** or other disposable supplies rather than in the case of large integrated systems. This is because in the case of the latter –even if we assume that there is a urgent need not previously foreseen in the formulation of the medium term procurement programme- it is almost impossible to satisfy the urgent need immediately.[1]

The question as to whether the unforeseeable events that caused the extreme urgency should not be attributable to the contracting authority is a difficult one. Once again it seems to be a matter of how much Member States are prepared to bind themselves. In any

[1] The delivery period of major defence equipment can stretch up to five or more years after the conclusion of the contract. This period could be reduced but it could hardly ever involve the immediate satisfaction of the need by the supplier. In the hypothetical case whrere there is an urgent need for the purchase of 40 fighting aircraft, even if there is an immediate order placed with a specific supplier, without any administrative delay –publication of the notice, screening of the suppliers, evaluation of the tenders etc.- it is highly unlikely that the supplier would be able to address this urgent need.

case **it seems unrealistic to suggest** that if the events which led to the extreme urgency are attributable to the contracting authority –bad planning, miscalculation of available spare parts- the latter should ignore the urgency and proceed by carrying out the acquisition on the basis of the open or restricted procedure. Defence procurement is already **a quite sensitive field** and probably such rules would make the regime look cumbersome, inflexible let alone unrealistic. It is suggested that it would be better to include a **reference in the explanatory memorandum of the directive that contracting authorities should try to ensure that the events leading to extreme urgency are not attributable to them.**

B) The second ground allowing for the use of the negotiated without publication of a notice is the case of **additional** defence supplies or services contracts. In particular additional supplies would be permitted under this procedure **if the acquisition of other equipment would involve disproportionate technical or financial difficulties** with regard to maintenance or operation.

For example a Member State wants to purchase 15 third generation fighting aircraft in order to replace some of its existing seventy strong fleet –losses because of accidents- or to increase the percentage of the operational ones –because a significant number of the existing ones are frequently grounded for maintenance. Assuming that the existing fleet comprises only one type of aircraft *it would be technically and financially disproportionate* to introduce a new type for the purposes mentioned above. New spare parts, the need for engineering personnel to specialise in the new aircraft, building new hangars, costs for training pilots, costs for new simulation equipment and most importantly the fact that pilots would not be able to immediately maximise benefits in operational terms from the acquisition of the new planes due to the transitional "acquaintance" period are some of the potential difficulties. **Thus it becomes clear that best solution from a technical, financial and operational point of view is to purchase the aircraft from the original supplier.**

Furthermore additional supplies could be justified under the negotiated procedure without prior publication of a notice **if they are the result of an option clause** stipulated in the original contract. Moreover it is suggested the use of this procedure on the ground of additional defence supplies or services contracts should be subject to the following **two conditions**. Firstly the additional contracts should take place within maximum **three years starting from date of the conclusion of the original contract**. Secondly the value of the additional contract **should not exceed 50 percent of the value of the original contract.**

C) The third ground for use of the negotiated procedure without publication is the so called sole-sourcing ground. This ground is used when the required supply or service can be only provided **by a specific economic operator**. The existence of a specific supplier or service provider **is to be judged at European level**.

7. Scope: what would be the most appropriate way of defining the field of application? A general definition? If so, what? A new list? If so, what? A combination of a definition and a list?

The directive should cover supplies and services contracts of conventional defence equipment. Thus contracts concerning cryptographic, nuclear, biological and chemical weapons should be excluded from the application of the regime.

In order to further clarify the field of application of the directive *ratione materiae* it is suggested that the latter should provide in an **annex an indicative list** with the equipment and services falling in its realm**. A second annex** should include the equipment and services that do not fall within the directive's sphere of application.

A) The first list is intended to have a similar function with the earlier list drawn by the Council with regard to defence equipment that fall under Article 296 (1b) EC. Furthermore it will clarify the indicative character of the list in order to accommodate future technological advances in defence equipment. Likewise it will update the content of the earlier list which was obviously unable to anticipate all technological developments that occurred in the field of defence the last fifty years. Finally as opposed to the **previous list will be formally published**. Publicity, apart from other positive effects, will also have a symbolic value since it will show that light is being shed to a heretofore –sometimes without intelligible reasons- secretive field.

b) The **second list** will provide for a **negative circumscription** of the directive's field of application thus enhancing legal certainty. Apart from stipulating that cryptographic, nuclear, biological and chemical weapons are not covered by this directive, it will also make explicit that dual use goods do not fall under the latter since they fall under the **regular public procurement regime**. This will formalise an existing reality in EC law deriving from the jurisprudence of ECJ.

In addition the Directive should stipulate that covered supplies and services contracts should exceed the threshold of **€ 10 million**. Contracts below this threshold would fall outside the field of application of the new regime.

The threshold of € 1 million currently stipulated in the Coherent Policy Document (CPD) of EDEM (in the framework of WEAG) is very low for defence procurement. In this respect it should be mentioned as an illustration that the prices of a third generation aircraft (let alone the latest fourth generation), an Early Warning Airborne System and a tank are approx. € 35 million, € 130 million and € 9 million respectively.

This effectively means that the framework directive even in the case of the € 10 million threshold will cover all major defence procurement projects. These are the projects, which attract the interest from suppliers established in other Member States. Therefore it is submitted that the opening of the European Defence market should focus on them rather than unduly burden the procurement of smaller projects.

8. Exemptions: do you think it would be useful/necessary to define a category of products that would be excluded categorically from the directive?

This is the purpose of the second list mentioned above (also this is the rationale of the € 10 million threshold.

9. Publication: do you think a centralised publication system would be appropriate, and, if so, how should it function?

A centralised publication system is essential for the success of the Directive. Such a system should employ all the latest technological developments to ensure security of information. End users namely defence companies, should have the first saying into the technical details of the latter.

10. Selection criteria: what criteria do you think should be taken into account in addition to those already laid down in existing directives to take account of the specific features of the defence sector? Confidentiality, security of supply, etc.? And how should they be defined?

The award criteria should reflect the principle objectives of the whole regime namely, **value for money** and the **furtherance of the European Defence Industrial Base (EDITB)**.

The most advantageous offer criterion should be analysed further to sub-criteria. The indicative list of sub-criteria should incorporate (in addition to the ones of the existing directives) additional such as the ***interoperability*** with existing equipment and ***security of supply.***

A) The criterion of interoperability is not difficult to determine since it is based on actual facts (i.e additional costs for altering existing infrastructure, training of personnel, technical interoperability with other systems of equipment etc.)

B) The criterion of security of supply is much more difficult to evaluate because as previously mentioned does not lie entirely within the sphere of influence of the company. Thus it should be limited into the investigation of the ability of the company to deliver the goods or services *assuming that external factors are in place* (the existence of an export licence).

If a company is able to provide hard evidence namely the export license and other guarantees from the home state, as part of the offer should be favourably evaluated. It seems that in this sense national companies would have always a natural advantage over foreign companies. Thus it should be made clear that the criterion of security of supply should not have a disproportionate weight of significance in comparison with other sub-criteria.

C) The question that arises is whether ***offsets*** can be included as a criterion for the evaluation of the most economically advantageous tender. (See also next question).

Prima facie the answer should be negative. It seems hardly compatible on the one hand to advocate the principle of non-discrimination as one of the Directive's main principles and on the other to use offsets as a factor for the award of defence procurement contracts.

Although prima facie offsets as sub-criterion seem incongruous with the directive, it is suggested that a closer observation may reveal a different image.

Offsets are a *lesser trade barrier* than for instance *direct allocation to national champions* through set aside mechanisms or preferential clauses for national industry when for example national suppliers are given a preferential margin over equivalent foreign offers. Likewise some forms of offsets *have less impact on trade than others*. By the same token the weighting of the offset proposal is important in this respect; the lower the weighting of a factor in the evaluation of a tender the less its importance.

Even considered in the light of Article 30 EC it seems that if assumed that the maintenance of a minimum defence industrial capability is a plausible public interest objective[2] [3] a mild form of offsets could qualify as the less detrimental measure for the pursuance of this objective. The position that state aids could provide a less detrimental measure to common market is not entirely accurate. Offsets have a quality that the typical state aids lack. This quality is the establishment of links between enterprises of different Member States, which could potentially result to more integration in the supply side.

Last but not least it should also be remembered that the success of the proposal for a Defence Procurement Directive depends on convincing Member States including the

[2] Along the lines of C 72/83 *Campus Oil v. Minister for Industry and Energy* [1984] ECR 2727.

[3] This seems to be acknowledged by the Green Paper as well p. 5.

smaller ones, which use more often offsets as a tool than the large country producers. It appears therefore appropriate, as a matter of **political realism**, not to exclude the possibility for a form of offsets (I suggest as an optional sub-criterion, See question 11 below for further analysis) under the new regime at least in the beginning and **for a specified period**.

11. How do you think offset practices should be handled?

(The recommendations for the treatment of offsets is analysed in detail in a forthcoming article of the author).

I believe that in the event of the adoption of a public Procurement Directive offsets practices should be treated as follows:

It should be clarified that the offset regime will apply only to **direct offsets**, namely offsets relating to defence production, and **not to indirect offsets** –namely the ones that refer to civil and dual use sectors.

As mentioned already under question 10, offsets could be included **in a mild form** as an award **sub-criterion** for a specified period of **maximum ten years** from the beginning of the implementation of the directive. This period seems appropriate because it coincides with the time needed for the implementation of two medium term defence procurement programmes (approximately five years each), which gives enough time to Member States to prioritise the defence industrial areas that they want to promote for the protection of their essential security interests.

It is suggested accordingly that offsets could be included as an ***optional*** award sub-criterion in the sense that foreign defence contractors **would not be obliged** to submit an offer for offsets.

In addition the offset sub-criterion will be taken into account in the evaluation phase **only if two or more bids are considered *comparable***. Likewise -two or more- bids will be deemed comparable if **their scores lie within a margin of ten percent between each other**. The point of reference for the calculation of this ten percent margin will be the bid with the highest score. In such a case the score of the offset offer will be added to the general score of the respective bid.

Furthermore it is submitted that the **relative value** attributed to the offset sub-criterion should be set at around **ten** to **fifteen percent** of the total value of the award criteria. The rationale behind this suggestion is to ensure that a balance is maintained between the inclusion of offsets in the procurement process and the observance of the value for money objective. It is believed that the aforementioned percentage achieves this balance by not unduly undermining the primary objective, which necessitates that the acquisition of equipment and services meets in the best way the needs of the contracting authority.

Moreover the contractor will have the obligation to fulfil his offset commitment –if he included an offer for offsets- even if the offset offer was not eventually used as an award criterion –because the bids were not comparable.

N.B. In addition the proposed offset regime foresees a **ceiling –**a maximum volume of offsets- and the requirement for Member States to draft an offset plan which will correspond to their national medium term procurement program. The plan would set the wider parameters in which offsets will be performed over the aforementioned period.

Ceilings are a method used in the state aid regime to control aids and balance the latter with the respect of the common market. It is suggested that in the case of the proposed regime the offset ceiling should be **equal to thirty percent** of the allocated budget of the medium-term defence procurement programme. For example if the allocated budget is € 12 billion then a volume of offset transactions of up to € 3.6 billion could be concluded over the same period –the period of the medium term defence procurement plan.

It should be pointed out that the thirty percent offset ceiling does not mean that this is the maximum offset volume for each individual defence contract. The aforementioned percentage rather focuses on the ***overall volume of offsets over a period of time***.

Thus if a Member State decides to concentrate its offset efforts on a particular segment of the defence market it may do so by negotiating offset transactions which represent more than thirty percent return of the value of the specific main defence contract as long as the overall return (namely the sum of all offset transactions over the specified period) does not exceed thirty percent of the allocated defence procurement budget.

For example if a government allocates € 12 billion to the defence procurement budget (for a period of five years), it can negotiate offset transactions of up to € 3.6 billion (thirty percent). Assuming that the government decides to focus the offset efforts on the area of aerospace, it may negotiate, in the framework of the acquisition of 100 new fighting aircraft (cost € 3 billion), offset transactions of € 1.5 billion (fifty percent). However the total volume of all concluded offset transactions during the aforementioned five-year period should not exceed € 3.6 billion (thirty percent of the overall defence procurement budget).

This necessarily means that in such a case Member **states should prioritise the industrial segments** that they want to promote.

It should be mentioned that the offset ceiling of thirty percent was thought appropriate because a lower ceiling would castrate any meaningful use of the mechanism for the rationalisation of domestic defence industries, while a higher one would overlook the fact that the ceiling would not cover offsets of collaborative projects –since they would fall outside the coverage of the proposed regime.

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	i	☑	European Defence Agency		15K	1.0	EN (English)	29/04/2005

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Paris, 15 February 2005

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~~Dear Mr. Bassi,~~ Cher ami,

Following the publication of the Green Paper on defence procurement, the European Union Institute for Security Studies has set up a Task Force of independent experts to explore possibilities to move towards the establishment of a European defence equipment market.

One of the tasks of the group has been to prepare answers and comments to the questions the Commission has put forward in its Green Paper. Attached you will find the results of this work. You are free to make this contribution publicly available.

The EUISS will soon publish the final report of its Task Force with a more detailed analysis of the current debate on defence market reforms.

Yours sincerely,

Nicole GNESOTTO

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EU INSTITUTE FOR SECURITY STUDIES

CONTRIBUTION TO THE CONSULTATION "GREEN PAPER ON DEFENCE PROCUREMENT"

ANSWERS AND COMMENTS
MADE BY THE EUISS TASK FORCE ON THE
ESTABLISHMENT OF A EUROPEAN DEFENCE EQUIPMENT MARKET

FEBRUARY 2005

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Question 1

Do you think it would be useful/necessary/sufficient to explain the existing legal framework in the way presented?

According to the Green Paper, an Interpretative Communication would give further clarification of the principles defined by the Court on the interpretation of Article 296 TEC. These principles are:

- Derogation from Internal Market rules is only justified if it is necessary for safeguarding the essential security interests invoked;
- Member states have to assess case-by-case whether each individual contract is covered by the exemption or not;
- The burden of proof that essential security interests necessitate derogation from the rules of the Internal Market lies with member states;
- Such proof is to be supplied, if necessary, to national courts or, where appropriate, the ECJ.

These principles are fairly simple, understandable and (hopefully) known to all relevant stakeholders. Further explanation seems therefore at first glance not to be necessary.

In practice, however, member states have often interpreted the possibility to derogate as an automatism. From that perspective, an explanation of the principles governing the use of Article 296 makes sense. Besides, the Communication would commit the Commission to ensuring that member states use Article 296 according to the interpretation given in that document. Provided the Commission sticks to this commitment, an Interpretative Communication could be useful for limiting misuse of Article 296.

At the same time, however, an Interpretative Communication would have a number of important shortcomings and weaknesses:

1. It would clarify *how* to use Article 296, but not for *which* contracts. It can neither render the list attached to Article 296 more precise nor clarify the concept of essential security interests (which justifies exemptions), because both are member states' prerogatives. It seems doubtful, therefore, that a Communication would actually facilitate the application of the existing Community legislation.
2. As a non-legislative measure, a Communication would, by definition, neither change the current Community law nor harmonise national defence procurement rules for contracts covered by Article 296. It would thus not contribute to rationalising Europe's fragmented regulatory framework.
3. A Communication would enhance transparency and competition mainly for non-warlike items (such as boots). Since this segment lies at the periphery of defence markets and clearly outside the scope of Article 296, a less lenient Commission could certainly ensure that the use of civil directives became the rule. This would result in better value for money, but it is unclear how great cost-savings would actually be.

4. For less sensitive warlike items which do not concern essential security interests (such as rifles), competition may increase as well, but only to a limited extent and with potentially problematic side effects. In this market segment, implementation of European law would probably be difficult, since the concept of essential security interests remains vague. Faced with a choice between the use of Article 296 or civil directives, which are generally considered ill-suited to defence contracts, member states may well try to interpret Article 296 as broadly as possible. In this case, a more proactive Commission policy would certainly increase the number of legal disputes.

5. The impact on high-value market segments (sensitive items and complex systems) would be close to zero. Member states may be more often obliged to justify the use of Article 296, but it is difficult to conceive many cases where the EC or the ECJ would not accept such justification.

6. Given its limitation to market segments at the lower end of the technological spectrum, an Interpretative Communication would contribute little to the competitiveness of European defence industries. Nor would it foster armaments cooperation (which normally takes place at the higher end of the spectrum).

For all these reasons, an Interpretative Communication seems insufficient.

Question 2

Are there other aspects of the Community system in question that should be clarified?

The opening up of national defence markets will only lead to fair competition if national and non-national suppliers operate under the same conditions. This necessitates not merely the coordination of procurement rules, but also the establishment common regimes for security of supply, transit, transfer, exports and state aid.

In this context, the clarification of the existing legal framework for state aid would be an important first step towards establishing the level playing field that is necessary for an effective marketplace. However, we recognise that this does not fall within the competences of DG Internal Market and cannot therefore be addressed in an Interpretative Communication on procurement law.

Question 3

Do you consider the rules of existing directives suited/unsuited to the specific characteristics of defence contracts? Please give your reasons.

The answer to this question depends on the definition of "defence contracts". Defence contract-awarding authorities can apply existing directives perfectly well for the procurement of civil goods and services, and probably also for the procurement of most equipment which is not exclusively military in nature (dual-use), provided the latter does not concern member states' essential security interests.

Existing directives, by contrast, seem ill-suited to the procurement of arms, munitions and war material. They have been developed for civil procurement and are therefore not adapted to the specificities of such equipment.

Many military systems, for example, are too complex to allow detailed technical specifications to be defined from the outset as the basis for open or selective tendering procedures. The necessary "translation" of a functional requirement into a system specification requires competitive dialogue and the negotiated procedure as standard award procedures. The civil directives, by contrast, allow these procedures to be followed only in exceptional cases. Another example is the long in-service life of many defence systems, which implies specific arrangements on modernisation and logistical support. Again, civil directives do not foresee appropriate rules for these cases. At the same time, they lack sufficient provisions for confidentiality and security of supply, which are crucial elements of defence procurement.

These examples are, of course, not exhaustive, but they illustrate that a directive for defence would probably differ considerably from the existing directives. The latter can serve as a useful basis for the former, but many provisions need to be adapted and complemented to become applicable to defence.

In general, a Defence directive should be inspired by a different philosophy than the civil directive and follow a sector-specific approach to achieve its objectives. The challenge would be to strike an appropriate balance between transparency and competition, on the one hand, and flexibility, on the other. Where this balance would lie is mainly a question of political goals. However, to be suitable for *all* warlike material outside the scope of Article 296, and to serve even as a "reference point should a Member State decide not to make use of Article 296 derogation even when it is entitled to" (as stated in the Green Paper), a defence directive would have to allow for a considerable degree of flexibility.

Question 4

Would a specific directive be a useful/necessary instrument for creating a European defence equipment market (EDEM) and strengthening the industrial and technological base of European defence (EDITB)?

An EDEM would consist of common sets of rules and regulations in areas such as competition, transfers, transits, exports and procurement. A directive would coordinate procedures for the award of contracts in certain segments of the defence market. In consequence, it would be a – albeit modest and limited – contribution to a more homogeneous regulatory framework in Europe and thus a useful and necessary step towards an EDEM.

It is generally recognised that the existing Community exemption system, based on Article 296, suffers from implementation problems and is frequently misused. It is also accepted that the current fragmentation of defence procurement law in Europe creates inefficiencies, lacks transparency and hinders intra-European competition. For industry, it is an obstacle to access to other European markets and leads to considerable overhead costs, which are particularly difficult to bear for SME. A defence directive has the potential to alleviate this situation at least partly.

However, its impact would differ greatly between the various market segments. Since it would neither replace Article 296 nor limit member states' right to invoke exemption for contracts which concern their essential security interests, most sensitive and complex systems would remain outside the scope of the directive. Although member states could make use of it on a voluntary basis, probably very little would change precisely in those market segments that represent the highest value.

Since the notion of "essential security interests" remains vague, it would still be difficult to draw the borderline between contracts covered by Article 296 and those which are not. A defence directive would not do away with this problem of definitions, but it could help to reduce its negative effects. Moreover, it has the potential to enhance competition for defence contracts which do not concern member states' essential security interests:

- In cases where the use of Article 296 is controversial, it would become easier for member states not to invoke the exemption (and thus avoid legal disputes) if a directive with rules adapted to the specificities of defence procurement were at their disposal.
- At the same time, the very existence of a "credible alternative" to national procedures could make it more difficult for member states to justify the use of Article 296. This effect would be helpful in opening up, at least partially, certain segments of the defence market.

The extent to which this would strengthen the EDITB is difficult to foresee. The directive might not concern the high technology end of the spectrum, but it could have a positive effect on market segments and industry sectors lower down the technology spectrum, where competition and consolidation are probably even more urgent.

However, how beneficial a directive would be in terms of competitiveness depends to a considerable degree on the extent to which member states use it for borderline Article 296 contracts. The more they accept a directive as an appropriate tool for fostering competition and cost-effectiveness, the greater its importance for the competitiveness of industry will be. In this respect, one should not forget that openness vis-à-vis a Community directive would probably increase once the latter has been established and "tested" in reality.

It is clear, however, that both fair competition and the strengthening of the EDITB necessitate more that just the coordination of defence procurement rules. The absence of common regimes for security of supply, transit, transfer and exports, for example, discriminates against non-national defence suppliers and thus represents an important obstacle to fair intra-European competition. The same is true of certain practices with regard to state aid. Moreover, Europe's regulatory framework lags behind new security and technology trends, which blur the dividing line between military and non-military security applications. Last but not least, the competitiveness of industry depends mainly on whether member states manage to coordinate their requirements more efficiently and cooperate better than in the past.

All this does not mean that a defence procurement directive would not help, but it should be regarded as one element of a comprehensive approach to establishing an EDEM and serve as a catalyst for reform in related areas.

Question 5

What is your opinion regarding the use of a possible directive for purchases by other bodies, such as the European Defence Agency (EDA)?

International procurement agencies, whether they are programme-specific (like NATO Agencies) or permanent structures (such as OCCAR), are international organisations or their subsidiary bodies. As such, they are exempt from existing Community directives.[1]

A directive could in theory specify that, for its purpose, organisations whose members are exclusively EU members (like OCCAR) are not considered to be *international* organisations (and would thus have to apply it). From a legal point of view, this would be consistent with the idea of the EU as a homogeneous juridical space.

However, international agencies are set up to manage complex systems which in any case would remain covered by Article 296. On this basis, they would still be able to use their own rules and regulations. At the same time, they should also be permitted to use the directive on an ad hoc basis. Participating member states would then decide for each programme (and each procurement phase) whether they want the agency concerned to apply the directive or not.

The situation is different in the case of the European Defence Agency (EDA), which is – in contrast to OCCAR – not established on the basis of an international treaty. However, whether a defence directive would be applicable to EDA is a theoretical question, since the latter is not conceived as a procurement agency. At least for the time being, EDA has only a small operational budget to fund feasibility studies, which are pre-competitive research activities and should not come under the directive in any case. This may change with the integration of other bodies (WEAO and OCCAR) into EDA, following which, member states participating in a project should again have the possibility to decide on an ad hoc basis whether they want to apply the directive.

[1] See Article 15 of the Directive 2004/18/EC.

Question 6

Procedures: do you believe the negotiated procedure with prior publication to be suitable for the specific needs of defence procurement? In what situations should use of the negotiated procedure without publication be allowed?

The negotiated procedure with publication offers a high degree of flexibility and therefore seems well suited to the specificities of the defence sector. At the same time, it guarantees a certain level of transparency and improves market access for non-national suppliers. This may be less relevant for complex systems where only a few companies in Europe have the necessary (system integration) capability, but it could foster competition in other areas further down the technology spectrum where even SME can act as contractors. Publication can also help SME – and even civil companies – to get in due time the necessary information to access defence-related service markets (repair, maintenance).

The negotiated procedure without publication is the procedure that entails the lowest level of competition and transparency. It should therefore only be allowed in certain well-defined cases where the nature of the contract de facto excludes competition.

Such cases could be:

- Pure research in support of the EDITB;
- Additional deliveries by the original supplier (without time limits);
- Only one possible provider (for technical, financial or IPR reasons, including, for example, follow-on contracts for production after the research phase of a project, upgrades, etc.);
- Emergency cases (extreme urgency in times of humanitarian, political or military crisis);
- ...
- ...

It should be noted that many of these circumstances only apply to sensitive contracts, which would remain covered by Article 296 and fall beyond the scope of the directive. However, in order to allow the voluntary use of the directive for these kinds of contracts, these provisions should be included.

Question 7

Scope: what would be the most appropriate way of defining the field of application? A general definition? If so, what? A new list? If so, what? A combination of a definition and a list?

The scope of the Directive would fall between the area covered by Article 296, on the one hand, and the area that comes under normal public procurement directives, on the other. It would thus cover warlike items (arms, munitions and war material) which do *not* concern member states' essential security interests.

In theory, a list would be the best instrument to define precisely which items come under the directive. However, covering warlike items, the scope of the directive would in any case have Article 296 as its reference point. Drawing up a list for the directive without revising the one annexed to Article 296 would thus mean having two lists, both covering arms, munitions and war material. The two may differ with regard to the level of detail, but they would inevitably overlap in many areas. This, in turn, could create even more problems of interpretation and implementation.

A revision of the 1958 list, however, is no solution either. First, it would involve politically difficult negotiations. In particular, an attempt to render the list more precise could provoke member states into including as many items as possible in order to maintain the possibility of invoking Article 296. The consequence would be an awkward and time-consuming exercise whose outcome would be doubtful.

Second, establishing precise lists means deciding beforehand for which items which procedures are to be used. This, in turn, would probably lead to a rigid implementation of procurement law. For at least two reasons, it seems more appropriate to give member states flexibility as to whether they prefer to invoke Article 296 or use the directive:

a) Whether a defence item is essential for a nation's security interests depends not only on its complexity and sensitivity, but also – and even mainly – on specific circumstances. Member states should be able to change their procurement practices according to these circumstances.
b) Member states should also be able to apply the directive on a voluntary basis to contracts for which they could theoretically invoke Article 296. This possibility, which is mentioned in the Green Paper, is more than a theoretical option. Depending on the way they tailor contracts to procurement projects, member states may, for example, choose Article 296 to develop and produce a complex system, but use the directive for follow-up contracts, such as those for supply of non-specific spare parts, repair and maintenance services, management of logistics systems, provision of training facilities and services, etc. With the appropriate research funding and IPR arrangements in place, they could even use Article 296 specifically for the development phase and the directive for the production phase.

For all these reasons, to define the directive's scope a general definition seems more appropriate than a list. Such a definition could simply state that:

This directive applies to arms, munitions and war material (plus the related services), for which member states do not invoke an exemption from Community rules according to Article 296 and the principles defined by the European Court of Justice.

Such a definition would draw a distinction vis-à-vis the field of application of civil directives (arms, munitions and war material), protect – and qualify – member states' ability to invoke Article 296, and allow voluntary application of the directive for contracts covered by the exemption.

However, if member states insist, for political reasons, on a list that defines the scope of the directive, they should at least avoid drawing up a new one – which would certainly be a complicated and time-consuming exercise – and use the existing list of the EU Code on Arms exports instead.

The challenge would be different if the directive were also to become applicable to the procurement of non-military security items. In principle, such an extension of the directive's scope would make sense:

- In today's threat environment, the dividing line between external and internal security is becoming blurred, and non-military security (e.g. protection against bio-terrorism) can be as sensitive as defence.
- Military and non-military security applications increasingly draw on the same technology base, and there is an intense technology transfer across the two sectors.
- Internal security represents a growing market, and many defence companies also have important activities in the field of non-military security.

Today, member states can use Article 296 (1a) to exempt non-military security items from the rules of the Internal Market if their essential security interests are concerned. Moreover, the civil directives contain escape clauses allowing the use of national procedures for this kind of procurement. However, not unlike defence, there is no community instrument adapted to the specificities of sensitive security items, which again hinders intra-European competition in an increasingly important market. The defence directive could fill this gap.

The challenge here would be to distinguish between security items for which the use of the defence directive is justified, and those which should still be subject to the civil directive. The crucial borderline for the directive's application to security items is thus (in contrast to defence) the one at the lower end of the scope. At the same time, the conceptual complexity of internal security, the strong dual-use character of these technologies and the great variety of awarding authorities make this borderline particularly difficult to draw.

To cope with these problems, the directive's field of application should be defined with a maximum of flexibility for defence, but with a maximum of precision for internal security (if the latter is to be included). Consequently, a specific list would be – at best – an option for defence items, but probably a "must" for security items. However, establishing such a list could again be a difficult task. The inclusion of security items into the directive's scope should therefore not be a prerequisite for its application to defence.

Question 8

Exemptions: do you think it would be useful/necessary to define a category of products that would be excluded categorically from the directive?

For reasons similar to those indicated above (Question 7), it seems politically wise not to exclude certain categories from the directive's field of application. The most obvious items to exclude would be highly sensitive ones (NBC, cryptology), but since Article 296 (plus the annexed list) remains in place, member states would in any case be able to use national procedures for this category. Exclusion of complex and sensitive systems is already more complicated, since it would raise problems of definition and limit member states' flexibility to choose between national and Community procurement procedures. For all other categories, automatic exemption should be out of the question, since it would completely deprive the directive of its sense.

Question 9

Publication: do you think a centralised publication system would be appropriate, and, if so, how should it function?

A centralised publication system would be crucial for the directive to achieve its objective of enhancing transparency and competition. It could be a specific defence publication system or a supplement of the Official Journal. In particular to satisfy the needs of SME, it must be easily accessible (electronically) and offer a solution to the EU's language diversity.

Question 10

Selection criteria: what criteria do you think should be taken into account in addition to those already laid down in existing directives to take account of the specific features of the defence sector? Confidentiality, security of supply, etc.? And how should they be defined?

Security of supply and confidentiality are the only selection criteria which should be added to those already mentioned in the civil Directives.

At the contract level, for the supplier security of supply mainly implies two commitments: (a) to give priority to the needs of the customer and/or to accelerate production in times of crisis; (b) to inform the customer in time if a change in its situation (ownership, restructuring, abandonment of production, etc.) could have an impact on supply. These commitments have then to be underpinned by an arrangement between the supplier and its national authorities. The security of supply criteria used for the directive should combine all these elements.

At the same time, the directive should be accompanied by an intergovernmental arrangement in which member states undertake not to hinder the supply of defence articles and services to other member states, whenever one of them requests it in order to meet the needs of its armed forces.

The second selection criteria, confidentiality, means the proven capacity of companies to handle classified information. To make it applicable for a defence directive implies that all member states mutually recognize security certifications issued by national authorities to defence companies established on their territory. This should be no problem for NATO countries, which have standardised procedures and criteria for these certifications. For non-NATO member states, ad hoc arrangements would be necessary (along the lines of the Swedish case in the LoI).

Question 11

How do you think offset practices should be handled?

The directive's provisions for offsets must aim at greater transparency and fair treatment of European suppliers, in particular vis-à-vis competitors from third countries.

In general, it should allow for direct offsets (activities related to the initial procurement contract, such as technology transfer and subcontracting), but prohibit indirect offsets, which often lack transparency and can even lead to distortion of civil markets.

At the same time, the defence directive should (like directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors) include a third country clause (for tenders comprising products originating in third countries). That Article would apply to tenders covering products originating in third countries with which the Community has not concluded an agreement ensuring comparable and effective access for Community undertakings to the markets of those third countries. Any tender submitted for the award of a contract may be rejected where the proportion of the products originating in third countries exceeds 50 % of the total value of the products constituting the tender.

DECISION No. 2005/02/EDA

OF 2 MARCH 2005

OF THE EDA STEERING BOARD IN NADS FORMATION ON

EDA INPUT TO THE COMMISSION'S CONSULTATION PROCESS ON THE GREEN PAPER

EDA welcomes the efforts of the Commission through their Green Paper on Defence Procurement. It identifies a number of important reasons for the creation of a European Defence Equipment Market (EDEM). In the more recent words of Commissioner Verheugen, "We must also accept that in the long run, competitiveness cannot be served by protectionism. What was true in so many other sectors of the economy, is also true of the European defence industry whose long-term survival will not be served by systematic recourse Article 296 of the EC Treaty: a consolidation and restructuring both on the supply and on the demand side are necessary in Europe".

The Green Paper also illustrates the limits of the existing legal framework. The Green Paper suggests two community instruments: an interpretative Communication and a Directive. They should not be considered mutually exclusive but rather deemed useful in a wider context of a sequence of workstrands towards a competitive EDEM.

- An interpretative Communication might help clarify in what circumstances the Commission would consider Article 296 to be legitimately invoked, and thereby assist MS in their judgements in this regard, without prejudice to their prerogatives under the Treaty, in particular in relation to the protection of the essential interests of their security. In the case that the Commission pursue such a Communication, the EDA would stand ready to offer its advice, working in partnership with the Commission as directed by the Steering Board in November 2004.

- A Directive would, as a binding Community instrument, ensure transparency, non-discrimination and equal treatment. The suggestion of such an instrument acknowledges in itself the specific elements of the defence market. A Directive, as a legal instrument, requires thorough knowledge about the nature of the market, including the segment where article 296 applies. According to EDA's judgement, this knowledge does currently not exist due to the lack of transparency in the practices of MS. A Directive should, therefore, be seen as a longer term solution to establish a level playing field for fair competition in areas where Article 296 does not apply. Nevertheless, this should not prevent work on a Directive being initiated shortly.

- Meanwhile, the EDA will explore the possibilities for a voluntary regime covering procurements where Article 296 applies. Along this way, practical and gradual progress towards a more competitive EDEM may already be made. This approach may also include steps towards strengthening the market position of SMEs as particularly innovative parts of defence industry. This intergovernmental work might well pave the way for the above-mentioned longer-term solution provided by a Directive.

EDA stands ready to continue working in partnership with the Commission on common efforts to support the creation of an internationally competitive EDEM, including the strengthening of a European DTIB.

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European Economic and Social Committee

INT/252
Procurement and Defence

Brussels, 9 February 2005

OPINION

of the

European Economic and Social Committee

on the

Green Paper – Defence procurement
COM(2004) 608 final

On 23 September 2004 the Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the

Green paper – Defence procurement
(COM(2004) 608 final).

The European Economic and Social Committee instructed its Section for the Single Market, Production and Consumption to prepare its work on this subject.

In view of the urgent nature of the work, the EESC appointed **Mr Wilkinson** as rapporteur-general at its 414th plenary session (meeting of 9 February 2005). At this same meeting the EESC adopted the following opinion, by 96 votes with 9 abstentions:

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1. Introduction

1.1 The Green Paper on Defence Procurement (COM(2004) 608 final) is one of the measures foreseen in the Communication "Towards a European Union defence equipment policy" which was adopted in March 2003, and on which the Committee commented in September 2003[1].

1.2 "European Defence Equipment Market (EDEM)", is in reality only a part of the internal market covering a specific sector. The Green Paper seeks to contribute towards the creation over time of an internal market for EU defence equipment that is more open and transparent, while respecting the specific nature of the sector. This should lead to a stronger and more competitive defence industry, increased cost effectiveness and support for the development of the military capabilities of the EU in the European Security and Defence Policy (ESDP) field, within the context of the Common Security and Foreign Policy (CSFP).

1.3 On 12 July 2004 the Council agreed the establishment of the European Defence Agency (EDA) which is designed "to support the Member States (MS) in their effort to improve European defence capabilities in the field of crisis management and to sustain ESDP as it stands now and develops in the future". This Agency has now started work. The EDA’s functions[2] all relate to improving Europe’s defence performance by promoting coherence in place of the current fragmentation.

1.4 "Defence performance" involves ensuring the availability of the capabilities needed to match the tasks envisaged, and the doctrine to undertake these tasks, in a cost effective way. This will include ensuring the maximum possible interoperability. At present the 25 MS together spend about €160 billion each year on defence, with about 20% of this used in the equipment procurement process (including research and development, acquisition and support)[3].

2. General comments

2.1 The matters covered in this Green Paper relate to the way in which improvements may be made to the system of defence equipment procurement in the 25 Member States (MS). Significant progress will only be possible when the other elements of "defence performance" (see paragraph 1.4 above) are clear[4]. Of particular concern to industry is the need for very clear guidance, harmonised requirements and continuity. Nonetheless the initiative is welcomed by the Committee as it can be treated as a discrete part of the process of starting to establish a more viable ESDP in a transparent and competitive market.

2.2 The leading role foreseen by the EDA is welcomed. There will be a need for clear agreement on the respective roles of EDA and others at present involved in the defence equipment field[5] and EESC would expect a reduction in their separate roles as progress allows. However, the lessons learnt from the experience of OCCAR[6] (which handles actual project management, including the key question of contract law) should be studied before changes are made.

2.3 We welcome the recognition that the starting points (and the procedures used) for each MS in the defence procurement process are very different and that changes are likely to be made at different speeds. We agree that it will be helpful to establish a more common basis for defence procurement and that this can be done relatively quickly given the agreement and the cooperation of all MS.

2.4 EESC agrees that there is a need to reduce fragmentation of the defence equipment market and to increase its competitiveness and transparency as prerequisites for maintaining and strengthening a viable EU defence industry and for contributing to more cost effectiveness in procuring and managing appropriate defence capabilities.

2.5 The analysis of the specific features of defence equipment markets given in paragraph 2 of the Green Paper is a good basis for consideration of the market and indicates some of the difficulties faced.

2.6 However, EESC would stress that any restructuring of defence industries must primarily be a matter for the industries concerned, taking account of market realities[7]. A good reason for this is that most significant companies are trans national, even though their customers are national. Moreover, MS have different industrial strategies, of which the defence industries are only a part.

2.7 Industry (in the defence sector as elsewhere) has to avoid too many regulatory procedures if it is to function efficiently and to provide cost effective and economical results.

3. Specific comments

3.1 It is necessary to clarify exactly what parts of the defence equipment procurement process are expected to be covered by the rules agreed. As well as the acquisition of such equipment there will be research and development, maintenance, repair, modification and training aspects, which are included in the cost of "ownership", to consider; these are normally far more costly over time than the acquisition.

3.2 *Article 296*

3.2.1 EESC agrees that exemptions to the EU rules on public procurement granted by virtue of Article 296 of the EU Treaty will continue to be needed to allow MS to derogate on the grounds of protecting their essential security interests.

3.2.2 The Commission should give an indication of the value of the equipments for which this derogation has been used over a period of, 5 years (and show it as a percentage of the total amount spent on defence equipment in the EU). They would then have a benchmark to help in measuring progress.

3.2.3 The problem is that the use of such derogation has, for some MS, become almost the rule rather than the exception and this is clearly not compatible with the single market. EESC supports the Commission's view that this should change. The challenge will be to use Article 296 in conformity with decisions in past cases[8] while retaining its possibility as a derogation from standard rules for public procurement. MS must be prepared to justify (legally if need be) derogations that they do make. The benefits of greater competition and greater transparency should be stressed in the discussion.

3.2.4 The list of products produced in 1958 under Article 296.2 which suggests the scope of Article 296.1 is not working and is likely to remain of no real value as a useful way of ensuring the proper use of the security derogation. Each case must continue to be treated on its merits since even basic equipment[9] will fall within the scope for derogations in some cases. Further, lists are not likely to keep pace with new developments.

3.2.5 There is thus no easy solution to defining which equipments and which services related to them could be covered under Article 296. As a first step there is a need to clarify the EU's existing legal framework through an "interpretative communication" to improve understanding and to facilitate better and more consistent application.

3.2.6 As well as procurement any such communication will have implications for several other aspects; State aid and (possibly) services of general interest are among these and need to be taken into consideration.

3.2.7 We believe that the "negociated procedure" with prior notification should be suitable for the specific needs of defence equipment where the "open" and the "restricted" methods are not suitable. However, this view may need to be reconsidered after experience has been gained of working with the "interpretative communication".

3.2.8 There is a view that a communication can only be an interim measure until a specific directive (or other specific legal instrument) has been drawn up. EESC's view is that after such an "interpretative communication" has been produced and agreed the need for a legislative instrument can be considered in the light of its effect. We would welcome early action to produce the communication.

3.2.9 There is a further possibility, not mentioned in the Green Paper, of establishing a "code of conduct" to be used by participating MS as another means of establishing an EDEM. Since the area is one within the responsibility of MS this could be considered, presumably using EDA as a facilitator. It might be difficult to monitor and enforce such a code and the Internal market aspects would still need to be included.

3.3 ***Publication of calls for tender***

3.3.1 The need to consider further the system and format for calls for tender is not convincing. If defence equipment is to be treated as just another part of the internal market in principle (although it has greater possibilities for derogations) it will presumably be dealt with in the same way as other tenders. This will entail different systems and problems, such as language, that are found elsewhere. The grounds for a centralised publication system are weak.

3.3.2 The potential problem areas are confidentiality and offset, which are more likely to arise for defence equipment than for other equipments and services, and security of supply, where it will be hard to change suppliers or contractors once a contract has been let. These are all areas where the MS concerned should be responsible, although some general guidance from the Commission may be helpful.

3.4 ***Dual use***

3.4.1 It is often difficult in today's industry to classify companies as being "defence equipment manufacturers". Much equipment is now "dual use" and the percentage is increasing. This is welcome from several points of view; for example, economies of scale can lead to more competitive pricing and security of supply can be easier to guarantee.

3.4.2 Also the efforts put into RTD for such equipment has a value to other (civil) purposes. It is therefore important that resources put into defence RTD is not subject to a regime that is too inflexible.

3.4.3 We remain concerned that there is much to be done to maximise the value of the coordination and focus that are needed in the defence equipment area, as we pointed out in our earlier paper on defence equipment[10].

3.5 ***European Defence Agency (EDA)***

3.5.1 We welcome the establishment of the EDA and recognise that it can play a leading role in the field of defence equipment. We note that it is still building up the resources required to fulfil its agreed roles.

3.5.2 It will be important for EDA to ensure that EU doctrine and capabilities take NATO's role, doctrine and capabilities fully into account by maximising interoperability and by minimising any differences. It is not yet clear how EDA could add value by becoming directly involved in procurement but its expertise in the field of defence equipment should leave it in a good position to suggest how national rules can be better harmonised.

3.5.3 It will also be valuable in getting agreement to the financial aspects of equipment cooperation where necessary. A significant area of potential difficulty is sharing the costs and benefits of RTD in defence related areas and in separating the defence and the general aspects in so doing.

3.5.4 EDA should also be helpful in moving towards the approximation of national licencing systems when defence equipments are transferred between Member States. At present the national procedures are both varied and burdensome. It could also help in getting agreement to the way in which offset arrangements are handled since these will remain a feature of procurement in the future.

3.5.5 EDA may find it possible to get some agreement on national industrial policies as far as defence equipment is concerned and to define the elements that constitute "strategic equipment" whose provision the EU would wish to be capable of providing to reduce dependence on third countries; this would be most valuable.

3.5.6 EDA may also be able to encourage MS to consider such innovative methods of acquisition as pooling, leasing and specialisation to meet capability needs.

3.5.7 Since ESDP will only become effective if the MS show the necessary strong political will to provide and to maintain the necessary capabilities to meet agreed EU tasks, EDA should also play a role in encouraging MS to do this.

4. **Conclusions**

4.1 Defence equipment is only one requirement for a viable "defence performance". For industry to play its part fully it will need clear guidance, harmonised requirements and continuity. It must also have primary responsibility for necessary restructuring. Industry also needs to avoid over burdensome regulatory procedures.

4.2 It must be made very clear what parts of the defence equipment procurement process will be covered by the rules agreed.

4.3 Article 296 of the Treaty will continue to be required. To ensure that progress in avoiding its too frequent use the Commission needs to establish a benchmark though examining current performance. It is not practicable to maintain any list of equipments and procedures to which Article 296 can be applied.

4.4 As a first step the Commission should produce as soon as possible an "interpretative communication" on Article 296. Only after experience has been gained with this communication will it be possible to decide whether a legal instrument is also required.

4.5 "Dual use" equipment is increasingly common and this trend is welcome, not least because of the potential for civil use of RTD which applies to military equipment.

4.6 The important role foreseen for the European Defence Agency (EDA) is welcome; it will need to be clear what part all the agencies now involved are to play.

4.7 Among the important roles for EDA in this area are:

- Ensuring coordination with NATO requirements
- Helping to negotiate all the necessary financial aspects
- Helping to harmonise existing national procedures
- Suggesting innovative ways of providing necessary capabilities
- Encouraging the maintenance of the necessary political will.

Brussels, 9 February 2005.

The President of the European Economic and Social Committee	The Secretary-General of the European Economic and Social Committee
Anne-Marie Sigmund	**Patrick Venturini**

[1] OJEC C10/1 of 14.1.2004

[2] EDA has four agreed functions; defence capabilities development, armaments cooperation, the European defence technological and industrial base and defence equipment market and research and technology.

[3] As we commented in our opinion on COM(2003) 113 final, this combined EU spending is about 40% that of the US, yet only produces about 10% of the operational capabilities.

[4] For example, the Committee notes the recent (September 2004) statement by the head of the EDA that EU forces are not well adapted to the modern world and its conflicts and threats; he spoke of the need to acquire more high technology equipment.

[5] Such as OCCAR, Western European Armemnets group (WEAG) and Letter of Intent (LoI) countries.

[6] OCCAR is a joint organisation for armaments cooperation to which 5 MS currently belong.

[7] However, because of the specific nature of defence markets and because of the need to manage payments as part of national financial arrangements, MS will inevitably play a role in facilitating the development of defence equipment.

[8] The decisions in the ‘Bremen case’ (1999/763/63(OJ L 301/8 of 24 November 1999) and the "Koninklijke Schelde Groep" (OJ L14/56 of 21 January 2003) are examples of the current lack of clarity.

[9] We should note that even apparently simple equipment such as clothing can involve advanced technology.

[10] See paragraph 5 of the opinion refered to at footnote 1.

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COMMUNICATION FROM THE COMMISSION

THE CHALLENGES FACING THE EUROPEAN DEFENCE-RELATED INDUSTRY, A CONTRIBUTION FOR ACTION AT EUROPEAN LEVEL

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1. Introduction

The defence-related industries are facing an economic and political context which is changing completely and calls for responses going beyond the national level.

The end of the cold war, considerably reducing the security risk to Europe, has made it possible to cut military budgets and step up the moves to convert the industries concerned. The need for the defence-related industries to scale down their activities substantially has had a significant direct impact, both on employment in this sector which has fallen by 37% from 1.6 million to 1 million since 1984, particularly hitting certain regions, and also on the manufacturing base and innovation capacity of European industry as a whole. Over this period the economic problems have persisted, if not worsened; they stem not only from the cuts in military expenditure but also from the fiercer international competition and, above all, from the anachronic fragmentation of the defence markets in Europe.

A change of attitude in favour of action by the Union is therefore emerging. On the one hand, the crisis in the industry has prompted industrialists and industrial policymakers in the Member States to encourage the Union, particularly the Commission, to assume its responsibilities. On the other, the measures taken on the Western European Union (WEU) and on the second pillar of the Maastricht Treaty have opened up paths for establishing a European armaments policy. In particular, on 30 June 1995 an informal group of EU/WEU experts produced a report setting out options, suggestions and recommendations for such a European armaments policy. In July 1995, Coreper set up an ad hoc interdisciplinary working party to identify areas for action by the Union. To this end, it will have to make recommendations on the follow-up within the Community framework or under the common foreign and security policy (CFSP) and, should the need arise, suggest specific measures without prejudice to the Commission's powers under the Treaty establishing the European Community. This communication is a contribution to this work.

The causes of the difficulties facing the defence-related industries are partly economic and partly political. Consequently, both these aspects must be taken into account when analysing the problems specific to these industries and when formulating possible European action.

However, although a global approach to this subject is clearly important, the establishment of a European security and defence identity is nevertheless a long-term process. On the other hand, the state of health of the defence-related industries is such that unless action is taken in time, there is a danger that whole sectors of the economy involved in defence-related activities could disappear, with further massive job losses, particularly considering the fiercer international competition.
This urgently calls for an appropriate European response.
Moreover, the introduction of mechanisms based on economic efficiency, particularly in procurement policies, will allow more rational use of budgetary resources, yielding very substantial savings.This will entail significant savings for the tax payer.According to a study these savings could vary between 5 to 11 billion ECUS a year.

Setting out from this need for action, this communication places the emphasis on action based on the existing Community instruments and, hence, concerning fields in which the European Community has powers and experience of its own. These means of action could possibly be used in combination with the CFSP. Consequently, they could be implemented in the short term as an initial response to the problems facing the defence-related industries and as a first contribution towards the process of building a European security and defence identity.

The approach followed by the Commission is based on the principles set out in its communication on "An industrial competitiveness policy for the European Union" (COM (94) 319, 14 September 1994).

2. The challenges

In the years ahead the European Union must meet a series of challenges with a view to establishing a European security and defence identity and maintaining a competitive technology and industrial base. The survival of these industries depends on this capacity to put in place a consistent strategy to respond to these challenges.

2.1. Economic and industrial challenges

2.1.1. Industrial structure and trends

The annual output of defence equipment in the European Union is currently worth an estimated ECU 50 billion which is about 3 percent of total industrial output. It is somewhat less than half the US defence industrial output. A growing number of defence-related technologies, components and services have both civilian and military applications. This development has made it increasingly difficult to define the boundaries of "defence-related industry" and has made the isolation of defence from civil industry increasingly untenable. The mix between civilian and defence-oriented activities varies from company to company and from industry to industry. In the European aerospace industry, for instance, defence activities account for about 40 percent of turnover.

The development and production of defence equipment currently directly occupy about 600 000 people in the EU. Another 400 000 jobs are generated indirectly in supplier and service industries.

About 70 percent of defence sales come from the aerospace and electronics industries. However, much of the value-added behind the weapon systems and other defence equipment originates in companies which supply components and subsystems and which are in many cases SMEs.

About 90% of the EU total production of defence equipment is concentrated in some Member States: France, the United Kingdom, Germany, Italy and Sweden.

A substantial part of the European defence industry is public or quasi-public, most notably in France, Italy and Spain (although the degree of state control varies).

The domestic demand for European defence equipment has been falling since 1987 when most EU Member States started to reduce their defence budgets. Total military expenditure fell by 5.3 percent in real terms between 1985 and 1994 as indicated in Table 1 in the annex, whereas the procurement of major weapons fell by 28.5 percent in real terms in the same period as indicated by Chart 1 in the annex. However, EU imports of major conventional weapons from third countries have not declined correspondingly.

The declining demand, particularly from developing countries, has practically halved the global arms market over the last decade according to SIPRI statistics.[1] European industry has maintained a share of one fifth of the world export market of major conventional weapons between the 1984-1988 period and 1993, but the absolute amount has been halved in real terms as indicated by Chart 2 in the annex. Compared to the United States, however, the European Union has been losing ground.

2.1.2. Restructuring and competitiveness

Industrial restructuring is expected to continue with significant capacity reductions though many companies have already taken far-reaching steps.

Restructuring

Conversion of military into civilian-oriented production "at factory level" is not considered a feasible strategy by most companies. Apart from the huge investment costs and difficulties of access for newcomers to established civilian markets, conversion is hindered by the difference between, on the one side, production of defence goods which is driven by technology and government specifications and, on the other side, civilian markets which are mainly driven by price with marketing playing a major role. However, conversion in the sense of redeploying a company's R&D base from defence-oriented work to a technically related field has proved practicable for a number of companies with established non-defence activities.

Some of the overall capacity reduction has occurred through outright liquidation of defence-oriented activities in companies which have chosen either to concentrate on what they define as their core activities or to expand the civilian sides of their businesses.

More often, however, the rationalization of the European defence industrial base has involved some form of inter-company arrangement. Mergers and take-overs have so far mainly taken place within national borders since the obstacles to cross-border acquisitions in the field of defence are still considerable. In the EU examples of national

[1] The arms trade statistics compiled and published by SIPRI (Stockholm International Peace Research Institute) are partly estimated since the official data do not provide a comprehensive picture.

consolidation of defence-related industries through mergers are numerous.[2] Cross-border acquisitions, like GIAT Industrie's take-over of the Belgian small-arms producer FN Herstal in 1991, remain exceptional.

In recent years the consolidation of the defence-related industry has advanced much faster in the United States than in Europe. Following some "mega mergers" and take-overs, the average size, as measured by arms sales, of the ten largest US defence-related companies is now twice that of the ten largest EU defence-related companies.[3]

Most of the consolidation which has reduced overheads costs, excess manufacturing and engineering capacity has taken place within national borders. The economic gains from further national consolidation are diminishing and appear now to be much smaller than the potential gains from cross-border industrial integration.

Competitiveness

In assessing the overall international competitiveness of the European defence-related industry, export performance, company profitability and technological capabilities might provide some indications about the competitive position of the industry and its constituent parts, but it only makes sense to speak about competitiveness for those companies and products which are actually exposed to international competition.

Compared to the US industry, the EU industry has lost ground and is now exporting less than half as much as the US industry. Many of the shifts in relative export performances are linked to international political events, like the end of East-West confrontation, the Gulf War of 1990/91 and the break-up of the Soviet Union. Changes in national arms export policies, including export subsidies, have undoubtedly also played a role. In this context, the US industry had, thanks also to the political influence exercised to benefit it, started to improve its export performance vis-à-vis the EU industry under the relatively stable international political conditions of the 1980s.

The abovementioned factors also suggest that part of the shift is due to changes in the underlying competitive positions, including the significant depreciation of the US dollar against European currencies since 1985, that put a heavy burden on the competitiveness

[2] - In the UK, a large part of the industry is now grouped around British Aerospace and GEC and further concentration has taken place (the take-over of VSEL - a Barrow-based submarine maker/shipbuilding company - by GEC).

- In Germany Daimler Benz Aerospace plays a key role.
- In Italy the scene is dominated by Finmeccanica.
- In France the national consolidation is more evenly spread between the companies

[3] Illustrative examples of the US restructuring and consolidation process are :

- Lockheed's acquisition of General Dynamics' fighter aircraft division in 1993
- Northrop's takeover of Grumman in 1994
- the agreed merger between Lockheed and Martin Marietta in 1994, followed by the acquisition of Loral in 1996
- the recent talks between Boeing and McDonnel Douglas on a possible merger of their civil and defence activities (1995).

of European defence-related companies. The G7 summit in Halifax pointed out the risks that such fluctuations pose to sustainable, non-inflationary growth and the continued expansion of international trade. The EU and US are therefore encouraged to work more actively and address the imbalance of the US dollar versus EU currencies. The conclusions of the recent transatlantic business dialogue held in Seville stressed the importance of fostering better monetary stability.

The strong competitive position of US industry vis-à-vis European industry is best illustrated with figures on defence equipment imports by individual EU Member States, i.e. inclusive of intra-EU trade: 75% of imported major conventional weapons came from the United States in the 1988-92 period. The worsening in the competitive position of the European defence-related industry results also from the bilateral EU-US trade balance for major conventional weapons that was 10/1 in favour of the United States in the 1988-92 period (see Table 4 in the annex).

But export performance cannot provide a complete picture of international competitiveness, particularly in a field where trade and procurement decisions are rarely taken on commercial and economic grounds alone. From a company perspective the important test of competitiveness is profitability.

For the European defence-related companies the picture is mixed in this respect. Quite a few of the large arms-producing companies have lost money in recent years on their defence-oriented activities, some of them over a considerable number of years. Other companies have continued to operate profitably in the defence field and have been rather successful on export markets.

Assessing European industry's technological strengths and weaknesses in the field of defence is also difficult and somewhat subjective. The US Department of Defence has tried to compare US and European capabilities regarding 20 so-called critical technologies. The DoD believes that European industry does not "significantly lead" the United States in any of the sectors but is "capable of making major contributions" in seven sectors.[4]

On an overall industry level the aforementioned trade figures give a strong indication that the European defence-related industry has experienced a worsening of its competitive position vis-à-vis the US industry since the 1980s. For comparable equipment, produced with economies of scale, the US industry tends to have better price competitiveness than the European industry due to a domestic market more than twice the combined size of the markets in the EU Member States and about seven times the largest national European market. This structural advantage of the US industry increases with reductions in overall demand and with technological advances and also with the persistence in the fragmentation of the EU market.

[4] Machine intelligence and robotics, simulation and modelling, weapon system environment, air-breathing propulsion, high-energy density materials, composite materials, and biotechnology. The 20 critical technologies are listed in Table 5 in the Annex.

2.1.3. Market fragmentation and barriers to cross-border integration

Market fragmentation

Since competitive strength is related to the ability to exploit economies of scale, the competitive position of the European defence-related industry, as described above, can partly be explained by the fragmented state of the European market for defence equipment. This fragmentation reflects the widespread and long-standing practice of Member States to favour national suppliers or, should these be lacking, suppliers from NATO countries, in their procurement of defence equipment.

A real European market for defence equipment hardly exists as intra-European trade amounted only to 3-4% of total procurement of major conventional weapons by EU Member States in the 1988-92 period. However, for components and sub-systems the market is more international.

Market fragmentation has generated a number of competitive disadvantages for the defence-related industry in the European Union:

- It has prevented the full exploitation of economies of scale in the production of armaments. The limited size of national orders has made the economic viability of many projects dependent on uncertain export contracts.
- The lack of serious competition for many domestic defence contracts has given rise to inefficiencies in the development and production of weapon systems. This is particularly the case when contracts are awarded on a cost-plus basis - a contract form which, however, is increasingly being phased out.
- In international cooperative programmes, which are more and more necessary for technological and economic reasons, inefficient work-sharing and "juste retour" between countries and their respective "domestic suppliers" have contributed to overcapacities and caused additional costs and have not allowed the integration of national industries on the basis of comparative advantage.

Cross-border industrial integration

Various forms of cross-border industrial cooperation have existed for decades in the defence field: companies from different countries engage in project-specific collaboration and cooperative joint-ventures and, to a lesser extent, strategic alliances (including full-function joint subsidiaries). Collaborative armaments programmes are now the most common way of addressing the prohibitive costs of purely national approaches to the development and production of large complex weapon systems in Europe. The largest European collaborative armaments project is the Eurofighter 2000 in which the major aerospace companies from the UK, Germany, Italy and Spain participate. Another key cooperative venture is developing a new-technology European military transport aircraft for the 21st century within the EUROFLAG consortium. Five countries are currently participating in the Future Large Aircraft programme.

Cross-border joint ventures are another form of industrial cooperation which has become more common in the European defence-related industry since the 1980s. Notable examples of strategic alliances are the relationship between Aérospatiale and Daimler-Benz Aerospace for the development, production and marketing of helicopters (Eurocopter)[5] and the planned establishment of ESI (European Satellites Industry) and EMI (European Missiles Industry) in the field of missiles and satellites or the recent acquisition by Thomson of a 25% stake in the Spanish manufacturer of defence-related electronics Indra.

Joint ventures are typically industry-led, but established with the consent of the governments of the home countries of the companies involved. They may be an effective mechanism for combining the diverse technological capabilities of different companies, but they are less efficient in bringing down development and production costs and in enhancing the overall operational performance of the products. International collaboration with the United States or other third countries is usually a consequence of "off-set" agreements in purchasing contracts with non-producer countries.

The ability of defence-related companies in the EU to rationalize and consolidate their businesses through mergers or sales across borders is restricted by at least five factors:

- Cross-border restructuring of the defence-related industry requires, in most cases, the consent of governments. This is unlikely to be obtained when it is perceived that the national security of supply for crucial defence equipment would be compromised by cross-border rationalization which would reduce the national defence industrial base significantly or make it very specialized.

- The relations between the government and defence-related companies differ considerably between Member States. In some countries a significant part of the industry is owned or controlled by the state, in others there is more distance between them. This disparity is a barrier to cross-border industrial integration which goes further than joint ventures. This situation not only creates distortions at the export level but also affects the development of intra-European policies, particularly industrial cooperation.

- The arms export policies, including arms export control policies, of Member States differ considerably. The attractiveness of a company as cooperation partner depends, among other things, on its ability to gain export licences from its home government.

- Another obstacle is the difference in national requirements regarding defence equipment, including the timing of orders and the strategic concepts for which the equipment is required. Only a joint definition of operational requirements would completely abolish this hindrance to defence industrial integration.

[5] Euromissile was the first significant joint-venture-like cooperative arrangement in this field. It was set up in 1972 by Aérospatiale and MBB (now part of Deutsche Aerospace).

- Finally, there is a lack of transnational legal structures (such as the European Company Statute) and of recognition of transnational partnerships as eligible for funding under national research budgets.

2.1.4. Technological synergies between civil and defence activities

The action by the European Union to facilitate integration of defence-related industrial activities will have to take account not only of the specific nature of the armaments sector but also of its essential and ever closer links with the civil sector (dual-use technologies, components, products and production installations) in order to encourage the development of technological and industrial synergies between these two sectors at European level.

Traditionally it has been argued that defence R&D generates externalities in the form of innovations for the benefit of the civilian side of the economy (the "spin-off" effect). Since the 1960s, however, the relationship between defence and civil activities has changed: the defence-related industry is increasingly relying on the technological dynamism of the civil sector by making more use of the technologies, components and products of civil origin (the "spin-in" effect). With defence R&D and production making up a smaller and smaller part of high technology activity, technological performance is coming to depend increasingly on firms' success in managing the interface between civil and defence technology. They have to become more adept at assimilating civil hardware and software into defence equipment, at organizing R&D programmes around dual-use technologies and at transmitting knowledge and expertise across the civil-defence divide.

Defence-related companies which operate in both civil and defence markets have an interest and important role to play in exploiting civil-defence synergies. A growing number of them are doing so, overcoming the separation between their civil and defence activities; but still too often, such separation remains an impediment to synergies in companies which have entered into European strategic alliances for their civilian activities but not yet for their defence-related activities. Furthermore, inter-firm synergies need also to be encouraged within and across borders.

The promotion of a dual-use approach has been, for several years, a major objective of US research and defence procurement policies, and is leading to a more integrated defence-civil technology and industrial base. The overall European defence R&D effort, which accounts for only one third of that in the US, is decreasing and comparatively more fragmented. It is therefore essential, if Europe is to preserve a technology base and a research capability (particularly its teams of researchers) which are competitive and sufficiently autonomous, that not only the efficiency of its defence R&D efforts is improved through more systematic cooperation and greater interdependency, but also that it derives maximum benefits from its civil R&D efforts through increased civil-defence synergies.

Action is being taken, to different extents in different Member States, to promote technological synergies between civil and defence activities. This needs to be pursued and strengthened, including at the European level, to optimize the overall use of R&D

resources and to facilitate the restructuring or diversification of defence-related industries. One good example of such convergence is space-related activities. One good example of such convergence are space-related activities. The space industry displays a great degree of common ground between military and civil applications. In that respect, the US industry has long benefited from defence programmes as a springboard into commercial applications in space. The desirable synergies, which are of great importance to Europe, will be identified in a forthcoming communication on space.

2. 2. Political and security challenges

2.2.1. The European security and defence identity

The changes in the international context and the strategic prospects opened up by the end of the cold war call for a review of all the leading players' security policies. A process of restructuring defence has started at both national and multilateral levels. In the long term, this process should ensure better use of security resources and a parallel massive reduction in defence budgets.

Europe's security depends on western European countries' capacity to form a centre of stability and integration. On the one hand, the spread of economic well-being and the gradual admission into the European Union of all European countries which wish to join are key ingredients of stability through integration. On the other, the progress made by the Union towards establishing a fully fledged common foreign and security policy is the second keystone for such a centre of stability. Deepening of the European Union, to include a defence policy in the long term, is therefore a priority. Close cooperation on armaments is a key factor in defence policy. The Union must not only implement a common foreign and security policy but also develop an armaments policy, all the more so since some of the Member States are amongst the largest producers, exporters and buyers of defence-related products.

In this context, Community instruments, adjusted if need be, could be used in respect of the defence-related industries. These instruments could, in particular, be adapted in the light of the security needs and of the political guidelines to be defined within the framework of the CFSP.
One positive development is that the end of the cold war has made it possible to cut defence budgets. However, in the long run the need for the defence-related industries substantially to scale down their activities, though the efforts for reconversion toward civil activities, had directs effects on unemployment losses especially in some regions.And if the required adjustments for the restructuring are not put in place, other consequences could manifest themselves in the long run in the form of impowerishment of the production base and the innovation capability of the european industry.

Maintenance and reinforcement of the sufficiently autonomous, competitive industrial and technology base which Europe needs in order to implement its common defence policy inevitably entails integration of the defence-related industries. This rationalization will allow more efficient cooperation for both the development and the production of military hardware. European undertakings will become all the more efficient and competitive if they develop synergies, cooperation and even restructuring on the single market.

The EU must foster the development of its own base for the technologies and products essential for defence in Europe. Consequently, it must endeavour to secure comparable, effective access to markets in third countries, which would reduce the one-way dependence on the third countries.

Completion of a European market in defence-related products should improve the efficiency of this sector and, consequently, cut costs for purchasers. Defence authorities' budgets will therefore benefit. However, they must ensure that the market offers them products in line with the duties assigned to their armed forces.

Increasingly, Europe will have to develop its operational capacity to prevent and manage conflicts. As provided for in the WEU's June 1992 Petersberg Declaration, in addition to its contribution to common defence in accordance with the NATO and WEU Treaties the WEU's tasks consist of keeping and restoring the peace, evacuations and humanitarian aid operations. These call on the European and national organizations concerned to plan and develop the appropriate equipment.

The long process of building a European security and defence identity has already begun. The Treaty on European Union and its annexed Declaration on Western European Union provide a means of taking account, at European level, of the political and security constraints which must shape all action on the defence-related industries. To this end, one important point to note is that the CFSP already provides a framework and instruments which could contribute to defining the context and priorities for such action. The WEU is developing its own resources with the objective of giving Europe's defence effective operational capacity. It is therefore essential to ensure a degree of parallelism between the EU's and the WEU's work.

2.2.2 The Intergovernmental Conference

The Intergovernmental Conference starting at the end of March 1996 will discuss, *inter alia,* developments concerning common security and defence policies, including the armaments aspects. Certainly, this does not necessarily mean waiting to implement the conclusions of the IGC before taking European action on the defence industry. On the contrary, it will be easier for the IGC to take decisions if the parties involved in the industry are cooperating already and the public authorities have already taken specific action for this sector at European level. In particular, it will be easier for the IGC to provide the means for a European armaments policy if an efficient industry meeting Europe's security needs has been maintained in the meantime. The Westendorp report which has received strong support among Member States, asserts that the Conference should consider how to encourage the development of European operational capabilities, how to promote closer European cooperation in the field of armaments and how to ensure greater coherence of action in the military field with the political, economic or humanitarian aspects of European crisis management.

3. The players and means of action

3.1 The European Union: promotion of the synergies between its various means of action

On the armaments market, supply and demand follow special rules dictated by the exclusive role of the public authorities, which are guided largely by security and foreign policy imperatives. This implies that armament issues could be discussed within the EU's CFSP bodies. However, the economic dimension of armament issues inevitably entails interaction with the EC Treaty. In this context, either the rules already in force, particularly on the single European market, must be taken as the basis for drafting rules specifically for the armaments sector or the existing rules must be applied, taking full account, however, of the specific nature of the sector. Completion of such a single market for armaments will create, in the perspective of the eventual framing of a common defence policy, interdependence between Member States for supplies of defence equipment. This will facilitate security of supply of such equipment between Member States under market conditions.

Although a European market in defence-related products could be established by applying the relevant rules of the EC Treaty and of Title V of the Treaty on European Union, it must also be acknowledged that a single European market implies that it must have its own identity vis-à-vis third countries. This would be created by establishing specific rules concerning the customs union, commercial policy and access to public contracts. In particular, it must be stressed that with this defence-products market with its own identity the European Union would be in a better position to secure comparable, effective access for its products to markets in third countries under mutually advantage conditions. In this connection, once normal conditions have been restored within the Customs Union, transatlantic trade must be developed on the basis of reciprocal liberalization with the objective of strengthening transatlantic cooperation on armaments, including on export limits on "inhuman" weapons (antipersonnel mines). Establishment of such a balanced relationship also implies establishing mechanisms for evaluating the volume of trade and enforcing effective and comparable access to markets in practice, where necessary.

3.1.1 Instruments available within the EC framework

First, the Community authorities have a range of instruments concerning the industrial aspects of armaments. Second and above all, the Community framework offers the possibility of applying binding rules taking account of the specific nature of the sector and guaranteeing legal certainty for all involved and fair conditions throughout the Community market.

In view of the importance of these instruments, this communication places the accent on the means of action available to the European Community which can be implemented in the short term. For this reason, a more detailed analysis of this potential is set out in Chapter 4, taking account of the specific nature of the sector.

These considerations will undoubtedly be an extremely important factor in ensuring that, in contrast to past practice, the Member States no longer interpret the exemptions authorized by Article 223 of the EC Treaty so broadly. In particular, hitherto Article 223 of the EC Treaty has placed limits on the Community framework by allowing exemptions from the provisions of the Treaty for "the production of or trade in arms, munitions and war material". This exemption applies only under particular circumstances and conditions since the same article adds that the national measures on the subject must be "necessary for the protection of the essential interests of the security" of the Member State and must "not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes." Article 225 lays down, in particular, procedures for the Court of Justice to monitor the national measures taken under Article 223. Moreover, Article 223 states that the national exemptions may apply solely to the products on the list to be established by the Council in 1958. This list was adopted by the Council on 15 April 1958 and has never been changed since. Consequently, Article 223 gives the Member States no exclusive general powers. Instead, it gives them the possibility of invoking an exemption to the discipline imposed by the Treaty under the conditions described above and under the supervision of the Courts.

Hitherto, however, some Member States have interpreted this Article broadly and divergently, accentuating the fragmentation of the European defence market. Exemptions have been applied to a wider range of products without reference to the 1958 list. The Commission has never exercised its powers to take the initiative to amend the list of products. Moreover, many Member States have seen Article 223 as embodying a general principle that all areas concerning national security are not covered by the Treaties. The Commission has always contested this approach, an attitude confirmed by two recent Court of Justice judgments. In cases C-70/94 and C-83/94 the Court gave its ruling on the Community's exclusive powers under Article 113 of the Treaty and dual-use goods. In particular, it found that since full responsibility for commercial policy was transferred to the Community, national commercial policy measures are therefore permissible only if they are specifically authorized by the Community and that a product cannot fall outside the scope of the common commercial policy on the grounds that it is of a strategic nature. On this basis, Article 11 of Regulation (EEC) No 2603/69 establishing common rules for exports allows Member States to adopt national restrictive measures to avoid the "risk of a serious disturbance to foreign relations or to peaceful coexistence of nations which may affect the security of a Member State". Moreover "a measure ... whose effect is to prevent or restrict the export of certain products cannot be treated as falling outside the scope of the common commercial policy on the grounds that it has foreign policy and security objectives."

3.1.2 Instruments available under the common foreign and security policy

The Treaty on European Union created a new situation by introducing a common foreign and security policy (CFSP) which "shall include all questions related to the security of the Union, including the eventual drafting of a common defence policy, which might in time lead to a common defence".

Security is a general concept. It therefore also includes issues relating to armaments. At the same time the Maastricht Treaty introduced the concept of important interests which the Member States have in common. In particular, the Union is gradually implementing joint action in areas where the Member States have important interests in common. In the case of security, these important common interests were identified in preparation for the entry into force of the Treaty on European Union (see the conclusions adopted by the European Council in Copenhagen on the preparatory work on security). This notion of common security interests will make it easier to decide the conditions for implementing the action necessary in the armaments sector within the framework of the CFSP.

In the "Declaration on non-proliferation and arms exports" adopted by the European Council in June 1991 and supplemented in June 1992, the Heads of State and Government expressed the desire for a common approach leading to a harmonization of national policies on arms exports, based on the eight criteria agreed on arms export policies.

At the Maastricht European Council they identified areas where common action could be taken as part of the future common foreign and security policy. These include the economic aspects of security, in particular control of the transfer of military technology to third countries and control of arms exports.

In 1995 the EU took joint action, based on Article J.3 of the Treaty on European Union, inter alia on extension of the Non-proliferation Treaty and on anti-personnel mines. The latter, in particular, included a ban on exports of mines from the Union, based on humanitarian as well as foreign and security policy concerns.

The existing legislation together with the objectives of the CFSP therefore lay the foundation for the EU to evolve a policy and action making the most appropriate use of the instruments available under the Community framework and under the CFSP to the benefit of the defence-related industries.

The European Union has a single institutional framework which ensures the consistency and continuity of the activities carried out in order to attain its objectives while complying with and building on the existing Community legislation. In particular, the Union ensures the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission are responsible for ensuring this consistency. They ensure implementation of these policies, each acting in accordance with its respective powers (Article C of the Treaty on European Union). In an economic area without internal frontiers and with common security interests, consistency demands that the Union institutions implement policies ensuring greater combination of the powers of the institutions in connection with the various pillars of the Union.

3.2. Closer cooperation between the WEU and EU

3.2.1 Relations between the EU and WEU

In the Declaration on Western European Union, as annexed to the Treaty on European Union, the WEU Member States agreed on the need to develop a genuine European security and defence identity and a greater European responsibility on defence matters. The WEU would be developed as the defence component of the European Union and as a means to strengthen the European pillar of the Atlantic Alliance.

At their meeting in Bonn in December 1992 the Ministers of Defence of the 13 countries then in the Independent European Programme Group (IEPG) set up in 1976 decided to transfer the Group's functions to the WEU, in accordance with the objectives set in Maastricht.

The Western European Armaments Group (WEAG), formerly the IEPG, bringing together 13 countries, including 2 non-EU members, was thus set up and attached to the WEU as the body responsible for cooperation on armaments issues within the WEU. The objectives of the WEAG are to open up the national defence markets to competition, to reinforce Europe's technological and industrial base in the defence sector and to bring about closer cooperation on research and development. At the meeting of the WEU Council in Noordwijk on 14 November 1994, the Ministers of Defence from the WEAG countries noted the establishment of an armaments secretariat within the WEU.

As its operational role develops the WEU/WEAG will probably take on activities in fields where the EU is active on the basis of the Community policies. Given that the EU and the WEU/WEAG have common political objectives, where their activities cover the same fields there are clear advantages to be gained from mutual information and closer cooperation, particularly in terms of efficiency, costs and consistency.

Closer cooperation between the EU institutions and the WEAG would be facilitated by building bridges between the European institutions dealing with defence markets. Such synergies and bridges could be established rapidly and pragmatically on the basis of the Treaty of Rome or of Title V (for example, by extending the existing information and consultation procedures between the WEU and the Commission).

3.2.2 European Armaments Agency

The Declaration on Western European Union annexed to the Treaty on European Union provided for enhanced cooperation between the Member States concerned in the field of armaments with the aim of creating a European Armaments Agency. Despite the considerable progress made with defining the Agency's tasks and statutes, the groundwork has revealed that big differences still remain on the principles and priorities of the Agency's activities.

The WEAG's decision establishing the Agency has therefore been delayed. Against this background, the Commission should consider its possible contribution to establishing this Agency and to defining its tasks and carrying out its activities.

In addition, France and Germany have decided to set up a joint armaments structure in 1996 to allow more rational cooperation and contribute towards establishing an efficient and appropriate industrial and technological base. The Ministers of these two countries declared that this move is part of the process of establishing the common security policy provided for in the Maastricht Treaty and, in particular, marks a constructive step towards establishment of the European Armaments Agency.

The Maastricht Treaty stipulates that the WEU "as the defence component of the European Union will formulate common European defence policy and carry forward its concrete implementation through the further development of its own operational role." To this end, for interoperability and cost reasons and in order to fulfil the common security objectives/tasks, increasingly the equipment requirements of the forces participating in the WEU will in turn become common. Definition by the WEU of European forces' operational requirements will mark a decisive step for European armaments policy. In particular, largely common demand for armaments from WEU states would put the EU in a position to define more closely the rules governing the internal market, imports and supplies of military equipment. Here too cooperation between the EU and the WEU is essential.

4. Contribution of the Community instruments and activities of relevance to the defence-related industry

4.1. Internal market and technological base

4.1.1 Public procurement

The Commission is convinced that important benefits could be derived by the defence community from applying procurement procedures largely inspired by those applied in the EU's civil sector.
It recognizes that the specific character of the defence sector, which involves essential national security interests, which may vary among Member States, may require some adjustments to the procedures which are enshrined in the Community's procurement directives. However, it is important that the main features of those rules are applied as uniformally as possible.

Indeed, the procurement regime, which exists in the Community is based mainly on the following principles: a generally applicable non-discrimination and equal treatment principle, competitive tendering, open and transparent procedures based on objective selection and award criteria and an enforcement structure consisting of legal remedies for aggrieved suppliers and an independent enforcement authority which has investigative powers and can seek corrective measures.

According to a study carried out in 1992 for the Commission into the "Cost of non-Europe in Defence Procurement[6]",defence procurement amounted, in 1990 in the EU to about 65 to 70 billion ECU a year. Efficient purchasing in this sector could result in savings of between 5 to 11 billion ECU per year thereby avoiding the substantial duplication of industrial capabilities in aircraft, helicopters, missiles, tanks and warships in the sector.

These principles have been further developed by the Council in six directives which lay down detailed provisions on procurement of goods, services and public works by public authorities and utilities and minimum requirements as to legal remedies. These detailed rules only apply above certain monetary thresholds. It is important to keep in mind, however, that the abovementioned principles apply to all contracts, regardless of their value. Applying a similar legal environment to the defence sector would enable Member States to take full advantage of the savings delivered by efficient procurement procedures, while being reassured that their partners abide by the same rules and are submitted to the same discipline.

Although the main core of the Community's procurement regime should therefore be applied to the defence sector as well, certain adjustments need to be made in order to take into account the specificity of that sector. The main issues in this regard are the need to ensure the confidentiality of information "the disclosure of which Member States consider contrary to their essential security interests", and the need to maintain guaranteed sources of supply.

The Community's procurement directives provide for three different types of purchasing procedures, i.e. open, restricted or negotiated. Although utilities can freely choose between these three alternatives, public authorities should normally opt for open procedures, unless there are important justifications to use one of the others. The Commission could well imagine that for certain strictly limited defence purchases, public authorities will consider bids only from companies which have been selected beforehand on the basis of *objective criteria* as willing and able to maintain the confidentiality of sensitive information. It is important to ensure, of course, that this selection process is not used as a disguised means of arbitrarily eliminating certain suppliers.

With regard to the necessity to maintain guaranteed sources of supply, especially in times of international tension or war, the Commission feels that the current regime offers sufficient possibilities to take this element into account. First of all the purchasing entity could select suppliers on the basis of their ability to ensure supply under virtually all circumstances. Furthermore they could conclude multilateral contracts, i.e. contracts concluded with several suppliers for one type of product or service. In such a case a hierarchical order would be established between the various suppliers. If supplier one is not able to provide the product within a given time-period the product would be purchased from the next company in line and so on.

[6] In 1990 defence procurement amounted in the EU to about 65 to 70 billion ECU per year within which expenditure on Article 223 items was estimated at ECU 40 billion.

If a Member State feels that its needs can be fully met by a offer from a non-EU company which makes the best offer for that Member State's money there does not seem to be a compelling reason for the Community to require this Member State to select an offer which satisfies its needs less well for the sole reason that it is presented by a Community supplier. This does not mean, of course, that the third-country supplier will be able to claim any rights to even being considered as a possible supplier. At this stage, the Commission considers that it would be preferable only to apply these rights, including legal remedies, to Community suppliers.

The Commission intends further to explore these ideas, as well as others which may be presented, with the other institutions and with representatives of the Member States, taking into due account the objective of enhancing in a dynamic way the competitiveness of the European defence-related industry. If this leads to legislative measures, it is obvious that these will have to be binding on all Member States.

However, in order to allow Member States some flexibility in extreme cases involving national security, a safeguard clause should be included in those measures. This clause could be used on condition that other Member States and the Commission are informed immediately after the decision to procure without following the common rules. Sufficiently detailed reasons should be given.

4.1.2 Intra-Community trade

The internal market does not only constitute a trade area favouring greater competitiveness, but also provides the environment for stronger cooperation amongst European industries. By facilitating intra-Community trade, the completion of a "European defence market" should facilitate both cooperation and integration in the European defence-related industry.

Regarding the EU framework, the gradual opening of intra-European borders requires a minimum standard of competition policy and in the long term harmonized export rules. Furthermore, it implies especially, whenever possible, the simplification and rationalization of controls on intra-Community trade carried out by States. In view of this objective and in order to coordinate the methods of control and ensure more transparent results, certain Community instruments should be put in place, based on administrative cooperation.

The need to simplify the national control procedures concerning the movement of defence products applies even more when the trade concerned by these controls takes place within the framework of industrial cooperation agreements. However, the principle of mutual recognition recognized in the framework of the EC Treaty could be used as a basis for technical specifications used for the construction of defence-related products, either in an intergovernmental framework, or through a Commission initiative.

At the end of the day, trade within Europe will not only contribute to eliminating distortions of competition, but also facilitate industrial cooperation and integration, whilst still assuring the necessary provisions for the national security of Member States.

4.1.3 Research and technological development (RTD) activities

Although they are focused on civil objectives, Community research programmes, like civil research activities at national level, are increasingly of interest for the defence technology base because of (1) the overlapping and converging technology needs of the civil and defence sectors in a wide range of areas (dual-use technologies) and (2) the leading role taken by the civilian markets in the development of a growing number of these dual-use technologies.

As the competitiveness of the Community industry is a primary objective of Community RTD policy, Community programmes support research in a wide range of dual-use technological areas (production technologies, advanced materials, information technologies, communications technologies, telematics, aeronautics, energy storage and conversion, etc.).

It has been estimated that technological areas of potential dual-use interest account for as much as one third (i.e. about 1 billion ECU per year) of the overall Community research budget. It is therefore not surprising that a number of companies and research organizations known to be active in the defence sector participate in Community programmes and that some Member States are encouraging them to do so. Some of these companies are also being consulted in the framework of the Commission's Task Forces to improve the links between research and industry (e.g. aeronautics).

Community RTD programmes can contribute to the technology base of the defence-related industry in several ways : (1) by strengthening the overall European research infrastructure and scientific base; (2) by supporting R&D projects leading, after further development, to commercial products, processes, standards or improved quality assurance which can also be used in the defence sector; (3) by supporting R&D projects on generic technologies which can lead, after further development, to either civil or defence-specific applications. Furthermore, Community programmes can also support research by defence related organizations to develop civil applications of their defence technologies.

With the growing importance of trans-European R&D cooperation in both civil and defence sectors, it is now appropriate to consider how, and to what extent increased civil-defence synergies can be promoted at the European level with the aim of optimizing the overall use of R&D efforts.
The Commission considers that, while maintaining the civil orientation of Community research programmes, appropriate steps to start addressing these issues should be :

- to establish cooperation links between EC and WEAG research programmes to avoid duplications, to ensure complementarity, and to facilitate optimal use of research results;

- to identify, in cooperation with the WEAG and industry, key dual-use technological areas where European capabilities are weak or not sufficiently autonomous and should be strengthened;

- to determine, on the basis of the experience and knowledge from the above action, whether, how and to what extent dual-use considerations should be taken into account in the preparation of the future Community programmes (Fifth Framework Programme).

4.1.4 Standardization and technical harmonization

Standardization has been transformed in recent years from a marginal policy area to one which is attracting priority attention within European industry as a means of reducing costs and promoting industrial competitiveness. It is recognized to be of strategic importance for the efficiency of the internal market.
Union-wide standardization policies are relevant to the defence-related industry in such key areas as information technology, telecommunications, power supply, laser technology, new materials, aerospace and quality systems and conformity assessment. In many of these areas, civil standardization activity is proceeding faster than similar work organized for purely military purposes and civil standards are becoming more widely used in defence procurement.

Hence, further convergence of civil and military use of standardization, in order to maximize economic benefits and to minimize duplication of effort and the waste of scarce technical expertise, should be one of the main objectives of EU policy in respect of the defence-related industry.

Greater use by the military of the existing standardization mechanisms and company accreditation at international and European level will combine the advantages of lower costs of procurement, greater competition in supply and, in some cases, shorter lead-times in the development of standards.

Although the scope for the use of civil standardization will remain limited or even non-existent in some security-sensitive areas, such as weaponry, in other areas standardization can provide a common basis from which additional, non-standard, requirements may be developed by the military, if necessary. Unnecessary overlap between civil and military standardization work should be avoided for reasons of industrial efficiency and budgetary savings.

In order to promote civil/military convergence in this field, the Commission considers that the following steps would be helpful:

- the conclusion of cooperative arrangements between the European standardization organizations and NATO standardization experts in order to identify areas of common interest of overlap in their current activity, perhaps by means of a joint report;

- identification by the defence authorities within the EU of standardization work already planned in the civil field that could also be of interest to the military, with the possibility of Community support, where appropriate, by standardization mandates;

- the establishment of a system for regular information exchange between NATO with the European standardization bodies in order to minimize the risk of duplication of work in the future.

Examples of such initiatives which have already been launched include developments in the field of CALS (Continuous Acquisition and Life cycle Support) where cooperation between civil and military structures is about to be implemented.
Recent discussions between the European Commission and the European aeronautics industry have taken place to bring about closer integration between military and civil standards.
NATO has also shown interest by setting up a new standardization organization (NSO).
These initiatives would not affect the continued commitment of the Community to ensure that European standardization is based on international standards wherever possible.

4.1.5 Competition policy

In the light of the emergence of a Community market for the defence industry, resulting from common defence programmes, from European alliances and from necessary restructuring, there is a place for the Community competition policy. It can facilitate, thanks to a clear framework and quick decisions, the concentrations and cooperations between companies which do not call into question effective competition. Moreover, rigorous control of State aids will make it possible to distinguish between aid necessary for restructuring, since it accelerates change, encourages research, development and innovation and reduces the social consequences of reorganization, and aid used for defensive reasons that certain Member States might be inclined to use to avoid the necessary structural changes and transfer the production and employment adjustment costs onto other Member States. The control of aid should also provide a means to make sure, in a more effective manner than today, that aid granted to the defence-related industry is not also used by certain companies to subsidize civil production.
In a sector such as the defence-related industry, the introduction of effective competition should therefore result in considerable productivity gains, in the form of cost reductions and increased innovation which could only improve the industry's exporting capacity.

The Commission considers that the legal basis for the Community's competition policy could be used and provide an adequate framework for competition matters relating to the European defence-related industry.

However, the application of competition law to the defence-related industry must take into consideration the specific features of this industry. It must also be consistent with the objectives of other Community policies, be receptive to information and comments from Member States' Ministries of Defence (MODs) in their capacity as main clients of the defence-related industry and allow Member States to take appropriate measures in order to protect national security in addition to those measures which might be taken by the Commission to maintain and develop effective competition. Competition policy in the defence-related industry should be implemented progressively, in fields such as State aids, agreements and concerted practices since, up to the present date, the Commission has adopted a careful approach to exercising its competence in these fields. Finally, it is evident that the Commission will take into consideration, in the operation of its competition policy for the defence-related industry, the manner in which in particular governments of third countries which produce armaments formulate and apply competition law to their own industry.

So far the Commission has approved/notified concentrations (see table in Annex) of defence industries on the following lines:

- For the moment, geographic markets for defence products and services tend to remain national where a domestic supplier exists because MODs still tend to have strong preferences for national suppliers. However, where there is no domestic supplier, then subject to other barriers such as export restrictions and national preferences, suppliers of defence products and services compete with each other world-wide. Consequently, dominant positions by European defence-related companies at world level are not likely to be observed, given the weight of US competitors in this area. Likewise, when the geographic market is national, a dominant position, if any, is normally not strengthened, given that there is no addition of market share, except when the merger concerns two national suppliers.

- When assessing the market position of a firm in the defence industry, account must be taken of the bargaining power of its main clients: the Ministries of Defence (MODs) of the States concerned. MODs generally formulate the operational requirements and technical specifications of armaments. Also, as a consequence of the reduction in national defence budgets, MODs tend to require higher technical specifications with lower levels of manpower and lower overall costs and to be reluctant to bear the risks associated with R&D.

- The Commission considered the general views of the MODs concerned as relevant for the assessment of the operation.

The extent to which a common market for defence equipment is achieved is crucial to evaluate the effects of the merger policy on the conditions of competition. As far as national markets remain, further concentration may aggravate monopolistic inefficiencies that can extend into civilian areas of business. On the other hand, if progress towards a common market for defence equipment is achieved, and provided that conditions of competition are preserved, business consolidation may contribute favourably to European competitiveness on a global market.

Finally the Merger Regulation allows Member States to take appropriate measures to protect public security [7].This clause which reaffirms Member States' ability either to prohibit a concentration or to make it subject to additional conditions and requirements compatible with Community law, has been used once by a Member State [8].

As regards agreements and State aids, the Commission has always approved the notified operations. The Commission is conscious that cooperation programmes are necessary in the defence-related industry, in view of the size of certain projects which require substantial financing and multiple skills. As far as financing of military R&D by Member States is required, the Commission takes account of the particularities of defence-related activities, namely a high technology base of production, high costs and a very long development cycle, which, to a large degree, require public financing. Concerning aid for rescuing and restructuring firms in difficulty, great attention should be given in particular to social and regional policy considerations.

4.1.6 Structural Funds

A study carried out in 1992 for the Commission on the economic and social impact of reductions in defence spending and military forces on the regions of the Community showed that about half of the regions in which defence-related activity is concentrated are not eligible for assistance under the Structural Funds instruments (Objective 1, 2 or 5(b) regions). Following the revision of the Structural Fund Regulations in 1993, a number of these areas (in UK, France and Italy) were integrated into Objective 2 regions. As a result more than half the defence-dependent areas are now in assisted areas. It is, however, important to note that even in assisted areas, Structural Fund aid is not available for investment in the defence-related industry itself. The role of the Structural Funds is therefore limited to providing general economic development assistance (including aid for conversion) through the Community Support Frameworks in place in the assisted regions and to the KONVER initiative.

In this context, Objective 4 of the European Social Fund and the related Community Initiative ADAPT have established a horizontal approach (i.e without a priori reference to specific industries or sectors) to structural change and its effects on the workforce.Incertain circumstances, assistance is available for measures which help the adaptation of workers threatened with unployment due to industrial change and change in production systems (especially within small and medium size enterprises).Particular emphasis is placed on the anticipation of labour market trends and improving qualifications and employment opportunities for the workers in question.

[7] Cf. Art. 21(3) of the Regulation

[8] See point 321 of the XXIIIrd Report on Competition Policy

In response to calls from the European Parliament, the Commission adopted Perifra 1 (1991) and Perifra II (1992). These special measures included support for demonstration projects which could serve as models for the conversion of military installations. In conformity with the position taken by the Parliament, the KONVER Community Initiative was adopted in 1993 to assist regions weakened by the decline of defence industries and installations. The annual programme introduced in 1993 has been extended on a multiannual basis up to the end of 1997.
The purpose of KONVER is to provide support for economic diversification in areas heavily dependent on defence-related activities through the encouragement of commercially viable activities not related to defence.
Eligible areas can be located anywhere in the EU, although at least 50% of the 1994-97 KONVER budget must be spent in ERDF assisted areas (Objective 1, 2 or 5(b)). The eligible areas are small geographical regions in which actual or announced defence-related job losses total 1.000 or more since 1990. Other areas heavily dependent on defence can also be accepted as eligible regions taking into account their high unemployment rates, poor environmental conditions, or isolation/remote location.
A full range of conversion measures including the financing of both tangible and intangible investment in alternative economic activities, the modernization of infrastructure in relation to the economic regeneration strategy of the area concerned, and measures in favour of the environment and tourism can be financed through KONVER. The budget for the programme is ECU 130 million for 1993 and ECU 500 million for the period 1994-97. A reserve of ECU 245 million to support product innovation, the development of environmental technologies and SMEs was allocated to the KONVER initiative on 4 October 1995. KONVER was also extended until the end of 1999. Loans from the European Investment Bank are also available.

Also, the possibility and detailed ruled for financing from other EU resources could be examined in the light of the priorities of the armament policy.

4.2. The external dimension

4.2.1 Export policy

In the European Union, national policies on arms exports have traditionally differed considerably, ranging from nearly total ban to a voluntaristic approach, where arms export is considered vital not only for strategic and political reasons but also for reducing unit costs and maintaining a broad defence industrial and technological base at the national level. Not less importantly, assessments of the risk of exports to certain destinations, linked to foreign policy considerations, have traditionally been made on a national basis. The ensuing differences between Member States are not without cost : national concerns about either a too restrictive or too liberal approach of one or more other Member States on arms exports in general, or in regard to specific destinations, have not favoured intra-European industrial cooperation or integration. Differences in export policy thus also impede the development of intra-European policies. As a consequence the development of common policies inside the European Union in order to secure the industrial basis of the sector should be complemented by a corresponding level of harmonization of national export policies and export-control systems.

The European Council has taken a first step towards a common approach on arms exports, by adopting, in June 1991 (Luxembourg) and June 1992 (Lisbon) (in the annex), eight criteria which Member States interpret when deciding on issuing a licence for a specific export. Exchanges of information on the concrete application of the criteria are being conducted between Member States, with a view to harmonizing their interpretation.

Given the difficulties in developping a common basis for the harmonization of arms export policies a gradual process should be pursued following a two steps approach. In a first stage, regular exchange of information between Member States on arms exports (type and quantity of exported material, destination, end-use) should be pursued. In the case of cooperation programmes, which should be encouraged, progress could be achieved on the basis of current experiences, namely by following the principles according to which export rules of the country where the prime contractor is located apply.
In a second stage the establishment should be pursued of an operational system aimed at eliminating the distorsions between the various national treatments. The drafting of such a system should, for it to become effective, take into account the modalities, principles, scope and the possible needs for improvement, based on the experience gained with the establishment of the export control regime on dual-use goods and technologies (see below).

4.2.2 Export controls on dual-use goods and technologies

To resolve one of the most difficult problems hindering the completion of the internal market, i.e. the problem of controls on intra-Community trade in dual-use goods, the Council agreed, after two years of intensive discussions on a Commission proposal, to establish a Community export control system. It is based on two legal instruments, viz. an Article 113 Regulation[9] and a Joint Action under the Common Foreign and Security Policy[10], which together form an integrated system. Both texts were formally adopted by the Council on 19 December 1994 and apply from 1 July 1995.

The objective of the integrated system is to ensure that effective controls, based on common standards, are applied by all Member States on exports of controlled goods from the Community.

[9] Council Regulation (EC) No 3381/94 of 19 December 1994 setting up a Community regime for the control of exports of dual-use goods, as amended by Council Regulation (EC) No 837/95 of 10 April 1995, OJ L 367 of 31 December 1994 and OJ L 90 of 21 April 1995.

[10] Council Decision 94/942/CFSP of 19 December 1994 on the joint action adopted by the Council on the basis of Article J.3 of the Treaty on European Union concerning the control of exports of dual-use goods, as amended by Council Decision 95/127/CFSP of 10 April 1995 and by Council Decision 95/128/CFSP of 10 April 1995, OJ L 367 of 31 December 1994 and OJ L 90 of 21 April 1995.

Two key features of the integrated system are:

- a common list of dual-use goods and technologies subject to export control by all Member States as well as a list of destination countries;
- common criteria to be applied by all Member States when determining whether or not to authorize exports from the Community.

This system is part of the effort of the international community to reinforce and coordinate export controls over sensitive items. In particular, 28 countries, among which all EU Member States, agreed in December 1995 on the establishment of the "Wassenaar arrangement". This arrangement succeeds the COCOM regime as regards export controls for arms and dual-use goods. There are obvious links between this arrangement and the EU system, which will call for an adaptation of the EU common list of dual-use goods.

In such a sensitive and complex area where internal market, trade, foreign and security policy interests converge, the common export control system cannot be applied overnight. Consequently, a transitional period is foreseen to ensure that the system works effectively. It will be used to strengthen, where necessary, the control systems of Member States and to reinforce administrative cooperation between the competent authorities.
The new system provides for a clear identification (and a common list) of dual-use goods and technologies and serves as a basis for the reduction, and ultimate elimination, of policy differences between Member States.The fact that an export licence issued by one Member State is presently valid throughout the Union, facilitates joint export projects between companies established in the Community.

The creation of a common regime for dual-use export controls is an important improvement in the regulatory framework for the European defence-related industry which will facilitate structural adjustments thereby increasing companies' competitiveness.Therefore the whole system has to be implemented effectively. When making new proposals for a common regime, the Commission will take into account the ruling of the European Court of Justice in case C-83/94 that dual-use goods fall within the scope of the common commercial policy defined by Article 113.

4.2.3 Import duties on military equipment

The common customs tariff provides for the application of customs duties to most military or dual-use civil and military equipment imported from third countries. Only certain products benefit from specific exemptions, generally as a result of GATT negotiations. Individual exemptions from duties have also been granted under preferential arrangements with certain third countries, such as the members of EFTA. However, other military equipment, and dual-use products are in principle subject to customs duties, although the level of those duties has been lowered considerably in the course of multilateral trade negotiations.

It is against this background that the Commission submitted a proposal to the Council in 1988 for a regulation temporarily suspending import duties on certain weapons and military equipment [11]. The aim was a uniform Community response to national defence

[11] COM(88)502 final - OJ C 265, 12.10.1988. p.9.

procurement requirements which had hitherto resulted in certain Member States unilaterally granting exemptions from custom duties. The Commission considered then, and still does, that the tariff arrangements for imported products, even military or dual-use equipment, are the sole responsibility of the Community and that Article 28 of the Treaty therefore constitutes the only permissible legal basis for granting autonomous suspensions. In this respect, the existence of differing national approaches, apart from not being founded in Community law, is incompatible with the very principles of the Customs Union and the Internal Market.

The scope of the proposal for a regulation was defined with the aim of establishing a balance between the desire to facilitate access by national armed forces to the most technologically advanced equipment and the need to take account of the interests of the Community arms industry. It therefore covers equipment which is military "by nature", and parts thereof. During discussions in the Council, a number of Member States asked for the list to be extended to certain equipment which would necessarily imply not only verifying that importation of this dual-use equipment with duties suspended is not likely to disturb the balance mentioned above but also defining what is meant by "military use" in their regard.

These discussions could be resumed within the overall context of this communication in order to establish a list of products benefiting from duty suspensions which is most suited to the various objectives of a European defence policy. This will also contribute, as proposed by the Commission since 1988, to resolve outstanding difficulties, referred to above.

4.2.4 Trade relations

The development of a European defence equipment market, to the extent that it would lead to greater self-sufficiency in different market segments, has potentially far-reaching implications for relations with third countries, and particularly with the United States, which is the main third-country supplier of arms to the European Union Member States.
Exploitation of the Community dimension in defence procurement does not imply unilateral opening at Community level of the defence market to third-country suppliers.
Because of the exceptions in the multilateral trade regime, including the Government Procurement Agreement (GPA) concluded in the framework of the WTO, competitive tendering does not yet apply to purchases of defence-related material by our trading partners. Every Member State will remain free to consider if bids received from non-EU firms should be examined.
Negotiations should be undertaken in order to lay down the conditions under which third-country suppliers could enjoy, in relation to public procurement and other market access issues, the same rights as Community suppliers in the armament sector, based on comparable and effective access to the markets of those countries for EU suppliers, whilst respecting each party's security interests.

5. Conclusions:

The Commission notes that matters concerning the production of and trade in armaments are linked to defence and foreign-policy considerations of Member States and to progress in the development of a European security and defence identity. On the other hand securing a competitive European defence-related industry is also a precondition for a European security and defence identity.

There is therefore an urgent need for recognition of the state of health of the defence-related industry since, if this is not followed by tangible action, there is a danger of aggravation of the situation, leading to massive job losses and the disappearance of technological skills, with serious repercussions in the civil sector.

Numerous questions, particularly concerning the demand side (for example, harmonization of operational requirements) can only be discussed within the framework of the preparations for a European security and defence identity. In the short term, however, the CFSP provides mechanisms and procedures which could smooth the way for urgent measures.

Many other questions, particularly with an impact on the competitiveness of businesses, can be answered within the European Community framework.

In fact a coherent range of Community instruments is available for the establishment of unified markets and competitive industries. The specificity of this industry can be taken into account adequately when implementing the current instruments.
The action proposed in this document could usefully be complemented by measures in the framework of the Western European Union, in particular the establishment of a European Armaments Agency referred to in the WEU Declaration of 10 December 1991.

The Council is requested to give its opinion on the foregoing analysis and on the suggestions concerning the contribution by the Community instruments.

In the light of the Council's work, the Commission plans to take the appropriate action in the form of specific proposals or other suitable measures.

ANNEX

Table 1*: Military expenditure, in constant price figures, 1985-1994

Figures are in US $m., at 1990 prices and exchange-rates.

	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994
North America										
Canada	11.014	11.233	11.488	11.631	11.536	11.547	10.413	10.482	10.433	10.151
USA	313.307	335.048	331.215	323.860	320.427	306.170	268.994	284.116	269111	252.358
Europe										
Belgium	4.789	4.984	5.017	4.806	4.732	4.644	4.579	3.760	3.571	3.549
Denmark	2.613	2.520	2.662	2.714	2.648	2.650	2.697	2.648	2.653	2.608
France	39.918	41.081	42.284	42.243	42.793	42.589	42.875	41.502	41.052	41.235
Germany	38.824	39.889	40.570	40.242	40.146	42.320	39.216	37.697	33.486	31.258
Greece	4.524	3.861	3.856	4.078	3.819	3.863	3.663	3.808	3.716	3.778
Italy	19.538	20.187	22.699	24.113	24.304	23.376	23.706	23.004	23.187	23.492
Luxembourg	74	78	89	101	93	97	107	111	102	110
Netherlands	7.350	7.461	7.598	7.561	7.636	7.421	7.161	7.088	6.548	6.263
Norway	3.339	3.234	3.442	3.279	3.369	3.395	3.293	3.569	3.385	3.523
Portugal	1.336	1.504	1.563	1.738	1.824	1.875	1.925	1.977	1.914	1.948
Spain	9.058	8.827	9.995	9.345	9.668	9.053	8.775	8.113	8.823	8.141
Turkey	4.011	4.532	4.316	3.802	4.398	5.315	5.463	5.747	6.355	6.173
UK	43.549	42.867	42.561	40.646	40.792	39.776	41.087	37.141	36.312	35.055
Austria	1.644	1.726	1.612	1.546	1.622	1.542	1.550	1.507	1.502	1.513
Finland	1.826	1.975	1.989	2.085	2.058	2.116	2.447	2.499	2.356	2.167
Ireland	556	571	533	530	525	596	623	617	592	613
Sweden	5.234	5.387	5.499	5.573	5.762	5.909	5.540	5.392	5.273	5.260
EC	180.833	182.921	188.527	187.321	188.422	187.827	185.951	176.856	171.087	173.163

Note : This series is based on the data given in the local currency series, deflated to 1990 price levels and converted into dollars at 1990 period-average exchange-rates. Local consumer price indices (CPI) are taken as far as possible from Internation Financial Statistics (IFS) (International Monetary Fund : Washington, DC). For the most recent year, the CPI is an estimate on the first 6-10 months of the year. Period-average exchange-rates are taken as far as possible from IFS.

* From SIPRI Yearbook 1995, pp. 440-441

Table 2: Major weapon procurement expenditure, 1983-92

Figures are in US $m, at constant (1991) prices

	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992
North America										
Canada	2.100	2.350	2.226	2.355	2.568	2.521	2.313	2.129	2.020	2.053
USA	68.635	76.442	83.997	90.105	91.461	84.956	84.271	79.337	74.757	66.140
Europe										
Belgium	705	646	615	650	664	583	474	371	379	322
Denmark	448	416	357	349	393	387	344	391	422	430
France	9.613	9.491	9.888	10.305	11.235	11.057	11.347	10.615	10.077	9.869
Germany	7.884	7.805	7.825	8.191	8.218	7.826	7.685	7.545	4.347	3.562
Greece	633	724	681	634	689	987	870	859	773	828
Italy	3.642	3.505	3.946	3.942	4.994	5.075	5.112	4.202	3.967	3.247
Luxembourg	1	1	3	2	3	3	4	4	6	5
Netherlands	1.700	1.774	1.739	1.531	1.367	1.561	1.359	1.344	1.130	1.208
Norway	637	527	834	668	704	619	838	769	727	846
Portugal	76	69	48	104	173	200	238	212	180	131
Spain	1.970	2.591	1.581	2.164	2.565	2.009	1.838	1.214	1.176	1.492
Turkey	411	519	573	847	1.010	888	785	1.103	1.287	1.488
UK	11.467	12.263	12.259	11.505	11.004	10.842	9.575	7.798	8.118	7.359
European NATO										
Total	39.189	40.333	40.349	40.894	43.021	42.038	40.468	36.427	32.587	30.787
NATO total	109.923	119.125	126.572	133.354	137.050	129.514	127.052	117.892	109.364	98.979
EC member										
countries	38.154	39.314	38.965	39.416	41.330	40.570	38.865	34.574	30.591	28.470

Sources : NATO, Financial and Economic Data Relating to NATO Defence (NATO : Brussels, annual); author's calculations. Figures for France are based on national data.

Table 3: **EU imports and exports of major conventional weapons, 1984-93**

Trend-indicator values, as expressed in mio US $, at constant (1990) prices

Year	EU imports	World total	EU exports	World total
1985	2.126	39.713	8.514	39.713
1986	3.118	44.118	8.001	44.118
1987	2.942	46.377	7.372	46.377
1988	4.162	38.585	6.129	38.585
1989	4.827	37.798	7.696	37.799
1990	3.865	30.891	6.160	30.891
1991	5.463	25.527	5.637	25.527
1992	6.190	24.776	4.611	24.777
1993	3.766	24.494	5.108	24.494
1994	3.766	21.725	6.548	21.725

Source: SIPRI Yearbook 1995, p 510-511

Table 4: **Imports by EU Member States of Major Conventional Weapons, 1988-92 (in millions of US dollars at constant 1990 prices)**

Supplier: Recipient	USA	F	D	I	NL	UK	Others	Total
Belgium	709	54		69			102	**933**
Denmark	204	12	49			286	43	**596**
Germany	4.279	67			32	80	15	**4.473**
Greece	3.309	1.365	987	15	254	24	244	**6.197**
Spain	3.040	372	30	126		19	159	**3.747**
France	1.577					13	36	**1.626**
Ireland	23			3		30	16	**71**
Italy	494	17	58				119	**688**
Netherlands	1.734		14			3	13	**1.765**
Portugal	449	36	836		43	10		**1.374**
UK	2.074	121	32		33		65	**2.326**
Total EU 12	**17.892**	**2.044**	**2.006**	**213**	**362**	**465**	**812**	**23.795**
USA		3	429	199		543	669*	**1.843**

* Of which at least $ 128 mio from non-EU countries

Source: SIPRI Yearbook 1994

Table 5: **Critical technologies**

Critical technologies		Dual-use	NATO allies
1	Semiconductor materials and microelectronic circuits	V	2
2	Software producibility	V	2
3	Parallel computer architectures	V	2
4	Machine intelligence and robotics	V	3
5	Simulation and modeling	V	3
6	Photonics	V	2
7	Sensitive radars	V	2
8	Passive sensors		2
9	Signal processing	V	2
10	Signature control		2
11	Weapon sytem environment	V	3
12	Data fusion	V	2
13	Computational fluid dynamics	V	2
14	Air-breathing propulsion	V	3
15	Pulsed power		2
16	Hypervelocity projectiles		2
17	High-energy density materials		3
18	Composite materials	V	3
19	Superconductivity	V	2
20	Biotechnology materials and processes	V	3

Capability to contribute to the technology :

4	Significantly ahead in some niches of technology
3	Capable of making major contributions
2	Capable of making some contributions
1	Unlikely to make any immediate contribution

SOURCE : Adapted from Office of Technology Assessment, 1990

Chart 1

CHART 1: EU Major Weapon Procurement Expenditure

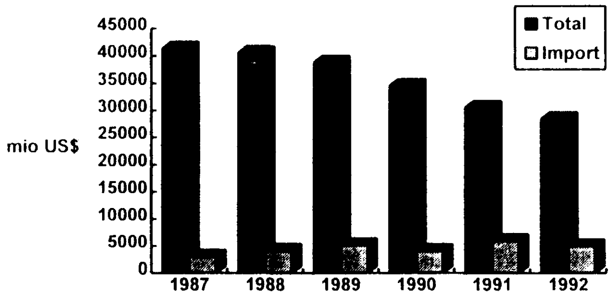


Chart 1 is based on Table 2 on NATO and EC major weapon procurement expenditure, 1983-92 period, and on Table 3 on EU imports and exports of major conventional weapons, 1984-93.

Chart 2

CHART 2: Exports of Major Conventional Weapons

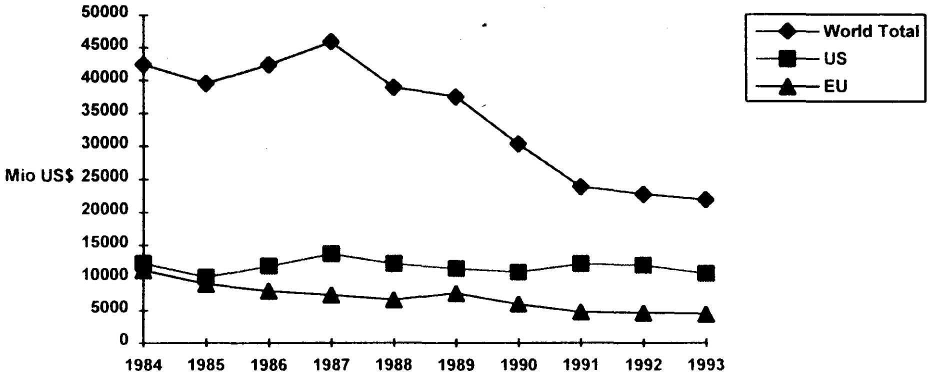
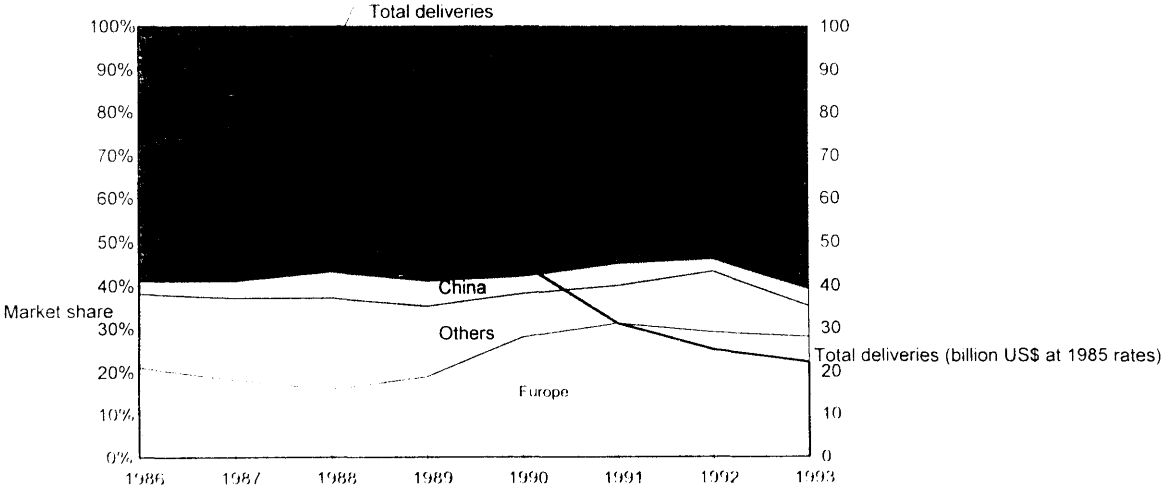


Chart 2 is based on Table 3

Chart 2 bis

CHART 2 BIS : Europe's share of total arms exports



Source : Convetionnal arms transfers to the Third World 1986-19963, RF Grimmett, Congressional Research Service, Library of Congress. Washington D.C. 1994, pp 87-88

Chart 3

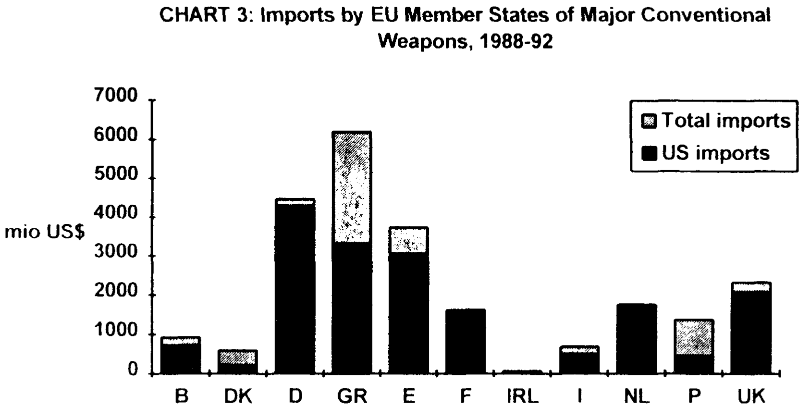


Chart 3 has been derived from the figures in Table 4

Chart 4

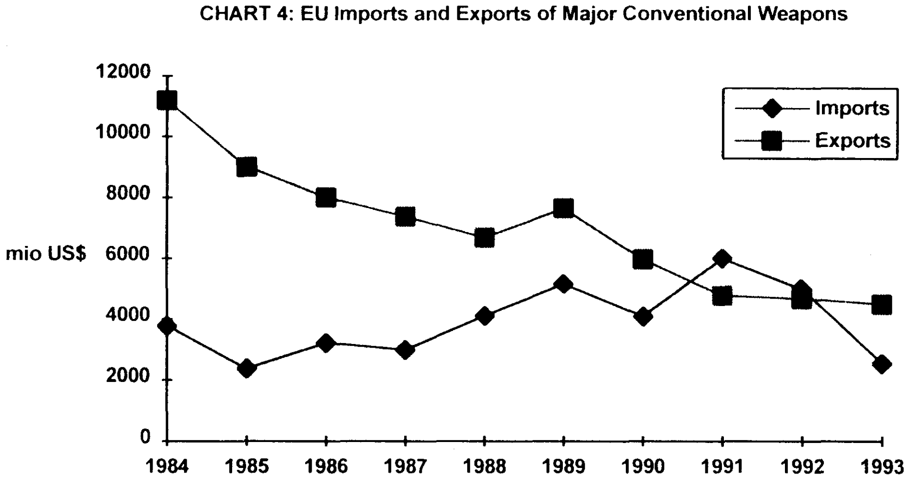


Chart 4 has been derived from the figures in Table 3

List of concentration operations with Community dimension in the defence industry[1] which have taken place since the "Merger" regulation took effect [2]

Reference N° of operation	Companies involved	Nationaly of companies involved	Activities involved	The status with regard to "Merger" regulation
IV/M.17	MBB/ Aerospatiale	RFA/France	Helicopters	approved on 25.2.91
IV/M.86	Thomson/Pilkington	France/UK	Optronics	approved on 23.10.91
IV/M.272	Matra/Cap Gemini Sogeti	France/France	Defence informatics	approved on 17.3.93
IV/M.318	Thomson/Short	France/UK	Missiles	approved on 14.4.93
IV/M.275	Aerospatiale/SNPE	France/France	Missiles engines	not notified under art. 223
IV/M.527	Thomson/Deutsche Aerospace	France/Germany	Propulsion systems for missiles	approved on 2.12.94
IV/M.528	British Aerospace/VSEL	UK/UK	Military shipbuilding	not achieved, not notified under art. 223
IV/M.529	GEC/VSEL	UK/UK	Military shipbuilding	not notified under art. 223
IV/M.571	CGI*/Dassault	France**/France	Defence informatics	approved on 24.3.95
IV/M.598	Daimler Benz/Karl Zeiss	FRG/FRG	Optronics	approved on 27.6.95
IV/M.620	Thomson/Teneo/Indra	France/Spain	Defence electronics	approved on 22.8.95

* Subsidiary of d'IBM
** US for the parent company headquarters

[1] Only includes operations involving solely or principally production of military material. One can find the same number of operations partially concerning defence material.

[2] Council regulation (EEC) n°4064/89 of 21 December 1989, on the control of concentrations between undertakings, came into effect on 21 September 1990. Only major concentrations with Community dimension are covered by the regulation and these are defined in terms of the turnover of the undertakings involved (see Art 1 of Regulation).

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COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMUNICATION FROM THE COMMISSION

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

IMPLEMENTING EUROPEAN UNION STRATEGY ON DEFENCE-RELATED INDUSTRIES

IMPLEMENTING EUROPEAN UNION STRATEGY ON DEFENCE-RELATED INDUSTRIES

SUMMARY

The need to implement a European Union strategy to keep up with the major changes in the European defence-related industries is becoming more pressing every day. The industrial and technological base of defence are both precious in terms of economic development and indispensable for weapons capabilities. Despite the urgent warning and call for action issued by the Commission in its Communication of January 1996 on the defence-related industry, the situation in the sector has deteriorated since then. Employment in the industry fell by 13% between 1993 and 1995. In 1995 the value of European Union imports of defence-related products from the United States was six times the value of its exports of the same category, whereas in 1990 the ratio was five to one, and in 1985, four to one. In 1996 it took eight European defence undertakings to achieve sales worth $60 billion, while the three biggest American undertakings alone achieved sales of $90 billion. This trend is even more worrying when one considers how it compromises the political objectives formally enshrined in the Treaty on European Union concerning the "eventual framing of a common defence policy". The essential responsibility for restructuring the defence industry lies with the Member States. However, their cooperation within the framework of the Union is important and the purpose of the Commission's initiatives is to facilitate the development of such cooperation.

An integrated European market for defence products must be set up using a combination of all the instruments at the Union's disposal: Community and Common Foreign and Security Policy legislative and non-legislative instruments. The Commission proposes a global approach to implementing this strategy:

- *a proposal for a Common Position on drawing up a European armaments policy. The Commission calls on the Council to adopt the proposed CFSP Common Position in order to open up the debate on the major issues relating to such a policy and promote the Member States' commitment to its establishment. The areas specifically covered by the proposal are intracommunity transfers, public procurement and common customs arrangements.*

- *an Action Plan for the defence-related industries. The Plan put forward by the Commission describes the areas in which immediate EU action seems necessary. The Commission will take appropriate steps to develop more detailed versions of the measures outlined in the Plan.*

The speed and scale of current change make it imperative for the Union to initiate practical action on this matter in 1998.

1. THE CONTEXT

In the last few years the European defence-related industry has been undergoing restructuring, shaped notably by the new security environment and international competition. The process involves, *inter alia*, shedding jobs and reducing production capacity. National frameworks no longer have the capacity to achieve the scale of restructuring needed. A European framework is now essential to provide adequate solutions, but it has not yet evolved into a source of rules governing a European market for armaments. Similarly, the objective of gradually defining a European defence policy is accepted, but the first steps towards a common defence initiative have not yet produced any list of specific European needs regarding defence equipment.

The essential responsibility for the restructuring process lies with the Member States because of the nature of the sector. However, cooperation between them at European level seems important for the success of this process. The purpose of the Commission's initiatives is to facilitate the development of such cooperation.

The process of restructuring and consolidating the European defence-related industry, which should be carried out on a European scale, cannot progress satisfactorily unless market barriers are lifted and a clear, reliable political and institutional frame of reference is provided. The European Union must take the necessary steps to establish this regulatory framework. The urgent need for such action is still greater given the fact that the European industry's biggest competitor, the United States industry, has achieved a much greater level of consolidation with the open and practical support of the Administration. The US industry's success in exporting arms to international markets is closely linked to the size of the American undertakings and their special relationship with government. The Commission Communication on the aerospace industry[1], which highlights the striking difference between the situations on either side of the Atlantic, calls for a reaction at Community level and contains some valuable suggestions on this matter which are equally applicable to other sections of the defence-related industry.

The Union accepted the need to adopt a strategy in this area as far back as the summer of 1995, when the Council established a working party on European arms policy with a mandate to put forward specific measures for areas within the Union's jurisdiction; these recommendations could be formulated as Community or CFSP measures. After two years of work, although the group has been unable to formulate any recommendations, it has made useful progress in defining the special characteristics of this sector and identifying areas in which action should be taken as a priority.

The Treaty of Amsterdam sets the course for the development of an armaments policy. Article J.7.1 stipulates that "The progressive framing of a common defence policy will be supported, as Member States consider appropriate, by cooperation between them in the field of armaments." The Declaration on Western European Union, which will be annexed to the Amsterdam Treaty and was adopted by the WEU Council of Ministers on 22 July 1997, provides for armaments cooperation between the EU and WEU "in the context of rationalisation of the European armaments market and the establishment of a European Armaments Agency."

The imminent establishment within the WEU of the Joint Organization for Armaments Cooperation (OCCAR), which will have important responsibilities in the management of joint armaments programmes, is an essential step towards setting up the European Armaments Agency. The latter body, which will have extensive responsibilities for all factors affecting the definition and organization of demand for armaments products, will facilitate the restructuring and consolidation of the European defence industry. Commission initiatives are also contributing to this process by helping to create a suitable environment for setting up the Agency sooner rather than later. In the interests of economic efficiency, the creation of a European market for defence products and the

[1] COM(97) 466.

establishment of the Agency should not be treated as unconnected. Complementary rules of operation should be developed for the market and the Agency so that a homogeneous overall framework can be established. The establishment of OCCAR and the preparation for setting up the European Armaments Agency must take full account of EU *acquis*. This, together with the development of a European armaments policy, means that more effective links will have to be established between Union institutions and the Western European Armaments Group (WEAG).

As far back as January 1996 the Commission presented a Communication on the challenges facing the European defence-related industry in which it outlined the action the Union should take. The strategy indicated in this document was approved by Parliament which, in June 1997 adopted a detailed resolution on EU initiatives. The Economic and Social Committee also approved the communication. The Commission has built up close links with the defence-related industry and through meetings and discussions with its representatives it has identified the most important areas in which action should be taken in the short and medium term.

It has to be said that since the Communication was adopted in January 1996 the situation of the defence industry has deteriorated still further. The warning then issued by the Commission did not trigger action at Community level. According to BICC (Bonn International Center for Conversion) data for 1997, employment in the defence-related industry fell by 13% between 1993 and 1995. US Arms Control & Disarmament Agency statistics show that in 1995 the value of European Union imports of defence-related products from the United States was six times the value of its exports in the same category; in 1990 the ratio was five to one; in 1985 four to one. In 1996, thanks to consolidation, the three biggest American defence undertakings achieved sales of more than $90 billion, while it took the eight biggest European undertakings to achieve a total of $60 billion in sales. These figures should be considered in the light of the fact that there is a single internal market for American companies which is considerably bigger than all the Member States' markets put together. Since 1990 the market for defence products has fallen significantly in the Member States because of the end of the Cold War. The United States, faced with a similar decline, reacted to the new situation by restructuring its defence-related industry. The European market is still too fragmented and the level of intracommunity trade in defence equipment is astoundingly low compared to total procurement by the Member States.

This downward trend in the industrial base is all the more worrying if one considers how it compromises the objectives formally adopted by the Member States. The Amsterdam Treaty, which was finalised at the Amsterdam European Council in June 1997 and signed on 2 October, provides for the first time (in the first subparagraph of Article J.7.1) that "the common foreign and security policy shall include all questions relating to the security of the Union, including the progressive framing of a common defence policy ... which might lead to a common defence, should the European Council so decide." The Atlantic Alliance, at its ministerial meeting in June 1996 and at the Madrid Summit in July 1997, stressed the emergence within the Alliance of a European security and defence identity and set out a number of guidelines to further this process. But there can be no European defence policy or identity without a healthy and competitive European technological and industrial base.

2. EUROPEAN UNION STRATEGY

The need to implement a European Union strategy to keep up with the major changes in the European defence-related industries is becoming more pressing every day. The most important undertakings in the sector and the association representing them at European level are calling for action by EU institutions. The defence-related industry and the context in which it operates are changing fast, although not so fast as its American counterpart. The factors driving this change are still at work. The Commission Communication on the European aerospace industry[2] stresses the importance of these changes in the United States and the need for drastic action in Europe. It is not possible for the aerospace industry of any single Member State alone to maintain adequate performance and competitiveness. It is vital to consolidate the industry's non-military and military activities at European level. The same applies other defence-related sectors. There, too, change within the industry must be accompanied by public measures at European level. The industry needs a reliable and transparent frame of political and legal reference and it needs it soon.

The Commission Communication of January 1996[3] gave rise to a widespread debate, a key product of which was the Parliament resolution adopted in May 1997 which strongly endorsed the Commission's ideas. The Council's working party on European armaments policy ("Polarm") has reviewed the positions of the Member States and found a number of points of convergence:

Firstly, the Union must maintain the industrial and technological base of its defence-related industry. This base, which increasingly involves dual-use products, is valuable for economic development and indispensable for a weapons capability. The reasons for maintaining it therefore relate to establishing a European defence identity and to competitiveness and jobs in crucial manufacturing sectors.

Secondly, the Union is one of the preferred frameworks for action in this area. It complements others such as the national frameworks and those of the defence organisations to which most Member States belong. The Community framework has proved its efficacy in setting up European markets for non-defence products; Union instruments can now also serve the same purpose for defence products. This kind of market would be of great benefit to the defence industry. The Union should therefore apply a combination of its legislative, non-legislative, first pillar and second pillar instruments.

Thirdly, the different strategies afforded by these instruments need to be combined because of the particular nature of the defence industry, namely that it is both a major means of production and essential to foreign and security policy. Any action by the European Union has to take this dual nature into account, if necessary by adapting the resources within the Community's jurisdiction.

[2] Presented in September 1997.

[3] COM (96) 10: The challenges facing the European defence-related industry, a contribution for action at European level

In conclusion: Action should be taken at once, without waiting for a new institutional context to be established, in areas in which it is urgently needed to protect the defence sector's technological and industrial base.

3. COMMISSION INITIATIVES

The Commission proposes a global approach to implementing EU strategy:

- **A proposal for a Common Position on drawing up a European armaments policy.** The Commission herewith sends to the Counci! a draft Common Position adopted under Article J.2 of the Treaty on European Union. This form of CFSP instrument has been used because of the foreign policy and defence dimensions of any European Union measures on arms. Following work done earlier by the Council, the Common Position proposed by the Commission sets out a number of principles and indicates where the first steps should be taken. The areas specifically covered by the proposal are intracommunity transfers, public procurement and common customs arrangements. The Council has already done work on them, specifically in connection with armaments. Furthermore, their advantage is that EU measures could be based on a substantial *acquis communautaire* in these areas. This proposal for a Common Position should open up the debate on the major issues relating to European armaments by directly involving policy-makers in the decision-making at the appropriate levels. It is intended to promote Member States' political commitment to the progressive establishment of a genuine European armaments policy.
- **An Action Plan for the defence-related industries.** The Commission has drawn up a list of areas in which it considers EU action necessary and specifies what measures should be taken at once to ensure progress towards a true European market for defence products. Some of these measures require legislation while others could be adopted under instruments already available to the Union. The Action Plan has been drafted for the attention of the EU institutions and the Member States, but also for the European defence industry. The Commission will take the necessary steps to develop more detailed versions of the measures outlined in the Plan.

In the Commission's view the Council should adopt a position on EU strategy on the defence-related industries as a matter of urgency. The proposed measures would provide a framework and a programme for initiatives at European level. The speed and scale of current change make it imperative for the Union to initiate practical action on this matter in 1998.

CONCLUSIONS

- *The Council is asked to adopt the proposal set out in Annex I.*
- *The Commission calls on the Council to take note of the Action Plan attached as Annex II. The Commission will take the appropriate initiatives following the procedures provided for by the Treaty in close collaboration with the relevant authorities in the Member States.*
- *The Commission calls on the European defence-related industries and other parties concerned to cooperate in the implementation of the Action Plan.*

ANNEX I

DRAFT COMMON POSITION

ON FRAMING A EUROPEAN ARMAMENTS POLICY

adopted on the basis of Article J.2 of the Treaty on European Union

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article J.2 thereof,

Whereas drawing up a European armaments policy based on the existence of a competitive technological and industrial base is an essential precondition for the development of a European defence identity within the framework of the Common Foreign and Security Policy;

Whereas specific measures, including measures on armaments, must be taken to follow up on the political commitment to the progressive framing of a defence identity which was reaffirmed by the Amsterdam European Council of 16 and 17 June 1997;

Whereas the Declaration by Western European Union on the role of WEU and its relations with the European Union, adopted on 22 July 1997, and in particular paragraph 7 thereof, provides for greater cooperation between these two organisations;

Whereas Community policies and instruments can make an important contribution to developing a European armaments policy;

Whereas the Commission Communications of January 1996 on the defence-related industries and of September 1997 on the European aerospace industry, which focus on the urgent need to restructure the industries at European level and promote synergy between military and non-military production and trade, demonstrate the necessity of taking action at European level, in particular through the Community;

Whereas it is necessary to protect the industrial and technological defence base and promote the competitiveness of the European industry;

Whereas the defence industry is an important source of employment in some regions;

Whereas the Council has named intracommunity transfers and public procurement as priority areas for EU action;

Whereas in is in the interests of the European Union and the Community that certain imports of arms and equipment for the European armed forces should benefit from exemption from customs duties and a list of equipments suitable for exemption from such duties is therefore needed;

Whereas, in accordance with Article 223(2) of the Treaty the Council has drawn up a list of products to which the provisions of Article 223(1)(b) apply,

HAS ADOPTED THIS COMMON POSITION:

Article 1

For the purposes of this Common Position account shall be taken of the specific features of the armaments sector as defined in the annexed document.

Article 2

The Council considers that developing an effective European armaments policy entails using CFSP and Community instruments.

Article 3

The Council notes that European armaments policy is linked to Community policies, in particular on industry, trade, customs, the regions, competition, innovation and research.

Article 4

The Council notes that the Commission has presented an Action Plan for the defence-related industries calling for the application of a number of Community instruments and that the Commission will take the appropriate initiatives to ensure that it is implemented. The Council declares its intention of using the Plan to further develop a European armaments policy.

Article 5

In accordance with Article M of the Treaty on European Union, the following measures will be adopted as soon as possible following the appropriate procedures:

1. *Movement of goods*

- a simplified system applicable to intracommunity transfers including export and re-export guarantees, and monitoring and surveillance mechanisms;
- binding principles, rules and mechanisms on transparency and non-discrimination in respect of procurement, taking current Community public procurement rules as a guiding principle.

2. *Customs*

The Council undertakes to draw up, before 31 December 1998, a list of products which could be exempt from the common customs tariff in the light of the defence needs of the Member States and the desirability of encouraging the development of a European armaments policy.

Taking account of this list Commission will, where appropriate, make appropriate proposals for exemptions based on the Treaty establishing the European Community.

Article 6

This Common Position shall be reviewed 18 months after its adoption.

Article 7

This Common Position shall enter into force on the day of its adoption.
This Common Position shall be published in the Official Journal of the European Communities.

Definition of specific characteristics of the defence-related sector

(Text drafted by the working party on European armaments policy and approved by the Coreper on 10 December 1996)

1. Any definition of the characteristics specific to the defence-related sector must begin with the current circumstances in which the sector finds itself. There are a number of political and economic factors which have specific relevance for this sector. On the political side, there is the impact of the end of the Cold War and the changes that have resulted in the international climate in which foreign, security and defence policy is formulated and conducted. There is also the development of the EU's Common Foreign and Security Policy (CFSP), which "shall include all questions related to the security of the Union, including the eventual framing of a common defence policy, which might in time lead to a common defence". The EU's Intergovernmental Conference is currently reviewing the CFSP provisions of the Treaty on European Union. At its meeting in Berlin in June 1996, the NATO Ministerial Council agreed to develop the European security and defence identity within NATO, and the WEU and NATO are currently working on the implementation of the inter-related aspects of the decisions taken in Berlin.

2. On the economic side, the domestic demand for European defence equipment has been falling since 1987 and the global arms market has practically halved in the last decade. This reduction in the national defence budgets of European countries has implications for the survival of an independent industrial and technological defence base. Employment in this sector has fallen by 37% since 1984 (from 1.6 million to 1 million). This has hit certain regions in particular and has implications for the manufacturing base and innovation capacity of European industry as a whole. The market remains fragmented - in the 1988-92 period, intra-European trade amounted to 3-4% of total procurement. The lack of competition and impossibility of fully exploiting economies of scale has worsened the competitive position of the European industry vis-à-vis the US since the 1980s. The consolidation of defence-related industry has advanced much more in the US than in Europe, due to, inter alia, less fragmented market conditions in the US, an insufficient degree of harmonisation of European operational requirements and the various security imperatives in Europe.

3. The specific characteristics of the armaments sector, which have been acknowledged since the foundation of the Community, are taken into account by the provisions of Article 223 of the Treaty.

4. The defence-related industry is a strategic industry, the products of which can be crucial to national defence. Unlike in other industries, where economic considerations are the determining factor, security and defence policy, to varying degrees, also dictates national armaments policy. Political, strategic and security considerations accordingly come into play in determining the conditions within which the industry operates and the demand for its products.

5. 90% of the production of EU defence equipment is concentrated in some Member States: France, UK, Germany, Italy and Sweden.

6. Since governments are the only customers, and in some cases a major owner of defence industries, the market differs from most other sectors of the economy. Also, relations between the government and defence-related companies differ considerably between Member States, for example the extent of State ownership, the extent of funding for R&D, etc. The role of governments explains many of the characteristics of this sector and has a major influence on the way it is built up and restructured. At the same time, the industry itself has a specific role and responsibilities in this regard.

The following considerations arise in the context of the role of governments :

- in the first place, the production and trade of armaments are subject to governmental authorisation ;
- secondly, governments being the sole customers, they are therefore alone in defining operational requirements and technical specifications. As sole customers, governments determine demand for the industry's products ;
- furthermore, long-term demand cannot be forecast with certainty, since it is dependent on the evolution of threats, which influences the assessment of needs and budget planning;
- in addition, the quality-price relationship is not the sole criterion which determines procurement policy. Offset (compensation), including industrial co-operation agreements, as well as strategic political, economic and security considerations can also be a factor ;
- finally, national defence interests require guaranteed sources of supply. The requirement for security of supply goes beyond the normal customer supplier relationship. In certain areas, some Member States consider an indigenous capability essential for their national interest. This should not, however, prevent governments from purchasing from an external supplier.

7. The long-term technological value of the industry is important. This includes the maintenance of both technological and industrial capabilities. Defence programmes can be spread out over 20-30 years, and, following lengthy development programmes, equipment can have an in-service life of as much as 30 years or more.

8. Confidentiality regarding sensitive military information is crucial to national interests. This can lead to constraints on competition and to relationships between customer and supplier which are more close-knit than usual.

9. Many products in the armament sector carry disproportionately high Research & Development costs. High standards are required, as technological advances are necessary to national defence. However, returns on this investment are uncertain. Mass production, which might offset high R+D costs, is rare in comparison with civil industry. The need for confidentiality can preclude the wide circulation of technological developments and the financial benefits of such a circulation. There will always be a need for one-off products, which it may be uneconomical to produce. Numbers of programmes are limited and R+D teams sometimes cannot be supported by purely commercial means during intervals between programmes. Commercial organisations driven by market-t forces could not be expected to make the necessary investment in R+D and government support could be therefore required.

10. Some defence-related technologies can have both civil aid military applications. However, there is an increasing synergy between civil and military technologies in some areas and the above characteristics of purely military programmes may not apply to all defence-related or dual-use domains.

11. The exports of this sector are subject to government authorisation. Arms export policies, including export control policies of Member States, differ. The European Council has adopted Common Criteria to be applied to arms exports.

Conclusions and recommendations

12. It was concluded that the analyses contained in this paper of characteristics specific to the defence-related sector is a useful contribution to the ongoing consideration of items on the agenda of the Ad Hoc Working Party on European Armaments Policy, and will be taken into account as appropriate, inter alia, in the deepening discussions on "the simplification of controls governing intra-EU transfers of armaments and other defence related products" and "procurement policy". It is recommended that in accordance with its mandate the Ad Hoc Working Party should keep the item "definition of characteristics specific to the defence-related sector" on its agenda, with a view to further developing its analyses in the light of future developments.

EUROPEAN COMMISSION

/Annex II

Action Plan for the defence-related industries

Action Plan for the defence-related industry

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I. INTRODUCTION

The Treaty on European Union as well as the new Amsterdam Treaty offer a context for action in the area of defence-related industries by calling for enhanced co-operation between the European Union and the Western European Union. For this co-operation, the European Commission could offer its experience and legal and administrative structures in support of this new relationship.

The necessary urgent restructuring of the defence industries in Europe, which are still nationally based, requires that a European dimension is provided to this industry and to the market, demand and supply sides, in which it operates.

As far as the demand side is concerned, the role of Member States, the WEU and other multilateral organisations is particularly important in areas such as the harmonisation in time and content of operational requirements and the creation of a European Armament Agency to run programmes with a European dimension.

As far as the supply side is concerned, intense discussions, during the recent months, between the Commission and industry have been useful in identifying industry's requirements to establish a strong, integrated and competitive European Defence Technological and Industrial Base.

This Action Plan takes into account the issues raised by industry that fall within the competence of the European Union. It will be implemented according to the Timetable provided in chapter VI.

Some of these actions were also drawn up together with a Common Position, under Article J.2 of the Common and Foreign Security Policy (CFSP).

II. DEFENCE INDUSTRY RESTRUCTURING

In response to declining demand and increasing competition a restructuring process has started among the European defence industries. So far the restructuring has mainly taken place on a national level, but the need to pursue these efforts at a European level is pressing.

The European industry must be allowed to carry out the necessary restructuring process, co-operate or merge activities where they are similar or complementary and improve its competitive position. Whilst industry must lead this process, the Member States and European Institutions and Organisations must strive to establish the necessary framework to allow for the proper functioning of the European defence-related equipment market. When creating this framework the European industry's position in the global arena must be taken into account.

III. THE EUROPEAN DEFENCE TECHNOLOGICAL AND INDUSTRIAL BASE

The defence technological and industrial base, including technological know-how, R&D facilities, a skilled work-force, manufacturing facilities and a marketing and export capacity, is a vital strategic asset for Europe and needs therefore to be consolidated and preserved. Some very important reasons for this are:

- It is a pre-requisite for the establishment of a genuine European Security and Defence Identity;
- It is a necessity for the preservation and the development of an important technological and industrial base which is of importance both for military and civil purposes;
- It is an important factor for employment, particularly in specific European regions, and for many SME's.

The situation as it is today, with European companies fragmented into too many and too small national suppliers, is no longer sustainable. The consequences of the present structure are for example:

- Costly research and development of similar technologies and systems by national suppliers;
- Too small batches of systems and therefore inadequate economies of scale.

IV. OBJECTIVES FOR AN ACTION PLAN

The main objectives of the Action Plan are therefore to establish the necessary conditions to:

- strengthen the competitiveness of the European defence industry;
- preserve the Defence Technological and Industrial Base;
- favour the integration of European Defence Technological and Industrial Base in the general economy to avoid duplication of efforts between the civil and the military areas;
- create the necessary preconditions for a European Security and Defence Identity.

V. ACTIONS

A timetable for the actions proposed below can be found in chapter VI. The timetable shows that the Commission will work in parallel with actions to be implemented in the short term and actions that will be implemented in the medium term.

V.1 Simplification of Intra-community transfers

National procedures relating to intra-Community transfers of defence related products are burdensome and time consuming. A simplification of these procedures could increase the competitiveness of the European defence industry and lighten the administrative tasks and reduce costs.

The simplification objective cannot be obtained without a significant commitment by Member States. It also supposes the establishment of confidence mechanisms between the Member States. The Commission will therefore propose to put in place a simplified licensing system applicable to the shipment of defence related products within the European Community. This system shall comprise guaranties for exports and re-exports as well as mechanisms for control and surveillance.

V.2 European Company Statute

The creation of a European Company Statute which would help the creation and management of companies with a European dimension will facilitate the necessary restructuring of this industry. The Commission will continue its efforts to create such a legal framework.

The report of the "Davignon Group" on the European Company Statute opens new perspectives for political agreement on employee involvement in the European Company in the months ahead. If this hurdle can be overcome it could lead the way to the adoption of the Statute as one of the priority measures foreseen in the Single Market Action Plan agreed at the Amsterdam European Council of the European Union. It is therefore important to obtain a favourable Council decision on this subject as soon as possible.

V.3 Public procurement

The concrete system of rules that will apply to procurement of defence equipment will impact substantially on the way a competitive Defence Technological and Industrial Base will be set up.

This framework should make provision for competitive tendering whenever feasible.

Furthermore, it must favour the maintenance and development of the fundamental industrial capabilities and key technologies at European level. In addition, these rules must guarantee the security of the necessary supply, while enabling a progressive elimination of over-capacity.

To this end, taking into account the need to build broad support in this matter, it is necessary to establish an appropriate set of principles, rules and mechanisms on procurement by the defence sector. In order to take into account the specificities of the defence sector, and in particular the need for confidentiality and security of supplies, an appropriate level of flexibility should be envisaged where necessary.

For this purpose, materials for the defence sector could be divided into three categories:

- Products intended for the armed forces but not for military use therefore not covered by Article 223 EC nor by Article 2 of the directive 93/36 (markets declared secret, protection of vital interests, national security, etc). As these products are already subject to the Community public procurement rules, the Commission will specify, where appropriate, in the most suitable form the conditions for the application of these rules;
- Products intended for the armed forces and for military use, but not constituting " highly sensitive defence equipments ". The Commission could work out a fairly flexible set of rules, while respecting the principles of transparency and non-discrimination, inspired by the existing Community public procurement rules;

- Highly sensitive equipments covered by the scope of Article 223 EC. These products could be exempted from the rules referred to above when safety or the protection of vital national interests of the country in question so require. A notification mechanism for this purpose should be foreseen in order to ensure a degree of control and transparency.

V.4 RTD (Research and Technological Development)

The level of research and development costs in relation to turnover is in general much higher in the military field than in the civil field. Technology plays a vital role for the competitiveness in these industries.

Increasing integration of civil and military research activities within company's is a reality in the United States, in particular in certain sectors of the defence-related industry such as aeronautics or space. The Commission, for example, highlighted this phenomenon in its analysis of the merger between Boeing and McDonnell Douglas.

It is therefore desirable that the European firms as well as Member States draw the conclusions from this development as regards the restructuring of these industries, the merging of research teams, and the impact of certain military purchases on the civil technological capacity.

The Community's Framework Programme for Research and Technological Development[4], is aimed solely at civil objectives. Some of the technological areas covered (e.g. materials, Information and Communication Technologies - ICT) have a multiple use dimension: the development of these technologies can contribute to the improvement of the defence technological base and the competitivness of this industry.

The Commission also considers that the complementarity between national and European research programmes should be reinforced to avoid a wasteful duplication of effort.

V.5 Standardisation

Setting up a European defence equipment market and consolidating Europe's defence industrial base will call for an effort to rationalise the sets of standards currently being used by the defence ministries of the Member States.

With increasing use being made of dual-use technologies in the military systems, the current trend is to make as much use as possible of civil standards.

The on-going replacement of military standards by civil standards in the US should be considered so as to avoid that the European industry finding itself at a disadvantage.

It is with the purpose of promoting the use of international industrial standards that the Commission is proposing to take into account the experience gathered in the field of standardisation by the Community.

[4] The Commission adopted, on 9 April 1997, its proposal for the Fifth Framework Programme (COM(97)142).

Therefore, the Commission will pursue the following actions:

- inviting the industrial circles concerned to get together to draw up a work programme for identifying a homogeneous system of standards for defence equipment programmes;
- assessing different ways and means of setting up a system of regular exchange of information between NATO and the European standardisation bodies, so as to reduce as far as possible the risk of duplication of efforts in the future;
- providing support at Community level to the standardisation organisations concerned that have agreed on the need to act. For this support, careful consideration will be devoted to taking account of the particular characteristics of the industrial sectors concerned (aeronautics, space, electronics, mechanics...) and the "defence" specificity of the topics covered.

V.6 Customs duties

Common tariffs for imported products is a basic principle of the Customs Union and the Single Market.

Article 28 of the Treaty therefore constitutes the only permissible legal basis for granting autonomous suspensions. In this respect, the existence of differing national approaches for tariff arrangements for imports of military or dual-use equipment generates unequal treatment of operators and for this reason common rules on the tariff arrangements for such equipment need to be established.

Therefore:

- legislative initiatives should be taken to harmonise tariff arrangements with a view to achieve equal treatment of operators throughout the Community;
- the Commission proposal from 1988, for temporary suspension of import duties on certain weapons and military equipments, should be reviewed and adopted;

V.7 Innovation, transfer of technology and SME's

In the Commission's Green Paper on Innovation dated December 1995 the potential for civilian use of defence technologies is acknowledged. General policies to promote technology transfer can facilitate the civilian exploitation of defence technologies; and should also involve SMEs because of their interest and role in this process.

In this context, the Commission will support initiatives for the purpose of disseminating ideas, technologies and best practices. In particular, the Commission will continue to support the following activities:

- the organisation of partnering events between suppliers (e.g. INTERPRISE) and between suppliers and research institutes;
- the organisation of partnering events between main contractors and suppliers (e.g. IBEX).

V.8 Competition policy

The emergence of a Community market for the defence industry, resulting from common programmes, from necessary restructuring and European alliances, and from common rules on public procurement requires that the Community's competition policy examines in an appropriate way all competition issues within the defence industry.

The process of restructuring the European industry, in particular the defence industry and related industries, has given rise and will continue to give rise to an increasing number of mergers and co-operations between companies within the European Union. Such a development must be welcomed as being in line with the requirements of dynamic competition and capable of increasing the competitiveness of the European industry, in particular the defence industry, insofar as it does not result in lasting damage to competition. This is why Community competition policy and in particular the Community Merger Control Regulation provides for a clear framework and quick decisions, so as to facilitate those concentrations and co-operations between companies which do not call into question effective competition. Moreover, Community control of State aids in all industrial sectors, including those of the defence sector, makes it possible to distinguish between those aids necessary for restructuring - to the extent they accelerate change, encourage research, development and innovation and reduce the social consequences of reorganisation - and for the preservation of adequate security of supply, and those aids granted for by Member States for the mere protection of their national companies which do not promote the overall competitiveness of the sector.

In this respect, it is important to recognise the specificity of the defence-related industry in the application of Community competition policy, in particular as regards the geographical scope of the market. Whilst this scope may be kept limited by public procurement rules and administrative procedures, competition may increasingly take place for certain products, at European or even world wide scale. In this context, the Commission will take into account the manner in which, in particular, governments of third countries which produce armaments formulate and apply competition law to their own industry.

V.9 Exports

Dual-use goods and technologies

A common regime for dual-use exports controls was adopted by the Council in December 1994, on a proposal from the Commission. It is based on two legal instruments, an article 113 Regulation (No 3381/94) and a Joint Action under the Common Foreign and Security Policy (94/942/CFSP) which together form an integrated system. This regime reflects the international arrangements to prevent proliferation of weapons of mass destruction.

For dual-use goods, industry and administrations are invited to provide evidence if they face disadvantages under European export control compared to US and Japanese controls. The Commission will work to balance the situation and create a level playing field in this area if such a need exists.

The Commission will draw a report on the application of the Dual-use regulation and possible proposals to strengthen and improve the current system particularly taking into account the ruling of the European Court of Justice in cases C-70/94 and C-83/94 that states that dual-use goods fall within the scope of the common commercial policy defined by Article 113.

Conventional armaments

Increasing industrial co-operation in the form of transnational co-operations and mergers is necessary to achieve an efficient industry structure. It is therefore urgent to eliminate limits to such co-operations arising from differing export policies.

In this respect it should be recalled that political guidelines already exist, notably in the form of 8 criteria adopted by the European Councils in Luxembourg (June 1991) and Lisbon (June 1992) to guide Member States in their decisions concerning arms exports.

Given the difficulties in developing a common basis for harmonisation of arms export policies, a gradual process should be pursued. First, the exchange of information on the application of the 8 criteria within the Council should be intensified.

Secondly, the adoption by Member States in the EU framework of a code of conduct concerning arms exports, which the incoming UK Presidency has indicated to be a priority, would be an important development.

The resolution adopted by the European Parliament in may 1997 in support of the Commission communication on defence industry invites the Commission to present a White Paper on the subject of arms export policy. The Commission intends to prepare such a White Paper formulating possible options for progress toward a common arms export policy, which could contribute to the establishment of an effective code of conduct.

In the case of co-operation programmes further progress could be achieved on the basis of some experiences, namely by following the principle whereby will apply the export rules of the country where the prime contractor is established or where the final assembly and the physical export takes place.

V.10 Structural funds

In Agenda 2000, (EU-Bulletin Supplement 5/97) the Commission proposes a reform for the Structural Funds in the light of the new financial perspective (period 2000-2006):

Three Objectives are foreseen under the new Structural Funds framework. In addition to Objective 1 which concerns the development and structural adjustment of regions lagging behind, a redefined Objective 2 will be created for other regions with structural problems. These are areas undergoing economic change (in industry or services), declining rural areas, crisis-hit areas dependent on the fishing industry or urban areas in difficulty. A limited number of significant areas should be identified in order to facilitate an integrated strategy for economic diversification. Objective 3 will concern the strategy for human resources outside these regions.

In Agenda 2000, the Commission does not foresee the continuation of a number of specific Community initiatives, including the one related to the reconversion of areas dependent on the defence, since these objectives could already be integrated in the aforementioned programmes as such.

Possible needs for diversification and conversion within the defence-related industry will therefore have to be properly considered when considering the new programmes for the next programming period. The new programmes supporting Objective 2 regions should focus on economic reconversion and diversification, including in regions heavily dependent on a single declining economic sector. For this reason specific attention should be given to SME's and innovation, professional education, local development, environmental protection and the fight against social exclusion. In this context, regional reconversion linked to the defence industry may also be the subject of actions aimed at the economic and social reconversion of regions covered by Objective 2. A similar approach may be followed in the regions covered by Objective 1. Further, Objective 3 could possibly contribute in the context of the adaptation of workers to industrial change.

V.11 Taxation

Indirect taxation

In July 1996 the Commission published its suggested programme for a "common system" of VAT for the European Community (EC), COM 328(96) Final. To achieve this, the new system's essential characteristics must ensure that:

- No distinction shall be made between domestic and intra-EC transactions;
- All transactions shall be taxed in the EC on the basis of the origin principle, and;
- A new mechanism to decide the place of supply of goods and services needs to be established;
- The VAT rates shall be simplified.

The Commission believes that the new system will benefit also to the defence industry. The Commission will in parallel secure a fuller implementation of the eighth directive.

Direct taxation

As part of its new global approach to taxation, the Commission adopted in November 1997 a Communication outlining a tax package on which it invited Member states to reach a political agreement. Part of this package is a request to Member states to make a political commitment to work towards the early adoption of a Directive to eliminate withholding taxes on interest and royalty payments between companies. Such a directive would eliminate an important barrier to transfers of capital and technology between companies, as these withholding taxes create obstacles for economic operators: they can involve time consuming formalities, result in cash flow losses, and sometimes lead to double taxation.

The Commission's new proposal for a directive on interest and royalties can be expected in early 1998.

V.12 Principles for market access

Based on principles of comparable and effective access to markets, the Community should seek to remove obstacles to European exporters, including Customs duties.

In the case of the US (with which the EU trade balance is in the ratio of 1 to 6) the issue might be raised , if European and American industries so decide, in the Transatlantic Business Dialogue or in the context of the New Transatlantic Agenda (the chapter on the new Transatlantic Marketplace).

V.13 Benchmarking

In line with the Commission's industrial policy to promote benchmarking as a tool for increasing the competitiveness of European industry and spreading best practice, the Commission will consult industry and other relevant actors for a benchmarking exercise in certain areas of interest to the competitiveness of defence-related industries. Such an exercise could for example look at issues such as best practice for the utilisation of synergies between civil and military information technologies, best practice for the integration of civil and military standards or best practice concerning multilateral projects.

V.14 Enlargement

The Commission will launch a study in order to better assess the situation of defence industries in the CEEC. The outcome of this study together with other relevant informations should be used as a basis for further analysing and reflecting upon the following topics:

- the potential of the defence and industrial base of Central and Eastern European countries and its impact on European industry.
- the relevance for and the best ways of promoting industrial co-operation.

VI. TIMETABLE FOR MAJOR ACTIONS PRESENTED IN THE ACTION PLAN (SUMMARY)

Area	Action	Timing
V.1 Intra-Community transfers	The Commission shall propose a simplified licensing regime	1998
V.2 European Company Statute	Council decision	1998
V.3 Public procurement	Proposal of rules for procurement in the defence sector	1998-1999
V.4 RTD	Establishment of complementarity between national and European research programmes	1998-1999
V.5 Standardisation	Finalisation of study. Draw up a work programme to identify homogeneous system of standards for defence equipment programming.	Second semester 1998 End 1998
V.6 Customs duties	Commission propose legislative initiatives to harmonise tariff arrangements within the Community Review and adopt Commission proposal from 1988 on temporary suspensions on import duties	End 1998 End 1998
V.7 Innovation, transfer of technology and SME's	Continue to support initiatives such as : INTERPRISE, IBEX	Ongoing
V.8 Competition policy	Take into account specificities of the defence-related industry in Competition assessments	Ongoing
V.9 Exports – Dual-use goods and technologies – Conventional armaments	– Report on the application of the Dual-use regulation – White paper – Proposal for a code of conduct	First semester 1998 First semester 1998 In accordance with White Paper
V.10 Structural funds	– Proposal for a general reform of cohesion policy according to Agenda 2000 – Negotiation of these proposals in the Council and in Parliament as well as consultation of the other institutions and bodies – Implementation of the new regulation/framework	First semester 1998 2nd semester 1998 Between end of 1998 to end of 1999
V.11 Indirect Taxation Direct Taxation	Pursue Council discussions Propose directive on interest and royalties	Ongoing Early 1998
V.12 Principles for market access	Issue to be raised in the context of the the TABD if EU and US industries so decide or in the New Transatlantic Agenda	During 1998-1999
V.13 Benchmarking	The Commission will consult industry and other relevant actors on a benchmarking exercise in the defence-related industry.	1998-2000
V.14 Enlargement	– Finalisation of Study – Industrial impact assessment	End 1998 1998-2000

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

EUROPEAN DEFENCE - INDUSTRIAL AND MARKET ISSUES

Towards an EU Defence Equipment Policy

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EXECUTIVE SUMMARY

In 1996 and 1997 the Commission produced two Communications to encourage industrial restructuring and greater efficiency in the European Defence Equipment Market. Some of these ideas came to fruition. But Member States did not act in a number of essential areas – feeling, perhaps, that the proposals were before their time. Following a period of transformation in this sector and in the institutional framework of the EU, including the beginnings of a real European Security and Defence Policy (ESDP) the European Parliament, in a Resolution of 10 April 2002, invited the Commission to present a new Communication.

These issues have been brought into sharper focus by the Convention on the future of Europe. A working group on defence has made substantive recommendations which will be the subject of further work over the coming months.

Strengthening the industrial and market situation of European defence companies will greatly improve the EU's ability to fulfil the Petersberg tasks in the accomplishment of ESDP. It will also benefit collective defence by strengthening Europe's contribution to NATO.

Whatever the long-term prospects for a full common European defence equipment policy, the Commission is determined to make progress at once wherever this may be possible. The present Communication therefore proposes action in the following fields:

- Standardisation: Stakeholders recognise the need for harmonised European approach to defence standardisation. The Commission is working on this issue with CEN to assist co-operation between Ministries of Defence and industry to develop, by the end of 2004, a handbook cataloguing standards commonly used for defence procurement.

- Monitoring of defence related industries: Stakeholders need a clearer picture of the defence industrial and economical landscape in Europe. To achieve this, the Communication proposes to launch a monitoring activity on defence-related industries.

- Intra-community transfers: It has long been argued that a simplified European licence system could help to reduce the heavy administrative procedures, which impede the circulation of components of defence equipment between EU countries. The Commission proposes to launch an impact assessment study in 2003 and, depending on its results, start elaborating at the end of 2004 the appropriate legal instrument.

- Competition: Competition improves market efficiency and protects innovation. Consequently, and without excluding the possibility of exceptions consistent with the Treaty, the Commission intends to continue its reflection on the application of competition rules in the defence sector.

- Procurement rules: Harmonised procurement rules for defence equipment would also increase market efficiency. On this basis, a reflection on how to optimise defence procurement at national and EU levels should be initiated in the EU. The end goal would be to have a single set of rules for procuring defence equipment in Europe. There have been several important Court judgements in recent years that are relevant to this work - especially in helping to define the scope of Article 296. The

Commission will issue an Interpretative Communication by the end of 2003 on the implications of these judgements. In parallel, it will work on a Green Paper which might be issued in 2004 as a basis for discussion with stakeholders.

- Export control of dual use goods: International export control regimes exist – but in most cases, the EC is not a member. The consequence is that Member States often adopt uncoordinated positions, which may unnecessarily limit export opportunities for EU civil industries and may affect the functioning of the internal market after enlargement. The Communication proposes to raise this issue in relevant Council bodies.

- Research: The Communication proposes to consult Member States and industry in 2003 to identify common needs and to establish a security-related research agenda. In this respect, the Commission intends to launch a pilot project.

The Commission has followed the debate on a possible EU Defence Equipment Framework overseen by an Agency (or Agencies). Such a framework could help to co-ordinate national collaborative programmes and provide a basis for drawing in Member States, which are not presently engaged. Until now, Member States have chosen to conduct most of this work outside the EC Treaty, but there may also be a place for certain Community instruments and mechanisms.

INTRODUCTION

In 1996 and 1997 the European Commission produced two Communications[1] on defence-related industries to encourage restructuring and the setting up of an efficient European defence equipment market. Concrete proposals and actions followed with respect to some of these issues. However, as regards the most essential reforms, Member states considered action on the European level premature.

Following a period of considerable change in the industrial armaments sector and in the institutional framework of the EU, including developments in ESDP, the European Parliament, in a Resolution of 10 April 2002, invited the Commission to address the issue of armaments in a new Communication.

In autumn 2002 the Convention on the Future of Europe set up a working group on defence chaired by the European Commissioner, Michel Barnier. The working party's report[2] stressed that the credibility of European defence policy depends on the existence and development of a European capacity and a strengthening of the industrial and technological base of the defence sector.

Taken together, EU Member States spend less than half of what the U.S. spends on defence[3]. The total US budget comes to an annual $390 billion, compared to a cumulative budget of €160 billion for EU Member States together. For many years, defence investment in Europe has been significantly smaller than in the USA in procurement (€40bn per annum in Europe compared to $100bn in USA) and in research (€10bn in Europe compared to $50bn in USA). But apart from absolute levels of spending which are necessarily a function of their respective objectives, Europe yield much less in terms of operational capabilities. The real military capability of EU Member States is estimated at about 10 per cent of that in the US[4]. This issue has repercussions for the transatlantic relationship. A reinforced European defence and technological industrial base can provide an important contribution to collective security in the context of NATO and other partnerships. Taxpayers should get the most out of the investment they make in security. There is ample evidence that this is not the case at present and that a European defence equipment market would bring significant savings in costs. It is crucial for both civil and defence sectors of the economy that we create an environment in which European companies can give better value for money. That is why the Commission wishes to set the questions of arms trade and production in their industrial context. The scope of concern encompasses all industrial activity in Europe related to components, which may end up in civil and/or military products.

Cost efficiency of defence spending, the maintenance of a competitive defence and technological industrial base, better access for EU manufactured goods to third markets, ethics and fairness in the arms trade, security of supply, and also the need to respect Member States prerogatives in this sensitive area are all important considerations when defining an EU armaments[5] policy.

[1] COM(96)10 and COM(97)583.

[2] Final report of working group 8 on Defence: CONV461/02 dated 16 December 2002.

[3] Regardless of the increase in the US defence budget from 2003 totalling some 100 billion $ over a three year period.

[4] Cf. European Parliament Resolution of 10 April 2002.

[5] For the purpose of this Communication synonymous with defence equipment policy.

On the military side, the efficiency of multinational corps such as Eurocorps, Eurofor, and Euromarfor requires the highest degree of interoperability of their armaments. To achieve this in a cost-effective way, the solution would be to equip the national units that make up these forces increasingly with the same equipment.

On the industrial side, the survival of a European defence industrial base able to support the ESDP will depend on successful national and trans-European consolidation of the industry as well as transatlantic partnerships between companies. The currently fragmented legal and regulatory framework places limits on the adjustment capabilities of companies or pushes them towards strategies and alliances which put the Union in a disadvantageous position. Failure to safeguard a competitive defence industrial base, and the loss of autonomous design and innovation capabilities, limits available choice and is bound to lead in the long run to higher procurement costs.

For all these reasons, there is a strong case for a more co-ordinated EU defence equipment policy. Just as the ESDP complements, national defence policies and NATO, an EU Defence Equipment Policy would complement corresponding national policies.

One key contribution that the Commission can make in this field is in seeking to improve the quality of the EU regulatory framework governing the treatment of armaments in Europe. This is the purpose of the present communication.

European defence industries compete on a global market. The Commission acknowledges the need to address at a later stage some particular issues such as the improvement of the functioning of the existing Code of Conduct on Arms and wider opening of third country markets to European defence products.

1. RECENT DEVELOPMENTS STRENGTHEN THE CASE FOR A EUROPEAN DEFENCE EQUIPEMENT POLICY

1.1 Recent developments inside and outside the EU

The 1999 European Councils of Cologne and Helsinki gave new impetus to European security and defence policy through the definition of a headline goal to be achieved by 2003; and with the creation of new EU structures such as the Political and Security Committee, the EU Military Committee and the EU Military Staff. The European Capability Action Plan (ECAP), which seeks to fill EU capability shortfalls, is likely to include off-the-shelf procurement and collaborative programmes as well as defence research and technology measures.

A close co-operation is being established with NATO to enable the EU to have assured access to NATO planning assets for ESDP operations. Extensive consultations are taking place in this context in order to ensure maximum compatibility of EU and NATO concepts for this purpose.

Meanwhile, outside the EU institutional framework there has been further substantial restructuring of defence-related industries. Companies – faced by ever-stronger competition, notably from the US – are crying out for a more open and efficient market to improve the competitiveness of the European defence technological and industrial base. Groups of Member States have responded to the new challenges by entering into ad hoc agreements such as the Letter of Intent (LoI)[6] and its Framework Agreement which aim to facilitate industrial restructuring; and the “Joint Armaments co-operation organisation” known as OCCAr (*Organisme Conjoint de Coopération en matière d’Armement*)[7], which aims to improve the management of co-operative armament programmes.

These various initiatives in the field of European armaments trade and production need to be underpinned by a more coherent overall framework in order to bring more legal certainty and attract participation by a larger number of Member States.

The recent adoption of Council regulation (EC) No 150/2003[8] suspending import duties on certain weapons and military equipment constitutes a step forward towards setting up a European Defence Market.

These objectives have been brought into even sharper focus by the Convention on the future of Europe. One of its working groups had a fundamental debate on defence, and made substantive recommendations[9] which will be the subject of further scrutiny and debate in the course of the Convention’s deliberations over the coming months.

1.2 European Armaments and industrial policies

There is an intrinsic unity of purpose in the European Union’s internal policy, including the Lisbon targets, and external goals to which all policies and instruments must contribute. The Commission considers that the dynamism of industry is essential for Europe to be able to sustain and increase its prosperity while meeting its wider social, environmental and international ambitions[10]. One of the aims of its Communication of 11 December 2002 on Industrial Policy in an Enlarged Europe is to place industry back on the policy agenda. A key message is that Industrial 7Policy, while being horizontal in nature, needs to take into account the specific characteristics and needs of every individual sector. In that context, the STAR 21 report published in July 2002 contained an in-depth analysis of the situation and challenges facing Europe’s aerospace sector with particular emphasis on the need to address the defence dimension. A similar exercise concerning maritime industries (LeaderSHIP 2015) was launched in January 2003.

In that spirit and with a view to the Spring European Council on 21 March 2003, proposals were made by the Commission and also by Member States on structural reform and modernisation in Europe with a view to strengthening economic competitiveness and guaranteeing employment opportunities for all. *Inter alia*, measures were proposed to lift barriers regarding market and competition conditions, to rapidly conclude legislation on the internal market which is currently being reviewed, with a view to obtaining results that truly open up the markets, to enhance research results and to establish clearer links between research institutes and business creation.

[6] The Letter of Intent and its Framework Agreement include six countries namely: France, Germany, Italy, Spain, Sweden, and the United Kingdom. Its aims at facilitating the industrial restructuring process.

[7] The OCCAr includes four countries, namely: France, Germany, Italy, and the United Kingdom. This international organisation aims at improving the management of co-operative programs.

[8] A Council Regulation on the basis of Art. 26 TEC was adopted in January 2003 suspending import duties on certain weapons and military equipment OJ n° L25 of 30.1.2003, p. 1.

[9] Final report of Working Group VIII - Defence of 16 December 2002; CONV 461/02

[10] COM (2002) 714 on Industrial Policy in an Enlarged Europe dated 11 December 2002.

Failure to enhance the contribution of Community policies, especially on trade, development, internal market, research, and competition policy will result in sub-optimal solutions in terms of the effectiveness of the ESDP. In turn failure to develop a European dimension to the defence equipment market, and to invest in research, is certain to have a negative effect on the competitiveness of high technology enterprises. Knowledge and innovation are essential elements in enabling those enterprises to compete and to co-operate on an equal footing with international competitors such as U.S. companies which themselves enjoy a far higher level of backing of their governments.

Although some EU companies are world-class innovators, a low share of European patent and R&D activity vis-à-vis the EU's main competitors means that, overall, Europe's innovative performance remains too weak. These facts lie behind the less encouraging competitiveness performance of the EU in some of the highest value added segments of the economy. Different measures of comparative advantage reveal that the EU tends to specialise in medium-high technology and mature capital-intensive industries. If it is essential to keep the strengths in these sectors, which represent a higher share of total output and employment, the EU should seek to improve its position in enabling technologies such as ICT, electronics, biotechnology or nano-technology, where it often lags behind its main competitors. Technology-driven industries are not only a source of knowledge and technological spill over throughout the economy, they are also the ones which exhibit greater productivity growth. The European industry's relative weakness in these fields as well as their low share in the economy weigh on the overall growth and productivity performance of the EU.

The reality is that a major contribution to security and defence systems now comes from industries and SMEs developing their products and services primarily for civil applications.

The defence-related industries could benefit from the approach proposed in the EU industrial policy communication.

1.3 European armaments policy and the Treaty provisions

Questions of trade and production of armaments lie at the intersection of defence and industrial policies. In the past, it has proved difficult to reconcile industrial and defence imperatives. The European armaments industry has suffered as a consequence. A more appropriate framework needs to be defined..

Over the years wide application of Art. 296 ECT [11] has led to fragmentation of markets and industries at national level. However, it should be possible to improve the situation within the provision of the current Treaties. With sufficient will, it should be possible to frame a common set of rules on defence equipment, which will take due account of the specificities of armaments thereby progressively limiting recourse to Article 296. Some of the rules required

[11] TEC article 296 :
1. The provisions of this Treaty shall not preclude the application of the following rules:
(a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;
(b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.
2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.

may either fall under pillar one (the EC treaty) or pillar two (Common Foreign and Security Policy) of the EU treaty[12].

2. Objectives of a European Defence equipement Policy

Armament policy issues[13] can be conveniently grouped under four headings:

(1) Defence equipment demand: harmonisation of the military and other security-related requirements as well as the planning and procurement of defence-related equipment.

(2) Defence equipment supply: completion of the industrial consolidation process (primarily the responsibility of industries themselves); supportive policies and actions by the Commission and Member States towards the creation and maintenance of a competitive industrial structure in Europe.

(3) Defence equipment market: an appropriate regulatory framework addressing internal and external aspects; appropriate rules for cost-efficient procurement of goods and services both by member states defence procurement Agencies and by any future European Agency(ies); and economically efficient export controls. All this needs to be developed while preserving ethical standards and promoting reciprocal market access.

(4) Research: co-operation and coherence of defence-related research at European level; exploitation of civil-military synergies.

Community action is most likely to be able to add value in the third and fourth areas above.

[12] TEU Article 17
1. The common foreign and security policy shall include all questions relating to the security of the Union, including the progressive framing of a common defence policy, which might lead to a common defence, should the European Council so decide. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.
The policy of the Union in accordance with this Article shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.
The progressive framing of a common defence policy will be supported, as Member States consider appropriate, by co-operation between them in the field of armaments.
2. Questions referred to in this Article shall include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking.
3. Decisions having defence implications dealt with under this Article shall be taken without prejudice to the policies and obligations referred to in paragraph 1, second subparagraph.
4. The provisions of this Article shall not prevent the development of closer co-operation between two or more Member States on a bilateral level, in the framework of the Western European Union (WEU) and NATO, provided such co-operation does not run counter to or impede that provided for in this title.
5. With a view to furthering the objectives of this Article, the provisions of this Article will be reviewed in accordance with Article 48.

[13] These were already addressed in the Commission's 1997 Communication on armaments which findings and recommendations are still valid.

2.1 Defence equipment demand

New common security risks will increasingly be dealt with by multinational coalitions, requiring interoperability between national forces.

In the ESDP context, in consistency with NATO, there is also an urgent need to enhance the harmonisation of defence equipment requirements. To be beneficial in economic terms, this should be translated into common defence equipment programmes with common technical characteristics and seamless procurement schedules. The number of defence equipment programmes and subsequent procurements that could be undertaken jointly by the largest possible number of Member States should be increased.

That process should help to deliver economies of scale in production and savings from increased bargaining power in acquisition leading to reduced costs, in addition to the advantages which arise from increased interoperability. More predictability and consistency at European level on planning and acquisition would enable industry to anticipate and better adjust its production capability.

Given the long lifetime of defence equipment, harmonisation of the planning and procurement of equipment will also depend on an improvement in the current European Capabilities Action Plan (ECAP) which should help to bring a longer-term perspective.

Overall guidance, monitoring of progress and matching financing methods to ECAP proposals will require the active involvement of both the European Council and Defence Ministers in order to maintain impetus and to provide the necessary political authority to ensure rapid decisions.

2.2 Defence equipment supply

As noted above, there has been steady consolidation in defence-related industries in recent years. This is especially so in aerospace which, in the course of its rationalisation, has reinforced its European dimension. There have not yet been comparable levels of rationalisation of land-based systems and naval shipyards. Major consolidation in these sectors is now required in order to maintain Europe’s capacity in areas, where Europe has traditionally been strong and technologically advanced.

Enlargement will bring special challenges in that the defence industries in the new Member States are for the most part loss-making. Restructuring and rationalisation are necessary to bring them to viability. This process could be facilitated by social and regional policies using the Community Structural Funds in accordance with existing modalities.

The need to share the huge development costs of new systems, and to gain insight into essential technologies, has driven European and American firms into partnerships, such as the Lockheed Martin-led Joint Strike Fighter, now renamed F-35: the biggest defence programme in history, worth $200bn over the next 30 years. It is a programme that is likely to dominate defence industrial relations across the Atlantic for many years to come. The project offers participating countries the prospect of work for their local industry in advanced aerospace technology. Four EU member states have signed up to participate in the programme and committed around €4bn to it. The Pentagon has ordered 2900 aircraft. To illustrate the gap in transatlantic purchasing power, the largest European order amounts to only 150 aircraft.

However, in the meantime, three fighter jets are currently produced in Europe: the Eurofighter, which is a joint venture between Germany, Italy, Spain and the UK; the French Rafale; and the Swedish-British Gripen.

Such European projects do have certain advantages. They can also enter service more quickly than the F-35, as Rafale and Gripen are already in service, and Eurofighter is scheduled to arrive in 2003.

Such choices on key defence equipment programmes may have negative industrial policy consequences regarding the ability of Europe to sustain a competitive and indigenous fighter jet industry. This is likely to have an impact on civil business and commercial transport aircraft industries.

The results for European firms are very variable. Non-US firms are generally treated less favourably when they seek to supply or partner US firms in supplying to US procurement agencies. Firms from Europe also have to adopt special local arrangements in order to observe rules on ownership of defence firms in the United States. And even where European firms, or in some cases their governments, have invested heavily in new weapons systems to be developed in the US, their level of access to the key design and development phases is rarely satisfactory. In addition to the potential loss of the ability to keep companies with prime contracting status within the EU, the future of thousands of SMEs' throughout Europe which are directly or indirectly linked to these contractors will be adversely affected.

There is a danger that European industry could be reduced to the status of sub-supplier to prime US contractors, while the key know-how is reserved for US firms.

Decisions on restructuring in Europe will be taken in the first place by firms themselves as a function of market realities, including the interests of their shareholders. But there are limits to what companies alone can deliver in terms of further efficiency as long as the framework in which they operate remains unchanged. The interests of security of supply mean that Member States individually and collectively have a clear interest in a competitive industrial structure for the needs of national armed services and ESDP. Public interest also requires us to take account of the important spin off effects in terms of civil applications of these high tech industries.

2.3. Regulating the EU defence equipment market

European defence-related industries are currently at a critical stage in their development, and decisions taken now can be expected to determine their future prospects and strengths for decades to come. A further complication is that many of the same companies are involved in producing for both the civil and defence markets, which are governed by two separate regulatory frameworks.

It is vital to reduce the handicap of European companies vis-à-vis their competitors, in particular from the US, arising from the fact that the regulations governing defence-related activities are not homogeneous at EU level but fragmented at national level. As regards market access outside the EU, the fact that problems are normally dealt with at the level of individual Member States means an important loss of negotiating strength. The collective inability of European firms and their governments fully to exploit the weight of the Union, which comes from acting together, can only be to the detriment of European industry.

To overcome these problems Member States should aim to create a genuine European Defence Equipment Market. This would be in line with the objective already set by Member States which are members of Western European Armaments Group – WEAG[14.] In practice, the absence of binding commitments has weakened the achievement of this objective. That deficiency could be remedied by an EU framework of rules bringing legal certainty and uniform implementation of legislation. Such a framework could also pave the way for the involvement of a larger number of Member States.

2.4. Research

European Armament Organisation (WEAO)[15] has any responsibility for managing cooperative defence-related research programmes but it handles only 2.5% of European investment in this area. Neither OCCAR or the LoI cover research at present.

European countries invest four to five times less than the US, and this gap is accentuated by the and fragmentation and compartmentalisation of European research. This allows the Americans to impose quality standards that Europeans often find hard to meet because of the failure to invest in certain key technologies.

In Europe there is a fairly strict divide between civil and military research. Technology transfers from the civilian sector to the defence sector remain low while there are significant transfer from European defence research to civilian activities. We need to multiply such synergies by creating a snowball effect that will strengthen European industrial competitiveness and help achieve the goal laid down by the Barcelona European Council of March 2002, namely 3% of GDP devoted to financing research by 2010.[16]

Defence-related research plays a major role in innovation in the US; it benefits the whole of industry, including the civilian sector. This interpenetration of defence and civilian research has benefited both the American arms industry and civilian users in terms of market access and costs. Note that the US military's procurement of advanced technology, whereby it shoulders the risk and the costs of demonstration and depreciation, has also benefited American suppliers and facilitated the integration of such technologies into civilian applications: the internet, the "Windows-icons-pointer" interface, the RISC microprocessor (found today in mobile telephones) and GPS (Global Positioning System) are all systems that were originally financed by American military research, notably through DARPA (Defence Advanced Research Project Agency).

3. Proposals for Action

Developing an EU defence equipment policy will be a long-term process involving many different stakeholders. The present Communication focuses on a number of specific measures, which the Commission believes can make a contribution to achieving broader EU objectives. The proposed measures are intended to encourage industrial restructuring and consolidation,

[14] Their Defence Ministers have already approved a set of principles laid down in the Coherent Policy Document (CPD) in 1990 and in an updated CPD in 1999 aimed at making their armaments activities WEAG-wide.

[15] The WEAO has 19 members (European members of NATO): Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, Turkey, United Kingdom. The Netherlands took over the chair on 1 January 2003 for two years.

[16] COM(2002) 499 final.

to promote the establishment of a European defence equipment market and to enhance competitiveness of the European industry, and to achieve broader socio-economic objectives.

3.1 Towards a European defence equipment market.

3.1.1. Standardisation

While work on standardisation of defence equipment is largely a technical matter, it is an important precondition for the opening-up of national markets and the gradual establishment of a single European market. Both manufacturers and public authorities (Ministries of Defence) will benefit from a common reference regarding standards elaborated in consistency with NATO works. It will help to enhance cost efficiency and interoperability. That necessity has been recognised by all those stakeholders who are participating on a voluntary basis in the development of a “Defence Standardisation Handbook”. It will contain references to standards and standard-like specifications commonly used to support defence procurement contracts as well as guidelines on the optimum selection of such standards.

The action currently under way with the participation of the MoDs and industry and with the assistance of CEN is funded under the framework contract for standardisation of 1998. The Commission will ensure that the European Handbook is ready in its initial phase by the end of 2003 and in a first operational version around the end of 2004.

The next phase should be to give formal status to the Handbook so that, once approved in terms of content, its use will be systematic in defence procurement contracts. The Commission would then propose appropriate complementary measures to ensure the upkeep of the Handbook and its use.

3.1.2. Monitoring of defence-related industries

In accordance with the Community's task to ensure the conditions for competitiveness of industry (Art. 130 TEC), the Commission should keep the situation under permanent review in all industrial sectors. In order to monitor the economic situation of the defence industrial base at EU level (including new Member States), including its ability to support the supply requirements of ESDP, the Union needs regular access to the relevant data. Levels of competitiveness and design expertise, geographic distribution of expertise, R&D investment, etc. need to be known and measured in order to allow benchmarking and to contribute to the development of relevant policies. Moreover, producers need a better knowledge of the market conditions in which restructuring can take place.

For this purpose, it is proposed that a monitoring activity be launched on defence-related industries using data available in EUROSTAT and in the European Statistical System (ESS) as well as other relevant sources of information, including industrial associations, while respecting existing rules of confidentiality.

3.1.3. Intra-Community transfers

The Commission is all too aware that intra-Community transfers of defence equipment are time-consuming and involve a lot of red tape because of the number of national procedures. These procedures take the form of individual licences for firms, import/export licences, checks on delivery and in some cases end user certificates. What is more, these procedures apply equally to transfers of defence equipment to Member States as to exports to non-member countries. One of the reasons for these complications is the desire of Member States to control the final destination of defence equipment, especially in the case of non-member countries.

The Commission has therefore tried, working with national experts to identify possible ways of simplifying intra-Community transfers of defence-related goods. For example, one possible way would be to align national licensing systems by adopting the principle of a global authorisation that would apply to intergovernmental programmes and industrial cooperation programmes.

An impact analysis is thus needed to establish the value added of any Community-level legislative initiative. This would also be an opportunity to draw lessons from the transfer arrangements for military equipment for the armed forces under the relevant NATO agreements. In the light of its findings the Commission will propose an appropriate legislative instrument (Regulation of Directive). Work on this will start at the end of 2004.

3.1.4. Competition policy

Competition policy is an essential element of the common market and does not represent an obstacle to technological change or a hindrance to private initiative. Moreover, it must ensure that changes brought about by market forces, such as through mergers and acquisitions, do not lead to the creation or strengthening of dominant positions, but result instead in benefits in terms of innovation and value for money.

Insofar as purely military mergers have been notified to the Commission under the EC Merger Control Regulation (ECMR), the Commission has not objected to such operations. Recently however, complex cross-border mergers have occurred, which call for a thorough assessment of their overall impact on competition, notably with respect to dual-use or civil products. Both industry and governments would appreciate greater clarity. Producers need a stable and transparent framework in which restructuring can take place. Equally, the interests of other market participants, and in particular customers, competitors and subcontractors from other Member States, also need to be taken into account.

Due to its specificities and in particular to the close relationship with public authorities, the defence sector may benefit, directly or indirectly, from public support constituting State aid. Under the provisions of Art 296 TEC, to the extent that the companies concerned produce only military equipment, Article 87 TEC concerning State aids control has not so far been applied. Neither has there has been any notification of such aid based on the argument that it contributed to the "execution of an important project of common European interest" as set out by Article 87(3)(b) TEC. Public financial support for defence production should in any case not alter competitive conditions in the common market of goods, which do not have a specific military purpose. This aspect is of particular relevance when the companies in question manufacture both strictly military and non-military products. It is necessary in particular to ensure that there is no cross-subsidisation between these two activities. Aid to non-specifically military products falls within the ambit of the standard provisions regarding State Aid.

The Commission intends to continue its reflection on the application of competition rules in the defence sector taking due account of the specificities of this field and the provisions of article 296 ECT.

3.1.5. Spending better in defence procurement

Removing inefficiencies in the European defence equipment markets would bring benefits from increased competition, from international trade, less duplication in R&D and both economies of scale and learning effects in manufacturing.

Further opening of defence procurement at EU level will ensure that all companies would be dealing with the same interfaces and processes for developing, delivering and supporting equipment as well as bidding for contracts. EU Member States that are also members of WEAG have already endorsed this approach and attempted to open their respective markets by establishing national procurement focal points and by publishing their defence procurement needs in national “Official Journals”. However, the lack of any binding commitment has weakened that effort.

A first step towards harmonising public procurement rules should be to look into the various practices and develop a common approach.

On this basis, a reflection on how to optimise defence procurement at national and EU levels should be initiated in the EU. This would concern products procured by Ministries of Defence in the Member States, or by any European Agency that might be created in the future. The end goal would be to have a single set of rules for procuring defence equipment in Europe.

There have been several important Court judgements in recent years that are relevant to this work - especially in helping to define the scope of Article 296. The Commission will issue an Interpretative Communication by the end of 2003 on the implications of these judgements.

In parallel, it will work on a Green Paper which might be issued in 2004 as a basis for discussion with stakeholders. The aim would be to seek an agreement on procurement rules to apply to defence goods depending on the level of sensitivity of the equipment.

With the creation of a European defence equipment market operating on the basis of fair competition among European companies, offsets (ie practices involving industrial compensation required as a condition for purchases of defence equipment and/or services) would no longer be required. However, due to existing contractual obligations, transitional arrangements would need to be put in place. The above-mentioned Green Paper will also address the issue of offsets in both its intra-EU and external dimensions.

3.1.6. Export Control of dual-use goods and technologies.

Dual-use items are goods, software and technologies likely to have both civilian and military uses[17]. Member States control exports of these items and participate individually in a number of informal (politically, but not legally binding) international export control regimes[18].

[17] Definition taken from EC regulation n° 1334/2000 of June 22, 2000.

[18] The Australia Group controls exports and transhipments that could result in proliferation of chemical and biological weapons.
The Missile Technology Control Regime aims at preventing proliferation of unmanned delivery systems for weapons of mass destruction by controlling exports of missiles and related technologies.
The Nuclear Suppliers' Group controls transfers of nuclear-related dual-use equipment, material and technology in order to prevent civilian nuclear trade from contributing to nuclear weapons acquisition.
The Wassenaar Arrangement controls transfers of conventional weapons and sensitive dual-use goods and technologies, primarily electronic products defined widely. "

The Community Regulation (1334/2000) based on the Article 133 TEC, while supporting the principle of the free circulation of goods inside the EU, provides for legally binding common principles and rules for the national implementation and enforcement of dual-use export controls by Member States. There is a strict link with the export control regimes, as the Regulation comprises a common list of items subject to control, which is directly derived from the consensus decisions taken in the regimes.

Due to differences in the implementation of dual-use export control commitments by the countries participating in the export control regimes (not to mention those countries which are not part of the regimes), great care must be taken to prevent civil industrial sectors such as nuclear, chemical, biological, pharmaceutical, space and aeronautics, information technologies, which are potentially affected by the controls, from being constrained unnecessarily or unequally.

The Community, by transposing in legal terms the decisions taken by the Member States in the export control regimes, imposes export control restrictions on European industries. The Commission is not a member (with the exception of the Australia Group) of the regimes. There is a need for greater Commission involvement in order more effectively to make more effective co-ordination of Member States' positions in the various regimes and to represent Community interests. In particular, the Commission, while supporting the central objective of the security of EU citizens, would also look at the functioning of the single market and the economic interests of a variety of civil industrial sectors.

While the EC imposes export controls on dual use items for security purposes and in accordance with decisions taken in export control fora, consideration should be given to their impact on the competitiveness of the EU defence and dual use industries. There is a need to ensure that all these aspects will be adequately addressed in the perspective of enlargement to ensure that both the dual use single market and the Community Export control regime are not adversely affected.

The Commission will bring up the issue of how to achieve these aims with Member States in the relevant Council working bodies, including the particular challenges stemming from enlargement.

3.2. Towards a more coherent European advanced security research effort

The Commission has had a great deal of experience in managing Community research programmes and coordinating national research activities and programmes. It is willing to offer its expertise for an initiative to promote cooperation on advanced research in the field of global security".

The setting-up of the European Research Area demonstrated that the Union and the Member States would derive greater benefits from national research programmes if they were better coordinated, something which is also true of advanced security-related research. By harnessing efforts at European level with an eye to medium to long-term requirements, advanced technologies that are crucial for Europe could be better developed and a real European value-added gained.

To this end, and as suggested by Parliament in its resolution of 10 April 2002, the Commission will ask national administrations, industry and research institutions with extensive activity in this area to identify in the course of this year an European agenda for advanced research relating to global security and the most appropriate ways of tackling it jointly.

To prepare for the implementation of this advanced research agenda, the Commission intends to launch a preparatory project that it would implement with the Member States and industry to implement some specific aspects that would be particularly useful in carrying out Petersberg tasks. This preliminary operation lasting no longer than three years would constitute a pilot phase for acquiring the experience for evaluating the conditions and arrangements needed for effective cooperation between national research programmes in the field of global security. It will cover just a few carefully selected subjects of advanced technology together with specific accompanying measures.

4. THEMES FOR FURTHER REFLECTION FOR THE EU AND MEMBER STATES

4.1 EU Defence Equipment Agency proposals

Article 17 of the Treaty on European Union provides that "the progressive framing of a common defence policy will be supported, as Member States consider appropriate, by cooperation between them in the field of armaments." The possibility of creating a European Armaments Agency is foreseen in the declaration on WEU annexed to the Treaties of Maastricht and Amsterdam. The defence working group of the Convention included in its recommendations the creation of an agency on an intergovernmental basis, which would deal with armaments and strategic research and could also contribute to ensuring that capabilities are improved. This proposal has been supported by the Franco-British declaration issued in the context of the summit which was held in *Le Touquet* on 4 February 2003.

Various Member States have already established joint procurement and research initiatives such as OCCAr, the LoI and WEAO. Any EU initiative should build on this base. We should seek to create an EU Defence Equipment Framework, including:

– collaborative programmes on the basis of OCCAr, progressively associating countries that wish to join in such co-operation in accordance with OCCAr rules (ie abandoning “juste-retour”) ;

– research and technology: The Europa MoU agreed within the Western Europe Armament Organisation framework includes a number of valuable ideas that could be further explored ; in a longer term the EU should consider the creation of a European DARPA (Defence Advance Research Project Agency);

– off-the-shelf procurement. This issue is not currently addressed at a European level. It is time that it was.

Any Agency (or Agencies) established to oversee such an EU Framework should reflect Member States' political choice that much of this work should continue to be conducted outside the current EC Treaty. It would be sensible nevertheless to draw upon Community mechanisms and instruments where Member States agree that the Community has a contribution to make (for example where the work touches on market mechanisms; or where it may be possible to build, in the research area, on experience with the civil Framework Programmes). In the longer run, too, Member States may decide to develop some central financial mechanism to ensure that Member States with disproportionately small national defence budgets nevertheless contribute their fair share to EU capacities.

An additional advantage of an EU Defence Equipment Framework of this kind is that it could, in some cases, would reinforce EU's position when negotiating commercial agreements, thereby strengthening the EU's hand.

4.2 Security of supply

Until recently the issue of security of supply has been addressed primarily by Member States individually. The process of consolidation in the defence field, which is necessary for Europe to maintain a competitive industrial base, is likely to lead to increased sectoral concentration. Governments will be required to accept the loss of some domestic capabilities, to procure directly from foreign or trans-national companies, and to allow changes to the ownership of defence companies. Mutual dependency between nations for the supply of certain armament materials already exists. Some countries buy entire systems from foreign firms, and even where a nation procures from national suppliers, most complex equipment includes some components from non-domestic sources.

By moving towards an EU-wide approach to security of supply Governments could:

- avoid keeping non competitive excess capacity by placing work with national companies,

- be able to allow trans-national mergers involving a change of ownership,

- facilitate trans-national movement and transfers of personnel working on classified matters,

- allow the trans-national transfer of goods and technology.

Such an approach would, *de facto,* help to diversify sources of supply and thereby reduce dependency on any single supplier, such as the United States.

EU progress in this field should build on work already undertaken in other forums such as LoI, NATO and WEAG.

4.3 Defence trade issues

A wider opening of foreign markets, especially the US, to European defence products is a major objective as it is essential for the EU defence industries to maintain and further develop their design expertise and competence in the most advanced technologies. If this does not happen, most of the national European markets will remain open to US manufacturers, while the US market will remain closed, except for a few European-owned but US-based companies.

Greater credibility in this area could be achieved by consolidating national defence markets and exploiting the potential of the combined EU defence procurement budget (national and EU level). This process would create greater negotiating capital for the purpose of working towards enhanced reciprocity and achieving a more level playing field for European companies seeking access to US markets.

Further work is needed on the some these aspects. The Commission will revert to this at a later stage.

On the question of ethics in arms trade, the Council adopted in 1998 the EU code of conduct on arms exports. This Code of Conduct is a politically binding instrument that seeks to create "high common standards" for Member States to use when making arms export decisions and to increase transparency on conventional arms exports. It also has a specific operative mechanism designed to discourage individual Member States from undercutting sales denied by other EU states. A common list of military goods to which the Code applies has been agreed and serves as a guideline; Member States are free to use their own lists.

A first step towards a practical solution to streamlining export decisions regarding the products of multinational companies has been made by the six signatory nations of the Letter of Intent (LoI). The ideas developed there should serve as a basis for future EU rules. In particular, a decision to export outside the European Union should take account of the need for prior consultation with the Member States involved in authorisations while recognising the political responsibility of the final exporting state.

5. CONCLUSION

This Communication is intended as a further contribution to greater efficiency in the defence equipment industry, which is both an objective in itself and an important challenge if the Union is to develop a successful ESDP. The Commission proposes to:

- provide the necessary financial resources to ensure that the European Standardisation Handbook is ready by 2004 and then propose appropriate complementary measures to ensure the upkeep of this Handbook and its use;

- launch a monitoring activity on defence-related industries using data available in EUROSTAT and in the European Statistical System framework; as well as other relevant sources of information, while respecting existing rules of confidentiality.

- launch an impact assessment study in 2003 and, depending on its results, start elaborating at the end of 2004 the appropriate legal instrument to facilitate intra-Community transfer of defence equipment.

- continue its reflection the application of competition rules in the defence sector taking due account of the specificities of this field and the provisions of article 296 ECT.

- initiate a reflection on how to optimise defence procurement at national and EU levels. Given the important Court judgements in recent years, especially in helping to define the scope of Article 296, the Commission will issue an Interpretative Communication by the end of 2003 on the implications of these judgements. In parallel, it will work on a Green Paper, which might be issued in 2004 as a basis for discussion with stakeholders.

- bring up, in the relevant Council working bodies, the issue of the Commission's involvement in export controls regimes.

- launch a preparatory action for advanced research in the field of global security with a view to implementing with the Member States and industry specific practical aspects that would be useful for carrying out Petersberg tasks in particular;

- to pursue work on a possible EU Defence Equipment Framework overseen by an Agency (or Agencies). This framework will pull together national initiatives - especially in collaborative programmes in Research and development, and in off-the-shelf procurement. It will encourage more Member States to join such programmes and it will enable the EU to draw, where appropriate, on Community mechanisms and instruments.

IMPORTANT LEGAL NOTICES

de en fr

Public Procurement

Public Procurement Public Private Partnerships

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

- Political conclusions drawn from the public consultation – the PPP Communication
- Presentation of the Green Paper
- Report on public consultation
- Contributions to the PPP Green Paper consultation authorised for publication
- Related documents
- Useful links

Political conclusions drawn from the public consultation – the PPP Communication

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

What are the preferred policy options following the PPP Green Paper consultation?

Concessions

Having carefully considered all arguments and the factual information submitted in the course of the consultation, it would currently appear that a legislative initiative is the preferable option as regards concessions. However, before formally proposing legislation further in-depth analysis will need to be undertaken in accordance with the principles of “Better Regulation”.

Institutionalised PPPs

Many respondents to the PPP Green Paper asked how EU rules should apply to the choice of private partners in “institutionalised PPPs”, i.e. public service undertakings held jointly by both a public and a private partner. Overall, it appears at present that an Interpretative Communication would be better suited to this demand than fully-fledged legislation.

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

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

- Press release (17.11.2005)
- Frequently asked questions (17.11.2005)
- Communication COM(2005) 569 de en fr

Presentation of the Green Paper

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

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

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

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

- Press release (4.5.2004)
- Green paper - COM(2004)327 da de el en es fr it nl pt fi sv

Report on public consultation

On 30 April 2004, the Commission launched a public consultation inviting interested parties to send their observations on the questions raised in the Green Paper. The consultation was officially closed on 30 July 2004 although the Commission continued to receive contributions throughout autumn 2004. In total the Commission received 195 replies to the list of questions set out in the PPP Green Paper. Governments or individual ministries from Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Lithuania, the Netherlands, Poland, Portugal, Slovakia, Spain, Sweden and the United Kingdom, 15 other public authorities from these Member States, 111 associations with private and/or public entities as their members, 38 enterprises and 13 individuals contributed in writing to the consultation.

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

The objective of the report on the outcome of the public consultation on the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions is to reflect the ideas, opinions and suggestions made in the contributions. It tries to identify, as objectively as possible, the main trends, views and concerns set out in the contributions.

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

Contributions to the PPP Green Paper consultation authorised for publication

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

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

Related documents

- New Community Directives coordinating the procedures for the award of public contracts
- Interpretative Communication on concessions under Community law
- Communication from the Commission - Developing the trans-European transport network: Innovative funding solutions - Interoperability of electronic toll collection systems
  COM/2003/0132 final da de el en es fr it nl pt fi sv
- Report of the high-level group on the trans-European transport network of 27 June 2003
  de en fr
- Conclusions of the Presidency, Brussels European Council, 12 December 2003
- Communication from the Commission to the Council and the European Parliament - Public finances in EMU - 2003
  SEC(2003)571/COM/2003/0283 final da de el en es fr it nl pt fi sv
- New decision of Eurostat on deficit and debt - Treatment of public-private partnerships
  de en fr

Useful links

- Green Paper on services of general interest and follow up
- Speech of Mr. Charlie McCreevy, Commissioner for Internal Market and Services "Public-Private Partnerships – Options to ensure effective competition" of 17 November 2005

Contacts

Last update on 17-11-2005

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15.11.2005
COM(2005) 569 final

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

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

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

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

(Text with EEA relevance)

1. INTRODUCTION

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

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

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

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

[1] COM(2004) 327 final, 30.4.2004.

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

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

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

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

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

2. KEY ISSUES FOR POSSIBLE FOLLOW-UP

2.1. Issues requiring follow-up at EC level

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

- the award of concessions (questions 4 to 6 of the Green Paper – chapter 3 of this Communication) and

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

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

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

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

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

2.2. The Competitive Dialogue: the Commission will provide clarification

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

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

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

2.3.1. No new legislation covering all contractual PPPs

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

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

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

2.3.2. No Community action on other specific aspects of PPPs

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

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

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

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

2.4. Continuation of debate on PPPs at EC level

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

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

3. CONCESSIONS

3.1. Background

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

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

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

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

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

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

3.2. Options to provide legal certainty on concessions

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

Interpretative Communication

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

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

Legislative initiative

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

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

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

3.3. Content of a possible Community initiative on concessions

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

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

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

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

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

4. INSTITUTIONALISED PPPS

4.1. Preferred approach

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

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

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

4.2. Content of a possible Interpretative Communication on institutionalised PPPs

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

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

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

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

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

[14] Paragraph 63 of the PPP Green Paper.

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

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

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

5. NEXT STEPS

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

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

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

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

IP/05/1440

Brussels, 17 November 2005

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

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

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

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

Institutionalised PPPs

Many respondents to the PPP Green Paper asked how EU rules should apply to the choice of private partners in "institutionalised PPPs" (IPPPs), which are public-service undertakings held jointly by both a public and a private partner. Overall, it appears at present that an Interpretative Communication would be better suited to this demand than fully-fledged legislation. This Interpretative Communication should be published during 2006.

Concessions

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

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

Background

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

The full text of the proposals is available at:
http://europa.eu.int/comm/internal_market/publicprocurement/ppp_en.htm

MEMO/05/431

Brussels, 17 November 2005

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

What are public-private partnerships (PPPs)?

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

What prompted the Commission to launch this initiative?

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

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

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

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

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

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

What are concessions?

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

What are Institutionalised PPPs?

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

What was the result of the PPP Green Paper consultation?

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

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

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

- A clear majority supported an EU initiative, legislative or non-legislative, on concessions (which are currently not subject to the detailed EU public procurement rules), in order to clarify both the term ‘concessions’ and the rules applicable to their award.
- Many respondents asked how EU rules should apply to the choice of private partners in “institutionalised PPPs” (i.e. public-service undertakings held jointly by both a public and a private partner).

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

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

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

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

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

In particular, this would require:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30.4.2004
COM(2004) 327 final

GREEN PAPER

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

(presented by the Commission)

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

1.1. The “public-private partnership” phenomenon

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

2. The following elements normally characterise PPPs:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

complex contracts", and thereby certain forms of PPPs. This new procedure, designated as "competitive dialogue", allows the public authorities to hold discussions with the applicant businesses in order to identify the solutions best suited to their needs.

14. The fact remains that many representatives of interested groups consider that the Community rules applicable to the choice of businesses called on to cooperate with a public authority under of a PPP, and their impact on the contractual relationships governing the execution of the partnership, are insufficiently clear and lack homogeneity between the different Member States. Such a situation can create a degree of uncertainty for Community players that is likely to represent a genuine obstacle to the creation or success of PPPs, to the detriment of the financing of major infrastructure projects and the development of quality public services.

15. The European Parliament invited the Commission to examine the possibility of adopting a draft Directive aimed at introducing homogeneous rules for the sector of concessions and other forms of PPPs.[16] The Economic and Social Committee also considered that such a legislative initiative was called for.[17]

16. In the context of its Strategy for the internal market 2003-2006,[18] the Commission announced that it would publish a Green Paper on PPPs and Community law on public procurement and concessions, in order to launch a debate on the best way to ensure that PPPs can develop in a context of effective competition and legal clarity. The publication of a Green Paper is also one of the actions planned under the European Initiative for Growth.[19] Lastly, it responds to certain requests made in the course of the public consultation on the Green Paper on services of general interest.[20]

1.3. Specific aim and plan of this Green Paper

17. The aim of this Green Paper is to launch a debate on the application of Community law on public contracts and concessions to the PPP phenomenon. Once underway such a debate will concentrate on the rules that should be applied when taking a decision to entrust a mission or task to a third party. This takes place downstream of the economic and organisational choice made by a local or national authority, and can in no way be perceived as attempting to make a value judgement regarding the decision to externalise the management of public services or not; this decision remains squarely within the competence of public authorities. Indeed, Community law on public contracts and concessions is neutral as regards the choice exercised by Member States to provide a public service themselves or to entrust it to a third party.

18. Put more clearly, this Green Paper aims to show the extent to which Community rules apply to the phase of selection of the private partner and to the subsequent

[16] Opinion of the European Parliament (first reading) on the proposal of the Commission, COM (2000) 275, 10.05.2002.

[17] Opinion, ESC, OJ C 14, 16.1.2001, rapporteur Mr Levaux, point 4.1.3 and Opinion, ESC, OJ C 193, 10.07.2001, rapporteur Mr Bo Green, point 3.5.

[18] Strategy for the internal market, Priorities 2003-2006, COM (2003) 238 final.

[19] Communication from the Commission "A European initiative for growth: Investing in networks and knowledge for growth and jobs", COM (2003) 690 final, 11 November 2003. This report was approved by the Brussels European Council on 12 December 2003.

[20] See Report on the results of the consultation on the Green Paper on general interest services. See above, footnote 5.

phase, with a view to identifying any uncertainties, and to analyse the extent to which the Community framework is suited to the imperatives and specific characteristics of PPPs. Avenues of consideration for possible Community intervention will be outlined. Since the aim of this Green Paper is to launch a consultation, no option for Community intervention has been decided on in advance. Indeed, a wide variety of instruments are available to make PPPs more open to competition in a transparent legal environment, i.e. legislative instruments, interpretative communications, actions to improve the coordination of national practice or the exchange of good practice between Member States.

19. Thus, while this Paper focuses on issues covered by the law on public contracts and concessions, it should be noted that the Commission has already adopted measures, in certain fields, designed to remove barriers to PPPs. Thus, there has already been clarification of the rules on the treatment in the national accounts of contracts entered into by public entities under partnerships with private entities.[21] Note also that the adoption of the statute for a European company will facilitate trans-European PPPs.[22]

20. As part of the analysis of this Green Paper, it is proposed to make a distinction between:

- PPPs of a purely contractual nature, in which the partnership between the public and the private sector is based solely on contractual links, and

- PPPs of an institutional nature, involving cooperation between the public and the private sector within a distinct entity.

This distinction is based on the observation that the diversity of PPP practices encountered in the Member States can be traced to two major models. Each of these raise specific questions regarding the application of Community law on public contracts and concessions, and merit separate study, as undertaken in the following chapters.[23]

2. PURELY CONTRACTUAL PPPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS

21. The term "purely contractual PPP" refers to a partnership based solely on contractual links between the different players. It covers a variety of set-ups where one or more tasks of a greater or lesser magnitude are assigned to the private partner, and which can include the design, funding, execution, renovation or exploitation of a work or service.

[21] See above, footnote 3.

[22] Council Regulation (EC) No 2157/2001, 8 October 2001.

[23] The distinction thus made does not take account of the legal interpretations made under national law and in no way prejudges the interpretation in Community law of these types of set-ups or contracts. The sole purpose of the analysis which follows is to make a distinction between the set-ups generally termed PPPs, in order to decide, in a second phase, which rules of Community law on public contracts and concessions should apply to them.

22. In this context, one of the best-known models, often referred to as the "concessive model",[24] is characterised by the direct link that exists between the private partner and the final user: the private partner provides a service to the public, "in place of", though under the control of, the public partner. Another feature is the method of remuneration for the joint contractor, which consists of charges levied on the users of the service, if necessary supplemented by subsidies from the public authorities.

23. In other types of set-up, the private partner is called on to carry out and administer an infrastructure for the public authority (for example, a school, a hospital, a penitential centre, a transport infrastructure). The most typical example of this model is the PFI set-up.[25] In this model, the remuneration for the private partner does not take the form of charges paid by the users of the works or of the service, but of regular payments by the public partner. These payments may be fixed, but may also be calculated in a variable manner, on the basis, for example, of the availability of the works or the related services, or even the level of use of the works. [26]

1. What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?

2.1. Phase of selection of the private partner

2.1.1. Purely contractual partnership: act of award designated as a "public contract"

24. The arrangements applicable to the award of public works contracts or public services contracts defined as having priority[27] result from the provisions of the Community Directives laying down detailed rules particularly relating to advertising and participation. When the public authority is a contracting authority acting under the "classical" Directives,[28] it must normally have recourse to the open or restricted procedure to choose its private partner. By way of exception, and under certain conditions, recourse to the negotiated procedure is sometimes possible. In this context, the Commission wishes to point out that the derogation under Article 7(2) of Directive 93/37/EEC, which provides for recourse to negotiated procedure in the case of a contract when "the nature of the works or the risks attaching thereto do not permit prior overall pricing", is of limited scope. This derogation is to cover solely the exceptional situations in which there is uncertainty *a priori* regarding the nature or scope of the work to be carried out, but is not to cover situations in which the uncertainties result from other causes, such as the difficulty of prior pricing owing to the complexity of the legal and financial package put in place.[29]

[24] It should be noted that the interpretation given by national law or by the parties has no impact on the legal interpretation of these contracts for the purposes of the application of a Community law on public contracts and concessions.

[25] The term PFI refers to "Private Finance Initiative", a programme of the British Government permitting the modernisation of the public infrastructure through recourse to private funding. The same model is used in other Member States, sometimes with major variants. For example, the PFI model inspired the development of the "Betreibermodell" in Germany.

[26] See the case of "virtual tolls", used in the context of motorway projects, particularly in the United Kingdom, Portugal, Spain and Finland.

[27] i.e. those listed in Annex IA of Directive 92/50/EEC and Annex XVIA of Directive 93/38/EEC.

[28] i.e. Directives 93/37/EEC, 92/50/EEC and 2004/18/EC.

[29] For example, it may apply when the works are to be carried out in a geologically unstable or archaeological terrain and for this reason the extent of the necessary work is not known when launching

25. Since the adoption of Directive 2004/18/EC, a new procedure known as "competitive dialogue" may apply when awarding particularly complex contracts.[30] The competitive dialogue procedure is launched in cases where the contracting body is objectively unable to define the technical means that would best satisfy its needs and objectives, or in cases where it is objectively unable to define the legal and/or financial form of a project. This new procedure will allow the contracting bodies to open a dialogue with the candidates for the purpose of identifying solutions capable of meeting these needs. At the end of this dialogue, the candidates will be invited to submit their final tender on the basis of the solution or solutions identified in the course of the dialogue. These tenders must contain all the elements required and necessary for the performance of the project. The contracting authorities must assess the tenders on the basis of the pre-stated award criteria. The tenderer who has submitted the most economically advantageous tender may be asked to clarify aspects of it or confirm commitments featuring therein, provided this will not have the effect of altering fundamental elements in the tender or invitation to tender, of falsifying competition or of leading to discrimination.

26. The competitive dialogue procedure should provide the necessary flexibility in the discussions with the candidates on all aspects of the contract during the set-up phase, while ensuring that these discussions are conducted in compliance with the principles of transparency and equality of treatment, and do not endanger the rights which the Treaty confers on economic operators. It is underpinned by the belief that structured selection methods should be protected in all circumstances, as these contribute to the objectivity and integrity of the procedure leading to the selection of an operator. This in turn guarantees the sound use of public funds, reduces the risk of practices that lack transparency and strengthens the legal certainty necessary for such projects.

27. In addition, note that the new Directives emphasise the benefit to the contracting bodies of formulating the technical specifications in terms of either performance or functional requirements. New provisions will thus give the contracting bodies more scope to take account of innovative solutions during the award phase, irrespective of the procedure adopted.[31]

2. In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

3. In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.

the tender procedure. A similar derogation is provided for in Article 11(2) of Directive 92/50, and in Article 30(1)(b) of Directive 2004/18/EC.

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

[31] Article 23 of Directive 2004/18/EC and Article 34 of Directive 2004/17/EC.

2.1.2. *Purely contractual partnership: act of award designated as a "concession"*

28. There are few provisions of secondary legislation which coordinate the procedures for the award of contracts designated as concession contracts in Community law. In the case of works concessions, there are only certain advertising obligations, intended to ensure prior competition by interested operators, and an obligation regarding the minimum time-limit for the receipt of applications.[32] The contracting bodies are then free to decide how to select the private partner, although in so doing they must nonetheless guarantee full compliance with the principles and rules resulting from the Treaty.

29. For their part, the rules governing the award of services concessions apply only by reference to the principles resulting from Articles 43 and 49 of the Treaty, in particular the principles of transparency, equality of treatment, proportionality and mutual recognition.[33] In its *Telaustria* Judgment, the Court stated in this respect that "*[the] obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed*".[34]

30. The Commission considers that the rules resulting from the relevant provisions of the Treaty can be summed up in the following obligations: fixing of the rules applicable to the selection of the private partner, adequate advertising of the intention to award a concession and of the rules governing the selection in order to be able to monitor impartiality throughout the procedure, introduction of genuine competition between operators with a potential interest and/or who can guarantee completion of the tasks in question, compliance with the principle of equality of treatment of all participants throughout the procedure, selection on the basis of objective, non-discriminatory criteria.

31. Thus the Community law applicable to the award of concessions is derived primarily from general obligations which involve no coordination of the legislation of Member States. In addition, and although the Member States are free to do so, very few have opted to adopt national laws to lay down general and detailed rules governing the award of works or services concessions.[35] Thus, the rules applicable to the selection of a concessionaire by a contracting body are, for the most part, drawn up on a case-by-case basis.

32. This situation may present problems for Community operators. The lack of coordination of national legislation could in fact be an obstacle to the genuine

[32] See Article 3(1) of Directive 93/37/EEC, and Articles 56 to 59 of Directive 2004/18/EC.

[33] Although the Commission had proposed that services concessions be included in Directive 92/50/EEC, in the course of the legislative process the Council decided to exclude them from the scope of that Directive.

[34] Case C-324/98. See also ruling of 30 May 2002, Case C-358/00, *Deutsche Bibliothek,* ECR. I-4685. These principles are also applicable to other State acts entrusting an economic service to a third party, as for example the contracts excluded from the scope of the Directives owing to the fact that they have a value below the threshold values laid down in the secondary legislation (Order of the Court of 3 December 2001, Case C-59/00, *Vestergaard*, ECR. I-9505), or so-called non-priority services.

[35] Spain (law of 23 May 2003 on works concessions), Italy (Merloni law of 1994, as amended) and France (Sapin law of 1993) have nonetheless adopted such legislation.

opening up of such projects in the Community, particularly when they are organised at transnational level. The legal uncertainty linked to the absence of clear and coordinated rules might in addition lead to an increase in the costs of organising such projects.

33. Moreover, some persons have claimed that the objectives of the internal market might not be achieved in certain situations, owing to a lack of effective competition on the market. In this context the Commission wishes to recall that the "public contracts" Directives aim not only to ensure transparency of procedures and equality of treatment for economic operators, but also require that a minimum number of candidates be invited to participate in the procedures, whether these be open, restricted, negotiated, or competitive dialogue procedures.[36] There is a need to assess whether the effective application of these provisions is sufficient, or whether other measures are needed to facilitate the emergence of a more competitive environment.

34. The Commission has also observed, in the context of infringement procedures already investigated, that it is not always easy to determine from the outset if the contract which is the subject-matter of the procedure is a public contract or a concession. Indeed, in the case of contracts designated as concessions when the procedure is launched, the distribution of risks and benefits may be the subject of negotiations throughout the procedure. It may occur that, following these negotiations, the contract in question must in the end by redefined as a "public contract", resulting often in a calling into question of the legality of the award procedure selected by the contracting body. According to the views expressed by the parties concerned, this situation creates a degree of legal uncertainty which is very damaging to the development of such projects.

35. In this context, the Commission could envisage proposing legislative action designed to coordinate the procedures for the award of concessions in the European Union, such new legislation being added to the existing texts on the award of public contracts. In that case it would be necessary to lay down the detailed provisions applicable to the award of concessions.

36. Also, there are grounds to examine if there are objective reasons for making the award of concessions and the award of other contractual PPPs subject to different sets of provisions. In this context, it should be noted that it is the criterion of the right of exploitation and its corollary, the transfer of the risks inherent in the exploitation, which distinguish public contracts from concessions. If it is confirmed that legal uncertainty, linked to the difficulty of identifying a priori the distribution of the risks of exploitation between the partners, arises frequently when awarding certain purely contractual PPPs, the Commission might consider making the award of all contractual PPPs, whether designated as public contracts or concessions, subject to identical award rules.

[36] Article 19 of Directive 93/36/EEC, Article 22 of Directive 93/37/EEC, Article 27 of Directive 92/50/EEC and Article 31 of Directive 93/38/EEC. See also Article 44 of Directive 2004/18/EC and Article 54 of Directive 2004/17/EC.

4. Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?
5. Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?
6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?
7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

2.2. Specific questions relating to the selection of an economic operator in the framework of a private initiative PPP

37. Certain practices where the private sector has the opportunity to take the initiative in a PPP project have recently been developed in some Member States.[37] In arrangements of this type, the economic operators formulate a detailed proposal for a project, generally in the field of construction and infrastructure management, in some cases at the invitation of the public authority.

38. Such practices make it possible to sound out at an early stage the willingness of economic operators to invest in certain projects. They also encourage them to develop or apply innovate technical solutions, suited to the particular needs of the contracting body.

39. The fact that a public utility project originates in a private initiative does not change the nature of the contracts concluded between the contracting bodies and the economic operators. Where these contracts concern services covered by secondary legislation and are concluded for pecuniary interest, they must be designated either as a contract or a concession and adhere to the resulting award rules.

40. It is therefore necessary to ensure that the procedures applied in this context do not end up depriving European economic operators of the rights to which the Community legislation on public contracts and concessions entitles them. In particular, and at the very least, the Commission is of the view that all European operators must be guaranteed access to such projects, primarily through adequate advertising of the invitation to formulate a project. Subsequently, if the public authority wishes to implement a given project, it must organise a call for competition addressed to all the economic operators who are potentially interested in developing the selected project, providing full guarantees of the impartiality of the selection process.

[37] In certain Member States, the private initiative is subject to specific supervision (see in Italy the Merloni law of 18 November 1998 and, in Spain, the regulation on local authority services of 1955 and the law 13/2003 on works concessions of 23 May 2003). In other Member States, the private initiative PPP is also emerging in practice.

41. To make the system attractive, the Member States have sometimes tried to provide certain incentives for first movers. The option of compensating the initiator of the project – for example, paying him for his initiative outside of the subsequent call for competition procedure – has been used. The possibility was also envisaged of awarding the first mover certain advantages in the context of the call for competition designed to develop the selected project. Such solutions merit close consideration, to ensure that these competitive advantages awarded to the project mover do not breach the equality of treatment of candidates.

8. In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?
9. In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?

2.3. The phase following the selection of the private partner

42. Community secondary legislation on public contracts and concessions mainly concerns the phase of award of a contract. Secondary legislation does not cover comprehensively the phase following selection of the private partner. However, and the principle of equality of treatment and the principle of transparency resulting from the Treaty generally rule out any intervention of the public partner after selection of a private partner, in so far as any such intervention might call into question the principle of equality of treatment between economic operators.[38]

43. The often complex nature of the arrangements in question, the time which may elapse between the selection of the private partner and the signing of the contract, the relatively long duration of the projects and, lastly, the frequent recourse to sub-contracting mechanisms, sometimes complicate the application of these rules and principles. Two aspects are covered below: the contractual framework of the PPP and sub-contracting.

2.3.1. The contractual framework of the project

44. The contractual provisions governing the phase of implementation of the PPPs are primarily those of national law. However, contractual clauses must also comply with the relevant Community rules, and in particular the principles of equality of treatment and transparency. This implies in particular that the descriptive documents must formulate clearly the conditions and terms for performance of the contract so that the various candidates for the partnership can interpret them in the same manner and take them into account when preparing their tenders. In addition, these terms and conditions of performance must not have any direct or indirect discriminatory impact or serve as an unjustifiable barrier to the freedom to provide services or freedom of establishment.[39]

[38] See Case C-87/94, *Commission v. Belgique* (*Bus Wallons),* Judgment of 25 April 1994, point 54. See also Case C-243/89, *Commission v. Danemark (Bridge on the Storebaelt),* Judgment of 22 June 1992.

[39] Case C-19/00, *SIAC Constructions*, Judgment of 18 October 2001, points 41-45; Case C-31/87, *Gebroeders Beentjes v. Pays-Bas*, Judgment of 20 September 1988, points 29-37. See also Article 26 of Directive 2000/18/EC and Article 38 of Directive 2000/17/EC.

45. The success of a PPP depends to a large extent on a comprehensive contractual framework for the project, and on the optimum definition of the elements which will govern its implementation. In this context, the appropriate assessment and optimum distribution of the risks between the public and the private sectors, according to their respective ability to assume these risks, is crucial. Also important are mechanisms to evaluate the performance of the titular holder of the PPP on a regular basis. In this context, the principle of transparency requires that the elements employed to assess and distribute the risks, and to evaluate the performance, be communicated in the descriptive documents, so that tenderers can take them into account when preparing their tenders.

46. In addition, the period during which the private partner will undertake the performance of a work or a service must be fixed in terms of the need to guarantee the economic and financial stability of a project. In particular, the duration of the partner relationship must be set so that it does not limit open competition beyond what is required to ensure that the investment is paid off and there is a reasonable return on invested capital. An excessive duration is likely to be censured on the basis of the principles governing the internal market[40] or the provisions of the Treaty governing competition.[41] Similarly, the principle of transparency requires that the elements employed to establish the duration be communicated in the descriptive documents so that tenderers can take them into account when preparing their tenders.

47. Since they concern a service spread out in time, PPP relationships must be able to evolve in line with changes in the macro-economic or technological environment, and in line with general interest requirements. In general, Community public contract law does not reject such a possibility, as long as this is done in compliance with the principles of equality of treatment and transparency. Thus, the descriptive documents transmitted to the tenderers or candidates during the selection procedure may provide for automatic adjustment clauses, such as price-indexing clauses, or stipulate the circumstances under which the rates charged may be revised. They can also stipulate review clauses on condition that these identify precisely the circumstances and conditions under which adjustments could be made to the contractual relationship. However, such clauses must always be sufficiently clear to allow the economic operators to interpret them in the same manner during the partner-selection phase.

48. In certain projects, the financial institutions reserve the right to replace the project manager, or to appoint a new manager, if the financial flows generated by the project fall below a certain level. The implementation of such clauses, which fall within the category of so-called "step-in" clauses, may result in changing the private partner of the contracting body without a call for competition. Consequently, to guarantee the compatibility of such projects with Community law on public contracts and concessions, special attention must be paid to this aspect.

49. In general, changes made in the course of the execution of a PPP, if not covered in the contract documents, usually have the effect of calling into question the principle of equality of treatment of economic operators.[42] Such unregulated modifications are

[40] See Interpretative Communication on concessions, in particular point 3.1.3.

[41] Articles 81, 82 and 86 (2) of the EC Treaty.

[42] See Case C-337/98, *Commission v. France*, Judgment of 5 October 2000, points 44 ff. Community law also rejects any changes made during the phase of drawing up the contract, after the final selection of the successful tenderer. In this respect the new provisions governing competitive dialogue stipulate that

therefore acceptable only if they are made necessary by an unforeseen circumstance, or if they are justified on grounds of public policy, public security or public health.[43] In addition, any substantial modification relating to the actual subject-matter of the contract must be considered equivalent to the conclusion of a new contract, requiring a new competition.[44]

50. Lastly, it should be pointed out that secondary legislation lays down the exceptional situations in which additional works or services not included in the project initially considered or in the initial contract may be awarded directly, without a call for competition.[45] The interpretation of these exceptions must be restrictive. For example, they do not refer to the extension of the period of an already existing motorway concession, in order to cover the cost of works to complete a new section. Thus, the practice of combining "profitable" and "non-profitable" activities awarded to a single concessionaire must not lead to a situation where a new activity is awarded to an existing concessionaire without competition.

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

11. Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?

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

13. Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment.? Do you know of other "standard clauses" which are likely to present similar problems?

14. Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?

the successful tenderer may only "clarify aspects of the tender or confirm commitments contained in the tender, provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender or does not risk distorting competition or causing discrimination".

[43] Article 46 of the Treaty.

[44] Case C-337/98, *Commission v. France*, Judgment of 5 October 2000, points 44 ff. The Interpretative Communication on concessions states in this context that the extension of an existing concession beyond the period originally laid down must be considered equivalent to granting a new concession to the same concessionaire.

[45] See Article 11 (3)(e) of Directive 92/50/EEC, Article 7 (3)(d) of Directive 93/37/EEC and Article 20 (2)(f) of Directive 93/38/EEC. The new Directive 2004/18/EC provides for a similar exception for works concessions, see Article 61.

2.3.2. *Sub-contracting of certain tasks*

51. It is the Commission's experience that the application of subcontracting rules sometimes gives rise to uncertainties or queries in the context of PPP arrangements. Certain parties have claimed, for example, that the contractual relations between the project company, which becomes the holder of the contract or the concession, and its shareholders, raise a certain number of legal issues. In this respect, the Commission wishes to point out that when the project company is itself in the role of contracting body, it must conclude its contracts or concession contracts in the context of a competition, whether or not these are concluded with its own shareholders. The only case where this does not apply is when the services entrusted by a project company to its shareholders have already been the subject of a competition by the public partner prior to the formation of the company undertaking the project.[46] However, when this company is not in the role of contracting body, it is in principle free to conclude contracts with third parties, whether these be its own shareholders or not. By way of exception, when the project company is a "works concessionaire", certain publicity requirements apply to the award of works contracts exceeding a threshold of EUR 5 million, with the exception of contracts concluded with businesses that have formed a group in order to win the concession, or their affiliated companies.[47]

52. In principle, private partners are free to subcontract part or all of a public contract or a concession. However, it should be pointed out that, in the case of the award of public contracts, tenderers may be asked to indicate in their tenders the share of the contract which they intend to subcontract to third parties.[48] In the case of public works concessions where the value exceeds EUR 5 million, the contracting body may require the concessionaire to award contracts representing a minimum of 30% of the total value of the work for which the concession contract is to be awarded to third parties.[49]

15. In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.

16. In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

17. In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

[46] Article 13 of Directive 93/38/EEC provides for a derogation when the sub-contracting contracts for services are awarded by a network systems operator acting as contracting entity to an affiliated enterprise. Article 23 of Directive 2004/17/EC extends this exception to sub-contracting contracts covering supplies or works.

[47] Article 3 (4) of Directive 93/37/EEC and Articles 63 to 65 of Directive 2004/18/EC. In the latter articles the above-mentioned threshold is fixed at EUR 6 242 000.

[48] Article 17 of Directive 93/36/EEC, Article 20 of Directive 93/37/EEC, Article 25 of Directive 92/50, Article 27 of Directive 93/38. See also Article 25 of Directive 2004/18/EC and Article 37 of Directive 2004/17/EC.

[49] Article 3(2) of Directive 93/37/EEC. See also Article 60 of Directive 2004/18/EC.

3. INSTITUTIONALISED PPPS AND THE COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS

53. Within the meaning of this Green Paper, institutionalised PPPs involve the establishment of an entity held jointly by the public partner and the private partner.[50] The joint entity thus has the task of ensuring the delivery of a work or service for the benefit of the public. In the Member States, public authorities sometimes have recourse to such structures, in particular for to administer public services at local level (for example, for water supply services or waste collection services).

54. Direct cooperation between the public partner and the private partner in a forum with a legal personality allows the public partner, through its presence in the body of shareholders and in the decision-making bodies of the joint entity, to retain a relatively high degree of control over the development of the projects, which it can adapt over time in the light of circumstances. It also allows the public partner to develop its own experience of running the service in question, while having recourse to the support of a private partner.

55. An institutionalised PPP can be put in place, either by creating an entity held jointly by the public sector and the private sector (3.1), or by the private sector taking control of an existing public undertaking (3.2).

56. The discussion below focuses solely on issues concerning the law on public contracts and concessions applicable to institutionalised PPPs. For a more general discussion of the impact of this law when setting up and executing such PPPs, please refer to the preceding chapters.

3.1. Partnership involving the creation of an ad hoc entity held jointly by the public sector and the private sector.[51]

57. The law on public contracts and concessions does not of itself apply to the transaction creating a mixed-capital entity. However, when such a transaction is accompanied by the award of tasks through an act which can be designated as a public contract, or even a concession, it is important that there be compliance with the rules and principles arising from this law (the general principles of the Treaty or, in certain cases, the provisions of the Directives).[52]

58. The selection of a private partner called on to undertake such tasks while functioning as part of a mixed entity can therefore not be based exclusively on the quality of its capital contribution or its experience, but should also take account of the

[50] The Member States use different terminology and schemes in this context (for example, the Kooperationsmodell, joint PPPs, Joint Ventures).

[51] The question being dealt with here is the creation of *ex novo* entities in the context of a specific legal arrangement. However, the case of pre-existing mixed entities participating in the procedures for the award of public contracts or concessions will not be dealt with specifically, because this latter hypothesis does not give rise to much comment in terms of the applicable Community law. The mixed character of an entity participating in a tendering procedure does not in fact involve any derogation from the rules applicable to the award of a public contract or a concession. Only in the case where the entity in question meets the characteristics of an 'in house' entity, within the meaning of the *Teckal Case* Law of the Court of Justice, is the contracting authority entitled not to apply the usual rules.

[52] Note that the principles governing the law on public contracts and concessions apply also when a task is awarded in the form of a unilateral act (e.g. a legislative or regulatory act).

characteristics of its offer – the most economically advantageous – in terms of the specific services to be provided. Thus, in the absence of clear and objective criteria allowing the contracting authority to select the most economically advantageous offer, the capital transaction could constitute a breach of the law on public contracts and concessions.

59. In this context, the transaction involving the creation of such an entity does not generally present a problem in terms of the applicable Community law when it constitutes a means of executing the task entrusted under a contract to a private partner. However, the conditions governing the creation of the entity must be clearly laid down when issuing the call for competition for the tasks which one wishes to entrust to the private partner.[53]

60. However, the Commission has noted that, in certain Member States, national legislation allows the mixed entities, in which the participation by the public sector involves the contracting body, to participate in a procedure for the award of a public contract or concession even when these entities are only in the course of being incorporated. In this hypothesis, the entity will be definitively incorporated only after the contract has actually been awarded to it. In other Member States, a practice has developed which tends to confuse the phase of incorporating the entity and the phase of allocating the tasks. Thus the purpose of the procedure launched by the contracting authority is to create a mixed entity to which certain tasks are entrusted.

61. Such formulae do not appear to offer satisfactory solutions in terms of the provisions applicable to public contracts and concessions.[54] In the first case, there is a risk that the effective competition will be distorted by a privileged position of the company being incorporated, and consequently of the private partner participating in this company. In the second case, the specific procedure for selecting the private partner also poses many problems. The contracting authorities encounter certain difficulties in defining the subject-matter of the contract or concession in a sufficiently clear and precise manner in this context, as they are obliged to do. The Commission has frequently noted that the tasks entrusted to the partnership structure are not clearly defined and that, in certain cases, they even fall outside any contractual framework. This raises problems not only with regard to the principles of transparency and equality of treatment, but even risks prejudicing the general interest objectives which the public authority wishes to attain. It is also evident that the lifetime of the created entity does not generally coincide with the duration of the contract or concession awarded, and this appears to encourage the extension of the task entrusted to this entity without a true competition at the time of this renewal. Sometimes this results in a situation where the tasks are awarded *de facto* for an unlimited period.

62. In addition, it should be pointed out that the joint creation of such entities must respect the principle of non-discrimination in respect of nationality in general and the

[53] Also, these conditions must not discriminate against or constitute an unjustified barrier to the freedom to provide services or to freedom of establishment, or be disproportionate to the desired objective.

[54] When planning and arranging such transactions, the test involving the use of the standard forms - which include the elements indispensable for a well-informed competition, - also demonstrate how difficult it can be to find an adequate form of advertising to award tasks falling within the scope of the law on public contracts or concessions.

free circulation of capital in particular.[55] Thus, for example, the public authorities cannot normally make their position as shareholder in such an entity contingent on excessive privileges which do not derive from a normal application of company law.[56]

63. The Commission also wishes to point out that the participation of the contracting body in the mixed entity, which becomes the joint holder of the contract at the end of the selection procedure, does not justify not applying the law on public contracts and concessions when selecting the private partner. The application of Community law on public contracts and concessions is not contingent on the public, private or mixed character of the joint contractor of the contracting body. As the Court of Justice confirmed in the *Teckal* case, this law is applicable when a contracting body decides to entrust a task to a third party, i.e. a person legally distinct from it. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out *the essential part of its activities* with the controlling local authority or authorities.[57] Only entities that fulfil these two conditions at the same time may be treated as equivalent to "in-house" entities in relation to the contracting body and have tasks entrusted to them without a competitive procedure.[58]

64. Lastly, it should be pointed out that if the mixed entity has the quality of a contracting body this quality also requires it to comply with the law applicable to public contracts and concessions when it is awarding tasks to the private partner which have not been the subject of a call for competition by the contracting authority ahead of the incorporation of the mixed entity. Thus, the private partner should not profit from its privileged position in the mixed entity to reserve for itself certain tasks without a prior call for competition.

3.2. Control of a public entity by a private operator

65. The establishment of an institutionalised PPP may also lead to a change in the body of shareholders of a public entity. In this context, it should first be emphasised that the changeover of a company from the public sector to the private sector is an economic and political decision which, as such, falls within the sole competence of the Member States.[59]

[55] Participation in a new undertaking with a view to establishing lasting economic links is covered by the provisions of Article 56 relating to the free movement of capital. See Annex I of Directive 88/361/EEC, adopted in the context of the former Article 67, which lists the types of operations which must be considered as movements of capital.

[56] See Judgments of the Court of 4 June 2002, Case C-367/98, *Commission v. Portugal*, ECR I-4731; Case C-483/99, *Commission v. France*, ECR I-4781; and Judgments of 13 May 2003, Case C-463/00, *Commission v. Spain,* ECR. I-4581; Case C-98/01, *Commission v. United Kingdom,* Rec. I-4641. On the possible justifications in this framework, see Judgment of the Court of 4 June 2002, Case C-503/99, *Commission v. Belgium*, ECR I-4809.

[57] Case C-107/98, *Teckal*, Judgment of 18 November 1999, point 50.

[58] The Court of Justice has been asked to make three preliminary rulings (Cases C-26/03, C-231/03 and C-458/03) designed to obtain additional clarification on the scope of the criteria which can establish the existence of an "in house" type relationship.

[59] This follows from the neutrality principle of the Treaty in relation to ownership rules, recognised by Article 295 of the Treaty.

66. It should also be pointed out that Community law on public contracts is not as such intended to apply to transactions involving simple capital injections by an investor in an enterprise, whether this latter be in the public or the private sector. Such transactions fall under the scope of the provisions of the Treaty on the free movement of capital[60], implying in particular that the national measures regulating them must not constitute barriers to investment from other Member States.[61]

67. On the other hand, the provisions on freedom of establishment within the meaning of Article 43 of the Treaty must be applied when a public authority decides, by means of a capital transaction, to cede to a third party a holding conferring a definite influence in a public entity providing economic services normally falling within the responsibility of the State.[62]

68. In particular, when the public authorities grant an economic operator a definite influence in a business under a transaction involving a capital transfer, and when this transaction has the effect of entrusting to this operator tasks falling within the scope of the law on public contracts which had been previously exercised, directly or indirectly, by the public authorities, the provisions on freedom of establishment require compliance with the principles of transparency and equality of treatment, in order to ensure that every potential operator has equal access to performing those activities which had hitherto been reserved.

69. In addition, good practice recommends ensuring that such a capital transaction does not in reality conceal the award to a private partner of contracts which might be termed public contracts, even concessions. This is the case in particular when, before the capital transaction, the entity in question is awarded, directly and without competition, specific tasks, with a view to making the capital transaction attractive.

18. What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not ?

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

In general and independently of the questions raised in this document:

20. In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?

21. Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of "good practice" in this framework which could serve as a model for the Union? If so, please elaborate.

22. More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

[60] Article 56 ff. of the EC Treaty.

[61] See Communication of the Commission on certain legal aspects concerning intra-EU investment OJ No C 220, 19 July 1997, p.15.

[62] See, on these lines, the Judgment of the Court of 13 April 2000, Case C-251/98, *Baars*, ECR I-2787

4. FINAL REMARKS

70. The Commission invites all interested parties to send their comments on the questions set out in this Green Paper. The replies, comments and suggestions may be sent by mail to the following address:

European Commission
Consultation "Green Paper on PPPs and the Community law on public contracts and concessions"
C 100 2/005
B-1049 Brussels

or by electronic mail to the following address:

MARKT-D1-PPP@cec.eu.int

Comments should reach the Commission by **30 July 2004** at the latest. For the information of interested parties, contributions received by electronic mail, with the name and address of the originators, will be posted at the site *http://europa.eu.int/comm/internal_market*, provided that the authors in question have not expressly objected to such publication.

71. On the basis of the contributions received, *inter alia*, the Commission plans to draw conclusions and, where appropriate, to submit concrete follow-up initiatives.

IP/04/593

Brussels, 4 May 2004

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

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

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

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

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

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

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

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

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

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

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

European Commission

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

C 100 2/005

B-1049 Brussels

Or by e-mail to the following address:

MARKT-D1-PPP@cec.eu.int

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

Background

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

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

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

http://europa.eu.int/comm/internal_market/ppp

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 3.5.2005
SEC(2005) 629

COMMISSION STAFF WORKING PAPER

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

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1. INTRODUCTION

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

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

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

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

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

[1] COM(2004) 327, 30.4.2004.

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

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

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

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

2. GENERAL OBSERVATIONS ON THE CONSULTATION

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

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

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

3. EXECUTIVE SUMMARY

3.1. Horizontal PPP initiative

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

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

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

3.2. Selection of the private partner

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

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

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

3.3. The contractual framework for PPPs

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

3.4. Subcontracting

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

3.5. Institutionalised PPPs

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

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

3.6. Perceived barriers to the introduction of PPPs

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

3.7. Collective consideration

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

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

4. THE MAIN RESULTS OF THE PUBLIC CONSULTATION

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

Question 2 of the PPP Green Paper

Question

In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

Main views of stakeholders

- **Many contributors consider the Competitive Dialogue to be well adapted to the award of contracts designated as public contracts.**
- **A large majority of stakeholders report problems with applying the procedure in practice, in particular as regards its scope, its complexity, its cost implications and the need to keep intellectual property confidential.**
- **Most of the contributors ask the Commission to provide clarification on various aspects of the Competitive Dialogue.**

4.1.1. Scope of Competitive Dialogue

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

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

4.1.2. Concerns about protection of confidentiality

The majority of the contributors express concern that participants in the Competitive Dialogue could potentially gain access to confidential data. These contributors point out that under Article 29(6), first subparagraph, of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, contracting authorities shall ask the participants to the dialogue to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue. It is claimed that this might lead to the unauthorized transfer of intellectual property, including innovative ideas, from one bidder to his or her competitors. The perceived consequences of this practice include a loss of improvements to public services and of benefits through innovation. Many of the contributors are also concerned that contracting authorities might unduly profit from know-how; unsuccessful bidders are not compensated.

4.1.3. Perceived lack of flexibility of Competitive Dialogue

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

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

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

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

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

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

4.1.4. *Plea for compensation of non-successful bidders*

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

4.1.5. *Guidance on applying the Competitive Dialogue is needed*

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

4.1.6. *Views on the application of the negotiated procedure*

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

4.2. The selection of private partners for contractual partnerships

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

Question 3 of the PPP Green Paper

Question

In the case of such contracts [meant are the purely contractual PPPs mentioned in Question 2]*, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.*

Main views of stakeholders

- **The main points considered to pose problems in terms of Community law on public contracts include the difficulty of distinguishing between the various types of public contracts and concessions and the related uncertainty as to the appropriate public procurement procedure.**

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

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

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

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

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

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

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

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

4.2.2.1. Practical experience with award procedures for concessions

Questions 4 and 5 of the PPP Green Paper

Question

Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?

Main views of stakeholders

- **Many stakeholders contend that the Community legal framework is sufficiently detailed in the sense of question 5.**
- **Problems encountered in the course of award procedures for concessions include a lack of legal certainty, in particular as regards deciding whether a given contract qualifies as a public contract or a concession, discrimination against concession models by Community regional policy and the competitive advantages of national companies.**

While many stakeholders consider the Community legal framework sufficiently detailed to allow non-national companies to participate effectively in procedures for awarding concessions, and a substantial number of contributions describe their practical experience in this field as positive, various other contributors point to problems encountered. These problems include a lack of legal certainty due to non-standardised public procurement procedures, confusion about which EU rules apply, in particular whether a given contract qualifies as a public contract or a concession, discrimination against concession models by Community regional policy and the competitive advantages of national companies.

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

4.2.2.2. General support for an EC initiative on concessions

Questions 6 and 7 of the PPP Green Paper

Question

In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

Main views of stakeholders

- **A clear majority of stakeholders favour a Community initiative in the area of concessions. Views are divided on the form of such an initiative.**
- **A Community initiative in this area should, above all, provide more clarity as regards the award procedure. However, there is broad agreement that public contracts or concessions should not be subject to identical award arrangements.**
- **A key argument against any initiative on concessions is the perceived need for flexibility in award procedures.**
- **Many stakeholders are in favour, but a slight majority are against a horizontal PPP initiative.**

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

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

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

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

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

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

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

Considerable support for legislation on the EC concession award regime

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

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

[8] OJ C 121, 29.4.2000, p.2.

[9] Point 34 of the Green Paper.

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

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

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

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

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

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

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

Views against any EC initiative on concessions

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

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

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

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

4.3. Private initiative PPPs

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

Question 8 of the PPP Green Paper

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

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

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

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

Question 9 of the PPP Green Paper

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

A large number of stakeholders recognise the need for some sort of encouragement for private initiative PPPs; most of them present ideas. Conversely, a substantial number of contributors explain that the application of existing EC rules, in particular the EC Treaty principles, provides sufficient encouragement for operators to embark on private initiative PPPs. Many stakeholders acknowledge that any measure encouraging private initiative PPPs needs to strike a balance: motivating operators to invest in such initiatives, while not distorting fair competition. Some stakeholders believe, however, that encouraging private initiative PPPs necessarily conflicts with the principles of transparency and equal treatment.

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

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

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

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

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

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

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

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

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

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

4.4. The contractual framework for PPPs

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

Question 10 of the PPP Green Paper

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

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

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

One stakeholder considers regular reviews of the PPP contract essential.

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

Question 11 of the PPP Green Paper

Question

Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or the freedom of establishment? If so, can you describe the type of problems encountered?

Main views of stakeholders

- **Few stakeholders are aware of cases where the conditions of execution – including the clauses on adjustments over time – had a discriminatory effect or represented an unjustified barrier to the freedom to provide services or freedom of establishment.**
- **There is broad consensus that the duration of the contract is not a source of discrimination in current PPP practice and that adjustments to long-term PPPs over time are needed.**
- **Those contributors who perceive discriminatory effects complain in particular about the different treatment of public and private companies.**

4.4.2.1. General remarks

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

4.4.2.2. Duration of PPPs

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

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

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

4.4.2.3. Adjustments to long-term PPPs over time

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

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

[11] Point 46 of the Green Paper.

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

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

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

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

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

Question 12 of the PPP Green Paper

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

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

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

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

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

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

Question 13 of the PPP Green Paper

Question

Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other "standard clauses" which are likely to present similar problems?

Main views of stakeholders

- **There is broad consensus that step-in clauses are of crucial importance for the financing of PPPs without raising particular procurement problems.**

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

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

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

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

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

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

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

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

Question 14 of the PPP Green Paper

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

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

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

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

4.5. Subcontracting

4.5.1. Perceived problems in relation to subcontracting

Question 15 of the PPP Green Paper

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

4.5.1.1. Overview

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

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

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

4.5.1.3. Problems related to the position of subcontractors

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

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

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

4.5.1.4. Uncertainties with regard to the applicable EC law

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

4.5.1.5. Other problems related to subcontracting

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

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

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

4.5.2. Clear opposition to more detailed rules for subcontracting

Question 16 of the PPP Green Paper

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

Question

In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

Main views of stakeholders

- **There is broad consensus against new initiatives in the area of subcontracting, in particular as regards the potential extension of tendering requirements to such contracts.**
- **A substantial number of stakeholders consider additional rules in this area useful, in particular to guarantee fair competition.**

4.5.2.1. Arguments against an extension of tendering rules for subcontracting

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

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

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

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

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

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

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

4.5.2.2. Proposals for more detailed rules on subcontracting

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

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

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

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

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

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

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

Question 17 of the PPP Green Paper

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

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

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

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

4.6. Institutionalised PPPs

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

Question 18 of the PPP Green Paper

Question

What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not ?

Main views of stakeholders

- **There is no agreement on whether or not current institutionalised PPP practice in the Member States actually complies with Community law on public contracts and concessions.**
- **Public authorities, public companies and associations of public bodies from various Member States tend to assess compliance fairly positively.**
- **Many contributors from the private sector perceive current compliance with Community law on public contracts and concessions as deficient in certain respects, pointing to circumvention of public procurement law and distortions of competition.**

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

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

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

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

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

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

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

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

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

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

Question 19 of the PPP Green Paper

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

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

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

4.6.2.1. Overview

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

4.6.2.2. Views in favour of a Community initiative on IPPPs

Reasons given for a Community initiative on IPPPs

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

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

Form of a Community initiative on IPPPs

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

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

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

Possible content of a Community initiative on IPPPs

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

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

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

4.6.2.3. Views opposing a Community initiative on IPPPs

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

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

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

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

Question 20 of the PPP Green Paper

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

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

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

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

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

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

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

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

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

Question 22 of the PPP Green Paper

Question

More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

Main views of stakeholders

- **There is broad support for some sort of collective consideration of PPP issues at EC**

level.

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

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

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

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

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

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

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

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

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

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

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

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

4.8.3. Arguments against collective consideration at Community level

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

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

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

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

ANNEX: LIST OF CONTRIBUTORS[20]

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

[20] This list includes all contributors who have authorised the publication of their comments

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

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

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

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

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

152.	United Kingdom Government
153.	Veolia/Vivendi Environnement
154.	Verband der Elektrizitätswirtschaft – VDEW
155.	Verband deutscher Verkehrsunternehmen – VDV
156.	Verband kommunaler Unternehmen – VKU
157.	Verband kommunaler Unternehmen Österreichs (VKÖ) – eigene Stellungnahme
158.	Verband der Öffentlichen Wirtschaft und Gemeinwirtschaft Österreichs
159.	Verbindungsstelle der österreichischen Bundesländer with contributions from • Amt der NÖ Landesregierung • Amt der OÖ Landesregierung • Amt der Tiroler Landesregierung • Amt der Vorarlberger Landesregierung • Amt der Wiener Landesregierung
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164.	One position signed by four Portuguese individuals • Luis Parreirao • Rafael Rossi • Gustavo Fontes • Daniel Lopes • Duarte Leite de Campos

IP/05/555

Brussels, 12 May 2005

Public procurement: consultation shows need for clarification of EU rules on public-private partnerships

The European Commission has published a report on the results of a consultation on public-private partnerships (PPPs) that was launched in April 2004 (IP/04/593). The aim of the consultation was to help assess if there is a need to improve EU law in this area. A majority of stakeholders asked for clarification of EU public procurement rules that apply to the selection of private partners for PPPs. Opinion was divided on the form and the precise content of the EU initiatives required. The report is available at: http://europa.eu.int/comm/internal_market/ppp

Internal Market and Services Commissioner Charlie McCreevy said: "The number of responses received confirms the growing importance of public-private-partnerships. PPPs are now widely used in large infrastructure projects and public services, and can make a major contribution to the growth of the EU economy. The Commission needs to ensure that the selection of private partners is transparent and that there is fair competition, not least because it is those principles which ensure value for money for taxpayers. The consultation revealed many arguments both for and against EU initiatives in this area. We will consider all these views and report on possible next steps before the end of 2005."

Responses

The Commission received 195 contributions from: public authorities, including 16 Member State governments; associations of private and/or public entities; private and public enterprises; and individuals. A high proportion of contributions came from Germany, France, UK, Austria and Italy.

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

Many respondents asked how EU rules should apply to the choice of private partners in "institutionalised PPPs", which are public service undertakings held jointly by both a public and a private partner.

In particular, respondents asked about the difference between 'in-house' and third-party entities. EU law on public contracts and concessions applies when a contracting body entrusts a task to a third party, unless the relation between the two is so close that the latter is equivalent to an 'in-house' entity. In general, public-sector respondents argued for widening the definition of 'in-house', while the private sector wished to maintain its limited scope as confirmed by the European Court of Justice (Stadt Halle C-26/03).

Next steps

The Commission plans a Communication before the end of 2005. Possible measures to increase fair competition include legislation, interpretative communications, initiatives to improve the coordination of national practice and exchange of good practice between Member States. The Communication will indicate the Commission's preferences.

Background

Public-private partnerships (PPPs) are forms of cooperation between public authorities and businesses to meet needs in the general interest. They involve complex legal and financial arrangements for carrying out infrastructure projects or providing services for the public. These partnerships are widely used within the EU, in particular in transport, public health, education, public safety, waste management and water distribution.

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Betrifft: Grünbuch PPP;
Stellungnahme der Republik Österreich

Zum Grünbuch der Kommission zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen vom 30. April 2004, KOM(2004) 327, wird nach Konsultation der betroffenen Kreise folgende Stellungnahme seitens der Republik Österreich abgegeben:

I. Einleitende Bemerkung zur Terminologie:

Es wird darauf hingewiesen, dass die im Grünbuch verwendete Bezeichnung „ÖPP“ in Österreich unüblich ist; es wird daher im Folgenden die auch international übliche Abkürzung „PPP“ verwendet.

Es darf in diesem Zusammenhang darauf hingewiesen werden, dass der Begriff PPP lediglich Public Private Partnerships, d.h. Partnerschaften bzw. Kooperationen zwischen dem öffentlichen und dem privaten Sektor, nicht aber Public Public Partnerships, d.h. Kooperationen zwischen verschiedenen Akteuren des öffentlichen Sektors (etwa mehrerer Gemeinden oder einer Gemeinde mit einem ausgegliederten Rechtsträger, der selbst öffentlicher Auftraggeber ist) erfasst. Da Public Public Partnerships rein sprachlich von der Abkürzung PPP umfasst sein könnten, soll daher hiermit klargestellt werden, dass nur Kooperationen zwischen der öffentlichen Hand einerseits und privaten Partnern andererseits vom Begriff „PPP“ und von der vorliegenden Stellungnahme erfasst sind.

II. Allgemeines zu PPP:

Public Private Partnership (PPP) ist in Österreich als Begriff positiv-rechtlich nicht verankert. Auch eine von rechtlichen Definitionen unabhängige Begriffsbestimmung durch die Lehre gestaltet sich schwierig, weil PPP einen – noch dazu aus dem angloamerikanischen Rechtskreis stammenden – Sammelbegriff für eine Vielzahl möglicher Kooperationsformen zwischen der öffentlichen Hand und dem privaten Sektor darstellt und sich nicht etwa in einer bestimmten Vertrags- oder Gesellschaftsform erschöpft.

Eine **Arbeitsdefinition** von PPP könnte folgende Formulierung darstellen: PPP ist eine auf Dauer angelegte Kooperation von öffentlicher Hand und privater Wirtschaft bei der Planung, der Erstellung, der Finanzierung, dem Betreiben oder der Verwertung von (bislang) öffentlichen Aufgaben mit angemessener Verteilung der Risken und Verantwortlichkeiten.

PPP als Begriff ist auch dem Vergaberecht unbekannt, sodass die übliche Typologie der einschlägigen Rechtsnormen (Bau-, Liefer-, und Dienstleistungsauftrag sowie Bau- und Dienstleistungskonzessionen) zur Anwendung gelangt (d.h. eine Zuordnung zu den von den Richtlinien definierten „Vertragstypen“ erfolgen muss).

Die Situation der öffentlichen Haushalte erschwert den Gebietskörperschaften oft die Erbringung qualitativ hochwertiger und preislich wettbewerbsgerechter Infrastruktur-Dienstleistungen. PPP als neue, innovative Form der Zusammenarbeit zwischen Verwaltungen und Wirtschaft stellen eine Möglichkeit dar, die öffentlichen Verwaltungen bei der Lösung ihrer Aufgaben zu unterstützen. Die öffentliche Hand sucht vor allem Finanzierungspartner für Bauleistungen und Betreiber öffentlicher Einrichtungen. Public-Private-Partnerships ermöglichen jedoch neben der Erschließung neuer Finanzierungsmöglichkeiten auch den Zugang zu operativem und strategischem Know-how, Managementfähigkeiten und Erfahrungen der Privatwirtschaft für die Öffentliche Hand, um die Effizienz und Effektivität der Verwaltung zu erhöhen und somit die Leistungserbringung zu verbessern. Schließlich können PPP zur Verwirklichung eines konkreten Bürokratieabbaus und der Verwaltungsmodernisierung beitragen.

Insbesondere in Großbritannien sind Public Private Partnership-Projekte seit längerem ein bekanntes Modell, um die Strukturen des öffentlichen Sektors mit dem Know-how der Wirtschaft zum gegenseitigen Nutzen zu verbinden. Das britische Instrument „Private Finance Initiative“ (PFI), die vorherrschende Form von PPP, wurde bereits 1992 unter der konservativen Regierung Major geschaffen, um zusätzliche öffentliche Investitionen mit Hilfe privaten Kapitals zu ermöglichen. Das Instrument wurde von der folgenden Labour-Regierung übernommen.

In Europa nehmen neben Großbritannien die Niederlande und Irland eine Vorreiterrolle ein. In Deutschland setzen sich Public Private Partnerships erst allmählich durch, in letzter Zeit ist allerdings eine dynamische Entwicklung zu beobachten. In Österreich sind die praktischen Erfahrungen auf diesem Gebiet noch geringer. Gleichzeitig rückt PPP wegen des sonst schwer zu deckenden staatlichen Bedarfs an Investitionen auch hierzulande zunehmend in das Zentrum des Interesses.

In Großbritannien gelangte ein durch die Treasury Taskforce (Arbeitsgruppe des Finanzministeriums) in Auftrag gegebenes Gutachten zu durchschnittlichen geschätzten Einsparungen von 17%. Untersuchungen in Deutschland zu Einsparpotenzialen bei PPP zeigen, dass im Vergleich zur herkömmlichen Realisierung öffentlicher Infrastrukturprojekte 10 bis 20% eingespart werden können. Zugleich besteht ein großes beschäftigungspolitisches Interesse, da durch die Mobilisierung privaten Kapitals der Ausbau öffentlicher Infrastrukturen gesichert oder gar beschleunigt werden kann.

Internationale Erfahrungen zeigen, dass PPP in vielen Bereichen öffentlicher Leistungserbringung sinnvoll sein können. Beispiele für PPP-Modelle sind zahlreich; sie sind vor allem in Versorgungsbereichen zu finden, die hohe Infrastrukturaufwendungen erfordern, insbesondere im Verkehrsinfrastrukturbereich, für Schulen, Hochschulen, Krankenhäuser, Altersheime, Justizanstalten, Messegelände, Sportstätten etc.

PPP gewinnen aber erst dann an strategischer Relevanz, wenn sie mehr sind als finanzielle Notlösungen in Zeiten knapper Kassen. Sie müssen sich für den Staat gleichermaßen wie für die Wirtschaft lohnen. Ziel ist eine „win-win-Situation“ für beide, nicht nur in finanzieller Hinsicht, sondern zum Beispiel auch hinsichtlich der Bündelung von Wissen und dem Austausch von Kenntnissen und Erfahrungen. Das partnerschaftliche Miteinander von öffentlicher Hand und Privaten bietet die Möglichkeit, die spezifischen Kompetenzen der Projektpartner zu nutzen. Das Zusammenfließen öffentlicher und privater Beiträge soll Synergieeffekte bewirken. Basis und wesentliche Voraussetzung für ein funktionierendes PPP-Projekt ist die faire Verteilung von Risiken und Kosten auf die Partner. Nur wenn der private Investor positive Renditeerwartungen hat, wird er eine Verbindung mit dem öffentlich-rechtlichen Partner eingehen (Refinanzierbarkeit der eingesetzten Mittel). Erfolgreiche PPP-Projekte zeichnen sich durch möglichst weitgehende Anreize an die beteiligten Privaten, effizient und effektiv zu produzieren, sowie durch eine optimale Risikoverteilung zwischen privaten und öffentlichen Partnern nach dem Prinzip der Beherrschbarkeit der Risken aus.

III. Allgemeine Bemerkungen zum Grünbuch:

In dem Grünbuch beleuchtet die Kommission zum einen den geltenden (Vergabe-) Rechtsrahmen für die Beauftragung Privater im Rahmen von PPP-Modellen. Darüber hinaus enthält es einen umfassenden Fragenkatalog über die in den Mitgliedsstaaten bestehenden Formen von PPP, bereits bestehende nationale Regelungen sowie über praktische Erfahrungen mit PPP. Mit der letztgenannten Fragenkategorie verfolgt die Kommission das Ziel, eine eindeutige Antwort von Politik, Wirtschaft und Auftraggebern zu bekommen, ob die gemeinschaftlichen Vergaberegeln ausreichen, einen diskriminierungsfreien Zugang aller interessierten Wirtschaftsteilnehmer zu PPP zu gewährleisten (Ziffern 24-41) oder ob gemeinschaftliche Maßnahmen (auslegende Mitteilungen, Rechtsakt) ergriffen werden sollen.

Ein Teil der Ausführungen und Fragen bezieht sich auch auf die Phase nach der Vergabe einer Konzession oder eines öffentlichen Auftrags im Rahmen eines PPP („Ausführungsphase“). Auch hierzu wird gefragt, ob hierfür ein Rechtsrahmen geschaffen werden sollte, um die „Gleichbehandlung“ der Wirtschaftsteilnehmer zu sichern (Ziffer 42 ff). Die Kommission legt zum einen in allgemeiner Form dar, wie eine Leistungsbeschreibung in den Vergabeunterlagen transparent, nicht-diskriminierend und wettbewerbsoffen abzufassen ist und unter welchen Voraussetzungen nachträgliche Vertragsanpassungen zulässig sein könnten. Zum anderen fragt die Kommission, ob zusätzliche Regelungen für die Vergabe von Unteraufträgen nötig sind.

Das **Grünbuch** ist **über weite Strecken nicht ergebnisoffen**. Insbesondere zu Konzessionsvergaben bringt die Kommission – durch den Hinweis auf nicht näher spezifizierte Rechtsverstöße – relativ klar zum Ausdruck, dass sie entweder neue Spezialvergaberegeln oder die Unterwerfung unter das geltende Vergaberecht für angezeigt hält. Dieser grundsätzliche Ansatz eines Konsultationsverfahrens **steht** jedoch **mit den Grundsätzen** der Strategie einer „**Besseren Gesetzgebung**“ **in Widerspruch** (vgl. dazu die Aussagen der Kommission u.a. in der Mitteilung „Action Plan „Symplifying and improving the regulatory environment“, KOM(2002)278, hinsichtlich der genauen Evaluierung allfälliger Alternativen zu Gesetzgebungsvorhaben).

Nach Ansicht der Republik Österreich wäre ein **Rechtsakt** zur Regelung von PPP (bzw. Konzessionen) **nicht zweckmäßig und wird daher abgelehnt**. Das Grünbuch selbst zeigt, dass der heute schon bestehende Rechtsrahmen einen Großteil aller Fragen, die PPP-Konstruktionen aufwerfen können, abdeckt. Auch dort, wo die sekundärrechtlichen Vorschriften nicht zum Tragen kommen, gewährleisten die primärrechtlichen Grundsätze (insb. Nichtdiskriminierung, Transparenz, Verhältnismäßigkeit, gegenseitige Anerkennung) in ihrer vom EuGH entwickelten Ausprägung angemessene und mit den Grundsätzen des Binnenmarktes vereinbare Beteiligungsmöglichkeit für Wirtschaftsteilnehmer aus allen Mitgliedstaaten.

Der große Vorteil von PPP liegt in der Flexibilität, die eine Anpassung des Vertrages auf den Einzelfall und im spezifischen Interesse der jeweiligen öffentlichen und privaten Partner ermöglicht. Eine weitgehende **Harmonisierung bzw. „Koordinierung" hätte zwangsläufig eine Einschränkung dieser Flexibilität zur Folge** und **würde das Entwickeln zweckmäßiger innovativer Lösungsmodelle erschweren**, was wiederum zu einer Zurückdrängung dieser nützlichen Form der Zusammenarbeit führen würde. Auf Grund der vielfältigen immer neuen Erscheinungsformen und der notwendigen projektspezifischen „Maßschneiderung" von PPP wäre deren abschließende Regelung wohl auch gar nicht möglich.

In diesem Zusammenhang wird auch darauf hingewiesen, dass die wirtschaftliche und organisatorische Entscheidung, **ob** bestimmte Dienst- oder Bauleistungen selbst erbracht oder an Dritte **ausgelagert** werden sollen, jedenfalls **Sache der Mitgliedsstaaten** (bzw. der einzelnen öffentlichen Auftraggeber) ist und bleiben muss (hinsichtlich Dienstleistungen von allgemeinem Interesse vgl. dazu das Weißbuch der EK zu Dienstleistungen von allgemeinem Interesse, Pkt. 4.3.). Dies sollte zweifelsfrei klargestellt werden.

Auslegende Mitteilungen zu einzelnen Problemfeldern, wie etwa zum wettbewerblichen Dialog, werden jedoch als **zweckmäßig** erachtet (siehe dazu näher bei der Beantwortung der einzelnen Fragen). Wesentlich ist jedoch auch hier, dass diesbezügliche Klarstellungen nicht zu einer restriktiveren Anwendung des gemeinschaftsrechtlichen Rechtsrahmens führen und die erforderliche Flexibilität bei der Vergabe von PPPs gewahrt bleibt.

Hinzuweisen ist ferner darauf, dass die Aussage der Kommission in Fußnote 52 (*„Es sei daran erinnert, dass die Grundsätze der Rechtsvorschriften über die Vergabe von öffentlichen Aufträgen und von Konzessionen ebenfalls gelten, wenn die Vergabe eines*

Auftrags durch eine einseitige Maßnahme erfolgt (beispielsweise einen öffentlichen Rechtsakt)“) verfehlt ist. Wie Erwägungsgrund 8 der RL 92/50/EWG hervorhebt, unterliegen Auftragsvergaben nur dann dem Vergaberegime der Richtlinien wenn sie auf der Grundlage von „Aufträgen“ erfolgt. „Andere Grundlagen …, wie etwa Gesetz oder Verordnungen … werden nicht erfasst.“ Die Aussage im Grünbuch ist daher dahingehend zu korrigieren, dass *wenn die Vergabe eines Auftrags durch eine einseitige Maßnahme erfolgt (beispielsweise einen öffentlichen Rechtsakt) erfolgt, die Grundsätze des primären Gemeinschaftsrechts ebenfalls gelten.* In diesem Zusammenhang wird darauf hingewiesen, dass auch Rz 11 des Grünbuches missverständlich formuliert ist.

IV. Zu den einzelnen Fragen:

1. Welche Formen von ÖPP auf Vertragsbasis sind Ihnen bekannt? Gibt es in Ihrem Land spezifische (gesetzliche oder andere) Rahmenbedingungen für derartige Konstruktionen?

Es gibt in Österreich keine spezifischen gesetzlichen Regelungen für PPP auf Vertragsbasis. Sie können auf Grundlage der allgemeinen zivil- und haushaltsrechtlichen Normen unter Beachtung allenfalls anwendbarer vergabe-, beihilfen-, gesellschafts-, steuer-, verfassungs- und arbeitsrechtlicher Regelungen und des gemeinschaftsrechtlichen Rechtsrahmens errichtet werden.

In Österreich kommen PPP-Modelle in zunehmendem Maße vor allem im Bereich Verkehr und Infrastruktur zum Einsatz.

Ungeachtet der Tatsache, dass für jedes PPP ein Bündel von speziell auf das jeweilige Projekt zugeschnittenen Verträgen zu erstellen ist, lassen sich die in Österreich bisher praktizierten PPP-Modelle folgenden Kategorien zuordnen (wobei letztere nach der Einteilung der Kommission kein PPP auf Vertragsbasis, sondern ein Modell einer institutionalisierten PPP ist):

- **Betreibermodell**: Ein Privater übernimmt die Planung, Errichtung und Finanzierung eines Betriebes bzw. einer Anlage und schließt mit der öffentlichen Hand einen (langfristigen) Errichtungs- und Betreibervertrag. Die öffentliche Hand leistet ein entsprechendes Entgelt. („Öffentliche Hand bestellt und zahlt.“)
- **Konzessionsmodell**: Die öffentliche Hand erteilt dem privaten Partner eine Konzession für den Bau einer Anlage oder die Erbringung einer Dienstleistung.

Der private Konzessionär betreibt die Anlage bzw. erbringt die Dienstleistung an Stelle der öffentlichen Hand und hebt dafür von Dritten Entgelt ein.

- **Kooperationsmodell**: Öffentliche Hand und privater Partner beteiligen sich als Gesellschafter an einer eigens gegründeten Projekt-/Kooperationsgesellschaft, die etwa mit der öffentlichen Hand eine Ver-/Entsorgungsauftrag und mit dem privaten Partner einen Betriebsführungsvertrag schließt. Vielfach werden auch getrennte Besitz- und Betriebsgesellschaften eingerichtet.

Genannt werden auch Betriebsführungs-, Belehnungs-, Verfügbarkeits-, Contracting- und Finanzierungsmodelle sowie direkte und indirekte Nutzerfinanzierungsmodelle.

Es wird darauf hingewiesen, dass in der Praxis zwei identisch umgesetzte Modelle meist nicht zu finden sind und viele PPP-Projekte Elemente mehrerer Grundmodelle vereinen.

2. Nach Auffassung der Kommission wird die Umsetzung des wettbewerblichen Dialogs in einzelstaatliche Rechtsvorschriften den betroffenen Parteien ein Verfahren an die Hand geben, das sich ganz besonders für die Vergabe öffentlicher Aufträge in Zusammenhang mit der Einrichtung einer ÖPP auf Vertragsbasis eignet und gleichzeitig die Grundrechte der Wirtschaftsteilnehmer wahrt. Stimmen Sie dem zu? Falls nein, warum nicht?

In Rz 24 des Grünbuches wird zunächst ausgeführt, dass gemäß der Baukoordinierungsrichtlinie, der Dienstleistungsrichtlinie sowie der neuen „klassischen" RL 2004/18/EG die Durchführung eines Verhandlungsverfahrens (u.a.) dann zulässig ist, wenn es sich „um Arbeiten handelt, die ihrer Natur nach oder wegen der damit verbundenen Risiken eine vorherige globale Preisgestaltung nicht zulassen". Die Interpretation der Kommission, wonach diese Ausnahmeregelung ausschließlich für Sonderfälle gelte, in denen die Art oder der Umfang der Arbeiten von vornherein unwägbar ist, und insbesondere nicht für Fälle gedacht sei, in denen andere Unwägbarkeiten aufträten, etwa Probleme mit der vorherigen Preisfestlegung auf Grund der Tatsache, dass die rechtliche und finanztechnische Konstruktion sehr komplex ist, erscheint in dieser Allgemeinheit problematisch und unzutreffend. (Abgesehen davon ist das Extrembeispiel der Arbeiten in einer geologisch instabilen oder archäologischen Zone schlecht geeignet, ein durchschnittliches Verhandlungsverfahren zu begründen, da in solchen Fällen das Ausmaß der notwendigen Arbeiten oft nicht bloß nach Beginn des Vergabeverfahrens, sondern erst nach Beginn der Arbeiten selbst nach und nach bekannt wird.)

Gerade die Lokalisierung und Zuteilung wirtschaftlicher und rechtlicher Risken in PPP-Modellen stellt den öffentlichen Auftraggeber, aber auch die Bieter, vor erhebliche Schwierigkeiten, wenn nicht das Verhandlungsverfahren gewählt werden kann. Die Erfahrung zeigt nämlich, dass komplexe, über längere Zeiträume geschlossene PPP-Verträge die Notwendigkeit mit sich bringen, dass über den Vertragsinhalt mit den ausgewählten Bietern verhandelt werden kann. Ohne Verhandlungen ist es nicht möglich, die zahlreichen Risken, die ein lange Zeit laufendes PPP-Modell für beide Vertragsteile mit sich bringt, optimal zu verteilen und damit den volks- und betriebswirtschaftlichen Nutzen eines PPP-Modelles nicht zu gefährden. In diesem Zusammenhang ist auch darauf hinzuweisen, dass die Entgeltmechanismen in aller Regel sehr komplex sind und insbesondere an die jeweilige Risikozuteilung angepasst werden müssen. Nach Ansicht der Republik Österreich können daher bei einem komplexen PPP-Projekt durchaus die Voraussetzungen für die Anwendung des Verhandlungsverfahrens mit vorheriger Bekanntmachung vorliegen (dies muss freilich für jeden Einzelfall geprüft werden). Dies ist insbesondere in jenen Fällen von Bedeutung, in denen das Verfahren des wettbewerblichen Dialogs noch nicht ins nationale Recht umgesetzt oder zwar bereits umgesetzt, nicht aber das bestgeeignete Verfahren für die Vergabe eines konkreten Auftrags ist.

Zur Frage der Kommission: Grundsätzlich scheint das Verfahren des wettbewerblichen Dialogs durchaus geeignet, ein PPP-Projekt auf Vertragsbasis zu vergeben. Die Bestimmung des Art. 29 der RL 2004/18/EG birgt jedoch eine Reihe möglicher Probleme (hingewiesen wird darauf, dass die nachfolgende Auflistung der Probleme keineswegs erschöpfend ist):

Unklarheiten bestehen etwa bereits hinsichtlich der Beurteilung, ob der Anwendungsbereich des Art. 29 eröffnet ist. Fraglich ist nämlich, ob auf „objektive“ oder „subjektive“ Umstände abzustellen ist (ersteres legt die Definition „besonders komplex“ in Art. 1 (11) lit c nahe, letzteres Erwägungsgrund 31 (arg „anzulasten“) und Art. 29 Abs. 1 („falls seines Erachtens“). Ein Abstellen auf „rein objektive“ Umstände („ist der Auftraggeber in der Lage die Konditionen festzulegen“) wäre bei einer strikten Lesart problematisch, denn daraus könnte abgeleitet werden, dass der Auftraggeber jede nur erdenkliche Anstrengung zu unternehmen hat, um die Konditionen festzulegen. Dies würde im Endeffekt bedeuten, dass z.B. der Auftraggeber gezwungen wäre, in völlig unwirtschaftlicher Weise eine Vielzahl von externen Beratern (Sachverständigen) zu beschäftigen, die letztlich alle erdenklichen Varianten ausloten und bewerten müssten, damit der Auftraggeber die für ihn „beste“ Ausschreibungskondition eruieren kann (arg: „objektiv ist die Festlegung der Konditionen möglich“, ob der damit verbundene Aufwand in einer wirtschaftlichen Relation zum geschätzten Auftragswert steht, ist nicht erheblich). Die Republik Österreich geht jedoch davon aus, dass auch in diesem Fall die Bestimmung so zu verstehen ist, dass eine (objektiv nachprüfbare) wirtschaftliche Unverhältnismäßigkeit für die Festlegung der rechtlichen/finanziellen/technischen Konditionen als „objektiv unmöglich“ im Sinne des Art. 1 Abs. 11 lit. c gilt.

Unklar ist auch wie die gemäß Anhang VII zwingend (!) vorgeschriebenen Informationen für Bekanntmachungen (insbes. Z 6 Hinweis auf Optionen, Lose, Losgrößen bei Bauaufträgen, Einordnung des Lieferauftrages als Kauf, Leasing usw., Optionen bei Lieferungen und Dienstleistungen; Z 7, Z 9 und andere mehr) bereitgestellt werden können, da gemäß der Definition der wettbewerbliche Dialog nur dann zulässig ist, wenn man gerade nicht weiß, ob man Optionen braucht (diese sinnvoll sind), ob ein Kauf besser als ein Leasing ist usw. Hier wäre eine Klarstellung dringend angebracht, welche Informationen zwingend anzugeben sind bzw. ob die Informationen nur „gegebenenfalls“ (wenn der Auftraggeber zumindest das schon weiß) anzugeben sind.

Es wird sich erst in der Praxis zeigen, ob es möglich ist, bereits in der Bekanntmachung – also noch vor der Dialogphase und zu einem Zeitpunkt, zu dem die Art der Umsetzung der Leistung noch nicht feststeht – die Zuschlagskriterien so konkret anzugeben, dass anhand dieser Kriterien die Angebote, welche nach Abschluss der Dialogphase erstattet werden, sachgerecht und hinreichend genau beurteilt werden können. So ist es durchaus vorstellbar, dass im Rahmen der Verhandlungen zu einem PPP-Projekt zum Teil nicht unwichtige Aspekte abgeändert werden und die Dialogphase zeigt, dass bestimmte Aspekte für die Entscheidung des Auftraggebers wesentlich sind, die in den Zuschlagskriterien noch nicht berücksichtigt wurden. Auch ist es in einem flexiblen Verfahren mit einer definitionsgemäß erst am Ende möglichen Beschreibung der Leistung schwierig, die Vergleichbarkeit der Angebote sicherzustellen.

Weiters besteht die Gefahr, dass der öffentliche Auftraggeber nach der „Rosinenmethode“ die am Markt verfügbare beste Lösung ermittelt und damit substantielles Know-how eines (oder mehrerer) Marktteilnehmer an sich zieht, um die so ermittelte Ideallösung in der anschließenden Angebotsphase der billigsten Realisierung zuzuführen (ob die in Art. 29 Abs. 3 3.UA getroffene „Lösung“ in der Praxis anwendbar ist, wird erst die Erfahrung zeigen). Diese Frage nach den geistigen Eigentumsrechten der Bieter steht wiederum in einem Spannungsverhältnis zum Ziel des effizienten Mitteleinsatzes der öffentlichen Hand. So scheint fraglich, ob die (teilweise sicherlich notwendige) Abgeltung von Konzepten/Lösungsvorschlägen nicht zum Zug gekommener Bewerber das Verfahren des wettbewerblichen Dialogs für die Auftraggeber wirtschaftlich erscheinen lässt. Es stellt sich in diesem Zusammenhang auch die Frage, ob und in welchem Umfang Auftraggeber schon vorab (z.B. in der

Bekanntmachung) die Zustimmung der Bieter zur Weitergabe von Informationen verlangen können.

Bei manchen begutachtenden Stellen in Österreich hat sich der Eindruck ergeben, dass Art. 29 Abs. 6 nach der Dialogphase auf ein offenes Verfahren hinzielt (arg.: „Einladung zur Legung eines *endgültigen* Angebots“). Die Republik Österreich geht jedoch davon aus, dass nach der Dialogphase jedenfalls Verhandlungen zulässig sind (so auch das Verständnis im Rat bei der Diskussion der Bestimmung). In diesem Zusammenhang sei auch darauf hingewiesen, dass die Richtlinie nicht regelt, in welchem Detaillierungsgrad über verschiedene Lösungen Dialog geführt werden kann bzw. soll (oder gar muss).

Gemäß Art. 29 Abs. 4 der RL kann der Auftraggeber einzelne Lösungen ausscheiden. Nicht völlig klar ist nach dem Richtlinientext, ob mit dem Ausscheiden der Lösung auch ein Ausscheiden des die Lösung anbietenden Bieters verbunden ist bzw. sein muss oder ob der entsprechende Bieter weiter am Dialog und der anschließenden Vergabe des Vorhabens und zwar hinsichtlich anderer Lösungen teilnehmen kann.

Weiters stellt sich die Frage, bis zu welcher Grenze „Nachverhandlungen“ gemäß Art. 29 Abs. 7 2. Unterabsatz zulässig sind (insbesondere worauf sich diese „Erläuterungen und Klarstellungen“ beziehen dürfen und wie andere Bieter davon – zur Wahrung ihrer Rechte – ausreichend Kenntnis erlangen).

3. Sehen Sie in Bezug auf diese Aufträge neben der Wahl des Vergabeverfahrens andere Punkte, die mit dem Gemeinschaftsrecht über öffentliche Aufträge in Konflikt stehen könnten? Wenn ja, nennen Sie diese und begründen Sie!

Nach Konsultation der betroffenen Akteure scheinen grundsätzlich (zu den Ausnahmen s.o. bzw. unten) keine unüberbrückbaren Hindernisse für die Vergabe und Durchführung von PPP-Projekten zu bestehen.

Probleme könnten allerdings im Zusammenhang mit den Zuschlagskriterien auftreten. So ist eine sinnvolle Festlegung von Zuschlagskriterien ohne Kenntnis der verschiedenen (erst in der Dialogphase präsentierten) Lösungsansätze und der gebotenen Risikoverteilung schwierig bzw. nur äußerst rudimentär möglich (siehe dazu auch schon oben zu Frage 2). Mangels konkreter Abgrenzungskriterien ist weiters die erforderliche Abgrenzung zwischen Bau- und Dienstleistungsaufträgen einerseits und Bau- und Dienstleistungskonzessionen andererseits problematisch (siehe dazu noch näher unten zu Frage 4).

4. Haben Sie bereits einmal ein Verfahren zur Vergabe einer Konzession in der Europäischen Union organisiert, daran teilgenommen bzw. ein solches organisieren oder daran teilnehmen wollen? Welche Erfahrungen haben Sie gemacht?

Der Kommission ist zuzustimmen, dass es nicht einfach ist, von Vornherein festzulegen, ob das ausgeschriebene Vorhaben ein öffentlicher (Bau- oder Dienstleistungs) Auftrag oder eine Konzession ist. Zutreffend zeigt die Kommission dabei das Problem auf, dass sich im Laufe des Verfahrens die Einstufung als öffentlicher Auftrag oder Konzession ändern kann und dies zu erheblicher Rechtsunsicherheit sowohl für den Auftraggeber als auch die Bieter führt. Denn es darf nicht übersehen werden, dass die Durchführung eines Verfahrens zur Vergabe eines PPP-Projektes auf beiden Seiten erheblichen Zeitaufwand und Kosten verursacht. Insbesondere wenn sich erst zu einem verhältnismäßig späten Verfahrenszeitpunkt zeigt, dass der nunmehr in Rede stehende Auftrag nicht mehr als Konzession zu beurteilen oder die Einordnung zumindest fraglich ist, wären alle vergangenen Aufwendungen frustriert, wenn sich das Verfahren insgesamt als nicht mehr rechtmäßig darstellen würde.

Um diesem Rechtsrisiko auszuweichen, könnte ein öffentlicher Auftraggeber verleitet sein, von Vornherein die „sichere“ Variante zu wählen und den Auftrag als „klassischen“ öffentlichen Auftrag ausschreiben. Wie aber oben bereits aufgezeigt, wäre es diesfalls – folgt man der Auffassung der Kommission – öffentlichen Auftraggebern in aller Regel verwehrt, PPP-Vorhaben im Wege des Verhandlungsverfahrens zu vergeben. Damit würden jedoch in vielen Fällen volks- und betriebswirtschaftlich wertvolle Optimierungspotentiale verloren gehen.

Der **Vorschlag der Kommission**, dieses Problem durch **einheitliche Regelungen für alle PPP-Projekte** zu lösen, ist nach Ansicht der Republik Österreich jedoch **kein geeignetes Mittel**. Die Abgrenzungsfragen zwischen Auftrag und Konzession würden diesfalls lediglich durch – noch weniger geklärte und äußert schwierige – Abgrenzungsfragen zwischen PPP-Projekt und „normalem“ Auftrag bzw. Konzession ersetzt. So scheint es denkbar schwierig, etwa eine „normale“ Dienstleistungskonzession von einem PPP-Projekt in Form einer Dienstleistungskonzession durch klare Merkmale zu unterscheiden (ein bloßes Abstellen auf die Vertragsdauer wäre wohl zu wenig und würde der besonderen Natur von PPP nicht gerecht werden; beim Aspekt der Risikoverteilung sind jedoch Unterschiede nicht ohne weiteres ersichtlich).

Möglicherweise kann dieses Problem bereits durch die Umsetzung des wettbewerblichen Dialogs entschärft werden. Damit wäre zumindest sichergestellt, dass die – zu Beginn des Vergabeverfahrens häufig nicht abschätzbare – Frage der Risikoverteilung nicht notwendigerweise zu einem Wechsel des bei der Auswahl des Vertragspartners anzuwendenden Verfahrens führt.

Sollten nach Auffassung der Kommission nach Durchführung des gegenständlichen Konsultationsverfahrens Unklarheiten etwa zur Frage der Abgrenzung zwischen Konzessionen und Aufträgen bestehen, so wäre die Klärung der Fragen durch eine Auslegende Mitteilung zweckmäßig. Hilfreich könnte eine Klarstellung sein, welche konkreten Risken bzw. welches Ausmaß an Risikotragung der private Partner übernehmen muss, damit eine Konzession vorliegt, bzw. wie hoch der vom Auftraggeber bezahlte Anteil des Auftragswertes sein kann, ohne dass dies einer Konzession entgegen steht. (Möglich wäre auch – vergleichbar mit der Mitteilung der EUROSTAT zur Behandlung öffentlich-privater Partnerschaften vom 11. Februar 2004, wonach Vermögenswerte, die Gegenstand eines PPP sind, nicht als Vermögenswerte des Staates zu klassifizieren sind, wenn der private Partner das Baurisiko und mindestens entweder das Ausfallsrisiko oder das Nachfragerisiko trägt – klarzustellen, wie die am Markt gegenwärtig üblichsten PPP Modelle vergaberechtlich einzustufen sind; auch wenn ein konkretes PPP-Projekt vom „gängigen Modell“ abweicht, könnte dies zumindest einen Anhaltspunkt darstellen.)

5. Halten Sie das derzeitige Gemeinschaftsrecht für präzise genug, um die konkrete und effektive Teilnahme von Gesellschaften oder Gruppierungen aus anderen Staaten an den Konzessionsvergabeverfahren sicherzustellen? Sind Sie der Ansicht, dass in dieser Hinsicht normalerweise ein tatsächlicher Wettbewerb herrscht?

Bereits aus den Grundsätzen des EG-Vertrages ergibt sich eine weitgehende Verpflichtung, Unternehmen aus allen Mitgliedstaaten bei Konzessionsvergaben zuzulassen. Für Baukonzessionen enthält die RL 93/37/EWG bzw. die RL 2004/18/EG darüber hinaus spezifische Vorschriften, die den Wettbewerb innerhalb der Gemeinschaft sicherstellen sollen. Nach Auffassung der Republik Österreich ist daher bereits durch das geltende anwendbare Recht ein zwischenstaatlicher bzw. innergemeinschaftlicher Wettbewerb sichergestellt. Dies haben auch die im Zuge der Konsultationen zum vorliegenden Grünbuch befassten Auftraggeber, Unternehmen und Interessensverbände mehrheitlich bestätigt.

6. Halten Sie einen Vorschlag für einen gemeinschaftlichen Rechtsakt zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe für wünschenswert?

Bereits aus der Beantwortung der Frage 5 ergibt sich, dass ein **gemeinschaftlicher Rechtsakt zur Festlegung eines Verfahrensrahmens für die Vergabe von Konzessionen entbehrlich** ist **und** von der Republik Österreich **abgelehnt** wird.

Es wird weiters darauf hingewiesen, dass sich der Gemeinschaftsgesetzgeber bewusst dafür entschieden hat, Konzessionen einem weniger strengen Vergaberegime zu unterwerfen (Baukonzessionen) bzw. vom Anwendungsbereich des sekundärrechtlichen Vergaberegimes überhaupt auszuschließen (Dienstleistungskonzessionen). Diese bewusste Entscheidung hat der europäische Gesetzgeber erst kürzlich bei der Erlassung des Legislativpakets, welches die diesbezügliche Rechtslage im Wesentlichen unverändert lässt, bestätigt. Der Gemeinschaftsgesetzgeber hat mit dieser Entscheidung der Tatsache Rechnung getragen, dass der Begriff „Konzession“ eine Vielfalt von unterschiedlichen, sich stets weiterentwickelnden Fällen umfasst (vgl. auch die Mitteilung der Kommission zu Auslegungsfragen im Bereich Konzessionen im Gemeinschaftsrecht) und bei der Vergabe von Konzessionen daher eine größere Flexibilität als bei der Vergabe von klassischen öffentlichen Aufträgen erforderlich ist. Weiters muss berücksichtigt werden, dass ein Konzessionär nicht nur eine Leistung im öffentlichen Interesse erbringt, sondern – anders als ein Auftragnehmer, der nur das kalkulatorische Risiko trägt – auch das wirtschaftliche Risiko der Leistungserbringung trägt. Bei der Beurteilung der Notwendigkeit von Regelungen muss deshalb sowohl dem Auftraggeber (bei der Auswahl des Partners) als auch dem Auftragnehmer (für die Ausführung der Leistung) ein größerer Handlungsspielraum zugestanden werden. Es ist nicht ersichtlich, warum diese (richtige) Entscheidung des europäischen Gesetzgebers aus Anlass der Diskussion von PPP revidiert werden sollte.

Ein gemeinschaftsrechtlicher **Rechtsakt** zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe ist daher **nicht erforderlich**.

Allenfalls könnte in einer Auslegenden Mitteilung Fragen im Zusammenhang mit Konzessionsvergaben klargestellt werden (vgl. auch schon oben zu Frage 4). Allfällige bestehende Probleme im Zusammenhang mit Konzessionsvergaben sollten aber nicht als Vorwand für die vollständige „Verrechtlichung“ der Konzessionsvergabe bzw. ihre Einbeziehung in das (diesbezüglich völlig ungeeignete) allgemeine Vergaberegime dienen.

7. Allgemeiner gefragt: Wenn Sie ein neues Gesetzgebungsvorhaben der Kommission für erforderlich halten, gibt es dann objektive Gründe dafür, in diesem Rechtsakt sämtliche ÖPP auf Vertragsbasis zu behandeln und sie ein und demselben Regelwerk für die Vergabe zu unterwerfen, ganz gleich ob die Vorhaben as öffentliche Aufträge oder als Konzessionen einzustufen sind?

Hiezu wird zunächst auf die Antwort zu Frage 6 verwiesen. Danach ist ein neues **Gesetzgebungsvorhaben** der Kommission **nicht erforderlich**.

Im Hinblick auf den Vorschlag der Kommission, die Vergabe von Aufträgen und Konzessionen im Rahmen von PPP-Projekten einem einheitlichen Regime zu unterwerfen, darf – wie bereits oben ausgeführt – nicht übersehen werden, dass die reine Erbringung einer Leistung im Auftrag sich von einer Erbringung der Leistung im Rahmen einer Konzession deutlich unterscheidet. Trägt ein Auftragnehmer lediglich das kalkulatorische Risiko, so ist ein Konzessionär doch dem wirtschaftlichen Risiko der gesamten Leistungserbringung ausgesetzt. Dieser Unterschied sollte auch (weiterhin) im Hinblick auf Überlegung zur Gestaltung des gemeinschaftsrechtlichen Rahmens beachtet werden.

Besondere Vorschriften nur für PPP würden im Übrigen eine entsprechende Definition von PPP voraussetzen. Angesichts der bestehenden großen Auffassungsunterschiede über den Begriff PPP und mangels konkreter Abgrenzungskriterien zu „normalen" Aufträgen oder Konzessionen (siehe dazu auch schon oben zu Frage 4) wären Sonderregelungen für PPP nach Ansicht der Republik Österreich äußerst problematisch und dem Ziel einer für alle Rechtsanwender klaren Rechtslage nicht dienlich. Darüber hinaus ist zu bemerken, dass der bestehende vergaberechtliche Rahmen nicht verlassen werden sollte. Eine Gesetzgebung ausschließlich für PPP, die ein eigenes Vergaberegime neben dem bestehenden errichtet, wäre überschießend und für die Praxis erschwerend.

Allenfalls könnte in einer auslegenden Mitteilung der gemeinschaftsrechtliche Rahmen von PPP-Projekten geklärt werden. Dabei stellen sich neben dem Vergaberecht auch zahlreiche weitere komplexe rechtliche Fragen, wie etwa Aspekte des Wettbewerbs- und des Beihilfenrechts. Eine diesbezügliche Klarstellung darf jedoch nicht zu einer (weiteren) Einschränkung der Handlungsfreiheit der betroffenen Akteure führen.

8. Ist Ihrer Erfahrung nach der Zugang der ausländischen Akteure zu privat initiierten ÖPP gewährleistet? Für den Fall, dass die Vergabestellen zur Initiative aufrufen, wird dieser Aufruf dann angemessen bekannt gemacht, so dass alle

interessierten Akteure Kenntnis davon haben können? Wird für die Ausführung des ausgewählten Projekts ein Auswahlverfahren auf Basis eines effektiven Wettbewerbs organisiert?
9. Wie könnte Ihrer Auffassung nach die Entwicklung privat initiierter ÖPP in der Europäischen Union unter Wahrung der Grundsätze der Transparenz und der Gleichbehandlung und ohne Verstoß gegen das Diskriminierungsverbot gewährleistet werden?

Zu „privat initiierten“ PPP wird zunächst grundsätzlich darauf hingewiesen, dass es selbstverständlich immer möglich ist, dass private Unternehmer mit einer Idee für ein bestimmtes gemeinsamen Vorhaben an einen öffentlichen Auftraggeber herantreten und somit selbst die Initiative zu einem PPP-Vorhaben ergreifen. Die Entscheidung, ein solches Vorhaben auch tatsächlich durchzuführen, muss freilich bei der öffentlichen Hand verbleiben, da nur sie die Disposition über die Notwendigkeiten der Hereinnahme privaten Kapitals oder privaten Wissens treffen kann.

Auch „privat initiierte“ PPP sind ihrem tatsächlichen Inhalt nach (derzeitig geltenden Recht) entweder als öffentlicher Auftrag oder als Dienstleistungs- bzw. Baukonzession zu qualifizieren. Entsprechend muss die Vergabe des Vorhabens im Wege öffentlicher Bekanntmachung, in einem fairen und angemessen transparenten Verfahren unter Beachtung der Grundsätze des EG-Vertrages, insbesondere des Grundsatzes der Nicht-Diskriminierung, erfolgen. Dabei ist der Wissensvorsprung des privaten „Initiators“ auszugleichen und allen am Vergabeverfahren beteiligten Unternehmen der gleiche Wissensstand verfügbar zu machen (und nicht etwa umgekehrt ein initiativer Bewerber auf Grund des durch seine Initiative erarbeiteten Wissensvorsprungs vom Vergabeverfahren auszuscheiden; letzteres verlangt auch § 21 Abs. 3 des österreichischen Bundesvergabegesetzes (BVergG) nur, wenn ansonsten ein fairer und lauterer Wettbewerb ausgeschlossen wäre, vgl. hiezu ausführlich die Erläuterungen zum BVergG AB 1118 XXI.GP, 29).

An dieser Stelle wird auch auf das oben zu Frage 2 betreffend den wettbewerblichen Dialog erwähnte Problem der Aufwandsabgeltung hingewiesen. Eine getrennte Honorierung für ein in privater Initiative erarbeitetes Konzept wäre – losgelöst vom Vergabeverfahren – grundsätzlich denkbar. Dies dürfte jedoch die öffentliche Hand nicht zu unvorhergesehenen und unkontrollierbaren Ausgaben verpflichten. Es sollte dabei weiters nicht vergessen werden, dass ein solcher Vorschlag eines privaten Unternehmens bis zu einem gewissen Grad der – im Wirtschaftsleben zweifellos notwendigen – Geschäftsanbahnung dient und die Kosten seiner Erstellung daher Teil des unternehmerischen Risikos darstellen.

Eine unterschiedliche Behandlung von „öffentlich initiierten“ und „privat initiierten“ PPP ist jedenfalls abzulehnen.

10. Welche Erfahrungen haben Sie in der Phase im Anschluss an die Auswahl des privaten Partners im Rahmen von ÖPP auf Vertragsbasis gemacht?
11. Sind Ihnen Fälle bekannt, in denen die Ausführungsbedingungen, einschließlich der Klauseln zur Anpassung im Zeitverlauf, eine diskriminierende Wirkung entfalten konnten oder eine ungerechtfertigte Behinderung der Dienstleistungs- oder Niederlassungsfreiheit darstellten? Falls ja, bitte beschreiben Sie die Art der aufgetretenen Probleme!
12. Sind Ihnen Praktiken oder Mechanismen zur Bewertung von Angeboten bekannt, die eine diskriminierende Wirkung haben?

Es sind aus der vergaberechtlichen Rechtsprechung in Österreich Fälle bekannt, in denen sich öffentliche Auftraggeber unzulässiger oder diskriminierender Praktiken bei der Vergabe von Aufträgen bedient haben. Es wird diesbezüglich jedoch auf die funktionierenden Rechtsschutzmechanismen verwiesen, die im Falle gemeinschaftswidriger Praktiken einen raschen und wirksamen Rechtsschutz im Sinne der gemeinschaftsrechtlichen Vorgaben und unter Beachtung des Effizienz- und des Äquivalenzgrundsatzes gewährleisten. Einschlägige Erkenntnisse der Vergabekontrollorgane können unter http://www.ris.bka.gv.at/verg/ abgerufen werden.

An dieser Stelle darf zu den Ausführungen der Kommission in Rz 46 zur zulässigen Laufzeit von Verträgen folgendes ausgeführt werden:

Die EG-Vergaberichtlinien enthalten in den Bestimmungen über die Berechnung des Auftragswertes Verweise auf Verträge mit unbestimmter Laufzeit bzw. auf Daueraufträge (vgl. Art. 7 Abs. 5 und 6 der RL 92/50/EWG und Art. 5 Abs. 2 der RL 93/36). Daraus lässt sich schließen, dass die Vergabe von **längerfristigen oder auch unbefristeten Aufträgen grundsätzlich zulässig** ist. Den vergaberechtlichen Vorschriften lassen sich auch sonst keine Anhaltspunkte für eine nur beschränkte Zulässigkeit der Vergabe von längerfristigen oder unbefristeten Aufträgen entnehmen. Aus diesem Grund ist die **Aussage in Rz 46 des Grünbuches**, wonach eine „übermäßig lange Laufzeit“ auf Grund der für den Binnenmarkt geltenden Grundsätze oder der wettbewerbsrechtlichen Bestimmungen des EG-Vertrags verboten sein dürfte, in dieser Allgemeinheit **nicht zutreffend**. Ebenso ist bei der Festlegung der angemessenen Vertragslaufzeit eine ausschließliche Orientierung an der Amortisierung der Investitionen und einer Verzinsung des eingesetzten Kapitals zu eng, da diesfalls andere berechtigte Interessen, wie etwa technische Kontinuität oder die Aufrechterhaltung der Versorgungssicherheit, nicht berücksichtigt werden können.

Zutreffend ist allerdings, dass das Transparenzgebot verlangt, eine vorherige Festlegung der Laufzeit, sofern dies möglich ist, in den Vergabeunterlagen zu veröffentlichen.

13. Sind Sie wie die Kommission der Auffassung, dass bestimmte Interventionsklauseln in Bezug auf die Grundsätze der Transparenz und der Gleichbehandlung problematisch sein können? Sind Ihnen andere Typen von Klauseln bekannt, deren Anwendung zu ähnlichen Problemen führen kann?

In den Rz 47ff behandelt die Kommission die Frage der Zulässigkeit von Vertragsanpassungen ohne erneute Bekanntmachung der Vergabe des PPP-Projektes.

Nach Ansicht der Republik Österreich sind Vertragsanpassungen und –änderungen während der Laufzeit von PPP-Projekten nicht anders zu beurteilen als nachträgliche Vertragsanpassungen bei sonstigen (komplexen) Aufträgen und mit den bestehenden Mitteln des Vergaberechts lösbar:

Es ist zunächst **nicht zutreffend**, dass, wie von der Kommission in Rz 49 ausgeführt, „**jede inhaltliche Änderung**“ in Bezug auf den Vertragsgegenstand dem Abschluss eines neuen Vertrags gleichzusetzen ist, was wiederum einen erneuten Aufruf zum Wettbewerb impliziert. Vielmehr kann ein neuer Auftrag und damit eine erneute Verpflichtung zur Bekanntmachung nur dann angenommen werden, wenn der bestehende Vertrag in wesentlichen Punkten geändert wird. Nur eine wesentliche Vertragsänderung (eine solche wird etwa bei einer Änderung des Preises, der Laufzeit oder einer Ausweitung der ausgeschriebenen Menge anzunehmen sein) ist als Abschluss eines neuen Vertrags (nach dem österreichischen Zivilrecht: als Novation im Sinne des § 1376 ABGB) und somit grundsätzlich als ausschreibungspflichtiger Vorgang zu werten (vgl. auch EuGH vom 5. Oktober 2000, Rs. C-337/98, Kommission gegen Französische Republik, Rz 44ff, wo der Gerichtshof bei der Beurteilung der Frage, ob die Änderung eines bestehenden Vertragsentwurfs durch nachfolgende Vertragsverhandlungen eine Ausschreibungspflicht auslöst, auf den Willen der Parteien zur Neuverhandlung wesentlicher Vertragsbestimmungen abstellt). Im Übrigen folgt dies **auch aus den Aussagen der Kommission selbst**, die in ihrer **Stellungnahme** in der **anhängigen Rs. 50/03, Simrad** et al, Rz 8, darauf abstellt, dass ein neuer Vertrag nur dann angenommen werden kann, ***„wenn sich der Auftragsgegenstand wesentlich ändert, sodass eigentlich ein ‚Aliud’, etwas anderes, beschafft werden soll***“.

Unwesentliche, geringfügige Eingriffe durch die Vertragsparteien begründen hingegen keine Ausschreibungspflicht, weil sie bei (fast) jeder langfristigen Vertragsabwicklung zur Anpassung an geänderte (ökonomisch, technische, gesetzliche) Rahmenbedingungen oder praktische Parteienbedürfnisse erforderlich sind (vgl. auch Heid, Eingriff in Altverträge mit komplexem Leistungsbild, RPA 2003, 318; vgl. im Übrigen auch die Kommission im ggstdl. Grünbuch, Rz 47: *„müssen sich die ÖPP-Beziehungen weiterentwickeln, um sich an Veränderungen des makroökonomischen oder technischen Umfelds sowie an das öffentliche Interesse anzupassen*“). Bei der Beurteilung der Wesentlichkeit der Vertragsanpassung ist auf alle Umstände des betroffenen Auftrags bzw. Projektes, wie etwa auf den Projektumfang, den Projektgegenstand, die bereits vergangene Projektlaufzeit sowie die noch verbleibende Restdauer des Projektes, Bedacht zu nehmen.

Auch wesentliche Änderungen eines bestehenden Vertrages können jedoch zulässig sein, wenn sie vom vertraglichen Konzept umfasst sind, das bereits Gegenstand einer rechtsgültigen Ausschreibung war. Dabei müssen die Umstände und Bedingungen, unter denen die Vertragsbeziehungen angepasst werden können, präzise im Vertrag dargelegt sein (zB Preis- oder Gebührenanpassungsklauseln). Diese Vertragsmodifikationen führen dann nicht zu einer neuen Ausschreibungspflicht, wenn sie unmittelbar auf einer entsprechenden Änderungsklausel im Vertrag beruhen und von dieser gedeckt sind, die Vertragsänderung daher ohne übereinstimmende Willenserklärung der Vertragspartner zustande kommt. Dies ist etwa bei der vertraglichen Indexierung der Vergütung der Fall. Findet die Vertragsanpassung keine vollständige Deckung in einer bestehenden Revisionsklausel, ist eine übereinstimmende Willenserklärung der Vertragspartner notwendig und es kommt in der Regel zu einem neuen Vertragsabschluss, welcher entsprechend der vergaberechtlichen Regelungen ausgeschrieben werden muss (vgl. Heid, Eingriff in Altverträge mit komplexem Leistungsbild, RPA 2003, 318, welcher so zwischen „derivativer“ und „originärer“ Vertragsanpassung unterscheidet).

Es ist nicht auszuschließen, dass bestimmte Preisanpassungs- oder Revisionsklauseln in Bezug auf die Grundsätze der Transparenz und der Gleichbehandlung problematisch sein können. So dürfen sie nicht so weitgehende Gestaltungsmöglichkeiten eröffnen, dass ein fairer Bieterwettbewerb gefährdet ist. Es kann allerdings nur im **konkreten Einzelfall** beurteilt werden, ob eine bestimmte Vertragsklausel zu weit gefasst und daher geeignet ist, die Grundsätze des EG-Vertrags zu unterlaufen. Grundsätzlich wird davon auszugehen sein, dass eine präzise Formulierung von Preisanpassungs- und Revisionsklauseln bereits im immanenten Interesse der Vertragsparteien liegt.

Allerdings wird selbst ein sorgfältig erstellter Vertrag nicht in allen Fällen sämtliche Eventualitäten und Entwicklungsmöglichkeiten über einen 20-30jährigen Zeitverlauf adäquat abbilden können. Es sind daher – wie von der Kommission ausgeführt – auch solche (wesentlichen, nicht durch die Vertragsunterlagen gedeckte) Änderungen zulässig, die durch ein unvorhergesehenes Ereignis erforderlich werden oder aus Gründen der öffentlichen Ordnung, Sicherheit oder Gesundheit gerechtfertigt sind.

Zusammenfassend gilt nach Ansicht der Republik Österreich daher Folgendes: Unwesentliche, geringfügige Änderungen eines bestehende Vertrages sind jedenfalls zulässig und begründen keine erneute Ausschreibungsverpflichtung. Wesentliche Änderungen sind hingegen ohne erneutes Ausschreibungsverfahren nur dann zulässig, wenn sie bereits in der Ausschreibung bzw. im Vertrag unter präzise definierten und im Einklang mit den Grundsätzen der Gleichbehandlung und der Transparenz stehenden Bedingungen vorgesehen sind oder durch ein unvorhergesehenes Ereignis erforderlich werden oder aus Gründen der öffentlichen Ordnung, Sicherheit oder Gesundheit gerechtfertigt sind.

Diese Überlegungen **gelten auch für Änderungen in der Person des privaten Partners**: Eine Änderung in der Person des privaten Partners stellt eine wesentliche Änderung des Vertrags dar und muss daher – außer uU in den Fällen der Gesamtrechtsnachfolge – grundsätzlich zu einem erneuten Aufruf zum Wettbewerb führen. Anders ist der Fall dann, wenn bereits in den Ausschreibungsunterlagen bzw. im Vertrag klargestellt war, dass ein bestimmter Dritter unter klar festgelegten (nicht-diskriminierenden) Voraussetzungen in den Vertrag eintreten kann. Diesfalls ist der Wechsel des Vertragspartners – nicht zuletzt auch im Hinblick auf die notwendigen Sicherheiten des Finanzierungspartners in PPP-Projekten – zulässig. Ebenso muss es möglich sein, dass unter bestimmten (im Vertrag genau definierten) Voraussetzungen dem privaten Partner der Auftrag entzogen wird und die Leistungen von der öffentlichen Hand selbst durchgeführt werden.

Zurückzuweisen ist in diesem Zusammenhang die Ansicht der Kommission, dass auch eine **Änderung in der Person des Projektmanagers zum Abschluss eines neuen Vertrages führt** (vgl. Rz 48 des Grünbuches). Der Austausch des Geschäftsführers bzw. Projektmanagers des Konzessionärs oder der Betreiberfirma ist eine Sache der internen Organisation der Vertragspartner und muss ohne neuerliche Ausschreibung des Projekts möglich sein, sofern die ordnungsgemäße Leistungserfüllung gewährleistet ist.

Die Frage, zu welchem Zeitpunkt solche Revisionsklauseln ausformuliert vorliegen müssen, wird maßgeblich von der (zulässigen) Verfahrensart abhängen, insbesondere davon, ob das Verhandlungsverfahren bzw. künftig auch das Verfahren des wettbewerblichen Dialogs gewählt werden kann. Problematisch könnte in diesem Zusammenhang nach Angabe einiger öffentlicher Auftraggeber sein, dass Revisionsklauseln nach Ansicht der Kommission schon in der Phase der Partnerauswahl ausformuliert sein müssen. Die konkret dem Vertragsabschluss zugrunde liegenden Preisanpassungs- oder sonstige Revisionsklauseln hängen teilweise maßgeblich vom konkret ausverhandelten Preismodell und sonstigen konkret ausverhandelten Vertragsbedingungen ab, sodass es nicht zielführend erscheint, wenn diese Klauseln ab dem Zeitpunkt der Bekanntmachung unveränderlich sein müssen. Gerade die Möglichkeit der Preisanpassung oder auch Anpassung sonstiger Vertragsbedingungen im Hinblick auf geänderte Umstände stellt einen wesentlichen Faktor der Risikoverteilung zwischen den Vertragsparteien dar. Wenn dieser Aspekt der Risikoverteilung mit den Bietern nicht verhandelt werden darf, kann dies zu einer suboptimalen Risikoallokation und damit volkswirtschaftlich hohen Kosten des Projektes führen.

Insbesondere in einem Verfahren des wettbewerblichen Dialogs können zweifellos nicht dieselben Anforderungen an die Ausschreibungsunterlagen gestellt werden wie z.B. in einem offenen Verfahren, bei dem die Ausschreibungsunterlagen so ausgestaltet sein müssen, dass sie Grundlage des Leistungsvertrages werden können. Insbesondere werden bestimmte Festlegungen, die erst im Laufe des Vergabeverfahrens im Zusammenwirken zwischen öffentlicher Hand und privatem Unternehmer entwickelt werden, nicht im Vorhinein für alle Bieter in gleicher Art vorgegeben werden können. Dazu zählen unter Umständen auch Festlegungen über die begleitende Kontrolle oder Revisions- und Interventionsklauseln.

14. Halten Sie es für erforderlich, dass bestimmte Aspekte der vertraglichen Rahmenbedingungen für ÖPP auf Gemeinschaftsebene geklärt werden? Falls ja, was sollte geklärt werden?

Die Phase nach der Auswahl des privaten Partners ist nicht mehr Gegenstand des Vergaberechts, sondern des (innerstaatlichen) Privatrechts. Auf die diesbezügliche Kompetenzbeschränkung des Art. 295 EGV wird verwiesen (zur Reichweite der Bestimmung vgl. Bär-Bouyssière in von der Groeben/Schwarze, Art. 295 Rz 7ff).

Notwendig ist daher eine klare Trennung zwischen dem Verfahren, das zum Vertragsabschluss führt (dazu gehören etwa auch die Regelungen über notwendige

Angaben in den Ausschreibungsunterlagen über den Inhalt des Vertrags, nicht aber die Festlegung der Vertragsbestandteile selbst), und den Regelungen über den Vertragsinhalt. Während das Verfahren grundsätzlich den Bestimmungen des Gemeinschaftsrechts unterliegt, ist eine (allfällige) Regelung des Vertragsinhaltes Sache der Mitgliedstaaten. In Bezug auf den Vertragsinhalt ist lediglich zu garantieren, dass – unbeschadet der derzeit bestehenden Ausnahmen vom Anwendungsbereich des Vergaberechts – Verträge über neue, bisher nicht vergebene Leistungen nicht ohne Durchführung eines neuerlichen Wettbewerbs geschlossen werden (vgl. dazu bereits die Ausführungen zu Frage 13). Hiefür bietet jedoch das bestehende Gemeinschaftsrecht bereits hinlänglichen Beurteilungsmaßstab und ausreichenden Schutz für potentielle Bieter.

Ein **gemeinschaftsrechtliches Gesetzesvorhaben zur Klärung bestimmter Aspekte der vertraglichen Rahmenbedingung für PPP** wird daher **von der Republik Österreich abgelehnt**.

15. Sind Ihnen bei ÖPP-Konstruktionen besondere Probleme mit der Vergabe von Unteraufträgen bekannt? Welche?

Nach Ansicht der Republik Österreich bestehen keine besonderen Probleme bei der Vergabe von Unteraufträgen im Zusammenhang mit PPP-Projekten.

16. Rechtfertigt die Existenz von ÖPP auf Vertragsbasis, die die Übertragung eines Aufgabenpakets an einen einzigen privaten Partner impliziert, Ihrer Auffassung nach, dass ausführlichere Regeln für die Vergabe von Unteraufträgen eingeführt werden und/oder dass der Anwendungsbereich erweitert wird?
17. Halten Sie, allgemeiner gesprochen, eine ergänzende Initiative auf Gemeinschaftsebene zur Klärung oder Umgestaltung der Regeln für die Vergabe von Unteraufträgen für erforderlich?

Nach Ansicht der Republik Österreich ist eine **ergänzende Initiative** zur ausführlicheren Regelung der Vergabe von Unteraufträgen **nicht erforderlich**; ebenso wenig wird eine Umgestaltung der bestehenden Regeln im Hinblick auf PPP für zweckmäßig erachtet.

Es ist nicht klar, was die Kommission mit der Frage nach der Erweiterung des Anwendungsbereiches (wovon? Im Hinblick worauf?) in Frage 16 bezweckt. Sollte damit die Erweiterung des Anwendungsbereiches der Vergaberichtlinien gemeint sein, darf lediglich darauf hingewiesen werden, dass deren Anwendungsbereich bereits zufrieden stellend und ausreichend deutlich normiert ist.

18. Welche Erfahrungen haben Sie mit der Einrichtung institutionalisierter ÖPP gemacht? Lassen Ihre Erfahrungen Sie zu der Schlussfolgerung gelangen, dass die gemeinschaftlichen Rechtsvorschriften für öffentlichen Aufträge und Konzessionen bei institutionalisierten ÖPP-Konstruktionen eingehalten werden? Falls nein, warum nicht?

Zur Einrichtung institutionalisierter PPP ist zunächst zu bemerken, dass – wie die Kommission zutreffend festhält – die Gründung einer Gesellschaft durch öffentliche und private Partner sowie Privatisierungsvorgänge (verstanden als Veräußerung von Unternehmensanteilen vom öffentlichen an den privaten Sektor) grundsätzlich nicht dem Vergaberecht unterliegen, sondern allein die Bestimmungen des EG-Vertrags (insbesondere das Beihilfenrecht) zu beachten sind. Dies gilt nach Ansicht der Republik Österreich auch, wenn das zu privatisierende Unternehmen bereits vor der Anteilsübertragung mit der Erfüllung bestimmter Aufgaben durch die öffentliche Hand betraut worden ist. Die **Anwendbarkeit** des vergaberechtlichen Sekundärrechts wäre lediglich dann **zu bejahen, wenn** die Betrauung eines Unternehmens mit bestimmten Aufgaben (im Einklang mit den vergaberechtlichen Bestimmungen ohne Durchführung einer Ausschreibung, etwa durch zulässige In-house-Beauftragung) in Verbindung mit einer nachfolgenden Beteiligung eines privaten Partners in der **Absicht** getätigt wurde, das Vergaberecht **zu umgehen**. Ein Indiz dafür wäre, wenn dem in Rede stehenden Wirtschaftsgebilde unmittelbar vor der Kapitalübertragung ohne Wettbewerb besondere Aufgaben übertragen werden (vgl. auch Rz 69). Hinzuweisen ist auch hier, dass eine Einzelfallbetrachtung erforderlich ist. Erfolgt nämlich der Anteilsverkauf (objektiv nachprüfbar) deswegen, weil das Unternehmen unvorhersehbar in Liquiditätsprobleme geraten ist und allein ein Anteilsverkauf diese beseitigen würde, so stellt der Anteilsverkauf wohl keine Umgehung dar, selbst wenn ein enger zeitlicher Konnex mit einer Aufgabenübertragung prima facie besteht.

In Rz 63 hält die Kommission zutreffend fest, dass Wirtschaftsgebilde, auf die die vom Gerichtshof in der Rs. Teckal aufgestellten Bedingungen zutreffen, ohne Durchführung eines Vergabeverfahrens Aufträge bzw. Konzessionen erhalten können (sogenannte „In-House-Vergabe“). Nach der Rechtsprechung des EuGH liegt nur dann ein Vertrag im Sinne der Vergaberichtlinien vor, wenn sich der Vertragspartner formal vom Auftraggeber unterscheidet und ihm gegenüber eigene Entscheidungsgewalt besitzt. Es liegt daher kein vergaberechtlich relevanter Vorgang vor, wenn der Auftraggeber über die fragliche Person (= den Vertragspartner) eine Kontrolle ausübt wie über ihre eigenen Dienststellen und wenn diese Person zugleich ihre Tätigkeit im Wesentlichen für die Gebietskörperschaft oder die Gebietskörperschaften verrichtet, die ihre Anteile innehaben (vgl. Rs C-107/98, Teckal, Rz 50f). Bei der Beurteilung, ob diese Voraussetzungen vorliegen, ist stets eine Einzelfallbetrachtung unter Abwägung aller (rechtlichen und faktischen) Umstände erforderlich. Die Frage hängt nicht zuletzt von der Ausgestaltung des nationalen Rechts in Bezug auf die gewählte Gesellschaftsform, aber auch von der individuellen Ausgestaltung des Gesellschaftsverhältnisses ab.

Das Kriterium „Kontrolle wie über eine eigene Dienststelle“ verlangt nach Ansicht der Republik Österreich keine idente, sondern eine mit der verwaltungsinternen Kontrolle vergleichbare Beherrschung (vgl. dazu die unterschiedlichen Sprachfassungen der diesbezüglichen Passage des Urteils C-107/98 und die Ausführungen der Republik Österreich im Verfahren C-26/03). Bei der Beurteilung dieser Voraussetzung ist eine Gesamtbetrachtung aller einschlägigen gesetzlichen Regelungen und Umstände (z.B. vertragliche Nebenabreden, Satzungen) vorzunehmen. Falls sich daraus ergibt, dass der Vertragspartner einer Kontrolle untersteht, die es dem Auftraggeber ermöglicht, alle Entscheidungen des Vertragspartners in jedem Fall zu beeinflussen, dann ist dieser qualifizierte Kontrolltatbestand nach Ansicht der Republik Österreich erfüllt. „Kontrolle“ im Sinne des zitierten Erkenntnisses „Teckal“ bedeutet nach Ansicht der Republik Österreich eine „umfassende Kontrollmöglichkeit“, denn auch in der öffentlichen Verwaltung, auf die die Formulierung des Erkenntnisses „Teckal“ abzielt (argumentum: „Dienststelle“), ist es regelmäßig so, dass die „Unterbehörde“ selbständig Entscheidungen treffen kann, die „Oberbehörde“ aber das Recht hat, diese Entscheidungen jederzeit abzuändern bzw. das Recht und die Möglichkeit hat, die Entscheidung in einer bestimmten Angelegenheit „an sich zu ziehen“. Insofern muss daher eine umfassende und unbeschränkte Einflussmöglichkeit auf strategische Zielstellungen wie auch alle Einzelentscheidungen bei der Leitung einer Gesellschaft gewährleistet sein. Dies kann etwa auch durch ein umfassendes Weisungsrecht bezüglich aller Entscheidungen des Rechtsträgers verwirklicht sein (vgl. etwa § 20 Abs. 1 des österreichischen GmbHG: „*Die Geschäftsführer sind der Gesellschaft gegenüber verpflichtet, alle Beschränkungen einzuhalten, die in dem Gesellschaftsvertrage, durch Beschluss der Gesellschafter oder in einer für die Geschäftsführer verbindlichen Anordnung des Aufsichtsrates für den Umfang ihrer Befugnis, die Gesellschaft zu vertreten, festgesetzt sind.*“).

Für eine solche umfassende Kontrollmöglichkeit ist es jedoch **nicht** zwingend **erforderlich**, dass der Auftraggeber 100%iger Eigentümer der betreffenden Einrichtung ist. Es steht daher einer „In-house-Konstruktion“ auch nicht entgegen, wenn ein privates Unternehmen an der betroffenen (beherrschten) Person beteiligt ist. Ausschlaggebend ist vielmehr die oben erläuterte qualifizierte Kontrollmöglichkeit (bei Beurteilung dieser Frage werden freilich die Beteilungsverhältnisse - in Verbindung mit den jeweiligen

Mehrheitserfordernissen - eine zentrale Rolle spielen) sowie die Frage, ob die so beherrschte Gesellschaft „im wesentlichen“ für den Auftraggeber tätig ist. Zu letzterem erlaubt sich die Republik Österreich lediglich darauf hinzuweisen, dass ihrer Ansicht nach ein systemimmanenter Rückgriff auf die 80%-Klausel des Art. 13 Abs. 1 der Sektorenrichtlinie nahe liegt.

Es darf in diesem Zusammenhang auch darauf hingewiesen werden, das ein Sachverhalt, auf den die vom EuGH in der Rs. Teckal aufgestellten Voraussetzungen zutreffen, auch **nicht** den primärrechtlichen Vorgaben des Diskriminierungsverbotes oder der Transparenzverpflichtung unterliegt (es liegt keine dem Gemeinschaftsrecht unterliegende wirtschaftliche Tätigkeit vor, vgl. etwa EuGI in der Rs T-77/92, *Parker,* Slg 1994, II-549, Rz 57 mit Hinweis auf die Urteile des Gerichtshofes vom 14.7.1972 in der Rs 48/69, *ICI/Kommission*, Slg. 1972, 619, Rz 136 bis 141, und vom 6.3.1974 in den Rs 6/73 und 7/73, *Istituto Chemioterapico Italiano und Commercial Solvents/Kommission*, Slg. 1974, 223, Rz 41, sowie Rs C-73/95 P, *Viho/Kommission*, Slg 1996, I-5457, Rz 15ff).

19. Halten Sie eine Initiative auf Gemeinschaftsebene für erforderlich, um die Verpflichtungen zu klären oder zu vertiefen, die die öffentlichen Auftraggeber in Bezug auf den Wettbewerb zwischen potentiell an einem institutionalisierten ÖPP-Projekt interessierten Wirtschaftsteilnehmen haben? Falls ja, welche Aspekte halten Sie für besonders wichtig und welche Form sollte eine solche Initiative haben? Falls nein, warum nicht?

Nach Ansicht der Republik Österreich ist **keine Initiative auf Gemeinschaftsebene erforderlich**, um die Verpflichtungen der Auftraggeber im Hinblick auf institutionalisierte PPP zu klären. Wenn es sich um eine vergaberechtlich relevante Auftragsvergabe handelt, wird das einzuhaltende Verfahren ohnehin in den bestehenden Richtlinien ausreichend geklärt. Eine bloße Unternehmensgründung bzw. –veräußerung hingegen wird in der Regel nach den Bestimmungen des Beihilfenrechts zu beurteilen sein. Die Verpflichtungen des Auftraggebers in Bezug auf den Wettbewerb können daher nur im jeweiligen Einzelfall festgestellt werden.

Allenfalls könnte in einer **Auslegenden Mitteilung** präzisiert werden, wann bzw. unter welchen Umständen und bei welchem zeitlichen Konnex nach Ansicht der Kommission bei einer (in-house) Beauftragung eines Wirtschaftskörpers mit nachfolgender (Teil-)Privatisierung Indizien für eine Umgehung des Vergaberechts vorliegen und damit die Anwendbarkeit der Vergaberichtlinien nach Auffassung der Kommission gegeben ist.

20. Welche Maßnahmen oder Verfahren behindern in der Europäischen Union die Einrichtung von ÖPP?

Rechtssicherheit und Klarheit in Verbindung mit der notwendigen Flexibilität sind wesentlich für die Verbreitung von PPP. Neben dem Vergaberecht stellen sich weitere komplexe Fragen, insbesondere im Beihilfenrecht. Problematisch könnte eine allfällige Überreglementierung und eine Überspannung des Transparenzgebotes sein. Durch – wie von der Kommission angedacht – weitere, zusätzliche Regelungen besteht die Gefahr, dass die Gestaltungsfreiheit sowohl des Auftraggebers als auch des privaten Partners zu sehr beeinträchtigt wird und daher die Realisierung von Projekten und die Erbringung von Dienstleistungen im Rahmen von PPP unattraktiv werden.

21. Kennen Sie andere ÖPP-Formen aus Drittländern? Kennen Sie aus Ihren Erfahrungen in solchen Ländern bewährte Verfahrensweisen, die auch für die EU beispielgebend sein könnten? Falls ja, welche?
22. Denken Sie dass es nützlich wäre, im Hinblick auf den großen Investitionsbedarf einzelner Mitgliedstaaten zum Erreichen einer sozialen und dauerhaften Entwicklung gemeinsam und in regelmäßigen Abständen über diese Fragen unter den betroffenen Akteuren nachzudenken und bewährte Verhaltensweisen auszutauschen? Sollte die Kommission noch Ihrer Auffassung ein derartiges Netzwerk aufbauen?

Ein **Informationsaustausch** im Rahmen eines informellen Netzwerkes ist **sehr zu begrüßen**. Es könnten **insbesondere „best practices“, Musterausschreibungen oder Musterverträge ausgetauscht** werden.

24. August 2004
Für den Bundeskanzler:
Michael FRUHMANN

Elektronisch gefertigt

AMT DER NIEDERÖSTERREICHISCHEN LANDESREGIERUNG
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Abteilung Landesamtsdirektion/Europareferat
Postanschrift 3109 St. Pölten, Landhausplatz 1

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Beilagen

LAD1-ER-2502/055-2004

Kennzeichen (bei Antwort bitte angeben)

		(0 27 42) 9005	
Bezug	Bearbeiter	Durchwahl	Datum
-	Mag. Halbwidl	17500	23. Juni 2004

Betrifft
Grünbuch PPP (Öffentlich-private Partnerschaften) der Kommission zu gemeinschaftliche Rechtsvorschriften für öffentliche Aufträge und Konzessionen

Zum letzten Schreiben vom 18. Mai 2004, VST-4763/18, und den im Grünbuch aufgeworfenen Fragen, teilt das Amt der NÖ Landesregierung mit:

Zu Frage 1:
Die Kläranlage Waidhofen an der Thaya wurde (nach einem 2-stufigen Vergabeverfahren) von einem privaten Konsortium errichtet und wird von diesem Konsortium betrieben, die Gemeinde zahlt dafür ein jährliches Entgelt. Spezifische Rahmenbedingungen für solche Konstruktionen sind nicht bekannt.

PPP´s auf Vertragsbasis sind in folgenden Bereichen bekannt: Errichtung und Betrieb von Klär- und Wasserversorgungsanlagen, Hausmüllabholung, Altpapierrecycling.

Zu Frage 2:
Da der wettbewerbliche Dialog ein neues Vergabeverfahren ist, kann über seine Anwendung in der Praxis noch nicht viel ausgesagt werden. Er scheint aber bei der Vergabe von
ÖPP-Modellen durchaus zielführend. Dies deshalb, da in Österreich noch nicht viel Erfahrungen mit ÖPP vorliegen und durch den Dialog mit den Bietern die Auswirkungen von Auftraggeber-Wünschen abgeschätzt werden können.

Zu Frage 5 und 6:
Aus Sicht der öffentlichen Aufraggeber sollte von einem weiteren gemeinschaftlichen Rechtsakt Abstand genommen werden. Für einen konkreten Auftraggeber wird eine Konzessions-Vergabe ein seltener oder gar einmaliger Akt sein. Es wäre zu befürchten, dass deshalb bei einem umfangreicheren Regelwerk kleinere Mängel passieren, so dass vielleicht aus formalen Gründen jene Vergabe, die den Intentionen des Auftraggebers am besten entspricht, nicht durchgeführt werden kann.
Die in Ziffer 32 geäußerte Befürchtung, dass die derzeitige Situation kostentreibend wirkt, kann nicht geteilt werden. Es steht schließlich jedem Auftraggeber frei, unabhängig von Vorschriften oder Schwellenwerten, ein europaweites Verfahren durchzuführen.

Zu Frage 7 in Verbindung mit Ziffer 34:
Das Problem einer Umstufung kann dadurch umgangen werden, dass ein gewähltes Verfahren als rechtmäßig anerkannt wird, wenn es von vornherein nach bestem Wissen eingestuft wurde (vergleiche auch klassische Vergaben, bei denen die Einhaltung der Schwellwerte nach dem geschätzten Auftragswert und nicht nach tatsächlicher Auftragshöhe erfolgt.)

Zu Frage 8:
Wenn eine Vergabestelle zur Initiative aufruft, liegt nach unserem Sprachgefühl keine privat initiierte ÖPP mehr vor, sondern hat die Vergabestelle bereits ein Vergabeverfahren gestartet.
Wenn eine Vergabestelle auf private Initiative hin ein Vergabeverfahren durchführt sollte dem Initiator jedenfalls ein gewisser Startvorteil eingeräumt werden können.

Zu Frage 13:
Wenn die Interventionsklausel bedeutet, dass der private Partner ohne Wettbewerb durch einen anderen ersetzt wird, erscheint dies tatsächlich problematisch.
Kein Problem wäre es allerdings, wenn unter bestimmten Voraussetzungen (Cash Flow, wirtschaftliche Leistungsfähigkeit etc.) dem privaten Partner der Auftrag entzogen wird und von der öffentlichen Hand selbst die Leistungen durchgeführt werden (oder durch ein neues Vergabeverfahren ein neuer Partner gesucht wird). Dies wird sogar sinnvoll sein, wenn die Qualität der Leistung oder die Erhaltung der Substanz oder Lebensdauer einer Anlage gefährdet erscheinen.

Zu Frage 14:
Eine Klärung von vertraglichen Randbedingungen erscheint nicht erforderlich, vielmehr sollte die Flexibilität des Marktes in dieser Hinsicht nicht eingeschränkt werden.

Zu Frage 18:
In Niederösterreich ist uns Bereich der Siedlungswasserwirtschaft 1 institutionalisierte ÖPP bekannt und wurde dabei der private Partner unserer Ansicht nach durch ein rechtskonformes Vergabeverfahren ermittelt.

Es sollte auch die Rolle der Unabhängigen Verwaltungssenate beachtet werden.

Der Unabhängige Verwaltungssenat im Land NÖ hat die Aufgaben der Nachprüfungsbehörde auf Grund des NÖ Vergabe-Nachprüfungsgesetzes. Bei Einlangen von Anträgen ist daher zu prüfen, ob es sich um eine Vergabe im öffentlich-rechtlichen Bereich handelt und damit die Anwendbarkeit des NÖ Vergabe-Nachprüfungsgesetzes gegeben ist. Diese Prüfung erfolgt im Einzelfall und nur so weit, bis die zu lösende Frage (Anwendbarkeit des Gesetzes und damit Zuständigkeit des Unabhängigen Verwaltungssenates im Land NÖ) einwandfrei beantwortet werden kann. Eine darüber hinausgehende Überprüfung von rechtlichen Konstruktionen der Antragsteller, der Antragsgegner oder allfälliger Mitbeteiligter erfolgt nicht.

Zu dem im Grünbuch aufgeworfenen Fragen wird allgemein die Ansicht vertreten, dass auf Grund der bisherigen Erfahrungen des Unabhängigen Verwaltungssenates im Land NÖ die bisherigen Regelungen ausreichend erscheinen, und kein Handlungsbedarf für die Schaffung zusätzlicher Normen, weder auf europäischer noch auf nationaler Ebene, gesehen wird.

Mag. Halbwidl

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Beilagen

LAD1-ER-2502/055-2004

Kennzeichen (bei Antwort bitte angeben)

Bezug	Bearbeiter	(0 27 42) 9005 Durchwahl	Datum
	Mag. Halbwidl	17500	30. Juni 2004

Betrifft
Grünbuch PPP (Öffentlich-private Partnerschaften) der Kommission zu gemeinschaftliche Rechtsvorschriften für öffentliche Aufträge und Konzessionen

Ergänzend zum Schreiben vom 23. Juni 2004 zur Zahl VST-4763/18 übermittelt das Bundesland Niederösterreich noch eine Stellungnahme der Abteilung Finanzen zu folgenden Fragen:

Zu Frage 1

Der Abteilung Finanzen sind in der Theorie folgende Formen von ÖPP auf Vertragsbasis bekannt:

- **Betriebsführungsmodell**
- **Betriebsüberlassungsmodell**
- **Kooperationsmodell**
- **Konzessionsmodell**
- **Betreibermodell**

Hingegen sind der Abteilung Finanzen keinerlei spezifische gesetzliche oder andere Rahmenbedingungen für derartige Konstruktionen bekannt.

Zu Frage 2

Für die Abteilung Finanzen ist kein wesentlicher Unterschied zwischen dem Verfahren des "wettbewerblichen Dialogs" und dem bei der Vergabe geistig-schöpferischer Dienstleistungen üblicherweise angewendeten Verhandlungsverfahren mit vorheriger Bekanntmachung ("zweistufiges Vergabeverfahren") erkennbar.

Sollte diese Ansicht der Abteilung Finanzen zutreffen, wären mit diesem Verfahren des "wettbewerblichen Dialogs" keine bedeutenden Verbesserungen gegenüber der derzeitigen Rechtslage verbunden.

Zu Frage 4

Die Abteilung Finanzen hat bisher an vier Verfahren zur Vergabe einer Konzession in der Europäischen Union teilgenommen. Die dabei gewonnenen Erfahrungen lassen sich dahingehend zusammenfassen, dass die Vorbereitung der Ausschreibung sowie die Verhandlungen mit den Interessenten äußerst umfangreich und mühsam sind, dass dafür nach Zuschlagserteilung die Auftragsabwicklung rasch, flexibel und unbürokratisch abläuft, wobei allerdings die Eingriffs- und Steuerungsmöglichkeiten des öffentlichen Auftraggebers stark eingeschränkt sind.

Zu Frage 5

Die Abteilung Finanzen vertritt die Ansicht, dass mit dem bestehenden Verhandlungsverfahren mit vorheriger Bekanntmachung ("zweistufiges Vergabeverfahren") eine ausreichende gemeinschaftsrechtliche Grundlage für die Abwicklung von Konzessionsvergabeverfahren besteht.

Die bisherige Erfahrung hat gezeigt, dass insofern kein tatsächlicher Wettbewerb herrscht, als sich ausschließlich österreichische Unternehmen um Konzessionsvergaben beworben haben. Der Grund dafür dürfte darin liegen, dass die derartigen Vergaben zugrunde liegenden Strukturen sehr komplex sind, weshalb nur solche nichtösterreichischen Unternehmen teilgenommen haben, die über Tochterunternehmen im Inland verfügen.

Zu Frage 6

Ein Vorschlag für einen gemeinschaftlichen Rechtsakt zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe erscheint nur dann wünschenswert, wenn damit eine Vereinfachung und Beschleunigung im Vergleich zum bisher praktizierten Verhandlungsverfahren mit vorheriger Bekanntmachung ("zweistufiges Vergabeverfahren") verbunden ist.

Zu Frage 7

Eine Gleichbehandlung in rechtlicher Hinsicht von Verfahren zur Vergabe öffentlicher Aufträge und von Verfahren zur Vergabe von Konzessionen wird dezidiert abgelehnt!

Die derzeit lediglich eingeschränkte Regelung der Vergabe von Konzessionen im Gemeinschaftsrecht (vgl. RNr. 28 bis 30) sollte keinesfalls verschärft werden!

Zu Frage 8

Die Abteilung Finanzen verfügt noch nicht über Erfahrungen mit privat initiierten ÖPP.

Es wird allerdings davon ausgegangen, dass entsprechend der geltenden Rechtslage dann, wenn das von Privaten initiierte Projekt tatsächlich umgesetzt werden soll, zumindest ein Verhandlungsverfahren mit vorheriger Bekanntmachung ("zweistufiges Vergabeverfahren") durchzuführen ist.

Zu Frage 10

Die Abteilung Finanzen hat erst an einer ÖPP auf Vertragsbasis mitgewirkt. Der Zeitraum seit der Auswahl des privaten Partners ist jedoch zu kurz, um ausreichende Erfahrungen gemacht zu haben. Jedenfalls wurde ein externes Unternehmen beauftragt, die Übereinstimmung des Umfangs und der Qualität der vom privaten Partner erbrachten mit den ausgeschriebenen Leistungen laufend zu überwachen.

Zu Frage 13

Es ist nicht auszuschließen, dass bestimmte Interventionsklauseln in Bezug auf die Grundsätze der Transparenz und der Gleichbehandlung problematisch sein können.

Andererseits erscheint es selbstverständlich, dass dann, wenn der Auftragnehmer das Projekt insbesondere in wirtschaftlicher Hinsicht nicht ausreichend betreibt, der Auftraggeber, der das Projekt letztlich zu finanzieren, zumindest aber zu verantworten hat, die Initiative wieder an sich reißt, um drohenden Schaden abzuwenden.

Es wird also jeweils im Einzelfall zu beurteilen sein, ob eine Interventionsklausel zu weit gefasst und damit geeignet ist, die Grundsätze der Transparenz und der Gleichbehandlung zu unterlaufen, oder nicht.

Zu Frage 14

Die bisherige Erfahrung hat gezeigt, dass mit dem bestehenden gemeinschaftsrechtlichen und nationalrechtlichen Instrumentarium durchaus das Auslangen gefunden werden kann.

Zu Frage 16

Die Abteilung Finanzen geht im Gegensatz zur Fragestellung davon aus, dass bei Vorliegen einer ÖPP, bei der der private Partner im Wege eines offenen Verfahrens, eines nicht offenen Verfahrens mit vorheriger Bekanntmachung oder eines

Verhandlungsverfahrens mit vorheriger Bekanntmachung ermittelt wurde, dieser bei der Vergabe von Unteraufträgen nicht mehr dem Vergaberegime unterliegt, da die erforderliche Transparenz und Gleichbehandlung bereits durch das o. g. Vergabeverfahren gewährleistet wurden. Gerade eben dadurch wird die durch ÖPP bezweckte rasche, flexible und unbürokratische Abwicklung sichergestellt.

Die Einführung oder Ausweitung von Regeln für die Vergabe von Unteraufträgen bei ÖPP wird daher abgelehnt.

Zu Frage 17

Es wird auf die Ausführungen zu Frage 16 verwiesen.

Zu Frage 18

Die Abteilung Finanzen hat bisher an drei institutionalisierten ÖPP mitgewirkt. In allen drei Fällen erfolgte die Gründung eines gemeinsamen Ad-hoc-Wirtschaftsgebildes erst nach der Auftragsvergabe. In beiden Fällen wurden die gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen eingehalten.

Zu Frage 19

Die Verpflichtungen, die die öffentlichen Auftraggeber in Bezug auf den Wettbewerb zwischen potenziell an einem institutionalisierten ÖPP-Projekt interessierten Wirtschaftsteilnehmern haben, sind nach Ansicht der Abteilung Finanzen bereits ausreichend geklärt.

Zu Frage 20

Die Probleme bei ÖPP liegen nach den Erfahrungen der Abteilung Finanzen nicht oder nur zu einem äußerst geringen Teil auf rechtlicher Ebene. Diese sind vielmehr zum einen faktischer, zum anderen fiskalischer Natur.

In faktischer Hinsicht ist festzustellen, dass weder die öffentlichen noch die privaten Partner viele Erfahrungen in diesem Bereich haben. Es existieren daher keine Schematismen, vielmehr muss "das Rad ständig neu erfunden" werden. Von großer Bedeutung und Wirkung wäre daher v. a. ein institutionalisierter Erfahrungsaustausch zwischen allen Interessierten.

In fiskalischer Hinsicht ist festzustellen, dass ÖPP hinsichtlich des Erfolgs der öffentlichen Haushalte nur dann vorteilhaft sind, wenn sich das Projekt mindestens zur Hälfte aus Zahlungen Dritter finanziert. Dementsprechend sind öffentliche Auftraggeber in Fällen, in denen durch das Projekt keine Einnahmen lukriert werden können, nicht bereit, sich der nicht unbeträchtlichen Mühe der Einrichtung einer ÖPP zu unterziehen, weil sie dadurch ebenso wenig positive Effekte auf ihren Haushalt, i. e. Reduktion des öffentlichen Defizits oder des öffentlichen Schuldenstands, generieren können, wie wenn sie die Leistung selbst erbringen.

Zu Frage 22

Unter Hinweis auf die Ausführungen zu Frage 20 wird noch einmal betont, dass nach Ansicht der Abteilung Finanzen dasjenige Mittel, das den Erfolg von ÖPP am meisten zu fördern in der Lage wäre, der Austausch von Erfahrungen und bewährten Verfahrensweisen ("best practice"), Musterausschreibungen, Musterverträgen etc. zwischen allen Interessierten wäre. Der Aufbau eines derartigen Netzwerks durch die Europäische Kommission wird daher unbedingt befürwortet.

NÖ Landesregierung
Im Auftrage
Mag. Halbwidl

elektronisch unterfertig

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22. Juni 2004

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EU; Öffentliches Auftragswesen; Grünbuch PPP; Stellungnahme
(Zu GZ BKA-671.801/0022-V/A/8/2004
und zu VST-4763/18 vom 18. Mai 2004)

Sehr geehrte Damen und Herren!

Zum Grünbuch zu öffentlich privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen KOM(2004)327 endgültig vom 30. April 2004 ist aus Sicht des Amtes der Oö. Landesregierung Folgendes zu bemerken:

1. Allgemeines:

1.1 Das Vorhaben der Kommission, das Phänomen der durch öffentlich-private Partnerschaften verwirklichten Projekte einer umfassenden und systematischen Diskussion zu unterziehen, der Versuch, die einzelnen Erscheinungsformen solcher Kooperationen systematisch mit den vergaberechtlichen Instrumentarien zu erfassen und die Ankündigung, das Ergebnis der öffentlichen Konsultation über das Grünbuch zur Grundlage von Entscheidungen über allenfalls zu ergreifende gesetzgeberische Initiativen zu machen, sind aus unserer Sicht grundsätzlich begrüßenswert. Es scheint daher nicht zielführend, das Grünbuch bzw. schon die Tatsache seiner Veröffentlichung undifferenziert zu kritisieren. Ebenso halten wir es für unzulässig, in der Diskussion über das Grünbuch eine Verbindung zur parallel laufenden Diskussion über die wettbewerbsrechtliche Behandlung von "Leistungen der Daseinsvorsorge" und zu Überlegungen hinsichtlich der Liberalisierung bestimmter (leitungsgebundener) Wirtschaftssektoren (vgl. die diesbezüglichen Überlegungen betreffend den Wassersektor) herzustellen. Oberösterreich befürwortet eine durchaus kritische, aber sachliche und auf die konkreten Inhalte des Grünbuches bezogene gesamtösterreichische Position bzw. gemeinsame Länderstellungnahme.

1.2 Über weite Strecken stellt das Grünbuch eine brauchbare Zusammenfassung des Standes der Judikatur und der Lehre zum PPP-Phänomen dar. In einigen Punkten, auf die nachstehend gesondert einzugehen ist, geht die Kommission jedoch - und zwar regelmäßig zum Nachteil des öffentlichen Auftraggebers bzw. der öffentlichen Hand - über die allgemein akzeptierten Auffassungen über die rechtliche Beurteilung öffentlich-privater Partnerschaften hinaus. Überhaupt vermittelt das Grünbuch den Eindruck, dass das Bedürfnis der Gebietskörperschaften nach wirtschaftlichen und praktikablen Modellen für die Erfüllung bestimmter Gemeinwohlaufgaben für die Kommission beim Verfassen der Mitteilung nicht von prioritärer Bedeutung gewesen sein dürfte. In diese Richtung deutet auch die Formulierung eines Großteils der Fragen, mit denen versucht wird, den Konsultationsprozess zu strukturieren.

1.3 Wir halten den von der Kommission zur Diskussion gestellten Richtlinienvorschlag zur einheitlichen Regulierung von Konzessionen und anderen Formen von PPP nicht für zweckmäßig. Das Grünbuch selbst zeigt, dass der heute schon bestehende Rechtsrahmen einen Großteil aller Fragen, die PPP-Konstruktionen aufwerfen können, abdeckt. Auch dort, wo die vergaberechtlichen Vorschriften nicht zum Tragen kommen, gewährleisten die primärrechtlichen Grundsätze (Nichtdiskriminierung bzw. Transparenz, Verhältnismäßigkeit, gegenseitige Anerkennung) in ihrer vom EuGH entwickelten Ausprägung angemessene und mit den Grundsätzen des Binnenmarktes vereinbare Beteiligungsmöglichkeiten für Wirtschaftsteilnehmer aus allen Mitgliedsstaaten. Eine weitgehende Harmonisierung bzw. "Koordinierung" dieses bis jetzt nur primärrechtlich geregelten Bereiches hätte zwangsläufig eine weitere Einschränkung der

Dispositionsfreiheit der öffentlichen Hand zur Folge und würde das Entwickeln zweckmäßiger innovativer Lösungsmodelle erschweren.

2. Zu den einzelnen Inhalten des Grünbuches:

2.1 PPP auf Vertragsbasis:

Bei der Definition des "Konzessionsmodells" in Rn 22 werden "Beihilfen der öffentlichen Stellen" als möglicher Bestandteil der Vergütung des Auftragnehmers bezeichnet. Wenn damit gemeint ist, dass die öffentliche Hand die Differenz zwischen ("sozialverträglich" gestalteten) Gebühren und einer marktgerechten Vergütung für den Auftragnehmer trägt, kann es sich dabei nicht um Beihilfen im Sinne der Art. 87 ff EGV handeln. Die Verwendung des Wortes "Beihilfe" im gegebenen Zusammenhang ist verwirrend und sollte vermieden werden.

Falls tatsächlich bei der Vergabe von Konzessionen Probleme für gemeinschaftsweit tätige Akteure auftreten und Rechtsunsicherheit herrscht, wie in Rn 32 behauptet, liegt dies wohl weniger am Fehlen einschlägiger Rechtsvorschriften als vielmehr an der mangelnden Beachtung der in Rn 30 ausgeführten primärrechtlichen Grundsätze. Für die Kommission sollte daher nicht die Erlassung einschlägiger Koordinierungsmaßnahmen, sondern die Überwachung der Einhaltung des von Gerichtshof aufgestellten Transparenzgebotes Priorität haben. Falls tatsächlich in Einzelfällen ein Problem bei der Abgrenzung zwischen öffentlichen Aufträgen und Konzessionen bestehen sollte, wäre dieses durch die Schaffung eines entsprechenden und in der Praxis handhabbaren Unterscheidungskriteriums im Rahmen der bestehenden Richtlinien zu lösen und soll nicht als Vorwand für die vollständige "Verrechtlichtung" der Konzessionsvergabe bzw. ihre Einbeziehung in das allgemeine Vergaberegime dienen.

Das in Rn 37 ff behandelte Phänomen der in privater Initiative entwickelten PPP-Modelle wird sich in den (in der Praxis gar nicht so seltenen) Fällen, in denen der private Partner ohne Aufforderung durch den öffentlichen Partner aktiv wird, nur schwer in den Griff bekommen lassen. Eine vom Sekundärrecht ausgesprochene deutliche Verpflichtung, ein in privater Initiative fertig entwickeltes PPP-Modell einem nachträglichen Wettbewerb auszusetzen (anders scheint die geforderte Teilnahmemöglichkeit anderer Interessenten nicht realisierbar) hätte wohl unweigerlich das Erlahmen jeden Interesses an der Suche nach innovativen Lösungen auf Seiten der privaten Interessenten zur Folge.

Mit Nachdruck ist der Aussage hinsichtlich der möglichen Laufzeit entsprechender vertraglicher Vereinbarungen in Rn 46 entgegenzutreten. Die Aussage, die höchstmögliche Laufzeit orientiere sich an der Amortisierung der Investitionen und einer angemessenen Verzinsung des eingesetzten Kapitals lässt die berechtigten Interessen des öffentlichen Partners wie Planungssicherheit oder Versorgungssicherheit vollkommen außer Betracht. Überdies mutet die Auffassung, durch eine im freien Wettbewerb zustande gekommene vertragliche Vereinbarung werde der freie Wettbewerb eingeschränkt, eigenartig an. Unverständlich ist auch im gegebenen Zusammenhang die Zitierung der Art. 81, 82 und 86 Abs. 2 EGV: Es ist nicht erkennbar, wie durch eine lang angelegte partnerschaftliche Beziehung eine der Formen des wettbewerbsbeschränkenden Verhaltens des Art. 81 verwirklicht sein könnte, die Verwirklichung des Tatbestandes des Art. 82 ist allenfalls in wenigen Einzelfällen denkbar und welcher eigenständige Gehalt im gegebenen Zusammenhang dem Art. 86 Abs. 2 zukommen soll, bleibt überhaupt im Dunkeln. Diesem Punkt ist aus unserer Sicht größte Aufmerksamkeit zu widmen, weil die Gefahr besteht, dass analoge Überlegungen zur Laufzeit vertraglicher Vereinbarungen auch im Bereich des "normalen" Vergaberechts angestellt werden.

2.2 **Institutionalisierte PPP:**

Bis auf weiteres sollte von Österreich die im Fall "Müllabfuhr Mödling" eingenommen Haltung, die versucht, möglichst viele Erscheinungsformen des "Gesellschaftsmodells" als In-House-Vergabe darzustellen, beibehalten werden.

Mit freundlichen Grüßen!

Für die Oö. Landesregierung:
Im Auftrag

Dr. Gerhard Hörmanseder

Amt der Wiener Landesregierung

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MD-VD - 378-8/04 Wien, 23. Juni 2004

EU;
Daseinsvorsorge;
Grünbuch zu öffentlichen-privaten Partnerschaften und den gemeinsamen Rechtsvorschriften für öffentliche Aufträge und Konzessionen, KOM(2004)327;
Stellungnahme

zu VST-4763/18

An die
Verbindungsstelle der Bundesländer
beim Amt der NÖ Landesregierung

Unter Bezugnahme auf das do. Schreiben vom 18. Mai 2004 teilt das Amt der Wiener Landesregierung Folgendes mit:

1. Allgemeines

Öffentlich-Private Partnerschaften (ÖPP) sind Modelle, die es der öffentlichen Hand vielfach ermöglichen, dauerhafte Lösungen zu vernünftigen Preisen anzubieten und dabei von privatem Know-how bzw. gegebenenfalls von privaten Finanzierungen zu profitieren. Die Beteiligung der öffentlichen Gebietskörperschaften garantiert die Nachhaltigkeit und Dauerhaftigkeit der Leistung, die Qualität und die Flexibilität gegenüber den Wünschen und Bedürfnissen der Bürgerinnen und Bürger. Das Amt der Wiener Landesregierung anerkennt die Rolle von ÖPP`s als mögliches Finanzierungsmodell für den Erhalt und den Ausbau notwendiger Infrastrukturmaßnahmen. Dies trifft insbesondere auf die neuen EU-Mitgliedstaaten zu.

Nach Ansicht des Amtes der Wiener Landesregierung ist der Inhalt des gegenständlichen Grünbuches jedoch enttäuschend, weil es sich im Wesentlichen nur mit der ohnehin bekannten vergaberechtlichen Problematik von ÖPP beschäftigt, andere Themenbereiche (wie etwa das Beihilfenrecht oder gesellschaftsrechtliche Aspekte) aber völlig ausklammert.

An Stelle von Lösungsansätzen für die schon auf Grund der bestehenden gemeinschaftsrechtlichen Vorgaben (insbesondere das Vergaberecht, das Beihilfenrecht sowie die vom EuGH und der EK aus dem Primärrecht abgeleiteten Grundsätze der Transparenz, Verhältnismäßigkeit, Gleichbehandlung und gegenseitigen Anerkennung) reichlich komplizierte Gründung von ÖPP werden nur Überlegungen zur Schaffung weiterer Regelungen angestellt. Es ist zu befürchten, dass Überreglementierungen in diesem Bereich zu einer Hemmung der Entwicklung verschiedener Formen wirtschaftlichen Handelns im Europäischen Wirtschaftsraum und so zu einem Wettbewerbsnachteil Europas gegenüber den wachsenden Märkten in Asien und Amerika führen könnten. Auf Grund der vielfältigen immer neuen Erscheinungsformen von ÖPP wäre deren abschließende Regelung wohl auch nicht möglich.

Die Betrauung von Unternehmen mit der Erbringung von Dienstleistungen von öffentlichen Dienstleistungen wie Abfallwirtschaft, Wasserversorgung oder Energieversorgung (s. Rz 7) stellt, wenn das betraute Unternehmen im Eigentum der jeweiligen Gebietskörperschaft steht, eine In-house-Vergabe dar. In diesem Fall sollten die Vergaberegeln nicht herangezogen werden.

2. Zum Vorschlag einer Richtlinie für ÖPP

Öffentlich- private Partnerschaften basieren auf einem Vertrauensverhältnis, auf einer Teilung der Ressourcen, der Risken und des Profits. Der Rechtsrahmen der EU sollte sich gegenüber diesen Realitäten positiv verhalten und keine Trennungen oder Grenzen schaffen. Der Mehrwert einer eigenen Richtlinie für ÖPP ist nicht erkennbar. Diese würde vielmehr zu einer Abgrenzungsproblematik zu den bestehenden Vergaberegeln führen.

Das Amt der Wiener Landesregierung spricht sich daher nachdrücklich gegen eine eigene Richtlinie für ÖPP aus.

3. Zur vorgeschlagenen Unterscheidung der ÖPP

Zur Gliederung des Grünbuchs ist zu sagen, dass die Unterscheidung zwischen ÖPP auf Vertragsbasis und institutionalisierten ÖPP dem österreichischen Rechtssystem fremd ist, weil in der Regel auch die Zusammenarbeit zwischen öffentlichem und privatem Sektor innerhalb eines Rechtssubjekts auf einem Vertrag (Gesellschaftsvertrag) beruht. Die Schaffung von ÖPP mit einem hoheitlichen Akt (Bescheid, Gesetz) dürfte hingegen eher unüblich sein.

4. Zur Auswahl des privaten Partners/Frage der Konzessionen

Im Kapitel 2.1. „Auswahl des privaten Partners“ findet sich eine für die Praxis nützliche (wenngleich restriktive) Auslegung des Ausnahmetatbestandes für ein Verhandlungsverfahren mit vorheriger Bekanntmachung betreffend Arbeiten, die eine globale Preisgestaltung nicht zulassen.

Das in Art. 29 der Richtlinie 2004/18/EG normierte neue Verfahren des wettbewerblichen Dialogs (Rz. 25) muss sich erst in der Praxis bewähren; entscheidend für das Gelingen eines solchen Verfahrens wird sein, inwieweit die Teilnehmer bereit sind, einander für die Ausarbeitung der endgültigen Angebote die eigenen Lösungsvorschläge zur Verfügung zu stellen.

Zur Vergabe von Dienstleistungskonzessionen (Punkt 2.1.2., Rz 28) ist zu sagen, dass die EK durch die Forderung von Auswahl- und Zuschlagskriterien über den vom EuGH entwickelten Transparenzgrundsatz (wobei in der Lehre durchaus umstritten ist, ob dieser Grundsatz überhaupt aus dem Primärrecht ableitbar ist) hinausgehende Anforderungen an die Auswahl des Konzessionärs stellt, die dieses Verfahren in die Nähe einer Auftragsvergabe gemäß den Vergaberichtlinien rücken.

Nach Ansicht des Amtes der Wiener Landesregierung soll aber zur Förderung rasch umsetzbarer flexibler Modelle von ÖPP die im Vergleich zu einem reglementierten Vergabeverfahren weniger förmliche Vergabe von Konzessionen weiterhin möglich sein.

Das Amt der Wiener Landesregierung spricht sich daher gegen eine Unterwerfung der Konzessionen unter die Regelungen für öffentliche Aufträge aus.

Die Schaffung einer eigenen Richtlinie zur Festlegung ausführlicher Bestimmungen für Konzessionen wird ebenfalls abgelehnt, da mit der angestrebten Vereinheitlichung der Vorgangsweise der öffentlichen Stellen bei der Vergabe von Konzessionen wohl die Schaffung eines engeren rechtlichen Korsetts für diese bislang noch relativ flexible Form wirtschaftlichen Handelns verbunden wäre.

5. Zur Phase nach der Auswahl eines privaten Partners

Die Phase nach der Auswahl eines privaten Partners (Kapitel 2.3.) ist nicht mehr Gegenstand des Vergaberechts sondern des (innerstaatlichen) Vertragsrechts, wobei der EK darin zuzustimmen ist, dass den Teilnehmern an einem Vergabeverfahren schon in den Ausschreibungsunterlagen die wesentlichen Vertragsbestandteile bekannt gegeben werden müssen. Auch dass die „zur Leistungsbeurteilung erforderlichen Elemente“ (geforderte Eignungsnachweise, zwingende Anforderungen an die Leistung, Zuschlagskriterien) in den Vergabeunterlagen veröffentlicht werden müssen, ist geltendes Recht. Die EK sollte jedoch näher darlegen, wie die Festlegung und Bewertung von „zur Risikoteilung erforderlichen Elementen“ erfolgen soll. Es stellt sich die Frage, ob es sich hier um eine neue - in den Vergaberichtlinien nicht vorgesehene - Kategorie von Kriterien handelt.

Eine zeitliche Befristung von ÖPP (Rz 46) ist nur dort möglich, wo eine Kooperation zur Umsetzung eines bestimmten Projektes eingegangen wird. Es gibt aber auch Fälle, in denen nur langfristig angelegte ÖPP wirtschaftlich sinnvoll sind (etwa bei Beteiligungen Privater an öffentlichen Unternehmen). Eine zeitliche Beschränkung der Zusammenarbeit mit einem privaten Partner würde überdies lang andauernde Kooperationen, wie sie im Infrastrukturbereich auftreten können, erschweren oder verhindern. Da die Auswahl des privaten Partners in der Regel ja bereits mittels einer Interessentensuche erfolgt ist, ist dem Transparenzgrundsatz hinreichend Genüge getan. Eine generelle Befristung von ÖPP wird vom Amt der Wiener Landesregierung daher abgelehnt.

Interessant ist die Forderung der EK nach „Revisionsklauseln“ (Rz 47) zur nachträglichen Vertragsanpassung. Nach den derzeit geltenden Vergaberechtsgrundsätzen sind lediglich automatische Anpassungen des Preises auf Grund einer Indexklausel oder die Verlängerung eines Vertrages auf Grund einer schon im Vergabeverfahren festgesetzten und wertmäßig in die Auftragssumme eingerechneten Option des Auftraggebers zulässig. Jede andere „Anpassung“ stellt einen neuen Vertragsabschluss dar, der einer Ausschreibung bedarf. Eine allfällig weniger strenge Handhabung durch die EK wird vom Amt der Wiener Landesregierung begrüßt. Allerdings scheinen die Ausführungen zu Rz 49 dem zu widersprechen. Es sollte daher klargestellt werden, welchen Inhalts und wie weitgehend solche Revisionsklauseln sein könnten.

In Rz 51 wäre klarzustellen, dass die „Projektgesellschaft“ bei der Vergabe von Aufträgen nur dann die Bestimmungen der Vergaberichtlinien einzuhalten hat, wenn sie selbst ein öffentlicher Auftraggeber ist oder namens eines solchen tätig wird.

6. Zur Einrichtung einer Partnerschaft durch die Gründung eines gemeinsamen Ad-hoc-Wirtschaftsgebildes des öffentlichen und privaten Sektors

Nicht nachvollziehbar sind für das Amt der Wiener Landesregierung die Ausführungen der EK zur „Einrichtung einer Partnerschaft durch die Gründung eines gemeinsamen Ad-hoc-Wirtschaftsgebildes des öffentlichen und privaten Sektors“ (Kapitel 3.1.). Die Gründung einer Gesellschaft durch einen öffentlichen und einen privaten Partner ist nach österreichischem Recht kein vergaberechtlicher Vorgang. Davon zu unterscheiden sind die Fragen, ob der öffentliche Auftraggeber diese Gesellschaft „freihändig“ beauftragen darf (dies ist nur bei Vorliegen aller Voraussetzungen für eine „Quasi-Inhouse-Vergabe“ der Fall) und ob die Gesellschaft selbst öffentlicher Auftraggeber ist.

Dem Transparenzgrundsatz wäre durch eine internationale Bekanntmachung der Suche von Projektpartnern Genüge getan. Dabei müsste es aber der „öffentlichen Hand“ überlassen sein, anhand welcher Kriterien (z. B. lediglich zwecks Beistellung von Kapital oder zwecks Zur-Verfügung-Stellung qualifizierten Personals) sie ihre Partner auswählt. Mit Vergaberecht hat aber nach Ansicht des Amtes der Wiener Landesregierung auch dieser Vorgang nichts zu tun, da in diesem Stadium kein Austausch von Leistung und Entgelt erfolgt.

Konstruktionen wie in Rz 60 ff. (betreffend gesamtwirtschaftliche Gebilde unter Beteiligung des öffentlichen Sektors als Auftraggeber) dargestellt gibt es, soweit dem Amt der Wiener Landesregierung bekannt, in Österreich nicht und wären wohl schon aus zivil- und gesellschaftsrechtlichen Gründen nicht möglich.

Zu Rz 64 (betreffend die Rolle gesamtwirtschaftlicher Gebilde als Vergabestelle) gelten die Ausführungen zu Rz 51 sinngemäß.

7. Zur Übernahme der Kontrolle über ein öffentliches Unternehmen durch einen privaten Akteur

Zu Rz 66 wird der Vollständigkeit halber angemerkt, dass ein Vorgang, bei dem die „öffentliche Hand“ einem Unternehmen Kapital zufließen lässt, aus beihilfenrechtlicher Sicht relevant sein kann.

Die Ausführungen zu Rz 68 bedeuten im Ergebnis, dass nach Ansicht der EK auch die Suche nach Teilhabern an öffentlichen Unternehmen im Wege einer internationalen Interessentensuche erfolgen müsste.

8. Conclusio

Zusammenfassend ist zu dem Grünbuch der Eindruck entstanden, dass es keinerlei Hilfestellung sondern nur zusätzliche Erschwernisse für die Gründung von ÖPP in Aussicht stellt, die die Wettbewerbsfähigkeit des Europäischen Wirtschaftsraumes nicht erhöhen sondern ernsthaft gefährden könnten.

Zu den einzelnen Fragen

Zu 1:

Da ÖPP ein Sammelbegriff für alle Formen der Kooperation der „öffentlichen Hand“ mit privaten Partnern ist, können nur einige typische Erscheinungsformen von ÖPP genannt werden:

1. Kooperationsmodell:

Beim Kooperationsmodell gründen ein öffentlicher Auftraggeber und ein privater Partner in der Regel eine Gesellschaft, an der die öffentliche Hand beteiligt ist. Besonders häufig werden Projekte etwa in den Bereichen Abwasser- oder Biotechnologie in dieser Form abgewickelt.

2. Organisationsprivatisierung:

Darunter versteht man die Ausgliederung durch Gründung einer Gesellschaft, die von der Gebietskörperschaft beherrscht ist.

3. Betreibermodell:

Beim Betreibermodell werden beispielsweise die Planung, die Errichtung, der Betrieb und die Finanzierung einer öffentlichen Einrichtung auf einen privaten Partner übertragen. Dabei kann es sich um eine Baukonzession oder um einen Bauauftrag handeln.

4. Leasinggeschäfte:

Bei beweglichen Gegenständen kann die Finanzierungsfunktion im Vordergrund stehen (z. B. „Sale and lease back-Verträge“) - dann handelt es sich um Finanzdienstleistungen - oder es handelt sich um den Erwerb von Gebrauchsrechten an diesen Gegenständen - dann liegt ein Lieferauftrag vor.

Bei unbeweglichen Gegenständen liegt ein Bauauftrag (Errichtung eines Bauwerks durch Dritte) vor, wenn ein Bauträger oder Leasingunternehmen ein Bauwerk nach genauen Vorgaben durch den Auftraggeber gegen Entgelt errichtet; wenn bloß bestehende Gebäude oder Räume gemietet oder geleast werden, handelt es sich hingegen in der Regel um einen (nicht dem Vergaberecht unterliegenden) zivilrechtlichen Vorgang (Bestandsvertrag).

Zunehmender Beliebtheit erfreuen sich sog. „Contracting“-Modelle, die den Zweck haben, durch bestimmte Maßnahmen Betriebskosten von Gebäuden zu sparen. Je nach Lage des Falles und des Ausmaßes des Entgeltsrisikos des Unternehmers kann es sich um Bauaufträge, Baukonzessionen oder Dienstleistungsaufträge handeln.

Immer häufiger werden in ganz Europa verschiedene Formen der einverständlichen Verwaltung:

Ein Beispiel wäre z. B. die Gewährung von Gebührenermäßigungen für private Projektwerber, wenn sie im Allgemeininteresse gelegene Leistungen erbringen.

Ob ein öffentlicher Auftrag vorliegt, hängt vom wahren wirtschaftlichen Gehalts des betreffenden Rechtsgeschäftes ab.

Zu 2:

Grundsätzlich ja, allerdings wird auf die oben geäußerten Bedenken (mögliche Eingriffe in Werkschutz- und Urheberrechte) verwiesen.

Grundsätzlich könnte das Verfahren des wettbewerblichen Dialogs im Rahmen der Auswahl des privaten Partners gewährleisten, dass öffentliche Auftraggeber bestmöglich von den Ideen und Projektvorschlägen der Privaten profitieren.

Zu 3:

Neben vergaberechtlichen sind auch steuer-, gesellschafts-, vertrags-, beihilfen- und allenfalls förderungsrechtliche Aspekte zu beachten; in wie weit einzelne Vorschriften zueinander in Konflikt stehen muss im Einzelfall geprüft werden (erfahrungsgemäß stehen allerdings die EG-Förderungslinien häufig mit den EG-Vergaberichtlinien in einem Spannungsverhältnis).

Zu 5:

Ja, das bestehende Vergaberecht ist ausreichend.

Zu 6:

Nein.

Zu 7:

Nein.

Zu 8:

Ja, es erfolgen regelmäßig internationale Bekanntmachungen.

Zu 9:

Schaffung günstiger wirtschaftlicher und rechtlicher Rahmenbedingungen (z.B. steuerliche Anreize, Möglichkeit rascher, unbürokratischer und flexibler Lösungen); den primärrechtlichen Grundsätzen könnte durch weit gehende Bekanntmachungspflichten entsprochen werden.
nicht gut.

Zu 10:

Keine Besonderen.

Zu 11:

Nein.

Zu 12:

Nein.

Zu 13:

Zur Beantwortung dieser Frage wären Informationen darüber erforderlich, was die EK unter „Interventionsklauseln“ konkret versteht.

Zu 14:

Nein, Vertragsrecht ist innerstaatliches Recht und soll es auch bleiben. Eine Harmonisierung dieser Regeln auf europäischer Ebene nur für ÖPP erscheint nicht zweckdienlich.

Zu 15:

Ausreichende Transparenz für die Vergabestellen, fehlende Vertragsbeziehung des öffentlichen Partners zum Subauftragnehmer, datenschutzrechtliche Probleme, Probleme bei Nichterbringung einer Leistung durch den Unterauftragsdienstleister (schwierige Durchsetzung, Ersatzvornahme).

Zu 16:

Nein.

Zu 17:

Nein.

Zu 19:

Allenfalls könnte eine Plattform zwecks internationalen Erfahrungsaustauschs eingerichtet werden; in diesem Rahmen sollten nicht nur Verpflichtungen der Auftraggeber erörtert sondern konstruktive Lösungsansätze erarbeitet werden. Austausch von Best- Practice-Projekten.

Zu 20:

Tendenz zur Überreglementierung und Überspannung des Transparenzgebotes, Vergaberecht, Beihilfenrecht.

Zu 21:

Nein.

Zu 22:

Ja. (siehe Beantwortung der Frage 19)

Für den Landesamtsdirektor:

Dr. Anne Wrulich

Ergeht an:

1. MA 4
2. MA 5
3. MA 13
4. MA 14
5. MA 27
   (zu MA 27 - 911/2003)
6. MA 33
7. MA 43
8. MA 56
9. MA 63
10. Wiener Holding GmbH
11. Wiener Stadtwerke Holding AG

Amt der Tiroler Landesregierung

Verfassungsdienst

An die
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Grünbuch zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen

Geschäftszahl Präs.II-1441/534
Innsbruck, 23.06.2004

Zu Zlen. VST-4763/16 vom 7.5.2004 und VST-4763/18 vom 18.5.2004

Mit den angeführten Schreiben wurden die Länder ersucht, eine auf das Grundsätzliche beschränkte Stellungnahme zu den im Grünbuch aufgeworfenen Fragen zu erstatten. Dazu wird mitgeteilt, dass seitens des Landes Tirol kein Bedarf an einer gemeinschaftsweit einheitlichen Regelung von Konzessionen und anderen Formen von öffentlich-privaten Partnerschaften gesehen wird.

Es wird nämlich davon ausgegangen, dass das derzeit geltende Gemeinschaftsrecht dafür ausreicht, die effektive Teilnahme von Interessenten aus anderen Mitgliedstaaten am Konzessionsverfahren sicherzustellen. Dies gilt insbesondere auch für den Bereich privat initiierter Partnerschaften, wo allerdings die aufgrund des gemeinschaftsrechtlichen Transparenz- und des Gleichbehandlungsgebotes sowie des Diskriminierungsverbotes geboten scheinende Bekanntmachung der privaten Initiative an alle interessierten Kreise das Risiko mit sich bringt, dass vom Initiator verschiedene Akteure dessen Ideen aufgreifen und im Endeffekt den wirtschaftlichen Vorteil daraus ziehen. Geht die Initiative für eine öffentlich-private Partnerschaft hingegen von der Verwaltung aus, so werden ohnedies regelmäßig Vergabeverfahren durchzuführen sein.

Abschließend wird bemerkt, dass für eine fundierte Beantwortung der im Grünbuch aufgeworfenen Fragen ha. die erforderlichen praktischen Erfahrungen mit öffentlich-privaten Partnerschaften fehlen.

Für die Landesregierung:

Dr. Liener
Landesamtsdirektor

Amt der Vorarlberger Landesregierung

Zahl: PrsE-10601.00

Bregenz, am 21.06.2004

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Betreff: Grünbuch zu öffentlich-privaten Partnerschaften und den gemeinsamen Rechtsvorschriften für öffentliche Aufträge und Konzessionen; Stellungnahme
Bezug: VST-4763/16 vom 7.5.2004 und VST-4763/18 vom 18.5.2004

Sehr geehrte Damen und Herren,

zu den im Grünbuch der Europäischen Kommission zu öffentlich-privaten Partnerschaften (ÖPP) und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen aufgeworfenen Fragen wird von Seiten des Landes Vorarlberg wie folgt Stellung genommen:

Frage Nr 1:
Im Sozialbereich spielen ÖPP eine Rolle. Es gibt hier verschiedene verschiedene Arten von Verträgen und Vereinbarungen, die keine Entgeltvereinbarung enthalten. Es sind dies zB

- formale Rahmenvereinbarungen,
- vertragliche Abwicklungsregelungen,
- Abwicklungsregelungen auf der Basis und im Rahmen von Entgeltanerkennungen (zT mit ergänzenden „Spielregeln“ über Konzepte und Abwicklungen etc),
- Förderungsregelungen bzw -programme auf Basis von Leistungskonzepten,
- Informelle bzw mündliche Vereinbarungen.

Abgesehen von den Vorschriften über die Auftragsvergaben sind keine spezifischen Rahmenbedingungen für ÖPP auf Vertragsbasis bekannt.

Frage Nr 2:
Es wird davon ausgegangen, dass sich der wettbewerbliche Dialog für die Auftragsvergabe im Zusammenhang mit der Errichtung einer ÖPP eignet. Es müssen jedoch die praktischen Erfahrungen abgewartet werden. Mit einer Ausweitung der Anbieterlandschaft – gerade im Sozialbereich – wird gerechnet.

Frage Nr 3:
Probleme werden im Zusammenhang mit den Zuschlagskriterien gesehen. Diese Kriterien müssen vorab festgelegt werden. Gerade bei komplexen Leistungen kann der Auftraggeber oft erst im Laufe des Vergabeverfahrens erkennen, welche Vor- und Nachteile die Lösungsansätze der einzelnen Bieter haben. Eine sinnvolle Festlegung von Zuschlagskriterien ohne Kenntnis der Lösungsansätze ist nur schwer möglich.

Ein weiteres Problem wird darin gesehen, dass bereits im Rahmen des Vergabeverfahrens eine starke Mitwirkung der in Frage kommenden Unternehmer gefordert ist. Diese sind aber zu einer Mitwirkung nur bereit, wenn sie auch damit rechnen können, den Auftrag oder eine Entschädigung für die Erarbeitung eines Lösungsansatzes zu erhalten.

Fragen Nr 4 bis 7:
Ein neuer gemeinschaftlicher Rechtsakt zur einheitlichen Regulierung von Konzessionen und anderen Formen von ÖPP wird nicht für wünschenswert erachtet. Die bei der Vergabe von Konzessionen gemäß EGV zu beachtenden Grundsätze der Transparenz, Gleichbehandlung, Verhältnismäßigkeit und gegenseitigen Anerkennung genügen, um eine effektive Teilnahme von Gesellschaften und Gruppierungen aus anderen Staaten zu gewährleisten.

Fragen Nr 8 und 9:
Es liegen ho wenig Erfahrung im Zusammenhang mit privat initiierten ÖPP vor. Allerdings dürfte die Bereitschaft eines Privaten, eine Initiative zu ergreifen, auch davon abhängen, ob er später mit einer Auftragserteilung rechnen kann.

Der Zugang ausländischer Akteure zu privat initiierten ÖPP ist nach ho Ansicht gewährleistet. ZB können im Sozialbereich in jenen Fällen, wo die Verwaltung auf private Initiativen „reagiert“, auch ausländische Akteure Vorschläge machen und Partner werden, wenn sie die für diesen sozialen Leistungsbereich durch Richtlinien, Verordnungen der Gesetze festgelegten speziellen Anforderungen erfüllen (Basisversorgung im Nahraum, Vereinbarung mit den örtlich zuständigen Gemeinden, Bürgerbeteiligung bzw -selbstorganisation, Nachhaltigkeit, Verlässlichkeit, Kooperation etc). Beispiele bestehen im Pflegeheimbereich. In jene Fällen, wo die Verwaltung „agiert“ (Probleme und Aufgaben selbst beschreibt) werden ohnedies Vergabeverfahren durchgeführt.

Fragen Nr 10 bis 14:
Nach ho Erfahrungen können Änderungen nach der Auswahl des privaten Partners nicht gänzlich vermieden werden. Geringfügige inhaltliche Änderungen in Bezug auf den Vertragsgegenstand sollten daher zulässig sein.

Eine Klärung bestimmter Aspekte der vertraglichen Rahmenbedingungen für ÖPP auf Gemeinschaftsebene wird nicht als notwendig angesehen und abgelehnt.

Fragen Nr 15 bis 17:
Im Zusammenhang mit ÖPP-Konstruktionen sind keine besonderen Probleme mit der Vergabe von Unteraufträgen bekannt. Ausführlichere Regelungen über die Vergabe von Unteraufträgen oder eine Umgestaltung dieser Regeln im Zusammenhang mit ÖPP werden nicht für erforderlich gehalten.

Fragen Nr 18 bis 22:
Eine über das vorliegende Grünbuch hinausgehende Initiative auf Gemeinschaftsebene wird als nicht erforderlich erachtet, zumal auch keine die Einrichtung von ÖPP behindernden Maßnahmen oder Verfahren bekannt sind.

Allenfalls könnte der Austausch bewährter Verfahrensweise zwischen den Mitgliedstaaten überlegt werden. Zu denken wäre hier aber nicht an Verfahren der offenen Koordinierung, sondern an die Einrichtung von Netzwerken auf verschiedenen Ebenen.

Unabhängig von den vorliegenden Fragen wird noch auf Folgendes hingewiesen:

Gerade für im Sozialbereich tätige gemeinnützige Träger, die keine Erwerbszwecke verfolgen und auch gesellschaftspolitischen Aufgaben nachkommen, ist die Öffnung für den Wettbewerb problematisch. Es ist fraglich, ob diese weiterhin ihre Aufgaben wahrnehmen können, wenn sie nun mit Wirtschaftsbetrieben konkurrieren sollen. Die ÖPP im Sozialbereich haben maßgeblich an der nachhaltigen sozialen und gesellschaftlichen Entwicklung des Landes Vorarlberg beigetragen. Diese Leistungen können weder genau definiert noch abgegolten werden, da Unternehmen im herkömmlichen Sinne keine vergleichbaren Leistungen anbieten. Der Sonderstellung des Sozialbereichs trägt die Europäische Kommission auch dadurch Rechnung, dass sie in ihrem Weißbuch zu Dienstleistungen von allgemeinem Interesse ankündigt, für den Gesundheits- und Sozialbereich eine eigene Mitteilung vorzulegen, wo sie diesen im Detail untersuchen will. Aufgrund des engen Zusammenhanges der im Grünbuch und der in der angekündigten Mitteilung behandelten Fragen, sollte der Gesundheits- und Sozialbereich vom gegenständlichen Konsultationsprozess ausgespart bleiben und im Hinblick auf alle gemeinschaftsrechtlich relevanten Fragen in der Mitteilung behandelt werden.

In der Randnummer 64 des Grünbuches wird daran erinnert, dass ein gemischtwirtschaftliches Gebilde in seiner Rolle als Vergabestelle auch dazu verpflichtet ist, die Rechtsvorschriften für öffentliche Aufträge und Konzessionen einzuhalten. Nach ho Meinung kann das nur gelten, wenn das gemischtwirtschaftliche Gebilde selbst öffentlicher Auftraggeber im Sinne der Vergaberichtlinien ist. Das muss nicht bei jeder Beteiligung des Staates der Fall sein.

Es wird gebeten, die gegenständliche Stellungnahme dem BKA-VD (zu Schreiben BKA-671.801/0022-V/A/8/2004) im Hinblick auf die Erstellung einer österreichischen Stellungnahme zum Grünbuch weiterzuleiten bzw diese in einer allfälligen Länderstellungnahme zu berücksichtigen.

Mit freundlichen Grüßen

Für die Vorarlberger Landesregierung
im Auftrag

Dr Martina Büchel-Germann

Nachrichtlich an:

1. Abteilung IIIb
   im Hause

   via VOKIS versendet

2. Abteilung IVa
   im Hause

   via VOKIS versendet

3. Abteilung IIb
   im Hause

   via VOKIS versendet

4. Abteilung IVb
   im Hause

   via VOKIS versendet

5. Abteilung VIa
   im Hause

via VOKIS versendet

6. Abteilung VIb
   im Hause

   via VOKIS versendet

7. Abteilung VIe
   im Hause

   via VOKIS versendet

8. Abteilung VIId
   im Hause

   via VOKIS versendet

Livre vert de la Commission européenne sur les partenariats public – privé et le droit communautaire des marchés publics et des concessions (Doc. COM (2004) 327 final)

Avis de la Belgique et réponses aux questions posées

Considérations générales

1. Les autorités belges apprécient l'analyse de la Commission consacrée , dans le présent Livre vert, aux formes de coopération entre le secteur public et le secteur privé, lesquelles se sont particulièrement développées au cours des dernières décennies, dans le but de rencontrer au mieux les besoins collectifs en permettant aux autorités publiques de bénéficier, à cette fin, du financement et du savoir-faire du secteur privé.

   Face à cette évolution, la préoccupation exprimée par la Commission, préoccupation fondamentale et légitime partagée par les autorités belges, est d'assurer que ce développement se fasse dans le respect des règles et principes découlant du Traité : transparence, égalité de traitement, proportionnalité, reconnaissance mutuelle, ainsi que le respect du droit communautaire des marchés publics et des concessions, dont, s'il échet, le respect des dispositions applicables aux procédures de passation des marchés publics.

2. Ainsi qu'il l'a déjà été souligné, les conventions P.P.P. qui résultent de « montages » contractuels ont des formes diversifiées et plurielles, en fonction du but poursuivi et des engagements des partenaires.

   Cependant, certaines caractéristiques communes se dégagent des conventions P.P.P. :

   - objectif commun d'intérêt général ;

   - globalité des contrats, c'est-à-dire qu'un seul contrat porte le plus souvent sur des marchés de travaux, de fournitures et de services ; ainsi en est-il lorsqu'un marché couvre à la fois la conception, le financement, la réalisation, l'exploitation et la maintenance ;

   - combinaison de deux ou trois catégories de prestations (travaux, fournitures et/ou services) ;

   - longue durée;

   - appel à la créativité et à l'innovation ;

   - financement, au moins partiellement, par le secteur privé et partage, même de manière inégale, des risques, responsabilités et avantages.

3. La directive 2004/18/CE du 31 mars 2004 apporte certaines réponses aux difficultés rencontrées pour la passation de marchés publics relatifs à des marchés complexes :

   3.1. Une nouvelle procédure de passation supplémentaire dite de *« dialogue compétitif »*, adaptée à des *« projets particulièrement complexes portant sur des solutions techniques et/ou des solutions financières/juridiques »* (considérant 31 de la dite directive).
   Cette nouvelle procédure semble être parfaitement adaptée à des marchés publics devant conduire à un partenariat public-privé.

   3.2. Le considérant 8 précise la possibilité pour l'autorité publique de recourir à un dialogue technique préalable

   « Avant le lancement d'une procédure de passation d'un marché, les pouvoirs « adjudicateurs peuvent, en recourant à un dialogue technique, solliciter ou accepter « un avis pouvant être utilisé pour l'établissement du cahier des charges, à condition « que cet avis n'ait pas pour effet d'empêcher la concurrence. »

   Un tel dialogue technique peut porter sur des éléments de participation, p. ex. d'ordre financier, qui seront destinés à être inclus dans le cahier des charges.

4. La directive 2004/17/CE du 31 mars 2004 n'envisage pas de nouvelle procédure, car la procédure négociée avec publicité constitue une procédure commune applicable à tous les marchés couverts par cette directive, pouvant dès lors être utilisée pour les P.P.P. concernés.

   On notera également le considérant n° 15 nouveau, relatif à la possibilité d'un « dialogue technique » préalable, identique à celui du considérant n° 8 de la directive 2004/18/CE.

5. Les concessions de travaux publics ont été couvertes avec des règles appropriées dans la directive 93/37/CE du 14 juin 1993 portant coordination des procédures de passation des marchés publics de travaux, alors qu'elles ne l'étaient pas auparavant, étant exclues de la directive 71/305/CEE.

   La directive 2004/18/CE n'apporte aucune modification de ces dispositions, considérées par tous les Etats membres comme satisfaisantes.

6. Les concessions de services publics, dont la définition a été précisée dans les directives, ne sont pas spécifiquement soumises à des procédures de passation.

   Néanmoins, leur attribution doit respecter les principes généraux de transparence, d'égalité de traitement et de proportionnalité.

Selon la jurisprudence de la Cour de Justice (TELEAUSTRIA), l'obligation de transparence qui incombe au pouvoir adjudicateur consiste à garantir un degré de publicité adéquat permettant une ouverture du marché des services à la concurrence.

7. Etant donné que les nouvelles directives ont été mises en vigueur il y a cinq mois seulement et qu'elles ne sont pas encore transposées dans la plupart des Etats membres, ceux-ci ayant 21 mois pour le faire, les autorités belges sont d'avis qu'il est prématuré de modifier en quoi que ce soit, en ce qui concerne les P.P.P. relatifs à des marchés publics, les dispositions législatives contenues dans les directives 2004/18/CE et 2004/17/CE. Une telle nécessité ne pourrait être établie aussi longtemps que les dispositions nouvelles de ces directives, rappelées ci-dessus, n'auront pas été expérimentées et qu'une évaluation objective de leur utilisation, voire de la mesure de leurs succès ou de leurs échecs.

   Le monde économique craint en effet une multiplication de règles de procédure qui seraient la source de contraintes supplémentaires de nature à constituer des entraves nouvelles à des coopérations entre secteur public et secteur privé, dont les objectifs restent la satisfaction de besoins d'intérêt général.

8. Par ailleurs, des clarifications et des précisions sur la portée et l'interprétation à donner aux textes existants par rapport aux partenariats P.P.P., dont l'objet est soit couvert, soit non couvert par les directives relatives aux procédures de passation des marchés publics, seront particulièrement appréciées par les autorités belges.

*

*   *

1. Quels types de montages de P.P.P. purement contractuel connaissez-vous ? Ces montages font-ils l'objet d'un encadrement spécifique (législatif ou autre) dans votre pays ?

La législation belge sur les marchés publics (loi du 24 décembre 1993 et ses arrêtés d'exécution) connaissent des dispositions particulières pour :

1. Les marchés de concession de travaux publics et les marchés de travaux passés au nom des concessionnaires de travaux publics. Ces dispositions constituent la transposition de celles de la directive 93/37/CE afférentes aux concessions de travaux publics.

2. Les marchés de promotion.

   Au sens de la loi, un marché de promotion est un marché de travaux ou de fournitures portant à la fois sur le financement et l'exécution de travaux ou de fournitures ainsi que, le cas échéant, sur l'étude de ceux-ci ou sur toute prestation de services relative à ceux-ci.

Des dispositions réglementaires obligent à préciser : le contenu du cahier des charges, les obligations du pouvoir adjudicateur, celles du promoteur et les clauses d'exécution du marché.

La formule de la promotion permet, non seulement de satisfaire les besoins du pouvoir adjudicateur lui-même, mais aussi ceux de tiers, lorsqu'elle conduit à ériger des ouvrages destinés à des tiers, par exemple des logements sociaux destinés à des personnes à revenus modestes, ou bien des bâtiments industriels pour favoriser le développement économique.

3. De l'avis de la Commission, la transposition en droit national de la procédure de dialogue compétitif permettra aux parties concernées de disposer d'une procédure particulièrement adaptée à la passation des contrats qualifiés de marchés publics lors de la mise en place d'un P.P.P. de type purement contractuel, tout en préservant les droits fondamentaux des opérateurs économiques. Partagez-vous ce point de vue ? Si non, pourquoi ?

La procédure de dialogue compétitif, telle que prévue dans la directive 2004/18/CE , apparaît tout-à-fait appropriée pour la mise au point de contrat P.P.P. de type contractuel. Cette nouvelle procédure pourra s'avérer souple et efficace dans les cas d'espèce. la Belgique partage donc l'avis de la Commission sur ce point.

Néanmoins, le recours à une procédure négociée avec publicité en application de l'article 30, § 1er, de la directive 2004/18/ CE :
« dans des cas exceptionnels, lorsqu'il s'agit de travaux, de fournitures ou de services dont la « nature ou les aléas ne permettent pas une fixation préalable et globale des prix »
ne doit pas être exclu pour la passation de contrats P.P.P., lorsque l'utilisation de ce type de procédure peut être justifiée.

En outre, l'article 30, § 1er, a) permet de recourir également à une procédure négociée, soit avec publicité préalable, soit sans publicité selon le cas, lorsque, en réponse à une procédure de dialogue compétitif, seules des offres irrégulières ou inacceptables ont été déposées.

4. En ce qui concerne ces contrats, existe-t-il selon vous des points autres que ceux relatifs au choix de la procédure d'adjudication, susceptibles de poser problème au regard du droit communautaire des marchés publics ? Si oui, lesquels et pour quelles raisons ?

La réponse est négative.

Aucun point particulier susceptible de poser problème au regard du droit communautaire des marchés publics, tel qu'il existe à l'heure présente, n'a été signalé aux autorités.

4. Avez-vous déjà organisé, participé, ou souhaité organiser ou participer à une procédure d'attribution de concession au sein de l'Union ? Quelle expérience en avez-vous ?

Les concessions de travaux sont passées par les pouvoirs adjudicateurs concernés selon les procédures prévues dans les dispositions législatives et réglementaires rappelées ci-avant et conformes à la directive 93/37/CEE.

En ce qui concerne les concessions de service, on peut citer, à titre d'exemple, l'octroi d'une concession de service ayant pour objet le développement et l'exploitation touristique d'un site de la bataille de Waterloo, à une société française après mise en concurrence internationale.

5. Estimez-vous que le cadre juridique communautaire actuel est suffisamment précis pour assurer la participation concrète et effective de sociétés ou groupements non-nationaux aux procédures de passation de concessions ? Une concurrence réelle est-elle, selon vous, habituellement assurée dans ce cadre ?

En ce qui concerne les concessions de travaux publics et les concessions de services publics, leur attribution doit nécessairement se faire dans le respect du principe du Traité.

Pour les concessions de travaux, étant donné le niveau élevé des dépenses publiques qui leur sont affectées, leur durée, leur importance dans la vie économique et dans des infrastructures, parfois internationales, le législateur européen a, en 1993, établi des règles de procédures pour leur mise en concurrence au niveau national et européen, pour les marchés supérieurs au seuil établi pour les marchés publics de travaux.

En ce qui concerne les concessions de service public, le cadre juridique au sujet de leur mise en concurrence a été nettement déterminé par la jurisprudence de la Cour de Justice.

6. Pensez-vous qu'une initiative législative communautaire, visant à encadrer la procédure de passation de concession, est souhaitable ?

La réponse est négative.

Une modification des règles actuelles pour les concessions de travaux publics n'apparaît pas justifiée, ni nécessaire ; selon leur contenu, elles risqueraient d'avoir un impact négatif sur l'avenir des partenariats recherchés.

7. De manière plus générale, si vous estimez qu'il est nécessaire que la Commission propose une nouvelle action législative, existerait-il à votre avis des raisons objectives de viser dans cet acte tous les P.P.P. de type contractuel, qu'ils soient qualifiés de marchés publics ou de concessions, pour les soumettre à des régimes de passation identique ?

Une uniformisation des procédures de passation pour tous les PPP de type contractuel est à rejeter, étant donné la multiplicité de types de partenariats possibles entre, d'une part, des autorités publiques et, d'autres part, des personnes privées, les unes et les autres recherchant à satisfaire des besoins d'intérêt général dans le cadre d'une convention mutuellement satisfaisante fondée sur la liberté des contrats.

Une semblable réglementation risque d'avoir pour conséquence de corseter tout développement des Partenariats Public – Privé, pourtant indispensables dans le contexte économique et social de la société actuelle.

8. Selon votre expérience, l'accès des opérateurs non-nationaux aux formules de P.P.P. d'initiative privée est-il assuré ? En particulier, lorsqu'il existe une invitation des pouvoirs adjudicateurs à présenter une initiative, cette invitation fait-elle généralement l'objet d'une publicité adéquate permettant l'information de tous les opérateurs intéressés ?
   Une procédure de sélection véritablement concurrentielle est-elle organisée pour assurer La mise en œuvre du projet retenu ?

Certaines réglementations nationales d'Etats membres donnent au secteur privé l'opportunité de prendre l'initiative d'une opération P.P.P. et offrent certaines incitations aux preneurs d'initiatives.

Ces incitations peuvent être de nature à octroyer des avantages aux preneurs d'initiatives.

De telles dispositions n'existent pas en Belgique.

Il serait utile pour les Etats membres de connaître la position de la Commission européenne sur ces réglementations.

9. Quelles serait selon vous la meilleure formule pour assurer le développement des P.P.P. D'initiative privée dans l'Union européenne tout en assurant le respect des principes de transparence, de non discrimination et d'égalité de traitement ?

Cette question est liée à la précédente. Sa réponse est liée à une analyse des résultats des réglementations nationales existant dans quelques Etats membres pour encourager ces formules de P.P.P. d'initiative privée.

Cependant, si l'initiative privée peut être stimulée, elle ne peut s'épanouir que dans l'hypothèse où des règles strictes et contraignantes ne constituent pas des obstacles nouveaux .

Il serait regrettable de constater que des initiatives privées innovantes d'entreprises européennes s'orientent à l'avenir vers des marchés hors C.E.E. plutôt que sur le marché intérieur CE.

10. Quelle expérience avez-vous de la phase postérieure à la sélection du partenaire privé dans les opérations de P.P.P. contractuels ?

11. Avez-vous connaissance de cas dans lesquels les conditions d'exécution – y compris les clauses d'adaptation dans le temps – ont pu avoir une incidence discriminatoire ou ont pu constituer une entrave injustifiée à la libre prestation de services ou à la liberté d'établissement ? Si oui, pouvez-vous décrire le type de problèmes rencontrés ?

12. Avez-vous connaissance de pratiques ou de mécanismes d'évaluation d'offres ayant des incidences discriminatoires ?

13. Partagez-vous le constat de la Commission selon lequel certains montages du type « step-in » peuvent poser problème en termes de transparence et d'égalité de traitement ? Connaissez-vous d'autres « clauses types » dont la mise en œuvre est susceptible de poser des problèmes similaires ?

14. Estimez-vous qu'il est nécessaire de clarifier au niveau communautaire certains aspects Relevant du cadre contractuel des P.P.P. ? Si oui, sur quel(s) aspect (s) devrait porter cette
Clarification ?

Ces questions s'adressent essentiellement aux opérateurs économiques qui auraient constaté ou auraient été victimes de discriminations dans les situations évoquées.

15. Dans le contexte des opérations de P.P.P., avez-vous connaissance de problèmes particuliers rencontrés en matière de sous-traitance ? Lesquels ?

16. Le phénomène des P.P.P. de type contractuel, impliquant le transfert d'un ensemble de tâches à un unique partenaire privé, justifie-t-il selon vous que des règles plus détaillées et/ou d'un champ d'application plus large soient mises en place en ce qui concerne le phénomène de sous-traitance ?

17. De manière plus générale, estimez-vous qu'une initiative complémentaire devrait être prise au niveau communautaire en vue de clarifier, ou d'aménager, les règles relatives à la sous-traitance ?

La réponse à ces trois questions est négative.

18. Quelle expérience avez-vous de la mise en place d'opérations de P.P.P. de type institutionnalisé ? En particulier, votre expérience vous conduit-elle à penser que le droit communautaire des marchés publics et des concessions est respecté dans le cas de montages de P.P.P. institutionnalisé ? Si non, pourquoi ?

19. Estimez-vous qu'une initiative doit être prise au niveau communautaire en vue de clarifier ou de préciser les obligations des organismes adjudicateurs quant aux conditions dans lesquelles doivent être mis en concurrence les opérateurs potentiellement intéressés par un projet de type institutionnalisé ? Si oui, sur quels points particuliers et sous quelle forme ? Si non, pourquoi ?

Au sens du Livre vert, les P.P.P. institutionnalisés résultent de la mise en place d'une entité détenue conjointement par le partenaire public et le partenaire privé. La Commission note que dans les Etats membres, des terminologies et schémas différents sont utilisés dans ces formes d'associations.

On se trouve devant des personnes morales distinctes, ayant une personnalité juridique propre choisie dans le cadre législatif existant : société anonyme, société coopérative, société en participation, association sans but lucratif, groupement d'intérêt économique.

Leur activité peut être de nature industrielle ou commerciale et les apports respectifs des associés peuvent être d'importances différentes.

On ne peut assimiler la constitution de telles entreprises mixtes à des « montages » qui seraient spécifiques à des opérations relatives à l'un ou l'autre marché des autorités concernées.

Ce sont des formes d'associations choisies par une autorité publique, dans un intérêt général public, et ce, en vertu de la liberté d'association, ce qui leur permet de bénéficier, entre autres, d'appuis financiers stables et du partage des risques.

De l'avis des autorités belges, la constitution de sociétés mixtes P.P.P. ne relève pas du droit communautaire des marchés publics et des concessions. Les règles du Traité relatives au droit d'établissement, à la libre circulation des capitaux, à la non-discrimination en raison de la nationalité se doivent néanmoins d'être respectées dans tous les cas.

Dès lors, les autorités belges n'estiment pas nécessaire une initiative communautaire législative dans ce cadre.

De façon générale et indépendamment des questions soulevées dans ce document :

20. Quelles sont les mesures ou les pratiques que vous estimez constitutives d'entraves à la mise en place des P.P.P. au sein de l'Union européenne ?

Nous n'avons pas identifié de telles mesures.

21. Connaissez –vous d'autres formes de P.P.P. développées dans les pays en dehors de l'Union ? Connaissez-vous des exemples de « bonnes pratiques » développées dans ce cadre, dont l'Union pourrait s'inspirer ? Si oui, lesquelles ?

Non.

22. De façon plus générale, et compte tenu des besoins importants d'investissements nécessaires dans certains Etats membres, afin de poursuivre un développement économique social et durable, estimez-vous utile une réflexion collective sur ces questions qui se poursuivrait à des intervalles réguliers entre les acteurs concernés, et qui permettrait un échange des meilleures pratiques ? Est-ce que vous considérez que la Commission devrait animer un tel réseau ?

Les autorités belges accueillent favorablement cette suggestion.

Proposed contribution to the European Commission's consultation on the

Public Private Partnership Green Paper

October 2004, Dublin

CECODHAS, the European Liaison Committee on Social Housing is very pleased that the green paper on Public Private Partnerships has been published. CECODHAS's members have built 25 million housing units in the enlarged Europe and manage around 15 million units. Developing such partnerships is desirable for our sector. Nevertheless, our members wish to alert the European Commission to the following points that need clarification and probably require legislation.

Legal clarification of the rules surrounding public procurement, especially for services of general economic interest (PPPs), must be carried out at the same rate as clarification of the legal security of these same SGEIs. Thinking on PPPs is moving faster than that on SGEIs/SGIs and is seeking to circumvent the problem of State aid and approvals. This can greatly disturb activities (not to mention the problems related to the services directive).

- It is not possible to discriminate between those involved according to their legal status. Social housing enterprises, non-profit-making enterprises, cooperatives and public bodies must be allowed to take part in public private partnerships on the same basis as private enterprises. Currently there are many barriers preventing social housing operators from taking part in PPPs and, therefore, from having access to an alternative source of financing to the public social housing budget. In public private partnerships, public procurement is carried out by private enterprises (with their equity capital), but a public operator may also respond to a public procurement using its own funds. The Treaty imposes non-discrimination between operators over their legal status. However, the Green Paper on PPPs does not take differences between operators into account in these proposals (for example, in standard contracts and negotiation and selection procedures). (Answers to questions 12, 14 and 19).

- The PPP phenomenon may lead to positive external effects for social housing if it can be fully involved in the negotiation phases in these new partnership schemes based on service performance. For this to happen, and in the same way as it does for the EIB's financing policies, social housing must be included in a global PPP urban development programme in which those involved in social housing can intervene as advisers, experts or inspectors of the implementation of long-term partnerships. This can be based on article 34 of directive 2004/18/EC and the terms and conditions for the negotiation phases that remain undecided but are subject to the rules and principles of the EC Treaty.

- Finally, thinking on urban production must be refined around the economic concept of externalities if we wish social housing to be an enduring market. We will then be able to envisage public private partnerships supplementing State aid. This will not happen until we have exchanged experiences of global urban development on these same external effects (urban renewal) on a European scale. For this, it is necessary to leave a flexible framework for "institutional PPPs" and to make the SGEIs/SGIs that are being negotiated in these PPPs more secure. (19).

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EUROPEAN ENERGY AND TRANSPORT FORUM
FORUM EUROPEEN DE L'ENERGIE ET DES TRANSPORTS

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

FORUM OPINION

Rapporteur: Ms Cristina Piai

Introduction

The Green Paper on public-private partnerships (PPPs) is one of the priorities identified in the EC Internal Market strategy for 2003-2006 and contributes to the measures planned as part of the initiative for growth in Europe. The declared aim of the Commission is to launch a public consultation through a wide ranging debate in order to check whether the EU has to intervene to ensure that the economic operators in the Member States have better access to the available opportunities of public private partnership in a situation of legal certainty and effective competition.

The Green Paper does not suggest any particular option or set of options for Community intervention, but put forward a wide set of instruments and tools available for improving the opening of PPPs operations to competition:

- Community legislative instruments;
- Interpretative communications;
- Evaluation tools aimed at better coordination of national practice;
- Exchange of best practice among Member States.

1. Purpose of the Green Paper

PPPs are cooperation forms between public authorities and the private sector aiming at ensuring that infrastructure projects can be carried out and/or that public services can be provided. They represent an important tool for improving the quality of public services and supporting growth in Europe. Over the last ten years these forms of partnership have been developed in several Member States and are now used in many areas of the public sector. The Commission sees it as the outmost importance that the choice of a private partner by a public authority is made according with Community rules on the awarding of public contracts.

The Green Paper analyses the phenomenon of PPPs with regard to Community law on public procurement and concessions setting out the scope of Community rules with a view to identifying possible uncertainties. The **main objective of the document** is to see whether it is necessary to improve the current rules, and assessing to what extent EU intervention might be necessary in order to ensure that:

- Economic operators have access to PPPs under conditions of legal clarity and real competition;

- The legal framework does not form an obstacle to economic operators' access to the different types of PPPs.

Under Community law, there is no specific legal system governing the many different possible forms of PPP. Contracts for these partnerships signed by public authorities with private companies are not, in general, covered by the EC Treaty (Art. 43 and 49) rules on the single market. In certain cases, they can be subject to the detailed provisions of the Directives on public procurement. However, other cases and in particular certain *concessions* are not covered. The Community legal framework is thus the subject of more or less intensive Community coordination at several levels.

The Green Paper sets out the way in which the rules and principles deriving from Community law on public contracts and concessions apply when a private partner is selected, and then for the duration of the contract, in the context of different PPP arrangements. Moreover the document addresses various topics directly linked to the public procurement aspect of PPPs, in particular:

- The framework for the procedures for selecting a private partner, in particular the advantages of the *competitive dialogue procedure* introduced by the new Directive on public procurement, which allows public authorities to hold discussions with applicant businesses in order to identify the solutions best suited to their needs;
- Setting up of PPPs on the initiative of the private sector;
- The contractual framework and contract amendments during the life of a PPP;
- Subcontracting.

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

The Green Paper also asks a set of questions intended to find out more about how these rules and principles work in practice, so that the Commission can determine whether they are sufficiently clear and suit the challenges and characteristics of PPPs.

2. Key elements of the Forum Opinion

The development of the PPP is regarded by the Commission as part of the more general change in the role of the State in the economy, moving from a role of direct operator to one of organiser, regulator and controller. On the one hand, there are Member States with a strong tradition of autoproduction, and this tradition seems to be guaranteed under Art. I. 5 of the Constitutional Treaty. In general, the term “Public-Private Partnership” refers to forms of cooperation between public authorities and the world of business which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service.

Since the term is not defined at Community level, the Forum analysed the elements characterising PPPs, as stated in the Green Paper. It examined closely not only the perspective of Community legislation, but also other important aspects related to the budget constraints of Member States and the need for private funding for the public sector. Elements, that characterise PPPs, are:

- The relatively long **duration** of the relationship, involving cooperation between the public partner and the private partner on different aspects of a planned project.
- The method of **funding the project**, in part from the private sector, sometimes by means of complex arrangements between the various players. Nonetheless, public funds - in some cases rather substantial - may be added to the private funds.

- The important **role of the economic operator**, who participates at different stages in the project (design, completion, implementation, funding). The public partner concentrates primarily on defining the objectives to be attained in terms of public interest, quality of services provided and pricing policy, and it takes responsibility for monitoring compliance with these objectives.
- The **distribution of risks between the public partner and the private partner**, to whom parts of the risks generally borne by the public sector might be transferred. However, a PPP does not necessarily mean that the private partner assumes all the risks, or even the major share of the risks linked to the project. The precise distribution of risk is determined case by case, according to the respective ability of the parties concerned to assess, control and cope with this risk.

In reviewing the various EU outputs on PPPs - the White Paper on Growth (1993), the Van Miert Report (2003), the Eurostat Proposal on Accounting Treatment of PPPs (2004), the new Procurement Directives with the introduction of competitive dialogue (2004) - the following themes tend to recur:

- The need for an appropriate and consistent legislative framework;
- The relation between the public procurement rules and PPPs;
- The interaction of PPPs with competition policy;
- The need to develop new financing instruments;
- Identifying ways of providing support at EU level;
- The identification of appropriate PPP projects;
- The development of institutional capacity in the public sector.

The Green Paper therefore presents many elements that may be object of thought as far as the topic of PPP is concerned, and in particular, besides subdividing the PPP operations in the two macro categories (contractual and institutional nature, par. 20):

- It introduces the evaluation mechanism which resorts to the instrument of the *Public Sector Comparator* analysis model that allows to simulate the cost of an infrastructural investment, be it implemented in PPP form or on the basis of a traditional work on contract (par. 5);
- It states that whatever act, both contractual and unilateral, through which a public enterprise entrusts the professional services of an economic activity to a third party must be examined in the light of the rules and principles resulting from the Treaty (par. 8);
- It introduces the notion of "*adjudicating organism*". In the document the word is employed to designate all of the organisms up to scratch to adjudicate public works on contract (national, regional or local entities, public law organisms created to carry out missions of general interest and under state control, enterprises which manage cluster industries: the term includes, therefore, the adjudicating administrations and the adjudicating entities (public authorities and public enterprises)) (par. 9);
- It holds the view that the formalism existing about the notion of contract in the national law cannot represent a valid argument to make directives lose their useful effect. Moreover the onerous character of a contract does not compulsorily imply the direct payment of a price on behalf of the public subject, but can derive from any other form of economic compensation received by the private partner (par. 10).

3. Recommendations from the Forum

Since at European level it was recognised that Governments have limited financial resources to devote to increased capital expenditure and improved public services, and face restrictions on their ability to raise debt, the development of PPPs is an approach which some countries have taken to procuring public infrastructure and services.

The state of PPP development and national legislative framework vary widely between Member States, but PPPs are established as one of the tools which are available to governments, regional or local entities even if these tools are often complex procedures longer than traditional projects, considering also that transactions costs, for both the public and private sector, tend to be higher.

The majority of EU actions in PPPs have taken place within Trans-European Transport Networks (TENs). The EU is promoting PPPs for supporting networks' building. TENs is an EU initiative with its own budget where EU institutions have specific interests. However even acknowledging that PPPs could help to put in place TENs, till now the Programme has been quite unsuccessful lagging very much behind schedule, basically because lack of funding.

The Forum considers strategic to investigate, discuss and assess whether the PPPs tool offers to both partners real European added-value compared with other options, which for instance meet public interest objectives for the public and value for money for the private sector.

It is not only a matter of improving the legislative framework but, among other possibilities, a clear definition of the role of the economic operator, especially in allocating the risks. Since PPPs are hard to be defined and they vary greatly across Europe, a purely legislative approach from the Commission is not sufficient. The Forum suggests a provision of EU guidelines to the Member States on PPPs since there are significant levels of uncertainty on how EU legislation applies to PPP. This uncertainty adds to the overall financial risks of undertaking such projects. The risks apply to both the public and private sectors, and inevitably result in higher costs.

If on one hand the EU wants to encourage a larger use of private funding, on the other the uncertainty on how to procure such projects, the additional complexity of combining PPP and grant funded project requirements, and the lack of precedents have made governments suspicious and prudent of such innovative tool.

The Forum emphasizes the need for better sharing of knowledge and experience between different sectors of the public and private sectors. This will help to ensure efficiency in the development of PPP approaches, processes and consistency in procurement. The Commission must play an important role in the development and procurement of PPPs, acting as a catalyst to support its vision for PPPs, adopting a structured, comprehensive approach to its development and assisting especially New Member States in fully exploiting this alternative approach to procurement, essential for tackling infrastructure challenges across Europe.

Initiatives, such as the **"Guidelines for the Development of Successful PPPs"** and the **"Resource Book"** adopted by the Commission (developed by DG Regional Policy) acknowledge the importance of financing environmental and transport infrastructure, attracting interest in PPPs in an enlarged Union. These initiatives are very useful as working tools for the identification, preparation and implementation of PPP projects within the general context of partnership between private funds with grant financing, especially considering EU grants.

Initiatives on normative framework must be implemented in close contact with a profound analysis of the many critical issues affecting successful PPP projects. This can represent a tool for assisting public sector decision makers in evaluating investments in public infrastructures taking into account the opportunity of matching public grants with private funds, and EIB and EBRD loans. Co-financing requirements together with the debt restrictions faced by the Members States, mean that some governments will resort to private co-financing support in order to make full use of the EU funds available.

To improve the understanding of PPPs, including the chances and possible risks, and to develop them within the EU, the Forum suggests setting up a PPP High Level Group at European level, including the Social Partners, as well as a joint Task Force between DG Internal Market, DG Regio, DG Energy and Transport:

- to clearly assess how its directives, regulations and legislation interact with PPP procurements;
- to coordinate activities related to PPPs and assess the impacts which EU actions have on their development;
- to disseminate the knowledge about PPPs EU policy and best practice;
- to assist Member States in combining EU funding with private sector finance and PPPs;
- to help Member States implementing pilot projects with practical guidelines.

30 July 2004

KAUPPA- JA
TEOLLISUUSMINISTERIÖ

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VIHREÄ KIRJA JULKISEN JA YKSITYISEN SEKTORIN YHTEISTYÖSOPIMUKSISTA SEKÄ JULKISIA HANKINTOJA JA KÄYTTÖOIKEUSSOPIMUKSIA KOSKEVASTA YHTEISÖN OIKEUDESTA

Julkisen ja yksityisen sektorin yhteistyösopimuksia, julkisia hankintoja ja käyttöoikeussopimuksia koskeva julkinen kuuleminen on ajankohtainen ja tarpeellinen. Pidämme myönteisenä komission asiaa koskevaa aloitetta kartoittaa julkisen ja yksityisen sektorin yhteistyöjärjestelyjä sekä käsityksiä erityisen yhteisölainsäädännön tarpeellisuudesta.

Julkisia hankintoja tullaan tekemään ja julkisia palveluita järjestämään yhä enenevin määrin erilaisin julkisen ja yksityisen sektorin yhteistyöjärjestelyin. Yhteistyö- ja kumppanuussopimukset voivat mahdollistaa julkisten viranomaisten keskittymisen ydintoimintoihinsa sekä edistää yksityisen sektorin hyvien toimintamallien ja innovaatioiden käyttöönottoa sekä uusia rahoitusmalleja. Parhaimmillaan yhteistyöjärjestelyt antavat uusia mahdollisuuksia yritystoiminnalle, edistävät elinkeinopolitiikkaa sekä parantavat työllisyyttä.

Ns. elinkaari- ja kumppanuusmallit kannustavat jatkuvaan kehitystyöhön ja uuden teknologian käyttöönottoon pitkällä aikajänteellä, koska palvelujen laadusta ja niiden tuottamiseen tarvittavasta varustuksesta on niiden toimittaja vastuussa koko pitkän sopimuskauden ajan. Pitkäjänteinen, sisäänrakennettu kehitystyön motivointi kumppanuushankkeissa lisää muutoin alhaista tuottavuutta ja kilpailukykyä palvelusektorilla, jolla on merkittävä vaikutus hyvinvoinnin ja elintason kohoamiseen palvelusektorin edustaessa yli kahta kolmasosaa bruttokansantuotteesta. Tätä tavoitetta tukee myös kumppanuushankkeissa palvelusektorin avaaminen kilpailulle ja uudelle yritystoiminnalle, mihin Suomen hallitus on sitoutunut uudessa hallitusohjelmassaan.

Kumppanuushankkeita vihreän kirjan tarkoittamassa muodossa on verrattain vähän Euroopan Unionin jäsenmaissa. Niiden potentiaali on kuitenkin suuri ja merkitys huomattava Euroopan kilpailukyvyn kehittämiselle, olisi tärkeää kaikin tavoin pyrkiä varmistamaan Euroopan laajuisten markkinoiden muodostuminen kumppanuushankkeille. Sirpaloituneet, pienet kansalliset markkinat eivät takaa riittäviä kehityspanostuksia eri toimijoilta eivätkä edistä tarvittavan osaamisen ja sitä kautta tehokkuuden ja tuottavuuden leviämistä yli Euroopan

Yhteistyöjärjestelyihin liittyy kuitenkin myös monia avoimia periaatteellisia sekä käytännön toteuttamiseen liittyviä kysymyksiä, jotka edellyttävät arvokeskustelua sekä myös lainsäädäntöjen yhteensovittamista.

Tärkeää on, ettei yhteisö- tai kansallinen lainsäädäntö aseta esteitä yhteistyöjärjestelyjen käytölle. Julkisen ja yksityisen sektorin yhteistyötä koskeva yhteisön sääntely on tällä hetkellä hajanaista ja tulkinnanvaraista. Yhteistyön järjestämisen tavasta riippuen sovellettavaksi voi tulla kansallisten säädösten lisäksi julkisia hankintoja koskeva lainsäädäntö, valtiontukia koskeva lainsäädäntö tai perustamissopimuksesta johdetut periaatteet sekä sitä koskeva oikeuskäytäntö. Sovellettaviksi voivat tulla myös yleishyödyllisiä palveluja, yleisiin taloudellisiin tarkoituksiin liittyviä palveluja sekä palvelujen sisämarkkinadirektiiviä koskevissa aloitteissa esitetyt yhteisölainsäädännön tulkinnat. Erityistä huomiota tulisikin kiinnittää näiden eri aloitteiden valmistelun ja soveltamisen yhteensovittamiseen ristiriitaisuuksien ja tulkinnanvaraisuuksien välttämiseksi.

Julkisen ja yksityisen sektorin yhteistyömuotojen yleistyessä on tärkeää selventää yhteisölainsäädännön soveltumista sekä saavuttaa yhteinen näkemys käytännön toimintavelvoitteista ja varmistaa näin säännösten yhteneväistä noudattamista jäsenvaltioissa. Vaikka yhteisön erityislainsäädännön laatiminen lisäisikin oikeudellista varmuutta, käsityksemme mukaan edellytyksiä kumppanuutta koskevan erityissääntelyn laatimiseen ei ainakaan tässä vaiheessa ole. Kumppanuudessa kysymys on monitahoisesta, sisällöltään vaihtelevasta ja kehittyvästä ilmiöstä, jonka yksityiskohtainen ja kattava sääteleminen ei ole näkemyksemme mukaan tarkoituksenmukaista eikä tällä hetkellä mahdollistakaan. Keskustelun jatkaminen, tulkintaohjeiden antaminen, mallisopimusten laatiminen sekä hyvien käytäntöjen vaihtaminen esimerkiksi asiantuntijaverkostoilla on kuitenkin kannatettavaa. Erityistä huomiota toivomme kiinnitettävän perustamissopimuksesta johdettujen toimintavelvoitteiden selventämiseen, sillä tulkinnanvaraisuuden on todettu aiheuttavan oikeudellista epävarmuutta, johtavan epäyhtenäisiin soveltamiskäytäntöihin sekä muodostavan jopa esteen yhteistyöjärjestelyjen käytölle.

Sitä vastoin toivottavaa olisi, että komissio tekisi aloitteen in house-järjestelyjä koskevaksi lainsäädännöksi. In house-ongelmatiikkaan otetaan Vihreässä kirjassa hyvin yleisellä tasolla kantaa. Myöskään uudet hankintadirektiivit eivät anna vastauksia siihen, missä laajuudessa hankintaviranomaiset voivat tehdä hankintoja ilman kilpailuttamista yksiköiltä, jotka ne omistavat kokonaan tai yhdessä muiden viranomaisten taikka yksityisen tai kolmannen sektorin toimijoiden kanssa. Koska kysymystä koskeva oikeuskäytäntö on myös tulkinnanvaraista ja tapauskohtaista, asiasta säätäminen olisi tärkeää. Selkeiden oikeusohjeiden puuttuminen on omiaan estämään tarkoituksenmukaisten rakenteellisten yhteistyöjärjestelyjen toteuttamista sekä johtamaan epäyhteneväisiin käytäntöihin.

Jos julkisen ja yksityisen sektorin yhteistyöjärjestelyjä koskevan yhteisön erityislainsäädännön laatimiseen päädyttäisiin, tulisi säännösten kattaa laajasti erilaiset yhteistyöjärjestelyt. Säännösten tulisi olla myös joustavia ja väljiä, jotta sääntely ei jäykistäisi mahdollisuuksia erilaisiin sopimusjärjestelyihin.

Vihreässä kirjassa esitetty kumppanuuden käsite on oikeansuuntainen. Kumppanuudella tarkoitetaan julkisviranomaisen ja yritysmaailman yhteistyömuotoja, joiden tarkoituksena on jonkin infrastruktuurin rahoittaminen, rakentaminen, uudistaminen, hallinnointi tai huolto taikka jonkin palvelun toimittaminen. Kumppanuuden käsite mahdollistaa erilaisia toteuttamistapoja, joista vihreässä kirjassa käsitellään sopimusperusteista kumppanuutta ja rakenteellista kumppanuutta. Julkisen ja yksityisen sektorin yhteistyömuodot voivat kuitenkin toteutua myös muilla tavoilla, kuten muodostamalla julkisten ja yksityisten toimijoiden verkostoja hoitamaan julkisia tehtäviä. Tällaisia verkostoja, joiden muodollinen organisoituminen ja alueellinen laajuus voivat vaihdella huomattavasti, käytetään Suomessa muun muassa työllisyyden edistämisessä sekä sosiaalialan osaamisen edistämisessä. Julkisia palvelutehtäviä voidaan antaa myös yleishyödyllisille yhteisöille ilman taloudellista kompensaatiota hankintaviranomaiselta tai palvelujen käyttäjiltä, jolloin julkisten hankintojen sääntely ei tule sovellettavaksi. Myös eräät valtionavuin kokonaan rahoitettavat tai yhdessä yksityisellä rahoituksella toimivat yhteisöt toteuttavat yleisen edun mukaisia tehtäviä. Julkisen ja yksityisen sektorin yhteistoimintaa tapahtuu myös erilaisissa yhteisrahoitteisissa tutkimus- ja kehittämishankkeissa. Olisi suotavaa, että tällaisten yhteistoimintamuotojen suhdetta nyt käsillä olevaan aloitteeseen tutkittaisiin myös. Vihreän kirjan ulkopuolella ovat myös julkisten yksiköiden yhteistyötä koskevat kysymykset, jotka ovat Suomessa myös ajankohtaisia ja tärkeitä. Toivottavaa olisi, että myös nämä kysymykset otettaisiin jatkossa tarkastelun kohteiksi.

Sopimusperusteinen kumppanuus voi toteutua julkisena hankintasopimuksena, jolloin sovellettavaksi tulee julkisia hankintoja koskeva sääntely. Käyttöoikeussopimukset ovat puolestaan käyttöoikeusurakoita lukuun ottamatta julkisten hankintojen sääntelyn ulkopuolella, jolloin sovellettaviksi tulevat perustamissopimuksen periaatteet ja niistä johdetut toimintavelvoitteet. Rakenteellisella kumppanuudella tarkoitetaan julkisen ja yksityisen sektorin yhteisesti hallinnoimien yksiköiden perustamista tai julkisten yksiköiden siirtämistä yksityisen toimijan valvontaan. Näitä järjestelyjä ei koske erityinen yhteisötason sääntely, vaan myös niiden toteuttamisessa on noudatettava perustamissopimuksen periaatteita ja niistä johdettuja toimintavelvoitteita. Vihreässä kirjassa esitetyt tulkinnat kumppanin valinnassa noudatettavasta sääntelystä kattaa tietyt kumppanuuden muodot, mutta jättää avoimeksi muissa järjestelyissä noudatettavan säännöstön. Ongelmallisia ovat jo tällä hetkellä erot julkisten hankintojen sääntelyn soveltamisalassa olevien sopimusten myöntämismenettelyissä verrattuna niiden soveltamisalan ulkopuolella oleviin sopimuksiin tai järjestelyihin. Lainsäädäntöä ei koeta neutraaliksi, sillä julkisten hankintojen yksityiskohtaisen ja jäykän sääntelyn soveltamisen välttämiseksi saatetaan käyttää hankintasääntelyn soveltamisalan ulkopuolella olevia järjestelyjä.

Lopuksi haluaisimme kiinnittää vielä huomiota henkilöstön asemaan liittyviin kysymyksiin sopimusperusteisessa ja rakenteellisessa kumppanuudessa. Kumppanin kilpailuttaminen ja henkilöstön siirtymiseen liittyvät kysymykset ovat nousseet esille erityisesti tilanteissa, joissa viranomainen siirtyy hankkimaan palveluja organisaationsa ulkopuolelta aiemmin omana työnä toteutetun palvelun sijaan ja edellyttää palvelusta vastanneen henkilöstön siirtyvän palveluntarjoajan palvelukseen. Kysymys voi tulla ajankohtaiseksi myös ulkoistettaessa palvelutuotantoa perustamalla yksin tai muiden toimijoiden kanssa yhteisyritys. Ongelmallisiksi näissä tilanteissa ovat osoittautuneet liikkeenluovutusta sekä julkisuutta koskevien säännösten soveltuvuus sekä tarjouspyyntöjen laatimiseen liittyvät käytännön ongelmat.

Ohessa yksityiskohtaiset vastauksemme vihreässä kirjassa esitettyihin kysymyksiin:

***Kysymys 1**. Millaisia puhtaasti sopimusperusteisia julkisen ja yksityisen sektorin kumppanuusjärjestelyitä tiedätte? Kuuluvatko järjestelyt maassanne lainsäädännöllisen tai*

muun erityissäännöstön piiriin?

Suomessa ei ole erityislainsäädäntöä julkisen ja yksityisen sektorin kumppanuusjärjestelyistä.

Yksityisen ja julkisen sektorin yhteistyöjärjestelyjä toteutetaan monin eri tavoin. Varsinaisen hankintalainsäädännön alaan kuuluvien sopimusten lisäksi yhteistyö voi perustua esimerkiksi yhteisöille myönnettäviin avustuksiin ja niiden ehtoina oleviin palveluvelvoitteisiin.

Esimerkkejä eräiden hallinnonalojen sopimusperusteisista yhteistyöjärjestelyistä:

Liikenneala

Sopimusperusteista kumppanuutta julkisen ja yksityisen välillä on kokeiltu mm. rakennushankkeiden ja väylähankkeiden toteutuksessa. Merkittävimmät hankkeet ovat liikenteen infrastruktuurihankkeita kuten Jävenpää-Lahti- ja Muurla-Lohja-moottoriteiden rakentaminen.

Puolustusala

Puolustushallinnon alalla sopimusperusteisia kumppanuushankkeita on edistetty erityisellä ohjelmalla, jonka tavoitteena on aluksi selvittää kumppanuuden toimintamalleja ja kerätä tietoa järjestelyjen eduista ja haitoista. Keskeistä kumppanuusohjelmassa on sellaisten yhteistyösuhteiden rakentaminen, jotka toimivat myös valmiuden kohottamisen eri vaiheissa. Puolustushallinnon kumppanuushankkeissa turvallisuusseikat ovat keskeisiä, sillä kumppani toimii usein puolustushallinnon tiloissa ja saa yksityiskohtaisia maanpuolustukseen liittyviä tietoja. Siten hankkeissa on korostunut tarve pitkäaikaiseen yhteistyöhön.

Kumppanuusohjelman kehittämisalueina ovat ruokahuolto, vaatetushuolto, terveydenhuolto, tietohallinto, korjaamopalvelut, kuljetuspalvelut sekä taloushallinto. Suurin osa kumppanuushankkeista selvittää mahdollisuuksia siirtää aiemmin omana toimintana toteutettuja tehtäviä yksityisen sektorin vastuulle sekä hyödyntää yksityisellä sektorilla kehitettyjä toimintamalleja, innovatiivisuutta ja joustoa

Osa puolustushallinnon kumppanuushankkeista kohdistuu palveluun, joka jää Amsterdamin sopimuksen 296 artiklan nojalla Euroopan yhteisön sääntelyn ulkopuolelle.

Kunnat

Kunnilla on ollut kumppanuushankkeita, jotka ovat usein liittyneet rakentamiseen ja kiinteistöhuoltoon. Tällaisia hankkeita ovat mm. Espoon kaupungin Kuninkaantien lukiohanke, Kilon sosiaali- ja terveysaseman rakentaminen ja kiinteistöhuolto sekä Turun, Mäntsälän ja Mikkelin kompostointilaitosten rakentamis- ja jätteiden käsittelyhankkeet.

Sopimusperusteisia kumppanuushankkeita on toteutettu kokeilumielessä myös huolto- ja ravintolapalveluissa.

Kuntasektorilla sopimusperusteista yhteistyötä on tehty myös sosiaali- ja terveysaloilla. Suomessa sosiaali- ja terveyspalveluita tuotetaan noin 80 prosenttia kuntien ja kuntayhtymien omana työnä ja noin 20 yksityisten palveluntarjoajien toimesta.

Sosiaaliala

Lakisääteistä työeläke- ja tapaturmavakuutuslainsäädäntöä toimeenpanevat vakuutusyhtiöt ja muut laitokset sekä työttömyyskassat ja sairauskassat ovat yksityisoikeudellisia toimijoita, jotka hoitavat lakisääteistä julkista tehtävää ja tietyissä tilanteissa käyttävät myös julkista valtaa. Esimerkiksi työeläkevakuuttajat ovat tehneet sopimusperusteisesti yhteistyötä viranomaisten kanssa muun muassa toteuttamalla sähköisiä julkisia verkkopalveluita. Sopimusperusteista yhteistyötä on tehty myös valtakunnallisen työtapaturmaohjelman (2001-2005) yhteydessä siten, että työmarkkinaosapuolten perustama työturvallisuuskeskus vastaa tarpeellisen henkilökunnan palkkauksesta ja ohjelman mukaisista toimenpiteistä julkisen osapuolen rahoituksella ja sen valvonnassa.

Sosiaalialan osaamiskeskuksista annetun lain (1230/2001) mukaiset sosiaalialan osaamiskeskukset muodostavat koko maan kattavan alueellisen yhteistyörakenteen sosiaalialan perus- ja erityisosaamisen edistämiseksi sekä sosiaalialan alueellista yhteistyötä edellyttävien erityisosaamista vaativien erityispalveluiden ja asiantuntijapalveluiden toteuttamiseksi. Osaamiskeskusten toimintaan on kuntien ja kuntayhtymien ohella pyritty saamaan mukaan alueellisia viranomaisia ja oppilaitoksia, mutta myös järjestöjen ja yksityisten edustajia. Osaamiskeskustoiminnan oikeudelliselle muodolle ei ole asetettu tarkkoja edellytyksiä, vaan osaamiskeskukset on eräillä alueilla muodostettu osakeyhtiöiksi, mutta toisilla alueilla yhteistyö perustuu sopimukseen.

Työhallinto

Euroopan sosiaalirahastosta maksettavien tukien välittäminen ei-julkisille yhteisöille toteutetaan yleishyödyllisten välittäjäorganisaatioiden avulla. Tavoitteena on saada kansalais- ja vapaaehtoisjärjestöjen, paikallisten toimijoiden sekä perinteisen projektitoiminnan ulkopuolelta tulevia toimijoita mukaan tukitoimintaan.

Paikallisissa työllisyyskumppanuuksissa yhdistetään paikallisten yksityisten, julkisen ja kolmannen sektorin toimijoiden asiantuntemusta ja kokemusta sekä hyödynnetään paikallista aloitteellisuutta ja mahdollisuuksia pitkäaikaistyöttömien ja muiden vaikeasti työllistyvien työllistämisessä sekä syrjäytymisen ehkäisemisessä. Toiminta perustuu eri yhteistyötahojen väliseen sopimukseen.

Ympäristöala

Ympäristön- ja luonnonsuojelun alalla esimerkkihankkeena voidaan mainita Repoveden kansallispuiston perustaminen, joka toteutettiin yhteistyössä suuren metsäyhtiön kanssa.

Kysymys 2. ***Komissio katsoo, että kilpailukeskeisen neuvottelumenettelyn siirtäminen kansalliseen lainsäädäntöön antaa kysymykseen tuleville osapuolille mahdollisuuden käyttää menettelyä, joka soveltuu mahdollisimman hyvin julkisiksi hankintasopimuksiksi katsottavien sopimusten tekoon***

puhtaasti sopimusperusteista julkisen ja yksityisensektorin kumppanuutta toteutettaessa, ja samalla turvata taloudellisten toimijoidenperusoikeudet. Oletteko samaa mieltä? Ellette ole, minkä vuoksi?

Yleisesti ottaen kilpailullista neuvottelumenettelyä pidetään käyttökelpoisena menettelynä kumppanin valinnassa silloin, kun kysymyksessä on sopimusperusteinen, julkisen hankintasopimuksen muodossa toteutettava kumppanuusjärjestely. Mahdollisuus neuvottelujen käymiseen tarjousmenettelyn aikana tuo tarvittavaa joustavuutta hankintamenettelyyn. Toisaalta avoimuuteen ja yhdenvertaiseen kohteluun liittyvät vaatimukset turvaavat osaltaan yritysten etuja. Uusi menettely, joka ei edellytä etukäteen valmisteltua tarkkaa tarjouspyyntöä, mahdollistaa myös entistä paremmin innovatiivisten ratkaisujen huomioimisen.

Ongelmalliseksi kuitenkin on nähty liikesalaisuuksien ja luottamuksellisuuden suojaan liittyvät kysymykset erityisesti tietotekniikka- ja suunnittelupalvelujen hankinnoissa. Menettelyn pelätään johtavan käytäntöihin, joissa aiemmin korvausta vastaan tehtävä määrittelytyö teetetään yrityksillä tarjousmenettelyn aikana ilman korvausta. Nämä uhkat voivat johtaa laadultaan heikkoihin ratkaisuehdotuksiin tai jopa yritysten haluttomuuteen osallistua hankintamenettelyihin.

Kysymys 3.** **Liittyykö kyseisiin sopimuksiin (sopimusperusteinen kumppanuus) nähdäksenne muita kuin hankintamenettelyn valintaa koskevia kohtia, jotka voivat aiheuttaa ongelmia julkisia hankintoja koskevaan yhteisön lainsäädäntöön nähden? Jos liittyy, mitä kohtia ja mistä syistä?

Joissakin tapauksissa julkisia hankintoja koskevien menettelytapasäännösten soveltuminen sopimusperusteisiin kumppanuuksiin on koettu epäselväksi. Tulkintaongelmia on aiheuttanut esimerkiksi kilpailuttamisvelvoitteen sisältö silloin, kun kysymyksessä on sekamuotoinen sopimus (mixed contract), jolloin sopimuksen pääasiallinen tarkoitus tai taloudellinen painopiste ei ole julkisessa hankinnassa. Ongelmalliseksi on koettu myös säännösten soveltuminen pitkäaikaisilla vuokrasopimuksilla toteutettaviin toimitilahankintoihin sekä käyttöoikeusurakan ja käyttöoikeussopimuksen välinen rajanveto rakentamista ja kiinteistöpalveluja koskevissa sopimuksissa.

Hankinnoissa, joissa neuvottelumenettelyä ei voida soveltaa, ongelmalliseksi voi muodostua hankinnan kohteen, keskeisten kumppanuuteen liittyvien sopimusehtojen sekä tarjoajien kelpoisuusehtojen sitova määrittely tarjouspyynnössä. Hankintamenettelyn aikana hankintayksiköllä on rajoitetut mahdollisuudet huomioida yritysten aloitteita ja ehdotuksia, tehdä tarjouspyyntöön muutoksia sekä neuvotella kumppanuussopimuksen sisältöön liittyvistä seikoista. Lisäksi hankintamenettelyn keskeyttämistä koskevan tiukan oikeuskäytännön on katsottu vähentävän joustavuutta ja mahdollisuuksia ottaa huomioon innovatiivisia ratkaisuja.

Epävarmuuden sopimuskausien sallitusta enimmäiskestosta on pelätty johtavan kestoltaan epätarkoituksenmukaisten yhteistyösopimusten solmimiseen tai jopa rajoittavan yhteistyösopimusten tekemistä. Kumppanuussopimuksella haetaan yleensä pitkäaikaista yhteistyösuhdetta, toisaalta julkisten hankintojen sääntely edellyttää melko tiheää uudelleenkilpailuttamista. Sopimuskausien tulisi voida olla riittävän pitkiä, jotta kumppanuussopimuksista voidaan tehdä tarkoituksenmukaisia, pitkäjänteisiä ja liiketaloudellisesti kannattavia. Tiheä kilpailuttaminen merkitsee myös hankintayksikön kasvavia prosessikustannuksia ja hankinnan kokonaistehokkuuden laskua.

Komissio katsoo sopimussuhteen aikana sopimukseen tehtävien olennaisten lisäysten tai muutosten vaarantavan useimmiten taloudellisten toimijoiden yhdenvertaista kohtelua ja niiden tekemisen edellyttävän uutta kilpailumenettelyä. Näkemys on tasapuolisuusvaatimuksen kannalta ymmärrettävä, mutta saattaa aiheuttaa merkittäviä ongelmia pitkäkestoisille kumppanuuksille. Kumppanuussopimuksessa kysymys on usein uusien toimintamallien kokeilemisesta, jolloin yhteistyösopimus hakee muotoaan pitemmän ajan kuluessa. Pitkien sopimusten voimassaoloaikana osapuolten tarpeet, riskinsietokyky, organisaatio tai asema voivat muuttua merkittävästi. Sopimukseen voi vaikuttaa myös lainsäädännöllisiä tai taloudellisia tekijöitä, jotka ovat osapuolten vaikutusmahdollisuuksien ulkopuolella. Tiukka uudelleenkilpailuttamisvelvoite voi haitata ja jopa estää toiminnan järkevää ja tarkoituksenmukaista kehittämistä sekä nostaa yhteistyösopimusten kustannuksia yksityisen sektorin riskien kasvaessa. Uudelleenkilpailuttaminen voi johtaa myös taloudellisesti ongelmallisiin tilanteisiin, joissa aiemman kumppanin tekeminen investointien lunastamisesta tulisi sopia. Sopimuksen tarkastelun sopimussuhteen aikana tulisi mielestämme olla mahdollista, jos se ei merkitse olennaisia muutoksia esim. osapuolten riskinjakoon.

Siltä osin, kun kysymyksessä on hankintadirektiivien soveltamisalan ulkopuolella oleva sopimus, perustamissopimuksista johdettavien yhteisöoikeudellisten kilpailuttamisvelvollisuuksien normiperusta ja toimintavelvoitteiden sisältö on koettu tulkinnalliseksi ja epäselväksi.

***Kysymys 4.* Oletteko jo järjestäneet tai halunneet järjestää käyttöoikeussopimuksen myöntämismenettelyn tai osallistuneet tai halunneet osallistua sellaiseen unionin piirissä? Millaisia kokemuksia olette saanut?**

Järvenpää-Lahti- ja Lohja-Muurla -moottoriteiden suunnittelua, rakentamista, rahoitusta ja kunnossapitoa koskevat sopimukset on toteutettu nk. varjotullisopimuksena, jossa valtio korvaa hankkeen kustannuksia tien käytön perusteella. Sopimuskaudet ovat 15- ja 25-vuotisia. Suomessa ei ole otettu käyttöön alueellisia tietulleja, jolloin yhtiö saisi rahoituksensa suoraan käyttäjiltä.

Tiealan hankkeiden toteuttamisessa ongelmalliseksi ei niinkään ole koettu julkisten hankintojen lainsäädäntöä vaan muun lainsäädännön soveltamiseen, kuten verolainsäädäntöön sekä valtiontalouteen ja sen ohjaukseen liittyvät kysymykset.

Sosiaali- ja terveyspalveluissa ei ole käytetty käyttöoikeussopimuksia. Sosiaali- ja terveyssektorilla ne voisivat kuitenkin soveltua pitkäaikaisten rakennus- ja laiteinvestointien rahoitukseen.

***Kysymys 5.* Katsotteko, että yhteisön nykyinen oikeudellinen kehys on kyllin selkeä, jotta muut kuin kansalliset yhtiöt tai ryhmittymät voivat osallistua konkreettisesti ja täysipainoisesti käyttöoikeussopimusten myöntämismenettelyihin? Voidaanko todelliset kilpailuolot tällöin mielestänne yleensä taata?**

Suomessa ei ole havaittu ongelmia eikä esteitä sille, että muut kuin kansalliset ryhmittyvät voivat osallistua käyttöoikeussopimusten myöntämismenettelyihin. Ulkomaiset yritykset ja konsortiot tai Suomeen etabloituneet tarjoajat ovat osallistuneet aktiivisesti esimerkiksi tiehankkeiden tarjouskilpailuihin.

Kysymys 6. ***Pidättekö toivottavana, että yhteisö tekee säädösaloitteen, jolla pyrittäisiin sääntelemään käyttöoikeussopimusten myöntämismenettelyä?***

Tässä vaiheessa emme katso säädösaloitteita tarpeelliseksi. Sitä vastoin kannatamme hyvien toimintatapojen levittämistä sekä keskustelua aiheesta. Sääntelytarvetta tulisi arvioida uudelleen saavutettujen kokemusten perusteella tai jos riittävän selkeää ja käytännön tarpeita vastaavaa yhtenäistä ohjausta ei muuten pystytä toteuttamaan.

Kysymys 7. ***Jos katsotte yleisemmin, että komission on tarpeen ehdottaa uutta säädöstä, onko mielestänne objektiivisia syitä siihen, että säädös koskisi kaikkia sopimusperusteisia julkisen ja yksityisen sektorin kumppanuuksia siitä riippumatta, onko ne luokiteltu hankintasopimuksiksi vai käyttöoikeussopimuksiksi, ja että ne saatettaisiin siten yhtenäisen myöntämissäännöstön alaisiksi?***

Emme kannata tässä vaiheessa erityisen säädösaloitteen tekemistä. Sitä vastoin tulkintaohjeiden laatiminen ja hyvien toimintatapojen levittäminen on kannatettavaa.

Kysymys 8. ***Onko saamienne kokemusten mukaan voitu varmistaa muiden kuin kansallisten toimijoiden mahdollisuus päästä mukaan yksityiseen aloitteeseen perustuviin julkisen ja yksityisen sektorin kumppanuusmalleihin? Erityisesti jos hankintaviranomaiset ovat esittäneet aloitetta koskevan suunnittelupyynnön, onko pyyntö yleensä ilmoitettu asiamukaisella tavalla, jotta kaikki asiasta kiinnostuneet toimijat ovat saaneet siitä tiedon? Onko hyväksytyn hankkeen toteuttamiseksi käynnistetty todelliseen kilpailuun perustuva valintamenettely?***

Suomessa ei ole olemassa mitään erityisiä järjestelmiä niitä tilanteita varten, jolloin direktiivin 92/50/ETY soveltamisalaan kuuluvassa asiassa aloite kumppanuudesta on tullut yksityiseltä sektorilta. Tehdyn aloitteen kiinnostaessa hankintayksikköä, sen tulee kilpailuttaa kumppani julkisten hankintojen menettelytapasäännösten mukaisesti. Käytännössä kilpailuttamisvelvoitteen on kuitenkin katsottu rajoittavan innovatiivisuutta ja halua ideoiden esittämiselle julkisille yksiköille.

Erityisesti työvoimakoulutuksen sekä tutkimus- ja kehityshankkeiden kohdalla viranomaiset usein kehottavat julkisesti aloitteiden tekemiseen. Pyynnöt julkaistaan EY:n virallisessa lehdessä, hankintojen kuuluessa hankintadirektiivien soveltamisalaan ja internetissä sekä ammattilehdissä tai kansallisessa laajalevikkisessä lehdessä hankintojen ollessa vain kansallisen sääntelyn piirissä. Saaduista aloitteista valitaan ne, jotka tullaan toteuttamaan. Menettely on avoin ja mahdollistaa markkinoillepääsyn, mutta ongelmallinen hankintasäädösten noudattamisen kannalta. Olisi suotavaa, että julkisten hankintojen sääntelyssä huomioitaisiin tarpeet ideoiden ja innovaatioiden houkuttelemiseen markkinoilta.

Kysymys 9. ***Mikä olisi mielestänne paras tapa kehittää yksityiseen aloitteellisuuteen perustuvia julkisen ja yksityisen sektorin yhteistyösopimuksia Euroopan unionissa ja samalla taata avoimuuden, syrjimättömyyden ja yhdenvertaisen kohtelun periaatteiden noudattaminen?***

Ensisijainen tapa tulisi olla lainsäädäntöön liittyvien tulkinnallisten epävarmuustekijöiden poistaminen. Menettelytapasäännösten joustavuuteen tulisi kiinnittää erityistä huomiota syrjimättömyyden periaatteita unohtamatta.

Avoimuuden edistämiseksi tulisi hankintaviranomaisia kannustaa yhteistyösopimusten solmimista koskevien aikeiden julkiseen ilmoitteluun esim. internetissä. Yritysten tiedonsaantia edistäisi erityisesti erityisen sähköisen kanavan perustaminen vapaaehtoista ilmoittelua varten tai vähintään tiedottaminen kansallisista ilmoituskanavista. Suomessa hankintalainsäädännön uudistamisen yhteydessä tullaan kansallisen sääntelyn piirissä olevia hankintoja koskevia ilmoitusvelvoitteita lisäämään ja kannustamaan ilmoitusten julkaisemiseen nimenomaisella internet-sivustolla.

Käytännön esimerkkinä yksityisen sektorin aloitteiden huomioimisesta voidaan mainita tiehallinnon viranomaisten käymät vuoropuhelut yleisistä alan kehittämiseen liittyvistä kysymyksistä alan toimijoiden kanssa. Mikäli näissä vuoropuheluissa tai erityisen aloitteen kautta tulisi esille jokin erityinen kumppanuuteen perustuva hankintakohde, viranomainen kilpailuttaisi tällaisen hankkeen hankintasäädöksiä noudattaen ja ei-kansallisilla toimijoilla olisi yhdenvertainen mahdollisuus osallistua kilpailuun. Myös muilla aloilla ostaja- ja myyjäpuoli käyvät epävirallista vuoropuhelua alan kehitysnäkymistä keskustelutilaisuuksissa, seminaareissa ja koulutustilaisuuksissa.

Ks. myös edellinen vastaus.

Kysymys 10. ***Mitä kokemuksia teillä on yksityisen kumppanin valinnan jälkeisestä vaiheesta sopimusperusteisissa julkisen ja yksityisen sektorin kumppanuusjärjestelyissä?***

Erityisiä ongelmia ei ole ilmennyt. Huomiota tulisi kiinnittää kuitenkin sopimusten tarjousten- ja tarjouspyynnönmukaisuuteen. Erityisesti osapuolten riskinjakoa koskevien ehtojen muuttaminen vaarantaa valintamenettelyn tasapuolisuutta.

Ks. myös vastaukset kysymyksiin 3 ja 11 sopimussuhteen pituudesta sekä sopimusmuutoksista.

Kysymys 11. ***Onko tiedossanne tapauksia, joissa täytäntöönpanoehdot – myös keston mukauttamista koskevat lausekkeet – olisivat aiheuttaneet syrjintää tai muodostaneet aiheettoman esteen vapaalle palvelujen tarjonnalle tai sijoittumisvapaudelle? Jos on, voisitteko selvittää, millaisia ongelmia on ilmennyt?***

Kumppanuussopimusten kestoon liittyvien rajoitusten pelätään lähinnä rajoittavan tarkoituksenmukaisten sopimusten tekemistä ja vähentävän yritysten halua kumppanuussopimuksiin. Lähtökohtana on, ettei sopimuksen kesto saa estää vapaata kilpailua. Toisaalta kesto ei saa myöskään muodostaa sopimuksesta kannattamatonta yksityiselle tai julkiselle sektorille. Tämän vuoksi kumppanuussopimusten kestoa harkittaessa tulee kiinnittää huomiota hankeen laajuuteen sekä erityisesti siihen tehtyihin yksityisen sektorin investointeihin. Jotta hanke muodostuisi sekä julkiselle että yksityiselle sektorille kannattavaksi, on hankkeeseen sijoitettavat investoinnit voitava kattaa taloudellisesti kannattavalla tavalla ja aikataulussa.

Vaikka käytännön tapauksia sopimusehdoista johtuvasta syrjinnästä ei ole tullut tietoomme, voi pitkäkestoisten sopimusten kilpailuttamiseen liittyä ongelmia, kuten aiemman sopimusosapuolen ylivertainen asema kilpailutilanteessa sekä pienten yritysten huonommat mahdollisuudet päästä markkinoille. Toisaalta pitkäkestoiset sopimukset houkuttelevat ulkomaisia yrityksiä lyhyitä sopimuksia paremmin markkinoille ja edistävät siten sijoittumista.

***Kysymys 12.** Onko tiedossanne tarjousten arviointia koskevia syrjintää aiheuttavia toimintatapoja tai järjestelyitä?*

Ei

***Kysymys 13.** Oletteko yhtä mieltä komission toteamuksesta, että tietyt "step in" -tyyppiset järjestelyt voivat aiheuttaa ongelmia avoimuuden ja yhdenmukaisen kohtelun kannalta? Onko tiedossanne muita lauseketyyppejä, joiden täytäntöönpano voi aiheuttaa vastaavia ongelmia?*

Step-in –ehdot herättävät kysymyksiä kilpailuttamisvelvoitteen sekä avoimuuden ja tarjoajien tasapuolisen kohtelun vaatimusten täyttymisestä. Ehdon käytön rajoittaminen voi toisaalta vähentää rahoituslaitosten kiinnostusta järjestelyihin. Tiealalla step in- ehtoja on muotoiltu siten, että sijaantulijan on otettava sopimus vastattavakseen ilman olennaisia muutoksia sillä uhalla, että sijaantulija muuten menettää oikeutensa ja hankkeen jatkaja haetaan uudella julkisella kilpailulla.

***Kysymys 14.** Katsotteko, että yhteisön tasolla on tarpeen selkeyttää tiettyjä julkisen ja yksityisen sektorin yhteistyösopimuksiin liittyviä sopimusnäkökohtia? Jos katsotte, mikä näkökohta tai mitä näkökohtia olisi selkeytettävä?*

Julkisen ja yksityisen sektorin sopimusperusteiset kumppanuudet ovat hyvin moninaisia ja vaihtelevia Kumppanuudessa noudatettavat sopimusehdot ja tarjouspyynnössä asetetut muut vaatimukset riippuvat hyvin pitkälti toteutettavana olevan kumppanuuden laajuudesta, laadusta sekä hankkeeseen liittyvien riskien jaosta ja arvioinnista sekä osapuolten riskinkantokyvystä. Tästä johtuen kumppanuutta koskevien yksityiskohtaisesti määriteltyjen sopimusehtojen/sääntöjen määritteleminen ja niitä koskevan sääntelyn antaminen ei ole tarkoituksenmukaista.

Kannatamme mallisopimusten ja ohjeistuksen laatimista käyttäen hyväksi soveltuvin osin esimerkiksi UNCITRALin, muiden kansainvälisten järjestöjen tai jäsenmaiden jo tekemää työtä.

***Kysymys 15.** Onko tiedossanne julkisen ja yksityisen sektorin kumppanuusjärjestelyjen yhteydessä ilmenneitä erityisongelmia alihankinnan alalla? Millaisia?*

Ei

***Kysymys 16.** Jos sopimusperusteinen julkisen ja yksityisen sektorin kumppanuus edellyttää jonkin tehtäväkokonaisuuden teettämistä yhdellä yksityisellä kumppanilla, onko tällöin mielestänne perusteltua, että alihankintojen osalta annetaan yksityiskohtaisempia sääntöjä ja/tai laajennetaan niiden soveltamisalaa?*

Pääsääntöisesti emme katso olevan tarvetta lisäsääntelyyn. Nykyisin käyttöoikeusurakoihin liittyvä mahdollisuus vaatia tietyn prosenttiosuuden antamista alihankintoina aliurakoitsijoille on riittävä.

Toisaalta tarjouksissa esitettyjen alihankkijoiden vaihtuminen sopimussuhteen aikana voi aiheuttaa tarjoajien tasapuolisen kohtelun kannalta. Emme kuitenkaan näe mahdollisuuksia ratkaista ongelmaa sääntelyn keinoin.

Kysymys 17. Katsotteko yleisemmin, että yhteisön tasolla olisi tehtävä täydentävä aloite alihankintoja koskevien sääntöjen selkeyttämiseksi tai tarkistamiseksi?

Pääsääntöisesti ei.

Kysymys 18. Mitä kokemuksia teillä on rakenteellisten julkisen ja yksityisen sektorinkumppanuusjärjestelyiden toteuttamisesta? Voitteko kokemuksenne perusteella ajatella, että julkisia hankintoja ja käyttöoikeussopimuksia koskevaa yhteisön lainsäädäntöä on noudatettu rakenteellisten julkisen ja yksityisen sektorin kumppanuusjärjestelyissä? Ellette voi, miksi?

Rakenteellinen kumppanuusjärjestely on verohallinnon atk-palvelujen tuottamiseen perustetusta julkisen ja yksityisen yhdessä omistamasta osakeyhtiömuotoisen yrityksen perustaminen. Yhtiökumppani ja palvelusopimus kilpailutettiin avoimella menettelyllä julkisten hankintojen direktiivien mukaisesti.

Kuntien rakenteellisista yhteistyöjärjestelyistä mainittakoon kuntien ja yksityisen sektorin toimijoiden yhteisyritykset elinkeinopolitiikan edistämisessä sekä jätehuollon, logistiikan sekä kiinteistöhuoltopalvelujen tarjoamisessa. Myös matkailun edistämiseen on perustettu alueellisia yrityksiä, joiden taustaorganisaatioihin (esim. järjestö) ovat vapaita liittymään alan yksityiset toimijat.

Julkisten hankintojen lainsäädännön soveltamisongelmat liittyvät pääasiassa in house-järjestelyihin, joiden sääntelemättömyys on koettu yhteisyritystilanteissa ongelmalliseksi jouduttaessa arvioimaan omistavan tahon (sidostahona olevan hankintaviranomaisen) ja yhteisyrityksen välisiä sopimusoikeudellisia toimia ja hankintoja. Hankintadirektiivit eivät anna vastauksia siitä, miten tällaisiin rakenteellisiin järjestelyihin tulisi suhtautua silloin, kun julkinen organisaatio tekee hankintoja sekaomisteiselta organisaatiolta.

Rakenteellisessa kumppanuussopimuksissa ongelmalliseksi on koettu myös sopimuksen kestoa koskeva oikeudellinen epävarmuus. Yhteisyrityksiä ja palveluhankintoja koskevien sopimusten tulisi voida olla riittävän pitkäkestoisia mm. toiminnan pitkäjänteisen suunnittelun, liiketaloudellisen kannattavuuden sekä henkilöstön asemaan liittyvien kysymysten vuoksi. Käytännöt näyttävät vaihtelevan EU:n jäsenvaltioissa, eräissä jäsenmaissa rakenteellisia kumppanuuksia on tehty jopa 20-30 vuoden sopimuksin.

Kysymys 19. Katsotteko, että yhteisön tasolla on tehtävä aloite hankintaviranomaisten velvollisuuksien selkeyttämiseksi tai täsmentämiseksi niiden ehtojen osalta, joilla rakenteellisen kumppanuustyypin hankkeesta mahdollisesti kiinnostuneita toimijoita kilpailutetaan? Jos katsotte, mihin kohtiin erityisesti ja millaisiin muotoiluihin toivotte kiinnitettävän huomiota? Jos ette, miksi?

Pidämme tärkeänä in house-järjestelyjä koskevan lainsäädäntöaloitteen tekemistä.

Erityisten menettelysääntöjen laatimiselle rakenteellisista kumppanuusjärjestelyistä ei ole tarvetta tässä vaiheessa. Kannatamme kuitenkin ohjeiden laatimista ja hyviä käytäntöjä koskevien näkemysten vaihtoa.

Kysymys 20. ***Minkä toimien tai toimintatapojen katsotte haittaavan julkisen ja yksityisen sektorin yhteistyösopimuksien toteuttamista Euroopan unionissa?***

Julkisen ja yksityisen sektorin kumppanuudessa on kysymys verraten uudesta toimintatavasta. Sääntelyn tulkinnanvaraisuuden lisäksi osaltaan myös kokemusten puuttuminen on vaikuttanut ongelmatilanteiden syntymiseen.

Yhtenä merkittävänä yhteistyösopimusten toteutumista haittaavana tekijänä on koettu sopimusperusteisen ja rakenteellisen kumppanuuden sopimuskauden kestoon liittyvää epävarmuutta. Ks. myös vastaus kysymykseen 3.

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Kysymys 21. ***Tunnetteko unionin ulkopuolisissa maissa kehitettyjä muunlaisia julkisen ja yksityisen sektorin kumppanuuksia? Tiedättekö esimerkkejä tällöin kehitetyistä hyvistä toimintatavoista, joista unioni voisi ottaa vaarin? Jos tiedätte, mitä?***

Tutustumisen arvoisia ovat kansainvälisten organisaatioiden työ yhteistyöjärjestelyjen käytön edistämiseksi sekä mallisääntelyn saavuttamiseksi. Esimerkkeinä Maailmanpankin Private Participation in Infrastructure-projektin sekä Public-Private Infrastructure Advisory Facility-ohjelman tulokset, UNCITRALin mallilainsäädännöt, Euroopan Talouskomission Public-Private Partnership Alliance Program.

Yhdysvalloissa ja Kanadassa on toteutettu lukuisia julkisen ja yksityisen sektorin yhteistyöhankkeita, joihin tutustuminen voisi tuoda lisätietoa hyvistä käytännöistä.

Kysymys 22. ***Yleisemmin ja ottaen huomioon tietyissä jäsenvaltioissa sosiaalisen ja kestävän taloudellisen kehityksen aikaansaamiseksi vaadittavat huomattavat investoinnit, katsotteko, että olisi hyödyllistä käsitellä näitä kysymyksiä säännöllisin väliajoin yhdessä asianosaisten toimijoiden kesken samalla varmistaen parhaiten toimintatapojen vaihtamisen? Katsotteko, että komission tulisi perustaa tällainen verkosto?***

Pidämme verkoston perustamista kannatettavana.

Ylijohtajan sijaisena
Hallitusneuvos Elise Pekkala

Hallitussihteeri Eija Kontuniemi

CAISSE DES DÉPÔTS ET CONSIGNATIONS

DIRECTION DES FINANCEMENTS DECENTRALISES

Département « Investissements et Participations »

NOTE

OBJET : Réponse au Livre vert de la Commission sur les partenariats publics-privés et le droit communautaire des marchés publics et des concessions

Le Livre vert sur les partenariats publics-privés et le droit communautaire des marchés publics et des concessions a pour objet de lancer une réflexion sur l'application du droit communautaire – essentiellement le droit des marchés sous l'angle du respect de la transparence des procédures- à ces formes récentes de contrats que sont les PPP, ainsi que , plus largement aux concessions.

Pour ce faire, la Commission s'est livrée à un travail de synthèse sur l'état actuel de la question, sans pour autant préjuger de la suite qui y sera donnée : en effet, s'il apparaît , au terme de la consultation, qu'il faut à la fois clarifier et sécuriser l'environnement juridique de ces contrats, un ensemble d'instruments *ad hoc* pourront être mis en place : directive, communication interprétative ou recommandation sur une meilleure coordination des pratiques nationales ou échange organisé de bonnes pratiques entre les Etats membres.

1 - Sur le cadre législatif au niveau européen

Si l'unification au niveau communautaire des procédures de passation ou des règles d'exécution est souhaitable afin de garantir la concurrence et l'égalité de traitement entre les candidats, il semble que c'est avant tout un souci de simplification qui doit guider l'action de la Commission en la matière. Il apparaît en effet que la multiplication des procédures de passation existantes en matière de marchés publics ou de concessions rend le choix et la conduite de celles-ci complexes, en particulier pour les collectivités territoriales sur des projets de taille moyenne. La Commission devrait ainsi veiller , sous couvert d'unification des procédures, à ne pas en alourdir pour autant le dispositif, sous

peine d'en compromettre la pertinence et de freiner à la fois les acteurs publics et privés-financiers et industriels- dans ces opérations complexes.
Plutôt qu'une nouvelle directive, c'est une éventuelle adaptation des directives existantes qui est attendue, accompagnée d'une communication interprétative donnant une cohérence au champ général de la commande publique.

2 - Sur le rôle des institutions financière publiques

L'expérience acquise par la Caisse des dépôts et consignations depuis de nombreuses années aux côtés des collectivités territoriales et de l'Etat, qui lui permet de faciliter la réalisation de projets innovants et de jouer un rôle essentiel en matière d'aménagement du territoire et de grands projets structurants, lui fait estimer qu'il existe un besoin de sécurité, notamment juridique des partenaires financiers et industriels..

Par ailleurs, le rôle confié par l'Etat français à la Caisse dans l'élaboration d'un cadre juridique adapté aux PPP : analyse juridique et financière de huit projets pilotes allant de grands projets d'infrastructures à la rénovation d'ensembles immobiliers universitaires ou hospitaliers (à cet égard, voir annexe n°4) montre le caractère fondamental de l'action de la Caisse dans le développement des PPP en France.

La légitimité de l'intervention d'entités financières publiques en accompagnement du développement des PPP est d'ailleurs soulignée par une décision du 26 novembre 2003 du Conseil de l'union Européenne, qui invite la Banque Européenne d'Investissement à intervenir de manière spécifique afin de faciliter un « démarrage rapide » des projets de PPP, au travers notamment de financements et instruments financiers propres à exercer « un effet de levier sur les capitaux privés ».

Dans cette perspective, la CDC, la KfW et San Paolo IMI se sont associées dans le cadre d'un Fonds d'investissement dédié au financement de projets de PPP en Europe, en particulier des fonds infrastructures TEN. La Cassa di Depositi e Prestiti, réformée en 2003 afin notamment de soutenir le démarrage des PPP en Italie, devrait se montrer intéressée par ce fonds. La Commission européenne y participe également, selon un montant fixé par la BEI. Elle démontre ainsi le caractère irremplaçable d'institutions financières publiques aux côtés des acteurs financiers et industriels traditionnels, dans le respect des règles de concurrence nationales et communautaires.

L'action de la Caisse des dépôts et consignations dans le cadre des PPP français vise principalement à contribuer, comme investisseur avisé de long terme, à la structuration d'un marché nouveau, sur lequel les acteurs peuvent avoir une visibilité réduite les dissuadant de se positionner

3 - Sur la définition du PPP

Il est patent que le développement du PPP au cours de la dernière décennie s'est fait en-dehors de toute définition au niveau communautaire. Sans pour autant en donner une, le Livre vert identifie quelques éléments constitutifs- longue durée par nature, mode de financement mixte, rôle du partenaire public centré sur la définition des objectifs, la qualité du service offert et le contrôle du respect de ces objectifs par l'opérateur économique, répartition précise des risques au cas par cas- qui n'appellent pas de commentaire particulier.

On soulignera toutefois que le dernier élément implique une diversité de situations résultant de la seule négociation contractuelle et qu'il s'accorde difficilement avec un cadre réglementaire trop contraignant, lorsque l'on sait par ailleurs que l'expérience britannique de la PFI montre la difficulté de cette phase de négociation afin d'aboutir à l'allocation optimale des risques.

Si la Commission devait légiférer sur cette forme particulière de contrats, cette spécificité devrait être prise en compte. En effet, si une définition des principes de base applicables aux PPP européens peut sembler souhaitable, elle ne devrait pas pour autant porter atteinte à la nécessaire liberté contractuelle dans ce type de montages, seule à même d'en garantir à la fois l'optimisation et l'adéquation aux conditions du marché- en particulier financier- qui sont appelées par nature à varier dans le temps et en fonction de chaque type de PPP.

4 - Sur les PPP « contractuels »

La Commission distingue en effet deux types de PPP, le PPP contractuel se fondant uniquement sur des liens contractuels entre les différents acteurs, le PPP institutionnalisé impliquant une coopération entre le secteur public et le secteur privé au sein d'une même entité. On soulignera toutefois que, dans certains cas, les deux formes pourront se conjuguer, la législation de certains Etats membres autorisant la prise de participations d'entreprises publiques locales par exemple au capital de sociétés de projet, elles-mêmes titulaires d'un contrat de PPP.

La Commission considère que les PPP prendront soit la forme d'un marché public, soit la forme d'une concession, la distinction entre les deux se faisant en fonction du mode de rémunération de l'opérateur : en concession , le partenaire privé se rémunère partiellement ou totalement sur l'usager, en marché public, la rémunération fait l'objet de paiements réguliers de la part de la puissance publique.

En l'état actuel de la législation communautaire, la passation des marchés publics est clairement encadrée, la procédure pouvant être , sous certaines conditions celle du dialogue compétitif. L'article 1-11c de la directive Marchés en date du 31 mars 2004 précise que l'on peut recourir au dialogue compétitif lorsque le marché est « particulièrement complexe », la personne publique n'étant pas en mesure de définir les moyens techniques pouvant répondre à ses besoins ou d'établir le montage juridique et/ou financier du projet.

En revanche, le choix du cocontractant est libre en concession, sous réserve du respect des principes posés par le Traité, notamment celui de non-discrimination, synonyme de transparence dans la procédure de passation, impliquant un certain degré de publicité.

Le Livre vert estime que la procédure du dialogue compétitif est particulièrement bien adaptée à la passation des PPP qui sont des marchés publics au sens communautaire. La Caisse des dépôts partage cette appréciation en insistant pour que soient clarifiées et sécurisées les conditions de recours à cette forme de mise en concurrence (sur ce point voir annexe n°1)

De même, la commission constatant qu'il n'est pas toujours aisé de déterminer dès l'origine si le contrat est un marché public ou une concession, la répartition des risques pouvant évoluer et influer sur la qualification, elle en déduit que l'adoption d'une législation destinée à encadrer et coordonner les procédures de passation des concessions pourrait être nécessaire. Il paraît important tout à la fois de garder sa spécificité à la concession (dont le contrat doit laisser une large place à la négociation) et de définir un tronc commun de procédures valable quelle que soit la forme contractuelle qui sera in fine retenue (sur ce point, voir annexe n°2)

De même, concernant la préoccupation de la Commission sur les clauses de « step-in » par lesquelles les institutions financières se réservent le droit de se substituer au gestionnaire du projet, voir annexe n° 3.

Dans cette perspective, afin d'assurer la nécessaire « bancabilité » des PPP, la France a prévu dans l'ordonnance du 17 juin 2004 sur les contrats de partenariat une disposition facilitant le financement de la société de projet par la cession, sous certaines conditions, de créances futures et certaines détenues sur la personne publique.

5 - Sur les PPP institutionnalisés

Le Traité institue les principes d'autonomie institutionnelle des Etats et des collectivités locales et de neutralité vis à vis du régime de la propriété, que le Livre vert d'ailleurs rappelle : en conséquence, la création d'une société d'économie mixte ou d'une personne morale dédiée relève d'un choix d'organisation qui appartient aux seuls Etats membres.

La longue expérience de la Caisse des dépôts, ainsi que sa mission statutaire d'accompagnement des collectivités territoriales dans leur développement, l'ont conduite à prendre des participations au capital de plus de cinq cent sociétés d'économie mixte. En effet, ce type de PPP institutionnalisé est la forme la plus souvent choisie par les collectivités territoriales pour des opérations de taille moyenne.

Le nécessaire respect de la concurrence et des principes fondamentaux du droit de la commande publique peuvent servir à protéger les collectivités dans la conclusion de PPP institutionnalisés avec des partenaires privés mieux rodés qu'elles aux lois du marché. Pour autant, une réglementation assimilant la création d'une entité au capital mixte à un marché public ou à une concession ou imposant à la personne publique de soumettre sa création à des procédures de mise en concurrence et au critère de l'offre économiquement la plus avantageuse peut se révéler inadapté.

Le contrat de société ne peut en aucun cas être assimilé à un marché public ou à une concession, rendant inopérant le critère de l'offre économiquement la plus avantageuse, un tel contrat de société impliquant par nature l'*affectio societatis* et la contribution aux pertes, notions qui sont étrangères aux marchés publics et aux concessions. L'étude des PPP institutionnalisés devrait donc faire l'objet d'une réflexion ad hoc ultérieure.

Le seul cas où un rapprochement entre ces deux formes de PPP contractuel et institutionnel est envisageable est celui de la création d'une SEM monoprojet à la seule fin de répondre à une consultation lancée par la collectivité publique actionnaire de la SEM. Dans ce cas, la décision de recourir à une SEM pourrait être laisse à la seule initiative de la collectivité publique, la mise en concurrence portant en une seule fois sur le choix et les modalités d'association du partenaire privé de la collectivité publique.

Annexe 1 Livre Vert PPP- PPP contractuel : le dialogue compétitif

1) Cadre actuel en marché public et concession

Le Livre vert estime que la procédure du dialogue compétitif est particulièrement bien adaptée à la passation des PPP, qui sont dans la majorité des cas qualifiés de marchés publics au sens communautaire.

En l'état actuel de la législation communautaire, la **passation des marchés publics est clairement encadrée**, la procédure pouvant être sous certaines conditions celle du dialogue compétitif. L'article 1-11c de la directive Marchés en date du 31 mars 2004 précise que l'on **peut recourir au dialogue compétitif lorsque le marché est « particulièrement complexe »**, la personne publique n'étant pas en mesure de définir les moyens techniques pouvant répondre à ses besoins ou d'établir le montage juridique et/ou financier du projet.

En revanche, le **choix du cocontractant est libre en concession**, sous réserve du respect des principes posés par le Traité et notamment la jurisprudence *Telaustria*, en particulier le principe de non-discrimination. Les conventions se mettent au point selon un processus itératif d'échanges et de discussions entre l'entité publique et chacun des candidats (processus de « libre négociation »).

2) Pour les contrats de partenariat : une procédure parfaitement adaptée, sous quelques réserves

- La **notion de « particulièrement complexe » est susceptible d'interprétations diverses**, notamment par le juge communautaire. La complexité du projet étant la principale condition à l'ouverture de la procédure du dialogue compétitif, il serait **souhaitable de pouvoir cerner au mieux cette notion** : le fait que celle-ci puisse faire l'objet d'une interprétation contraire par un juge engendre une incertitude juridique de nature à dissuader les investisseurs financiers et les opérateurs privés de se mobiliser, compromettant ainsi la possibilité de recourir au financement privé pour certains projets d'intérêt communautaire. Or la préoccupation de « bancabilité » des opérations de PPP – faisant appel à une structuration financière complexe- auprès des investisseurs financiers internationaux est une condition nécessaire au développement réussi des PPP.

- Il conviendrait de **s'assurer que les textes et formulaires européens relatifs à la passation de marchés soient adaptés**. La dichotomie habituelle entre marchés de services et marchés de travaux peut en effet s'avérer délicate, voire inopérante, dans le cadre de contrats de partenariat.

- Il serait également judicieux de préciser les éléments de **pondération des critères d'attribution**. Comment peut-on vouloir les définir préalablement au dialogue alors que les solutions les plus satisfaisantes ne peuvent apparaître qu'au cours de celui-ci, et que le lancement d'une procédure s'effectue sur la base d'un programme fonctionnel et non pas en fonction d'un cahier des charges définitivement élaboré ?

- Comment rédiger l'expression finale du besoin de la personne publique sans pour autant dévoiler les idées proposées par les entreprises ? Il devrait être clairement dit que le **dialogue doit se poursuivre avec chacun des candidats *sur la base des solutions de ce candidat***.

- Préciser les **modalités d'évolutivité des contrats**, par définition de longue durée. Car ces contrats, doivent pouvoir s'adapter à l'évolution des besoins, obligation renforcée par le fait qu'il s'agit de contrats globaux embrassant des métiers très divers mais néanmoins interdépendants pendant la durée du contrat.

→ La réponse à ces questions ne nécessite pas a priori une refonte des textes en vigueur, mais plutôt des **précisions sur la conduite du dialogue compétitif**, en veillant à ce que l'interprétation des exigences du Traité en la matière garantisse la nécessaire flexibilité des procédures.

Annexe 2 Livre Vert PPP – PPP contractuel :
Pour un tronc commun de procédure

La Commission, constatant qu'il n'est pas toujours aisé de déterminer dès l'origine si le contrat est un marché public ou une concession, la répartition des risques pouvant évoluer et influer sur la qualification, en déduit que l'adoption d'une législation destinée à encadrer et coordonner les procédures de passation des concessions pourrait être nécessaire. **Elle envisage même de soumettre la passation de tous les contrats de PPP, que ce soient des marchés publics ou des concessions, à un régime de procédure identique**.

1) Les conditions pouvant faire d'un tronc commun de procédure un véritable atout

*Remarque préliminaire : les montages en PPP « institutionnels » obéissent à une logique et à des déterminations radicalement différentes de celle des PPP contractuels. Dans un **cadre plus restreint**, la réflexion communautaire devrait prioritairement s'attacher à détailler les particularités propres des PPP contractuels, de type marché ou concession.*

L'unification au niveau communautaire des procédures de passation ou des règles d'exécution est souhaitable afin de garantir la concurrence et l'égalité de traitement entre les candidats, d'apporter plus de sécurité juridique évitant tout risque de requalification, et enfin dans un **souci de simplification**. Il apparaît en effet que la multiplication des procédures de passation existantes en matière de marchés publics ou de concessions rend le choix et la conduite de celles-ci complexes, en particulier pour les collectivités territoriales sur des projets de taille moyenne.

Mais la Commission devrait ainsi veiller, sous couvert d'unification des procédures, à ne pas en alourdir pour autant le dispositif, sous peine d'en compromettre la pertinence et de freiner à la fois les acteurs publics et privés dans ces opérations complexes. De plus, **si une définition des principes de base applicables aux PPP européens peut sembler souhaitable, elle ne devrait pas pour autant porter atteinte à la nécessaire liberté contractuelle dans ce type de montages**, seule à même d'en garantir à la fois l'optimisation et l'adéquation aux conditions du marché- en particulier financier- qui sont appelées par nature à varier dans le temps et en fonction de chaque type de PPP.

2) Quelques pistes pour un tronc commun de procédure

On pourrait comme le suggère la Commission envisager un tronc commun de procédure jusqu'à la détermination claire et sûre du type de contrat à passer, ce qui permettrait à la fois de gagner du temps en ne contraignant pas les pouvoirs adjudicateurs à relancer une procédure s'ils s'étaient engagés dans une mauvaise voie, et à sécuriser tous les partenaires sur la qualification retenue. Il conviendrait seulement de recadrer quelques éléments :

- la Commission pourrait souhaiter étendre le domaine du dialogue compétitif des marchés complexes aux concessions, ce qui remettrait en cause notre procédure de délégation de service public (DSP) et emporterait de nombreux effets négatifs ;
- il pourrait être suggéré au contraire de s'inspirer de la procédure de DSP : elle est plus formalisée que celle de la concession de travaux prévue par la directive mais laisse une place importante à la négociation. Elle permettrait de tenir compte des points communs aux PPP « marchés » et « concessions » relevés ci-dessus.

Avant de déterminer une procédure, il faudrait au préalable **aborder des questions de fond** :

- la frontière adoptée par la Commission entre marché et concession, suivant que le paiement est assuré par la personne publique ou l'usager, est-elle suffisante pour traiter les PPP sans les amoindrir (cf. l'expérience des *shadow toll*) ?
- le critère du risque pris par l'opérateur dans la durée ne serait-il pas plus pertinent (risque de fréquentation pour les DSP, risque de performance pour le PPP) ? Ce risque pris par l'opérateur semblant d'ailleurs justifier une certaine souplesse dans la procédure de passation du contrat.

→ Facteur de lisibilité et de sécurité juridique, **un tronc commun de procédure applicable à tous les PPP européens et respectueux d'une réelle liberté contractuelle semble souhaitable**. Une telle synthèse nécessitera au préalable des précisions et ajustements concernant notamment les critères de qualification, champs d'application et procédures respectifs des Marchés publics, DSP et PPP.

Annexe n°3 Livre Vert PPP – PPP contractuel : les clauses de *step-in*

1) les clauses de step-in, une nécessité pour la bancabilité des projets en PPP

Les clauses de « step-in », par lesquelles les institutions financières se réservent le droit de se substituer au gestionnaire du projet, sont devenues aujourd'hui **des standards sur les marchés financiers internationaux** –bien qu'à ce jour aucune clause de ce type n'ait encore donné lieu à exécution en France. Leur absence dans les contrats de PPP en Europe aurait pour conséquence un renchérissement du financement privé et donc par ricochet soit l'augmentation du coût *in fine* supporté par la collectivité publique, soit l'impossibilité pratique de réaliser certains projets au moyen d'un préfinancement privé.

Dans cette perspective, afin d'assurer la nécessaire « bancabilité » des PPP, la France a prévu dans l'ordonnance du 17 juin 2004 sur les contrats de partenariat une disposition facilitant, sous certaines conditions, le financement de la société de projet par la **cession de créances futures et certaines** détenues sur la personne publique.

Les clauses de step-in ne semblent pas poser par elles-mêmes de problèmes en terme de transparence et d'égalité de traitement. De même que le champ des adaptations prévisibles à l'origine du contrat, elles doivent en tout cas être clairement décrites dans les contrats. Il convient de rappeler que plus qu'un *candidat* c'est une *offre* qui a été choisie par l'autorité compétente, offre qui doit être réalisée même si le concessionnaire connaît des modifications de son capital.

Plus largement, la question des clauses de step-in permet de s'interroger sur la cessibilité des contrats. S'il peut certes sembler justifié de limiter ou encadrer l'exercice d'un tel droit par les financiers au cas de défaillance structurelle de la société de projet, un tel dispositif, dans la mesure où il ne s'agit pas de remettre en cause substantiellement les termes du contrat de PPP initial, **s'inscrit dans la logique de la nécessaire adaptation d'un contrat de longue durée aux évolutions inévitables sur de telles périodes**.

2) Un mécanisme à recadrer dans le contexte plus large de la cession de contrat

Dans ce domaine, il faut prendre en compte **deux aspects** : d'une part la légitime préoccupation de l'autorité publique que le contrat cédé continuera à être correctement exécuté par le cessionnaire et, d'autre part, le caractère patrimonial d'un contrat pour son titulaire à combiner avec les exigences du droit de la concurrence.

- Sur le premier aspect, il est incontestable que la substitution d'un titulaire à un autre dans ses droits et obligations n'est pas, pour l'autorité adjudicatrice, un évènement négligeable qui puisse lui être imposé sans qu'elle puisse s'exprimer. La collectivité publique peut refuser un transfert vers un concessionnaire qui ne présenterait pas toutes les garanties nécessaires, mais elle ne doit le faire que pour un motif légitime.

- Sur le second aspect, il faut refuser le principe d'interdiction de toute cessibilité du contrat. De tels contrats concrétisent en effet le droit obtenu par les entreprises d'exercer une activité économique et constituent un de leurs principaux actifs. Il serait préjudiciable à l'équilibre macro-économique des Etats membres que des dispositions excessives sur la non cessibilité des contrats entravent des opérations de cession de branches d'activité, voire des opérations d'évolution du contrôle du capital des sociétés.

Dès lors que le dispositif contractuel qui a motivé le choix d'un partenaire privé déterminé suite à la phase de dialogue compétitif n'est pas substantiellement remis en cause, son remplacement en cours d'exécution du contrat par un autre partenaire ayant accepté ledit dispositif contractuel et doté d'une capacité technique et financière comparable ne porte **atteinte ni à la transparence des procédures ni à l'égalité de traitement des candidats**.

→ Les clauses de « step-in », qui relèvent de la volonté des prêteurs de limiter leurs risques, apparaissent aujourd'hui **indispensables à la mise en œuvre de nombre de PPP**. Elles réduisent de fait le coût du financement et donnent une chance à la poursuite du contrat.

Annexe 4 Livre vert PPP : Synthèse des projets-pilotes étudiés par la CDC

Champ du projet	**Intitulé du projet**	**Coûts de réalisation provisionnels**
	Immobilier public	
Domaine hospitalier	Centre hospitalier universitaire de Caen	100 M€
Domaine universitaire	Université Toulouse II le Mirail	250 M€
Domaine culturel	Musée de l'air et de l'espace du Bourget	100 M€
	Infrastructures	
Transport collectif péri-urbain	Tramway rapide Leslys à Lyon	80 M€
Liaison ferroviaire TGV	Ligne à Grande Vitesse Sud Europe Atlantique	3 Md€
Autoroute urbaine	Liaison autoroutière A4-A86	660 M€
Ouvrage d'art	Pont levant sur la Garonne à Bordeaux	120 M€
	Environnement	
Traitement des déchets	Incinérateur d'ordures ménagères de Tours	120 M€

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RÉPUBLIQUE FRANÇAISE

NOTE DES AUTORITES FRANCAISES

Objet : Note des Autorités françaises en réponse au livre vert de la Commission sur les partenariats publics-privés et le droit communautaire des marchés publics et des concessions.

Les autorités françaises se félicitent de la parution du Livre vert sur les partenariats public-privé (PPP) et remercient la Commission pour la qualité du travail de réflexion et d'analyse contenu dans ce document dont elles estiment qu'il constitue une base appropriée pour lancer le débat sur l'établissement d'un cadre communautaire apte à clarifier et sécuriser les conditions d'établissement et de passation de ces partenariats.

Dans ce domaine, les autorités françaises considèrent en effet qu'il existe au sein du marché intérieur une indétermination, fortement nuisible au besoin de visibilité et de sécurité qu'expriment certaines parties susceptibles d'être concernées par toute la gamme des montages en PPP, qui interviennent par définition dans des domaines marqués par la complexité des projets et l'importance des engagements financiers.

Pour autant, il est clair que l'encadrement requis, s'il doit parvenir à l'établissement d'une conception homogène des PPP au sein de l'Union européenne, doit impérativement éviter l'écueil de l'amalgame et la tentation de l'uniformisation. Comme le Livre vert le souligne à juste titre, la problématique des PPP met en jeu, au-delà de caractéristiques de base communes, des modes d'organisation et des finalités très divers, qui appellent chacune une prise en compte appropriée. Or, de fait, les différentes modes de mise en œuvre des PPP (marchés et concessions pour l'essentiel) sont assujettis de façon très inégale au droit communautaire, et les pratiques nationales s'avèrent fort diverses.

En conséquence, les autorités françaises estiment que la priorité que l'action communautaire doit s'assigner en matière de PPP concerne tout d'abord la clarification de cette notion même. Elle doit également d'une part préciser divers éléments de la réglementation afférente aux marchés publics pour y intégrer les éléments aptes à rendre compte des spécificités des PPP, et d'autre part préparer un encadrement ad hoc clarifiant et précisant les règles applicables aux PPP dans le domaine des concessions, en prenant pleinement en considération les spécificités et les contraintes propres à chacune de ces deux catégories. De l'avis des autorités françaises, l'essentiel de ces clarifications ne nécessiterait pas de modification de texte sauf éventuellement pour assurer le recours à la procédure négociée en matière de PPP prenant la forme d'une concession.

C'est dans cette perspective que les autorités françaises ont l'honneur de présenter à la Commission leurs réponses aux questions posées par le Livre vert. Ces réponses ne suivront pas systématiquement l'ordre des questions posées par la Commission. En effet, les réponses à ces questions supposent, pour la plupart d'entre elles, une expérience concrète de la mise en œuvre de PPP : si cette expérience existe bien évidemment dans le droit français de la commande publique, il n'y a pas eu, en revanche, de modèle unique couvrant toutes les formes de PPP existant en France. Les éléments qui suivent se proposent en conséquence de synthétiser la conception française des PPP en se fondant sur les grandes catégories identifiées par le Livre vert.

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1. Sur la définition des PPP.

Les autorités françaises souscrivent, d'une façon générale, à l'analyse de la Commission identifiant les quatre éléments caractéristiques de la notion de PPP indiqués dans le Livre vert (durée longue, mode de financement mixte, rôle important de l'opérateur économique et examen approfondi de l'allocation des risques, qui peut aller d'un simple partage jusqu'à un véritable transfert). Ces éléments constituent effectivement les paramètres centraux permettant de mettre en évidence la particularité des PPP au sein des divers dispositifs associant les actions privées et publiques.

A cet égard, il doit être noté que, dans la perspective de parvenir à une caractérisation complète des PPP, un autre paramètre devrait être ajouté.

Le caractère essentiellement contractuel du PPP devrait être davantage mis en exergue. En effet, les autorités françaises estiment que seuls les contrats associant des partenaires publics et privés relèvent de la problématique des PPP ; les autres schémas identifiés par le Livre vert (v. ci-après) participent d'une autre logique. Il convient également de souligner la nécessité de faire participer le cocontractant à la définition fine du contrat par une procédure permettant un dialogue approfondi. De l'avis des autorités françaises, le fait que le contenu précis et détaillé du contrat résulte de la collaboration étroite, et sur une longue durée, des différents partenaires constitue un élément-clé permettant de cerner l'originalité de ces partenariats.

Toutefois, au-delà du constat que le "phénomène PPP" rassemble des caractéristiques originales dans ses différentes composantes et modalités de mise en œuvre, les autorités françaises ne peuvent approuver sans réserve la déclinaison opérée par le Livre vert en ce qui concerne les différentes formes juridiques de PPP qu'il identifie. Elles soulignent l'importance cruciale qu'elles attachent à ce que la réglementation communautaire tienne pleinement compte de la diversité essentielle des situations et des cas de figure que ces partenariats recouvrent en réalité. En particulier, elles estiment que la mise en place d'un cadre juridique général et uniforme pour l'ensemble des PPP contractuels, toutes catégories confondues (PPP contractuel/marché public, PPP contractuel/concession) apparaît difficile, et serait en toute hypothèse inopportune dans la mesure où ces différentes catégories de PPP obéissent chacune à des finalités propres qu'il importe de préserver.

S'agissant des montages et structures identifiés sous l'appellation "PPP institutionnels", elles estiment qu'ils ne sont pas à proprement parler des PPP n'étant pas de nature contractuelle. Ils obéissent à une logique et à des déterminations radicalement différentes de celles des PPP, et devraient faire l'objet d'une réflexion communautaire autonome prenant en compte la totalité des paramètres pertinents, tels l'autonomie institutionnelle et la neutralité du Traité en matière de régime de la propriété.

Au total, de l'avis des autorités françaises, la réflexion communautaire devra prioritairement s'attacher à respecter les particularités propres des PPP/marchés d'une part, et des PPP/concessions d'autre part.

Ces différents points sont explicités ci-après.

2. Sur les règles applicables aux PPP de type purement contractuels.

En conséquence des éléments de définition exposés au point 1, les autorités françaises précisent que seuls ces partenariats constituent de véritables PPP. Il n'y a donc pas lieu de distinguer entre des PPP "purement" contractuels et des PPP qui ne seraient que partiellement, ou pas du tout, contractuels.

Suivant une approche classique, la Commission considère qu'au delà de la diversité des montages, ces PPP prennent soit la forme d'un marché public, soit la forme d'une concession. Elle rappelle que la distinction entre ces deux types de contrats se fait en fonction du mode de rémunération de l'opérateur. Si la contre-prestation reçue par le partenaire privé consiste partiellement ou totalement en des redevances perçues sur les usagers du service, il s'agira d'une concession. Si elle prend une autre forme (paiements réguliers fixes ou variables, ou toute forme de rémunération atypique), l'opération sera qualifiée de marché public.

L'enjeu de cette distinction est de taille, puisque les directives communautaires encadrent strictement la procédure de passation des marchés publics. En revanche, le choix du cocontractant est libre pour les contrats de concession, à condition que soient respectées les règles du traité, et en particulier le principe de non-discrimination, qui implique notamment pour les pouvoir adjudicateurs une obligation de transparence, qui requiert un certain degré de publicité.

Dès lors que la distinction marchés publics/concessions apparaît apte à recouvrir, en droit communautaire, la totalité des cas de figure et des formes que peuvent revêtir les PPP, les autorités françaises estiment que la réflexion communautaire en la matière ne doit pas s'attacher à poser une réglementation nouvelle et autonome de ces partenariats, mais bien plutôt à compléter et clarifier le cadre juridique applicable à chacune de leurs deux composantes.

1. Quels types de montages de PPP purement contractuel connaissez-vous ? Font-ils l'objet d'un encadrement spécifique (législatif ou autre) dans votre pays ?

La mise sur pied de montages favorisant le recours aux opérateurs privés constitue un objectif important pour les autorités françaises. D'ores et déjà, le modèle de la concession de travaux et de services fondé sur un paiement par l'usager accompagné souvent d'une subvention publique d'équilibre, chaque fois que nécessaire, est d'usage à la fois fréquent et ancien. Son encadrement en France par la loi du 29 janvier 1993 (loi Sapin) permet de satisfaire aux principes de la mise en concurrence tout en permettant les apports d'une libre négociation. Par exemple, les concessions autoroutières font ainsi l'objet d'un appel public à concurrence suivi d'un examen par une commission consultative interministérielle des candidatures puis des offres, en termes de qualité de réalisation et d'exploitation, et en termes financiers et juridiques ; l'ensemble du contrat étant ensuite négocié avec le candidat retenu. Ce dispositif a donc permis de solidifier, en droit interne, les principes généraux du droit communautaire appliqués à certaines formes de commande publique – telles que les concessions de service en particulier.

Toutefois, plusieurs projets ont fait, ou font l'objet d'études pour déterminer les conditions de mise en place d'un nouveau partenariat, mais jusqu'à une date récente, l'inadaptation des dispositions juridiques existantes a constitué un frein à ces initiatives. Plusieurs textes ont été adoptés à cet égard : la loi n° 2002-1094 du 29 août 2002 d'orientation et de programmation pour la sécurité intérieure ; la loi n° 2002-1138 du 9 septembre 2002 d'orientation et de programmation pour la justice ; la loi n° 2003-73 du 27 janvier 2003 relative à la programmation militaire ; l'ordonnance n° 2003-850 du 4 septembre 2003 portant simplification de l'organisation et du fonctionnement du système de santé. La récente ordonnance n° 2004-559 du 17 juin 2004 sur les contrats de partenariats pose les règles non sectorielles permettant de mener à bien ces projets.

2.1. S'agissant des PPP prenant la forme d'un marché public.

Si l'attribution des marchés publics ne peut s'opérer qu'à titre exceptionnel dans le cadre d'une procédure négociée, la directive 2004/18/CEE a ouvert la possibilité d'instaurer un dialogue avec les candidats pour définir les conditions des marchés particulièrement complexes.

Cette procédure, dite de « dialogue compétitif », semble être parfaitement adaptée à la passation de ceux des PPP qui sont des marchés publics au sens communautaire, sous les cinq réserves suivantes.

La première est d'être assuré que les conditions de recours à la procédure ne seront pas interprétées trop restrictivement par les acteurs économiques (ce qui serait source d'insécurité juridique), et seront considérées de façon souple par les services de la Commission, notamment le caractère de complexité du projet envisagé. En effet, le contentieux du contrat est extrêmement sensible au respect des procédures de passation des contrats administratifs. La complexité du projet étant la condition principale d'entrée dans le dialogue compétitif, il conviendrait pour sécuriser ce type de contrat de définir le mieux possible cette notion. Il serait en effet préjudiciable au développement des contrats de partenariat que leur existence soit menacée du simple fait qu'un juge communautaire ou national aura estimé que le projet objet du contrat n'était pas véritablement « complexe ».

La deuxième est qu'il conviendrait de s'assurer que les textes et formulaires européens relatifs à la passation de marchés soient adaptés et éventuellement simplifiés. La dichotomie habituelle entre marchés de services et marchés de travaux peut en effet s'avérer délicate dans le cadre des contrats de partenariat, pour lesquels la distinction entre les deux notions n'est pas toujours aisée.

La troisième est la difficulté d'envisager pratiquement la pondération des critères d'attribution, ainsi que l'exige la directive ; des précisions sur ce point seraient les bienvenues. Principalement, comment concilier le fait que les critères d'attribution doivent être définis préalablement au dialogue et le fait que les solutions satisfaisantes pour la personne publique peuvent n'apparaître qu'au cours du dialogue ?

La quatrième est liée à la difficulté prévisible, à l'issue de la première phase de discussion séparée avec les entreprises, pour rédiger l'expression finale du besoin de la personne publique sans pour autant dévoiler les idées proposées par les entreprises dans cette première phase. Il importe que la procédure maintienne une concurrence réelle mais non artificielle entre les candidats participant au dialogue, ce qui peut conduire éventuellement à achever ce dernier avec un seul candidat. Il est par ailleurs impératif, compte tenu de ce que sont les contrats de PPP, qu'ils puissent être négociés véritablement dans tous leurs termes lors de cette procédure.

Enfin, la dernière réserve concerne l'évolutivité des contrats. En effet ces contrats, par définition de longue durée, doivent pouvoir aisément s'adapter à l'évolution des besoins, obligation particulièrement impérieuse s'agissant de contrats globaux qui embrassent des métiers très différents, mais interdépendants pendant la vie du contrat.

En conclusion de ce chapitre, les autorités françaises estiment que la réponse à toutes ces questions n'implique pas nécessairement *a priori* une refonte ni même une modification des textes en vigueur, mais plutôt des précisions et des clarifications sur la conduite du dialogue compétitif dans le domaine de la commande publique. Elles invitent ainsi la Commission à examiner la possibilité de préparer des lignes directrices sur ce sujet, en veillant à ce que l'interprétation des exigences du Traité en la matière garantisse la nécessaire flexibilité des procédures. Il serait en effet fortement inopportun que le dialogue compétitif devienne une sous-catégorie de l'appel d'offres, ce qui priverait largement de son intérêt le recours à cette nouvelle procédure.

2. De l'avis de la Commission, la transposition en droit national de la procédure de dialogue compétitif permettra aux parties concernées de disposer d'une procédure particulièrement adaptée à la passation des contrats qualifiés de marchés publics lors de la mise en place d'un PPP de type purement contractuel, tout en préservant les droits fondamentaux des opérateurs économiques. Partagez-vous ce point de vue ?

S'agissant du dialogue compétitif, il est prématuré de se prononcer sur son adaptation aux projets de PPP du fait d'un retour sur expériences quasi-inexistant. Néanmoins, cette procédure soulève d'ores et déjà plusieurs interrogations sur les conditions de sa mise en œuvre.

Il convient en effet d'appeler l'attention sur les difficultés susceptibles d'être générées par l'obligation d'élaborer, à l'issue d'un dialogue, une spécification fondée sur les propositions émises par les candidats et à partir de laquelle va s'effectuer la mise en concurrence. La procédure doit maintenir une concurrence réelle et non artificielle entre les candidats participant au dialogue, ce qui peut conduire éventuellement à achever ce dernier avec un seul candidat. En outre, les contrats de PPP doivent pouvoir être négociés véritablement dans tous leurs termes lors de cette procédure.

S'agissant des PPP, la problématique identifiée ci-avant est d'autant plus sensible que, du fait de la complexité de ces projets, la solution proposée par les candidats pour les montages technique, juridique et financier constituera un élément déterminant du choix du futur titulaire.

3. En ce qui concerne ces contrats existe-t-il selon vous des points autres que ceux relatifs au choix de la procédure d'adjudication, susceptibles de poser problème au regard du droit communautaire des marchés publics ? Si oui lesquels et pour quelles raisons ?

Les autorités françaises n'ont pas identifié d'autres points susceptibles de poser problème au regard du droit communautaire des marchés publics, mais soulignent qu'il convient, pour favoriser le développement de ce type de montage, qu'aucune mesure ne limite :

- la possibilité d'une évolution du prix de règlement du marché en fonction du niveau des **revenus tiers** perçus par le titulaire, le cas échéant, du fait de l'exploitation de l'ouvrage ou de l'équipement objet du PPP ;
- le **paiement différé** de l'investissement réalisé par l'opérateur économique privé ;
- la prise en compte de la nécessaire **évolutivité** du contrat compte tenu de sa durée ;
- la possibilité de passer un **marché global** incluant l'ensemble des besoins de la personne publique.

2.2. S'agissant des PPP prenant la forme d'une concession.

Après avoir souligné le caractère lacunaire de la réglementation communautaire en matière de concessions, la Commission s'interroge sur l'opportunité d'homogénéiser certaines règles régissant les PPP contractuels, et notamment de soumettre leur passation à un régime identique, qu'ils soient qualifiés de marchés publics ou de concessions.

Les autorités françaises ne peuvent souscrire totalement à l'approche "horizontale" des partenariats retenue par la Commission dans le Livre vert. Elles estiment qu'il n'est ni possible, ni souhaitable, de traiter en bloc les partenariats contractuels en appliquant un régime quasi-uniforme, fondé sur le dialogue compétitif, aux partenariats constitués en la forme de marchés publics et aux partenariats sous forme de concession. Ces deux catégories présentent en effet des différences essentielles dans leurs finalités et leurs modes d'exécution qui doivent être pleinement prises en compte par la réglementation communautaire.

La concession correspond en France, depuis plus d'un siècle, à un mode d'exécution du service public connu sous le nom de "gestion déléguée", consistant en la dévolution directe, par voie contractuelle, d'une activité d'intérêt général à un prestataire extérieur à l'administration. La caractéristique essentielle de la concession réside dans la prise en charge de la mission d'intérêt général, et des risques d'exploitation y afférents, par le cocontractant en lieu et place de la personne publique concédante.

Ainsi définie, la concession a vocation à s'appliquer à une très grande variété de missions de service public, et peut concerner indifféremment des services publics administratifs (c'est-à-dire, le plus souvent, des activités de nature non économique : il en va par exemple ainsi des caisses primaires de sécurité sociale, des ordres professionnels, des fédérations sportives ou encore des sociétés de chasse), ou des services publics industriels économiques, qui eux relèvent pleinement de la catégorie des services d'intérêt économique général (SIEG) et sont soumis aux dispositions de la loi du 29 janvier 1993 (dite "loi Sapin").

A des degrés divers, le régime juridique de la concession emporte application d'un régime juridique spécifique, dans lequel le concessionnaire est à la fois assujetti à des obligations exorbitantes du droit commun et titulaire, de façon très variable selon les cas, de prérogatives de puissance publique telles que par exemple le droit d'expropriation ou le droit de percevoir une rémunération auprès des usagers.

En tant que mode de gestion du service public, la concession participe de l'exercice direct des responsabilités de l'Etat. A ce titre, elle présente une différence radicale avec les marchés publics qui, quel que soit leur degré de complexité et de sophistication, s'analysent en fin de compte comme l'achat par la personne publique d'un bien ou d'un service. Il s'agit là d'une particularité de la concession de service public en droit français qui ne se retrouve que très partiellement dans la notion communautaire de concession de services ou de travaux.

Il en résulte, à raison même des caractéristiques propres de la concession, que la dévolution d'une mission de service public ne peut obéir intégralement aux mêmes règles que la commande publique, notamment sa procédure de dialogue compétitif. De l’avis des autorités françaises, il conviendrait de réserver la procédure du dialogue compétitif aux seuls cas pour lesquels elle a été conçue, c’est-à-dire ceux où la personne publique estime nécessaire le concours de partenaires privés pour définir avec elle les solutions appropriées à ses besoins. La procédure négociée doit en revanche demeurer la règle dans le cas des concessions, pour lesquelles la discussion des termes du contrat est prédominante par rapport à la définition des solutions à mettre en œuvre, dès lors que dans la plupart des cas la personne publique est en mesure de définir elle-même les moyens propres à répondre à ses besoins.

De plus, le dialogue compétitif propose une procédure qui est pratiquement l’inverse de celle rappelée en réponse à la question 1 à propos des concessions : alors que l’attribution d’une concession débute par un examen sur pièces des candidatures et des offres et se termine par une négociation approfondie de tous les termes du contrat, le dialogue compétitif procède à l’inverse et se termine par un examen sur pièces des offres finales sous forme d’un appel d’offres restreint. Cette rigidité finale, bien que tempérée par la possibilité pour le pouvoir adjudicateur de demander des « précisions, clarifications, perfectionnements ou compléments » après remise des offres est inadaptée à l’élaboration détaillée et partagée des termes d’une concession.

La nécessité d'une certaine liberté de choix du prestataire ne signifie évidemment pas que l'attribution de concessions doive s'opérer de façon arbitraire et discriminatoire : cette liberté doit au contraire s'exercer dans le cadre de principes clairs garantissant un degré approprié de transparence, d'ouverture et de non-discrimination dans la sélection du concessionnaire, ainsi que la Cour l'a rappelé dans sa jurisprudence Telaustria[1].

[1] Dans l’arrêt rendu le 7 décembre 2000 dans l’affaire « Telaustria » (C-324/98), la Cour a estimé que les entités adjudicatrices concluant des contrats de concessions de services : « sont *tenues de respecter les règles fondamentales du traité en général et le principe de non-discrimination en raison de la nationalité en particulier, ce principe impliquant, notamment, une obligation de transparence qui permet au pouvoir adjudicateur de s'assurer que ledit principe est respecté.* (...) *Cette obligation de transparence qui incombe au pouvoir adjudicateur consiste à garantir, en faveur de tout soumissionnaire potentiel, un degré de publicité adéquat permettant une ouverture du marché des services à la concurrence ainsi que le contrôle de l'impartialité des procédures d'adjudication ».*

Tel est l'objet des dispositions de la loi "Sapin" qui organisent, ainsi que le relève le Livre vert, les procédures de publicité préalable et d'appel à candidatures pour l'attribution des délégations de service public, en parfaite cohérence avec les principes édictés par la Cour et les dispositions concernant les concessions de travaux contenues dans la directive du 31 mars 2004.

Les autorités françaises partagent pleinement le souci exprimé par la Commission de préciser le cadre juridique, au sein du marché intérieur, en matière de réglementation des concessions, et plus particulièrement des concessions de services. En effet, le droit communautaire dérivé ne contient actuellement que des règles applicables aux concessions de travaux passées dans les secteurs classiques. Les concessions de services passées dans les secteurs classiques, ainsi que les concessions de travaux ou de services passées dans les secteurs spéciaux n'entrent pas dans le champ d'application des directives marchés. Le régime de passation de ces concessions reste néanmoins soumis aux principes issus directement du traité (égalité de traitement, transparence, proportionnalité, reconnaissance mutuelle) tels qu'interprétés par la Cour de justice, notamment dans l'arrêt Telaustria.

Toutefois, l'application des règles et grands principes du traité ne permet ni d'établir des règles d'octroi univoques, ni de garantir leur application uniforme, en particulier en ce qui concerne les modalités de la publicité préalable au choix du prestataire.

Ainsi par exemple, la jurisprudence « Telaustria », relative à l'interprétation des exigences de transparence issues du principe d'égalité de traitement, peut laisser place à une grande marge d'interprétation de la part des pouvoirs adjudicateurs de l'ensemble des Etats membres, notamment quant au niveau de publicité adéquat, à la nécessité ou non de procéder à une publication ou encore sur le choix du support de publication.

Il est indispensable de favoriser un rapprochement et une cohérence des pratiques des Etats membres et de préciser les exigences du droit communautaire en la matière. Les autorités françaises invitent en conséquence la Commission à retenir, dans son analyse des PPP, une approche conservant pleinement la différenciation des marchés publics et des concessions, et à veiller à ne pas étendre aux concessions des principes de dévolution qui ne présentent de pertinence que pour les seuls marchés publics.

L'initiative communautaire en la matière, si elle venait à être regardée comme nécessaire, devrait apporter les garanties exigées par la Cour, tant en ce qui concerne les modalités de publicité (seuil, support) que les informations nécessaires pour permettre aux délégataires potentiels de décider s'ils souhaitent participer à la procédure de sélection (objet de la délégation, étendue des prestations, critères de sélection). De l'avis des autorités françaises, il serait souhaitable que la Commission examine la possibilité de publier sur ce sujet des lignes directrices, sans préjudice, le cas échéant, du besoin d'un texte normatif de droit dérivé.

Les autorités françaises rappellent à cet égard à la Commission qu'elles avaient proposé, à l'occasion de la négociation du paquet législatif marchés publics, lors de la réunion du Groupe marchés publics des 4 et 5 octobre 2001, d'étendre aux concessions de services les règles applicables aux concessions de travaux. Une telle solution permettrait de répondre de façon satisfaisante à la double exigence de clarification du cadre juridique applicable à ces concessions, et de maintenir l'utilisation indispensable d'une procédure négociée.

En toute hypothèse, la réflexion communautaire sur les concessions ne devrait pas viser à développer une réglementation applicable aux secteurs faisant déjà l'objet d'une politique d'harmonisation.

Ainsi par exemple, les secteurs de l'électricité et du gaz, régis par des directives communautaires spécifiques, sont investis de fortes obligations de service public en contrepartie de la reconnaissance de droits exclusif et spéciaux. Il serait donc inopportun de leur appliquer des règles qui viendraient interférer de façon négative avec la réglementation sectorielle en vigueur, laquelle est elle-même en cours d'évolution[2].

4. Avez vous déjà organisé, participé ou souhaité organiser ou participer à une procédure d'attribution de concession au sein de l'Union ? Quelle expérience en avez vous ?

[2] Si la fourniture est ouverte à la concurrence, en matière gazière par exemple, la directive 2003/55/CE du 26 juin 2003 n'impose pas une mise en concurrence du mode de dévolution du contrat de concession pour l'établissement, la gestion et l'exploitation du réseau que ce soit de transport, de stockage ou de distribution – article 7 et 11 -. Ainsi est-il indiqué à l'article 11 que *« Les Etats membres désignent, ou demandent aux entreprises propriétaires ou responsable de réseaux de distribution de désigner, pour une durée à déterminer pour les Etats membres en fonction de considération d'efficacité et d'équilibre économique, un ou plusieurs gestionnaires de réseau de distribution.* » Cette directive prévoit donc que l'Etat désigne de façon formelle les gestionnaires de réseaux et n'impose pas de mise en concurrence des opérateurs dans ce cadre.

Dans le domaine des infrastructures de transports, la France a été à l'initiative (ou co-initiative) de plusieurs concessions, du tunnel sous la Manche au viaduc de Millau en passant par la liaison ferroviaire Perpignan-Figueras. Dans le seul domaine autoroutier et depuis 1993, une quinzaine d'avis ont été publiés par le gouvernement français pour une dizaine d'opérations différentes.

Dans chaque cas, la publicité organisée a été la plus large possible ce qui a notamment permis l'entrée de nouveaux opérateurs. Des entreprises européennes se portent désormais candidates dans divers groupements ; il en a été ainsi par exemple dans les trois dernières consultations lancées en 2003 (liaison A19, Artenay-Courtenay ; A41, Annecy-Genève et A65, Bordeaux-Pau).

La liaison Perpignan-Figueras a permis à l'Espagne et à la France d'inaugurer dans le domaine ferroviaire, une formule de concession inspirée des concessions autoroutières.

5. Estimez-vous que le cadre communautaire actuel est suffisamment précis pour assurer la participation concrète et effective de sociétés ou groupements non nationaux aux procédures de passation des concessions ? Une concurrence réelle est elle habituellement assurée dans ce cadre ?

Le cadre communautaire actuel est, d'une façon générale, insuffisamment précis pour garantir une pleine transparence et une concurrence loyale dans la conclusion des concessions, et particulièrement en raison de l'incertitude entourant l'attribution des concessions de services. En revanche, pour les concessions de travaux le cadre communautaire semble satisfaisant.

6. Pensez-vous qu'une initiative législative communautaire, visant à encadrer la procédure de passation des concessions est souhaitable ?

Les règles d'attribution des concessions de services devraient être clarifiées et précisées, notamment à la lumière de la jurisprudence "Telaustria". De l'avis des autorités françaises, il serait souhaitable que la Commission examine la possibilité de publier sur ce sujet des lignes directrices, sans préjudice, le cas échéant, du besoin d'un texte normatif de droit dérivé. L'initiative communautaire en la matière, si elle venait à être regardée comme nécessaire, devrait apporter les garanties exigées par la Cour, tant en ce qui concerne les modalités de publicité (seuil, support) que les informations nécessaires pour permettre aux délégataires potentiels de décider s'ils souhaitent participer à la procédure de sélection (objet de la délégation, étendue des prestations, critères de sélection).

En tout état de cause, il conviendra de veiller à la nécessaire cohérence entre le dispositif général des concessions et d'autres initiatives communautaires particulières telles la réflexion sur les SIEG (Livre vert sur les services d'intérêt général, COM (2003) 270 final), le projet de directive dit « Eurovignette » ou le projet de règlement relatif à l'action des Etats membres en matière d'exigence de service public et à l'attribution de contrat de services public dans le domaine des transports de voyageurs par chemin de fer, par route et par voie navigable.

7. De manière plus générale, si vous estimez qu'il est nécessaire que la Commission propose une nouvelle action législative, existerait-il des raisons objectives de viser dans cet acte tous les PPP de type contractuel, qu'ils soient qualifiés de marché public ou de concessions, pour les soumettre à des régimes de passation identiques ?

En toute hypothèse, il sera impératif de respecter les particularités et les caractéristiques respectives des concessions et des marchés publics, ce qui exclut toute uniformisation des règles et des procédures.

2.3. S'agissant des PPP d'initiative privée.

De par leurs finalités et leurs caractéristiques, les PPP suscitent, de façon légitime, des initiatives et des projets innovants de la part des acteurs privés. Cette dynamique novatrice doit être préservée dans le cadre communautaire applicable aux partenariats, tout en garantissant le maintien du libre choix de la personne publique pour donner ou non suite aux projets, en fonction de l'appréciation qu'elle porte sur la dimension d'intérêt général qu'ils présentent.

La prise en compte de l'initiative privée soulève néanmoins une interrogation sur la contradiction apparente qui peut être relevée entre d'une part l'objectif d'inciter les acteurs privés à présenter des projets innovants, et d'autre part la mise en concurrence qui peut aboutir à priver l'auteur du bénéfice de son projet. S'il ne saurait évidemment être question de reconnaître à l'auteur d'un projet un véritable "droit" à la conclusion du contrat, il convient néanmoins de conserver en la matière une approche pragmatique apte à préserver un minimum d'équité.

C'est ainsi que l'ordonnance française du 17 juin 2004 sur les contrats de partenariat autorise expressément dans son article 10 la saisine de la personne publique d'un projet sur l'initiative d'une personne privée. En ce cas, la personne publique reste libre d'y donner suite ou non, la personne privée étant autorisée à participer à la procédure de passation du contrat dans la première hypothèse. Il n'y a pas d'indemnisation obligatoire pour l'apporteur de projet, mais rien n'interdit non plus à la personne publique d'indemniser l'auteur du projet.

8. Selon votre expérience, l'accès des opérateurs non-nationaux aux formules de PPP d'initiative privée est-il assuré ? En particulier lorsqu'il existe une invitation des pouvoirs adjudicateurs à présenter une initiative, cette invitation fait-elle généralement l'objet d'une publicité adéquate pour permettre l'information de tous les opérateurs intéressés ? Une procédure de sélection véritablement concurrentielle est-elle organisée pour assurer la mise en œuvre du projet retenu ?

Le principe de toute mise en concurrence conduit à ce qu'elle soit précédée d'une publicité à laquelle ont accès l'ensemble des opérateurs, nationaux ou non nationaux. Tel est l'objectif poursuivi par l'ordonnance française du 17 juin 2004.

9. Quelle serait selon vous la meilleure formule pour assurer le développement des PPP d'initiative privée dans l'UE tout en assurant le respect des principes de transparence, de non-discrimination et d'égalité de traitement ?

De l'avis des autorités françaises, la principale difficulté réside dans la contradiction existant entre d'une part l'encouragement des initiatives privées, et d'autre part la mise en concurrence systématique qui fait perdre à l'auteur l'avantage de son initiative. La solution trouvée dans l'article 10 de l'ordonnance sur les contrats de partenariat apparaît à cet égard équilibrée.

10. Quelle expérience avez vous de la phase postérieure à la sélection du partenaire privé dans les opérations de PPP contractuels ?

Dans les contrats qui peuvent s'assimiler à des PPP contractuels, il importe d'organiser l'évolutivité de ces contrats. En effet ces contrats, par définition de longue durée, doivent pouvoir aisément s'adapter à l'évolution des besoins, obligation particulièrement impérieuse s'agissant de contrats globaux qui embrassent des métiers très différents, mais interdépendants pendant la vie du contrat.

En matière autoroutière, les clauses des cahiers des charges ont été récemment modernisées et renforcées sur les points suivants :
- contractualisation d'objectifs de qualité d'exploitation, d'entretien et de maintenance par période de 4 ans ;
- missions de dépannage sur le réseau ;
- obligation de fournir aux usagers une information routière en temps réel aussi fiable que possible ;
- obligation réciproque d'échange d'informations routières ;
- échanges de coordination entre gestionnaires de réseaux et autorités publiques en matière de gestion globale du trafic et d'assistance aux usagers en cas de crise ;
- modernisation du dispositif de pénalités et autres mesures coercitives (formalisation d'une procédure contradictoire) ;
- compte-rendu annuel d'exécution de la concession par le concessionnaire.

Cet exemple témoigne parmi d'autres de la nécessaire évolution des contrats au cours de leur durée. L'évolutivité des concessions constitue l'une des caractéristiques principales qui distinguent profondément celles-ci des marchés publics.

11. Avez vous connaissance de cas dans lesquels les conditions d'exécution, y compris les clauses d'adaptation dans le temps, ont pu avoir une incidence discriminatoire ou ont pu constituer une entrave injustifiée à la libre prestation de services ou à la liberté d'établissement ? Si oui, pouvez vous décrire le type de problèmes rencontrés ?

Non.

12. Avez vous connaissance de pratiques ou de mécanismes d'évaluation des offres ayant des incidences discriminatoires ?

Non.

13. Partagez-vous le constat de la Commission selon lequel certains montages du type « step-in » peuvent poser problème en terme de transparence et d'égalité de traitement ? Connaissez-vous d'autres clauses types dont la mise en œuvre est susceptible de poser de problèmes similaires ?

Les clauses de substitution sont la contrepartie des risques pris par les prêteurs dans le financement des projets. Elles sont et doivent demeurer de nature contractuelle. Elles doivent en outre s'accompagner d'une approbation du partenaire public.

14. Estimez-vous qu'il est nécessaire de clarifier au niveau communautaire certains aspects relevant du cadre contractuel des PPP ? Si oui, sur quels aspects devrait porter cette clarification ?

Hormis les questions relatives, en amont, à l'attribution des concessions (v. question 6), il ne paraît pas nécessaire d'encadrer plus avant, au plan communautaire, le régime des contrats de PPP.

En revanche, les autorités françaises soulignent l'intérêt qu'elles attacheraient à l'ouverture d'un dialogue entre les Etats membres permettant l'échange de bonnes pratiques en la matière.

2.4. S'agissant de la question de la sous-traitance

Il ressort d'une étude publiée par la Commission en mai 2004 que la valeur médiane d'un marché public attribué aux PME est de 249 000 euros alors que pour les grandes entreprises, elle est de 453 000 euros.

Il est d'ores et déjà certain que les marchés dévolus selon la procédure de partenariat public privé excluent les PME de la mise en concurrence du fait notamment de l'importance du marché, l'obligation de financement d'investissements lourds, la mise en pratique de procédures complexes…

Or, dans son considérant 32, la directive 2004/18/CE affirme le principe d'accès des PME à la commande publique : « afin de favoriser l'accès des petites et moyennes entreprises aux marchés publics, il convient de prévoir des dispositions en matière de sous-traitance ».

Les autorités françaises expriment toutefois des doutes sur l'opportunité et la pertinence d'un encadrement réglementaire poussé en matière de sous-traitance. Il s'agit en effet d'une matière mettant en cause des relations de nature purement privée et commerciale, qui ne donne *a priori* pas lieu à un besoin d'encadrement autre que celui apporté par les règles de droit commun.

Certes, un minimum de principes peut s'avérer nécessaire, compte tenu des spécificités propres des PPP qui peuvent rendre difficile l'accès direct des petites et moyennes entreprises à ces contrats. Lors de la concertation et du débat précédant l'adoption de l'ordonnance du 17 juin 2004, il est apparu nécessaire d'apporter une réponse concrète aux inquiétudes exprimées par les PME. C'est ainsi que l'ordonnance prévoit trois dispositions : parmi les critères d'attributions figure la part d'exécution du contrat que le candidat s'engage à confier à des petites et moyennes entreprises et à des artisans ; l'interdiction de la sous-traitance totale ; l'obligation faite au titulaire du contrat de constituer une caution garantissant le paiement des sous-traitants dans un délai maximal et l'obligation de prévoir les modalités de contrôle par la personne publique des conditions dans lesquelles le cocontractant fait appel aux sous-traitants.

Ces trois éléments sont requis pour apporter un minimum de garanties au bon accomplissement du contrat. S'il serait opportun que des principes de ce type trouvent à s'appliquer pour l'ensemble des contrats de partenariats conclus au sein du marché intérieur, il n'apparaît en revanche pas utile d'envisager de réglementer au-delà de ces aspects une matière qui relève essentiellement de relations commerciales.

15. Dans le contexte des PPP avez vous connaissance de problèmes particuliers rencontrés en matière de sous-traitance ? Lesquels ?

Non.

16. Le phénomène des PPP de type contractuel, impliquant le transfert d'un ensemble de tâches à un unique partenaire privé, justifie t-il selon vous que des règles plus détaillées et/ou d'un champ d'application plus large soient mises en place en ce qui concerne le phénomène de sous-traitance ?

Les autorités françaises considèrent qu'en la matière le principe de la liberté contractuelle doit s'appliquer dans le cadre des législations nationales.

17. De manière plus générale, estimez-vous qu'une initiative complémentaire devrait être prise au niveau communautaire en vue de clarifier ou d'aménager les règles relatives à la sous-traitance ?

Non.

3. Sur les PPP de type institutionnalisé.

Les développements que la Commission consacre à cette forme de PPP sont très succincts et mériteraient très certainement d'être quelque peu explicités. Il semble en effet que ces développements n'échappent pas à une certaine confusion entre les PPP et les notions de privatisation et d'externalisation.

La création d'une entité au capital mixte ou la prise de contrôle d'une entreprise privée dans une structure publique ne sont en aucune façon assimilables à un marché public ou à une concession et ne peuvent donc par conséquent être soumises aux règles de la commande publique (à l'exception du cas ou la création de l'entité est une modalité d'exercice de l'opération et a été prévue lors de la mise en concurrence).

En outre, aux yeux des autorités françaises, la mise en œuvre d'un PPP doit nécessairement se faire par contrat. La notion de PPP est en effet consubstantielle à la notion de contrat et à la négociation contractuelle, s'agissant notamment de la répartition des risques entre les différents acteurs.

La création d'une personne morale *ad hoc*, qu'elle prenne la forme d'une société d'économie mixte ou toute autre forme juridique, la répartition des capitaux publics et privés dans une telle entité, ou l'externalisation d'une activité particulière constituent des choix d'organisation qui correspondent aux prérogatives des Etats membres, conformément aux principes d'autonomie institutionnelle des Etats et de neutralité du Traité vis à vis du régime de propriété, dont le Livre vert reconnaît du reste lui-même l'applicabilité.

Bien évidemment, il ne saurait être question d'admettre la légitimité d'entités créées spécifiquement pour contourner le principe d'égalité d'accès aux contrats ; pour autant, il ne saurait davantage être question d'empêcher des personnes publiques et privées de conjuguer leurs initiatives et leurs capitaux pour construire un projet. La dimension publique des sociétés d'économie mixte, qui sont de vraies entreprises, ne constitue nullement un obstacle au jeu d'une concurrence équitable. En particulier, il doit être clair que la légitimité des sociétés créées pour porter un projet spécifique postérieurement à une procédure ouverte, transparente et non-discriminatoire ne saurait être remise en question.

Il s'agit d'une question difficile qui, de l'avis des autorités françaises, doit être examinée dans une réflexion *ad hoc* excédant le cadre du droit des concessions et de la commande publique. Elles invitent en conséquence la Commission à réserver ces problématiques pour des débats ultérieurs.

18. Quelle expérience avez vous de la mise en place d'opérations de PPP de type institutionnalisé ? En particulier votre expérience vous conduit elle à penser que le droit communautaire des marchés publics et des concessions est respecté dans le cas de montages de PPP institutionnalisé ? Si non, pourquoi ?

Les autorités françaises considèrent qu'il n'y a pas lieu d'inclure les montages de type institutionnalisé dans une réflexion communautaire sur les PPP, et qu'il convient impérativement d'éviter tout amalgame entre ces montages et les problématiques afférentes aux contrats de PPP.

19. Estimez-vous qu'une initiative doit être prise au niveau communautaire en vu de clarifier ou de préciser les obligations des organismes adjudicateurs quant aux conditions dans lesquelles doivent être mis en concurrence les opérateurs potentiellement intéressés par un projet de type institutionnalisé ? Si oui sur quels points particuliers et sous quelle forme ? Si non, pourquoi ?

Une initiative particulière apparaît prématurée. En toute hypothèse, une éventuelle réflexion en la matière ne devrait en aucun cas s'inscrire dans le cadre des travaux actuels sur les PPP.

20. Quelles sont les mesures ou les pratiques que vous estimez constitutives d'entraves à la mise en place des PPP au sein de l'UE ?

Le manque de recul dans ce domaine ne permet pas aux autorités françaises d'identifier à ce stade des mesures ou pratiques constitutives d'entraves à la mise en place des PPP au sein de l'UE.

21. Connaissez-vous d'autres formes de PPP développés dans les pays hors de l'Union ? Connaissez-vous des exemples de bonnes pratiques développées dans ce cadre, dont l'UE pourrait s'inspirer ? Si oui lesquelles ?

Non.

22. De façon plus générale, et compte tenu des besoins importants d'investissements nécessaires dans certains Etats membres, afin d'en poursuivre un développement économique, social et durable, estimez-vous utile une réflexion collective sur ces questions qui se poursuivrait à des intervalles réguliers entre les acteurs concernés ; et qui permettrait un échange des meilleures pratiques ? Est-ce que vous considérez que la Commission devrait animer un tel réseau ?

Les autorités françaises sont favorables à la poursuite d'une réflexion communautaire sur ces questions, animée par la Commission et visant à favoriser l'échange de bonnes pratiques.

Stellungnahme der Regierung der Bundesrepublik Deutschland zu dem Grünbuch der EU-Kommission zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen

I. Vorbemerkung:

Die Bundesregierung begrüßt die Initiative der Kommission, den Begriff „öffentlich-private Partnerschaft (ÖPP)“ zu klären und eine Kategorisierung der verschiedenen Kooperationsformen vorzunehmen, die unter den Begriff „ÖPP“ zu fassen sind. Denn die „öffentlich-private Partnerschaft (ÖPP)“, mehr noch die Abkürzung des englischsprachigen „public-private partnership (PPP)“, ist ein schillernder Begriff, der in den unterschiedlichsten Zusammenhängen verwendet wird und unterschiedlichste Inhalte transportiert.

Die Bundesregierung hofft, dass die Kommission in der Frage, ob und wie „ÖPP“ in Zukunft auf gemeinschaftsrechtlicher Ebene unter dem Blickwinkel des Vergaberechts behandelt werden, tatsächlich – wie mehrfach betont – ergebnisoffen ist. Das Grünbuch erweckt allerdings an vielen Stellen nicht diesen Anschein; vielfach entsteht der Eindruck, dass ein gemeinschaftliches Regelungsbedürfnis für Dienstleistungskonzessionen und „ÖPP“ begründet werden soll. Außerdem enthält das Grünbuch viele Aussagen, die sich in den Fragen nicht widerspiegeln. Die Bundesregierung wird daher im Folgenden nicht nur die Fragen der Kommission beantworten, sondern auch zu diesen Aussagen Stellung nehmen.

Um sich ein möglichst breites Bild zu machen, hat die Bundesregierung im Vorfeld dieser Stellungnahme Länder, kommunale Spitzenverbände, Wirtschaftsverbände und sonstige interessierte Kreise konsultiert. Sie hat schriftliche Stellungnahmen eingeholt und die Länder und Verbände zu Anhörungen eingeladen. Die vorliegende Stellungnahme stellt die Ansicht der Bundesregierung dar, berücksichtigt aber auch viele Punkte, die im Rahmen der Konsultationen vorgetragen wurden.

Die besondere Form der Zusammenarbeit zwischen Staat und Bürgern wurde in Deutschland erst in den letzten Jahren verstärkt Gegenstand der politischen Diskussion. Dem Thema „ÖPP" kommt in der Bundesrepublik Deutschland ein hoher politischer Stellenwert zu. Das Bundesministerium für Verkehr, Bau- und Wohnungswesen hat im Jahr 2002 einen Lenkungsausschuss gebildet, dem Vertreter der öffentlichen Auftraggeber (Bund, Länder und Kommunen) und der Bau- und Finanzwirtschaft angehören, um Impulse zur Verbesserung der ÖPP-Rahmenbedingungen zu geben und das Entstehen eines ÖPP-Kompetenznetzwerks in Deutschland zu fördern. Der Lenkungsausschuss hat im Jahr 2003 ein Gutachten zu „PPP im öffentlichen Hochbau" beauftragt. Gegenstand dieses Gutachtens ist ein Leitfaden zum ÖPP-Verfahren, eine Untersuchung der rechtlichen Rahmenbedingungen im Vergaberecht, Haushaltsrecht, Steuerrecht, Kommunalrecht und Zuwendungsrecht, ein Standard für Wirtschaftlichkeitsuntersuchungen, eine empirische Untersuchung von internationalen und 46 deutschen Projekten mit ÖPP-Elementen sowie ein Konzept für ein föderales Kompetenzzentrum. Das Gutachten ist auf der Homepage des Bundesministeriums für Verkehr, Bau- und Wohnungswesen (www.bmvbw.de) im Internet abrufbar.

Zurzeit wird – als Vorstufe eines föderalen Kompetenznetzwerks – in Kooperation mit dem Lenkungsausschuss beim Bundesministerium für Verkehr, Bau- und Wohnungswesen eine Task Force eingerichtet, die Pilotprojekte betreuen, Grundsatz- und Koordinierungsarbeiten sowie Öffentlichkeitsarbeit und Wissenstransfer übernehmen soll.

II. Anmerkungen zu den einzelnen Themenbereichen des Grünbuchs sowie den Fragen der Kommission

1. Definition des Begriffs „öffentlich – private Partnerschaft"

Die Kommission definiert den Begriff der öffentlich-privaten Partnerschaft als eine langfristig angelegte Form der Zusammenarbeit zwischen einer öffentlichen Stelle und einem Privatunternehmen (vgl. Rz. 1 ff. des Grünbuchs). An anderer Stelle betont sie jedoch, dass die Geltung des Gemeinschaftsrechts über öffentliche Aufträge und Konzessionen nicht davon abhängt, ob der Vertragspartner des öffentlichen Auftraggebers öffentlichen oder privaten

Status hat (vgl. Rz. 63 des Grünbuchs). Für die Bundesregierung stellt sich daher die Frage, ob die Kommission ihre Äußerungen auch auf öffentlich-öffentliche Partnerschaften und damit z.B. Formen der interkommunalen Zusammenarbeit bezogen wissen will.

Eine Ausdehnung des Vergaberechts auf solche Kooperationen lehnt die Bundesregierung strikt ab. Hierbei handelt es sich nicht um öffentliche Aufträge im Sinne des Vergaberechts, sondern um Formen staatlicher Aufgabenorganisation.

Dies folgt auch aus der kommunalverfassungsrechtlichen Selbstverwaltungsgarantie. Diese ist in Artikel 28 der Verfassung der Bundesrepublik Deutschland verankert und integraler Bestandteil der deutschen Staatsorganisation. Das Recht auf kommunale Selbstverwaltung ermöglicht es Kommunen und anderen Gebietskörperschaften, alle Angelegenheiten der örtlichen Gemeinschaft im Rahmen der Gesetze in eigener Verantwortung zu regeln. Entsprechende Gewährleistungen enthalten auch die Verfassungen der einzelnen Bundesländer. Sie vermitteln nicht nur eine institutionelle Garantie der Gemeinden im staatlichen Verwaltungsaufbau, sondern beinhalten auch ein subjektives und damit einklagbares Recht der Gemeinden auf eigenverantwortliche Wahrnehmung ihrer Angelegenheiten.

Das Recht auf kommunale Selbstverwaltung wird auch auf europäischer Ebene garantiert. Bereits die auf Initiative des Europarates zurückgehende Europäische Charta der kommunalen Selbstverwaltung von 1988 trug ihm Rechnung. Auch in der gerade beschlossenen europäischen Verfassung erfolgt eine ausdrückliche Anerkennung der regionalen und kommunalen Selbstverwaltung sowie der Unantastbarkeit der staatsorganisationsrechtlichen Strukturen. In Artikel 5 Absatz 1 heißt es:

> *„Die Union achtet die nationale Identität ihrer Mitgliedstaaten, die in deren grundlegender politischer und verfassungsrechtlicher Struktur einschließlich der regionalen und kommunalen Selbstverwaltung zum Ausdruck kommt. Sie achtet die grundlegenden Funktionen des Staates, insbesondere der territorialen Unversehrtheit, die Aufrechterhaltung der öffentlichen Ordnung und den Schutz der inneren Sicherheit.“*

Die Erwähnung in der europäischen Verfassung dokumentiert den hohen Stellenwert der kommunalen Selbstverwaltungsgarantie auch auf europäischer Ebene.

Aufgrund der kommunalen Selbstverwaltungsrechtsgarantie haben Kommunen das Recht zu entscheiden, wie sie ihre Aufgaben wahrnehmen, ob sie diese selbst oder durch private Dritte oder in Zusammenarbeit mit anderen Kommunen z.B. durch die Gründung oder den Beitritt zu einem sog. Zweckverband erledigen möchte.

Eine solche öffentlich-öffentliche Partnerschaft unterliegt dem Vergaberecht nicht. Denn hierbei handelt es sich nicht um den Einkauf einer Leistung am Markt. Der Markt ist erst dann betroffen, wenn die öffentliche Hand die Entscheidung getroffen hat, dass die Leistung von einem Dritten erbracht werden soll. Ein Dritter ist im Fall der Aufgabenwahrnehmung durch Zweckverbände aber nicht beteiligt. Es wird lediglich eine Aufgabe innerhalb des Staatsaufbaus verlagert. Gleiches gilt für die Aufgabenorganisation auf anderen Ebenen des Staates, d.h. auf der Ebene des Bundes oder Länder, wenn die Aufgabe weiterhin vom Staat wahrgenommen wird, sei es auch durch eine formal andere juristische Person.

Die Betrachtungsweise der Kommission, dass Dritter auch eine andere Gebietskörperschaft ist und – sobald die Aufgabe auf eine von dem eigentlichen Auftraggeber verschiedene juristische Person übertragen wird – der Markt berührt ist und damit der Wettbewerb eröffnet werden muss, greift zu kurz und ist aus der Sicht der Bundesregierung zu formalistisch. Denn dies führt zu einer unterschiedlichen Behandlung von zentralistisch organisierten Staaten, bei denen Aufgaben von unterschiedlichen Dienststellen, aber innerhalb einer juristischen Person wahrgenommen werden, und Staaten mit einer kleinteiligeren und verzweigteren staatsorganisationsrechtlichen Struktur. Es kann aber nicht von der verfassungsrechtlichen Organisation eines Staates abhängen, ob auf bestimmte Vorgänge Vergaberecht Anwendung findet oder nicht. Insofern greift die formale Betrachtungsweise der Kommission auf unzulässige Weise in das nun auch ausdrücklich verfassungsrechtlich garantierte Staatsorganisationsrecht der Mitgliedstaaten ein.

Würde den deutschen Städten, Gemeinden und Landkreisen durch das Vergaberecht die Möglichkeit genommen, Aufgaben in Kooperation mit anderen Gebietskörperschaften durchzuführen, wären sie in ihrer Aufgabenwahrnehmung beschnitten und letztlich auf eine reine Gewährleistungsrolle zurückgedrängt. Es ist eine Frage der politischen Entscheidung eines jeden Mitgliedstaates, ob und inwieweit er sich in bestimmten Aufgabenfeldern auf die Gewährleistungsrolle zurückzieht. Eine vergaberechtliche Frage ist dies jedenfalls nicht.

Frage 1a: Welche Formen von ÖPP auf Vertragsbasis sind Ihnen bekannt?

1. Die verschiedenen Modelle von ÖPP auf Vertragsbasis können grob in Betreiber-, Konzessions- und Betriebsführungsmodelle (vgl. unten unter a) bis c)) unterteilt werden, wobei diese Begriffszuordnung sehr pauschal ist und den komplexen Vertragsmodellen häufig nicht gerecht wird. Innerhalb dieser ÖPP-Formen haben sich insbesondere in den Bereichen Fernstraßenbau und öffentlicher Hochbau, in denen in Deutschland bislang die meisten Erfahrungen mit ÖPP gemacht wurden, zahlreiche Vertragstypen herausgebildet.

   Neben den ÖPP-Modellen auf Vertragsbasis gibt es sog. Gesellschafts- bzw. Kooperationsmodelle, bei denen es sich in der Terminologie des Grünbuchs um institutionalisierte ÖPP (vgl. unten unter 8.) handelt. Hierbei werden öffentliche Aufgaben (z.B. Finanzierung und Durchführung eines Infrastrukturprojekts) auf eine Objektgesellschaft übertragen, an der die öffentliche Hand (zumeist mehrheitlich) neben einem oder mehreren privaten Unternehmen beteiligt ist. Organisatorisch erfolgt bei den Kooperationsmodellen, die sich insbesondere im Bereich der Wasserversorgung bzw. der Abwasserentsorgung Anwendung finden, zumeist eine Aufspaltung in die "Besitzgesellschaft", die das Eigentum an den Anlagen hält und mehrheitlich der öffentlichen Hand gehört, und eine "Betriebsgesellschaft", welche die Anlagen von der Besitzgesellschaft mietet oder pachtet und eigenverantwortlich führt.

   a) Betreibermodell allgemein:

      Bei Betreibermodellen verpflichtet sich ein privater Investor gegen Entgelt gegenüber der öffentlichen Hand, eine Infrastrukturanlage zu planen, zu bauen, zu finanzieren und zu betreiben. Nach außen tritt der Betreiber regelmäßig nicht als selbständiger Rechtsträger in Erscheinung. Die öffentliche Hand bleibt gegenüber der Öffentlichkeit verpflichtet, die in Frage stehende Versorgungsleistung zu erbringen. Hierfür erhebt sie Gebühren. Die Betreibermodelle unterscheiden sich daher von der Konzession dadurch, dass die öffentliche Hand und nicht der Nutzer den Betreiber vergütet.

b) Konzessionsmodell:

Beim Konzessionsmodell verpflichtet sich der Auftragnehmer, eine bestimmte Leistung auf eigenes wirtschaftliches Risiko unmittelbar an den Bürger zu erbringen. Im Gegenzug erhält er das Recht, seine Kosten über Entgelte oder Gebühren von Nutzern zu finanzieren. Er steht in unmittelbarer vertraglicher Beziehung zu den Nutzern. Die Berechtigung zur Entgelt- oder Gebührenerhebung wird durch Verleihung der Berechtigung zur Erhebung einer Gebühr oder durch eine Tarifgenehmigung zur Erhebung eines privatrechtlichen Entgelts übertragen. Gegenstand einer Konzession kann sowohl eine Bau- wie auch eine Lieferleistung sein.

c) Betriebsführungsmodell:

Anders als bei den Betreiber- und Konzessionsmodellen überträgt die öffentliche Verwaltung beim Betriebsführungsmodell lediglich die Betriebsführung einem privaten Unternehmen, das hierfür ein Entgelt erhält.

2. Zu den vertraglichen Modellen in den unterschiedlichen Anwendungsbereichen von ÖPP:

a) Bereich Bundesfernstraßenbau

Im Bereich des Bundesfernstraßenbaus werden überwiegend zwei Formen von sog. Betreibermodellen angewendet:

aa) Betreibermodell für den mehrstreifigen Autobahnausbau (**A-Modell**)
bb) Betreibermodell gemäß Fernstraßenbauprivatfinanzierungsgesetz (**F-Modell**)

Obwohl diese Modelle als Betreibermodelle bezeichnet werden, haben sie auch Konzessionselemente. Die Modelle haben folgende Gemeinsamkeiten:

- Die Infrastrukturverantwortung des Bundes und der Länder bleibt durch die Betreibermodelle unberührt. Dies wird auch dadurch deutlich, dass Voraussetzung für den Bau einer Bundesfernstraße (weiterhin) deren Berücksichtigung im Bedarfsplan Straße des Bundes ist.

- Die Betreibermodell-Projekte kann der Bund nur im Einvernehmen mit den Ländern durchführen. Darüber hinaus umfassen sie nur einen begrenzten Anteil des Gesamtnetzes der Bundesfernstraßen. Der Fortbestand der Auftragsverwaltung nach Art. 90 Abs. 2 Grundgesetz ist somit gewährleistet.

- Die Verträge sind zeitlich befristet.

aa) Betreibermodell für den mehrstreifigen Autobahnausbau (**A-Modell**)

Die Einführung der streckenbezogenen Gebühr für schwere Lkw (≥ 12 t zulässiges Gesamtgewicht) auf Autobahnen ermöglicht ein Betreibermodell für den mehrstreifigen Autobahnausbau (A-Modell) mit folgenden Merkmalen:

- Der Anbau zusätzlicher Fahrstreifen, die Erhaltung und der Betrieb aller Fahrstreifen sowie die Finanzierung werden an einen privaten Betreiber übertragen.
- Das Gebührenaufkommen der schweren Lkw im auszubauenden Streckenabschnitt während des Betreiberzeitraumes wird für die Refinanzierung des privaten Betreibers vorgesehen.

- Die durch die Nutzung der Pkw/leichte Lkw entstehenden Infrastrukturkosten werden in Form einer Anschubfinanzierung (ca. 50 % der sonst üblichen Baukosten) aus dem Straßenbauhaushalt aufgebracht.

Bei diesem Modell handelt es sich um eine Aufgabenprivatisierung, bei der jedoch nur der Vollzug von Aufgaben auf einen Privaten übertragen wird. Für die vertragliche Umsetzung sind besondere gesetzliche Regelungen nicht erforderlich.

Das Modell ist unabhängig von den Betreibermodellen nach dem Fernstraßenbauprivatfinanzierungsgesetz (FStrPrivFinG) (F-Modell, vgl. unten unter bb)) und nur von der Einführung der streckenbezogenen Lkw-Gebühr auf Autobahnen abhängig. Voraussetzung ist die Zustimmung der jeweiligen Landesregierung sowie die Abstimmung mit dem Bundesministerium der Finanzen.

bb) Betreibermodell im Rahmen des Fernstraßenbauprivatfinanzierungsgesetzes (**F-Modell**)

Seit September 1994 sind mit dem FStrPrivFinG die rechtlichen Voraussetzungen zur Anwendung des Betreibermodells im Bundesfernstraßenbau gegeben. Danach können der Bau, die Erhaltung, der Betrieb und die Finanzierung von Bundesfernstraßen Privaten zur Ausführung übertragen werden. Zur Refinanzierung erhalten diese das Recht zur Erhebung von Mautgebühren.

Dieses Betreibermodell ist derzeit gesetzlich beschränkt auf

- Brücken, Tunnel und Gebirgspässe im Zuge von Bundesautobahnen und Bundesstraßen,
- mehrstreifige Bundesstraßen mit getrennten Fahrbahnen für den Richtungsverkehr mit Kraftfahrzeugen.

Die Zahl der nach dem Gesetz realisierbaren Maßnahmen (insbesondere Brücken- und Tunnelbauten) ist begrenzt, da sich nur bestimmte Vorhaben für eine Privatfinanzierung mit Refinanzierung durch Mautgebühren eignen. Ursächlich hierfür ist insbesondere die Lage der Projekte im Netz (z.B. innerorts oder Ortsumgehung mit guten Umfahrungsmöglichkeiten) sowie spezifische Projektsituationen, wie z.B. hohe Baukosten bei gleichzeitig relativ geringem Verkehrsaufkommen. Aus diesem Grunde kann zur Herstellung der erforderlichen privatwirtschaftlichen Rentabilität eine staatliche Anschubfinanzierung zu den Baukosten berücksichtigt werden, sofern das Projekt zum Zeitpunkt der Realisierung in den „Vordringlichen Bedarf“ des Bedarfplanes eingestuft ist.

cc) Neben den Betreibermodellen gibt es im Bereich des Fernstraßenbaus sog. „**Funktionsbauverträge**“. Hier handelt es sich um Bauverträge, bei denen die Anforderungen an den Straßenoberbau funktional beschrieben werden, Neben der eigentlichen Bauleistung übernimmt das private Unternehmen über einen vorgegebenen Zeitraum von 20 - 30 Jahren die bauliche Erhaltung, wobei die qualitativen Anforderungen anhand funktionaler Kriterien überprüft werden. Die Vergütung erfolgt aus dem Bundeshaushalt.

b) Öffentlicher Hochbau

Bund, Länder und Kommunen verfügen im Hochbau über mehrjährige Erfahrungen mit alternativen Realisierungsformen, bei denen Elemente von ÖPP genutzt werden. In den letzten 5 Jahren wurden Hochbaumaßnahmen mit ÖPP-Elementen im Wert von ca. 3 - 4,5 Mrd. € realisiert. 100 Ausschreibungen sind statistisch erfasst. Das sind etwa 3% bis 5% aller jährlichen Beschaffungsvorgänge im Hochbau. Je nach Interessenlage der öffentlichen Hand kamen verschiedene Modelle zur Anwendung, zum überwiegenden Teil handelt es sich hierbei jedoch nicht um Konzessionsmodelle. Der so genannte Lebenszyklus-Ansatz, d.h. eine umfassende Aufgabenübertragung von Planung, Bau, Finanzierung, Betrieb und

Verwertung von der öffentlichen Hand auf einen privaten Anbieter wurde in Deutschland aber bisher nicht umgesetzt.

Im Bereich des öffentlichen Hochbaus hat das in der Vorbemerkung erwähnte Gutachten folgende mögliche Modelle für ÖPP auf Vertragsbasis klassifiziert:

- Erwerbermodell
  Der private Auftragnehmer übernimmt bei diesem Modell Planung, Bau, Finanzierung und den Betrieb einer Immobilie, die von der öffentlichen Hand genutzt wird; die Laufzeit beträgt i.d.R. 20 – 30 Jahre. Zum Vertragsende geht das Eigentum an Grundstück und Gebäude auf den öffentlichen Auftraggeber über. Das Entgelt besteht in einer regelmäßigen Zahlung an den Auftragnehmer; es wird bei Vertragsschluss festgesetzt und besteht aus den Komponenten für Planung, Bau, Betrieb (Facility Management), Finanzierung und Erwerb der Immobilie incl. Grundstück.

- Inhabermodell
  Das Inhabermodell ähnelt dem Erwerbermodell. Im Gegensatz zu diesem betrifft das Projekt aber ein Grundstück des Auftraggebers. Auf diesem wird ein Gebäude neu errichtet oder saniert. Der öffentliche Auftraggeber wird bzw. bleibt daher bereits mit der Errichtung bzw. Sanierung Eigentümer des Gebäudes.

- Facility-Management-Leasingmodell
  Der private Auftragnehmer übernimmt hier Planung, Bau, Finanzierung und Betrieb einer Immobilie. Anders als beim Erwerbermodell besteht jedoch keine Verpflichtung zur Übertragung des Gebäudeeigentums am Ende der Vertragslaufzeit. Der Auftraggeber hat vielmehr ein Optionsrecht, die Immobilie entweder zurückzugeben oder zu einem vorab fest kalkulierten Restwert zu erwerben. Neben der Kaufoption möglich sind auch Mietverlängerungsoptionen oder Verwertungsabreden. Als Nutzungsentgelt zahlt der Auftraggeber regelmäßige Raten („Leasingraten“) an den

Auftragnehmer in bei Vertragsschluss feststehender Höhe; Bestandteile dieser Raten ist das Entgelt für die (Teil-)Amortisation der Planungs-, Bau- und Finanzierungskosten einerseits und den Betrieb (Facility Management) andererseits. Der Preis, zu dem der öffentliche Auftraggeber das Eigentum am Ende der Vertragslaufzeit erwerben kann, ist ebenfalls bereits im Zeitpunkt des Vertragsschlusses festgelegt.

- Vermietungsmodell

  Das Vermietungsmodell entspricht weitgehend dem Leasingmodell, jedoch ohne Kaufoption mit zuvor festgelegtem Kaufpreis. Allenfalls kann das Gebäude zum im Zeitpunkt des Vertragsablaufs zu ermittelnden Verkehrswert erworben werden. Der Auftraggeber zahlt regelmäßige Raten an den Auftragnehmer in bei Vertragsschluss feststehender Höhe; Bestandteile dieser Raten sind das Entgelt für Gebrauchsüberlassung („Miete“) und den Betrieb (Facility Management).

- Contractingmodell

  Das Vertragsmodell erfasst (Ein-)Bauarbeiten und betriebswirtschaftliche Optimierungsmaßnahmen von bestimmten technischen Anlagen oder Anlagenteilen durch den Auftragnehmer in einem Gebäude des öffentlichen Auftraggebers. Die Laufzeit beträgt ca. 5 – 15 Jahre, das Entgelt besteht in regelmäßigen, bei Vertragsschluss festgesetzten Zahlungen zur Abdeckung von Planungs-, Durchführungs-, Betriebs- und Finanzierungskosten des Auftragnehmers.

- Konzessionsmodelle

  Bei den Konzessionsmodellen übernimmt der Auftragnehmer Planung, Bau-, Finanzierung, Betrieb und u.U. auch den Eigentumsübergang einer Immobilie. Im Unterschied zu anderen Modellen erhält der Auftragnehmer kein festes Entgelt, sondern das Recht, seine Kosten durch Erhebung von Nutzungsentgelten (Entgelte oder Gebühren) zu decken, die Dritte für die Benutzung der Gebäude bzw. Anlagen zu entrichten haben (sog.

Drittnutzerfinanzierung). Hinsichtlich des Eigentumsübergangs zum Vertragsablauf sind unterschiedliche Regelungen möglich (z.B. automatischer Eigentumsübergang auf den Auftraggeber ohne Schlusszahlung, Entschädigung zu einem fest vereinbarten Preis oder zum Verkehrswert, Verlängerungsoptionen). Der Auftraggeber kann sich gegebenenfalls im Rahmen einer Anschubfinanzierung auch an den Kosten des Auftragnehmers beteiligen oder Zuschüsse zum laufenden Betrieb zusichern. Liegt der ganz überwiegende Schwerpunkt auf der Erbringung von Dienstleistungen des Facility Managements, Betriebs oder der Finanzierung, so liegt eine Dienstleistungskonzession vor. Enthält die Vertragsleistung jedoch einen nicht nur unerheblichen Anteil an Bauleistungen (Errichtung/Sanierung eines Bauwerks), so ist die Konzession nach der deutschen Rechtsprechung als Baukonzession zu qualifizieren.

Frage 1 b): Gibt es in Ihrem Land spezifische (gesetzliche oder andere) Rahmenbedingungen für derartige Konstruktionen?

In Deutschland gibt es kein besonderes ÖPP-Gesetz. Zu einzelnen Fragestellungen finden sich spezielle Regeln in Gesetzen oder Verwaltungsvorschriften. So ist z.B. die Möglichkeit der Aufgabenerbringung durch Private in einigen Gesetzen ausdrücklich geregelt (vgl. z.B. § 1 FStrPrivFinG, § 16 Krw-/AbfG, § 18 a WHG). Die bisherigen Erfahrungen in Deutschland haben gezeigt, dass ÖPP-Projekte mit den geltenden vergaberechtlichen Vorschriften gut verwirklicht werden können.

2. Wahl des Vergabeverfahrens

Frage 2: Nach Auffassung der Kommission wird die Umsetzung des wettbewerblichen Dialogs in einzelstaatliche Rechtsvorschriften den betroffenen Parteien ein Verfahren an die Hand geben, das sich ganz besonders für die Vergabe öffentlicher Aufträge in Zusammenhang mit der Einrichtung einer ÖPP

auf Vertragsbasis eignet und gleichzeitig die Grundrechte der Wirtschaftsteilnehmer wahrt. Stimmen Sie dem zu? Falls nein, warum nicht?

Der wettbewerbliche Dialog ist ein Verfahren, das die neuen europäischen Vergaberechtsrichtlinien neu eingeführt haben. Das Verfahren wurde auf der Grundlage theoretischer Überlegungen entwickelt; praktische Erfahrungen mit diesem Instrument gibt es bislang noch nicht. Der wettbewerbliche Dialog ist außerdem ein Verfahren, dessen Einführung den Mitgliedsstaaten freisteht.

Die Bundesregierung hält es keineswegs für ausgeschlossen, dass das Verfahren des wettbewerblichen Dialogs für die Durchführung bestimmter ÖPP ein mögliches geeignetes Verfahren darstellt. Die Frage nach seiner besonderen Eignung für ÖPP ist jedoch verfrüht. Aus deutscher Sicht müssen zunächst die Umsetzung dieses neuen Instruments durch die Mitgliedstaaten sowie erste praktische Erfahrungen abgewartet werden, bevor eine genauere Bewertung des wettbewerblichen Dialogs möglich ist.

Wenn der wettbewerbliche Dialog das einzige geeignete Verfahren für ÖPP wäre, hieße dies zudem, dass ÖPP-Projekte bislang nicht zufriedenstellend hätten realisiert werden können. In Deutschland wie in anderen Ländern wurden jedoch auch unter dem bislang geltenden Vergaberecht ÖPP ohne Probleme durchgeführt. Insbesondere stellt das Verhandlungsverfahren mit vorgeschaltetem EU-weitem Teilnahmewettbewerb aus deutscher Sicht ein Verfahren dar, das bei vielen ÖPP in Betracht kommt und mit dem gute Erfahrungen gemacht worden sind. Das Verhandlungsverfahren unterliegt bestimmten Voraussetzungen, die in der Richtlinie 2004/18/EG niedergelegt sind. Unter den genannten Voraussetzungen dürfen öffentliche Auftraggeber auf das Verhandlungsverfahren jedoch ohne weiteres zurückgreifen. Die Richtlinien gehen davon aus, dass in diesen Fällen die anderen Verfahren ungeeignet sind oder sich als ungeeignet erwiesen haben (vgl. Art. 30 Abs. 1 a) der RL 2004/18/EG) und es daher die Flexibiltät des Verhandlungsverfahrens erfordert.

Die Bundesregierung geht hier nicht von so strengen Voraussetzungen aus wie dies die Kommission tut. Das Verhandlungsverfahren ist nicht auf solche wenigen Sonderfälle beschränkt, in denen Art oder Umfang der Arbeiten schlechthin unwägbar sind (z.B. Bauen auf archäologischem Grund). Vielmehr kommt es auch bei öffentlichen Aufträgen in Betracht, bei denen die rechtliche oder finanztechnische Konstruktion sehr vielschichtig ist und zudem Teil des Angebots sein soll, wie dies bei umfangreicheren ÖPP häufig der Fall ist. In diesen Fällen ist die Leistung nicht hinreichend eindeutig und erschöpfend beschreibbar, um eine einwandfreie Preisermittlung zu ermöglichen. Der Auftraggeber kann also die vertraglichen Spezifikationen im Vorfeld noch nicht genau festlegen .

Außerdem ist der wettbewerbliche Dialog an strenge Voraussetzungen geknüpft. Er ist nur bei „besonders komplexen“ Leistungen zulässig, wie es in Deutschland z.B. der Neubau des Flughafens Berlin – Schönefeld wäre. Es muss für den öffentlichen Auftraggeber objektiv unmöglich sein, die Mittel zu bestimmen, die seinen Bedürfnissen gerecht werden, oder zu beurteilen, was der Markt bieten kann (vgl. Erwägungsgrund 31 der Richtlinie 2004/18/EG). Es ist zumindest fraglich, ob diese Voraussetzungen bei ÖPP-Projekten wie z.B. dem Ausbau eines Autobahnabschnitts oder dem Betrieb einer Schule erfüllt sind. Zudem wirft der urheberrechtliche Schutz der vorgeschlagenen innovativen Lösungen Probleme auf. Der Gewinn an Flexibilität gegenüber dem Verhandlungsverfahren ist fraglich.

Frage 3: Sehen Sie in Bezug auf diese Aufträge neben der Wahl des Vergabeverfahrens andere Punkte, die mit dem Gemeinschaftsrecht über öffentliche Aufträge in Konflikt stehen könnten? Wenn ja, nennen Sie diese und begründen Sie!

Es gibt in Deutschland im Bereich von ÖPP keine Regelungen oder Praktiken, die gegen Gemeinschaftsrecht verstoßen.

3. Anforderungen des Primärrechts an Dienstleistungskonzessionen, Aufträge unterhalb der Schwellenwerte und nicht prioritäre Dienstleistungen (Rz. 29 ff.)

In den Rz. 28 ff., insbesondere 30 ff. legt die Kommission dar, welche Anforderungen das Primärrecht ihrer Ansicht nach an die Ausschreibung von Dienstleistungskonzessionen stellt. Die Kommission leitet insbesondere aus den primärrechtlichen Grundsätzen der Gleichbehandlung und Transparenz sehr detaillierte Anforderungen ab.

Die Bundesregierung hält dies nicht für zwingend und hat starke Zweifel, dass aus dem Primärrecht so detaillierte Anforderungen hergeleitet werden können. Das Primärrecht kann nach Ansicht der Bundesregierung nicht dergestalt ausgelegt werden, dass bei Dienstleistungskonzessionen, die von den vergaberechtlichen Richtlinien nicht erfasst sind, letztlich die gleichen Anforderungen gelten wie bei öffentlichen Aufträgen. So detaillierte Anforderungen werden auch durch die bisherige Rechtsprechung des EuGH nicht getragen. In der Rechtssache *Telaustria* (C-324/98) hat der Gerichtshof festgestellt, dass bei Dienstleistungskonzessionen die primärrechtlichen Grundsätze der Nichtdiskriminierung und der Transparenz gelten und der Auftraggeber kraft der Verpflichtung zur Transparenz zugunsten potenzieller Bieter einen **angemessenen Grad von Öffentlichkeit** sicherstellen muss, der den Dienstleistungsmarkt dem Wettbewerb öffnet und die Nachprüfung ermöglicht, ob die Vergabeverfahren unparteiisch durchgeführt wurden. Es wurde vom EuGH jedoch nicht festgestellt, welche konkreten vom Auftraggeber zur Herstellung der Transparenz zu treffen sind (wie z.B. vorherige Bekanntmachung der Absicht der Konzessionserteilung und der Regeln für die Auswahl). In der Rechtssache *Deutsche Bibliothek* hat der EuGH schließlich lediglich festgestellt, dass Konzessionsverträge über von der Richtlinie 92/50/EWG grundsätzlich erfasste Dienstleistungen von dieser Richtlinie ausgeschlossen sind.

Zudem nimmt die Kommission in der Fußnote 34 an, dass dieselben Grundsätze auch für sogenannte nicht prioritäre Dienstleistungen (vgl. Anhang IIB der RL 2004/18/EG bzw. Anhang XVIIB der RL 2004/17/EG) und Aufträge unterhalb der Schwellenwerte gelten. Auch dem kann die Bundesregierung nicht beipflichten. Dienstleistungskonzessionen, nicht prioritäre Dienstleistungen und Aufträge unterhalb der Schwellenwerte können nicht pauschal über einen Kamm geschert werden. Insbesondere nicht prioritäre Dienstleistungen sind schon deswegen anders zu behandeln, als sie - anders als z.B. Dienstleistungskonzessionen - in den Vergaberichtlinien geregelt sind. Auf das Primärrecht kann daher bei diesen Dienstleistungen nicht uneingeschränkt zurückgegriffen werden. Die Vergaberichtlinien sehen in den Artikeln 35 Abs. 4 iVm. 21 RL 2004/18/EG und 43 iVm. 32 RL 2004/17/EG für nicht prioritäre Dienstleistungen ausdrücklich nur eine Verpflichtung zur Ex-post-Transparenz vor.[1] Angesichts dieser expliziten und differenzierten Entscheidung im Sekundärrecht ist es daher sinnwidrig, aus dem Primärrecht eine Verpflichtung zur vorherigen Bekanntmachung zu folgern, wie dies die Kommission in Rz. 30 tut. Die differenzierte Behandlung der verschiedenen Dienstleistungen in den Anhängen II A und B bzw. XVII A und B wäre damit hinfällig.

Aufträge unterhalb der Schwellenwerte unterfallen den Vergaberichtlinien zwar nicht. Es darf aber auch hier die Wertung, die der europäische Gesetzgeber mit der Festlegung eines Schwellenwertes getroffen hat, nicht unterlaufen werden. Die Auslegung des Primärrechts darf nicht dazu führen, dass für unterschwellige Aufträge letztlich die gleichen Regeln gelten und die Schwellenwerte damit sinnlos werden. Das Urteil des EuGH in der Sache *Vestergaard* stützt die Ansicht der Kommission hier nicht. Dieses Urteil begründet jedenfalls keine Bekanntmachungspflicht bzw. die Erforderlichkeit förmlicher Regeln. Denn in dem dem Urteil zugrundeliegenden Fall ging es um die europarechtliche Zulässigkeit einer Leistungsbeschreibung, die eine bestimmte nationale Marke forderte, also um einen klaren Verstoß gegen die Dienstleistungsfreiheit und das Diskriminierungsverbot (EuGH, Rechtssache C-59/00 – Vestergaard, Rz. 24, 26). Der Gerichtshof hat in der Entscheidung aber auch klargestellt, dass die strengen besonderen Verfahrensvorschriften, die in den Richtlinien niedergelegt sind, im Fall öffentlicher Aufträge von geringem Wert nicht angemessen sind (vgl. EuGH, Vestergaard, Rz. 19).

Frage 4: Haben Sie bereits einmal ein Verfahren zur Vergabe einer Konzession in der Europäischen Union organisiert, daran teilgenommen bzw. ein solches organisieren oder daran teilnehmen wollen? Welche Erfahrungen haben Sie gemacht?

[1] Vgl. Art. 21 der RL 2004/18/EG: Aufträge über Dienstleistungen gemäß Anhang II Teil B unterliegen nur Artikel

Von Seiten der befragten Wirtschaftsverbände wurden im Zusammenhang mit der Vergabe und Abwicklung von Konzessionsverträgen positive Erfahrungen geschildert.

Frage 5: Halten Sie das derzeitige Gemeinschaftsrecht für präzise genug, um die konkrete und effektive Teilnahme von Gesellschaften oder Gruppierungen aus anderen Staaten an den Konzessionsvergabeverfahren sicherzustellen? Sind Sie der Ansicht, dass in dieser Hinsicht normalerweise ein tatsächlicher Wettbewerb herrscht?

Das derzeitige Gemeinschaftsrecht gewährleistet aus Sicht der Bundesregierung die diskriminierungsfreie Beteiligung ausländischer Bieter an Konzessionsverfahren. Es bestehen keine Anhaltspunkte, dass in diesem Bereich kein Wettbewerb herrscht. In diesem Sinne äußerten sich auch die befragten Wirtschaftsteilnehmer.

Im übrigen weist die Bundesregierung darauf hin, dass die Tatsache, wie hoch der Anteil der ausländischen Unternehmen im Bereich von Dienstleistungskonzessionen ist, nicht als Gradmesser für das Bestehen von Wettbewerb bzw. als Rechtfertigung für zusätzliche gemeinschaftsrechtliche Regelungen herangezogen werden kann. Auch in den von den EG-Vergaberichtlinien erfassten Bereichen ist der Anteil grenzüberschreitender Bieter gering. Es gibt verschiedenste (tatsächliche) Gründe, wieso sich Unternehmen um öffentliche Aufträge oder Konzessionsverträge in anderen Mitgliedstaaten nur in beschränktem Maße bewerben (mangelndes Interesse, höhere Kosten aufgrund von Übersetzungen etc.). Dies gilt in gleichem Maße sowohl für durch Vergaberichtlinien geregelte öffentliche Aufträge als auch für diesen Richtlinien nicht unterliegende Dienstleistungskonzessionen.

23 und Artikel 35 Absatz 4.

4. Notwendigkeit zusätzlicher Regelungen für Dienstleistungskonzessionen und ÖPP allgemein

Frage 6: Halten Sie einen Vorschlag für einen gemeinschaftlichen Rechtsakt zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe für wünschenswert?

Die Bundesregierung hält zusätzliche Regelungen für nicht erforderlich. Dies gilt sowohl für den Bereich der Dienstleistungskonzessionen als auch für ÖPP auf vertraglicher Basis allgemein. In diesem Zusammenhang möchte die Bundesregierung daran erinnern, dass die Frage der normativen Regelung von Dienstleistungskonzessionen im Rahmen der Verhandlungen zum Legislativpaket diskutiert wurde, eine Einbeziehung von Dienstleistungskonzessionen in das Vergaberecht aber letztlich abgelehnt wurde. Die Bundesregierung ist daher erstaunt, dass nur wenige Tage nach dem Inkrafttreten der neuen Richtlinien erneut der Vorschlag gemacht wird, Dienstleistungskonzessionen besonderen gemeinschaftsrechtlichen Regelungen zu unterziehen.

Angesichts des in Artikel 5 Abs. 2 EGV und Art. 9 der europäischen Verfassung verankerten Subsidiaritätsprinzips besteht eine Kompetenz der Gemeinschaft nur insoweit, als die mit den verfolgten Maßnahmen angestrebten Ziele auf der Ebene der Mitgliedstaaten nicht ausreichend verwirklicht werden können. Vor diesem Hintergrund besteht eine Notwendigkeit gemeinschaftsrechtlicher Regelungen der Vergabe von Dienstleistungskonzessionen nicht. Ein Regelungsbedürfnis auf gemeinschaftlicher Ebene hat die Kommission in dem Grünbuch auch nicht dargelegt. Auch die der Bundesregierung übersandten Stellungnahmen sowohl von Seiten öffentlicher Auftraggeber als auch von Seiten der Wirtschaft haben nicht gezeigt, dass ein solches Bedürfnis besteht.

Eine Kompetenz zum Tätigwerden der Gemeinschaft besteht nur, wenn dies für die Realisierung der Grundfreiheiten und des Binnenmarktes notwendig ist. Dass sich größere Freiheiten für Unternehmen ergeben würden, im Binnenmarkt tätig zu sein, wenn zusätzliche Regeln geschaffen würden, leuchtet jedoch nicht ein. Es ist eher davon auszugehen, dass die bestehenden Freiräume durch gemeinschaftsrechtliche Regelungen beschränkt, die Bildung von ÖPP verkompliziert und behindert und die Grundfreiheiten dadurch letztlich sogar eingeengt würden.

Eine klare, einheitliche Definition des Konzessionsbegriffs, der eine Abgrenzung der verschiedenen Konzessionsarten in den einzelnen Mitgliedsstaaten ermöglichen würde, besteht nicht. Es gibt Konzessionen unterschiedlichster Art, bei denen nicht klar ist, ob sie unter den Dienstleistungskonzessionsbegriff der neuen Richtlinien fallen und bei denen sich eine einheitliche Behandlung verbietet (vgl. z.B. Wegekonzessionen im Energiebereich, Schankkonzessionen für Gaststätten, Taxikonzessionen). Auch durch die Mitteilung der Kommission zu Auslegungsfragen im Bereich Konzessionen im Gemeinschaftsrecht wurden diese Fragen nicht geklärt. Zudem reicht der Begriff der Konzession – je nach Auslegung – weit in den Bereich des öffentlichrechtlichen Zulassungsrechts hinein. Auch im Grünbuch wird nicht deutlich, welche Konzessionen von den Aussagen der Kommission erfasst sind: Teilweise ist von Dienstleistungskonzessionen die Rede, teilweise aber auch von Konzessionen allgemein.

Die Bundesregierung ist zudem nicht überzeugt, dass eine zusätzliche Regulierung, deren Notwendigkeit und Sinnhaftigkeit bislang nicht dargelegt wurde, das erwünschte Ziel der Kommission (stärkere Beteiligung ausländischer Unternehmen an Dienstleistungskonzessionen und damit stärkere Realisierung des Binnenmarktes) erreichen würde. Eine etwaige Zurückhaltung ausländischer Marktteilnehmer hat andere Ursachen als fehlende Regelungen (s.o.) Auch die Vergaberichtlinien haben bislang nicht zu einer stärkeren grenzüberschreitenden Vergabe von Aufträgen geführt. Die Bundesregierung befürchtet, dass weitere gemeinschaftsrechtliche Regeln im Gegenteil eher zu einer Überregulierung und regulatorischen Last führen. Dies würde die Initiative und das Engagement im Hinblick auf neue innovative Kooperationen zwischen öffentlicher Hand und privatem Sektor eher lähmen und die Bildung von ÖPP letztlich behindern.

Unzulänglichkeiten bei der Anwendung des geltenden Rechts dürfen nicht als Rechtfertigung für zusätzliche Regelungen genommen werden. Sofern in Einzelfällen aufgrund einer Nichtbeachtung vergaberechtlicher Regelungen kein ausreichender Wettbewerb stattgefunden hat, liegt dies nicht an unzureichenden Regeln, sondern an deren mangelhafter praktischer Umsetzung und Befolgung. Dem kann jedoch durch konsequente Anwendung des Vergaberechts beigekommen werden.

Frage 7: Allgemeiner gefragt: Wenn Sie ein neues Gesetzgebungsvorhaben der Kommission für erforderlich halten, gibt es dann objektive Gründe dafür, in diesem Rechtsakt sämtliche ÖPP auf Vertragsbasis zu behandeln und sie ein und demselben Regelwerk für die Vergabe zu unterwerfen, ganz gleich ob die Vorhaben als öffentliche Aufträge oder als Konzessionen einzustufen sind?

Nein. Dies ergibt sich bereits aus der negativen Beantwortung der **Frage 6**. Ein eigenes gemeinschaftsrechtliches Regelwerk für ÖPP stünde zudem großen Schwierigkeiten gegenüber, da es keine feste Definition für ÖPP gibt und diese in den unterschiedlichsten Erscheinungsformen auftreten. Angesichts der auch erwünschten schnellen Entwicklung und kreativen Möglichkeiten im Bereich von Kooperationen zwischen öffentlicher Hand und privatem Sektor würden gesetzliche Regelungen schnell veralten und sich als normativer Hemmschuh erweisen. Die Bundesregierung hält es daher für schädlich, die Entwicklung von ÖPP durch zusätzliche gesetzliche Regelungen zu beschränken. Die geltenden Regeln sind ausreichend, um die vergaberechtlichen Fragen im Zusammenhang mit ÖPP zu lösen.

Als hilfreich würde es die Bundesregierung dagegen ansehen, wenn die Kommission eine Art Handreichung oder Handbuch erarbeiten (lassen) würde, in dem - aufbauend auf den Antworten der Mitgliedstaaten und sonstigen interessierten Kreisen - verschiedene Formen von ÖPP und die vergaberechtlichen Konsequenzen dargestellt werden. Darin könnte z.B. die Abgrenzung zwischen Baukonzession und Bauauftrag präzisiert werden.

5. Behandlung Privat initiierter ÖPP

Aus den Ausführungen der Kommission in den Rz. 37 ff. wird nicht ganz deutlich, was genau mit privat initiierten ÖPP gemeint ist. Privat initiierte ÖPP mit eigenen gesetzlich niedergelegten Verfahren wie offenbar in Italien und Spanien (vgl. Fn. 37 des Grünbuchs) gibt es in Deutschland nicht. Natürlich gibt es Fälle, in denen der Anstoß für ein Projekt vom privaten Sektor kommt. Sofern es sich um einen öffentlichen Auftrag handelt, der unter das Vergaberechts fällt, muss der öffentliche Auftraggeber auch in diesen Fällen ein normales Vergabeverfahren durchführen. Die Bundesregierung sieht allerdings wie die Kommission das Problem, dass die grundsätzlich wünschenswerte Initiative privater Unternehmen, Vorschläge für ÖPP-Projekte zu machen, möglicherweise dadurch gehemmt wird, dass im Rahmen einer Ausschreibung ein anderes Unternehmen den Zuschlag erhält und die investierte Zeit und Mühe umsonst war. Die Bundesregierung wäre daher an Vorschlägen der Kommission interessiert, wie öffentliche Auftraggeber unter dem geltenden europäischen Vergaberecht die Initiative Privater in diesen Fällen honorieren können,. Dies gilt ebenso für Vorschläge der KOM, wie das Know–how potentieller späterer Verfahrensteilnehmer bereits in der Vorbereitungsphase von ÖPP (nicht nur privat initiierter) unter Beachtung des Gleichbehandlungsgebotes nutzbar gemacht werden kann.

Frage 8: Ist Ihrer Erfahrung nach der Zugang der ausländischen Akteure zu privat initiierten ÖPP gewährleistet? Für den Fall, dass die Vergabestellen zur Initiative aufrufen, wird dieser Aufruf dann angemessen bekannt gemacht, so dass alle interessierten Akteure Kenntnis davon haben können? Wird für die Ausführung des ausgewählten Projekts ein Auswahlverfahren auf Basis eines effektiven Wettbewerbs organisiert?

Ja, für privat initiierte ÖPP gelten in Deutschland keine Sonderregeln (s. Vorbemerkung). Sie werden wie andere Aufträge, die unter das Vergaberecht fallen, ausgeschrieben.

Frage 9: Wie könnte Ihrer Auffassung nach die Entwicklung privat initiierter ÖPP in der Europäischen Union unter Wahrung der Grundsätze der Transparenz

und der Gleichbehandlung und ohne Verstoß gegen das Diskriminierungsverbot gewährleistet werden?

Da privat initiierte ÖPP wie sonstige ÖPP behandelt werden, werden bei Einhaltung der bestehenden Regeln auch bei privat initiierten ÖPP die Grundsätze der Transparenz und Gleichbehandlung gewahrt.

6. Vertragliche Rahmenbedingungen von ÖPP

In den Rz. 44 ff. macht die Kommission Ausführungen zu den vertraglichen Rahmenbedingungen von ÖPP. Bei diesbezüglichen Vergaben ist aus Sicht der Bundesregierung darauf zu achten, dass keine Anforderungen gestellt werden, die ÖPP in der Praxis unausführbar machen und sie von vornherein zum Scheitern verurteilen. Die Ausführungen der Kommission erscheinen hier zum Teil realitätsfern. Zwar ist aus vergaberechtlicher Sicht wünschenswert, wenn die vertraglichen Rahmenbedingungen eines Projekts im Voraus so detailliert wie möglich feststehen – in der Praxis wird dies in vielen Fällen aber kaum machbar sein. Bei so komplexen Projekten, wie es ÖPP häufig sind, ist es in der Praxis kaum möglich, Vertragsbedingungen zu entwickeln, die alle nur irgendwie denkbaren Gegebenheiten zu jedem möglichen Zeitpunkt erfasst. Häufig wird im Zeitpunkt des Aufrufs zum Wettbewerb noch nicht in allen Einzelheiten abschließend feststehen, wie das Projekt verlaufen wird. Dies wird gerade in Fällen so sein, in denen das Verhandlungsverfahren in Betracht kommt und genau aus diesem Grund ein geeignetes Verfahren ist. Die Einzelheiten der Vertragsdurchführung, insbesondere auch der Risikoaufteilung und der Finanzierungsmodalitäten, sind dann Gegenstand der Verhandlungen und stehen erst nach deren Abschluss fest.

Bei ÖPP handelt es sich in der Regel um langfristige Projekte, bei denen eine gewisse Flexibilität bestehen muss, um zu verhindern, dass sie wirtschaftlich sinnlos werden. Die ÖPP-Beziehungen müssen sich weiterentwickeln – wie die Kommission in Rz. 47 richtig bemerkt - , um sich an Veränderungen des makroökonomischen oder technischen Umfelds anzupassen. Nicht alle Änderungen können nach Ansicht der Bundesregierung aber durch

Preisanpassungs- oder Revisionsklauseln vorhergesehen werden. Auch darüber hinaus sind nachträgliche einvernehmliche Änderungen der vertraglichen Beziehungen der Partner nach unserer Ansicht möglich, sofern sie im Zeitpunkt der Vergabe nicht vorhersehbar waren und die Änderungen nicht dazu dienen, die Grundsätze von Transparenz und Gleichbehandlung zu umgehen. Denn diese Änderungen beurteilen sich grundsätzlich nach Vertragsrecht, unter gleichzeitiger Beachtung des nationalen Haushaltsrechts. Dass solche Änderungen nur möglich sein sollen, wenn dies aus Gründen der öffentlichen Ordnung, Sicherheit oder Gesundheit erforderlich ist – wie die Kommission in Rz. 49 behauptet, stellt aus unserer Sicht zu hohe Anforderungen, die durch das Gemeinschaftsrecht nicht gerechtfertigt sind. Art. 46 EGV, den die Kommission zur Begründung ihrer Auffassung in Fn. 43 zitiert, gibt hier nach unserer Ansicht nach nicht den Maßstab vor, da es nicht um den Zugang zu einem öffentlichen Auftrag geht, sondern um Modifikationen einer bereits bestehenden vertraglichen, privatrechtlichen Beziehung.

Die Bundesregierung hält es insgesamt für wichtig, bei der Beurteilung von Vergabeverfahren im Zusammenhang mit ÖPP nicht zu formalistisch vorzugehen, sondern neben den Prinzipien der Gleichbehandlung und Transparenz, die natürlich nicht missachtet werden dürfen, auch die Grundsätze der Wirtschaftlichkeit und Sparsamkeit von ÖPP im Auge zu behalten. Dies gebietet der Grundsatz der Verhältnismäßigkeit. Auch die Kommission betont in Rz. 46 die Notwendigkeit, das wirtschaftliche und finanzielle Gleichgewicht des Projekts zu gewährleisten. Würde jede denkbare Vertragsänderung oder –weiterentwicklung aber mit einer erneuten Ausschreibungspflicht verbunden, wäre die für das Gelingen von ÖPP-Projekten auch erforderliche Kontinuität in Gefahr. Ob eine Ausschreibungspflicht besteht, ist eine Einzelfallentscheidung (vgl. auch Antwort zu Frage 10).

Frage 10: Welche Erfahrungen haben sie in der Phase im Anschluss an die Auswahl des privaten Partners im Rahmen von ÖPP auf Vertragsbasis gemacht?

Nach dem Zuschlag gilt nach unserer Ansicht grundsätzlich kein Vergaberecht mehr, sondern Zivilrecht. Zwar gibt es Fälle, wo eine Änderung der Vertragsbedingungen dem Abschluss eines neuen Vertrages gleichkommt und daher neu auszuschreiben ist. Die Aussage, dass jede inhaltliche Änderung in Bezug auf den Vertragsgegenstand dem

Abschluss eines neuen Vertrages gleichzusetzen ist, ist aus unserer Sicht aber zu weitgehend und zu pauschal. Es muss vielmehr in jedem Einzelfall geprüft werden, ob die Änderung dergestalt ist, dass sie wie ein neuer Vertrag zu behandeln sind.

Sofern sich die Kommission zur Bekräftigung ihrer Ansicht, welche Anforderungen sich aus dem Gemeinschaftsrecht an die Phase nach Auswahl des privaten Partners ergeben, auf Rechtsprechung des EuGH stützt, sind diese Verweise häufig ungenau. So folgt aus Rz. 54 der Rechtssache C-87/94 (Kommission gegen Belgien – Bus Wallons) kein Verbot jeglicher Intervention nach Auswahl des privaten Partners (vgl. Rz. 42 und Fn. 38 des Grünbuchs). Dort heisst es: „Das **Verfahren zum Vergleich der Angebote** musste somit in jedem Abschnitt sowohl den Grundsatz der Gleichbehandlung der Bieter als auch den Grundsatz der Transparenz wahren, damit alle Bieter **bei der Aufstellung ihrer Angebote** über die gleichen Chancen verfügen.“ Diese Aussage bezieht sich auf die Phase des eigentlichen Vergabeverfahrens, **vor** der Auswahl des privaten Partners. Auch in der zitierten Rechtssache C-243/89 (Kommission gegen Dänemark – Storebaelt-Brücke) ging es nicht um Änderungen nach dem Zuschlag. Der EuGH hat in der Rechtssache C-337/98 (Kommission gegen Frankreich, Rz. 44 ff.) weder festgestellt, dass im Verlauf einer ÖPP vorgenommene Änderungen generell den Grundsatz der Gleichbehandlung in Frage stellen würde, noch dass **jede inhaltliche Änderung** in Bezug auf den Vertragsgegenstand dem Abschluss eines neuen Vertrages gleichzusetzen sei (so Grünbuch, Rz.49, Fn. 42, 44). Der EuGH betont in der Entscheidung „Kommission gegen Frankreich“ (Rz. 44) vielmehr, dass es darauf ankommt, ob die nach dem dem Abschluss der ersten Verhandlungen eingeleiteten Verhandlungen **wesentlich andere Merkmale** aufwiesen als die zuvor geführten und damit den Willen der Parteien zur **Neuverhandlung wesentlicher Vertragsbestimmungen** erkennen ließen. In dem zitierten Verfahren C337/98 konnte die Kommission dies nicht darlegen. Der EuGH wies die Vertragsverletzungsklage der Kommission gegen Frankreich ab.

Frage 11: Sind Ihnen Fälle bekannt, in denen die Ausführungsbedingungen, einschließlich der Klauseln zur Anpassung im Zeitverlauf, eine diskriminierende Wirkung entfalten konnten oder eine ungerechtfertigte Behinderung der

Dienstleistungs- oder Niederlassungsfreiheit darstellten? Falls ja, bitte beschreiben Sie die Art der aufgetretenen Probleme!

Grundsätzlich nein. Die Ergebnisse der von der Task-Force begleiteten Pilotprojekte (s. Vorbemerkung) bleiben abzuwarten. Ein befragter Wirtschaftsverband nannte in diesem Zusammenhang sog. „Evergreen“-Klauseln (womit anscheinend Klauseln gemeint sind, die vom Auftragnehmer den jeweils neusten technischen Stand einfordern) und automatische Vertragsverlängerungsklauseln.

Frage 12: Sind Ihnen Praktiken oder Mechanismen zur Bewertung von Angeboten bekannt, die eine diskriminierende Wirkung haben?

Nein.

Frage 13: Sind Sie wie die Kommission der Auffassung, dass bestimmte Interventionsklauseln in Bezug auf die Grundsätze der Transparenz und der Gleichbehandlung problematisch sein können? Sind Ihnen andere Typen von Klauseln bekannt, deren Anwendung zu ähnlichen Problemen führen kann?

Nein. Interventionsklauseln, wonach Fremdkapitalgeber sich für bestimmte Situationen das Recht vorbehalten, einen neuen Projektmanager zu ernennen oder selbst das Projektmanagement zu übernehmen (sog. step-in-rights), sind in der Praxis üblich und unverzichtbar. Anderenfalls wäre die Fremdfinanzierung von ÖPP-Projekten nicht möglich und viele dieser Projekte würden von vornherein scheitern. Finanzinstitute stellen regelmäßig den größten Teil der Finanzierungsmittel einer ÖPP und sind damit am Risiko der ordnungsgemäßen Vertragserfüllung in hohem Maße beteiligt. Ihr Interesse, an der ÖPP beteiligte Partner, die ihre Verpflichtungen nicht mehr ordnungsgemäß erfüllen können, innerhalb einer angemessenen Frist austauschen zu können, ist legitim.

Aus deutscher Sicht führen diese Klauseln in der Praxis nicht zu Problemen. Sie kommen nur in Fällen unvorhergesehener, negativer Verläufe von ÖPP zum Tragen. In der Praxis kommt es nur sehr selten zur Ausübung der Interventionsrechte, da der Austausch „ultima ratio“ ist und zunächst angemessene Nachbesserungsfristen bestehen.

Fraglich ist in diesem Zusammenhang, ob auch Interventionsklauseln, die Teil eines von einem Bieter angebotenen Lösungsvorschlags im Rahmen des wettbewerblichen Dialogs sind, dem Grundsatz der Vertraulichkeit gemäß Art. 29 Abs. 3, 3. Unterabsatz i.V.m. Abs. 6 der Richtlinie 2004/18/EG unterliegen. Hierzu wäre eine klarstellende Auslegung im Kontext einer oben (vgl. Antwort zu Frage 7) angesprochenen Handreichung sinnvoll.

Frage 14: Halten Sie es für erforderlich, dass bestimmte Aspekte der vertraglichen Rahmenbedingungen für ÖPP auf Gemeinschaftsebene geklärt werden? Falls ja, was sollte geklärt werden?

Nein. Das Vertragsrecht fällt, wie die Kommission richtig bemerkt, in die Zuständigkeit der Mitgliedstaaten. Eine Einmischung der Gemeinschaft in diesen Bereich hätte unübersehbare Probleme für das Verhältnis zwischen nationalem und Gemeinschaftsrecht zur Folge. Ein weiterer Grund gegen eine gemeinschaftsrechtliche Klärung vertraglicher Rahmenbedingungen ist die Vielfalt und Verschiedenartigkeit der möglichen vertraglichen Regelungen. Gemeinschaftsrechtliche Vorgaben für vertragliche Rahmenbedingungen würden die Möglichkeiten von ÖPP einengen und unflexibel machen. Zudem ist auch bei diesem Punkt zu beachten, dass die praktischen Erfahrungen mit ÖPP in vielen Mitgliedstaaten noch gering sind.

7. Unteraufträge

Die Rechtslage hinsichtlich der Vergabe von Unteraufträgen ist aus Sicht der Bundesregierung nicht problematisch. Die Kommission hat in dem Grünbuch leider auch nicht deutlich gemacht, wieso aus ihrer Sicht Regeln für die Vergabe von Unteraufträgen notwendig sind, welche rechtlichen Fragen die Vergabe von Unteraufträgen aufwirft (vgl. Rz. 51) und warum diese Fragen auf Gemeinschaftsebene geklärt werden müssen.

Grundsätzlich kann eine Projektgesellschaft im Rahmen einer ÖPP Unteraufträge frei vergeben (wobei bestimmte Sonderregeln bei Baukonzessionen gelten). Wenn sie selbst öffentlicher Auftraggeber ist und es sich bei dem Unterauftrag um einen öffentlichen Auftrag handelt, müssen diese Unteraufträge ausgeschrieben werden.

Aus Sicht der Bundesregierung ist eine Ausschreibung dann nicht erforderlich, wenn der Hauptauftrag ausgeschrieben wurde und der Unterauftrag bereits Teil des Angebots war: Ein öffentlicher Auftraggeber bewirbt sich in einem Ausschreibungsverfahren um einen Auftrag und nimmt in seinem Angebot bereits darauf Bezug, dass er den Auftrag mit einem bestimmten Unterauftragnehmer ausführen wird. In diesem Fall wäre eine isolierte Ausschreibung des Unterauftrags zum einen nicht möglich, weil dies das ursprüngliche Angebot des Hauptauftragnehmers hinfällig machen würde, zum anderen auch überflüssig, weil der Unterauftrag bereits im Rahmen des Hauptangebots bewertet worden ist. Auch eine vorherige „bedingte“ Ausschreibung durch den öffentlichen Auftraggeber als potentiellen Auftragnehmer kommt nicht in Betracht, da eine Ausschreibung einen unbedingten Willen zum Vertragsschluss voraussetzt.

Maßgeblich für die Anwendung des Vergaberechts ist, ob im konkreten Fall ein öffentlicher Auftrag vorliegt. Dies setzt voraus, dass der (Unter-) Auftrag des als öffentlicher Auftraggeber zu qualifizierenden Beschaffenden auf Deckung eines in seinem eigenen Verantwortungsbereich aufgetretenen Beschaffungsbedarfs abzielt. Eine andere Situation liegt daher z.B. vor, wenn ein öffentlicher Auftraggeber aufgrund eines privatrechtlichen Vertrages von einem Privaten beauftragt wird und dann seinerseits einen Unterauftrag vergibt. Denn in diesem Fall erwächst die Notwendigkeit des öffentlichen Auftraggebers, Leistungen im Wege des Nachunternehmereinsatzes an Dritte zu vergeben, nicht dem eigenen Beschaffungsbedarf, sondern aus einer privatrechtlichen vertraglichen Verpflichtung
Hierfür bedarf es jedoch keiner zusätzlichen, differenzierenden Regelungen. Dieses Ergebnis ergibt sich vielmehr bereits aus der Definition des öffentlichen Auftrags. Ohnehin stellt sich die Frage bei der Vergabe von Unteraufträgen durch die als öffentlicher Auftraggeber zu qualifizierende ÖPP-Gesellschaft nicht, weil es hier immer um einen Beschaffungsbedarf der öffentlichen Hand geht.

Frage 15: Sind Ihnen bei ÖPP-Konstruktionen besondere Probleme mit der Vergabe von Unteraufträgen bekannt? Welche?

Nein, s. Vorbemerkung.

Frage 16: Rechtfertigt die Existenz von ÖPP auf Vertragsbasis, die die Übertragung eines Aufgabenpakets an einen einzigen privaten Partner impliziert, Ihrer Auffassung nach, dass ausführlichere Regeln für die Vergabe von Unteraufträgen eingeführt werden und/oder dass der Anwendungsbereich erweitert wird?

Diese Frage ist unklar formuliert. Von welchem Anwendungsbereich gesprochen, dem der Vergaberichtlinien? Die Bundesregierung sieht weder für neue gemeinschaftsrechtliche Regeln noch für eine Erweiterung des Anwendungsbereichs der Vergaberichtlinien Bedarf.

Frage 17: Halten Sie, allgemeiner gesprochen, eine ergänzende Initiative auf Gemeinschaftsebene zur Klärung oder Umgestaltung der Regeln für die Vergabe von Unteraufträgen für erforderlich?

Die Bundesregierung hält eine gemeinschaftliche Initiative zur Klärung oder Umgestaltung der Regeln für die Vergabe von Unteraufträgen – aus den oben genannten Gründen – nicht für erforderlich.

8. Institutionalisierte ÖPP

In den Ziffern 53 ff. des Grünbuchs beschäftigt sich die Kommission mit der Gründung von gemischtwirtschaftlichen Unternehmen, an denen sowohl die öffentliche Hand als auch Private beteiligt sind (sog. institutionalisierte ÖPP). Vergaberechtliche Fragen stellen sich bei solchen Konstellationen unter folgenden Gesichtspunkten: Ist bei der Wahl des privaten Partners eines gemischtwirtschaftlichen Unternehmen Vergaberecht anzuwenden (**dazu unter**

a))? Wann ist ein gemischtwirtschaftliches Unternehmen öffentlicher Auftraggeber (**unter b)**)? Findet auf die Erteilung eines Auftrags an ein gemischt-wirtschaftliches Unternehmen Vergaberecht Anwendung (Inhouse-Problematik) (**unter c)**)? Wie sind Privatisierungen zu beurteilen (**unter d)**)?

a) Die Kommission stellt in Rz. 57 richtig dar, dass der Vorgang der Gründung eines gemischtwirtschaftlichen Unternehmens als solcher nicht in den Anwendungsbereich des Vergaberechts fällt. Vergaberecht findet dann Anwendung, wenn gleichzeitig Aufgaben auf den Privaten übertragen werden, nicht dagegen, wenn der Private eine rein finanzielle Beteiligung an dem Unternehmen hält.

In diesem Zusammenhang bemängelt die Kommission, dass es Fälle gibt, in denen sich gemischtwirtschaftliche Unternehmen an Ausschreibungen beteiligen, bevor ihre Gründung abgeschlossen ist. Dies hält die Kommission für nicht zufriedenstellend. Aus Sicht der Bundesregierung vertritt die Kommission hier eine etwas lebensfremde Sichtweise. Gemischtwirtschaftliche Unternehmen werden in vielen Fällen eigens zu dem Zweck gegründet, eine bestimmte durch einen Auftrag vergebene Aufgabe zu erfüllen. Ihre Gründung würde ins Leere laufen, wenn sie den Auftrag letztlich nicht bekäme. In solchen Fällen, aus rein formalistischen Gründen zu verlangen, dass der Gründungsprozess der Gesellschaft zunächst durchgeführt wird, damit sie sich dann um den Auftrag bewerben kann, und sie ggf. danach wieder aufzulösen, ist wenig praktikabel und widerspricht dem Grundsatz der Wirtschaftlichkeit. Solche Anforderungen bergen viel eher die von der Kommission in Rz. 63 angesprochene Gefahr, dass dann der bereits gegründeten Gesellschaft in Umgehung des Vergaberechts Aufträge zugeschoben werden, um ihrer Gründung überhaupt einen Sinn zu geben. Wichtiger als die Frage, in welchem Gründungsstadium sich das gemischtwirtschaftliche Unternehmen befindet, ist aus Sicht der Bundesregierung, dass vor der Vergabe eines Auftrags an ein gemischtwirtschaftliches Unternehmen überhaupt eine Ausschreibung stattfindet.

b) Ein gemischtwirtschaftliches Unternehmen unterliegt dem Vergaberecht, wenn es öffentlicher Auftraggeber gemäß der Definition in Art. 1 Abs. 9 der RL 2004/18/EG ist, d.h. wenn es zu dem besonderen Zweck gegründet wurde, im Allgemeininteresse liegende Aufgaben nicht gewerblicher Art zu erfüllen und staatlich beherrscht ist. Hier kann fraglich sein, wann ein gemischt-wirtschaftliches Gebilde staatlich beherrscht ist, insbesondere wenn die öffentliche Hand nur Minderheitsgesellschafter ist. Die Bundesregierung würde es daher begrüßen, wenn die Kommission auch zu diesem Punkt in der unter Frage 7 erwähnten Handreichung Stellung nehmen würde.

c) Fraglich ist, unter welchen Voraussetzungen die Erteilung eines Auftrags an ein gemischtwirtschaftliches Unternehmen dem Vergaberecht unterfällt. Der EuGH hat hierzu in der Rechtssache Teckal (C-107/98) festgestellt, dass dann kein öffentlicher Auftrag vorliegt, wenn eine Gebietskörperschaft über den fraglichen Auftragnehmer eine Kontrolle ausübt wie über ihre eigenen Dienststellen und wenn der Auftragnehmer seine Tätigkeit im wesentlichen für die Gebietskörperschaft oder die Gebietskörperschaften verrichtet, die seine Anteile innehaben. Solche Aufträge unterfallen von vornherein nicht dem Vergaberecht. Die Reichweite dieser Rechtsprechung ist in den Einzelheiten noch nicht geklärt. Die Bundesregierung ist aber der Ansicht, dass die Kommission hier von zu engen Voraussetzungen ausgeht, wenn sie meint, dass die Beauftragung eines gemischt-wirtschaftlichen Unternehmens unter keinen Voraussetzungen ein „Inhouse"-Geschäft darstellen kann. Eine so enge Interpretation würde letztlich auch dazu führen, dass institutionalisierte ÖPP gar nicht erst gegründet würden.

Die Beteiligung eines Privaten an einer privatrechtlichen Gesellschaft schließt ein Inhousegeschäft nicht von vornherein aus. Es muss in jedem Einzelfall geprüft werden, ob die vom EuGH in der Rechtssache Teckal aufgestellten Kriterien einschlägig sind. „Kontrolle wie über eine Dienststelle" kann jedenfalls nicht heißen, dass der öffentliche Teil genau die identischen Aufsichtsbefugnisse wie über eine Dienststelle haben muss. Hier kommt es z.B. auf die Stimmverhältnisse innerhalb der Gesellschaft und die Verteilung des wirtschaftlichen Risikos an, aber auch auf die vertraglichen Weisungs- und Einflussmöglichkeiten des konkreten Auftrags. Anhaltspunkte hierfür können z.B. die in Art. 1 Abs. 9 der RL 2004/18/EG niedergelegten Kriterien geben.

d) Verkäufe von Anteilen an Gesellschaften im Eigentum der öffentlichen Hand fallen per se nicht unter das Vergaberecht. Denn hierbei handelt es sich um einen Verkauf, nicht um einen

Einkauf. Anderes gilt wiederum nur dann, wenn mit der Anteilsübertragung eine Aufgabenübertragung verbunden ist und Leistungen eingekauft werden. Die Bundesregierung hält es für unzulässig, hier von einem „Deckmantel der Kapitalübertragung" zu sprechen und Anteilsverkäufen damit von vornherein einen anrüchigen Anstrich zu geben. Es bleibt dabei, dass Kapitalübertragungen grundsätzlich nicht dem Vergaberecht unterliegen und in jedem Einzelfall geprüft werden muss, ob mit der Kapitalübertragung ein öffentlicher Auftrag verbunden ist.

Frage 18: Welche Erfahrungen haben Sie mit der Einrichtung institutionalisierter ÖPP gemacht? Lassen Ihre Erfahrungen Sie zu der Schlussfolgerung gelangen, dass die gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen bei institutionalisierten ÖPP-Konstruktionen eingehalten werden? Falls nein, warum nicht?

Bei ordnungsgemäßer Anwendung des Vergaberechts lassen sich auch vergaberechtliche Probleme im Zusammenhang mit institutionalisierten ÖPP zufriedenstellend lösen.

Frage 19: Halten Sie eine Initiative auf Gemeinschaftsebene für erforderlich, um die Verpflichtungen zu klären oder zu vertiefen, die die öffentlichen Auftraggeber in Bezug auf den Wettbewerb zwischen potenziell an einem institutionalisierten ÖPP-Projekt interessierten Wirtschaftsteilnehmern haben? Falls ja, welche Aspekte halten Sie für besonders wichtig und welche Form sollte eine solche Initiative haben? Falls nein, warum nicht?

Die Bundesregierung hält zusätzliche gemeinschaftsrechtliche Regelungen in diesem Bereich für nicht erforderlich. Eine Handreichung, in der die verschiedenen Situationen im Hinblick auf die Beteiligung von Privaten an gemischtwirtschaftlichen Unternehmen und die vergaberechtlichen Konsequenzen dargestellt werden, könnte hilfreich sein. Eine solche Handreichung sollte jedoch nicht aus rein rechtlicher theoretischer Sicht verfasst werden, sondern praktische Beispiele und Belange berücksichtigen.

Allgemein und unabhängig von den in diesem Grünbuch aufgeworfenen Fragen:

Frage 20: Welche Maßnahmen oder Verfahren behindern in der Europäischen Union die Einrichtung von ÖPP?

Dies ist eine sehr komplexe Frage, deren Beantwortung in Deutschland noch weiterer praktischer Erfahrungen bedarf. Die Bundesregierung möchte sich in Ihrer Stellungnahme gerne auf die vergaberechtlichen Aspekte von ÖPP beschränken. Was das Vergaberecht angeht, ist die Bundesregierung der Ansicht, dass angesichts der ohnehin schon sehr komplizierten Regeln weitere rechtliche Vorschriften die Einrichtung von ÖPP behindern würde. Die vergaberechtlichen Fragestellungen von ÖPP lassen sich mit dem geltenden rechtlichen Instrumentarium zufriedenstellend lösen. Maßgeblich ist, dass diese Regeln eingehalten werden.

Frage 21: Kennen Sie andere ÖPP-Formen aus Drittländern? Kennen Sie aus Ihren Erfahrungen in solchen Ländern bewährte Verfahrensweisen, die auch für die EU beispielgebend sein könnten? Falls ja, welche?

ÖPP-Formen oder bewährte Verfahrensweisen aus Drittländern sind nicht bekannt.

Frage 22: Denken Sie dass es nützlich wäre, im Hinblick auf den großen Investitionsbedarf einzelner Mitgliedstaaten zum Erreichen einer sozialen und dauerhaften Entwicklung gemeinsam und in regelmäßigen Abständen über diese Fragen unter den betroffenen Akteuren nachzudenken und bewährte Verfahrensweisen auszutauschen? Sollte die Kommission nach Ihrer Auffassung ein derartiges Netzwerk aufbauen?

Einen Informations- und Erfahrungsaustausch bewertet die Bundesregierung grundsätzlich positiv. Dies gilt insbesondere, als manche Mitgliedstaaten wie z.B. Großbritannien im Bereich ÖPP bereits intensive und langjährige Erfahrungen haben, während das Phänomen ÖPP in anderen Mitgliedstaaten erst am Anfang seiner Entwicklung steht. Es ist jedoch wichtig, dass ein solches Netzwerk keinen umfangreichen und bürokratischen Apparat schafft. Die (freiwillige) Verlinkung von nationalen Netzwerken oder Kompetenzzentren bietet sich an. Das Netzwerk sollte sich nicht auf rein theoretische Fragen beschränken, sondern in der Praxis mit ÖPP Beteiligten die Möglichkeit zum Austausch bieten. Die Bundesregierung würde weitere Vorschläge der Kommission zu einem solchen Netzwerk begrüßen.

20. Juli 2004

Beitrag der Senatsverwaltung für Finanzen des Landes Berlin zur Konsultation „Grünbuch zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen“

Mit dem Grünbuch zu öffentlich-privaten Partnerschaften (ÖPP) hat die Kommission eine Diskussion darüber eröffnet, ob die derzeitigen Vorschriften verbessert werden sollten, um die Entwicklung von ÖPP zu begleiten. Das Grünbuch enthält keine konkreten Vorschläge zur Modifizierung bestehender Vorschriften.

Grundsätzliche Anmerkung:

Die geltenden Verdingungsordnungen sind für die Durchführung von ÖPP zu starr. Ein Merkmal von ÖPP ist, dass die ihr zugrunde liegenden Einzelleistungen zu Beginn z.T. nur relativ global beschreibbar sind und oftmals erst durch Ideenfindungsprozesse und gemeinsame Entwicklung detailliert werden können.

Die Kommission versucht diesen Prozessen dadurch zu entsprechen, dass sie einen wettbewerblichen Dialog einer förmlichen Ausschreibung vorschalten würde. Offenbar vertritt sie dann jedoch die Auffassung, dass im weiteren Verfahren allein die Verdingungsordnungen in ihrer derzeit geltenden und unbedingten Form anzuwenden sind.

Ein wettbewerblicher Dialog ist grundsätzlich zu begrüßen. Allerdings dürfte er nicht mit der erwünschten Offenheit von Seiten der privaten Interessenten geführt werden können, da diese sich als Ideengeber verstehen dürften, Nutznießer ggf. aber Dritte und nicht sie selbst werden könnten. Denn nach dem hier herrschenden Verständnis über das Grünbuch soll der öffentliche Marktpartner als Ergebnis des Dialogs unter Einbezug der ihm nützlichen Erkenntnisse daraus eine konkrete, dann nicht mehr „verhandelbare/wandelbare“ Ausschreibung durchführen. Impulse, die ein Partner des Dialogs einbringt, könnten von einem Dritten aus der Ausschreibung entnommen und in das eigene Angebot eingebracht werden. Hinzu kommt, dass der öffentliche Marktpartner ggf. Gefahr läuft, unbeabsichtigt gegen Urheberrechte zu verstoßen.

Vielmehr sollte eine Ausschreibung mit einer möglichst konkreten ggf. aber nicht abschließenden Zielstellung an den Anfang gesetzt werden, der sich dann mit ausgewählten Bietern der wettbewerbliche Dialog anschließt. Es wäre dann Aufgabe der Vergabestelle, als Ergebnis der Verhandlungen die ÖPP mit dem privaten Partner einzugehen, der aus Sicht der Vergabestelle das interessanteste und auf der verhandelten Grundlage wirtschaftlichste Angebot abgibt. Dies heißt jedoch auch, dass vergaberechtliche Prüfungen nur dann angestrengt werden dürften, wenn Vermutungen einer diskriminierenden oder den allgemeinen Verfahrensregeln wiedersprechenden Vergabe erhärtet vorliegen.

Fragenkomplexe:

Frage 1:

Im Land Berlin erfolgte noch keine Umsetzung einer umfassenden ÖPP. Primär werden Hochbaumaßnahmen mit Dritten bis zu deren Fertigstellung realisiert. Grundlage sind die vom zuständigen Ausschuss des Abgeordnetenhauses von Berlin herausgegebenen vorläufigen Verfahrensregeln, die auf der Grundlage der Landeshaushaltsordnung (LHO) § 7 „Wirtschaftlichkeit und Sparsamkeit" beruhen; vor dem Eingehen einer Partnerschaft ist dem zuständigen Ausschuss die Wirtschaftlichkeit nachzuweisen.

Fragen 2 und 3:

Es ist zweckmäßig, den wettbewerblichen Dialog in nationales Recht umzusetzen. Allerdings wird, wie weiter oben in den „Grundsätzlichen Anmerkungen" dargestellt, ein flexibler Umgang in der Anwendung erwartet.

Fragen 4 bis 7:

Das Land Berlin hat an einem Verfahren zur Vergabe einer Konzession teilgenommen und auch selbst ein entsprechendes Verfahren betrieben. In einem Fall wurde das Vorhaben umgesetzt.

Da oberster Grundsatz jeglicher Verfahren das Diskriminierungsverbot ist, können sich selbstverständlich Gesellschaften oder Gruppierungen auch aus anderen Staaten beteiligen.

Es ist kein weiterer Regulierungsbedarf erkennbar, es sei denn er führt zur Endbürokratisierung und berücksichtigt auch hier den wettbewerblichen Dialog.

Fragen 8 und 9:

Es liegen noch keine Erfahrungen mit privat initiierten ÖPP vor. Es ist nicht erkennbar, warum ausländische Akteure bei privat initiierten ÖPP anders gehandelt werden könnten als nationale Akteure. Werden auf Initiative Privater ÖPP-Vorhaben angestoßen, so unterliegen sie den einschlägigen Bestimmungen der Vorankündigung, und der Ausschreibung durch die Vergabestelle, so dass alle interessierten Akteure Kenntnis davon haben können. Die Grundsätze von Transparenz, Gleichbehandlung und das Diskriminierungsverbot ergeben sich daraus.

Fragen 10 bis 14:

Bei den vom Land Berlin realisierten Projekten handelte es sich um klar umrissene und zeitlich begrenzte Maßnahmen, die keinen Diskriminierungsansatz bieten.

Grundsätzlich muss jedoch angezweifelt werden, dass es in einem sich ständig verändernden Umfeld gelingt, bei einer über Jahre angelegten ÖPP den Vorstellungen der Kommission, die sie mit dem Diskriminierungsverbot verbindet, zu entsprechen; sie führt dazu selbst in Tz. 48 ein durchaus realistisches Beispiel an. Insoweit besteht zwangsläufig die Möglichkeit, dass es zu inhaltlichen Änderungen im Zuge der Partnerschaft kommt. Hieraus einen erneuten Marktwettbewerb (Tz. 49) abzuleiten, scheint aufgrund der damit einhergehenden zeitlichen Komponenten, der Störungen bei der Leistungserfüllung und möglicher Schadensersatzforderungen des privaten Partners nicht angemessen.

Fragen 15 bis 17:

In der Regel wird die Vergabestelle bei komplexeren Aufgaben bereits von sich aus die potenziellen privaten Partner auffordern, die Unterauftragnehmer zu benennen, mit denen sie das gemeinsame Vorhaben realisieren möchten. Daher ist in solchen Fällen der Kreis der Leistungsersteller bereits weitgehend bekannt. Oftmals handelt es sich auch um Bieterkonsortien.

Werden die Aufgaben einem einzigen Vertragspartner übertragen, so ist dieser für die vertragsgemäße Erfüllung in der Gesamtverantwortung. Deshalb werden ihm auch entsprechende Freiheiten bei der Vergabe von Unteraufträgen eingeräumt werden müssen. Abgesehen davon hat jeder öffentliche Partner ein Interesse daran, dass bestimmte Volumina an Unteraufträgen allein deshalb ausgeschrieben werden, damit der regionale Markt die Chance hat, in Bieterverfahren für Unteraufträge einzutreten. Ergänzende Initiativen auf Gemeinschaftsebene werden daher als nicht erforderlich angesehen.

Fragen 18 bis 22:

Erfahrungen über institutionalisierte ÖPP liegen bislang nicht vor. Ein nennenswerter Bedarf dürfte jedoch gegeben sein. Dessen Befriedigung kann dadurch befördert werden, dass die Verfahrensregeln flexibilisiert werden; siehe „Grundsätzliche Anmerkungen“ und die Antworten zum Fragenkomplex 10 bis 14. Dementsprechend wird der Aufbau eines Netzwerks befürwortet.

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20.Juli 2004

Öffentliches Beschaffungswesen
Konsultation „Grünbuch zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen

Sehr geehrte Damen und Herren,

mit Interesse habe ich Ihre Pressemitteilung zu dem o.g. Thema gelesen. Für die Rechtsanwendung würde es sicherlich hilfreich sein, wenn ein Regulierungsrahmen für diese öffentlich-privaten Partnerschaften, insbesondere auch für den Bereich von Dienstleistungskonzessionen, geschaffen würde.

In diesem Zusammenhang würde ich gern noch auf einen weiteren Gesichtspunkt hinweisen, der zunehmend Auswirkungen auf den Wettbewerb hat, aber nicht unmittelbar auf einer öffentlich-privaten Partnerschaft basiert. Es geht um den Austausch von Leistungen zwischen öffentlichen Auftraggebern, die dann zu privaten Unternehmen in Konkurrenz treten.

Die öffentlichen Auftraggeber schreiben Aufträge aus, auf die sich sowohl private Unternehmen, aber auch andere öffentliche „Auftraggeber“ bewerben, weil sie die ausgeschriebene Leistung nicht nur für den eigenen Zuständigkeitsbereich erbringen wollen, sondern darüber hinaus noch Kapazitäten vorhalten, die sie am Markt anbieten. Das klassische Beispiel ist die Abfallentsorgung. Die rein privaten Unternehmen haben in der Regel keine Möglichkeit in einem Wettbewerb einen Auftrag von einem öffentlichen Auftraggeber zu bekommen, sobald sich ein anderer öffentlicher Partner als Auftragnehmer bewirbt, da diese rein öffentlichen Auftragnehmer steuerlich begünstigt sind und erheblich günstiger kalkulieren können. Darüber hinaus tragen sie kein Insolvenzrisiko, wie dies bei einem privaten Unternehmen der Fall ist. Eine rein öffentliche „Partnerschaft“, zum Beispiel zwischen benachbarten Kommunen, die in bestimmten Bereichen durchaus sinnvoll ist, um gemeinsam bestimmte Zielsetzungen zu verfolgen, wird dann problematisch, wenn es um die Vergabe eines Auftrages im Wege eines Wettbewerbes geht. Für die im Wettbewerb stehenden privaten Unternehmen ist es dann praktisch nicht mehr möglich, einen

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vergleichbaren Angebotspreis zu machen. Ein Wettbewerb findet dann eigentlich überhaupt nicht mehr statt.

Ich möchte deshalb anregen, nicht nur die öffentlich-privaten Partnerschaften zur Diskussion zu stellen, sondern auch die o.g. Partnerschaften zwischen öffentlichen Partnern bei dieser Gelegenheit miteinzubeziehen.

Mit freundlichen Grüßen

ohne Unterschrift, da elektronisch versandt
Ingeborg Diemon-Wies
Vorsitzende der Vergabekammer
bei der Bezirksregierung Münster

COM(2004) 327 final

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

Observations by the Central PPP Unit, Department of Finance of IRELAND

Introduction

1. The Central PPP Unit in the Department of Finance is responsible for leading, driving and coordinating the Public-Private Partnership process in Ireland, which is a significant element of Ireland's National Development Plan/Community Support Framework 2000-2006. The principal role of the Central PPP Unit is to provide guidance on best practice in the appraisal and procurement of PPP projects with a particular focus on establishing and providing value for money.

2. The Central PPP Unit welcomes the Green Paper as a positive response to recent development in the European Union and as a constructive contribution by the Commission to the Initiative for Growth in relation to increased investment in infrastructure.

General Comments

3. The Irish authorities are committed to the use of Public-Private Partnerships (cf *Framework for Public Private Partnerships, November 2001,* attached).

4. As well as continuing to develop guidance for Government and other public agencies in the use of PPPs, through the Central PPP Unit and groups established on both a cross-departmental and social partnership basis, the Irish Government has set specific targets for projects financed through Public Private Partnership. These amount to €3.6 billion in total public funding for PPPs, in addition to a target of €1.3 billion for PPPs funded by user charges over the same period, giving a total target for PPP investment of almost €5 billion by 2008. The Government has also established the National Development Finance Agency to advise public bodies on the financing of all capital projects, including PPPs, and, where appropriate, to provide financing.

5. Ireland has gained valuable experience in the use of PPP arrangements, including both public and private funding. Examples which have been procured include development and maintenance of schools, development and operation of toll roads and bridges, development and operation of environmental infrastructure, and operation of light rail. Our observations on the Green Paper are based on this experience.

6. Generally, we do not consider that there is a need for additional legislative initiatives to facilitate the use of PPPs - while ensuring the Treaty principles of equality of treatment, transparency and non-discrimination. We note that if the Commission were minded to consider such action, it would be subject to regulatory impact assessment and we would urge the Commission to ensure any such assessment would be thorough and comprehensive, having regard to the complexity of the sector.

Responses to Questions

Question 1. In broad terms, the types of purely contractual PPPs in Ireland include:
(a) Concessions, which may include a capital injection from the Exchequer towards part of the capital costs or contributions to operational costs (e.g.roads, waste treatment/recovery);
(b) Design, Build, Finance and Operate (e.g. schools, colleges)
(c) Design, Build and Operate (waste water treatment, water supply).
There are also some service contracts, in relation to the operation of a specific asset or set of assets, for a minimum of five years.
Less complex examples that are or have been used in some sectors include Design and Build, and Design, Build and Finance.

It is not clear what is meant by these set-ups being subject to specific supervision (legislative or other) in Ireland. In relation to competition and public procurement, they are subject to the provisions of the Guidelines on Procurement – Competitive Process (the latest version was issued by the Department of Finance in June 2004). More generally, the State Authorities (Public Private Partnership Arrangements) Act, 2002 was enacted to provide legal certainty regarding the powers of State authorities to enter into PPP arrangements for the performance of functions of the State authority. The National Development Finance Agency Act, 2002 established the Agency of the same name to advise State authorities of what are the optimal means of financing public investment projects, to advise authorities on all aspects of financing of projects by means of PPP, and where appropriate to provide financing.

Question 2
At this time, we do not have a conclusive view as to whether, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. We consider that we do not have a sufficient basis on which to form a view at this time. We are aware that there are concerns in the private sector regarding the possible implementation of the new directive, in terms of possible difficulties with the operation of the competitive dialogue procedure and also in relation to the basis for selection of procedure.
The challenge of clearly resolving all issues relating to PPPs at a sufficiently early stage could mean that the competitive dialogue may not be flexible enough to address these issues satisfactorily (as against, say, a transparent, non-discriminatory and competitive negotiated procedure). Following the transposition, we will have to consider whether the use of the competitive dialogue is so well adapted, having regard to the requirements of other policies and legislation – for example, provisions for the protection of employees; and also to the requirements of private finance. (It is noted that, for certain issues, it may be feasible to resolve them at pre-tender stage but at significant additional cost to the bidders – which may be a disincentive to bid and so have negative implications for the overall competitiveness of the tender process.)
We note that the procedures already applied in Ireland for PPPs, in advance of the introduction of the competitive dialogue procedure, have worked well without prejudice to these fundamental rights, in our view.

Question 3
On the basis of our experience, we are not aware that there are any other points which may pose a problem in terms of Community law on public contracts.

Question 4
The Central PPP Unit does not directly organise awards of concessions, which are the responsibility of the procuring agencies. However, the Central PPP Unit has been involved with procuring agencies in the development of procedures and the management of awarding concessions – which have consistently been carried out on a competitive basis. It is clear from our experience that these arrangements generally operated satisfactorily, in terms of providing equality, transparency and competition.

Question 5
On the basis of our experience, we consider that the current legal framework is satisfactory to allow concrete and effective participation of non-national companies or groups in the procedures for award of concessions. Concessions of which we are aware in Ireland have frequently been awarded to non-national companies or groups. The existing framework clearly guarantees competition, in our view.

Question 6
A Community legislative initiative to regulate the procedures for awards of concessions does not appear to be desirable or necessary.

Question 7
In our opinion, the Commission does not need to propose legislative action. In addition, it is our view that there are no objective grounds for any action that may be considered to cover all contractual PPPs, irrespective of whether these are designated as contracts and concessions. Identical award arrangements would not appear appropriate for such different contractual arrangements in terms of risk transfer.

Question 8
We do not have sufficient experience of private initiative projects in Ireland to be in a position to comment.

Question 9
We have no comment.

Question 10
Our experience of the phase following the selection of the private partner, so far, is that the contractual framework has ensured the principles of equality of treatment and transparency by setting out clearly the terms and conditions for performance, without any direct or indirect discriminatory impact. It is standard practice to make the contract terms available in the descriptive documents, which terms set out clearly the distribution of risks and performance criteria. (Of course, a criterion by which the

value for money of the PPP bids is appraised before award of contract, generally known as the Public Sector Benchmark, is not released as this might prejudice competition as well as the optimum distribution of risks between the public and private sectors.)

The duration of contracts has generally been set by reference to the requirements for remuneration of the capital and is typically 20 to 30 years. It is not clear to us why transparency would also require that the elements employed to establish the duration be communicated in the descriptive documents – a clear statement of the duration would appear to be sufficient for open competition.

Question 11

We are not aware of cases where the conditions of execution may have had a discriminatory effect or provided an unjustified barrier to the freedom to provide services or freedom of establishment.

Question 12

We are not aware of practices or mechanisms for evaluating PPP tenders which have a discriminatory effect. The comments of the enterprises may be of more interest to the Commission in this regard.

Question 13

We do not consider that "step-in" arrangements, as provided for in Irish PPPs, may present a problem in terms of transparency and equality of treatment. The provisions are set out clearly at the stage of competing for tender and parties are free to take part in tenders. In so far as they may be exercised in the course of a contract, having regard to the nature of the risk transfer, such arrangements are taking place between private actors. Finally, step-in arrangements, by their very nature, are effected in unforeseen circumstances and are incorporated in contracts on grounds of public policy, public security or public health – because the cessation of service which could arise in the absence of step-in would pose an unacceptable risk to policy, security or health.

We are unaware of other "standard clauses" which are likely to present similar problems.

Question 14

We do not consider that there is a need to clarify certain aspects of the contractual framework of PPPs at Community level.

Question 15

We are not aware of specific problems encountered in relation to subcontracting. (The issue of a project company being itself in the role of contracting body has not arisen, to our knowledge, as a relevant issue in the context of PPPs in the Irish administrative framework.)

Question 16
We do not consider that the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justifies more detailed rules and/or a wider field of application in the case of subcontracting.

Question 17
We do not consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting.

Question 18 and Question 19
We do not have sufficient recent experience of institutionalised PPPs to comment on these questions.

Question 20
We have not identified specific measures or practices that act as barriers to the introduction of PPPs at the European level. The complexity of PPPs as a means of procurement does, of course, present a series of challenges in terms of the skills and knowledge of the public sector, the interaction of various public policies, and the capacity of the private sector.

Question 21
We are aware of developments in a number of countries outside the European Union (e.g. South Africa, Canada, Australia). In general, the PPP models are broadly similar to the kinds of structures used in the EU. However, it is not possible to apply models directly from other jurisdictions as the administrative, legal and socio-economic contexts are substantially different. Consequently, the principal lessons to be learnt in terms of good practice are relevant to the overall approach rather than to specific measures or practices.

Question 22
We are open to the suggestion of collective consideration of questions relating to PPPs among the actors concerned, which would also allow for the exchange of best practice. However, if the Commission were to establish such a network, careful consideration should be given as to the appropriate lead Directorate, in so far as the questions to be considered may not be primarily questions of procurement, and other Directorates (e.g. TREN, REGIO) may also have an interest. For example, DG TREN already organises an informal PPP exchange.

Warsaw, 3rd Aug 2004

Republic of Poland
THE MINISTRY OF INFRASTRUCTURE
Department for Infrastructure
Financing and European Funds
PPP Division

Comments on the “Green Paper on public-private partnerships and community law on public contracts and concessions”

1. In Poland there is a specific legislation for PPP/BOT projects in road infrastructure (Act on Toll Motorways and National Road Fund). Also, a new PPP law is being prepared that will address a much wider range of projects. It will allow setting up contractual as well as institutional PPPs. There will be no preference for the PPP projects and they must offer value for money to be implemented. We have attached both the draft PPP law (which is still undergoing minor changes) and Act on Toll Motorways (without the latest amendment). The project of the PPP law has already been accepted by the Government and passed to the Parliament. The PPP law will also be accompanied by the introductory law, which has been recently passed to the Government for approval.

2. In our opinion, competitive dialogue procedure is an extremely useful tool that will allow output-based procurement, thus improving value for money offered by PPPs. However, we also think that the procurement procedure itself will become much longer and therefore more expensive. It will also require more supervision to ensure the equality of treatment of the bidders.

6,7. We are much in favor of specific legislation that would cover all contractual PPPs, including concessions. This is mostly due to the fact that we believe that there is a need for stable, homogeneous legal environment within the European Union. In our opinion, this would help reducing project cost as an effect of decreased legal risks and by attracting more bidders. The differences in procedures for the award of concessions and PPPs in general among the EU countries do not guarantee genuine competition. However, it should be noted that to achieve that, the new EU directives 17/2004 and 18/2004 on public procurement would have to be revised.

8. We believe that the rules on advertising are clear and adequate, giving all potential operators equal access to information.

9. In our view there is a need for specific legislation/guidance from the EC regarding treatment of private initiative/unsolicited proposals. It is especially important in case of PPP projects, where costs of preparing an offer are very high. The advantages for the first mover during the call for competition should either be disallowed, or there should be clear rules on how to proceed in case of private initiative. Certain countries have developed such rules, which could be a basis for further discussion (South Africa, Switzerland).

13. The Polish draft law on PPPs includes certain provisions on how to proceed in case of a takeover of an undertaking:

> 1. An entity selected in the course of the procedure applicable to the selection of a private partner may enter into all or a part of the rights and obligations of the private partner under the public private partnership contract.
>
> 2. .Prior to the entry into the rights and obligations of the private partner as referred to in Clause 1, the public entity may contract the performance of the obligations of the private partner in accordance with the procedure set out in Article 66 of the public procurement law, for a period of up to 12 months. This period can be extended upon consent of the Chairman of the Public Procurement Office.
>
> 3. The entry into all or a part of the obligations of the private partner as referred to in Clause 1 above shall become effective upon the transfer by the competent public administration body, by way of an administrative decision, of all or a part of the rights and obligations under a licence, permit or other administrative decision onto the transferee, unless the relevant regulations exclude the possibility of such transfer. The transfer shall take place on request of the private partner or the transferee.
>
> 4. In case of termination of the public private partnership contract Clause 2 shall apply accordingly.

17. Yes, we believe that there is a need for legal initiative on subcontracting at Community level in order to limit legal uncertainties. It should be aimed at achieving the balance between the freedom of subcontracting and protection of public interest.

22. Establishing a network to facilitate exchange of the best practice would certainly be a good move. We feel that all Member States would benefit from it, especially those that have limited experience with PPPs. It could also address some of the other issues i.e. PPPs cofinanced from the EU funds.

Draft

dated 5 July 2004

Act

of 2004

on Public Private Partnership

Section 1

General Provisions

Art. 1.1. A public private partnership within the meaning of this act shall be defined as a contract-based cooperation between a public entity and a private partner, aimed at performance of a public task, whereby the private partner shall bear in full or in part the financial outlay to implement an undertaking being the subject of such cooperation, or shall provide for such outlay to be borne by third parties.

2. Under the public private partnership contract the private partner shall undertake to the public entity to carry out the undertaking in exchange for remuneration.

3. The remuneration shall mean a payment of a certain amount of money by the public entity or the right of the private partner to draw profits or gain other benefits from the undertaking.

Art. 2.1. The public private partnership may be a form of implementing an undertaking, in accordance with the procedure and principles set out herein, in case when it results in benefits for the public interest that outweigh the benefits resulting from other methods of carrying out such undertaking.

2. The benefit for the public interest shall mean in particular: savings on the expenses of the public entity or higher standard of the services to be provided, as well as improved technical parameters or reduced inconvenience for the environment.

Art. 3 The private partner shall not disclaim the responsibility for the failure to comply with the standards of service and principles applicable to the use of the facilities or operation of the equipment hereinafter referred to as the “asset component”.

Art. 4 1. The term public entity within the meaning of this act shall include a government agency, a local self-government unit or an association of local self-government units.

2. The term public entity shall also include:

1) a state-owned institution of higher learning;
2) a research and development entity;
3) an independent public healthcare establishment;
4) an institution of culture owned by the state or self-government;

5) the Polish Academy of Science (Polska Akademia Nauk) and institutions established by it;

6) a state agency;

7) a company where the entity referred to in Clause 1 exercises the majority of the voting rights accruing from shares or has a decisive vote in the appointment of the majority of the members in its managing or supervisory authority;

8) a state-owned company;

9) the Polish Sports Confederation (Polska Konfederacja Sportu);

10) the National Health Fund (Narodowy Fundusz Zdrowia).

3. The execution of public tasks in the form of public private the public entity referred to in Clause 2, sub-clauses 2-4 may only take place upon consent of the founder, the overseeing agency or the organizing agency.

4. The exclusion or limitation of the possibility of the public entity to carry out public tasks in the form of a public private partnership shall be only done pursuant to the articles of association or the deed of the company with respect to the entity referred to in Clause 2, sub-clause 7.

5. Public entities may enter into an agreement or an understanding to cooperate with a private partner in execution of their joint public task in the form of a public private partnership and designate, at the same time, one of them as the public entity authorized to carry out the procedure referred to in Article 14 and enter into a contract with the private partner for and on their behalf.

Art. 5 1. The term private partner means an entrepreneur within the meaning of the regulations on business activity, as well as a foreign entrepreneur, provided that it meats the conditions applicable to conducting a business activity in the Republic of Poland.

2. The private partner may also mean a non-governmental organization, a church or other association of religious denomination.

3. Private partners may enter into an agreement or an understanding to jointly bid for award of a public private partnership contract and appoint an attorney to represent them in the procedure of awarding such public private partnership contract and to execute it.

4. The entity referred to in Article 4, Clause 2, sub-clauses 2-3 and 7-8 shall not act as the private partner with respect to its founder, overseeing agency or organizing agency.

Art. 6 1. An undertaking means the execution of an investment in respect of public tasks within the scope of the public entity, if it covers operation, maintenance or management of an asset that is the subject of such investment or is connected with it, or provision of public services related thereto.

2. An undertaking may also include the design of the investment referred to in Clause 1.

3. An undertaking shall also include the performance of public utility tasks or provision of public services for a period exceeding 3 years, if it covers the operation, maintenance or management of an asset that is necessary for this purpose.

Art. 7 **An undertaking may also consist in:**

1) promotion of economic and social development, including revitalization or development of a town or a part thereof, or another area:

   a) carried out based on a design plan provided by the public entity; or

   b) combined with its design by the private partner

- provided that the remuneration of the private partner shall not take form of a payment of an amount of money by the public entity;

2) a pilot, promotional, scientific, educational or cultural undertaking that supports the performance of public tasks, if the majority the remuneration of the private partner comes from other sources than the funds of the public entity.

Art. 8. The delegation of an undertaking to a private partner for performance under a public private partnership contract shall not cover the preparation of drafts of any normative acts or resolution of any individual cases concerning public administration.

Section 2

Preparation of a public private partnership

Art. 9.1 The competent minister for the relevant division of the governmental administration or the executive body of a local self-government unit shall prepare a draft of long-term directions and policies in respect of carrying out public tasks, taking into account the possible application of a public private partnership.

2. The long-term directions and public policy principles shall define:

1) validity term of at least 10 years;

2) principles of their updating;

3) diagnostics of the situation in the area concerned;

4) plan and time schedule of actions in the area concerned;

5) forms of performance of public tasks;

6) method of monitoring the performance of public tasks.

Art. 10. 1. The draft of long-term directions and principles of public policy shall be prepared taking into account the spatial development concept of the country, the development plans and the regional development strategy.

2. The draft may include assumptions for changes in the documents referred to in Clause 1 above, in case when such documents are developed by the entity that prepared the draft.

Art. 11.1. The draft referred to in Article 9, Clause 1 shall be subject to announcement in the Public Information Bulletin and shall be subject to public consultation including non-governmental organizations and business, social and cultural communities involved in the areas covered by the project.

2. The date and duration of the consultation referred to in Clause 1 above shall be set by the entity that prepared the draft. The duration of the consultation shall not be less than 30 days of the date of the announcement of the draft in the Public Information Bulletin.

Art. 12.1 The Council of Ministers upon a motion of the minister who prepared the draft referred to in Article 9, Clause 1 as submitted upon the lapse of the time allowed for public consultation along with information on the process and results of such consultation, approves, by way of a resolution, the long-term directions and principles of the public policy. Accordingly, the decision-making body of a self-government unit shall approve the draft prepared by the executive body of such unit.

2. The approved long-term directions and principles of the public policy shall be announced in:

1) the Official Journal of the Republic of Poland “Monitor Polski”- with respect to documents approved by the Council of Ministers;

2) in the voivodship official journal – with respect to documents approved by decision-making bodies of local self-government units;

3) the Public Information Bulletin.

Art. 13. An entity interested in being selected as the private partner for implementation of a certain undertaking in the form of a public private partnership may submit an application to the public entity with a proposal to implement such undertaking.

2. The entity that submitted the application referred to in Clause 1 above shall not receive any special treatment from the public entity during the procedure of selecting the private partner.

Art. 14. 1. Prior to the decision to implement a certain undertaking in the form of a public private partnership, having regard to the provisions of the long-term directions and principles of performance of public tasks, the public entity shall prepare an analysis of such undertaking to determine its efficiency and the threats involved in its implementation in such form, and in particular:

1) the risks involved in the implementation of the contemplated undertaking, taking into account different methods of sharing these risks between the public entity and the private partner and the impact on the public debt level;

2) the economic and financial aspects of the contemplated undertaking, including the comparison of the costs of implementing the undertaking in the form of a public private partnership with the costs of its implementation in another form;

3) comparison of the social benefits and threats involved in the implementation of the undertaking in the form of a public private partnership with the benefits and threats involved in the its implementation in another form;

4) legal status of the assets, if the legal title to the assets is to be transferred or established by the public entity for the benefit of the private partner;

5) technical arrangements of the contemplated undertaking, unless it constitutes the subject of the undertaking;

6) amount of the anticipated profit of the private partner.

2. The competent minister for economic affairs may define, by way of an ordinance, the mandatory elements of the methodology of the analyses referred to in Clause 1 above, taking into account the transparency, relevance and reliability of the analyses to be performed.

Art. 15. If the analyses referred to in Article 14, Clause 1 have shown that the undertaking requires, at least in part, financing from the public funds, the consent for implementation of such undertaking shall be given by:

1) the competent minister for public finance matters – in respect of tasks financed from the state budget;

2) the decision-making body of a local self-government unit – in respect of tasks financed from the budget of such unit;

3) the decision-making body of an association of local self-government units – in respect of tasks financed from the budget of such association.

Art. 16. The information about the planned implementation of a certain undertaking on a public private partnership basis shall be announced in the Public Procurement Bulletin.

Art. 17. In justified cases, and in particular in respect to preparation of the analyses referred to in Article 14, Clause 1, the public entity may rely on the assistance of a qualified advisor having the necessary knowledge and experience in respect of the undertaking that constitutes the subject of the public private partnership.

Section 3

Contribution of the public entity to the undertaking

Art. 18. 1. The contribution of a public entity to the undertaking shall be governed by a public private partnership contract.

2. The contribution of a public entity to an undertaking may specifically consist in:

1) own contribution to the implementation of the undertaking, including any Community funds, and non-reimbursable funds received from other countries, organizations and international institutions and private entities, or

2) the remuneration of the private partner.

3. The contribution of a public entity to an undertaking shall not cover in full the expenditures incurred by the private partner, unless the relevant separate regulations provide otherwise.

Art. 19.1. The own contribution may specifically consist in:

1) bearing a part of the implementation costs of the undertaking, including additional payments for the services provided by the private partner within the undertaking;

2) an enterprise within the meaning of Article 55[1] of the Civil Code of 23 April 1964 (Journal of Laws 1964 No. 16, item 93, as amended[1]), an immovable or movable property, licences and other intangible assets, if they are used for implementation of the undertaking.

2. The bearing of a part of the costs as referred to in Clause 1, sub-clause 1 above, by the public entity that is a governmental administration body or a local-self government unit shall take form of a subsidy (*dotacja)* within the meaning of the public finance regulations.

3. The own contribution referred to in Clause 1 shall be provided to the private partner with designation for specific purposes as set out in the public private partnership contract.

Art. 20.1. The own contribution referred to in Article 19, Clause 1, sub-clause 1, provided to a private partner, shall be exempted from the income tax to the extent and on the terms set out in separate regulations.

2. The transfer by a public entity of the own contribution referred to in Article 19, Clause 1, sub-clause 2 to a private partner or another entity designated in the public private partnership contract shall not result in imposition of the income tax, subject to the terms set out in separate regulations.

Art. 21. In the event when a public entity provides a real property to a private partner or another entity designated in a public private partnership contract for the purpose of the performance of such contract, as well as for use or for use and enjoyment of profits, the commune council may exempt such real property from the real estate tax, on the terms set out in the act on taxes and local charges of 12 January, 1991 (Journal of Laws 2002 No. 9, item 84, as amended[2])

Art. 22. In determining the remuneration of the private partners specific attention shall be given to the expected costs of the performance of the undertaking to be incurred by the private partner and the planned profit of the private partner, with due regard to ensuring and securing the public interest.

Art. 23. If the own contribution referred to in Article 19, Clause 1 has not been transferred or disbursed by the public entity in the amount or on the dates set out in the public private partnership contract, the private partner shall be entitled to interest, compensation or contractual damages, as appropriate.

Art. 24.1. The own contribution of the public entity referred to in Article 19, Clause 1, that has not been used in accordance with the intended purpose, shall be subject to repayment. In case of financial contribution, interest shall also due as of the date of payment of such funds.

2. Any claim for interest shall not exclude any claims for indemnity that may be brought by the public entity against the private partner.

Art. 25. The total amount up to which the governmental administration bodies may incur financial obligations under public private partnership contracts shall be set in the budget law.

Art. 26. In adopting the budget, the competent authority shall take into account:

1) the amounts spent on the payment of the obligations under the public private partnership contract;
2) the consequences of renunciation, temporary suspension or limitation of the scope of the undertaking implemented on a public private partnership basis;
3) the amounts spent on the compensation for the private partner under the public private partnership contract.

Section 4

Principles and procedure for selecting the private partner

Art. 27. 1. To the extent that is not regulated herein, the provisions of the public procurement law of 29 January 2004 (Journal of Laws No. 19 item 177, Journal of Laws No. 96, item 959) hereinafter referred to as the "public procurement law" shall apply to the selection of the private partner and public private partnership contracts.

2. The principal procedures for selecting the private partner include open tender, limited tender and negotiations with announcement. The provision of Article 55 of the public procurement law shall not apply.

3. In case when the public procurement law makes the performance of a certain action dependent of the contract value, such value shall be determined based on the total estimated value of the remuneration referred to in Article 1, Clause 3.

Art.28.1. The best tender as defined herein shall meat the tender that offers the best balance of the remuneration and other criteria concerning the subject of the contract, including:

1) the division of the tasks and risks relating to the undertaking between the public entity and the private partner, and
2) the dates and amount of the expected payments in consideration of the monetary amounts to be paid by the public entity, if any.

2. The provisions of Article 91, Clause 3 of the public procurement law shall not apply.

Art. 29. 1. The provisions of Article 142 Clause 2 of the public procurement law shall not apply to public private partnership contracts.

2. The public entity that takes the decision to enter into a public private partnership contract for periodic and continuous performance, for a period exceeding 3 years shall consider the prerequisites referred to in Article 142, Clause 3 of the public procurement law.

Art. 30. In case of particularly complex public procurement contracts or undertakings that require application of innovative solutions, the public entity may undertake to cover, for all bidders on equal terms, a part of the tender preparation costs as defined in the specification for the private partner selection.

Art. 31. To the extent that the specification for the private partner selection sets out the terms of amending or supplementing the public private partnership contract, Article 67, Clause 1, sub-clauses 6 and 7, and Article 144 of the public procurement law shall not apply to public private partnership contracts.

Art. 32. In the event that new circumstances would make the performance of a public private partnership contract contrary to the public interest, the public entity may renounce the contract on the terms and according to the procedure set out therein. The provisions of Article 145 of the public procurement law of shall not apply.

Section 5

Public private partnership contract

Art. 33.1. The public private partnership contract shall specify:

1) the purpose and the subject of cooperation and its time schedule;
2) the total value of funds designated for the implementation of the complete undertaking that constitutes the subject of the contract, independently of the source of their origination;
3) the obligations of the private partner, including its obligations with respect to the financing of the undertaking that constitutes the subject of the cooperation;
4) the obligations of the public entity, including the size, terms and timeframe for making the own contribution, if such contribution is envisaged, as well as the principles of handling such contribution;
5) the specification of quality norms, requirements and standards applicable to the performance of the public task;
6) the principles of selection of subcontractors, the scope of their responsibilities and the conditions on which the public entity may refuse to approve the subcontractors;
7) the powers of the public entity in respect of the ongoing control of the performance of the task by the private partner and the principles of periodical joint assessment of the execution of the undertaking to be carried out by the parties including the implementing recommendations;
8) the term the contract has been entered into for and the conditions of extension or early termination of the contract, as well as the conditions and method of its early termination before lapse of the term it was entered for and the principles of mutual settlements and the compensation due in such case;
9) the conditions and procedure for amendment of the contract and the change in the scope of the undertaking that constitutes the subject thereof, if such possibility was envisaged in the terms of the public contract;

10) the form, amount and principles of determining and transferring the remuneration;

11) the mechanism to ensure that the level of the profit generated by the private partner that is deemed allowed will not be exceeded;

12) the scope and principles of liability of the parties for non-performance or improper performance of the contract, including in case of an extraordinary change of relationships and occurrence of a force majeure event;

13) the division of the risks involved in the execution, performance and termination of the contract;

14) the terms and scope of the insurance of the undertaking to be implemented, as well as any additional warranties and agreements and undertakings of the parties in this regard;

15) the procedure and terms of settlement of any disputes arising in connection with the contract, and the method of selecting the mediator, if the parties select mediation as the dispute settlement procedure.

2. The public private partnership contract shall be made in writing or may otherwise be null and void, unless separate regulations require any specific form.

Art. 34. The public private partnership contract may cover implementation of more than one undertaking referred to in Article 6, and Article 7, Clause 1.

Art. 35.1. The public private partnership contract may provide that the public entity and the private partner shall establish a company for the purpose of its performance.

2. The purpose and subject of the activity of the company referred to in Clause 1 above shall not go beyond the scope defined in the public private partnership contract.

3. A public entity that is a governmental administration body and established a company referred to in Clause 1 above, shall exercise the rights accruing under the shares in such company owned by the State Treasury.

4. In the public private partnership contract the parties may agree the date and terms, on which the public entity shall acquire the shares held by the private partner in the company referred to in Clause 1 above.

5. The creation of the company referred to in Clause 1 above shall not release the private partner from the responsibility referred to in Article 3.

Art. 36.1. The following acts shall require a consent of all shareholders in the company referred to in Article 35, Clause 1:

1) disposal or encumbrance of an asset;

2) amendment of the deed or the articles of association of the company.

2. The public entity shall have the pre-emptive right to purchase the shares of the private partner in the company referred to in Article 35, Clause 1 within 6 months of the date of communication by the private partner of the intention to dispose thereof.

3. Any disposal by the private partner of the shares in breach of Clause 2 above shall be invalid.

Art. 37.1. Unless the public private partnership contract provides otherwise, upon termination of the contract, the private partner shall transfer the asset that is the subject of the public private partnership contract to the public entity or other entity designated in the contract, in non-deteriorated conditions, subject to wear and tear resulting from its proper use.

2. The transfer of the asset that is the subject of the public private partnership contract by the private partner or the company referred to in Clause 1 to the public entity by the date set out in the

public private partnership contract shall not result in imposition of the income tax, in accordance with the terms set out in separate regulations.

Art. 38. The public entity shall have the right to demand a financial security from the private partner in respect of the potential losses resulting from non-performance or improper performance of the public private partnership contract.

Art. 39. In case when two or more entities are represented as either party to the public private partnership contract, they shall be jointly and severally responsible for non-performance or improper performance of such contract, unless the public private partnership provides otherwise.

Art. 40. In selection of providers of services, supplies or construction works for the private partner in connection with the preparation, execution or performance of the public private partnership the Article 121, Clause 2 of the public procurement law shall apply accordingly, unless the private partner is a contracting party within the meaning of the public procurement law.

Art. 41. Public private partnership contracts shall be governed by the Polish law.

Art. 42. A public private partnership contract shall be invalid by virtue of the law in case when:

1) the competent authority has not prepared or approved the long-term directions and principles of public policy in the relevant area of public tasks;
2) the analyses referred to in Article 14, Clause 1 have not been carried out;
3) the consent referred to in Article 15 has not been obtained;
4) the information referred to in Article 16 has not been announced;
5) the private partner has not obtained the consents, permits, licences or other administrative decisions required to execute the undertaking;
6) occurrence of any of the prerequisites referred to in Article 146, Clause 1 of the public procurement law.

Art. 43. Within 7 days of the signing of a public private partnership contract, the public entity shall provide a copy of such contract to the competent minister for economic affairs, and in case of contracts that affect the public debt, also to the competent minister for public finance.

Section 6

Dispute resolution

Art. 44. 1. The list of arbitrators maintained by the Chairman of the Public Procurement Office shall include arbitrators authorised to examine appeals against dismissals or rejections of protests lodged in the course of the private partner selection procedure.

2. The arbitrator who examines the appeal in respect of Clause 1 should possess knowledge of the issues pertaining to public private partnership.

3. The knowledge of the issues referred to in Clause 2 shall be confirmed with a positive result of an examination carried out on the terms referred to in the public procurement law.

4. Any observer of the Chairman of the Public Procurement Office in the private partner selection procedure must be an arbitrator who meets the conditions set out in Clauses 2 and 3.

Art. 45. If mediation is the dispute resolution procedure selected by the parties in the contract, they shall be obliged to finalise it within 30 days of the date of the notice to select the mediator issued by either party.

Art. 46. Any disputes concerning the public private partnership contract or arising in connection with such contract shall come within domestic jurisdiction.

Section 7.
Takeover of the undertaking

Art. 47. In case of:

1) reassignment of the authority in respect of the performance of a public task from the hitherto public entity onto another public entity
2) liquidation or transformation of the public entity

- the public entity that has assumed the authority in respect of the performance of a public task, takes over by virtue of the law the respective rights and obligations, including the responsibility for the liabilities of the public entity that was hitherto a party to the public private partnership contract.

Art. 48.1. An entity selected in the course of the procedure applicable to the selection of a private partner may enter into all or a part of the rights and obligations of the private partner under the public private partnership contract.

2. Prior to the entry into the rights and obligations of the private partner as referred to in Clause 1, the public entity may contract the performance of the obligations of the private partner in accordance with the procedure set out in Article 66 of the public procurement law, for a period of up to 12 months. This period can be extended upon consent of the Chairman of the Public Procurement Office.

3. The entry into all or a part of the obligations of the private partner as referred to in Clause 1 above shall become effective upon the transfer by the competent public administration body, by way of an administrative decision, of all or a part of the rights and obligations under a licence, permit or other administrative decision onto the transferee, unless the relevant regulations exclude the possibility of such transfer. The transfer shall take place on request of the private partner or the transferee.

4. In case of termination of the public private partnership contract Clause 2 shall apply accordingly.

Section 8
Competent authorities

Art. 49.1. The tasks of the competent minister for economic affairs in respect of this law shall include specifically:

1) gathering and developing and promoting best practices in public private partnership, including in particular contract clauses, principles applicable to the management and supervision of public

private partnership undertakings and the standards of public services provided on a public private partnership basis, as well as cost reduction methods for such undertakings and services;

2) preparation of information materials and training on public private partnership;

3) carrying out reviews, analyses and assessments of the operation of public private partnership, with particular emphasis on the current status and prospects for financial involvement of the private sector;

4) maintaining a register of public private partnership contracts.

2. To carry out the tasks referred to in Clause 1 above, the competent minister for economic affairs shall establish a budgetary enterprise named the Centre of Public Private Partnership.

Section 9

Final provision

Art. 50. This law shall enter into force in accordance with the procedure and on the terms set out in the law on the implementing regulations for the public private partnership law.

[1] The amendments to the above-mentioned law were announced in Journal of Laws 1971 No. 27, item 252; 1976 No. 19, item 122; 1982 No. 11, item 81, No. 19, item 147 and No. 30, item 210; 1984 No. 45, item 242; 1985 No. 22, item 99; 1989 No. 3, item 11; 1990 No. 34, item 198, No. 55, item 321 and No. 79, item 464; 1991 No. 107, item 464 and No. 115, item 496; 1993 No. 17, item 78; 1994 No. 27, item 96, No. 85, item 388 and No. 105, item 509; 1995 No. 83, item 417; 1996 No. 114, item 542, No. 139, item 646 and No. 149, item 703; 1997 No. 43, item 272, No. 115, item 741 and No. 117, item 751 and No. 157, item 1040; 1998 No. 106, item 668 and No. 117, item 758; 1999 No. 52, item 532; 2000 No. 22, item 271, No. 74, item 855 and 857, No. 88, item 983 and No. 114, item 1191; 2001 No. 11, item 91, No. 71, item 733, No. 130, item 1450 and No. 145, item 1638; 2002 No. 113, item 984 and No. 141, item 1176; 2003 No. 49, item 408, No. 60, item 535, No. 64, item 592 and No. 124, item 1151 and 2004 No. 91, item 870 and No. 96, item 959.

RATIONALE

1. Background issues

The main objective of the draft law on public private partnership [PPP] is to stimulate public sector investments, specifically into infrastructure, by providing optimum legal framework for public undertakings with participation of private entities and removing the obstacles that result in considerable risk of PPP undertakings for both parties under the current legal framework. In a broader context, the law is aimed at eliminating psychological barriers concerning the role and function of the government in the execution of public tasks with participation of a private partner. The law is intended to enable the public entities and private partners to establish a relationship in the form of a PPP contract to carry out public tasks. It is also to prevent such situations where a PPP undertaking becomes a political instrument or is vulnerable to political pressures.

The key economic and legal issue in case of PPP is how the parties understand, and properly reflect in the PPP contract they are bound by, the distribution of the risks involved in the implementation of a specific public task undertaking on such basis, usually over a long time period. In such a broad and often complex setting, it is a rather new issue for the Polish administration and policy.

The draft law does not provide for creation of any new institutions of the administrative and business law as the existing legal measures – once the proposed changes are made and taking into account the harmonisation of the Polish legislation with EU regulations – are sufficient for PPP contracts to be effectively executed. The draft takes into account the law on public benefit activity and volunteerism (so-called small PPP) and other laws, so that other solutions similar to PPP that are already provided for under other laws.

It should be pointed out that where amendments to other laws are proposed, they refer to their latest versions (such as in case of the public procurement act). The intention was to ensure that, from the very beginning, the draft of the PPP law is consistent with the European Commission Guidelines for successful public private partnership and refers to the most current version of other legislative acts.

The approach used in the design of the PPP draft law assumes that changes are to be introduced in two dimensions: at a general level in the PPP law and in a separate law implementing the PPP law, which provides for amendment of several dozen of specific regulations. This is intended to show the direction of changes and the implications that the adoption of the PPP law will have for other legislation. The design of PPP law as a framework law is to enable PPP projects in each segment of infrastructure and public services and therefore the modifications of general solutions adopted in the draft may be introduced in specific regulations, if necessary for individual divisions of the administration or public tasks.

According to the assumptions, PPP was not meant to have the features of a new nominate contract but rather was to be understood as a new method or organisation of carrying out a public undertaking, on the basis of an agreement that has the necessary elements in respect of the distribution of the risks between the parties. It should be noted that PPP may take different legal forms (based on a legal relationship) and therefore the main emphasis was put on the definition of the procedure and the terms of cooperation between the private and public partner, including the fundamental provisions of the contract that for the basis for the partnership.

Consequently, the definition of a public private partnership within the meaning of the draft law consists of two elements: (I) the contract itself, including specific provisions as to the terms of the implementation of a certain undertaking, and (II) the procedure of arriving at such contract, which constitutes the constructive element of PPP.

2. General provisions

The introductory section of the draft includes a general definition that specifies the PPP features in terms of substance by indicating that it means a cooperation between a public entity and a private partner, based on a contract, which is aimed at performance of a public task (Article 1.1 of the draft). PPP is a method of carrying out a public undertaking jointly with a private partner or by the private partner itself, with due regard to several presumptions, the most important being that this form of public task performance should ensure benefits for the public interest that outweigh the benefits resulting from other methods of carrying out the relevant public task or specific undertaking (Article 2), where detailed analyses are to provide the basis for ascertaining that this is the case, as provided in Article 14. Moreover, as implied by Article 1.1, the private partner is to incur expenditures to carry out the undertaking that is the subject of PPP, or ensure that such expenditures are incurred by third parties. Finally, the remuneration due to the private partner may take different forms (Article 1.1).

It should be noted that the performance of task by private partners on PPP basis does not release the public entity from the responsibility for the performance of its statutory tasks, regardless of whether they are carried out directly or through a private partner.

The initiative to enter into a PPP contract comes always from the public entity. This is implied by EU directives concerning public procurement and the public procurement law, to which the reference is made in Article 27.1 of the draft as regards the selection of a private partner and PPP contracts. This reflects the basic presumption of PPP, namely that the performance of public tasks, including provision of public services, although it takes place through a private partner, remains an obligation of the public entity and is subject to its decision and responsibility. Thereby, the difference should be drawn between a PPP undertaking and normal business undertakings pursued jointly by a public entity (e.g. self-government) and a private investor, which are not related to the performance of public tasks (e.g. Article 10 of the municipal utility services law).

It should be added that the law requires from the public entity that is the formal initiator of PPP starts such undertaking on the basis of consciously defined public policy in the relevant area of the public administration (Article 9 and the following). This approach is an important prerequisite of a rational decision-making process, not only in terms of the content, but also on the political dimension, since the public discussion on the shortcomings and advantages of different methods of carrying out public tasks develops social participation attitudes, on the one hand, and, on the other, strengthens the confidence as to the direction to be followed, also in the financial aspect, and finally reduces the ease of taking politically motivated decisions (including e.g. decision to terminate PPP when the relationship was established by a political predecessor of the party being currently in power).

3. Undertaking that constitutes the subject of PPP

In accordance with Article 1.1, the draft law concerns a specific form (PPP) of public task performance. The law is not intended to extent the public authority on any areas that are beyond the scope of its operation; therefore PPP – from the viewpoint of a public entity – concerns those tasks that it is required or authorised to perform under separate regulations.

PPP, i.e. the cooperation between a public entity and a private partner aimed at performance of a public task, refers to execution of a specific undertaking that constitutes the subject of a public private partnership contract.

The potential scope of PPP was defined broadly, taking into account the needs of the public sector as they are currently identified, through appropriate definition of the term "undertaking". According to Article 6.1 undertaking means implementation of an investment in respect of public tasks. The above provision constitutes a basis for implementation of investments in those public task areas where the existing investment needs – particularly those relating to the obligations resulting from the participation of Poland in the European structures – cannot be met with traditional ways used by public entities, specifically such as roads, railways and environmental protection. On the other hand, Article 6.3 concerns those public tasks where certain infrastructure already exists but the quality of services leaves a lot to be desired, in particular as a source of social discontent, the examples being healthcare or social welfare, as well as public order.

In addition, public private partnership may concern other initiatives, including revitalisation (Article 7). The condition of entering into cooperation in such areas of public tasks is, however, that they have to be organised in such a way that the remuneration of the private partner does not take the form of a payment of an amount of money by the public entity.

In determining the form of remuneration the public entity should above all look for the possibility to provide the remuneration of the private partner in the form of profits from the undertaking that constitutes the subject of cooperation or ensuring other benefit for the private partner. The situation when the entire remuneration consists of a payment of an amount of money by the public entity is only allowed as an exception, if separate regulations so provide.

The ability to raise capital contributions from the private sector for implementation of public undertakings is an important feature of PPP. It is also vital in the view of the need to mobilise the financial capacity of Poland to draw from the structural funds from the EU.

4. Preparation of public private partnership

The procedure of arriving at the conclusion that a specific public task is to be carried out on PPP basis is the central issue for the public entity. The decision to opt for PPP cannot be driven by immediate political interest or pressures coming from the potential private partners (investors). For this reason it was deemed necessary that the competent minister for the relevant division of the governmental administration and the executive body of a local self-government unit prepare long-term directions and principles of the public policy in the relevant public tasks area (e.g. education, water and sewage systems, social policy), which, after diagnostics of the situation in the relevant areas and definition of an action plan and time-schedule, shall recommend the PPP model to the public as the most rational one (Article 9 and the following).

Undoubtedly, the competent minister and the executive body of a local self-government unit, will take the decision to select PPP as the form of carrying out a public task that is recommended in the long-term directions and principles of the public policy in the relevant area of administration based on the existing needs and the capabilities of the entity concerned to finance them. Public private partnership may be a form of carrying out public tasks as long as it has been designated as such in the above-mentioned document.

However, prior to taking the decision to execute a certain undertaking on PPP basis, the analyses referred to in Article 14.1 have to be performed in order to confirm the rationale for such decision.

5. Terms applicable to financing of PPP undertakings from public funds

Financial arrangements constitute one of the fundamental regulations that should be addressed in detail by the parties. Even though it is assumed that the private partner is to provide – at least in part – the financing of the PPP undertaking, a PPP project may often consist in an attempt to achieve savings (efficiency improvement) of such undertaking, within the expenditures incurred by the public entity. The law provides for such a financing model of PPP undertakings that enables flexible structuring in the contract. Consequently, the possible options include:

- financing without contribution of funds by the public entity;
- partial financing from the funds of the public entity, and, exceptionally,
- full financing from the funds of the public entity.

In the latter two cases, Section 3 of the law shall apply to the funds provided by the public entity. The above section relates to the contribution of the public entity in the undertaking. The contribution of the public entity (its level, form, terms of providing) shall be defined in the PPP contract (Article 18.1).

The level of its contribution shall be decided by the public entity after carrying out the analyses referred to in Article 14.1, and in particular the economic and financial aspects. The above analyses should be carried out on case-by-case basis with a view to minimising the contribution of the public entity. If the public entity decides that the undertaking, at least in part, requires financing from the public funds, the consent of the competent authority is necessary (Article 15).

The remuneration of the private partner will in principle take the form of a monetary consideration, though the payment does not have to originate from the budget; it may, for instance, consist in granting the private partner the right to charge fees from the users or draw proceeds from the undertaking. In such case the contract should regulate in detail the terms of tariff or fee increase, the method of charging the fees and all instruments for consumer protection against the consequences of the emergence of a potential private monopoly.

On the other hand, the takeover of the ownership of a real property by the private partner does not constitute a potential payment option (although it may be a form of contribution to the undertaking as a specific contribution in-kind – e.g. land or a building). Such contribution of the public entity by definition is not intended to constitute the remuneration for the private partner, and is also subject to restitution upon the termination of the contract (Article 37). This regulation prevents potential conflicts with local communities that are often concern discontent with such “privatisation” of the common public property. This also limits the possibility of speculation, eliminates the problems related to the valuation of such property, and reduces the risk of corruption. Specifically, it is vital that the contract regulates the terms on which the public property is to be used by the private partner.

The principles of remunerating the private partner remain transparent and clear, also for the users at large. This reduces the mental resistance against handing over public tasks to the private sector.

6. Principles and procedure for selection of a private partner

There were to possible methods that could be used in defining the procedure for selection of a private partner. The first one was to develop a completely separate procedure for PPP purposes. The second consisted in leveraging the existing selection procedures as set out in the public procurement law, assuming that some regulations of this law would be modified or excluded to adjust the procedures described therein to the specific of PPP projects. It seems that the latter approach, the one that was used, offers more benefits from the viewpoint of the PPP law itself, as it avoids detailed regulation of these matters in the law while enhancing the consistence of the legal framework as a whole.

The public procurement law will be directly applicable to the private partner selection procedure and to the PPP contract itself, with due regard to the provisions of the draft law (Article 27).

In case of PPP only the part of the undertaking for which a private partner has been selected constitutes the subject of the procurement contract. As to the selection of the best tender, it is assumed that the remuneration of the private partner is not always the best indication of the bid in case of PPP, since the proposed division of risks (Article 28) also has to be considered, which is not such a crucial issue in contractual relationships in case of “normal” public procurement contracts.

As far as the contract term is concerned, it is commonly believed that the regulation of the public procurement law, which requires a consent of the Chairman of the Public Procurement Office for entry into any contract for a term exceeding 3 years, is one of the main obstacles to the development of PPP projects in Poland. PPP contracts are by their nature long-term contracts with terms reaching even 20 years or more. The above requirement has been removed in respect of those PPP contracts for which it would constitute unnecessary and excessive restriction of the freedom to contract (Article 29).

In some cases a part of the costs related to preparation of the tenders by the bidders may be covered by the public entity. The proposed mechanism is intended to provide an incentive for the bidders to develop creative solutions in their tenders. The high costs involved in the preparation of such tenders are often a barrier, which may discourage investment of major effort and funds into development of innovative solutions (Article 30).

As far as renouncement of the contract against compensation is concerned (Article 32), the proposed solution is an attempt to reconcile two objectives. On the one hand, it is meant to provide the public entity with the option to renounce the PPP contract on the grounds of the general public interest clause. On the other hand, the current regulations of the public procurement law that provide only for payment of a part of the remuneration in such case, discourage private investors from becoming involved in undertakings where the public partner may withdraw based on an ambiguous public interest criterion.

7. Public Private Partnership Contract

The PPP contract is intended to be the fundamental legal document that defines the rights and obligations of the public entity and the private partner. The PPP contract is to be a contract based on the contract notion within the meaning of the civil law, which is discerned from other contracts by its specific objective and detailed principles of diving the risks related to its execution and performance. The essence of the PPP is that both parties derive benefits from the performance the contractual provisions. The structure of individual contracts should be aimed at ensuring that individual risks rest with the party that is most capable of controlling them, and the responsibilities are split according to the competencies, which will maximise the economic efficiency. The contract must allow for sufficient degree of flexibility and control to ensure that the objectives set by each party are achieved.

The PPP contract shall define in detail the obligations of the parties. Its specific function is to provide comprehensive description of the entire project and the questions related to the associated agreements (e.g. consulting agreement, construction contract, operation contract, etc.) and third parties (specifically banks that provide financing of the undertaking on the part of the private partner). The purpose of the PPP contract is to coordinate all agreements that constitute the so-called contract package for the execution of the PPP project. Such agreements, as the instruments that support the execution of the undertaking and define its subsequent stages, are subject to the general provisions of the Civil Code.

The contract must ensure fair sharing of risks and benefits. In particular, a transparent and equitable price-setting mechanism should be envisaged, so that the private sector is not threatened by the market developments, and, on the other hand, to protect the service user against the drive of the private sector to gain quick, unjustified profits.

The main provisions of the contract are set out in Article 33 of the draft law. Such highlighting of perhaps obvious elements of the contract is necessary in the view of public interest protection.

8. Dispute resolution

According to Article 33.1.15, the procedure and principles of dispute resolution shall be defined in the contract. It should be noted that the reference to mediation in this provision is not accidental. The draftsmen believe that any disputes resulting from the PPP contract should be first resolved through an amicable procedure. This is based on the view that a PPP undertaking involves two types of entities: entrepreneurs who are used to the commercial law standards and communes familiar with formal administrative procedures. The intention is that any frictions resulting from the different mindsets of such parties are addressed in the most expedient and effective manner possible through an informal procedure such as mediation. A court or arbitration proceedings should be used as the last resort and each time be preceded with an attempt of a mediator to reconcile the interests of both parties. This will reduce the risk that each, even trivial controversy between the parties to a PPP undertaking will involve a threat that the work is suspended until the court judgement is issued.

9. Takeover of the undertaking

The draft law recognises that due to various circumstances the originally selected private partner may not be able to perform the contract it has entered into. Independently of the claims against the private partner in this regard, the public entity may select a new partner in accordance with the procedure set out in Section 4 of the draft law. On one hand it is related to the fact that PPP is a form of carrying out a pubic task and as such it should be continued, and on the other, it is protective measure against circumvention of the provisions of the law concerning the selection of a private partner.

10. Competent authorities

The draft law assumes that most of the tasks of the public administration in respect of PPP will be carried out by the competent minister for economic affairs (Article 49). In particular, it will promote good practices in public private partnership and review the operation of public private partnership.

11. Final provisions

The final provisions link the entry of the law into force to a separate law on the implementing regulations for the public private partnership law. This is due to the fact that in order to introduce the possibility of entering into PPP contracts in the administrative practice and business transactions, a comprehensive review of the entire legal system is required and a large number of legislative acts has to be amended.

Assessment of regulatory implications of the draft law on the public private partnership

1. Entities affected by the proposed regulation:

The regulations of the proposed law affect the public sector through creation of the legal framework that facilitates the performance of public tasks. At the same time, the above regulations affect the entities of the private sector that enter into cooperation with the public sector in respect of the implementation of public task undertakings.

2. Findings from consultations:

The draft law was put for discussion between the ministries and social partners, among other things, through its publication in the website of the Ministry of Economy, Labour and Social Policy. The draft was submitted for review by the Joint Government and Local Self-Government Commission, and sent to the Council for Public Benefit Activity, the Council of Entrepreneurship and the Trade Unions Forum. All remarks have been considered and in most cases taken into account, including in particular the incorporation of all remarks of the Office of the Committee for European Integration concerning the alignment of the proposed provisions with the EU legislation. Some reservations were to a certain extent due to wrong interpretation of the proposed regulations, or lack of full understanding of the legislator's intentions and assumptions, and for that part an attempt was made to modify such provisions so as to ensure the adequate level of transparency.

3. Impact of the regulation on:

a) Public finance sector

The implementation of the law will not result directly in any budget expenditures. Instead, it will bring about a different philosophy in financing of public tasks. The potential benefits for the public sector are related to the fact that private partners take over the financing of the expenditures required to carry out public tasks. It is an effective measure of raising capital, particularly in the view of the shortage of public funds. At the same time, PPP will support absorption of the EU aid. The public entity seeking financial support from the EU may report the contribution of a private investor as the required project co-financing. Thereby, the pressure on the budgets of local self-governments and the national government will be eased.

It will be possible to allocate the budget expenditures primarily for the maintenance of the administration institutions, and to a lesser extent for public investment.

The long-term nature of PPP contracts will support introduction of long-term financial planning.

A broad application of PPP may contribute to major savings as a result of reduced investment costs and the costs of providing public utility services. Such savings are generated despite generally higher cost of capital incurred by the private partner as compared to the situation when the public sector is the borrower. Based on the British experience the benefits from PPP range on average between 10 and 20 per cent. Taking a simplified assumption that the share of Poland in the value of PPP projects implemented in the Western Europe will be proportional to the size of the population, based on the data for years 1985-2000 the estimated yearly value of PPP transactions in our country would average US$ 1.5 billion. The savings on the projects implemented in Poland will concern the reduction of the total investment costs, lower operating costs and limited risk exposure on the part of the public entity.

b) Labour market

The law will have positive impact on the labour market through increase in the volume of infrastructure projects implemented on the initiative of the public sector. The development of adequate infrastructure will also support the emergence and development of businesses, including inflow of foreign investment, which will also positively influence the labour market.

c) Internal and external competitiveness of the economy

With regard to internal competitiveness of the economy, the law will have positive impact, particularly on those areas of the municipal utility services where user fees are charged. It is expected that the costs of such public services will be subject to verification.
In terms of external competitiveness, the faster development of infrastructure investments will result in improved competitiveness of Poland. This in turn will have positive impact on attracting foreign investors to our country.

Moreover, a positive impact on the business sector is expected are a result of broader access of private entities to the market segment of public investments and services. Although the cooperation with the private sector with regard to the performance of public tasks is also possible prior to the entry of the proposed law into force, the existing barriers considerably hinder its development. With regulation of the PPP issues new business opportunities become available for private entrepreneurs. The application of PPP formula enables long-term commitment of private capital in those undertakings that so far have not been accessible for private entities through public procurement, or due to formal or financial considerations. Considerable opportunities for application of this formula exist in the area of investments in transportation, communication, environmental protection, municipal utility services, heat generation, as well as healthcare services, social welfare, real estate management, development planning and cultural activities.
An accelerated growth of enterprises, including small and medium ones is expected in a number of industries. Firstly, the business involved directly in the execution of PPP projects, i.e. from the construction and infrastructure investments sector are expected to develop. Secondly, it is anticipated that manufacturing company that will supply goods for the contractors of such investments will also grow. Thirdly, consulting and legal firms are likely to grow, as they will be engaged in the preparation of PPP projects, both by the public and the private party.

The law will stimulate the growth of the financial and capital market by increasing the demand for financing to carry out PPP investments. It is expected that the quantity and volume of loans taken by the private sector for execution of public investments will increase.

d) Regional situation and development

The law will have a positive impact on the situation and development of the regions by accelerating investments into infrastructure. This will result in improved competitiveness of individual regions in Poland and facilitate inflow of investments to those regions in other sectors of the economy.

The law will also enable increased absorption of the EU structural funds. This will be possible as the financing provided by the private partner will constitute a part of the own contribution required to obtain the structural funds, and thereby self-government units will be able to complete a larger number of infrastructure investments at the same time.

e) State structure and the society

The regulation of PPP issues is particularly needed by local self-governments that are responsible for carrying out the majority of public tasks and infrastructure projects. This form enhances the execution opportunities for many investment projects and ensures co-financing in EU supported projects.

The major impact of the law will consist in the increased participation of the private sector in the performance of public tasks, particularly in the area of transportation, technical (specifically environmental) and social infrastructure. Stronger involvement of the private sector is expected in financing, preparation and execution of infrastructure investments, as well as in management of this infrastructure combined with its operation and maintenance up to the required standard. This involvement should not only contribute to a growth in the volume of infrastructure projects implemented on the initiative of public sector entities but also their more efficient and effective execution with lower financial expenditures and use of modern technologies. Last but not least, the social needs should be met faster and up to higher quality standards.

The regulation may contribute to increased supply of public services and accelerated execution of numerous investment projects, which will contribute to improvement in the standard of living of the society.

Broader application of the PPP formula in financing of public tasks should lead to improved quality of the provided services and reduction in their costs. However, it should not be excluded that in some cases, depending on the results of economic and financial analyses where full costs of service provision by the pubic sector are taken into account, the charges for facility and service users could increase.

Portuguese comments on the «Green Paper on PPPs and the Community law on public contracts and concessions»

September 23, 2004

1 PPPs and the Community law on public contracts and concessions

Efficiency We see PPPs as an important instrument for introducing private sector efficiency in the development of public projects in infrastructure and provision of public services. Not just in management activities but also in the actual definition of the projects. That's why we always associate PPPs with flexibility. In order to obtain value-for-money in the public tenders for PPPs we need a lot of flexibility in the tender documents. At the same time we need a clear prior definition of the expected final results of the PPP and a set of tender rules that assure competition and non-discrimination.

Competition We consider that internal market and competition principles are not just matters of European concern, but also of national concern, as competition — a wide competition — is essential to obtain value-for-money in public procurement. So we endeavour a lot of efforts to obtain economic competition in PPP tender procedures — not just legal, formal competitiveness, but real, effective competitiveness.

Innovation The challenge of obtaining effective competitiveness is a hard one, because the most interesting PPPs (from the point of view of the public sector) are the ones in which the bidders are able to introduce a lot of innovation. That prevents us from using some traditional ways of tendering (for instance, defining precisely the kind of works and services needed and then evaluating the bid price for those requirements), in favour of more flexible (but always clearly stated) evaluation criteria, involving price, technical ability, quality, and (very important) satisfaction of required performance.

Long-term The need for the design of a long-term contratual relationship creates an additional burden, implying the evaluation of incentive mechanisms (payments, fines and penalties) that are designed by the public sector but subject to a considerable degree of improvement by the bidders (that can propose additional commitment and incentive mechanisms).

So, we consider that, at present time, PPPs and concessions should be ruled by the principles of the European Treaties (including the internal markets and competition principles) and by national laws.

We still need to develop innovative ways of tendering PPPs. We also need to experiment with innovative approaches designed in the «new» public tendering EU directives (2004/17 and 2004/18) in order to learn more and extend those experiments to PPPs.

EU public procurement rules have improved competition and non-discrimination rules but are still unsatisfactory in what relates to obtaining value-for-money and effectiveness in traditional procurement — cost overruns and delays are common in most EU countries. So a lot of care is needed in designing rules for sensitive schemes like PPPs.

We need to call attention to the fact that different national legal environments (namely, different environmental appraisal regulations) will imply that the optimal tender procedures will be different from country to country. Also the different degrees of risk accepted by public partners (and different degrees of risk of projects tendered as PPPs) will call for different tender rules.

At the same time we advocate that **no EU directive** should be designed for PPPs at the present time, we strongly recommend that some kind of **PPP observatory** should be established, in order to collect and diffuse information on PPPs, as well as providing a forum for discussion and analysis of PPP experiences. That Observatory should be a very small body, providing information services and using resources from research institutes and national PPP units for the required analysis of information.

2 Portuguese PPP experience

The Portuguese government has developed innovative experiences in the management of public services and in the conception and construction of large public infrastructures. Several of them involve long-term contracts between a public body and a private consortium, requiring that the private partner runs a public service using a public infrastructure or that the private partner conceives and constructs a public infrastructure (using private or public finance) and makes it available for the public sector for a long period (typically 30 years) or operates a public service on it — those contracts are the so called public–private partnerships, or PPP.

In the last decade several PPP were implemented in Portugal, mainly in the transport sector (highways, rail and tram). The first projects demonstrated the effectiveness of PPPs for the rapid development of infrastructure and the improvement of service to end-users. Those first projects, being welcomed by their users and by the public in general, fostered the diffusion of PPP schemes to other areas, with PPPs being now studied in sectors like health, water and waste management, student accommodation, and prisons.

Having been launched, maintained and expanded by a series of governments, from different political parties, those PPP created a cross-party consensus on the need to develop PPP schemes, albeit with different aims and emphasis, dependent on the political positioning of each party.

Regarding the water sector one should mention a recent government decision (Resolução do Conselho de Ministros nº 72/2004, June 16th) defining guidelines for the restructuring of this sector which will allow for an increasing number of PPP schemes. A large PPP hospital programme is currently under way (ten new hospitals to be contracted in the next few years, including the provision of clinical services and every other service in the hospitals), with bids already submitted in the first public tender, a second one invited, and several other tenders in preparation. In the port business, the concession of terminals is common, mainly for freight handling.

While still being used in the traditional fields of infrastructure (two new large highway concessions are currently being tendered, several tram and train concessions are being negotiated or prepared), the PPP potential for efficiency is still expanding to new fields, and including a large component of service provision to end-users, as witnessed in the PPP hospital programme.

3 Recent institutional changes

The main driver of the first decade of PPPs in Portugal was the need for faster development of infrastructure and high quality public services. In recent years, severe budgetary constraints created incentives for using PPP as a substitute for direct public investment. In a move to keep the focus of PPPs on efficiency, incorporating lessons from past experience and preparing for new PPP programmes, the government applied some institutional changes in the course of 2002 and 2003:

- definition of appraisal procedures for PPP projects, requiring the justification of the PPP, the choice of an optimal PPP model, the existence of adequate long-term budgetary appropriation, the definition of a public sector comparator and the intervention of experts from the Finance Ministry (Decree-Law n.º 86/2003, April 26th);

- creation of a PPP Unit, in Parpública SA, with generic responsibilities for the surveillance of public–private relationships and collection, analysis, and diffusion of information on PPPs, and provision of expertise to sectoral ministries, as well as specific roles in evaluation and appraisal of PPP projects and tender documentation, evaluation of bids in public tenders, and negotiations with private partners (see the decree-law Decreto-Lei n.º 86/2003, April 26th; and the joint order Despacho Normativo n.º 35/2003, published in the official journal, *Diário da República, I Série – B*, in August 20th);

- consolidation of prior rules for the creation of long-term budgetary appropriations for PPP programmes and projects (Lei de Enquadramento Orçamental, Law n.º 91/2001, August 20th, changed and republished by Organic Law n.º 2/2002, August 28th).

Parpública SA (a state firm fully owned by the Treasury Department and involved in the management and privatisation of public shares and assets in the hands of government) had a PPP team operating since year 2000, presenting advise to the Treasury Secretary and several government departments. Parpública SA received the above mentioned responsibilities in August 2003, having reinforced his PPP Unit then.

Besides data collection and analysis, and a lot of internal, external and internacional debate on PPP matters, the PPP Unit is currently involved in the appraisal of several new large projects, mainly in the transport (highways, railways and tramways) and health sectors, at different stages (evaluation of departmental proposals, preparation of tender documents, bid evaluation) and in the supervision of signed contracts (refinancing and renegotiations).

For the development of large specific programs, like the PPP hospital programme, ministers rely on special purpose departments, like Parcerias.Saúde, the Health Ministry PPP Unit, who work in association with Parpública SA.

4 Specific questions

1. What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?

We have a lot of contractual PPPs, now launched under new legislation, as described above. EU internal market and competition principles are implemented by those rules.

2. In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

The different kinds of risk-taking involved in different PPPs will require different provisions in order to safeguard the principles of the Treaty (not just the internal market and competition principles but also principles regarding public sector efficiency and general interest). For some complex PPPs the competitive dialogue procedure may be just enough, but in others we would expect that less clear goals will require more strict rules of procedure. So eventually some specific procedures for PPPs and concessions will be enacted.

But a new directive on PPPs and concessions should only be designed some years after the transposition of the «new directives» (2004/17 and 2004/18), in order for them to be fully exploited and developed. New procedures should try to focus on very complex PPPs and concessions, trying to obtain the maximum flexibility in procurement, in order to obtain value-for-money out of innovative bidder approaches.

3. In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.

Being long-term contracts, PPPs will be subject to change along the life of contracts. So, the way change is introduced (or the way it is managed, as change will generally occur independently of the will of partners) will certainly matter and should studied in order to design rules that prevent uncompetitive behaviour.

4. Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

(see above)

5. Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?

Within the current framework, several different tender schemes were launched in Portugal, with a wide range of results, but always guarantying competition among European bidders.

6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

As stated above, that Community legislative initiative is not considered desirable, at this moment.

7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

As considered above, different degrees of project-risk and different degrees of risk-transfer will require different tender arrangements. And, at the present moment, introducing EU legislative action could jeopardise moves towards more innovative and efficient procedures.

8. In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?

There are no private initiative PPPs in Portugal. This kind of projects introduces some competitiveness concerns and innovative possibilities, so the European experiences with them should be carefully studied and diffused. Collecting and diffusing information on them should be a task for a EU PPP Observatory.

9. In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?

(see answer to previous question)

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

As we tend to use competitive negotiations (with at least two bidders) in the PPP tenders, the selection of preferred bidder is coincident with BAFO (best and final offer) and financial closure — so most negotiations are already made at BAFO, and contract signature follows shortly the adjudication.

11. Are you aware of cases in which the conditions of execution — including the clauses on adjustments over time — may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?

We are not aware of such cases in Portugal.

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

The use of several practices and mechanisms may result in some sort of discriminatory effect (like discriminating against small firms or in favour of financial partners) but we are not aware of practices or mechanisms that have originated some kind of discrimination against non-nationals.

13. Do you share the Commission's view that certain «step-in» type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other «standard clauses» which are likely to present similar problems?

We do not consider «step-in» and similar provisions as matters of concern in terms of transparency and competitiveness, as they are essential for the financial stability of partnerships (and also for some reduction in risks and costs) and their rules are described in the contracts.

14. Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?

No, not at present time.

15. In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.

We are not aware of such specific problems. Note that we treat PPPs as contracts for the provision of a stream of services (highway services or railway transportation, for instance), so we try to concentrate on output and performance, and not to rule conditions for subcontracting. In effect, subcontracting is one option for the private partner, subject to a small set of requirements. An please note that most of our PPPs involve a construction consortium as partner, so reducing the risks of subcontracting.

16. In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

No, we really consider there is no need for new subcontracting rules as long as there is a competitive procedure for the selection of the private partner.

17. In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

No, there is no such need.

18. What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not?

We, at central government level, have no experience with institutional PPPs.

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

Probably a more clear definition of public firms and the boundary between definitions of public and private firms would help in clearing the processes in institutionalised PPP projects. For the moment, there is no need for new EU rules, but that clear definition would help in guarantying that, at least once, there is some kind of competitive procedure in the development of institutional PPPs.

In general and independently of the questions raised in this document:

20. In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?

Too many rules and too strict rules would be a major constraint on PPP development.

21. Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of «good practice» in this framework which could serve as a model for the Union? If so, please elaborate.

The answer to this question should be given by a collective effort of all interested parties, with the help of that EU PPP Observatory we would like to be provided.

22. More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

As considered above, we would sincerely welcome the establishment of a EU PPP Observatory, with a small information office (for collecting and diffusing information on PPPs) and a network of research institutes, PPP units and PPP partners.

■

The Opinion of Slovak Republic (the Office for Public Procurement) on Green Paper on Public-Private Partnership and Community Law on Public Contracts and Concessions

Introduction
The Slovak Republic does not dispose of definite legal framework and of definite rules that would adjust process and relationships within PPPs.
The Slovak Republic does not have in substance any experiences with PPPs (particularly on the level of state institutions).
The Slovak Republic welcomes the initiative of European Commission in this area because this initiative can help concrete Member states to lay down comparable framework/rules for PPPs.
Owing to the aforementioned it is advisable to look at our answers in the survey "Green Paper".

Answers to questions in Green Paper:

1. In the Slovak Republic, we know only concession procurement on works (Article 50 in the Act No.523/2003 on public procurement) as one of form of PPP set-up. This concession procurement is included in the Act No. 523/2003 on public procurement and on amendment of the Act No. 575/2001 Coll. on the organization of central state administration as amended. We would like to add the new forms of PPP set-ups into new preparing legislation in the next future.

2. We suppose that competitive dialogue procedure will be right form for using PPPs after the transposition into national law. This is good idea.

3. We do not consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts.

4. We have not yet organised or participate in a procedure for the award of a concession within Union. The Ministry of Economy and the Ministry of Transport, Posts and Telecommunication are interested in involving the private sector in construction of highways and hence there is opportunity to organise a procedure for the award of some form of PPPs.

5. Our opinion is that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concession and there is genuine competition guaranteed in this framework.

6. We do not think that there is next Community legislative initiative, designed to regulate the procedure for the award of concession, desirable. In our view, regulation the procedure for the award of concession should be let on concrete member state.

7. It would be useful to cover all contractual PPPs in legislation by adding rough framework also of other forms of PPPs than concessions because in current and new directives there are rules governing only concessions.

   The answers to questions 5, 6, 7 are our assumption because of no experiences in this area.

8. We have no experiences with private initiative PPP schemes; PPP is in our country only at the commencement of using.

9. It should be guaranteed compliance with the principles of transparency, non-discrimination and equality of treatment by adding the rough framework of PPP into the legislation because directives respect these principles.

10. We have no experiences with the phase, which follows the selection of the private partner in contractual PPPs but the state administration body, and other contracting authorities invite in most cases of public procurement an international advisor to choose the best project (tender).

11. In Slovakia, there were not recorded any problems or barriers to provide services or freedom of establishment.

12. We have not encountered any practices or mechanisms for evaluating tenders, which have had a discriminatory effect.

13. In this regard, we share the Commission´s view.

14. We do not have knowledge about the impact on financial situation of contracting authorities in public-private partnership, whether state liabilities will increase and thereby the debt and deficit of public finance.

15. Because we have no experiences with PPPs, we are not aware of specific problems encountered in relation to subcontracting. We think provided that the conditions stated in new directives (Article 60 of Directive 2004/18/EC) will be fulfilled, it is on agreement between two sides (public and private partner) what extent of subcontracting being agreed on.

16. In our opinion, the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, do not justify more detailed rules or a wider field application in the case of the phenomenon of subcontracting.

17. We consider that there is not a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting; these rules are sufficiently stipulated in new directives.

18. We do not have any knowledge about institutionalised PPPs.

19. Unfortunately, we do not know to express our opinion to this question.

20. No measures or practices act as barriers to the introduction of PPPs within European Union, using PPPs depends on legislation of each member state and on the will to exploit the advantages of PPPs. In Slovak Republic there is few knowledge about this theme and no experiences in this field and therefore it is hard to begin.

21. We do not know other forms of PPPs, which have been developed in countries outside the Union (we have heard some information about PPPs from USA and Japan but we can not regard them relevant).

22. We will be pleased if the Commission will establish such a network, which would allow for the exchange of best practice concerning PPPs. Our government is planning to use PPPs in the next future but the first stage is legislation.

Elaborated by Mr. Ján Beka (European Affairs and International Cooperation Department of the Office for Public Procurement) and approved by Mrs. Katarína Némethová (Head of this Department).

Bratislava, July 2004

Asunto: Aportación de la representación española en el Comité Consultivo para los Contratos Públicos de la Comisión Europea en relación con las cuestiones que se plantean en el Libro verde sobre la colaboración público-privada y el Derecho comunitario en materia de contratación pública y concesiones (CPP), presentado por la Comisión.

La Comisión Europea, a través de su Dirección de Política de Contratos Públicos ha expresado sus consideraciones sobre el desarrollo de la colaboración público - privada (CPP) y su relación con el Derecho comunitario, respondiendo a las iniciativas del Parlamento, del Consejo y del Comité Económico y Social Europeo para la adopción de una iniciativa legislativa por parte de la Comisión, ha presentado el denominado Libro verde sobre la colaboración público-privada y el Derecho comunitario en materia de contratación pública y concesiones (CPP).

Este documento tiene por finalidad expresar la opinión sobre el contenido del Libro verde desde la representación española en el Comité Consultivo para los Contratos Públicos.

1. Introducción.

El contenido del documento presenta un pormenorizado análisis de las cuestiones que afectan a las diferentes posibilidades de la gestión de actividades propias de las Administraciones públicas mediante el recurso a nuevas formas de naturaleza contractual en el que destaca el notable esfuerzo realizado por los servicios de la Comisión.

No obstante, desde la perspectiva de la delegación española en el Comité Consultivo para los Contratos Públicos se considera necesario realizar determinadas consideraciones que tratan de reflejar los antecedentes de tramitación de la Directiva 92/50/CEE, del Consejo, de 18 de junio de 1992, sobre coordinación de los procedimientos de adjudicación de los contratos públicos de servicios y el desarrollo de la llamada colaboración público - privada en España cuyos antecedentes son remotos en el tiempo.

1.1. La Directiva 92/50/CEE, en su propuesta de la Comisión al Consejo, documento COM (90) 372, publicado en el Diario Oficial de las Comunidades Europeas C 23, de 31 de enero de 1991, incluía en su articulado a las concesiones de servicios en su ámbito objetivo.

La falta de una regulación específica definidora del concepto concesión de servicios, para su aplicación común a todos los Estados miembros, y la inclusión, sin otra precisión más concreta, de un término ausente de una completa regulación, dio lugar a una clara división de posturas en el grupo de Contratos públicos del Consejo que elaboró el texto de la Directiva, discrepancias que se mantuvieron en el Comité de Representantes Permanentes, toda vez que como tal referencia a las concesiones de servicios postulada por la Comisión en su presupuesta implicaba la incorporación a un mercado plenamente abierto de tal figura contractual que tenían un ámbito definido y desarrollado en los países cuyo sistema normativo se encuentra en las técnicas del Derecho administrativo francés, con normas propias reguladoras de tales concesiones y de aplicación habitual, pero que no se correspondía por otros Estados en los que tal concepto de concesión de servicios ni se encontraba regulado ni recibía aplicación alguna. La consecuencia lógica de tal incorporación suponía, como señalamos, una aportación al mercado de técnicas contractuales de unos Estados miembros que no recibían correspondencia alguna por parte de los restantes, consecuencia que se reforzaba ante la ausencia de una definición clara y explicita que implicará el sometimiento de tal técnica concesional a todos los Estados miembros. Así sucedía en el caso de España que mantiene una amplia tradición en el desarrollo de la figura concesional en el ámbito de los llamados contratos de gestión de servicios públicos.

La exclusión de la concesión de la Directiva 92/50/CEE y su efecto ha sido valorada por el Tribunal de Justicia de las Comunidades Europeas, que refleja en su texto los motivos que dieron lugar a la exclusión de las concesiones de servicios del ámbito de la Directiva[1].

En tal sentido, el Consejo manifestó que para proceder a incluir a las concesiones de servicios en las Directivas sobre coordinación de los procedimientos de adjudicación de los contratos, se debía proceder a realizar un exhaustivo estudio que expusiera el alcance y las consecuencias de su aplicación [2].

1.2. Las figuras concesionales en el marco de la contratación pública, cuya importancia desde la perspectiva económica es absolutamente trascendente, ha venido formando parte del ordenamiento jurídico regulador de los contratos públicos en el Derecho español, tanto respecto de la concesión de obras públicas como respecto de la gestión de servicios públicos o de aprovechamiento y explotación de bienes de las Administraciones Públicas. Así, ya la Ley general de obras públicas de 13 de abril de 1877 y su Reglamento general de 6 de julio del mismo año contienen normas reguladoras de las concesiones de obras a particulares, tanto en el ámbito de la Administración del Estado como en el ámbito de las Corporaciones locales. Posteriormente la Ley de Administración y Contabilidad de 1 de julio de 1911, modificada por la Ley de 20 de diciembre de 1952, regula en su capítulo V las cuestiones relacionadas con la contratación pública, para regularse mediante una normas especificas en la Ley 198/1963, de 28 de diciembre, de Bases de Contratos del Estado, y en su Texto articulado, aprobado por Decreto 923/1965, de 8 de abril, aspectos concretos de estas figuras concesionales. Completan este marco normativo, respecto de los municipios y provincias, el Reglamento de Contratación

[1] Sentencia Teleaustria y Telefonadress, de 7 de diciembre de 2000, en el asunto C-324/98; apartados 46, 47 y 48. Apartado 48: "*... en el transcurso del procedimiento legislativo, el Consejo suprimió toda referencia a las concesiones de servicios públicos, principalmente a causa de las diferencias existentes entre los Estados miembros en materia de delegación de la gestión de servicios públicos y en las modalidades de dicha delegación, que podrían crear una situación de enorme desequilibrio en la apertura de los mercados de concesiones de servicios públicos...*".

[2] Id. apartado 50 "*...el Consejo no aceptó la propuesta de la Comisión de incluir en la Directiva 90/531 normas relativas a las concesiones de servicios públicos, basándose en que tales concesiones sólo se conocían en uno de los Estados miembros y en que no resultaba oportuno regularlas sin haber llevado a cabo un estudio detallado sobre las diversas formas de concesión de servicios públicos existentes en los Estados miembros en los mencionados sectores*".

de las Obras y Servicios de las Entidades Municipales, aprobado por Decreto de 2 de julio de 1924, y el posterior Reglamento de Contratación de las Corporaciones Locales, aprobado por Decreto de 19 de enero de 1953, y el Reglamento de Servicios de las Corporaciones Locales, aprobado por Decreto de 17 de junio de 1955. En el ámbito patrimonial son diferentes las leyes y reglamentos reguladores de las relaciones de tal carácter cuya enumeración carece de trascendencia a los efectos de esta aportación.

1.3. Por otra parte debe especificarse previamente a la presentación de los siguientes comentarios que la licitación de los llamados contratos de gestión de servicios públicos, entre los que se incluyen las concesiones de servicios, se realiza siguiendo los mismos procedimientos de adjudicación que se establecen en las Directivas 2004/18/CE y 2004/17/CE, y aplicando las mismas reglas sobre capacidad, requisitos, publicidad, igualdad y transparencia, con la única y lógica excepción de que tales licitaciones no se publican en el Diario Oficial de la Unión Europea, ni se someten a los dilatados plazos de recepción de candidaturas y ofertas que las citadas Directivas se establecen. Tales licitaciones y la adjudicación del correspondiente contrato se publica en los Diarios Oficiales correspondientes de la Administración que otorga el contrato de la misma forma que en los contratos de importe inferior al establecido en la Directiva 2004/18 respecto de los contratos de obras, de suministro y de servicios.

Desde la perspectiva de la concurrencia de empresas podemos indicar que se encuentra abierta no solo a las empresas nacionales sino también a todas las empresas de los Estados miembros de la Unión Europea y del Espacio Económico Europeo que reúnan las condiciones que para cada contrato se exijan, así como a las empresas de terceros países que acrediten la reciprocidad de trato respecto de las empresas españolas.

La regulación concreta de las concesiones de servicios se encuentra hoy en los artículos 154 a 170 de la Ley de Contratos de las Administraciones Públicas, Texto refundido aprobado por Real Decreto Legislativo 2/2000, de 16 de junio, y en los artículos 183 a 186 del Reglamento General de la Ley de Contratos de las Administraciones Públicas, aprobado por Real Decreto 1098/2001, de 12 de octubre, normas que son de aplicación general tanto al Estado como a los entes territoriales (Comunidades autónomas, provincias y municipios), así como por los artículos 114 a 137 y concordantes del Reglamento de Servicios de las Corporaciones Locales.

La duración de tales contratos se extiende en el tiempo en función de su objeto. El artículo 157 de la Ley de Contratos de las Administraciones Públicas determina que estos contratos no podrán tener carácter perpetuo o indefinido y su duración se especificará en el pliego. Su duración máxima, incluidas las prórrogas, no puede superar cincuenta años en los contratos que comprendan la ejecución de obras y la explotación de servicio público. No podrá superar veinticinco años en los contratos que comprendan únicamente la explotación de un servicio público no relacionado con la prestación de servicios sanitarios en cuyo caso la duración máxima será de diez años.

De cuanto se expone se puede apreciar que aun cuando las concesiones de servicios no se encuentran incorporadas al Derecho comunitario ello no impide que su adjudicación se regule, en la práctica, por las mismas reglas y que el acceso a las mismas no está reservado a empresas españolas sino que se encuentra abierto a las empresas del resto de países en las mismas condiciones que se aplican para los restantes contratos.

2. Cuestiones, respuestas y comentarios.

2. En cuanto se refiere a las diferentes cuestiones e interrogantes que se plantean en el Libro verde sobre la colaboración público-privada y el Derecho comunitario en materia de contratación pública y concesiones (CPP) expresamos a continuación nuestra opinión.

Como hemos resaltado, la experiencia de la Administración Pública española se encuentra ampliamente desarrollada en el sentido expresado por las dos alternativas expuestas en el documento, si bien con un claro y evidente predominio de la relación contractual en la que se enmarca, entre otras modalidades, la concesión como sistema principal, siendo por lo general, y salvo muy determinadas excepciones, los supuestos en los que el órgano de contratación (poder / entidad adjudicador) quien determina los elementos fundamentales de la concesión, si bien existe la posibilidad de la que la propuesta pueda ser planteada por el sector privado que, una vez valorada por la entidad adjudicadora, decide si procede la dar curso a la propuesta procediendo a la apertura a la concurrencia de las empresas interesadas en obtener la concesión. En tal sentido describiremos en las correspondientes cuestiones aquellos datos detallados que permitan apreciar tales precisiones.

Cuestión 1. ¿Qué tipos de operaciones de CPP puramente contractual conoce? ¿Se ha creado en su país algún marco específico (legislativo o de otro tipo) para esta clase de operaciones?

Respuesta. Como indicamos, la gestión de servicios públicos, bajo forma contractual, se encuentra regulada en los artículos 154 a 170 de la Ley de Contratos de las Administraciones Públicas, Texto refundido aprobado por Real Decreto Legislativo 2/2000, de 16 de junio, y en los artículos 183 a 186 del Reglamento General de la Ley de Contratos de las Administraciones Públicas, aprobado por Real Decreto 1098/2001, de 12 de octubre, normas que son de aplicación general a todas las Administraciones Públicas, así como por los artículos 114 a 137 y concordantes del Reglamento de Servicios de las Corporaciones Locales.

Entre las distintas modalidades podemos referir las siguientes:

a) Concesión, por la que el empresario gestionará el servicio a su propio riesgo y ventura.

b) Gestión interesada, en cuya virtud la Administración y el empresario participarán en los resultados de la explotación del servicio en la proporción que se establezca en el contrato.

c) Concierto con persona natural o jurídica que venga realizando prestaciones análogas a las que constituyen el servicio público de que se trate.

d) Sociedad de economía mixta, en la que la Administración participe, por sí o por medio de una entidad pública, en concurrencia con personas naturales o jurídicas.

Cuestión 2. En opinión de la Comisión, la transposición al Derecho nacional del procedimiento de diálogo competitivo permitirá que las partes interesadas dispongan de un procedimiento particularmente adaptado a la adjudicación de contratos calificados de contratos públicos durante la puesta en marcha de una CPP de tipo puramente contractual, al tiempo que se protegen los derechos fundamentales de los operadores económicos. ¿Comparte esta opinión? Si su respuesta es negativa, ¿por qué?

Respuesta. Es evidente que por lo reciente de la adopción de la Directiva se desconoce la virtualidad de aplicación del nuevo procedimiento de dialogo competitivo y si en su proyección futura constituirá un sistema que aporte beneficios a la contratación pública. De todos es bien sabido, y así se puso de manifiesto en diversas reuniones del Comité Consultivo para los Contratos Públicos, que las soluciones que puede aportar el diálogo competitivo podían obtenerse mediante la aplicación de supuestos concretos del procedimiento negociado. Será el tiempo y la práctica aplicada por los diferentes poderes adjudicadores quien aporte respuestas a la pregunta, pero, en principio, un detenido estudio de la gestión del servicio público que se pretende concertar aportará las soluciones alternativas para lograr una gestión efectiva.

Conscientes de que tales aspectos deben estar previamente definidos por el órgano de contratación, la Ley de Contratos en el artículo 158 exige que se determinen en el expediente los aspectos de carácter jurídico, económico y administrativo y, en su caso, las tarifas que hubieren de percibirse de los usuarios, los procedimientos para su revisión, y el canon o participación que, en su caso, hubiera de satisfacerse a la Administración. Concordante con tal precepto el artículo 183 del Reglamento general de la Ley exige que los proyectos de explotación deberán referirse a servicios públicos susceptibles de ser organizados con unidad e independencia funcional y que los mismos comprenderán un estudio económico - administrativo del servicio, de su régimen de utilización y de las particularidades técnicas que resulten precisas para su definición, que deberá incorporarse por el órgano de contratación al expediente de contratación antes de la aprobación de este último.

En tal sentido, respecto de las Corporaciones locales, el artículo 115 del Reglamento de Servicios de las Corporaciones Locales dispone cual será el contenido mínimo del pliego:

> "*Artículo 115. En toda concesión de servicios se fijarán las cláusulas con arreglo a las cuales se otorgare, que serán las que se juzguen convenientes y, como mínimo, las siguientes:*
>
> *1.1 Servicio objeto de la concesión y características del mismo.*
>
> *2.1 Obras e instalaciones que hubiere de realizar el concesionario y quedaren sujetas a reversión, y obras e instalaciones a su cargo, pero no comprendidas en aquélla.*
>
> *3.1 Obras e instalaciones de la Corporación cuyo goce se entregare al concesionario.*
>
> *4.1 Plazo de la concesión, según las características del servicio y las inversiones que hubiere de realizar el concesionario sin que pueda exceder de cincuenta años.*
>
> *5.1 Situación respectiva de la Corporación y del concesionario durante el plazo de vigencia de la concesión.*

6.1 Tarifas que hubieren de percibiese del público, con descomposición de sus factores constitutivos, como base de futuras revisiones.

7.1 Clase, cuantía, plazos y formas de entrega de la subvención al concesionario, si se otorgare.

8.1 Canon o participación que hubiere de satisfacer, en su caso, el concesionario a la Corporación.

9.1 Deber del concesionario de mantener en buen estado las obras e instalaciones.

10. Otras obligaciones y derechos recíprocos de la Corporación y el concesionario.

11. Relaciones con los usuarios.

12. Sanciones por incumplimiento de la concesión.

13. Régimen de transición, en el último período de la concesión en garantía de la debida reversión o devolución, en su caso, de las instalaciones, bienes y material integrantes del servicio.

14. Casos de resolución y caducidad.

En lo que se refiere a las concesiones de obras públicas la Ley de Contratos de las Administraciones Públicas, en su artículo 227 determina el alcance y contenido del estudio de viabilidad que precede a la tramitación de cualquier concesión de tal carácter.

"1. Con carácter previo a la decisión de construir y explotar en régimen de concesión una obra pública, el órgano que corresponda de la Administración concedente acordará la realización de un estudio de viabilidad de la misma.

2. El estudio de viabilidad deberá contener, al menos, los datos, análisis, informes o estudios que procedan sobre los puntos siguientes:

a) Finalidad y justificación de la obra, así como definición de sus características esenciales.

b) Previsiones sobre la demanda de uso e incidencia económica y social de la obra en su área de influencia y sobre la rentabilidad de la concesión.

c) Valoración de los datos e informes existentes que hagan referencia al planeamiento sectorial, territorial o urbanístico.

d) Estudio de impacto ambiental cuando éste sea preceptivo de acuerdo con la legislación vigente. En los restantes casos, un análisis ambiental de las alternativas y las correspondientes medidas correctoras y protectoras necesarias.

e) Justificación de la solución elegida, indicando, entre las alternativas consideradas si se tratara de infraestructuras viarias o lineales, las características de su trazado.

f) Riesgos operativos y tecnológicos en la construcción y explotación de la obra.

g) Coste de la inversión a realizar, así como el sistema de financiación propuesto para la construcción de la obra con la justificación, asimismo, de la procedencia de ésta.

3. La Administración concedente someterá el estudio de viabilidad a información pública por el plazo de un mes, prorrogable por idéntico plazo en razón de la complejidad del mismo y dará traslado del mismo para informe a los órganos de la Administración Gene-

ral del Estado, las Comunidades Autónomas y Corporaciones Locales afectados cuando la obra no figure en el correspondiente planeamiento urbanístico que deberán emitirlo en el plazo de un mes.

4. El trámite de información pública previsto en el apartado anterior servirá también para cumplimentar el concerniente al estudio de impacto ambiental, en los casos en que la declaración de impacto ambiental resulte preceptiva.

5. Se admitirá la iniciativa privada en la presentación de estudios de viabilidad de eventuales concesiones. Presentado el estudio será elevado al órgano competente para que en el plazo de tres meses comunique al particular la decisión de tramitar o no tramitar el mismo o fije un plazo mayor para su estudio que, en ningún caso, será superior a seis meses. El silencio de la Administración o de la entidad que corresponda equivaldrá a la no aceptación del estudio.

En el supuesto de que el estudio de viabilidad culminara en el otorgamiento de la correspondiente concesión tras la correspondiente licitación, su autor tendrá derecho, siempre que no haya resultado adjudicatario y salvo que el estudio hubiera resultado insuficiente de acuerdo con su propia finalidad, al resarcimiento de los gastos efectuados para su elaboración, incrementados en un 10 por 100 como compensación, gastos que podrán imponerse al concesionario como condición contractual en el correspondiente pliego de cláusulas administrativas particulares. El importe de los gastos será determinado por la Administración concedente en función de los que resulten acreditados por quien haya presentado el estudio, conformes con la naturaleza y contenido de éste y de acuerdo con los precios de mercado.

6. La Administración concedente podrá acordar motivadamente la sustitución del estudio de viabilidad a que se refieren los apartados anteriores por un estudio de viabilidad económico-financiera cuando por la naturaleza y finalidad de la obra o por la cuantía de la inversión requerida considerara que éste es suficiente. En estos supuestos la Administración elaborará además, antes de licitar la concesión, el correspondiente anteproyecto o proyecto para asegurar los trámites establecidos en los apartados 3 y 4 del artículo 228".

Es decir, frente a la incertidumbre la norma exige que se proceda a un estudio previo del ámbito de desarrollo de la gestión del servicio público y de las variables que han de considerarse, así como de la concesión, como requisito previo a la licitación del correspondiente contrato, con la advertencia de que tal estudio forma parte integrante del contrato o lo que es lo mismo se integra en la definición de los derechos y obligaciones que asumen las partes.

Cuestión 3. En lo que se refiere a este tipo de contratos, ¿existen, en su opinión, otros elementos, diferentes de los relativos a la elección del procedimiento de adjudicación, que puedan plantear problemas en relación con el Derecho comunitario en materia de contratación pública? En caso afirmativo, ¿cuáles y por qué motivos?

Respuesta. Como se señala en la respuesta a la cuestión anterior, deben solucionarse problemas derivados de la ausencia de un estudio previo que determine con el alcance necesario una completa definición de los elementos que intervienen, tales como población de hecho y sus variables, usos o consumos mínimos y máximos de los usuarios previstos, proyección temporal de la gestión, tarifa remuneradoras de la gestión a percibir de los usuarios, procedimiento de revisión y variables que intervienen en el mantenimiento del equilibrio económico de la concesión, incidencia de los costes de explotación del concesionario y de su control, etc.

Cuestión 4. ¿Alguna vez ha organizado o deseado organizar un procedimiento de adjudicación de concesión o ha participado o deseado participar en un procedimiento de este tipo en la Unión Europea? ¿Qué experiencia conserva de ello?

Respuesta. La pertenencia de los representantes españoles en el Comité Consultivo para los Contratos Públicos a un órgano de carácter consultivo en materia de contratación, excluye la posibilidad de acreditar la participación directa en la gestión de concesiones, lo que no impide tener, por razón del ejercicio consultivo, un acceso directo a la problemática generada en la misma. La principal experiencia que se puede aportar es que se aprecia una ausencia de estudios y proyectos completos que definan la concesión y los elementos que intervienen, ausencia que se ve reforzada por la falta de control de los gastos de explotación del concesionario ligados a la concesión lo que en algunos casos da lugar a propuestas de modificación de la concesión inclusive respecto de la duración de la misma produciendo un efecto indeseado y que puede afectar a la libre concurrencia y a la oferta de otros candidatos que de conocer las posibles modificaciones podrían haber presentado una oferta disferente.

Cuestión 5. ¿Considera que el marco jurídico comunitario actual es lo suficientemente preciso como para garantizar la participación concreta y real de empresas o agrupaciones no nacionales en los procedimientos de adjudicación de concesiones? ¿Cree que, en general, se garantiza una competencia real en este marco?

Respuesta. Sí.

Cuestión 6. ¿Cree que es conveniente una iniciativa legislativa comunitaria destinada a regular el procedimiento de adjudicación de concesiones?

Respuesta. Sí, pero con una condición básica imprescindible. Que exista una completa definición de la concesión de manera que en todos los Estados miembros se trate la cuestión de la misma manera, evitando que el uso de prácticas distintas para una finalidad común ocasione beneficios a unos Estados miembros y a sus empresas y perjudique a otros que al abrir sus mercados, sin las obligadas correspondencias, no recibe una igual de trato.

Cuestión 7. De manera más general, si considera que es necesario que la Comisión proponga una nueva acción legislativa, ¿cree que hay razones objetivas para que en dicho acto se contemplen todas las CPP de tipo contractual, tanto si se consideran contratos públicos como concesiones, para someterlas a regímenes de adjudicación idénticos?

Respuesta. Sí. La oportunidad de establecer una regulación completa de los diferentes objeto de los contratos aconseja que la iniciativa de la Comisión sea completa.

Cuestión 8. De acuerdo con su experiencia, ¿tienen los operadores no nacionales el acceso garantizado a las fórmulas de CPP de iniciativa privada? En particular, cuando los poderes adjudicadores invitan a presentar una iniciativa, ¿se suele dar una publicidad adecuada a la invitación, de manera que la información llegue a todos los operadores interesados? ¿Se organiza un procedimiento de selección realmente competitivo para la puesta en marcha del proyecto seleccionado?

Respuesta. Tanto el Reglamento de Servicios de las Corporaciones Locales como la Ley de Contratos de las Administraciones Públicas, respecto del contrato de concesión de obras públicas, establece tal posibilidad.

Al respecto el artículo 117 del citado Reglamento establece:

> *"1. Cuando algún particular solicitare por su propia iniciativa la concesión de un servicio deberá presentar memoria sobre el que se tratare de establecer y en la que justifique la conveniencia de prestarlo en régimen de concesión.*
>
> *2. La Corporación examinará la petición y, considerando la necesidad o no del establecimiento del servicio y la conveniencia para los intereses generales de su gestión por concesión, la admitirá a trámite o la rechazará de plano.*
>
> *3. Si se pidiere subvención de fondos, la Corporación deberá expresar, en el supuesto de admisión, si acepta o rechaza en principio la cláusula y, en caso afirmativo, la partida del presupuesto a cuyo cargo hubiere de imputarse."*

También sobre esta iniciativa los artículos 122 y 123 del Reglamento establecen:

> *"Artículo 122. 1. Aprobado por la Corporación el proyecto que, redactado por particulares o por la misma Corporación, hubiere de servir de base a la concesión del servicio, se convocará licitación pública para adjudicarla.*
>
> *2. Podrá tomar parte en la licitación cualquier persona, además de los presentadores de proyectos en el concurso previo si se hubiere celebrado.*
>
> *3. Si el proyecto proveyera la subvención con fondos públicos al concesionario, la Corporación podrá disponer que la licitación verse sobre la rebaja en el importe de aquélla.*
>
> *4. En otro caso, y en el de igualdad en la baja, la licitación se referirá al abaratamiento de las tarifas-tipo señaladas en el proyecto, y si se produjera empate, sucesivamente a los siguientes extremos: Ventajas a los usuarios económicamente débiles; mayor anticipación en el plazo de reversión, si la hubiere, y más rendimiento para la Administración, en forma de canon o participación en los beneficios.*
>
> *5. La Corporación podrá, sin embargo, disponer que la licitación se refiera simultáneamente a todos o varios de los extremos señalados en los párrafos 3 y 4 u otros que ordenare, asignando a cada uno de ellos uno o más puntos, fijados en las bases de la convocatoria, para efectuar la adjudicación a quien obtuviere la puntuación más alta.*

6. En los supuestos regulados en los párrafos 3 y 4, los licitadores presentarán, en plicas separadas, sus propuestas relativas a cada uno de los extremos que sucesivamente comprendiera la licitación, indicando en el sobre a cuál de ellos se refiere para limitar la apertura a los que fueren relevantes.

Artículo 123. 1. El peticionario iniciador a que alude el artículo 117 tendrá derecho de tanteo si participare en la licitación y entre su propuesta económica y la que hubiere resultado elegida no existiera diferencia superior a un 10 por 100.

2. El propio derecho corresponderá en iguales circunstancias al titular del proyecto que hubiere resultado elegido en el concurso previo de proyectos, de haberse celebrado, si en las bases se le otorgare, como premio, tal derecho a tenor de lo previsto en el apartado c) del párrafo 2 del artículo 118.

3. Podrá ejercerse este derecho en el acto de la apertura de plicas, que se prolongará al efecto treinta minutos después de la adjudicación provisional.

4. Si hicieren uso del derecho de tanteo las personas a que se refieren los párrafos 1 y 2, se otorgará, de las dos, a quien hubiere presentado la propuesta más económica, y si existiera empate entre ambas, se resolverá por pujas a la llana, en la forma dispuesta por la norma 4. a del artículo 34 del Reglamento de Contratación de las Corporaciones locales, partiendo de la propuesta sobre la que se ejercitara el indicado privilegio.

5. En el acto de la licitación se hará constar si se hizo uso o no de derecho de tanteo."

Respecto de las concesiones de obras públicas los artículos 222 y 227 de la Ley de Contratos de las Administraciones Públicas disponen:

"Artículo 222. Contratos de concesión de obras públicas a instancia de particulares o de otras Administraciones Públicas.

Con independencia de la iniciativa de la Administración competente para licitar posibles concesiones, podrá iniciarse el procedimiento a instancia de personas naturales o jurídicas o de otras Administraciones que se propongan construir y explotar una obra de las reguladas en esta Ley, siempre que el solicitante, además de cumplir los requisitos generales establecidos en ella, acompañe su petición del correspondiente estudio de viabilidad previsto en el artículo 227 con el contenido previsto en el apartado 2 de dicho artículo. Esta solicitud iniciará el procedimiento establecido en dicho artículo".

"Artículo 227. Estudio de viabilidad.

5. Se admitirá la iniciativa privada en la presentación de estudios de viabilidad de eventuales concesiones. Presentado el estudio será elevado al órgano competente para que en el plazo de tres meses comunique al particular la decisión de tramitar o no tramitar el mismo o fije un plazo mayor para su estudio que, en ningún caso, será superior a seis meses. El silencio de la Administración o de la entidad que corresponda equivaldrá a la no aceptación del estudio.

En el supuesto de que el estudio de viabilidad culminara en el otorgamiento de la correspondiente concesión tras la correspondiente licitación, su autor tendrá derecho, siempre que no haya resultado adjudicatario y salvo que el estudio hubiera resultado insuficiente de acuerdo con su propia finalidad, al resarcimiento de los gastos efectuados para su elaboración, incrementados en un 10 por 100 como compensación, gastos que

> *podrán imponerse al concesionario como condición contractual en el correspondiente pliego de cláusulas administrativas particulares. El importe de los gastos será determinado por la Administración concedente en función de los que resulten acreditados por quien haya presentado el estudio, conformes con la naturaleza y contenido de éste y de acuerdo con los precios de mercado".*

De cuanto se expone respecto de la propuesta de una iniciativa privada de una concesión se aprecia que toda propuesta debe ser abierta a la concurrencia pública de aquellos candidatos que estén interesados en su explotación, por lo que la apertura de un procedimiento competitivo está asegurada, aplicándose el correspondiente procedimiento de adjudicación del contrato, que como hemos señalado es el mismo que el que se regula en la Directiva 2004/18/CE para los contratos de obras, suministros y servicios, exclusión hecha de las nuevas figuras y sistemas que en esta última Directiva se incluyen respecto de las Directivas 92/50, 93/36 y 93/37. En tales procedimientos la publicidad se realiza por medio de los Diarios oficiales y, por lo general, figura en los correspondientes portales de Internet de los órganos de contratación.

A la licitación pueden concurrir no solo empresas españolas sino también todas las empresas de los Estado miembros de la Unión Europea y del Espacio Económico Europeo que reúnan las condiciones que para cada contrato se exijan, así como a las empresas de terceros países que acrediten la reciprocidad de trato respecto de las empresas españolas y que reúnan tales condiciones.

Cuestión 9. ¿Cuál sería, en su opinión, la mejor fórmula para el desarrollo de operaciones de CPP de iniciativa privada en la Unión Europea en las que se garantice el respeto de los principios de transparencia, no discriminación e igualdad de trato?

Respuesta. La aplicación de las normas contenidas en la Directiva 2004/18/CE de manera que a toda iniciativa privada puedan acceder todos los candidatos que tuvieran interés, salvaguardando los posibles derechos de los proponentes.

Cuestión 10. ¿Cuál es su experiencia en relación con la etapa posterior a la selección del socio privado en las operaciones de CPP contractuales?

Respuesta. Se reitera la respuesta a la cuestión 4.

Cuestión 11. ¿Conoce algún caso en el que las condiciones de ejecución (incluidas las cláusulas de adaptación en el tiempo) hayan podido tener efectos discriminatorios o hayan podido constituir un obstáculo injustificado a la libre prestación de servicios o a la libertad de establecimiento? En caso afirmativo, describa el tipo de problemas encontrados.

Respuesta. No.

Cuestión 12. ¿Conoce alguna práctica o mecanismo de evaluación de ofertas con efectos discriminatorios?

Respuesta. No. Sería contrario a la legislación española sobre contratos y a la legislación sobre competencia.

Cuestión 13. ¿Está de acuerdo con la afirmación de la Comisión según la cual determinadas fórmulas de tipo step-in pueden plantear problemas en términos de transparencia e igualdad de trato? ¿Conoce otras «cláusulas tipo» cuya aplicación pueda plantear problemas similares?

Respuesta. Compartimos la opinión de la Comisión.

Se desconocen otros tipos de cláusulas.

Cuestión 14. ¿Considera necesario aclarar a escala comunitaria determinados aspectos correspondientes al marco contractual de las operaciones de CPP? En caso afirmativo, ¿a qué aspecto o aspectos debería referirse dicha aclaración?

Respuesta. Como se viene indicando en las anteriores respuestas a las diferentes cuestiones la legislación española es precisa en la definición de conceptos y reglas que permiten concretar los aspectos necesarios para el desarrollo del procedimiento de adjudicación de los contratos que tienen por objeto la adjudicación de las concesiones. Tales normas aportan básicamente la aplicación de los principios de transparencia, apertura de la concurrencia, publicidad y trato por igual a los candidatos, como principios propios del Tratado.

Entendemos que tales normas deben reflejar una posición de mínimos en el desarrollo de una nueva norma comunitaria de manera que, junto con una acertada definición de las concesiones de aplicación por igual en todos los Estados miembros, el desarrollo del procedimiento de adjudicación sea el mismo en todo el ámbito comunitario.

Cuestión 15. En el marco de las operaciones de CPP, ¿sabe de algún problema concreto que se haya planteado en materia de subcontratación? Descríbalo.

Cuestión 16. En su opinión, el fenómeno de las operaciones de CPP de tipo contractual, al implicar el traspaso de un conjunto de tareas a un único socio privado, ¿justifica la introducción de normas más detalladas o la ampliación del ámbito de aplicación en lo que se refiere a la subcontratación?

Cuestión 17. De manera más general, ¿considera que debería adoptarse una iniciativa complementaria a escala comunitaria para aclarar u organizar las normas relativas a la subcontratación?

Respuesta a las cuestiones 15, 16 y 17. La figura de la subcontratación en los contratos de gestión de servicios públicos, y en las concesiones como modalidad de su régimen contractual, requiere que el concesionario realice de forma directa el desarrollo de la concesión limitándose las posibilidades de subcontratación a prestaciones auxiliares, pero en ningún caso a la prestación principal. En tal sentido el artículo 170 de la Ley de Contratos de las Administraciones Públicas dispone que "en el contrato de gestión de servicios públicos, la subcontratación sólo podrá recaer sobre prestaciones accesorias".

Tal precisión, en nuestra opinión, especialmente por la naturaleza y objeto de la prestación, aconseja que se introduzcan normas limitativas de tal posibilidad de subcontratación. Lo contrario, puede producir una efectiva y peligrosa falta de control de los elementos y variables propias del sistema concesional (p.ej. ausencia de control de los costes de explotación del concesionario).

Cuestión 18. ¿Cuál es su experiencia en materia de puesta en marcha de operaciones de CPP de tipo institucionalizado? En concreto, ¿su experiencia le lleva a pensar que el Derecho comunitario en materia de contratación pública y concesiones se respeta en el caso de operaciones de CPP institucionalizada? Si su respuesta es negativa, ¿por qué?

Las decisiones de crear entidades públicas para la prestación de servicios propios de la Administración se enmarcan en el desarrollo de las competencias de autoorganización de las Administraciones Públicas y la posibilidad de encomienda de desarrollo de una prestación de servicio público tiene su base jurídica en la disponibilidad e los medios propios de una Administración decisión que no colisiona con los derechos de terceros.

Cuestión distinta debe ser la posible privatización de tal entidad pública que en la medida que afecte a la apertura de la concurrencia pudiera ser regulada.

Cuestión 19. ¿Considera que debe tomarse una iniciativa a escala comunitaria para aclarar o precisar las obligaciones de los organismos adjudicadores en cuanto a las condiciones en las que deben ser convocados los operadores potencialmente interesados por un proyecto de tipo institucionalizado? En caso afirmativo, ¿en qué puntos particulares y en qué forma? Si su respuesta es negativa, ¿por qué?

En principio debe ser analizada la posible solución con la finalidad de disponer de elementos necesarios para poder adoptar una decisión.

Cuestión 20. ¿Qué medidas o prácticas cree que constituyen obstáculos a la puesta en marcha de operaciones de CPP en el seno de la Unión Europea?

Respuesta. En principio se desconocen dado el sistema abierto que se regula en la legislación española. No obstante, como señalamos anteriormente una norma unificada con definiciones comunes a todos los Estados miembros puede significar una medida que eviten posibles obstáculos.

Cuestión 21. ¿Conoce otras formas de CPP desarrolladas en terceros países? ¿Conoce ejemplos de «mejores prácticas» desarrolladas en este marco, que puedan servir de inspiración a la Unión? En caso afirmativo, ¿cuáles?

Respuesta. No.

Cuestión 22. De forma más general, y teniendo en cuenta la necesidad de importantes inversiones en ciertos Estados miembros a fin de lograr un crecimiento *económico social y sostenible, ¿estima que sería útil una reflexión colectiva sobre estas cuestiones, que se llevaría a cabo a intervalos regulares entre los sectores concernidos, y que permitiría un intercambio de mejores practicas?, ¿considera que la Comisión debería propiciar una red de este tipo?*

Respuesta. Sin duda alguna.

Madrid, 18 de octubre de 2004

REGERINGSKANSLIET

2004-09-03 Fi2004/2588

Finansdepartementet

Commission européenne
Consultation "Livre vert sur les PPP et le droit communautaire des marché publics et des concessions" C 100 2/005
B-1049 Bryssel

Den svenska regeringens synpunkter på Kommissionens grönbok om offentlig-privata partnerskap och EG-rätten om offentlig upphandling och koncessioner, (KOM (2004) 327 slutlig

Inledning

Den svenska regeringen, som har inhämtat yttrande från Nämnden för offentlig upphandling, Konkurrensverket, Svenska Kommunförbundet och Landstingsförbundet, Föreningen Svenskt Näringsliv, Vägverket samt Banverket, lämnar följande synpunkter på grönboken.

Nämnden för offentlig upphandling är tillsynsmyndighet för den offentliga upphandlingen i Sverige.
Konkurrensverket är den centrala förvaltningsmyndigheten för konkurrensfrågor.
Svenska Kommunförbundet är en sammanslutning av Sveriges kommuner. Förbundet skall tillvarata kommunernas intressen, främja deras samverkan och tillhandahålla dem service.
Landstingsförbundet är landstingens/regionernas intresse-, bransch- och arbetsgivarorganisation.
Föreningen svenskt näringsliv skall främja företagens gemensamma intressen.
Vägverket är central förvaltningsmyndighet med ett samlat ansvar, sektorsansvar, för hela vägtransportsystemet.
Banverket är central förvaltningsmyndighet med ett samlat ansvar, sektorsansvar, för hela järnvägstransportsystemet.

Sammanfattningsvis anser den svenska regeringen att det finns ett behov av lagstiftning på gemenskapsnivå som reglerar hur det offentliga kan samarbeta med det privata avseende koncessioner och andra typer av avtal, där de privata leverantörerna tillför ekonomiska medel och/eller tar en ekonomisk risk. Alla typer av sådana avtal bör omfattas av samma lagstiftning, dvs. sådana offentliga kontrakt som i dag inte omfattas av gällande upphandlingslagstiftning.

Det är naturligtvis inte möjligt att ta ställning till hur en sådan gemenskapslagstiftning skall vara utformad i detalj innan offentlig-privata partnerskap klart definierats i EG-rätten. Dock bör en ny lagstiftning klargöra hur de grundläggande EG-rättsliga principerna är tillämpliga avseende offentliggörandet av upphandlingar, möjligheten till förhandling under hela upphandlingsförfarandet, möjligheten till förändring av ingångna avtal samt innehålla särskilda bestämmelser avseende s.k. ”step-in”-klausuler och rättsmedel.

En av målsättningarna i det fortsatta arbetet bör vidare vara att göra regelverket för offentlig-privat samarbete lätt att förstå och lätt att tillämpa. I annat fall finns en risk att regelverket snarare försvårar en effektiv samverkan.

Kommissionens frågor

Fråga 1.
I Sverige finns det inte någon allmänt vedertagen definition av begreppet offentlig-privata partnerskap och det finns inte någon särskild lagstiftning som reglerar sådana förfaranden. Projekt avseende offentlig-privata partnerskap kan indelas i följande huvudsakliga grupper:

A Koncessioner

Renodlade byggkoncessioner är svåra att finna och det är tveksamt om det förekommit några tjänstekoncessioner i den betydelse som Kommissionen angivit i sitt tolkningsmeddelande[1] och enligt vad som kan utläsas av EG-domstolens domar[2].

”Tredje mansupphandling”
Med ”tredjemansupphandling” avses ett koncessionsliknande förfarande varigenom en upphandlande myndighet för annans räkning upphandlar en nyttighet som ett led i myndighetens åligganden enligt lag. Myndigheten själv skall inte tillgodogöra sig nyttigheten eller betala för den.

I svensk domstol har således ett kontrakt, enligt vilket ett bilbärgningsföretag gavs i uppdrag att forsla undan fordon uppställda i strid med lag, av domstol förklarats inte vara offentlig upphandling[3]. Upphandlingen hade genomförts av Rikspolisstyrelsen. Bortforslingen avsåg inte polisens egna fordon, utan privatägda och betalningsskyldighet för bortforslingen ålåg fordonsägaren.

[1] Kommissionens tolkningsmeddelande om koncessioner enligt EG-rätten,
EGT C 121 29.04.2000 s. 0002 - 0013

[2] C-324/98 Telaustria, Reg. s. I-10745 och C-358/00 Deutsche Bibliothek, Reg. s. I-4685

[3] RegR dom i mål nr 1080-1995 från den 7 juli 1995, RÅ 1995 not 252

B Upphandlingskontrakt - Byggentreprenader

De flesta offentlig-privata partnerskapkontrakt är att beteckna som byggentreprenadkontrakt. På senare tid diskuteras ofta alternativa finansieringsformer. Bland annat har kommuner, regioner och näringsliv tillskjutit medel för att starten av samhällsekonomiskt viktiga vägprojekt skall kunna tidigareläggas. Den fasta förbindelsen över Öresund har finansierats genom broavgifter.

Joint ventures och andra typer av samarbetskontrakt

Staten är sällan part i sådana projekt medan det hos kommunerna och landsting är betydligt vanligare. De offentlig-privata partnerskap som existerar idag bland kommuner och landsting sker framför allt inom idrott-, kultur- och fritidsområdet. Intresset är också stort ute i landet för mer kunskap om offentlig-privat partnerskap inom dessa områden. Orsaken till detta är framför allt att man från kommunernas sida vill söka externt eller alternativt engagemang och finansiering för uppgifter som inte tillhör de obligatoriska uppgifterna. Detta innebär också att det i många fall inte bara är kommunen och en privat aktör som är involverad i projektet utan även en eller flera ideella föreningar, som tillsammans bildar ett offentligt-privat partnerskap. Det har för kommuner eller landsting hittills inte varit intressant att söka offentlig-privata partnerskap inom t.ex. infrastrukturområdet dvs. områden som kräver stora finansiella investeringar, eftersom det i dessa fall är betydligt billigare att låna pengar. Sveriges kommuner har möjlighet att låna pengar för att finansiera en investering.

C Kundvalssystem

Det finns olika typer av kundvalssystem. De flesta används på kommunal nivå. Gemensamt för dessa är att en kommuninvånare erhåller en anvisning eller check som berättigar honom/henne att mot denna erhålla en viss tjänst. Detta innebär i vissa fall att privata utförare bedriver en kommunal verksamhet på uppdrag av kommunen.

Frågan hur dessa förhåller sig till reglerna för offentlig upphandling har varit föremål för flera utredningar, bl.a. Upphandlingskommittén SOU 2001:31. Utredningen har kommit fram till att om ett uppdragsförhållande föreligger, infaller upphandlingsskyldighet. Den svenska regeringen har angivit att frågan om kundvalssystem inom äldreomsorg, sjukvård, barnomsorg m.m. skall utredas vidare (prop. 2001/02:142, sid. 86). Något slutligt ställningstagande finns således inte.

För närvarande kan det endast sägas att graden av den upphandlande enhetens inblandning får avgöra huruvida transaktionen är att beteckna som ett ömsesidigt kontrakt med ekonomiska villkor eller någon annan form av överenskommelse. I de fall när en kommun tillhandahåller en lista på leverantörer, dvs. väljer dem som får tillhandahålla tjänsterna samt garanterar betalningen, uppstår det ett kontrakt mellan kommunen och leverantören, även om det är kommuninvånaren som väljer vilken av de anvisade leverantörerna som skall anlitas. Sådana situationer uppstår framför allt vid obligatoriska uppgifter för en kommun, såsom tillhandahållande av förskoleverksamhet eller äldreomsorg. Det finns dock fall när en kommuninvånare erhåller en check som får användas för vissa tjänster även utanför den egna hemkommunen, såsom fotvård. Sådana är närmast att beteckna som en form av individuellt bistånd till den enskilde och omfattas sannolikt inte av reglerna om offentlig upphandling. Härutöver finns andra typer av kundvalssystem i vilka kommunens ansvar för tjänstens tillhandahållande är delat eller inte lagstadgat och dessa är svårare att bedöma.

”Avknoppning”

En form av privatisering som möjligen kan hänföras till offentlig-privata partnerskap är s.k. avknoppning. Detta innebär att en personalgrupp erbjuds att i bolags- eller föreningsform utföra uppgifter vilka de dittills utfört som anställda. En offentlig arbetsgivare kan därmed privatisera delar av sin verksamhet samtidigt som man tar till vara den upparbetade kompetensen.

Frågan om man utan föregående upphandling under en begränsad tidsperiod får överlämna driften av en verksamhet till en grupp av tidigare anställda har utretts flera gånger men har ännu inte lett till någon lagstiftning. Frågan huruvida ett sådant överlämnande kan ske utan föregående upphandling har inte bedömts på ett likartat sätt i olika utredningar.

Fråga 2.

När föremålet för upphandlingen är av särskilt komplicerad natur skulle den nya möjligheten till s.k. konkurrenspräglad dialog kunna vara lämpad för ingående av partnerskap. Koncessioner och andra former av avtal mellan det offentliga och det privata, där den privata partnern tillför ekonomiska medel och/eller tar en ekonomisk risk, bör dock inte omfattas av de regler som gäller ”normala” bygg- och tjänsteupphandlingar. Avtalens konstruktion torde kräva att de upphandlande enheterna och deras privata och/eller offentliga partners ges mer långtgående möjligheter att förhandla, även efter det att anbudsgivarna avlämnat sina anbud, än de som finns i upphandlingsdirektiven. Därmed är den konkurrenspräglade dialogen inte tilläckligt flexibel för dessa typer av avtal.

Det har dock framförts farhågor från näringslivet att den konkurrenspräglade dialogen försvåras av de juridiska och praktiska oklarheter som fortfarande föreligger. Dessa oklarheter berör bl.a. förutsättningarna för att inleda proceduren, riskerna för att priser förhandlas och hanteringen av företagshemlig information.

Fråga 3.

Den faktorn att anbudsgivarna tar på sig en ekonomisk risk bör innebära möjligheter att förändra ingångna avtal, t.ex. i de fall de ekonomiska kalkylerna visar sig ohållbara, något som i ”vanliga” upphandlade avtal enligt upphandlingsreglerna normalt inte är tillåtet.

Risken med att låta det nu befintliga regelverket även omfatta upphandling av tjänstekoncessioner samt andra avtal där det privata tillför ekonomiska medel och/eller tar en ekonomisk risk är att de privata leverantörerna avstår från att delta i sådana upphandlingar. De privata företagen avstår därmed från att bidra med ekonomiska medel till offentliga projekt, vilket strider mot hela grundidén med koncessionsförfarandet och de avtal avseende offentlig-privat samarbete som avses i detta yttrande.

Det kan föreligga stora svårigheter att upprätta ett förfrågningsunderlag enligt EG-rätten om offentlig upphandling med avseende på krav som får ställas på leverantören och finansiärer för den långa avtalsperiod som erfordras samt att beskriva upphandlingsföremålet som uppfyller kravet på transparens samtidigt som beskrivningen inte får hindra en önskad teknisk utveckling under avtalsperioden. Likaså är ersättning och frågor om avtalsförhållandets upphörande komplicerade att reglera vid långa avtalstider och ekonomiskt stora åtaganden. Över en 20- till 30-årsperiod kan så grundläggande förutsättningar för avtalet ändras, att konsekvenserna av avtalsvillkor för sådana långt i framtiden liggande händelser kan bli vanskliga att förutse. Svårigheterna att tillgodose kravet på transparens, öppenhet och förutsebarhet i förfrågningsunderlaget blir därmed uppenbara.

Vidare är den blandning av åtaganden som ofta förutsätts ett problematiskt förhållande vid användningen av offentlig-privata partnerskap. Det kan bli så att reglerna för offentlig upphandling inte täcker allt som partnerskapet är tänkt att omfatta. Hur skall man t.ex. i ett partnerskap som berör fast egendom särskilja ev. hyresarrangemang (som inte omfattas av upphandlingsreglerna)?

Ett exempel som visar att EG-rätten om offentlig upphandling inte är lämpad för denna typ av projekt är följande: en kommun blir uppvaktad av ett antal små fotbollsföreningar inom kommunen om önskemål att bygga en fotbollshall. Föreningarna har i samråd kontaktat näringslivet och funnit någon som är villig att bygga billigt och andra som är beredda att ställa upp som sponsorer. Men de vill att kommunen står som ekonomisk garant för projektet. Man vill alltså att kommunen skall ingå i ett flerpartssamarbete, det ena företaget bygger byggnaden, det andra står som garanterad sponsor för en tid av t.ex. 10 år, föreningarna i samverkan skall äga och driva hallen, medan kommunen står som ekonomisk garant och utlovar att man kommer att hyra hallen ett visst antal timmar per vecka till förmån för allmänheten och skolor för en lång tid framåt. Men kommunen vill aldrig och har heller inte för avsikt att i framtiden äga hallen. Frågan är vilken upphandlingsform som passar in på detta och hur man faktiskt skall gå till väga. Reglerna om offentlig upphandling är inte anpassade för sådana projekt.

Fråga 4.
Vägverket har uppgett att verket för något år sedan utrett möjligheten att genomföra ett offentligt-privat partnerskap som avsåg tillhandahållandet av vägtjänster, byggande och drift av väg för en period om 25-30 år. Arbetet bedrevs i projektform och gick ut på att ta fram förfrågningsunderlag med användande av gällande regelverk på upphandlingsområdet. Syftet var att på ett kostnadseffektivt sätt tillvarata goda idéer och nya lösningar. Ett projektbolag bestående av bl. a. byggentreprenör och finansiär skulle finansiera, bygga och handha driften av väg mot en årlig ersättning från staten. Det var enligt verket tveksamt om projektet skulle falla in under

koncessionsbegreppet och den privata finansieringen visade sig emellertid innebära en betydande fördyring som svårligen skulle kunna uppvägas av eventuella effektivitetsvinster, vilket var en av huvudorsakerna till att projektet slutligen avbröts.

Vägverket gjorde den erfarenheten från projektet att det var svårt att hitta en lämplig upphandlingsform och vidare att det var svårt att hantera sådana projekt inom ramen för upphandlingsreglerna. Problem som uppstod var hur projektbolaget skulle kvalificeras och vilka krav i övrigt som behövde ställas med hänsyn till den långa avtalstiden. Vidare kunde det skönjas en tveksamhet från projektbolaget att stanna kvar som avtalspart även under driftsskedet. En uppenbar svårighet att finna former för att garantera ett långtgående engagemang kunde konstateras. Eftersom just ett efterföljande långtgående ansvar för driften av den anläggning man skapat var tänkt som en drivkraft för att skapa en kostnadseffektiv anläggning i det långa perspektivet fanns här en viss intressekonflikt inbyggd. Vägverket genomför också för närvarande ett projekt där samma part som bygger vägen, Norrortsleden i Stockholm, också efter vägens färdigställande har funktionsansvaret under en längre avtalstid. Det är inte fråga om privat finansiering, men i övrigt finns vissa beröringspunkter mellan detta projekt och offentligt-privata partnerskap, såsom att långtgående funktionsansvar ställs på entreprenören.

Såvitt Svenska Kommunförbundet känner till har ingen kommun gjort en koncessionsupphandling. Det som liknar koncessioner inom det kommunala området hanteras idag som tjänsteupphandlingar, tex. renhållning och vissa vårdtjänster. Generellt sett kan man ha flera invändningar mot koncessionsupphandlingar. För det första blir det ofta billigare för kommunen att själv genomföra investeringen genom lån hos riksgälden. För det andra är det ingen fördel för konkurrenssituationen att ha långvariga koncessioner. Meningen med att konkurrensutsätta en kommunal verksamhet genom driftentreprenad är att åstadkomma ”bäst värde för pengarna”. Detta görs genom att regelbundet konkurrenspröva tjänsten. Svenska Kommunförbundet råder kommunerna att inte ha längre avtalstider än fem år, undantag kan naturligtvis förekomma. Orsaken till detta är också att det är omöjligt att förutspå finansiell ställning och kompetens hos det vinnande anbudet efter ca 10 år. Vidare kan man heller inte avgöra om man får ett bra pris eftersom det är omöjligt att förutspå prisutvecklingen alltför långt in i framtiden, det finns inga lämpliga index för ändamålet. Detta gör att koncessioner inte varit aktuella.

Fråga 5.
Den svenska regeringen anser att befintlig gemenskapsrättslig lagstiftning inte är tillräcklig för att ge vägledning till vare sig upphandlande myndigheter eller till anbudsgivare avseende tjänstekoncessioner och andra sådana kontrakt som inte lyder under några sekundärrättsliga regler.

Fråga 6.
Ja, mycket talar för att legala ramar för förfarandet bör fastställas och att upphandling av rörelsemässigt stora koncessioner bör regleras på EU-nivå. Målet bör vara så enhetliga regler som möjligt. Ett lagstiftningsinitiativ bör

dock föregås av ytterligare klarlägganden avseende definitioner av de kontraktstyper som initiativet kommer att omfatta. Överhuvudtaget bör inriktningen på ett eventuellt lagstiftningsarbete vara tydlighet och enkelhet. Reglerna bör inte heller bli alltför detaljerade eller omfattande. Det är vidare önskvärt att det klargörs hur de EG-rättsliga grundprinciperna skall tillämpas på området.

Fråga 7.
Det vore enligt svenska regeringens mening fördelaktigt att ge ramar för alla typer av samarbete mellan det offentliga och det privata. Att endast delvis reglera sådana avtal som det här är fråga om, riskerar att leda till svåra gränsdragningsproblem. Koncessioner och övriga typer av avtal mellan upphandlande enheter och leverantörer, där de senare bidrar med ekonomiska medel och/eller tar en ekonomisk risk, bör omfattas av samma lagstiftning.

Fråga 8.
Såvitt känt har någon sådan form av direkt uppmaning till privata aktörer att lämna egna initiativ hittills inte förekommit i Sverige.

Från kommunalt håll framhålls att de mindre kommunerna sällan har resurser eller möjlighet att komma med nya idéer vad gäller projektering, anläggning och resursanvändning av gemensamhetsanläggningar t.ex. en idrottshall. Detta har emellertid de större byggbolagen. De har resurser att lägga ner tid och pengar i planering och ekonomisk kalkylering av ett projekt, som sedan presenteras för en kommun. Det är tänkbart att kommunen uppvaktas av ett byggföretag som har en bra idé om hur man kan få god ekonomi i ett projekt genom att bygga kringfunktioner och som i vissa fall ligger utanför den kommunala kompetensen, dvs. kommunen kan inte själv realisera idén. Kommunen skulle förplikta sig endast att hyra del av objektet och ev. i framtiden äga denna del av anläggningen. Kommunerna är i sådana fall förpliktade att upphandla enligt lagen om offentlig upphandling. Här uppstår en intressekonflikt. Det är inte säkert att byggbolaget som kom med idén och gjort grundarbetet vinner upphandlingen. Kommunen å sin sida kan hamna i en upphovsrättstvist med de första bolaget om vem som har rätt till de upphovsrättsligt skyddade materialet som legat till grund för förfrågningsunderlaget, t.ex. ritningar. Om ett bolag förlorar alltför många idéprojekt så är det klart att detta inte gynnar privata PPP-initiativ.

I de fall där kommuner eftersökt en avtalsrättslig privat partner har dock detta skett via ett upphandlingsförfarande. Detta garanterar även de icke-nationella aktörernas tillgång till marknaden. Något fall där en icke-nationell partner lämnat anbud är dock inte känt. Orsaken till detta kan vara flera, men huvudsakligen beror nog detta på att en PPP-lösning kräver lokal närvaro och att även internationella aktörer arbetar genom egna nationella bolag.

Fråga 9.
Offentlig-privata partnerskap på privat initiativ bör regleras på samma sätt som koncessioner, se svaren under fråga 5 och 6. Risken att principerna om

insyn, icke-diskriminering och likabehandling inte beaktas är annars avsevärd.

Ett problem att beakta i sammanhanget är att offentlig privata partnerskap på privat initiativ förutsätter att företaget utvecklar idéer utan någon som helst garanti för att engageras i ett eventuellt följande projekt.

Fråga 10.
Det är oerhört viktigt att förfrågningsunderlaget håller god kvalitet för att därigenom kunna styra och medverka i PPP-lösningen på bästa sätt. Det har också visat sig viktigt att det finns en politisk enighet vid valet av PPP-lösning. I annat fall riskerar den privata partnern att mötas av en splittrad offentlig partner vilket medför att det ömsesidiga förtroendet som eftersträvas inte kan uppnås.

I Sverige har vi haft en situation där ett flertal entreprenader genomförts på ett sätt som resulterat i dålig byggkvalitet. Fukt- och mögelskador med tillhörande innemiljöproblematik har varit resultatet i ett flertal större projekt inom bostads- och lokalmarknaden. Projekten har blivit försenade, lett till kraftigt ökade kostnader och slutligen har entreprenör och byggherre mötts i rättsliga tvister. Dessa problem har varit föremål för ett flertal utredningar där olika modeller har analyserats i syfte att hitta lösningar som passar samtliga parter. Bland annat har frågan om garantitid diskuterats flitigt, som idag är två år. Ett exempel där längre garantitider hade inneburit ett annat utfall för byggherren är byggnationen av Moderna museet i Stockholm. Fel i byggskedet ledde till fuktskador men eftersom detta inte uppdagades förrän efter två år stod den offentliga byggherren risken och fick bära den allra största kostnaden för ombyggnad medan entreprenören endast tvingades betala en mindre del. En annan modell som diskuterats för att komma till rätta med problemen med dålig byggkvalitet och alldeles för höga kostnader och långdragna rättsliga tvister har varit att samarbeta i partnerskap. Så kallade partnerskapsavtal med incitamentskonstruktioner har provats på en del håll i Sverige. Längre avtal med entreprenören där denne även ansvarar för byggnaden en bra bit in i förvaltningsskedet har varit en modell för att ge största möjliga incitament till att bygga så bra och kostnadseffektivt som möjligt. Tanken är att försöka skapa projekt där man redan före start skapar en situation där samtliga parter har gemensamma mål och värderingar. Kraft kan då läggas på att bygga bra istället för inbördes argumentation och tvister. Detta sätt att arbeta har utvecklats mer och mer de senare åren och har inneburit att PPP-lösningar blivit än mer populärt att diskutera för de offentliga fastighetsföretagen vid uppförande av byggnader.

Ytterligare en modell är ”rethinking construction”. Modellen består bl. a. av det man kallar ”strategic partnering”, som innebär att man bygger upp laganda och erfarenhet i de konstellationer som ska arbeta tillsammans genom längre avtal som innefattar byggnation av ett flertal projekt efter varandra. På så vis ökar kunskapen och byggkvaliteten blir bättre. Vid vanliga byggentreprenader byter man vanligen ”lag” efter att ett projekt är avslutat (jmf bilindustrin där samma team bygger bil efter bil). När det är en offentlig byggherre som är inblandad blir den nationella upphandlingslagstiftningen aktuell och det förekommer idag tveksamheter kring hur man kan genomföra dessa projekt inom ramen för lagstiftningen om offentlig upphandling. Det är viktigt att se till att vi har en lagstiftning, på både EU-nivå som nationell nivå, som stödjer bra lösningar inte motverkar dem.

Fråga 11.
Ett problem är att det är svårt att avgöra vad som är lämplig tidslängd för ett avtalsrättsligt offentligt-privat partnerskap. Om man har för långa avtalstider så påverkar det konkurrensen negativt. Det innebär att nya företag har svårt att etablera sig och samtidigt kan det vara svårt att utnyttja konkurrensfördelarna om avtalstiden överskrider 5 – 7 år. Å andra sidan kan det vara önskvärt att uppnå ett syfte med avtalet som kanske bara låter sig göras genom att ett längre avtalsförhållande uppstår. Avtalstiden borde vara en fråga att diskutera på EU-nivå, eftersom det har så stor betydelse för konkurrensen.

Vidare är det tänkbart att krav på säkerheter och andra finansiella krav kan medföra att endast stora aktörer kan delta i offentlig-privata partnerskap.

Fråga 12.
När en upphandlande enhet söker bevis för kvalitet och kompetens efterfrågar man ofta erfarenheter från liknande projekt, krav på finansiell ställning, referenser etc. Detta kan emellertid uppfattas som diskriminerande, eftersom det innebär att nystartade företag får svårt att komma in på marknaden.

Fråga 13.
Den svenska regeringen delar kommissionens uppfattning att dessa så kallade ”step-in”-upplägg medför problem vid upphandlingar av koncessioner och offentlig-privata partnerskap. De är framför allt svåra att förena med principen om förutsebarhet.

Samtidigt kan det konstateras att privata företag skulle få stora svårigheter att finansiera sina åtaganden vid koncessioner och andra typer av avtal med en ekonomisk risk, om inte finansieringsinstituten ges ”step-in”-möjligheter. Om det är så att kommissionen avser att föreslå särskild lagstiftning avseende de typer av avtal varom det här är fråga bör den ta hänsyn till denna faktor, möjligtvis genom att begränsa möjligheten till att gälla under en viss tidsperiod. Under denna period kan den upphandlande enheten välja att antingen själv överta åtagandet eller genomföra en ny upphandling, antingen av en tjänstekoncession eller av en tjänst.

Fråga 14.
En ny lagstiftning bör klargöra hur de grundläggande EG-rättsliga principerna är tillämpliga avseende offentliggörandet av upphandlingar, möjligheten till förhandling under hela upphandlingsförfarandet, möjligheten till förändring av ingångna avtal samt innehålla särskilda bestämmelser avseende s.k. ”step-in”-klausuler och rättsmedel.

Gemenskapslagstiftning som kan komma i konflikt med de nationella civilrättsordningarna bör dock undvikas så långt möjligt.

Fråga 15.
Inga särskilda problem i detta avseende beträffande just offentlig-privata partnerskap.
Det kan dock vara av intresse att ett förslag om s.k. byggentreprenadavdrag för närvarande är föremål för beredning inom Regeringskansliet. Förslaget innebär i korthet följande: Den som ger någon ett uppdrag att utföra bygg- eller anläggningsverksamhet skall göra ett avdrag från den ersättning som betalas ut. Avdraget belopp tillhör uppdragstagaren och skall betalas in till ett konto hos Skatteverket. Genom förfarandet skall skatteinbetalningar säkerställas. En uppdragsgivare som inte gör föreskrivet avdrag från utbetald ersättning kan göras ansvarig för uppdragstagarens skatter och avgifter. Syftet med förslaget är att förhindra det skatteundandragande som sker genom svartarbete i bygg- och anläggningsbranschen.

Fråga 16.
I sådana avtal som det här är fråga om är det av särskild vikt för den upphandlande enheten att känna till sin motparts ekonomiska och finansiella ställning samt tekniska kapacitet, eftersom den upphandlande enheten kan riskera att själv behöva överta driften av dyra och komplicerade projekt. Däremot är det inte nödvändigt att särskilda bestämmelser införs vad gäller underleverantörer vid avtalsmässiga offentlig-privata partnerskap.

Fråga 17.
Ett sådant initiativ bedöms inte behövligt.

Fråga 18.
Från kommunalt håll anses att kravet på upphandling vid kommuns köp från sitt helägda bolag enligt Teckal-domen medför att institutionella offentlig-privata partnerskap inte är särskilt attraktiva.

Från näringslivet ses en risk att institutionella offentlig-privata partnerskap kan användas för att kringgå reglerna om offentlig upphandling.

Fråga 19.
Svensk rättspraxis på området anger tydligt att en upphandlande enhet inte har möjlighet att utan offentlig upphandling tilldela ett kontrakt till en annan juridisk person, även i de fall den äger mer än hälften av denna person. Det innebär att det i dag inte är möjligt för upphandlande enheter att teckna avtal med en annan juridisk person det själv äger utan konkurrensutsättning, oavsett om ägandet till en minoritet ägs av ett annat rättssubjekt eller om enheten själv äger hela. Det innebär t.ex. att även i det fall en upphandlande enhet och ett annat rättssubjekt gemensamt startar ett bolag, kan inte den upphandlande enheten garantera den andra partnern några ekonomiska fördelar av samarbetet. För svensk del är det därmed inte nödvändigt att kommissionen tar initiativ i den här frågan.

Fråga 20.
Den svenska regeringen anser att bristen på klargörande rättsregler kan hindra upphandlande enheter att inleda offentlig-privata partnerskap. Risken att bryta mot befintliga rättsregler, och därmed riskera överprövningar och

skadestånd, är för stor. Privata bolag är också tveksamma till att bidra med tid, kraft och ekonomiska medel, om de riskerar att projekten havererar.

I övrigt kan reglerna om myndighetsutövning ställa upp hinder med tanke på begränsningar i rätten att delegera sådan samt även tillgodoseende av den svenska offentlighetsprincipen som kan göra privata företag tveksamma till att gå in i sådana avtal.

Från näringslivets sida har framhållits att bristen på politisk vilja att ge upp sina interventionsmöjligheter och rädsla för konkurrens med egenregiverksamheten genom tillämpning av reglerna för offentlig upphandling.

Fråga 21.
Från svensk sida har vi inte kännedom om andra sådana former av offentlig-privata partnerskap i andra länder utanför unionen.

Fråga 22.
Den svenska regeringen anser det mycket önskvärt, både för upphandlande enheter i Sverige, men särskilt för upphandlande enheter i de nya medlemsländerna, att få tillgång till praxis och erfarenhet av offentlig-privata partnerskap.

Eftersom det är av stor betydelse att de gemenskapsrättsliga reglerna tolkas på likartat sätt i alla medlemsländer, vore det önskvärt att kommissionen tog initiativet till att bilda ett sådant nätverk. Nätverket bör bestå av teknisk, finansiell och juridisk expertis från alla medlemsländer.

Med vänliga hälsningar

Lilian Wiklund
Expeditions- och rättschef

Kopia till:

Utrikesdepartementet, EU-enheten
Riksdagens kammarkansli

COM (2004) 327 final

Green Paper on Public Private Partnership

Observations by the Dutch Government

Summary
The Dutch government attaches great importance to Public-Private Partnerships (PPP's) because standard practice has shown that PPP's are a suitable method in order to realise projects in an efficient way. Therefore the Dutch government welcomes, with expressions of gratitude to the European Commission, the presentation of the Green Paper.

There are several ways in which PPP's are applied in the Netherlands. PPP's can be subdivided into two categories: object-related PPP's and area-related PPP's. Object-related PPP's are projects related to specific objects such as a motorway or a railway. In almost all cases different types of DBFMO-contracts (including concessions) are applied. Those PPP's are usually strict contractual PPP's.
In case of area-related PPP's an area is being developed completely in order to build, for example, houses, offices, shops as well as the infrastructure and the green areas. It is possible that the aspects that are profitable, such as the sale of prepared sites for the construction of houses and offices, can be used in order to finance the aspects, which are not profitable (for instance the infrastructure and the green areas). The object in this method is in most cases only for a small percentage made up of public works. In a number of cases a special legal body is set up for area-related PPP's, which makes these projects usually an institutionalised PPP. Besides that, one can use a contractual PPP.

The realisation of a PPP-agreement is complex as the success of it is depending on several (uncertain) factors. Often a project is awarded even before the development of it has started. So that at that very moment detailed data is not available yet. Therefore it is crucial with PPP's that the parties make good arrangements in order to steer well clear off conflicts, cases for arbitration or summary proceedings at a later stage.

Candidates often have to make (high) costs in order to be considered for a contract. When the competition is taking place in different stages and the communication between parties is only on paper without any form of consultation and the absence of the possibility that one or more parties drop out in the meantime, tender costs could increase tremendously. Tender costs that could go up too high can prevent a bidder from taken part in the competition. In consideration 41 in the directive (2004/18) the possibility of a staged application of the negotiation procedure and the competitive dialogue is laid down, in which case the number of tenders may be limited step by step, by applying the award criteria. With the application of this staged procedure, the tender costs for the contracting authority as well as for the candidates will be limited and the principle of proportionality will be taken into consideration.

Confidentiality in the processing of the information of the candidates plays also a crucial part in the realisation of a PPP-agreement. Candidates must be assured that innovative solutions are not passed on to other candidates and that the contracting authority will refrain from cherry picking. When these requirements are not met, it may stop candidates from taking part in the PPP-competition.

The processing of the factors mentioned above requires thoroughness and stresses the need for a frequent exchange of information, to negotiate between times or to discuss the realisation of a PPP-agreement. In other words: in order to realise a PPP-agreement there must be a possibility to negotiate or to consult. With the realisation of a PPP-agreement the Community law with regard to public procurement and concession agreements must be complied with. When the negotiation procedure is being applied, this procedure will be in principle the negotiated procedure with prior publication of a contract notice, since this procedure, compared to the negotiation procedure without prior publication of a contract, has the advantage that with publication the Treaty provisions of transparency, non-discrimination and equal treatment are complied.

The variety of types of PPP's, the share of public provisions that can vary strongly, as well as the possibility to negotiate and the differences in national legislation, requires flexibility in legislation and not new or more legislation. The current European legislation offers, in the opinion of the Dutch government, enough opportunities to realise a PPP. The Dutch government holds the opinion that the competitive dialogue will result in a positive contribution to this realisation of a PPP.

With regard to the explanation of European legislation, the Dutch government points out the Guidelines for Successful Public-Private Partnerships (European Commission, DG Regional Policy, 2003). These guidelines offer sufficient transparency of the European legislation.

An European level PPP-facility would stimulate the application of PPP's further, through for example the finance of appealing projects. This facility could help new projects in relative new branches in financing the high additional and tender costs and in offering longer terms. After the building of a track record the additional and tender costs will decrease. This facility will therefore be temporarily.

The Hague, September 2004

UK GOVERNMENT RESPONSE TO THE EUROPEAN COMMISSION'S GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS, MAY 2004

The UK Government welcomes the debate on the suitability of the existing Community framework on specific characteristics of PPPs and the valuable contribution of the European Commission's Green Paper on public-private partnerships (PPPs) and community law on public contracts and concessions to this debate.

The UK Government's objective is to deliver world-class public services whilst laying the foundation for a flexible and productive economy. Achieving that objective requires the right public infrastructure through investment, accompanied by a reform of public services, and a pragmatic, flexible approach to how they are delivered. The UK PPP/Private Finance Initiative programme plays an important role in the delivery of the Government's investment plan for public services.

The UK Government's approach to public service reform is based on four key principles:

- that it is the Government's job to set standards, designed to ensure that citizens have the right to high quality services wherever they live;
- that these standards can only be delivered effectively by devolution of responsibility to the frontline;
- that more flexibility is required for public service organisations to deliver the diversity of service provision needed to respond to the wide range of customer aspirations;
- that public services need to offer expanding choice for the customer.

The current UK approach to PPPs is based on equity, efficiency and accountability; ensuring that we secure the most cost effective infrastructure over the long term. Effective competition and a flexible approach have an essential role to play in ensuring the delivery of public service investment through PPPs meets these criteria.

The UK believes that there is an important Community role in:

- simplifying, clarifying and modernising the current EC legal framework for public procurement through two new directives on public works and utilities;
- policing the Single Market and competition rules which apply to the procurement of public services

The UK also recognises the value of disseminating best practice and guidance at Community level, as a catalyst in ensuring that PPPs in Member States are developed in a transparent and competitive manner. However it remains unconvinced of the value to be added by a common legislative framework and obligations for PPPs at EU level. Currently Member States are in the process of implementing the two new procurement directives (2004/18/EC and 2004/17/EC), which recognises concepts discussed in the Green Paper e.g. competitive dialogue. Separate legislation to create a uniform approach in the EU would result in a resource intensive task with compliance burdens for businesses, reducing the competitive market appetite for competing for public service contracts, as well as undermining the flexibility needed to develop successful PPPs within the context of national circumstances.

A cautious approach should be taken to expanding the Community's role in setting the legislative framework for PPPs. The Green Paper does not put forward a compelling case that an enhanced Community role would provide greater clarity and greater benefit for Member States and their citizens.

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UK RESPONSE TO QUESTIONS SUBMITTED FOR DISCUSSION

(Q1) What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?

1. The most commonly used form of contractual PPP in the UK is the Private Finance Initiative (PFI), where the public sector contracts to purchase quality services on a long-term basis so as to take advantage of the private sector management skills incentivised by having private finance at risk. This includes concessions and franchises, where a private sector partner takes on the responsibility for providing a public service, including maintaining, enhancing or constructing the necessary infrastructure.

2. There is no specific law for PPPs in the UK and where appropriate PPPs will be subject to EC procurement rules following the UK Regulations implementing the public procurement directives. Where the procurement directives do not cover PFI projects, such as for service concession contracts, these projects will be advertised in OJEU.

3. *UK PPPs are managed through the dissemination of best practice and guidance. Contract standardisation is rigorously enforced to reduce the burden of bid costs, helping ensure the promotion of competition and transparency. A value for money appraisal is also carried out at three key stages of the procurement process with the aim of ensuring that there is no inherent bias between procurement options, and that the flexibility exists to choose alternative procurement routes where they offer better value for money. This ensures in particular that the most economically advantageous procurement option is undertaken.*

4. *The National Audit Office (NAO) and other UK audit bodies are the primary bodies charged with assessing the Government's PFI programme. In this capacity they audit procurement policy, the conduct of procurement and the value for money of selected projects. The Public Accounts Committee (PAC) frequently follows up on reports produced by the NAO placing Government policy under parliamentary scrutiny.*

***(Q2)* In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?**

5. *The competitive dialogue procedure will provide a suitable framework for the award of such contracts, as indeed it was designed to do, replicating many of the features of a competitive negotiated procedure. The Commission, in the Green Paper points to the flexibility of the competitive dialogue procedure, which it was instrumental in ensuring.*

The successful application of the procedure is dependent upon the broad interpretation of this flexibility.

6. *In contrast, in paragraph 24, the Commission gives an unusually narrow interpretation of the circumstances in which a competitive negotiated procedure can be used for Works contracts. The UK believes that the narrow interpretation of provisions, whether concerning the use of the existing negotiated procedure for works contracts or the new competitive dialogue procedure would unnecessarily hamper good procurement of PPPs without delivering benefits in terms of transparency, openness or minimising barriers to trade.* **(Q3) In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.**

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7. *No, we are not aware of any problems.*

(Q4) Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

8. *Yes, both works and services concession contracts have been awarded as part of the UK's PFI/PPP programme. The award of these contracts have followed a fully competitive route in line with UK policy of achieving value for money and following the EC Treaty and the EC procurement rules, where appropriate.*

(Q5) Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?

9. *The UK experience has been that the provisions of the Treaty regarding non-discrimination, together with UK national requirements of obtaining value for money and contract standardisation have been sufficient to ensure genuine competition and participation from non-national companies. Concessions have been awarded to non-national companies such as Skanska (Swedish) and Bouygues (French).*

(Q6) In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

10. *While the UK Government agrees with the Commission's intention to bring service concessions into the existing procurement framework, separate legislation in this area would be redundant. As UK procuring authorities are required to adopt a fully competitive award procedure (principles of transparency and equal treatment of tenders) for concessions, the current situation has not caused practical problems in the UK context. Separate legislation would also have the drawbacks of causing legal uncertainty as to which set of rules would apply where, taking a long time to negotiate and*

implement, during which time the PPP market would have developed and changed considerably.

11. *However the UK does not strongly support the differential treatment of works and service concession contracts and if there were to be any legislative action, it could be sensible to align the provisions for works and services concession contracts. This would be achieved more effectively by amending the public sector public procurement directive, rather than by introducing a new legislative measure.*

(Q7) More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

12. *The flexibility that drives innovation afforded at present would be hindered if all contractual PPPs were subject to identical award rules. The need for distinction between contracts and concession contracts is essential, as in the former, the economic operator is fully exposed to market forces, which is not necessarily the case for concessionaires. Therefore a moderate approach needs to be taken in the award of concession contracts and on the award of contracts by concessionaires, not themselves subject to the Directive. As already mentioned this would be achieved more effectively by amending the public sector public procurement directive, rather than by introducing a new legislative framework (Q6).*

(Q8) In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?

13. *The UK is not aware of any particular problems caused by selection procedures in the UK as they are designed to observe the Treaty rules and promote competition.*

14. *The UK does not normally undertake private initiative PPP schemes.*

(Q9) In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?

15. *Private initiative PPPs are already subject to the principles of transparency, non-discrimination and equality of treatment. The best formula for ensuring their further development is for the Commission to continue to play its role as catalyst, transferring knowledge of best practice in PPP structuring and procuring.*

(Q10) In contractual PPPs, what is your experience of the phase which follows the selection of the private partner?

17. *UK experience of the phase following the selection of the private partner has not shown up any significant problems and PFI market participants and public authorities are generally content with existing procedures.*

18. *The phase following the selection of the private partner, prior to contract award, provides the contracting authority with the opportunity to discuss and develop precise solutions to meet its output requirements. The focus on public sector output requirements and private sector total costing in delivering those outputs is an integral part of developing PPPs, as both parties are required to focus on the long-term need for and implications of investment.*

19. *By defining services as outputs, the public sector can take advantage of the private sector's capacity to innovate in competing to meet those requirements. This allows the public sector to harness some of the increased efficiency that can come from contestability in service delivery. Balancing competitiveness and transparency with the need to maintain bid costs at a manageable level is imperative in order to make it more appealing to potential bidders to enter the competition process. Any change to this process would have a negative impact on attaining best value for money by procuring [contracting] authorities, and any increase in bid costs, as a result would tend to damage rather than improve access by private operators and competition for procurements.*

(Q11) Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?

20. *Paragraph 46 refers to the need to fix the length of contracts to ensure that the private partners investment is paid off and a reasonable return on the invested capital is secured. The lengths of PPP contracts should be set to take into account the benefits of whole life costing of assets provided, rather than to ensure a set level of financial reward for the private sector. As a result, fixing contract lengths to financial returns would diminish the flexibility individual PPPs require, and diminish their value for money for the public sector.*

21. *We agree strongly with the Commission's statement advocating the evolution of PPP relationships, and we would reiterate the need for flexibility in contracts to allow genuine partnership working and innovation over the contract period. Two key factors in the development of PPPs: structure/clauses of the contracts and the advertisement of the contract ensure that there are no barriers to effective competition. Community level control over the relationship aspect of PPPs is not pertinent as the level of advancement appropriate is best determined by the circumstances of individual projects.*

(Q12) Are you aware of any practices or mechanisms for evaluating tenders which have a discriminatory effect?

22. *No. Tenders are evaluated in accordance with community law and Treaty principles.*

23. *The current UK approach to PPPs is based on equity, efficiency and accountability; ensuring that we secure the most cost effective infrastructure over the long term. The National Audit Office (NAO) and other audit bodies, and the Public Accounts Committee (PAC) ensure accountability and effective competition by investigating, reporting and making recommendations based on their investigations of significant individual PFI projects. They also conduct systematic reviews of important PFI policy areas or other aspects of the PPP/PFI programme.*

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(Q13) Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other "standard clauses" which are likely to present similar problems?

24. *The UK Government does not believe that "step-in" arrangements present problems in terms of transparency and equality of treatment; on the contrary, they are intrinsically linked to the rationale for PPP. The fundamental premise behind a PPP is the transfer of risk to the private sector. With the private sector's capital at risk and not just its profit, there is a powerful incentive to build and maintain assets so that high service standards are delivered throughout the contract life with assets more likely to be built on time, as payments only begin when they are available. Contractors also have the incentive to build with an asset's whole-life cost in mind, as it is they who will bear those costs during the operational phase of the project.*

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25. *Step-in rights form an integral part of a funders security over any project, allowing the private sector consortium as a whole to become comfortable with placing their finance at risk to service delivery. As such they are an integral part of PPP, and of the approach a bidding consortium proposes to meet service delivery requirements over the long term. Such rights are for use in exceptional circumstances and to ensure that services continue to be provided. Where financial institutions exercise step-in rights this would not lead to any undue discrimination as these arrangements do not contradict the edicts of transparency and equality of treatment, and the financiers involved will act to secure the most economically advantageous proposal to continue meeting service delivery requirements. Step-in rights are established in the contract when competed and it is not the contracting authority that is responsible for exercising these rights. If this security were not to be provided, it would jeopardise the participation of financial institutions.*

(Q14) Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?

26. *No, we do not feel that are any gains from further Community level intervention on aspects of contractual PPPs.*

(Q15) In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.

27. *No, we are not aware of problems.*

(Q16) In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

28. *No. It should not be necessary to interfere in the relationship between the private sector partner and its sub-contractors.*

29. *Treaty principles are observed when all PPP/PFI contracts are awarded to a project company by a public sector contracting body. Any subsequent sub-contracting conducted by the private sector entities should not be subject to further regulation beyond the initial competition. The private sector entity should be free to operate on a commercial basis without prejudice to public sector procurement rules. The Commission statement in Paragraph 52 '...private partners are free to sub-contract part or all of a public contract...' supports this view and we do not feel there are any gains from applying further rules to contractual PPPs and subcontracting.*

(Q17) In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

30. *No. Proper application of existing rules should enable effective competition to operate, and it should not be necessary to have extra regulation.*

(Q18) What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not ?

31. *The NATS (National Air Traffic Services) PPP would probably be regarded by the European Commission as an institutionalised PPP. The UK Government sold a controlling shareholding in NATS to the Airline Group (a consortium of seven airlines) in July 2001, with BAA also taking a minority shareholding in 2003. Community law on public contracts and concessions was not applicable to the process for selecting the strategic partner for NATS. However, the process for selecting the Airline Group followed the principles of freedom of establishment, i.e. the Airline Group were selected following an open competitive tendering process and on the basis that their offer was the most economically advantageous when assessed against pre-determined selection criteria.*

(Q19) Do you think that an initiative needs to be taken at Community level to clarify or define the obligations of the contracting bodies regarding the conditions requiring a call for competition between operators potentially interested in an institutionalised project? If so, on what particular points and in what form? If not, why not?

32. *Paragraphs 53-69 could potentially be interpreted as covering a very wide variety of institutions and contractual arrangements and we regard it as important that any proposals for change very clearly define the circumstances in which they would apply. Bearing in mind that caveat, we regard it as important in circumstances where the framework cannot be described as a* procurement *that we should be free to choose a PPP partner without having to negotiate with other firms or to auction involvement in the PPP company.*

33. *However, we have read the Green Paper as primarily concerned about a Government entering a JV which then participates in a procurement, on the grounds that it leads to a favoured bid. We recognise that this could be an area for concern but would be reluctant to approve of any initiative at Community level to deal with what the Green Paper refers to as "institutionalised PPPs" outside of the normal procurement framework. In our view, if an "institutionalised PPP" is accompanied by the award of a contract then the relevant procurement regime (whether works, services, supply etc) should apply and should provide safeguards against discrimination, unequal treatment etc. If the procurement rules do not apply to the conferring of a task upon the JV e.g. because it is a sale of an undertaking to the PPP company rather than a procurement of a service then, in our view, general Treaty principles (e.g. non-discrimination, freedoms of movement of capital and services) should be sufficient to guard against abuse by Member States.*

(Q20) In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?

34. *Uncertainty, whether about legal aspects or changes to contractual practices, creates market difficulties and therefore slows down the development of PPPs. The Commission will need to consider whether the impact of any proposals it might make would reduce uncertainty, or have the potential to increase it. It is also important to ensure that inflexibility does not become a barrier to the adoption of PPPs within the European Union, and particularly their adaptation to national circumstances.*

(Q21) Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of "good practice" in this framework which could serve as a model for the Union? If so, please elaborate.

35. *There are a wide variety of PPP-type contracts or institutions employed both within and outside the Union. Many structures are adapted to fit particular national circumstances or individual projects, and so they are unlikely to be very broadly*

applicable standard frameworks. However, the UK has noted the successful adoption of PFI-type structures in several Australian states, and in Canada.

(Q22) More generally, given the considerable investments needed in certain member states in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would allow for the exchange of best practice would be useful? Do you consider that the commission should establish such a network?

36. *Sharing of knowledge and experience of successful structures between different national circumstances would be a positive step in furthering development of PPPs in the different member states. The existing Advisory Committee on Public Contracts or the European Public Procurement Network might well be a suitable vehicle for such exchanges.*

European Commission
Consultation “Green Paper on PPPs and
the Community law on public contracts
and concessions”
C100 2/005
B-1049 Brussels

Bae Caerdydd / Cardiff Bay
Caerdydd / Cardiff
CF99 1NA

Eich cyf / Your ref
Ein cyf / Our ref

23 July 2004

Dear Sir,

EC GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS

The Economic Development and Transport Committee of the National Assembly recently considered this consultation document.

The Committee has no direct experience of managing contracts of the kind described in the paper and we are therefore unable to answer many of the detailed and specific questions set out. However, we have a number of general comments on this type of contract which we would like the European Commission to take into account.

While some members have concerns about the principles underlying this kind of contract, the Committee nonetheless agreed that where contracts of this type were used they should be properly established on the basis of clear principles.

Members considered that the key requirement for any such contract was for it to be set out as simply as possible and for there to be complete transparency in its content. This is important in ensuring that any obligations on behalf of either the public or the private sector are clearly understood and open to public scrutiny.

Members noted that commercial confidentiality was sometimes cited as a reason for requiring details not to be disclosed – but considered that this should not uncritically be used as a reason for reducing transparency. They considered that commercial operators might have to accept that if they wish to enter into this kind of agreement they would need to be more open that would normally be the case.

Members recognised the need for financing organisations to retain ‘step in’ rights to protect the interest of both the public service body in the partnership and the public who would benefit from the service contractors.

They also welcomed the approach of using ‘framework agreements which, while often more complex to set up, offered a more flexible approach to further contracts while still protecting the need for open competition.

Christine Gwyther

Christine Gwyther AM
Chair, Economic Development and Transport Committee
Cadeirydd, Pwyllgor Datblygu Economaidd a Thrafnidiaeth

Cynulliad Cenedlaethol Cymru
National Assembly for Wales

Y Pwyllgor Llywodraeth Leol a Gwasanaethau Cyhoeddus
Local Government and Public Services Committee
Bae Caerdydd / Cardiff Bay
Caerdydd / Cardiff CF99 1NA

European Commission
Consultation 'Green paper on PPPs and Community law on public contracts and concessions'
C 100 2/005
B-1049 Brussels

27 July 2004

Dear Secretary-General

Green Paper on public-private partnerships and Community law on public contracts and concessions

The Local Government and Public Services Committee of the National Assembly for Wales considered the European Commission's 'Green Paper on public-private partnerships and Community law on public contracts and concessions' at its meeting on 7 July. Please find attached a report setting out the Committee's views.

I am sending a copy of this letter to the Minister for Finance, Local Government and Public Services, Chairs of the European and External Affairs Committee and Economic Development and Transport Committee.

Yours sincerely

Ann Jones

Ann Jones
Chair, Local Government and Public Services Committee

The National Assembly for Wales
Local Government and Public Services Committee

Report on the European Commission Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions

July 2004

Background

On 7 July 2004, the National Assembly for Wales' Local Government and Public Services Committee[1] considered the European Commission Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions[2]. This report identifies the key issues subsequently agreed unanimously by the Committee.

The Committee noted that the aim of the Green Paper is to launch a debate on the desirability of adapting European Community rules on public procurement and concessions to accommodate the development of public-private partnerships (PPPs). It aims to improve the current rules in order to ensure that economic operators have access to PPPs under conditions of legal clarity and real competition. It describes the ways in which the rules and the principles deriving from Community law on public contracts and concessions are applied when a private partner is being selected, and for the subsequent duration of the contract, in the context of different types of PPP. It also asks a set of questions intended to find out more about how these rules and principles work in practice, so that the Commission can determine whether they are sufficiently clear and suitable for the requirements and characteristics of PPPs.

The Committee noted that paper does not touch on the decision to contract out public services or keep them in the public sector, which the Commission notes remains within the competence of the public authorities of Member States.

The UK Government supports the increased use of PPPs in both national and Trans-European infrastructure delivery, expressing the view that the use of private finance can offer better value for money than conventional public investment. To this end, the UK is keen to ensure the right conditions for the development and implementation of PPPs are in place.

The Committee's view

The Committee supports a Community legislative initiative to regulate the procedure for the award of concessions and inclusion of detailed provisions applicable to such awards. Whilst the Committee recognises the current principles and rules governing the award of contracts, it felt that further emphasis should be placed on transparency of procurement, for both contractual and PPP concessions.

In terms of the selection of private partners, the Committee felt that the criteria should be extended to reflect the wider principle of Sustainable Development, which uniquely within the European Union, the National Assembly for Wales has a legal duty to pursue[3]. In particular the selection criteria should focus on social and environmental benefits, as well as economic advantages. Further to this, the Committee felt it would be necessary to define, more precisely, the term 'economically advantageous'.

As a general point, the Committee highlighted the need to explicitly refer to protection of employee rights within any proposed legislative action designed to co-ordinate the procedures for the award of concessions, and safeguard against the development of a two-tier workforce within the public sector.

[1] A cross-party Committee of 10 Assembly Members

[2] COM(2004) 327 final

[3] *The Government of Wales Act 1998*, s.121

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VKÖ
Verband kommunaler
Unternehmen Österreichs

VÖWG
Verband der Öffentlichen Wirtschaft
und Gemeinwirtschaft Österreichs

An die
Europäische Kommission
Konsultation „Grünbuch zu öffentlich-privaten
Partnerschaften und den gemeinschaftlichen
Rechtsvorschriften für öffentliche Aufträge
und Konzessionen“
C 100 2/005
B-1049 Brüssel

Wien, am 9. Juli 2004
Dr.S/SE

**Grünbuch zu öffentlich-privaten Partnerschaften
und den gemeinschaftlichen Rechtsvorschriften
für öffentliche Aufträge und Konzessionen,
KOM(2004)327 endg. vom 30.04.2004;
Stellungnahme**

Sehr geehrte Damen und Herren!

Auf Einladung der Kommission an alle mit den im vorliegenden Grünbuch aufgeworfenen Fragen befassten Organisationen Stellung zu nehmen, erlauben sich die unterzeichneten Verbände ihre akkordierte gemeinsame Stellungnahme zur Kenntnis zu bringen.

Grundsätzlich ist positiv festzuhalten, dass die Kommission der aus verschiedenen Gründen immer wichtiger werdenden Zusammenarbeit zwischen öffentlichen Stellen und Privatunternehmen zwecks Finanzierung und Betrieb von Infrastrukturen und zwecks Bereitstellung von Dienstleistungen eine erhöhte Aufmerksamkeit zuwendet, um Rechtsunsicherheiten auf beiden Seiten so weit als möglich zu vermeiden.

Zurecht widmet die Kommission dem bereits vorhandenen gemeinschaftlichen Rechtsrahmen breiten Raum für jene Fälle, in denen öffentliche Stellen eine definierte Dienstleistung, die über den Markt erreichbar ist, durch Dritte – wozu eben auch das weite Feld von ÖPP zählt – erbringen will. Es ist unbestritten, dass derartige Dienstleistungen grundsätzlich dem Wettbewerb in Gestalt der Durchführung eines diskriminierungsfreien und transparenten Vergabeverfahrens geöffnet wird. Damit wird nicht nur dem Wettbewerbsprinzip, sondern auch den Grundregeln des EG-Vertrages Rechnung getragen.

Diese grundsätzlich anzuerkennende Ausschreibungspflicht besteht jedoch nicht absolut. Im Grünbuch wird zwar ausdrücklich darauf verwiesen, dass die Gebietskörperschaften entscheiden können, ob sie Dienstleistungen selbst (direkt) erbringen wollen oder ob sie damit Dritte beauftragen.

Allerdings wird jedoch der sog. In-house-Erbringung von Dienstleistungen gerade im Bezug auf institutionelle ÖPP mit beherrschender Stellung der öffentlichen Hand, insb. von Gemeinden/Regionen zu wenig – wenn überhaupt – Aufmerksamkeit geschenkt, was sich als grundsätzlicher Mangel dieses Grünbuches erweist. Nach Auffassung der unterzeichneten Verbände muss die Entscheidungsfreiheit der Gebietskörperschaften, insb. der Gemeinden, ob sie Dienstleistungen von allgemeinem wirtschaftlichem Interesse wie ÖPNV, Wasserversorgung, Entsorgung und andere Aufgaben der kommunalen Daseinsvorsorge durch eigene Unternehmen u.a. auch durch solche IÖPP, an denen sie mit qualifizierter Mehrheit beteiligt sind, selbst erbringen wollen oder ob sie diese Aufgaben an Dritte u.a. auch an IÖPP (etwa mit geringerer Beteiligung) vergeben wollen, jedenfalls erhalten bleiben.

Zu weiteren Aspekten des Grünbuches wird im Einzelnen auf die Beantwortung des Fragenkatalogs der Kommission verwiesen (Beilage).

Die unterzeichneten Verbände ersuchen die Kommission die obige Stellungnahme in ihre weiterführenden Überlegungen und Schlussfolgerungen zum Thema öffentlich-private Partnerschaften und gemeinschaftliche Rechtsvorschriften für öffentliche Aufträge und Konzessionen einfließen zu lassen und verbleiben

mit freundlichen Grüßen

VERBAND KOMMUNALER UNTERNEHMEN ÖSTERREICHS (VKÖ)

VERBAND DER ÖFFENTLICHEN WIRTSCHAFT UND GEMEINWIRTSCHAFT ÖSTERREICHS (VÖWG)

eh.	eh.	eh.
Dipl.Ing. Friedrich PINK	Gerhard GREINER	Dkfm. Ferdinand LACINA
Präsident des VKÖ	Geschäftsführer	Präsident des VÖWG

Beilage:
Fragenkatalog

VKÖ
Verband kommunaler
Unternehmen Österreichs

VÖWG
Verband der Öffentlichen Wirtschaft
und Gemeinwirtschaft Österreichs

BEANTWORTUNG des FRAGENKATALOGS zum GRÜNBUCH der Europäischen Kommission „zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen (ÖPP)“ KOM(2004)327 endg. vom 30. April 2004

1) Welche Formen von ÖPP auf Vertragsbasis sind Ihnen bekannt?
Gibt es in Ihrem Land spezifische (gesetzliche oder andere) Rahmenbedingungen für derartige Konstruktionen?

ÖPP auf Vertragsebene reichen von einer Privatisierung von Aufgaben über Teilung der Aufgaben, Outsourcing bestimmter Bereiche, Finanzierung der Infrastruktur, Entlastung öffentlicher Hände zur Vermeidung von finanziellen Engpässen bis zur Nutzung des Know-hows privater Unternehmen.

Als Form treten sowohl das Betreibermodell, als auch das Konzessionsmodell in Erscheinung.

In Österreich gibt es keine spezifischen gesetzlichen Regelungen für ÖPP: Die Anwendung des allgemeinen Gesellschaftsrechts und überhaupt des bestehenden nationalen Rechtsrahmens ist ausreichend.

2) Nach Auffassung der Kommission wird die Umsetzung des wettbewerblichen Dialogs in einzelstaatliche Rechtsvorschriften den betroffenen Parteien ein Verfahren an die Hand geben, das sich ganz besonders für die Vergabe öffentlicher Aufträge in Zusammenhang mit der Einrichtung einer ÖPP auf Vertragsbasis eignet und gleichzeitig die Grundrechte der Wirtschaftsteilnehmer wahrt. Stimmen Sie dem zu? Falls nein, warum nicht?

Dieser Auffassung der Kommission kann zugestimmt werden.

3) Sehen Sie in Bezug auf diese Aufträge neben der Wahl des Vergabeverfahrens andere Punkte, die mit dem Gemeinschaftsrecht über öffentliche Aufträge in Konflikt stehen könnten? Wenn ja, nennen Sie diese und begründen Sie!

Bei ÖPP auf Vertragsbasis kann davon ausgegangen werden, dass die anzuwendenden gemeinschaftlichen Rechtsregeln keine unüberbrückbaren Hindernisse für die Betrauung von ÖPP mit Dienstleistungen im allgemeinen wirtschaftlichen Interesse darstellen. Eine andere Sichtweise betrifft die institutionellen ÖPP (siehe dort).

4) Haben Sie bereits einmal ein Verfahren zur Vergabe einer Konzession in der EU organisiert, daran teilgenommen bzw. ein solches organisieren oder daran teilnehmen wollen? Welche Erfahrungen haben Sie gemacht?

Zu dieser Frage können seitens der unterzeichnenden Verbände keine Aussagen getroffen werden.

5) Halten Sie das derzeitige Gemeinschaftsrecht für präzise genug, um die konkrete und effektive Teilnahme von Gesellschaften oder Gruppierungen aus anderen Staaten an den Konzessionsvergabeverfahren sicherzustellen?
Sind Sie der Ansicht, dass in dieser Hinsicht normalerweise ein tatsächlicher Wettbewerb herrscht?

Auf Grund der direkten Anwendung der Bestimmungen des Primärrechts der Gemeinschaft bei Dienstleistungskonzessionen (Art. 43 bis 49 EG-Vertrag; siehe EuGH Rs Telaustria) einerseits und der zusätzlichen Anwendung von Bestimmungen des EU-Vergaberechts bei Baukonzessionen andererseits ist nach Auffassung der Verbände weitgehend ein auch zwischenstaatlicher Wettbewerb sichergestellt.

6) Halten Sie einen Vorschlag für einen gemeinschaftlichen Rechtsakt zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe für wünschenswert?

Aus der Beantwortung der Frage 5 ergibt sich, dass ein gemeinschaftlicher Rechtsakt für die Festlegung eines Verfahrensrahmens für Konzessionsvergaben entbehrlich ist.

7) Allgemeiner gefragt: Wenn Sie ein neues Gesetzgebungsvorhaben der Kommission für erforderlich halten, gibt es dann objektive Gründe dafür, in diesem Rechtsakt sämtliche ÖPP auf Vertragsbasis zu behandeln und sie ein und demselben Regelwerk für die Vergabe zu unterwerfen, ganz gleich ob die Vorhaben als öffentliche Aufträge oder als Konzessionen einzustufen sind?

Die unterzeichnenden Verbände halten weitere gemeinschaftliche Rechtsakte über den bestehenden Rechtsrahmen hinaus für nicht erforderlich, sodass auch eine Angleichung der Verfahren für öffentliche Aufträge und Konzessionen im Zusammenhang mit ÖPP auf Vertragsbasis abzulehnen ist.

8) Ist Ihrer Erfahrung nach der Zugang der ausländischen Akteure zu privat initiierten ÖPP gewährleistet?
Für den Fall, dass die Vergabestellen zur Initiative aufrufen, wird dieser Aufruf dann angemessen bekannt gemacht, so dass alle interessierten Akteure Kenntnis davon haben können?
Wird für die Ausführung des ausgewählten Projekts ein Auswahlverfahren auf Basis eines effektiven Wettbewerbs organisiert?

Durch die Umsetzung des neuen Verfahrens, des sog. wettbewerblichen Dialogs nach Art. 29 der RL 2004/18/EG in die nationalen Rechte der Mitgliedstaaten wird letztlich ermöglicht, dass alle interessierten Akteure an den betreffenden ÖPP-Vorhaben teilnehmen können, sodass auf dieser Basis effektiver Wettbewerb besteht. Das Instrument des „wettbewerblichen Dialogs“ kann auch als „geeignetes Verfahren“ die Gründung von ÖPP in jenen Fällen erleichtern, wo Gemeinden/Regionen sich dafür entscheiden, eine spezielle Dienstleistung im allgemeinen wirtschaftlichen Interesse auszuschreiben, d.h. nicht selbst oder durch Unternehmen wahrzunehmen, die unter den Begriff „In-house“ fallen (siehe dort, Beantwortung der Frage 18).

9) Wie könnte Ihrer Auffassung nach die Entwicklung privat initiierter ÖPP in der EU unter Wahrung der Grundsätze der Transparenz und der Gleichbehandlung und ohne Verstoß gegen das Diskriminierungsverbot gewährleistet werden?

Für eine privat initiierte ÖPP bedarf es über den bestehenden Rechtsrahmen hinaus keiner weiteren Gewährleistung. Wenn die Idee des initiierenden Unternehmens und die dadurch gewonnenen Erkenntnisse allen später teilnehmenden Unternehmen bekannt gegeben werden können, sodass ein gleicher Informationsstand für alle herstellbar ist, wäre dies im Sinne eines breiten Wettbewerbs eine Möglichkeit, dieses Thema zu behandeln.

10) Welche Erfahrungen haben Sie in der Phase im Anschluss an die Auswahl des privaten Partners im Rahmen von ÖPP auf Vertragsbasis gemacht?

Zu dieser Frage können seitens der unterzeichnenden Verbände keine Ziel führenden Aussagen getroffen werden.

11) Sind Ihnen Fälle bekannt, in denen die Ausführungsbedingungen, einschließlich der Klauseln zur Anpassung im Zeitverlauf, eine diskriminierende Wirkung entfalten konnten oder eine ungerechtfertigte Behinderung der Dienstleistungs- oder Niederlassungsfreiheit darstellten? Falls ja, bitte beschreiben Sie die Art der aufgetretenen Probleme!

In den Mitgliedsunternehmen der unterzeichnenden Verbände sind keine derartigen Fälle bekannt. Im Übrigen existieren innerstaatliche gesetzliche Regelungen, die Rechtssicherheit für alle Parteien gewährleisten.

12) Sind Ihnen Praktiken oder Mechanismen zur Bewertung von Angeboten bekannt, die eine diskriminierende Wirkung haben?

Derartige Praktiken oder Mechanismen sind den unterzeichnenden Verbänden aus dem Bereich ihrer Mitglieder nicht bekannt.

13) Sind Sie wie die Kommission der Auffassung, dass bestimmte Interventionsklauseln in Bezug auf die Grundsätze der Transparenz und der Gleichbehandlung problematisch sein können?
Sind Ihnen andere Typen von Klauseln bekannt, deren Anwendung zu ähnlichen Problemen führen kann?

Diese Problematik ist den unterzeichnenden Verbänden nicht bekannt.

14) Halten Sie es für erforderlich, dass bestimmte Aspekte der vertraglichen Rahmenbedingungen für ÖPP auf Gemeinschaftsebene geklärt werden? Falls ja, was sollte geklärt werden?

Im Hinblick darauf, dass die vertraglichen Rahmenbedingungen für die Ausführung von Projekten eng mit nationalen Rechtsvorschriften verknüpft sind, sollte – wie bisher – kein abgeleitetes Gemeinschaftsrecht – auch in Teilbereichen – geschaffen werden.

15) Sind Ihnen bei ÖPP-Konstruktionen besondere Probleme mit der Vergabe von Unteraufträgen bekannt? Welche?

Bei ÖPP-Konstruktionen sind uns keine besonderen Probleme mit der Vergabe von Unteraufträgen bekannt. Die unterzeichnenden Verbände weisen jedoch darauf hin, dass bei exzessiver Vergabe von Unteraufträgen Probleme grundlegender Art auftreten. Je länger die Kette von Unteraufträgen ist, desto schwieriger sind derartige Konstruktionen für vergebende Einrichtungen und Behörden – als die Garanten öffentlicher Dienstleistungen – kontrollierbar.

Die Unterbeauftragung könnte auf den ersten Blick zwar Effizienzgewinne nach sich ziehen, auf der anderen Seite kann die Vergabe von Unteraufträgen jedoch nachhaltigem Wirtschaften entgegen wirken, weil Qualitätsverluste festzustellen sind, die eine von den Bürgern zu Recht erwartete hochwertige Erbringung von Dienstleitungen im allgemeinen Interesse beeinträchtigen. Zudem stellen auch die Arbeitnehmervertretungen zunehmend fest, dass die Vergabe von Unteraufträgen die Umgehung gesetzlicher Bestimmungen arbeits- und sozialrechtlicher Natur begünstigt.

16) Rechtfertigt die Existenz von ÖPP auf Vertragsbasis, die die Übertragung eines Aufgabenpakets an einen einzigen privaten Partner impliziert, ihrer Auffassung nach dass ausführlichere Regeln für die Vergabe von Unteraufträgen eingeführt werden und/oder dass der Anwendungsbereich erweitert wird?

Im Zusammenhang mit ÖPP auf Vertragsbasis bedarf es keiner weiteren Regeln für die Vergabe von Unteraufträgen, zumal es den vergebenden öffentlichen Stellen möglich ist, auf die Gestaltung des Inhalts von Unteraufträgen Einfluss zu nehmen.

17) Halten Sie, allgemeiner gesprochen, eine ergänzende Initiative auf Gemeinschaftsebene zur Klärung oder Umgestaltung der Regeln für die Vergabe von Unteraufträgen für erforderlich?

Eine ergänzende Initiative auf Gemeinschaftsebene zur Klärung oder Umgestaltung der bestehenden Regeln für die Vergabe von Unteraufträgen ist entbehrlich.

18) Welche Erfahrungen haben Sie mit der Einrichtung institutionalisierter ÖPP gemacht? Lassen Ihre Erfahrungen Sie zu der Schlussfolgerung gelangen, dass die gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen bei institutionalisierten ÖPP-Konstruktionen eingehalten werden? Falls nein, warum nicht?

Aus der Sicht öffentlicher/gemeinwirtschaftlicher Unternehmen, die eine Minderheitsbeteiligung privater Wirtschaftsteilnehmer aufweisen, kann eine solche Einrichtung institutionalisierter ÖPP in der Vergangenheit nur positiv beurteilt werden, da durch den (die) privaten Partner finanzielle Unterstützung sowie in zahlreichen Fällen auch Know-how eingebracht wird, anderseits die öffentlichen Partner weiterhin eine bestimmende Kontrolle über die Erbringung von Dienstleistungen im allgemeinen Interesse ausüben und jederzeit erforderliche Anpassungen an sich im Laufe der Zeit ändernden Umfeldbedingungen vornehmen können, die eine auf Dauer gerichtete Qualität dieser Dienstleistungen sicherstellen.

IÖPP auf kommunaler Ebene mit bestimmender, d.h. qualifizierter Mehrheit der Anteile der Gemeinde im Sinne von Art. 2 Abs.1 lit.b der RL 2004/17/EG des Europäischen Parlaments und des Rates vom 31.03.2004 (Amtsblatt EU, L 134/1 vom 30.04.2004) sind Ausdruck der Subsidiarität, der wirtschaftlichen Gemeindehoheit und Freiheit der Gemeinde in eigenen Angelegenheiten – wozu die Daseinsvorsorgeleistungen wie ÖPNV, Wasser, Abwasser, Entsorgung u.dgl. gehören – selbst zu entscheiden, ob bzw. in welcher Weise diese Dienstleistungen für den Bürger erbracht werden sollen.

Umso bedauerlicher ist nach Ansicht der unterzeichnenden Verbände die Lücke im vorliegenden Grünbuch, keine Aussagen über Reichweite eines In-house-Tatbestandes zu treffen, sondern vielmehr auf künftige Entscheidungen des EuGH zu verweisen, was für die für IÖPP notwendige Rechtssicherheit nicht förderlich ist.

In dieser Hinsicht versagt das Grünbuch als Wegweiser der Kommission, zu Fragen entscheidender Natur dezidiert Stellung zu nehmen.

19) Halten Sie eine Initiative auf Gemeinschaftsebene für erforderlich, um die Verpflichtungen zu klären oder zu vertiefen, die die öffentlichen Auftraggeber in Bezug auf den Wettbewerb zwischen potenziell an einem institutionalisierten ÖPP-Projekt interessierten Wirtschaftsteilnehmern haben? Falls ja, welche Aspekte halten Sie für besonders wichtig und welche Form sollte eine solche Initiative haben? Falls nein, warum nicht?

Eine diesbezüglich von der Kommission angesprochene Initiative auf Gemeinschaftsebene ist entbehrlich, da eine solche wiederum nur einen kleinen Teilaspekt umfassen würde, der im übrigen durch das primäre Gemeinschaftsrecht (Transparenz, Gleichbehandlung) hinlänglich bestimmt ist.

20) Welche Maßnahmen oder Verfahren behindern in der EU die Einrichtung von ÖPP?

Bis dato sehen wir keine Maßnahmen oder Verfahren, die die Einrichtung von ÖPP behindern. Allerdings besteht die Gefahr, dass durch überschießende Regelungen die Gestaltungsfreiheit des Auftraggebers zu sehr beeinträchtigt wird und daher die Realisierung von Projekten und die Erbringungen von Dienstleistungen im Rahmen von ÖPP unattraktiv werden.

21) Kennen Sie andere ÖPP-Formen aus Drittländern?
Kennen Sie aus Ihren Erfahrungen in solchen Ländern bewährte Verfahrensweisen, die auch für die EU beispielgebend sein könnten? Falls ja, welche?

Derzeit sind den unterzeichnenden Verbänden keine derartigen Erfahrungen aus Drittländern bekannt.

22) Denken Sie dass es nützlich wäre, im Hinblick auf den großen Investitionsbedarf einzelner Mitgliedstaaten zum Erreichen einer sozialen und dauerhaften Entwicklung gemeinsam und in regelmäßigen Abständen über diese Fragen unter den betroffenen Akteuren nachzudenken und bewährte Verfahrensweisen auszutauschen?
Sollte die Kommission nach Ihrer Auffassung ein derartiges Netzwerk aufbauen?

Die Erbringung von Dienstleistungen im allgemeinen Interesse ist in allen Mitgliedstaaten ein entscheidendes Element des wirtschaftlichen und sozialen Zusammenhalts, sodass über Wege, Mittel und Verfahren, diese sicherzustellen, jede Erfahrung und Kenntnis bewährter Vorgangsweisen sinnvoll und nützlich ist.

Auch im Rahmen der EU könnte ein solches Netzwerk an Informationsquellen Vorteile für alle Interessierten bringen.

VERBAND KOMMUNALER UNTERNEHMEN ÖSTERREICHS (VKÖ)
&
VERBAND DER ÖFFENTLICHEN WIRTSCHAFT UND GEMEINWIRTSCHAFT ÖSTERREICHS (VÖWG)

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An die
Europäische Kommission

Konsultation „Grünbuch zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen“

C 100 2/005

mit E-mail: **markt-d1-ppp@cec.eu.int**

STELLUNGNAHME

zum

GRÜNBUCH
ZU ÖFFENTLICH-PRIVATEN PARTNERSCHAFTEN UND DEN GEMEINSCHAFTLICHEN RECHTSVORSCHRIFTEN FÜR ÖFFENTLICHE AUFTRÄGE UND KONZESSIONEN

Das 3P- Public Private Partnership – Forum (kurz „3P“) ist eine ÖPP Plattform, die von zahlreichen österreichischen Unternehmen und Institutionen unterstützt und getragen wird. 3P vertritt damit die Interessen zahlreicher an ÖPP interessierter Marktteilnehmer in Österreich mit dem Ziel, die Akzeptanz6 von ÖPP in Österreich zu erhöhen und die Umsetzung von PPP Projekten in Österreich zu fördern.

Die folgende Stellungnahme zum Grünbuch der Europäischen Kommission dient einerseits dem Zweck, unser Verständnis der neuen gemeinschaftsrechtlichen Vorschriften (insbesondere zum wettbewerblichen Dialog) wiederzugeben und andererseits auch Anregungen oder Bedenken der Förderer von 3P zu gemeinschaftsrechtlichen Themen der öffentlichen Auftragsvergabe und ÖPP zu formulieren.

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I. ÖPP's auf Vertragsbasis

1. Welche Formen von ÖPP auf Vertragsbasis sind Ihnen bekannt? Gibt es in Ihrem Land spezifische (gesetzliche oder andere) Rahmenbedingungen für derartige Konstruktionen?

3P sind Formen von ÖPP auf Vertragsbasis bekannt, zB Konzessions-, Betreiber-, Betriebsführungs-, Belehnungs-, Contracting- und Finanzierungsmodelle sowie direkte und indirekte Nutzerfinanzierungsmodelle.

Es gibt in Österreich kein Gesetz, das für PPP's/ÖPP's besondere Regelungen trifft, welche von den allgemein geltenden abweichen. In einigen Sondermaterien (zB Schieneninfrasturkturfinanzierungsgesetz) setzt der österreichische Gesetzgeber den Begriff PPP voraus, führt ihn aber keiner besonderen Regelung zu.

I.1. Auswahl des privaten Partners

I.1.1. Partnerschaft auf Vertragsbasis: als öffentlicher Auftrag eingestufte Beauftragung

2. Nach Auffassung der Kommission wird die Umsetzung des wettbewerblichen Dialogs in einzelstaatliche Rechtsvorschriften den betroffenen Parteien ein Verfahren an die Hand geben, das sich ganz besonders für die Vergabe öffentlicher Aufträge in Zusammenhang mit der Einrichtung einer ÖPP auf Vertragsbasis eignet und gleichzeitig die Grundrechte der Wirtschaftsteilnehmer wahrt. Stimmen Sie dem zu? Falls nein, warum nicht?

ALLGEMEINES

Bislang fehlte es Auftraggebern an institutionalisierten Möglichkeiten, mit privaten Unternehmen verschiedene am Markt etablierte Strukturen zu erörtern, unter anderem um die Eignung des Projekts für eine ÖPP zu prüfen. Bei der Strukturierung von ÖPPs spielt die konkrete Aufgaben- und Risikoverteilung und damit die Finanzierbarkeit regelmäßig eine wesentliche Rolle. Da neben den Interessen der unmittelbaren Projektteilnehmer auch Aspekte von finanzierenden Parteien zu berücksichtigen sind,

sind ÖPPs tendenziell „besonders komplexe“ Projekte. Diese Komplexität gepaart mit den erwähnten fehlenden Möglichkeiten der Erkundung möglicher Strukturen ist wohl ein Grund, dass ÖPPs in Österreich zahlenmäßig bislang nicht sehr verbreitet sind.

Um Auftraggebern zumindest zu ermöglichen, solch komplexe Projekte in einem Verhandlungsverfahren zu vergeben, wurde sowohl von privaten Unternehmern als auch Auftraggebern ein leichterer Zugang zum Verhandlungsverfahren gefordert. Dies wird durch den wettbewerblichen Dialog nunmehr umgesetzt, den wir als Sonderform des Verhandlungsverfahrens mit vorheriger Bekanntmachung verstehen. Schließlich dürfen gem Art 29 (3) RL 2004/18 alle Aspekte des Auftrags erörtert werden.

Da der wettbewerbliche Dialog im Gegenzug zum „klassischen“ Verhandlungsverfahren aber zu einem früheren Zeitpunkt ansetzt und auch eine Verhandlung über das Projekt an sich, dh die Ausschreibungsunterlage, ermöglicht, bietet er auch eine formelle Lösung für die sogenannte Vorarbeitenproblematik (aufholbare oder nicht aufholbare Wettbewerbsvorteile eines Bieters wegen Mitarbeit bei der Erstellung der Ausschreibungsunterlage).

Im allgemeinen erwarten wir, dass die Anzahl der ÖPPs in Österreich durch die Einführung des wettbewerblichen Dialogs und die damit verbundene Möglichkeit zur breiten Nutzung nationalen und internationalen Know-hows bei deren Strukturierung und Umsetzung steigen wird.

Besondere Komplexität

Der wettbewerbliche Dialog steht Auftraggebern nur für *besonders komplexe* Vorhaben zur Verfügung. Aus unserer Sicht sind klassische ÖPP Projekte, bei denen der private Partner auch die Finanzierung zu übernehmen bzw zu besorgen hat, regelmäßig *besonders komplex*.

Wir verstehen den wettbewerblichen Dialog aber auch als eine Lösung für eines der größten praktischen Probleme für öffentliche Auftraggeber. Nach geltendem Recht ist es Aufgabe des Auftraggebers, bereits vor Ausschreibung des Vorhabens festzulegen, ob er einen zB einen Bauauftrag oder eine Baukonzession ausschreibt. Dementsprechend kommen unterschiedliche Regeln zur Anwendung. Neben den bestehenden erheblichen Abgrenzungsschwierigkeiten zwischen Auftrag und Konzession, steht der Auftragnehmer gegebenenfalls vor dem Problem, bei der Ausschreibung und vor Beginn eines Verhandlungsverfahrens nicht abschließend beurteilen zu können, zu welcher Risikoverteilung und allenfalls zu welchem öffentlichen Zuschusserfordernis die Verhandlungen über ein ÖPP Projekt führen werden. Dies können aber entscheidende Parameter für die Qualifikation eines Vorhabens als Bauauftrag oder Baukonzession sein. Sofern es einem Auftraggeber bei einem bestimmten Projekt tatsächlich (und objektiv nachvollziehbar) nicht möglich sein sollte, die Risikoverteilung und sonstige für die vergaberechtliche Qualifikation des

Vorhabens entscheidende Kriterien vorab zu beurteilen, sollte dem Auftraggeber für dieses Vorhaben der wettbewerbliche Dialog offen stehen. In diesem Dialog könnten Risikoverteilung und die finanziellen Leistungen des Auftraggebers rein im Interesse der wirtschaftlich bestmöglichen Lösung diskutiert werden, ohne für die Findung dieser Lösung hinderliche vergaberechtliche Beschränkungen.

Rechte am eingebrachten Know-how

Einerseits soll bieterspezifisches Know-how in die Lösungsfindung einfließen, andererseits sind die Rechte der einzelnen Teilnehmer an ihrem Know-how angemessen zu wahren. Um zu verhindern, dass proprietäres Know-how in einem wettbewerblichen Dialog an andere Bieter fließt, sollte das Verfahren streng formalisiert ablaufen und eine Pflicht für den Auftraggeber zur Dokumentation der einzelnen Dialogphasen vorgesehen werden. Die Bestimmung des Art 29 (3) RL 2004/18, wonach vertrauliche Informationen oder Lösungsvorschläge nicht ohne Zustimmung des teilnehmenden Bieter weitergegeben werden können, wird daher ausdrücklich begrüßt. Nur durch eine detaillierte Dokumentation des Verfahrens- und Dialogablaufs wird diese Vertraulichkeit aber auch nachvollziehbar und somit dem notwendigen Rechtsschutz zugänglich.

Im Allgemeinen befürchten private Unternehmen, dass der wettbewerbliche Dialog zu einer Abschöpfung ihres Know-hows ohne adäquate Gegenleistung führen könnte. Die Bieter könnten aufgrund einer starken Position des Auftraggebers dazu gezwungen sein, ihr Know-how preis zu geben und müssten dabei das Risiko eingehen, bei der anschließenden Vergabe einem Unternehmen zu unterliegen, das dieses Know-how nicht hatte und in die Erlangung des Know-hows auch keine Investitionen tätigen musste. Unternehmen, die bestimmtes Know-how kostenintensiv erwerben, werden zwangsläufig höhere Kosten haben und zu einem höheren Preis anbieten, als Unternehmen, die lediglich vom Know-how anderer profitieren. Eine obligatorische Aufwandsentschädigung wurde von der Europäischen Kommission und dem Europäischen Parlament im Vorfeld zwar diskutiert, letztendlich aber nicht in den endgültigen Richtlinientext aufgenommen. Dies ist aus Sicht der privaten Unternehmen, von deren Know-how der wettbewerbliche Dialog und die öffentlichen Auftraggeber profitieren sollen, bedauerlich. Den Bietern würde durch eine Zusicherung der Abgeltung ihrer Aufwendungen ein angemessener Anreiz zur Preisgabe ihres Know-hows gegeben. Fehlt dieser Anreiz, besteht für den Auftraggeber die Gefahr, dass Bieter wichtige Informationen zurückbehalten und nicht in die Lösungsfindung einbringen. Bei Zurückbehaltung von projektdienlichen Informationen besteht aber die Gefahr ungleicher Wissensstände unter den Bietern. Jedenfalls bestünde ein Gegenanreiz für die Bieter, der dem Grundgedanken des wettbewerblichen Dialogs zuwiderlaufen würde. Wir gehen aber davon aus, dass es nunmehr Sache des nationalen Gesetzgebers ist, eine solche Entgeltlichkeit vorzusehen, um den Erfolg des wettbewerblichen Dialogs zu sichern.

Die Richtlinie lässt in diesem Zusammenhang auch offen, ob und in welchem Umfang Auftraggeber schon vorab (zB in der Beschreibung) die Zustimmung der Bieter zur Weitergabe von Informationen verlangen können. Sofern eine solche Vorabzustimmung möglich ist, sollte sie jedenfalls nur gegen Leistung eines angemessenen Entgelts zulässig sein.

Wettbewerblicher Dialog – geschlossener Teilnehmerkreis?

Nach Art 29 (6) RL 2004/18 hat der Auftraggeber, nachdem er die Teilnehmer vom Abschluss des Dialogs informiert hat, diese aufzufordern, ein endgültiges Angebot zu legen. Die Bestimmung könnte daher so verstanden werden, dass nur die Teilnehmer des Dialogs ein solches Angebot legen können. Da Bieterwechsel während eines Vergabeverfahrens grundsätzlich unzulässig sind, müssten Bieter folglich bereits bei Abgabe ihres Antrags zur Teilnahme am Dialog – und damit bevor die konkrete Lösung überhaupt feststeht – allen Eventualitäten vorbeugen und gegebenenfalls Bietergemeinschaften bilden oder sich die Dienste von Subunternehmern sichern. Dies könnte die Effizienz des Dialogs und der Ermittlung der bestmöglichen Lösung beeinträchtigen. So erscheint es denkbar, dass nicht alle Teilnehmer am Dialog eine letztendlich ermittelte Lösung auch (alleine) umsetzen können; diesen Bietern wäre ansonsten die Chance auf Zuschlag verwehrt.

Da eine Einladung auch anderer Bieter zur Angebotslegung als der Teilnehmer am Dialog in Art 29 der RL nicht explizit ausgeschlossen ist, wäre klarzustellen, ob es dem Auftraggeber auch offen steht, andere Bieter zur Legung eines Angebots für die Umsetzung der ermittelten Lösung(en) einzuladen. Sollte dies möglich sein, wäre lediglich sicherzustellen, dass die anderen (am Dialog nicht teilnehmenden) Bieter die gleichen Informationen erhalten, wie die Teilnehmer am Dialog, um eine Vorarbeitenproblematik zu vermeiden. Insbesondere in solchen Verfahren, wo die Bieter einer Informationsweitergabe zustimmen, sollte diese Vorgansgweise möglich sein.

Wir schlagen daher vor, in Form einer interpretierenden Mitteilung klarzustellen, ob der Auftraggeber ausschließlich die Teilnehmer am Dialog oder auch andere Bieter zur Abgabe eines Angebots einladen kann.

Verfahrensfragen

Dem Vorhaben und dem Grundgedanken des wettbewerblichen Dialogs dienlich wäre uE auch, dem Auftraggeber die Wahl zwischen allen auf das entsprechende Vorhaben sonst anwendbaren Verfahren zu geben und ihn nicht auf ein offenes Verfahren zu beschränken (in diese Richtung scheint Art 29 (6) aber zu deuten, wenn er von einer Einladung zur Legung eines *endgültigen* Angebots spricht). Es ist nicht klar nachvollziehbar, warum einem Auftraggeber für ein Projekt grundsätzlich die Wahl verschiedener Verfahren offen stehen kann, diese Wahl aber nach Abschluss des wettbewerblichen Dialogs verschlossen sein soll. In diesem Zusammenhang sei darauf hingewiesen, dass die Richtlinie nicht regelt, in welchem Detaillierungsgrad über verschiedene Lösungen Dialog geführt werden darf bzw soll.

Ähnliches gilt für die Entscheidung, ob ein Auftrag oder eine Konzession vergeben wird, welche Verfahrensart zu wählen ist (wenn es sich um keine Konzession handelt, wo die Verfahrenswahl frei ist), und, welche Auftragsart vorliegt. Gerade wenn über rechtlich komplexe Konstruktionen diskutiert wird, kann sich im Laufe des Dialogs ergeben, dass der am Ende abzuschließende Vertrag kein Auftrag, sondern eine Konzession sein wird, oder umgekehrt. Da die Lösungen der Teilnehmer am Wettbewerb voneinander deutlich abweichen dürften, können manche als Konzession und manche als Auftrag einzustufen sein, nachdem rechtliche und finanzielle Unklarheiten erörtert worden sind. In vielen Fällen wird es dem Auftraggeber daher unmöglich sein, diese Entscheidung schon vor Beginn der Dialogphase zu treffen. Ist die Kommission der Ansicht, dass die Festlegung, ob Konzession oder Auftrag und die Vertragsart schon vor der Dialogphase zu erfolgen haben, wären (ähnlich der Schätzung des Auftragswertes) Mindestkriterien hilfreich, wie der Auftraggeber dabei vorzugehen hat.

Wird im Zuge des Dialogs über ein Infrastrukturvorhaben ein Konzessionsmodell als bestmögliche Lösung ermittelt, bleibt unklar, ob der Auftraggeber mit den Bietern auch den Konzessionsvertrag (der zu Beginn des Dialogs noch nicht existierte) im Dialog bis ins letzte Detail diskutieren und „verhandeln“ darf/muss. Eine solches „Ausverhandeln“ aller Punkte wäre aber notwendige Voraussetzung, stünde dem Auftraggeber für die Vergabe anschließend nur noch das offene Verfahren zur Verfügung.

Wir schlagen daher vor, in Form einer interpretierenden Mitteilung klarzustellen, ob (A) dem Auftraggeber nach Abschluss des Dialogs andere als das offene Verfahren zur Verfügung stehen, (B) sofern dem Auftraggeber auch andere Verfahren zur Verfügung stehen, bis zu welchem Detaillierungsgrad die einzelnen Lösungen im wettbewerblichen Dialog erörtert werden können, (C) wie Vorsorge dafür getroffen werden kann, dass sich Festlegungen der Bekanntmachung insbesondere hinsichtlich der Abgrenzung Auftrag/Konzession als unrichtig oder unvollständig erweisen.

Zuschlagskriterien

Nach Art 29 (4) RL 2004/18 kann der Auftraggeber den Dialog in „verschiedene aufeinanderfolgende Phasen“ einteilen, „um so die Zahl der in der Dialogphase zu erörternden Lösungen anhand der in der Bekanntmachung angegebenen Zuschlagskriterien zu verringern“. Dies wirft gleich mehrere Fragen auf: So scheint Art 29 (4) der RL anzudeuten, dass Lösungen nach den „Zuschlagskriterien“ auszuwählen sind. Da Zuschlagskriterien im allgemeinen jene Kriterien sind, nach denen einem Bieter der Zuschlag für ein Vorhaben zu erteilen ist, könnte Art 29 (4) so verstanden werden, dass die Zuschlagskriterien und die „Auswahlkriterien“ iSd Art 29

(4) der RL die selben sein müssen. Dies wäre nicht erforderlich und kann für die Umsetzung innovativer Strukturen unter Umständen hinderlich sein. Insbesondere in jenen Fällen, in denen die genaue Struktur eines ÖPPs noch nicht feststeht (und der wettbewerbliche Dialog der Findung eben dieser Struktur dient), kann es zweckmäßig sein, separate Kriterien für Auswahl und Zuschlag zuzulassen. Es müssen nur beide Arten von Kriterien im Vorhinein vollständig bekannt gegeben werden und den selben Anforderungen genügen, die das Vergaberecht auch sonst hinsichtlich Objektivität, Auftragsbezogenheit und Nichtdiskriminierung usw an Zuschlagskriterien stellt.

Gemäß Art 29 (5) der RL setzt der öffentliche Auftraggeber den Dialog mit den ausgewählten Bietern fort, bis er - erforderlichenfalls nach einem Vergleich - die Lösung bzw. die Lösungen ermitteln kann, mit denen seine Bedürfnisse erfüllt werden können. Wir gehen davon aus, dass auch dieser Vergleich der verschiedenen Lösungen – ähnlich dem Ausscheiden von Lösungen - anhand der in der Einladung bekannt zugebenden Zuschlagskriterien zu erfolgen hat. Auch dies wäre klarzustellen.

Da der wettbewerbliche Dialog nur für besonders komplexe Projekte zur Verfügung steht, deren genaue Definition dem öffentlichen Auftraggeber gerade nicht möglich ist, ist zu erwarten, dass es dem Auftraggeber auch erhebliche Schwierigkeiten bereiten wird, sämtliche Zuschlagskriterien für eine noch nicht feststehende Lösung im Vorhinein festzulegen. Die Möglichkeit einer Festlegung der Zuschlagskriterien erst nach Abschluss der Dialogphase wurde im Vorfeld der Richtlinie 2004/18 diskutiert, letztendlich aber nicht umgesetzt. Die Praxis wird zeigen, inwiefern die nunmehr gewählte Lösung, dass die Zuschlagskriterien bereits vor Auswahl der Lösung fixiert werden müssen, die Umsetzung innovativer Lösungen (von denen der Auftraggeber bei Beginn des wettbewerblichen Dialogs keine Kenntnis hatte und daher auch bei der Formulierung der Zuschlagskriterien nicht berücksichtigen konnte) beeinflussen wird.

Da sich die Lösungsvorschläge, die im Rahmen des Dialoges ermittelt werden, erheblich voneinander unterscheiden können, ist deren unmittelbarer Vergleich bei der Zuschlagsentscheidung schwierig. Das gilt umso mehr bei ÖPPs, die durch lange Laufzeiten und komplexe Strukturen gekennzeichnet sind. Weiters sind Abstufungen bei der Risikoübernahme oder anderen wesentlichen wirtschaftlichen und rechtlichen Fragen denkbar. Als Zuschlagskriterien kommen uE hauptsächlich Funktionalitäten und Life Cycle Costs in Frage. Interpretationshilfen auf Gemeinschaftsebene, welche Zuschlagskriterien zulässig sind, wären wünschenswert.

Ausscheiden nur von Lösungen oder auch von Bietern?

Gemäß Art 29 (4) RL kann der Auftraggeber einzelne Lösungen ausscheiden. Nicht völlig klar ist nach dem Richtlinientext, ob mit dem Ausscheiden der Lösung jedenfalls ein Ausscheiden des die Lösung anbietenden Bieters verbunden ist bzw sein muss oder ob der entsprechende Bieter weiter am Dialog und der anschließenden Vergabe des Vorhabens und zwar hinsichtlich anderer Lösungen teilnehmen kann.

Nachträgliche Erläuterungen und Bestätigungen – Umfang und Zeitpunkt unklar

Gem Art 29 (7) RL 2004/18 können nach Ermittlung des Bestbieters von diesem Erläuterungen und Bestätigungen verlangt werden. Das, obwohl auch im wettbewerblichen Dialog der Grundsatz gilt, dass die einlangenden Angebote nach objektiven Kriterien vergleichbar sein müssen und Erläuterungen nach der Angebotsbewertung, bei welcher das betreffende Angebot verbindlich und für den Auftraggeber klar verständlich sein muss und gemäß Art 29 (6) RL 2004/18 alle erforderlichen Einzelheiten enthalten muss, überflüssig sein sollten. Der Grund, warum gerade im wettbewerblichen Dialog ein solches Vorgehen vorgesehen wurde, ist nicht eindeutig erkennbar. Um den Grundsatz der Gleichbehandlung und der Transparenz zu wahren, sollten solche Erläuterungen und Bestätigungen in einem Stadium erfolgen, in dem den anderen Bietern noch Rechtsmittel zur Verfügung stehen. Weiters fehlt eine Eingrenzung, worauf sich diese Erläuterungen und Klarstellungen beziehen dürfen und wie andere Bieter davon – zur Wahrung ihrer Rechte - ausreichend Kenntnis erlangen.

Wir schlagen vor, in Form einer interpretierenden Mitteilung klarzustellen, in welchem – nur sehr eingeschränkten – Umfang solche nachträglichen Erläuterungen und Bestätigungen zulässig sind, und dass sichergestellt sein muss, dass solche Erläuterungen und Bestätigungen nur unter voller Wahrung eines effektiven vergaberechtlichen Rechtsschutzes der anderen Bieter zulässig sind.

Widerruf möglich?

Die RL lässt offen, unter welchen Voraussetzungen ein Auftraggeber einen wettbewerblichen Dialog abbrechen bzw seine Einladung widerrufen kann. Da nur „besonders komplexe“ Projekte (wie insbesondere ÖPPs) für den wettbewerblichen Dialog zugelassen werden, besteht die Möglichkeit, dass ein Auftraggeber im Verlauf eines wettbewerblichen Dialogs feststellt, dass keine der angebotenen Lösungen für ihn adäquat ist. Da gerade wettbewerbliche Dialoge hohen Aufwand für alle Beteiligten bedeuten werden, ist diese Frage von Relevanz.

Wir regen daher an, durch eine interpretierende Mitteilung klarzustellen, unter welchen (allgemeinen) Voraussetzungen ein Auftraggeber den wettbewerblichen Dialog abbrechen kann.

Risikoverteilung

Wesentlich für die ökonomische Attraktivität eines ÖPP aus Sicht der privaten Partner ist die Verteilung der Risiken zwischen der öffentlichen Hand einerseits und ihren privaten Partnern andererseits. Je früher private Partner in ein Projekt eingebunden werden, desto größer ist die Tendenz, ihnen mehr und mehr Projektrisiken zu übertragen (zB Genehmigungsrisiken). Es kann daher nicht ausgeschlossen werden, dass Auftraggeber mit wenig ÖPP-Erfahrung den wettbewerblichen Dialog als Rechtfertigung für die Überwälzung von Risiken verwenden könnten, die vom Bieter trotz früherer Einbindung nicht kontrollierbarer oder nicht kalkulierbar sind. Entscheidend für den Erfolg des wettbewerblichen Dialogs wird das Verständnis der Auftraggeber sein, dass eine frühere Einbindung der privaten Unternehmen in die Lösungsfindung zwar erhebliche Synergien und Kostenersparnisse bringen kann, gewisse Risiken, wie insbesondere das Genehmigungsrisiko, dadurch aber nur wenig kalkulierbarer und beherrschbarer werden und daher vom Privaten auch weiterhin kaum übernommen werden können.

I.1.2. Partnerschaft auf Vertragsbasis: als Konzession eingestufte Beauftragung

4. **Haben Sie bereits einmal ein Verfahren zur Vergabe einer Konzession in der Europäischen Union organisiert, daran teilgenommen bzw. ein solches organisieren oder daran teilnehmen wollen? Welche Erfahrungen haben Sie gemacht?**
5. **Halten Sie das derzeitige Gemeinschaftsrecht für präzise genug, um die konkrete und effektive Teilnahme von Gesellschaften oder Gruppierungen aus anderen Staaten an den Konzessionsvergabeverfahren sicherzustellen? Sind Sie der Ansicht, dass in dieser Hinsicht normalerweise ein tatsächlicher Wettbewerb herrscht?**
6. **Halten Sie einen Vorschlag für einen gemeinschaftlichen Rechtsakt zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe für wünschenswert?**
7. **Allgemeiner gefragt: Wenn Sie ein neues Gesetzgebungsvorhaben der Kommission für erforderlich halten, gibt es dann objektive Gründe dafür, in diesem Rechtsakt sämtliche ÖPP auf Vertragsbasis zu behandeln und sie ein und demselben Regelwerk für die Vergabe zu unterwerfen, ganz gleich ob die Vorhaben als öffentliche Aufträge oder als Konzessionen einzustufen sind?**

Zu den Fragen 4 bis 7:

Aufgrund der regelmäßig hohen Komplexität von ÖPPs handelt es sich bei ÖPP-Projekten meist um gemischte Vorhaben. Eine klare Abgrenzung zwischen Auftrag und Konzession einerseits aber auch zwischen Bau- und Dienstleistungskonzession andererseits kann daher schwierig sein. Wesentlich für einen effektiven Wettbewerb bei ÖPP-Projekten ist aber eine klare rechtliche Einschätzbarkeit des Projekts und des damit zusammenhängenden Rechtsschutzes der Bieter. In Form einer interpretierenden Mitteilung sollte die Kommission – dem Beispiel von Eurostat mit seiner Mitteilung vom 11.2.2004 folgend - klarstellen, wie die am Markt gegenwärtig üblichsten ÖPP Modelle vergaberechtlich einzustufen sind. Als Beispiel seien sogenannte „Verfügbarkeitsmodelle“ genannt, die wir vorschlagen, pauschal als Konzessionen einzustufen (s. schon zu Frage 2).

Entscheidend ist aus unserer Sicht nicht eine Gleichschaltung von Konzessionen und Aufträgen, sondern Rechtssicherheit durch eine Präzisierung der Abgrenzungskriterien zwischen den einzelnen Kategorien. Die Mitteilung der Kommission zu Auslegungsfragen im Bereich Konzessionen (2000/C 121/02) stellt zwar klar, dass die Tragung des finanziellen Nutzungsrisikos durch den Konzessionär wesensimmanent für eine Konzession ist. Zahlt der Staat für die Leistung des Konzessionärs, schadet das noch nicht, solang das sich aus der Nutzung ergebende Risiko nicht beseitigt wird. Wie das beim Konzessionär verbleibende Risiko zu quantifizieren ist (Geld?) und ab wann der Staat dieses Risiko überwiegend trägt, ist offen und verursacht in der Praxis Abgrenzungsprobleme.

I.2. Fragen im Zusammenhang mit der Auswahl eines Wirtschaftsteilnehmers im Rahmen einer privat initiierten ÖPP

8. Ist Ihrer Erfahrung nach der Zugang der ausländischen Akteure zu privat initiierten ÖPP gewährleistet? Für den Fall, dass die Vergabestellen zur Initiative aufrufen, wird dieser Aufruf dann angemessen bekannt gemacht, so dass alle interessierten Akteure Kenntnis davon haben können? Wird für die Ausführung des ausgewählten Projekts ein Auswahlverfahren auf Basis eines effektiven Wettbewerbs organisiert?

In Österreich bestehen keine besonderen Regeln für privat initiierte ÖPPs, „Aufrufe zu privaten Initiativen“ sind der österreichischen Vergaberechtsordnung daher unbekannt.

9. Wie könnte Ihrer Auffassung nach die Entwicklung privat initiierter ÖPP in der Europäischen Union unter Wahrung der Grundsätze der

Transparenz und der Gleichbehandlung und ohne Verstoß gegen das Diskriminierungsverbot gewährleistet werden?

In Österreich bestehen keine besonderen Regeln für privat initiierte ÖPPs, dh weder spezielle Verfahrensregelen noch Bestimmungen, die solch privat initiierte Projekte speziell fördern würden. In der Regelung des § 21 Abs 3 BVergG 2002, wonach ein Unternehmen, das an der Erarbeitung der Ausschreibungsunterlagen auch nur mittelbar beteiligt war, von der Teilnahme an der Ausschreibung unter Umständen auszuschließen ist, wird in der Praxis oftmals sogar eine abschreckende Regelung gegen solche privaten Initiativen gesehen.

Private Initiativen für die Lösung öffentlicher Aufgabenstellungen in Form von ÖPPs sind aus Sicht von 3P jedenfalls zu unterstützen. Aus österreichischer Sicht könnte sehen wir den wettbewerblichen Dialog bereits als ersten Schritt in diese Richtung, da der Auftraggeber aufgrund einer privaten Initiative einen wettbewerblichen Dialog einleiten und den Lösungsvorschlag dort mit anderen Bietern umfassend erörtern und mit anderen Lösungsvorschlägen vergleichen kann. Problematisch könnte in diesem Zusammenhang aber die Möglichkeit sein, ganze Lösungsvorschläge für vertraulich zu erklären (siehe Art 29 (3)). Im Interesse der Wahrung des vergaberechtlichen Grundsätze könnte erwogen werden, vorzusehen, dass auf die private Initiative in der Einladung zum wettbewerblichen Dialog oder der Verdingungsunterlage hingewiesen werden muss.

I.3. Die Phase nach der Auswahl des privaten Partners

I.3.1. Vertraglicher Rahmen

10. Welche Erfahrungen haben sie in der Phase im Anschluss an die Auswahl des privaten Partners im Rahmen von ÖPP auf Vertragsbasis gemacht?

11. Sind Ihnen Fälle bekannt, in denen die Ausführungsbedingungen, einschließlich der Klauseln zur Anpassung im Zeitverlauf, eine diskriminierende Wirkung entfalten konnten oder eine ungerechtfertigte Behinderung der Dienstleistungs- oder Niederlassungsfreiheit darstellten? Falls ja, bitte beschreiben Sie die Art der aufgetretenen Probleme!

12. Sind Ihnen Praktiken oder Mechanismen zur Bewertung von Angeboten bekannt, die eine diskriminierende Wirkung haben?

13. Sind Sie wie die Kommission der Auffassung, dass bestimmte Interventionsklauseln in Bezug auf die Grundsätze der Transparenz und der Gleichbehandlung problematisch sein können? Sind Ihnen andere Typen von Klauseln bekannt, deren Anwendung zu ähnlichen Problemen führen kann?

14. Halten Sie es für erforderlich, dass bestimmte Aspekte der vertraglichen Rahmenbedingungen für ÖPP auf Gemeinschaftsebene geklärt werden? Falls ja, was sollte geklärt werden?

Interventions- oder Step-In-Klauseln genauso wie Revisionsklauseln sind den Bietern zwar im Vergabeverfahren bekannt, können aber so weitgehende Gestaltungsmöglichkeiten eröffnen, dass ein fairer Bieterwettbewerb gefährdet ist oder unkalkulierbare Risken überwälzt werden. Andererseits sind sie für günstige Finanzierungskonditionen wichtig. Weniger problematisch sind in diesem Zusammenhang Step-In-Klauseln, weil diese idR die bestehenden Leistungspflichten nicht ändern, solange die Qualifikation des eintretenden Partners gewährleistet ist. Aber auch die Probleme im Zusammenhang mit Revisionsklauseln erscheinen mit den bestehenden Mitteln des Vergaberechts lösbar, insbesondere mit den bestehenden Vorschriften über die Kalkulierbarkeit von Risiken, die der Auftraggeber auf die Bieter überwälzt, mit den Kriterien für die Vergleichbarkeit der Angebote und mit dem Rechtsrahmen über Optionen. Abgeleitetes Gemeinschaftsrecht zu vertraglichen Aspekten erscheint deshalb nicht erforderlich.

I.3.2. Die Vergabe von Unteraufträgen für bestimmte Aufgaben

15. Sind Ihnen bei ÖPP-Konstruktionen besondere Probleme mit der Vergabe von Unteraufträgen bekannt? Welche?

Nach unserer Ansicht weisen ÖPP-Modelle keine spezielle Affinität zu Problemen mit Subvergabe auf.

16. Rechtfertigt die Existenz von ÖPP auf Vertragsbasis, die die Übertragung eines Aufgabenpakets an einen einzigen privaten Partner impliziert, ihrer Auffassung nach, dass ausführlichere Regeln für die Vergabe von Unteraufträgen eingeführt werden und/oder dass der Anwendungsbereich erweitert wird?

17. Halten Sie, allgemeiner gesprochen, eine ergänzende Initiative auf Gemeinschaftsebene zur Klärung oder Umgestaltung der Regeln für die Vergabe von Unteraufträgen für erforderlich?

Subaufträge sind geeignet, KMU’s einen Zugang zu öffentlichen Aufträgen zu verschaffen, weil sie bei Projekten, die für ÖPP-Konstruktionen geeignet sind, für eine Mitwirkung in einem Bieterkonsortium zu klein sind. In wie weit also, darf ein Auftraggeber Subvergaben verlangen?

Ein weiterer Aspekt der Subvergabe liegt im Risiko des Auftraggebers, dass die Subauftragnehmer wesentliche Leistungsteile besorgen sollen, ihre Aufgabe aber schlecht erfüllen. Dann stehen ihm nur Ansprüche gegen den Hauptauftragnehmer zur Verfügung, der aber den mangelhaften Leistungsteil selbst nicht besorgen kann. Unlängst hat der EuGH[1] Aussagen getroffen, in wie weit ein Auftraggeber Subvergaben verbieten darf, damit aber bei weitem nicht alle Streitfragen geklärt.

Wichtig sollte bei Subvergaben nicht sein, dass der Hauptauftragnehmer mit Subauftragnehmern seine Eignung nachweisen kann, wie bisher in der Rechtsprechung des EuGH überbetont. Vielmehr sind die Interessen von Auftraggebern und Auftragnehmern in den Vordergrund zu stellen, dass auf Subunternehmer zurückgegriffen werden darf/muss, um preislich kompetitive Angebote legen zu können, und gleichzeitig eine ordnungsgemäße Erfüllung zu sichern. Das beinhaltet, dass die Zahl der Subauftragnehmer und Art sowie Umfang der auf sie übertragbaren Leistungsteile sachgerecht limitiert werden dürfen. Insoweit besteht Liberalisierungsbedarf.

Was oben über Revisions- und Step-In-Klauseln hinsichtlich der Hauptauftragnehmer gesagt wurde, gilt auch hinsichtlich der Subauftragnehmer.

[1] EuGH vom 18.März 2004, Rs C-314/01.

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II. INSTITUTIONALISIERTE ÖPP

II.1. Einrichtung einer Partnerschaft durch die Gründung eines gemeinsamen Adhoc-Wirtschaftsgebildes des öffentlichen und des privaten Sektors

II.2. Übernahme der Kontrolle über ein öffentliches Unternehmen durch einen privaten Akteur

18. Welche Erfahrungen haben Sie mit der Einrichtung institutionalisierter ÖPP gemacht? Lassen Ihre Erfahrungen Sie zu der Schlussfolgerung gelangen, dass die gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen bei institutionalisierten ÖPP-Konstruktionen eingehalten werden? Falls nein, warum nicht?

In Österreich gibt es bis dato wenige institutionalisierte ÖPP von Bedeutung. Zu nennen sind u.a. das LKW-Mautsystem (Betreibermodell) und die 2004 erteilte Konzession für ein Behörden Bündelfunksystem (BOS-Austria). Im kommunalen Bereich sind immer wieder Betreibermodelle für Abfall- und Abwasserentsorgung, das Management von Krankenanstalten oder die Erbringung von EDV-Dienstleistungen ein Thema.

Generell fällt auf, dass bezüglich der rechtlichen Rahmenbedingungen für institutionalisierte ÖPP relativ große Rechtsunsicherheit herrscht. Das betrifft insbesondere die vergaberechtlichen Bestimmungen, die auf die Besonderheiten institutionalisierter ÖPP nicht Bedacht nehmen. Das betrifft z.B.

- die Veräußerung von Beteiligungen der öffentlichen Hand im Rahmen eines Vergabeprojektes (wenn eine ÖPP durch die Veräußerung von Anteilen an einer Gesellschaft erfolgen soll, die bisher im alleinigen Eigentum der öffentlichen Hand gestanden ist) – die vergaberechtlichen Bestimmungen betreffen nur die Vergabe von Aufträgen, hier kommt es jedoch gleichzeitig zu einer „Teilprivatisierung" und somit zu einer Übertragung einer Vielzahl von Rechten und Pflichten; Soweit nämlich bestehende öffentliche Wirtschaftskörper mit Konzessionen oder schon (in house) erteilten Aufträgen von Privaten Bietern übernommen werden, könnte das Vergaberecht umgangen werden. Schließlich verfügen diese öffentlich beherrschten Wirtschaftskörper über Aufträge, die sonst ausgeschrieben werden müssten. Notwendig sind Klarstellungen, wann bloß die Privatisierungsgrundsätze des Beihilfenrechts anzuwenden sind (wo der enthaltene Auftragsbestand ohnedies in die Unternehmensbewertung einfließt) und wo die Vergaberegeln. Insbesondere ist nicht hinreichend klar, wie stark der Konnex zwischen der Gründung/Ausgliederung dieses

Wirtschaftskörpers einerseits und einem ÖPP-Projekt andererseits sein darf, damit keine Umgehung des Vergaberechts vorliegt.

- die Änderung der Beteiligungsverhältnisse an der ÖPP auf Seite des Auftragnehmers, die nach Auftragserteilung erforderlich sein könnte (z.B. aufgrund eines „Step-in-Rights“ einer finanzierenden Bank) – hier würde ein nachträglicher Wechsel des Auftragnehmers vorliegen;
- generell die Abgrenzung zwischen Projektgesellschaft (institutionalisiertem ÖPP) und Gesellschafter derselben, zumal letztere üblicherweise ursprünglich als Bieter auftreten, die Ausführung dann jedoch durch die Projektgesellschaft erfolgt;
- die Möglichkeit aufgrund einer Option die 100% Beteiligung an der ÖPP wieder an sich zu ziehen – generell stellt sich nach dem derzeitigen Vergaberegime die Frage, in welchem Maße der Auftraggeber Optionen vorsehen darf;
- die Frage, unter welchen Umständen eine in-house Vergabe vorliegt;
- die Frage, inwiefern eine ÖPP durch die Beteiligung der öffentlichen Hand möglicherweise selbst wieder öffentlicher Auftraggeber wird;

Diese Rechtsunsicherheit kann auch zu einer fehlerhaften Anwendung der Vergaberegeln durch öffentliche Auftraggeber führen. Um dieses Risiko zu vermeiden, gibt es Tendenzen bei öffentlichen Auftraggebern innovative Lösungsansätze für ÖPP erst gar nicht in Betracht zu ziehen. In gewissen Fällen kommt es sogar dazu, dass ÖPP aufgrund vergaberechtlicher Überlegungen strukturiert werden, um sie an die vergaberechtlich vorgesehenen Auftragsarten anzupassen. Es sollte daher eine Klarstellung getroffen werden, die die erforderliche Flexibilität für die Anwendung unterschiedlicher ÖPP-Strukturen gewährt.

19. Halten Sie eine Initiative auf Gemeinschaftsebene für erforderlich, um die Verpflichtungen zu klären oder zu vertiefen, die die öffentlichen Auftraggeber in Bezug auf den Wettbewerb zwischen potenziell an einem institutionalisierten ÖPP-Projekt interessierten Wirtschaftsteilnehmern haben? Falls ja, welche Aspekte halten Sie für besonders wichtig und welche Form sollte eine solche Initiative haben? Falls nein, warum nicht?

Wie zu Frage 18 bereits ausgeführt, wäre eine Initiative zur Klärung der betreffenden Verpflichtungen wichtig.

Auch hinsichtlich institutionalisierter ÖPP’S sind insbesondere folgende Aspekte zu berücksichtigen(s. auch unter Frage 18)

- inwiefern überhaupt eine Veräußerung von Anteilen im Rahmen einer Teilprivatisierung vergabepflichtig ist, selbst wenn diese die Erbringung von Leistungen an die öffentliche Hand impliziert;
- Bewertungsmechanismus der Angebote, wenn die Übertragung von Gesellschaftsanteilen an der ÖPP mit der Erbringung von Leistungen an die öffentliche Hand verbunden ist;
- die Veränderung der Beteiligungsverhältnisse an der ÖPP nach Auftragserteilung;
- Verhältnis Projektgesellschaft zu öffentlichem Auftraggeber und zu Gesellschaftern derselben;
- unter welchen Umständen eine in-house Vergabe vorliegt;
- inwiefern die ÖPP selbst als öffentlicher Auftraggeber gilt;
- spezielles Vergabeverfahren für derartige ÖPP, u.U. in Form eines wettbewerblichen Dialogs mit nachgeschalteter Vergabe im Verhandlungsweg (ähnlich einem Verhandlungsverfahren, das jedoch derzeit nur auf die in den Vergaberichtlinien vorgesehenen Auftragkategorien anwendbar ist).

Hinsichtlich der Form einer solchen Initiative gilt, dass die Verbreitung von ÖPP bereits gemeinschaftsweit eingesetzt hat. Je rascher eine Maßnahme kommt, desto hilfreicher erscheint sie aus momentaner Sicht. Also befürwortet 3P interpretative Klarstellungen der Kommission, va in Form von Mitteilungen. Neue Rechtsakte sollten nur erlassen werden, wenn unbedingt notwendig.

III. Allgemein und unabhängig von den im Grünbuch aufgeworfenen Fragen:

20. Welche Maßnahmen oder Verfahren behindern in der Europäischen Union die Einrichtung von ÖPP?

Wie mehrfach betont, ist Rechtssicherheit und Klarheit für die Verbreitung von ÖPP's von entscheidender Bedeutung und zwar aus allen Blickwinkeln. Wie ebenfalls erwähnt, wäre eine integrierende Betrachtung/eine Zusammenschau, die über den Bereich des Vergaberechts hinaus den status quo aller relevanten Bereiche des Gemeinschaftsrecht aus der Sicht von ÖPP berücksichtigt und Widersprüche beseitigt, in einer ersten Phase vordringlicher als eine Neukodifizierung.

Neben dem Vergaberecht stellen sich den beteiligten Parteien bei ÖPP-Projekten aber auch zahlreiche weitere komplexe rechtliche Fragen. Aspekte des Wettbewerbsrechts sind ebenso zu beachten wie das Regime des Beihilfenrechts und Förderungen. Wünschenswert und für ÖPP jedenfalls förderlich wäre eine umfassende Mitteilung der Kommission über die wesentlichen gemeinschaftsrechtlichen Fragestellungen bei ÖPP. Dadurch wäre eine erhöhte Rechtssicherheit (und damit gesteigerter

Wettbewerb) nicht nur bei der Vergabe sondern auch bei der Umsetzung von ÖPPs gewährleistet.

21. Denken Sie dass es nützlich wäre, im Hinblick auf den großen Investitionsbedarf einzelner Mitgliedstaaten zum Erreichen einer sozialen und dauerhaften Entwicklung gemeinsam und in regelmäßigen Abständen über diese Fragen unter den betroffenen Akteuren nachzudenken und bewährte Verfahrensweisen auszutauschen? Sollte die Kommission nach Ihrer Auffassung ein derartiges Netzwerk aufbauen?

ÖPP stellen eine Möglichkeit zur effizienteren und kostengünstigeren Umsetzung von Investitionsprojekten dar. Auf Grund der geringen Erfahrung in einzelnen Mitgliedstaaten besteht Unsicherheit bei der Abwicklung von ÖPP-Projekten. Der Aufbau eines Netzwerkes wird sicher dazu beitragen, diese Unsicherheiten abzubauen und die Umsetzung von Investitionen durch ÖPP Projekte voranzutreiben. Unabhängige Initiativen, welche die Bedürfnisse öffentlichen Hand genauso berücksichtigen wie die Interessen der Wirtschaftsteilnehmer, können einen Beitrag leisten.

INDUSTRIELLEN VEREINIGUNG

An die
Europäische Kommission
Konsultation „Grünbuch zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen“
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Wien, am 23. Juli 2004

Stellungnahme zum Grünbuch der Europäischen Kommission zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen KOM (2004) 327 endg

Die Industriellenvereinigung dankt für die Übermittlung des Grünbuchs der Europäischen Kommission zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen und erlaubt sich, hiezu folgende Stellungnahme abzugeben bzw. die ihm Rahmen des Grünbuches gestellten Fragen wie folgt zu beantworten:

Grundsätzliches

Die rein vergaberechtlichen Fragestellungen bilden bei der Realisierung von ÖPP-Projekten nur einen Teilaspekt der rechtlichen Betrachtung. Nach den bisherigen Erfahrungen ist festzuhalten, dass auch die Anforderungen aus anderen Rechtsgebieten, die noch aus der tradierten Abgrenzung zwischen hoheitlichem und privatwirtschaftlichem Handeln der öffentlichen Hand resultieren, eine Umsetzung von ÖPP in der Praxis erschweren. Über Erfolg oder Scheitern von ÖPP-Projekten entscheidet auch die Fähigkeit zur Auflösung steuer-, beihilfen-, gesellschafts-, arbeits-, verfassungs- und verwaltungsrechtlicher Fragestellungen.

1. **Welche Formen von ÖPP auf Vertragsbasis sind Ihnen bekannt? Gibt es in Ihrem Land spezifische (gesetzliche oder andere) Rahmenbedingungen für derartige Konstruktionen?**

In Österreich gibt es – wie auch in anderen EU-Mitgliedstaaten – keine gesetzliche Definition von ÖPP. Charakteristisch für alle ÖPP-Modelle ist, dass es sich im Unterschied zur klassischen öffentlichen Auftragsvergabe nicht um eine Auftraggeber-Auftragnehmer bzw Kunde-Dienstleister Beziehung handelt, sondern dass die öffentliche Hand mit privaten Akteuren echte Kooperationen zum beiderseitigen Nutzen eingeht.

Ungeachtet der Tatsache, dass für jedes ÖPP ein Bündel von speziell auf das jeweilige Projekt zugeschnittenen Vertragswerken zu erstellen ist, lassen sich ÖPP-Modelle typischerweise in drei Kategorien unterteilen:

- Betreibermodelle
- Konzessionsmodelle
- Institutionalisierte Kooperationsmodelle: Beteiligung der öffentlichen Hand und der Privatwirtschaft an einer gemeinsamen gemischt-wirtschaftlichen Gesellschaft.

Alle drei Kategorien von ÖPP-Modellen wurden in Österreich in der Vergangenheit bereits verwirklicht.
Es gibt im öffentlich-rechtlichen Bereich Sondergesetze, die ausdrücklich den Gebietskörperschaften bzw. den öffentlichen Unternehmen die Umsetzung von ÖPP erlauben. (z.B ASFINAG-ErmächtigungsG, ÖBB-StrukturG)

2. Nach Auffassung der Kommission wird die Umsetzung des wettbewerblichen Dialogs in einzelstaatliche Rechtsvorschriften den betroffenen Parteien ein Verfahren an die Hand geben, das sich ganz besonders für die Vergabe öffentlicher Aufträge in Zusammenhang mit der Einrichtung einer ÖPP auf Vertragsbasis eignet und gleichzeitig die Grundrechte der Wirtschaftsteilnehmer wahrt. Stimmen Sie dem zu? Falls nein, warum nicht?

Es ist zuzustimmen, dass die Durchführung eines Vergabeverfahrens zur Auswahl des privaten Partners gerade bei sehr komplexen ÖPP-Projekten öffentliche Auftraggeber vor erhebliche Probleme stellt. Bei komplexen ÖPP Projekten wurde daher schon bisher auf das Instrument des Verhandlungsverfahrens mit Bekanntmachung zurückgegriffen und mit den ausgewählten Bewerbern ein konkretes ÖPP-Modell als ein Paket an langfristigen Leistungsverträgen (Errichtung, Betrieb, Finanzierung etc) ermittelt.

Das Hauptproblem bei der Vergabe komplexer Beschaffungsvorhaben wie insbesondere ÖPP kann auch das Verfahren des wettbewerblichen Dialogs nicht lösen: Jedenfalls erfordert die Durchführung – ob im klassischen Verhandlungsverfahren oder nach dem neuen Verfahren des wettbewerblichen Dialogs – vom öffentlichen Auftraggeber eine klare Beschreibung seiner Beschaffungsziele, somit wenigstens eine eindeutige funktionale Leistungsbeschreibung in Form einer konkreten Aufgabenstellung, die den Zweck der Leistung und die an die Leistung gestellten Anforderungen des Auftraggebers in technischer, wirtschaftlicher und unter Umständen gestalterischer Hinsicht klar erkennen lässt.

Neu am wettbewerblichen Dialog ist, dass die Phase der Herausarbeitung des Leistungsgegenstandes im Wege von Verhandlungen nunmehr explizit als eigene Dialogphase des Verfahrens gestaltet wurde und das „Last and Best Offer“ aller Bieter in der daran anschließenden Angebotsphase, an der alle Bewerber teilnahmeberechtigt sind, ebenfalls institutionalisiert wird.
Für den Bieter birgt der wettbewerbliche Dialog die Gefahr, dass der öffentliche Auftraggeber das substanziell beste Know-How eines (oder mehrerer) Marktteilnehmer an sich zieht, um die so ermittelte Ideallösung in der anschließenden Angebotsphase der „billigsten“ Realisierung zuzuführen.

Kritisch betrachtet werden muss auch die Möglichkeit des öffentlichen Auftraggebers mit dem bereits gekürten Bestbieter „Nachverhandlungen“ in gewissem Umfang führen zu können (Art 29 Abs 7 EU-Vergaberichtlinie 2004/18/EG). Diese Möglichkeit darf nicht dazu führen, dass nach Abschluss der Bestbieterermittlung in intransparenter Weise für die Mitbewerber vertragliche Anpassungen vorgenommen werden, die – wären sie dem Leistungswettbewerb aller Bieter unterzogen worden – zu einer Änderung der Bieterreihung geführt hätten.
Unklar ist aus derzeitiger Sicht, wie im Rahmen des wettbewerblichen Dialogs eine nicht diskriminierende Festlegung der Zuschlagskriterien erfolgen soll.

Grundsätzlich sollte für ÖPP die freie Wahl zwischen dem offenen, dem nicht offenen und den Verhandlungsverfahren bzw. dem wettbewerblichen Dialog möglich sein.

3. Sehen Sie in Bezug auf diese Aufträge neben der Wahl des Vergabeverfahrens andere Punkte, die mit dem Gemeinschaftsrecht über öffentliche Aufträge in Konflikt stehen könnten? Wenn ja, nennen Sie diese und begründen Sie!

Während vergaberechtliche Verstöße des öffentlichen Auftraggebers, darunter insbesondere die falsche Wahl der Verfahrensart gemäß den EU-Rechtsmittelrichtlinien vor den nationalen Vergabekontrollinstanzen bekämpft werden können, bleibt effizienter Rechtsschutz im Fall der gänzlichen Missachtung des Vergaberechts („Freihandvergabe“ bzw. „Direktvergabe“) durch den Auftraggeber weitgehend versagt. Das Problem der Rechtsschutzlücke bei Freihandvergaben stellt sich nicht nur bei der Vergabe von ÖPP, ist hier jedoch von besonderer Tragweite, da typischerweise langfristige Verträge abgeschlossen werden.
Zwar kann nach dem österreichischen Vergaberecht ein Bieter im Fall einer zu Unrecht erfolgten Direktvergabe (Freihandvergabe) vor der zuständigen Vergabekontrollinstanz den Antrag auf Feststellung stellen, dass die freihändige Vergabe rechtswidrig war und in Verstoß gegen das EU-Vergaberecht erfolgte. Der Eingriff in den abgeschlossenen Vertrag ist aber auch durch einen positiven Feststellungsbescheid nicht mehr möglich. Auch der EuGH geht in seiner Rechtsprechung von der Bestandskraft unter Missachtung des Vergaberechts geschlossener Verträge aus.

Weiters sind die Abgrenzungsfragen zwischen Bau- und Dienstleistungsaufträgen bzw. Bau- und Dienstleistungskonzessionen nach wie vor nicht klar geregelt. Generell kollidiert die erwünschte frühzeitige Einbindung von Privaten zur Optimierung des ÖPP Projektes immer wieder mit dem Interesse des Auftraggebers, erst dann zu vergeben, wenn die Leistungsbeschreibung genau präzisiert ist, aber auch mit dem Interesse des Auftragnehmers, keine Genehmigungsrisken übernehmen zu wollen.

4. Haben Sie bereits einmal ein Verfahren zur Vergabe einer Konzession in der Europäischen Union organisiert, daran teilgenommen bzw. ein solches organisieren oder daran teilnehmen wollen? Welche Erfahrungen haben Sie gemacht?

In Österreich wurden in der Vergangenheit mehrere große Dienstleistungskonzessionsprojekte. Seit Inkrafttreten des Bundesvergabegesetzes 2002 in Österreich (1.9.2002) unterliegt die Vergabe einer Dienstleistungskonzession gemäß der

Rechtsprechung des EuGH einem Vergaberegime „light“: Die öffentlichen Auftraggeber sind zur öffentlichen Bekanntmachung und zur Einhaltung der Grundsätze des Vergaberechts verpflichtet, der Rechtsschutz ist in der Regel nicht vor den eigens dafür eingerichteten Vergabekontrollbehörden, sondern der ordentlichen Gerichtsbarkeit angesiedelt.

5. Halten Sie das derzeitige Gemeinschaftsrecht für präzise genug, um die konkrete und effektive Teilnahme von Gesellschaften oder Gruppierungen aus anderen Staaten an den Konzessionsvergabeverfahren sicherzustellen? Sind Sie der Ansicht, dass in dieser Hinsicht normalerweise ein tatsächlicher Wettbewerb herrscht?

Der Wettbewerb bei ÖPP-Projekten in der EU ist sehr intensiv. Ohne Kenntnisse der Bedingungen vorort ist jedoch eine Teilnahme am Wettbewerb wenig erfolgversprechend. Wichtig erscheint vielmehr, dass für Vergabe- und wettbewerbsrechtliche Verstöße einen raschen und wirksamen Rechtschutz gibt.

6. Halten Sie einen Vorschlag für einen gemeinschaftlichen Rechtsakt zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe für wünschenswert?

Ein gemeinschaftsrechtlicher Rechtsakt zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe ist nicht erforderlich. Jedoch sollte die Mitteilung der Kommission zu Auslegungsfragen im Bereich Konzessionen im Gemeinschaftsrecht in einigen Punkten noch Präzisierungen erfahren. So wurde in den neuen EU-Vergaberichtlinien eine Definition der Dienstleistungskonzession eingefügt. Aus dieser Definition geht jedoch gerade jenes Tatbestandselement, dass nach der Mitteilung der Kommission ausschlaggebend für die Abgrenzung zwischen Dienstleistungsauftrag und Dienstleistungskonzession ist, nämlich die Tragung des wirtschaftlichen Risikos durch den Konzessionsnehmer, nicht explizit hervor.

Fraglich ist auch, ob Nutznießer einer Dienstleistungskonzession die Allgemeinheit sein muss, oder ob auch die Vergabe einer Dienstleistungskonzession für einen beschränkten Empfängerkreis bzw zugunsten der öffentlichen Hand selbst denkbar ist, sofern nur eine Risikotragung durch den Konzessionsnehmer erfolgt.

7. Allgemeiner gefragt: Wenn Sie ein neues Gesetzgebungsvorhaben der Kommission für erforderlich halten, gibt es dann objektive Gründe dafür, in diesem Rechtsakt sämtliche ÖPP auf Vertragsbasis zu behandeln und sie ein und demselben Regelwerk für die Vergabe zu unterwerfen, ganz gleich ob die Vorhaben als öffentliche Aufträge oder als Konzessionen einzustufen sind?

Ein eigenes Gesetzgebungsvorhaben für ÖPP wird nicht für sinnvoll erachtet.

8. Ist Ihrer Erfahrung nach der Zugang der ausländischen Akteure zu privat initiierten ÖPP gewährleistet? Für den Fall, dass die Vergabestellen zur Initiative aufrufen, wird dieser Aufruf dann angemessen bekannt gemacht, so dass alle interessierten Akteure Kenntnis davon haben können? Wird für die Ausführung des

ausgewählten Projekts ein Auswahlverfahren auf Basis eines effektiven Wettbewerbs organisiert?

9. Wie könnte Ihrer Auffassung nach die Entwicklung privat initiierter ÖPP in der Europäischen Union unter Wahrung der Grundsätze der Transparenz und der Gleichbehandlung und ohne Verstoß gegen das Diskriminierungsverbot gewährleistet werden?

Auch privat initiierte ÖPP sind ihrem tatsächlichen Inhalt nach entweder als öffentlicher Auftrag oder aber als Dienstleistung- bzw. Baukonzession zu qualifizieren. Entsprechend muss der Aufruf zur Teilnahme am Vergabeverfahren von den Vergabestellen im EU-Amtsblatt wie die Vergabe jedes anderen öffentlichen Auftrags bekannt gemacht werden.

Geht die Initiative für ein ÖPP von einem privaten Wirtschaftsteilnehmer, der selbst als Partner der öffentlichen Hand an der Realisierung des von ihm entwickelten Projektes interessiert ist, so stellt sich das Problem der Vorarbeitenproblematik für diesen Wirtschaftsteilnehmer. Die Vergabestelle wird in der nachfolgenden Ausschreibung darauf achten müssen, dass allfällige Wettbewerbsvorteile dieses Unternehmens in der Projektierungsphase neutralisiert werden, damit sich das initiierende Unternehmen selbst auch an der Ausschreibung beteiligen kann, ohne dass gegen den Grundsatz der Bietergleichbehandlung verstoßen wird.

Privat initiierte ÖPP haben, sofern es sich um öffentliche Aufträge handelt den selben Regeln zu unterliegen wie von der öffentlichen Hand initiierte ÖPP. Eine gesonderte Regelung in Unterscheidung „öffentlich initiierte" und „privat initiierte" ÖPP ist abzulehnen.

10. Welche Erfahrungen haben sie in der Phase im Anschluss an die Auswahl des privaten Partners im Rahmen von ÖPP auf Vertragsbasis gemacht?

Sofern in der laufenden Abwicklung eines ÖPP Projektes zwischen den Vertragsparteien Vertragsanpassungen vorgenommen werden, die grundsätzlich eine Neuausschreibungspflicht auslösen müssten, wird davon der Mitbewerber keine Kenntnis erlangen und daher auch nicht mit vergaberechtlichen Mitteln dagegen vorgehen können. Entsprechend gibt es auch nur wenige Entscheidungen der Vergabekontrollbehörden im Zusammenhang mit Vertragsanpassungen.

Unbestritten muss im Gegenzug jedoch gerade bei komplexen ÖPP Projekten den Vertragsparteien die Möglichkeit zur Vertragsanpassung innerhalb der bereits in den Ausschreibungsunterlagen vorgezeichneten Grenzen möglich sein (ausschreibungsneutrale derivative Vertragsanpassung wie Preisgleitklauseln, Verlängerungsoptionen etc).

11. Sind Ihnen Fälle bekannt, in denen die Ausführungsbedingungen, einschließlich der Klauseln zur Anpassung im Zeitverlauf, eine diskriminierende Wirkung entfalten konnten oder eine ungerechtfertigte Behinderung der Dienstleistungs- oder Niederlassungsfreiheit darstellten? Falls ja, bitte beschreiben Sie die Art der aufgetretenen Probleme!

13. Sind Sie wie die Kommission der Auffassung, dass bestimmte Interventionsklauseln in Bezug auf die Grundsätze der Transparenz und der Gleichbehandlung problematisch sein können? Sind Ihnen andere Typen von Klauseln bekannt, deren Anwendung zu ähnlichen Problemen führen kann?

Es ist vielfach üblich, dass sich die öffentliche Hand im Rahmen von ÖPP das Recht zur außerordentlichen Kündigung des Vertrages bei Eintritt bestimmter Umstände (z.B. Strukturänderungen des privaten Partner o.ä.) oder andere Kontrollmöglichkeiten bzw. einseitige Möglichkeiten zum Vertragseingriff vorbehält.

Während des laufenden Vergabeverfahrens können derartige in den Ausschreibungsunterlagen enthaltene Klauseln von den Bietern im Wege eines Nachprüfungsverfahrens vor den österreichischen Vergabekontrollinstanzen bekämpft werden, wenn dem Auftragnehmer durch sittenwidrige Klauseln ein unkalkulierbares Risiko auferlegt wird oder es sich um diskriminierende Bestimmungen handelt.

Nach Abschluss des Vergabeverfahrens sind allfällige sittenwidrige oder gröblich benachteiligende Klauseln in den Ausführungsbedingungen eine Angelegenheit der Vertragsabwicklung zwischen Auftraggeber und Auftragnehmer, welche mit Mitteln des nationalen Zivilrechts zu lösen sind.

12. Sind Ihnen Praktiken oder Mechanismen zur Bewertung von Angeboten bekannt, die eine diskriminierende Wirkung haben?

Es sind auch aus der vergaberechtlichen Rechtsprechung in Österreich zahlreiche Fälle bekannt, in denen sich öffentliche Auftraggeber unzulässiger oder diskriminierender Zuschlagskriterien bedient haben bzw. grundsätzlich tauglichen Zuschlagskriterien bei der Durchführung der Bewertung der Angebote unzulässige oder diskriminierende Bedeutung beigemessen haben.

Typische Fehler betreffen die Verwendung von Eignungskriterien als Zuschlagskriterien, wobei insbesondere die Verwendung von Referenzen als Zuschlagskriterium eine vergaberechtliche Grauzone darstellt. Probleme auch oft die Bewertung von vergaberechtlich grundsätzlich zulässigen subjektiven Kriterien (z.B. Benutzerkomfort, Ästhetik etc) durch mangelnde Sachkunde der bewertenden Vergabekommission, bloße Bewertung im Schulnotensystem ohne verbale Begründung, willkürliche Elemente bei der Punktevergabe. Weitere Schwierigkeiten ergeben sich durch die fehlende Transparenz der Zuschlagskriterien oder der Bewertungsmethoden.

14. Halten Sie es für erforderlich, dass bestimmte Aspekte der vertraglichen Rahmenbedingungen für ÖPP auf Gemeinschaftsebene geklärt werden? Falls ja, was sollte geklärt werden?

Vertragliche Bestimmungen in ÖPP-Verträgen und deren Zulässigkeitsgrenzen sind Angelegenheit der jeweiligen nationalen Zivilrechte. Eine Regelung auf Gemeinschaftsebene ist nicht erforderlich.

Generell ist bei ÖPP die Wechselwirkung zwischen den betroffenen Rechtsmaterien zu beachten. Die Anforderungen des Vergaberechts sind mit denen des Beihilfenrechts, des Vertragsrechts, der Finanzierungsbedingungen, der EUROSTAT-Regeln und dem öffentlich-rechtlichen Rahmen in den einzelnen Sektoren in Einklang zu bringen. Gerade die interdisziplinäre Betrachtung wäre nicht nur auf der Ebene der Mitgliedsstaaten, sondern auch auf der EU-Ebene eine dringende Aufgabe.

15. **Sind Ihnen bei ÖPP-Konstruktionen besondere Probleme mit der Vergabe von Unteraufträgen bekannt? Welche?**
16. **Rechtfertigt die Existenz von ÖPP auf Vertragsbasis, die die Übertragung eine Aufgabenpakets an einen einzigen privaten Partner impliziert, ihrer Auffassung nach, dass ausführlichere Regeln für die Vergabe von Unteraufträgen eingeführt werden und/oder dass der Anwendungsbereich erweitert wird?**
17. **Halten Sie, allgemeiner gesprochen, eine ergänzende Initiative auf Gemeinschaftsebene zur Klärung oder Umgestaltung der Regeln für die Vergabe von Unteraufträgen für erforderlich?**

Die Spielregeln für Unteraufträge sind klar definiert. Ausführlichere Regeln sind nicht notwendig.

Eine ausdrückliche Klarstellung im Rahmen einer auslegenden Mitteilung der Kommission wäre sinnvoll, dass sowohl die technische wie auch die finanzielle und wirtschaftliche Leistungsfähigkeit durch Beziehung eines Subunternehmers substitutiert werden kann, sofern der Bieter bereits mit Abgabe seines Angebotes verbindlich nachweist, dass ihm die Mittel des Subunternehmers im Auftragsfall tatsächlich zur Verfügung stehen werden.

18. **Welche Erfahrungen haben Sie mit der Einrichtung institutionalisierter ÖPP gemacht? Lassen Ihre Erfahrungen Sie zu der Schlussfolgerung gelangen, dass die gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen bei institutionalisierten ÖPP-Konstruktionen eingehalten werden? Falls nein, warum nicht?**

Der typische Fall eines institutionalisierten ÖPP ist die Gründung eines gemischt-wirtschaftlichen Unternehmens, an dem sowohl die öffentliche Hand als auch der private Partner beteiligt sind. Hier stellt sich die nach wie vor ungelöste Frage der Reichweite des In-house-Privilegs. Selbst wenn der Vorgang der Gesellschaftsgründung, in die gleichzeitig die Vergabe eines initialen öffentlichen Auftrages an die Gesellschaft verbunden war, EU-weit öffentlich ausgeschrieben wurde, stellt sich die Frage, ob die öffentliche Hand als Gesellschafter ausschreibungsfrei Aufträge an ihr Tochterunternehmen vergeben darf und bis zu welcher Grenze die Gesellschaft ihre Leistungen auch am Markt anbieten darf, ohne dass das In-house-Privileg verloren geht.

Während bei 100% Eigengesellschaften und gemischt-öffentlichen Unternehmen das Vorliegen eines In-house-Geschäfts in der Rechtsprechung bereits ausdrücklich bejaht wurde, bestehen zur Frage der In-house-Vergabe an gemischt-wirtschaftliche Unternehmen noch keine positiven Entscheidungen der Vergabekontrollinstanzen. Das vorliegende Grünbuch verweist zwar allgemein auf den Ausnahmetatbestand des In-house-Privilegs und dessen Voraussetzungen, äußert sich aber nicht näher zu deren Grenzen und Reichweite.

Leider hat die Regelung der In-house-Vergabe auch keinen Eingang in die neuen EU-Vergaberichtlinien gefunden. Zur Beseitigung dieser Rechtsunsicherheit sollte die Kommission eine auslegende Mitteilung veröffentlichen.

19. Halten Sie eine Initiative auf Gemeinschaftsebene für erforderlich, um die Verpflichtungen zu klären oder zu vertiefen, die die öffentlichen Auftraggeber in Bezug auf den Wettbewerb zwischen potenziell an einem institutionalisierten ÖPP-Projekt interessierten Wirtschaftsteilnehmern haben? Falls ja, welche Aspekte halten Sie für besonders wichtig und welche Form sollte eine solche Initiative haben? Falls nein, warum nicht?

Ein gemeinschaftlicher Rechtsakt ist nicht erforderlich. Die Kommission sollte eine auslegende Mitteilung erlassen, in der dargestellt wird, in welchen Fällen die Gründung eines institutionalisierten ÖPP ausschreibungspflichtig ist und in welchen Fällen eine In-house-Vergabe möglich ist.

20. Welche Maßnahmen oder Verfahren behindern in der Europäischen Union die Einrichtung von ÖPP?

Behindert werden ÖPP-Modelle oft nicht nur durch vergaberechtliche Notwendigkeiten, sondern auch durch Rechtsprobleme in anderen Bereichen. U.a. können ÖPP-Modelle z.B. mehrwertsteuerrechtlich unerwünschte Konsequenzen nach sich ziehen (Vorsteuerabzug).

Behinderungen für ÖPP ergeben sich weiters durch

- zu zögerliche Liberalisierungen und Marktöffnungen in bestimmten Sektoren, z.B. Schienenverkehr
- finanzielle Restriktionen, z.B. bei der Schieneninfrastruktur
- mangelnde Vernetzung der verschiedenen nationalen ÖPP-Initiativen über die Kommission
- offene Fragen beim Wachstums- und Stabilitätspakt bezüglich der Kriterien Budgetdefizit und öffentliche Verschuldung.

21. Kennen Sie andere ÖPP-Formen aus Drittländern? Kennen Sie aus Ihren Erfahrungen in solchen Ländern bewährte Verfahrensweisen, die auch für die EU beispielgebend sein könnten? Falls ja, welche?

Das sog. Verfügbarkeitsmodell (Konzessionär trägt Planungs- und Ausführungsrisken, nicht aber das Nutzungs- bzw. Frequenzrisiko) ist im Hinblick auf die Risikoverteilung und Bankability zurzeit das am besten nutzbare Modell mit den geringsten privaten Finanzierungskosten. Daher könnte es insbesondere auch im Verkehrsinfrastrukturbereich forciert Anwendung finden.

22. Denken Sie dass es nützlich wäre, im Hinblick auf den großen Investitionsbedarf einzelner Mitgliedstaaten zum Erreichen einer sozialen und dauerhaften Entwicklung gemeinsam und in regelmäßigen Abständen über diese Fragen unter den betroffenen Akteuren nachzudenken und bewährte Verfahrensweisen auszutauschen? Sollte die Kommission nach Ihrer Auffassung ein derartiges Netzwerk aufbauen?

In einigen Mitgliedstaaten wird versucht, eine wissenschaftliche Begleitung von ÖPP Projekte und die Evaluierung von Best-Practice-Modellen durchzuführen, da insbesondere in einer umfassenden Wirtschaftlichkeitsprüfung der Schlüssel zum Erfolg von ÖPP liegt. Die Koordinierung eines derartigen Netzwerks unter Einbindung der Auftraggeber- und der Auftragnehmerseite wäre wünschenswert.

Wir ersuchen um Berücksichtigung unserer Stellungnahme in der weiteren Bearbeitung.

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An die Europäische Kommission

Konsultation „Grünbuch zu öffentlich-privaten Partnerschaften“

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Wien, am 15. Juli 2004
Zl.: 035-1/150704/Dr

Konsultation „Grünbuch zu öffentlich-privaten Partnerschaften“

Sehr geehrte Damen und Herren!

Seitens des Österreichischen Gemeindebundes erlauben wir uns zum oben erwähnten Grünbuch folgende Stellungnahme abzugeben:

Die so genannten gemischten Partnerschaften aus privaten Investoren und der öffentlichen Hand (Public-Private-Partnerships/PPP) haben in den letzten Jahren an Bedeutung gewonnen. Sie sind vielfach durchaus geeignet, den öffentlichen Interessen zur dauerhaften und flächendeckenden Leistung in entsprechender Qualität und zu einem angemessenen Preis zu entsprechen. Die Europäische Kommission will daher offenbar EU-weite Regeln für öffentlich-private Partnerschaften festlegen. Bisher gilt für ihre grenzüberschreitende Vergabe das EU-Recht für öffentliche Beschaffungsvorgänge.
Im Hinblick auf die im Grünbuch aufgeworfenen Fragen zu öffentlich - privaten Partnerschaften nimmt der Österreichische Gemeindebund folgende Position ein: :
Das Grünbuch will vor allem den Binnenmarkt stärken und Markteintrittshindernisse beseitigen. Soziale Konsequenzen oder die Möglichkeit der praktischen Umsetzung, insbesondere in kleinen Kommunen, werden nicht berücksichtigt.

Der Inhalt des Grünbuches ist nicht überzeugend, da er sich mit der bisher ausufernden Diskussion über die vergaberechtlichen Aspekte der PPP befasst, andere Probleme aber gänzlich unberührt lässt.

Die Frage nach einer europäischen Regelung ist im Zusammenhang mit bestehenden nationalen Regeln zu sehen. In Österreich beinhaltet das Bundesvergabegesetz komplexe Regeln für die Vergabe öffentlicher Aufträge, die Kommunen haben daher schon dadurch zum Teil aufwändige Vergabeverfahren einzuhalten.

Es steht fest, dass der freie Markt kein Garant für Qualität oder Flächendeckung ist. Eine zu starke Betonung der Rolle des Marktes für den Anwendungsbereich von PPP birgt die Gefahr der Überregulierung durch Vorschriften des Vergaberechtes. Öffentlich-private Partnerschaften werden von den Kommunen üblicherweise flexibel genutzt, eine Überregulierung könnte die Attraktivität dieser Organisationsform und die positiven Effekte im Sinne der oben genannten öffentlichen Interessen erheblich vermindern. Eine Überregulierung kann etwa zur Verteuerung und zur Zerschlagung von funktionierenden regionalen Strukturen führen.

Aus Sicht der Kommunen erscheinen viele im Grünbuch aufgeworfene Fragen realitätsfern. Die Kommission geht von Ausschreibungen und Konzessionen großen Ausmaßes aus und vergisst die besondere Lage kleiner Kommunen. Für kleine Einheiten und Aufträge von geringem Umfang hätte auch im Grünbuch auf Freistellungsregelungen verwiesen werden müssen. Auch für Inhouse-Vergabe sollten die Vergaberegeln nicht angewendet werden.

Bei einer Abwägung von Wettbewerbsüberlegungen gegenüber anderen Interessen, insbesondere der öffentlichen Hand, erscheint uns wesentlich festzustellen, dass der Wettbewerb grundsätzlich öffentlichen Interessen im Sinne der Konsumenten zu dienen hat und daher kein Wert an sich ist. Außerdem ist zu sagen, dass PPPs rechtlich und finanztechnisch komplizierte Konstruktionen mit sich bringen. Schon im Rahmen normaler Auftragsvergaben im Anwendungsbereich des Vergaberechts zeigt sich, dass derartige Regelungen den Vergabeprozess naturgemäß wesentlich verkomplizieren. Bei den um ein vielfaches aufwändigeren und komplexeren Umsetzungsschritten eines PPP-Projekts würden „vergaberechtliche“ Bestimmungen viele PPP-Projekte von vornherein unmöglich machen und damit insgesamt letztlich die negativen wirtschaftlichen Auswirkungen überwiegen.

Grundsätzlich kann unseres Erachtens mit den derzeitigen Regelungen für das öffentliche Beschaffungswesen auch im Bereich der PPP das Auslangen gefunden werden. Der Österreichische Gemeindebund spricht sich daher vehement gegen eine eigene Richtlinie für PPP aus. Diese Einschätzung betrifft Auftrags- wie Konzessionsvergabe sowie vertragliche und institutionalisierte PPP gleichermaßen.

Sollte es dennoch zu derartigen – unserer Ansicht nach insgesamt kontraproduktiven Regelungen - kommen, so sollten aus den genannten Gründen zumindest die Überlegungen zur vertraglichen Laufzeit von PPP (Pkt 46 – 50 des Grünbuchs) und zu institutionalisierten PPP fallen gelassen werden. Diese würden besonders massive Eingriffe in die Autonomie u.a. der Gemeinden mit sich bringen , soferne sie nicht als dispositive Empfehlungen verstanden werden.Auch die Entscheidungsfreiheit der Kommunen über die Art der Erbringung von Dienstleistungen und die Vergabe von Dienstleistungskonzessionen muss gewahrt bleiben. Insbesondere dürfen Regelungen des Vergaberechts nicht die kommunale Zusammenarbeit beeinträchtigen. Der Zusammenschluss mehrerer kommunaler Einrichtungen zur Erbringung gemeinsamer Leistungen ist für viele Kommunen die einzige Möglichkeit, Dienstleistungen selbst anbieten zu können. Für den Zusammenschluss von Kommunen zur Erbringung gemeinsamer Aufgaben sollten daher Freistellungsregeln zur Anwendung gelangen.

Wir können unsere Enttäuschung darüber nicht verbergen, dass den Kommunen durch das vorliegende Grünbuch keine Perspektive zur Erleichterung für die Errichtung von PPP´s gegeben werden konnte.

Mit freundlichen Grüßen

Für den Österreichischen Gemeindebund:

Der Generalsekretär:

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Der Präsident:

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Grünbuch zu ÖPP und den
gemeinschaftlichen Rechtsvorschriften für öffentliche
Aufträge und Konzessionen

Wien, 30.Juli 2004
Dr. Sl
Kl.89982
069-32/724/04

Europäische Kommission
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Grundsätzlich begrüßt der Österreichische Städtebund die Bemühungen der Europäischen Kommission durch die eingeleitete Konsultation zum Grünbuch eine Diskussion zu eröffnen, die Positionen der Mitgliedstaaten und der betroffenen Gebietskörperschaften zu erkunden und in der Folge eine Erhellung der derzeit noch offenen Fragen herbei zu führen.

Einleitend ist fest zu stellen, dass die Europäische Kommission mit diesem Grünbuch versucht, die unterschiedlichen Gestaltungsformen der Öffentlichen-Privaten-Partnerschaften (ÖPP) zu erfassen und entsprechend dem Binnenmarktprinzip deren Beauftragung unter den Regeln des Primärrechtes, des abgeleiteten Rechts und der Judikatur zu erläutern.

Unter Hinweis darauf, dass insbesondere die lokale Ebene sich der Partnerschaft mit dem Privatsektor für die Erbringung der öffentlichen Dienstleistungen in den Bereichen Abfallwirtschaft, Wasserversorgung oder Energieversorgung bedient, betont die Kommission, dass auch unter dem Aspekt der

Erbringung von Leistungen von allgemeinem Interesse die Rechtsvorschriften für öffentliche Aufträge und Konzessionen eingehalten werden müssen.

Grundsätzlich kann jedoch eine Kompetenz der Kommission im Bereich der Dienstleistungen von allgemeinem Interesse – sofern es sich nicht um große grenzüberschreitende Netze handelt - hinterfragt werden. Bisher hat sich die Kommission in ihren Überlegungen auch nur mit diesen Dienstleistungen beschäftigt. Wenn sie nunmehr ihr Anliegen der Marktöffnung auf die lokale bzw. regionale Ebene trotz der dort gegebenen Vielfalt – wie sie ja selbst feststellt – herabbricht, besteht die Gefahr der Zerstörung gut funktionierender Strukturen und damit indirekt eine Beeinflussung der Eigentumsstrukturen, insbesondere der lokalen Ebene.

Wenn die Ergebnisse der bisherigen Liberalisierungen der großen Netze betrachtet werden, so kann festgestellt werden, dass die ehemaligen staatlichen Monopole durch privatrechtlich organisierte Oligopole oder sonstige Zusammenschlüsse ersetzt wurden, welche wieder den Markt beherrschen und einschränken. Die Preisgestaltung auf dem Treibstoffsektor ist das beste Beispiel für dieses private Marktverhalten.

Die Kommission begründet ihr Anliegen der Marktöffnung mit der Notwendigkeit, die Qualität der Dienstleistungen zu erhöhen, ohne jedoch einen Nachweis vorzulegen, dass die lokale Ebene bei der Erbringung dieser durch eigene Unternehmen den Erfordernissen der Bürger nicht gerecht wird und daher private Partner herangezogen werden müssten.

Es darf daher angezweifelt werden, dass das Aufbrechen des kleinräumigen Marktes durch den Ausschreibungszwang automatisch zu einer Verbesserung der Dienstleistung führen wird.

Die Kommission verweist in ihrem Grünbuch darauf, dass es im Wesentlichen um jene Vorschriften geht, die nach der Entscheidung, eine Aufgabe an einen Dritten zu übertragen, anzuwenden sind. In diesen Fällen unterscheidet sie zwischen Partnerschaften basierend auf einer reinen Vertragsbeziehung zur Erbringung bestimmter Leistungen und einer solchen aufgrund eines Gesellschaftsvertrages.

Bezüglich der als Auftrags- bzw. Konzessionsverhältnis anzusehenden Partnerschaft verweist die Kommission auf die Möglichkeit des neuen Instrumentes des wettbewerblichen Dialogs, welcher sicher als Erleichterung zu begrüßen ist, jedoch hinsichtlich des Verfahrens auf den bisher schon zu beachtenden Grundsätzen der Transparenz, Gleichbehandlung und des Vertragsrechtes fußt.

Schwierigkeiten bereitet das von der Kommission als institutionalisierte ÖPP bezeichnete Vertragsverhältnis, weil es mit den bekannten Unsicherheiten – unklare Regeln für das Auswahlverfahren des Partners, Beauftragung mit der Erbringung der (Dienst-)Leistung belastet ist. Durch das Grünbuch scheinen diese nicht abschließend angesprochen zu sein. Insbesondere zieht sich die Kommission hinsichtlich der Auswahl des Partners auf das Kriterium des wirtschaftlich günstigsten Angebots in Bezug auf die zu erbringende Leistung zurück, wobei klare und objektive Kriterien gefordert werden.

Auch für die Gründung des Wirtschaftsgebildes müssen die Bedingungen klar festgelegt werden, „bevor die Aufgabe, die einem privaten Partner übertragen werden soll, im Wettbewerb vergeben werden“ (RZ 58 f).

Daraus wäre zu folgern, dass für die Gründung und Beauftragung eines „gemischtwirtschaftlichen“ Unternehmens zwei Ausschreibungen durchzuführen sind – erstens, um das günstigste Angebot für die Hereinnahme des Privaten zu eruieren und dann für die Vergabe der Leistung im Wettbewerb. Nicht behandelt wird die Frage der Abgrenzung zwischen einer rein finanziellen Beteiligung eines Privaten und der Leistungserbringung weiterhin durch den öffentlichen Partner im Rahmen eines gemischtwirtschaftlichen Unternehmens.

In diesem Zusammenhang gibt die Kommission keinerlei Hinweise, bis zu welchem Beteiligungsgrad eines Privaten sie eine ÖPP als inhouse-fähig ansieht. Es ist unbefriedigend, ausschließlich auf das Urteil des Europäischen Gerichtshofes in der Causa Teckal zu verweisen, wonach nur dann eine Ausnahme von den Vorschriften möglich ist, wenn eine Kontrolle ausgeübt wird, die der über eine eigene Dienststelle gleichkommt. Dies bedeutet, dass erst im Nachhinein bei der Prüfung im Einzelfall festgestellt wird, ob diese Bedingung erfüllt ist und damit keine Verletzung von EU-Recht vorliegt.

Auch hinsichtlich der zweiten Bedingung – der Wirtschaftstätigkeit im Wesentlichen für die den Aufwand tragende Gebietskörperschaft – ergibt sich eine Benachteiligung der öffentlichen Hand. Im überwiegenden Maße werden ÖPP aus finanziellen Gründen eingegangen und dabei wird das Know-how von der öffentlichen Seite eingebracht. Dieses Know-how könnte auch eine Basis für wirtschaftliches Handeln darstellen und an andere Gebietskörperschaften „weiterverkauft“ werden. Die TransparenzRL wäre ausreichende

Grundlage dafür, dass unzulässiger Transfer von Kosten hintan gehalten würde.

Der Österreichische Sdtädtebund geht jedenfalls davon aus, dass die Dienstleistung von allgemeinem wirtschaftlichem Interesse, welche in Form von „In-house" erbracht wird – sei es durch einen Regiebetrieb oder durch eine eigene Gesellschaft – nicht ausgeschrieben werden muss. Das Gleiche gilt, wenn mehrere Gemeinden einen Zweckverband, d.h. einen in Österreich verfassungsrechtlich abgesicherten Zusammenschluss von Gemeinden zur Erfüllung einzelner Leistungen der Daseinsvorsorge vereinbaren.

Die Vergabe von Dienstleistungen von allgemeinem wirtschaftlichem Interesse an private Institutionen ist mit vielen Imponderabilien verbunden. Einerseits werden den auflaufenden Transaktionskosten kein Augenmerk gewidmet. Soll eine Gemeinde die ordnungsgemäße Erbringung der Dienstleistung gewährleisten, so bedarf es andererseits für eine effiziente Kontrolle auch eines ausreichenden Maßes an Know-how, welches aufrecht erhalten werden muss.

Die Kommission verweist richtigerweise auf die Problematik der Laufzeit der Verträge und zieht als Grenze die Dauer der Amortisation samt Verzinsung des eingesetzten Kapitals (RZ 46). Hier zeigt sich jedoch voll das Problem der notwendigen Erneuerung und Instandhaltung, z. B. der baulichen Anlagen. Wenn lediglich auf die Amortisationszeit abgestellt wird, kann sich daraus in Folge des marktwirtschaftlichen Prinzips ergeben, dass so lange wie möglich keinerlei oder nur im geringsten Maße Instandhaltungsaufwendungen getätigt werden, weil sowieso nach der Amortisation der Investitionen der

Vertrag endet, die Anlage an die öffentliche Hand zurückfällt und diese die wegen des Alters in die Höhe schnellenden Reparaturkosten zu tragen hat.

Der Österreichische Städtebund kann auch nicht den Ausführungen der Kommission (RZ 47) folgen, wo es um Vertragsänderungen oder Revisionsklauseln geht. Dementsprechend müssten entweder wegen des technischen Fortschrittes etwaige technische Verbesserungen vorhergesehen und in den Vertrag – mit entsprechendem Preis - eingebaut oder erst später neu ausgehandelt werden, wobei der öffentlichen Hand dann ein Monopolist mit entsprechender Marktmacht gegenübersteht.

In der RZ 49 beschränkt die Kommission die nicht durch Vertrag gedeckten Änderungen auf jene nach einem unvorhergesehenen Ereignis bzw. aus Gründen der öffentlichen Ordnung, Sicherheit oder Gesundheit. Andere Änderungen würden einen erneuten Aufruf zum Wettbewerb implizieren. Dies würde jedoch zu einer Beendigung des Vertragsverhältnisses mit dem bisherigen Partner oder dessen Wiedereinstieg zu einem Preis führen, dessen Marktgerechtigkeit zweifelhaft ist.

Die Ausführungen in RZ 51f sind nicht eindeutig klärend. Einerseits wird von einer Projektgesellschaft gesprochen, welche selbst die Rolle einer Vergabestelle erfüllt, wobei Ausschreibungszwang vorliegt, andererseits ist es ihr möglich, mit Dritten Verträge zu schließen, wenn sie keine Aufträge vergibt. Um welche Verträge handelt es sich dann?

Zusammenfassend ist Folgendes fest zu halten:

Die Kommission bestätigt in ihrem Grünbuch, dass die Kommunen in ihrer Entscheidung frei seien, ob sie eine Leistung selbst erbringen oder sich dafür Dritter bedienen.

Wenn die zweite Lösung zur Anwendung gelangt – was offenkundig von der Kommission präferiert wird, weil sie auf den Rückzug des Staates und die Auslagerung von Aufgaben verweist - , dann sind jedoch die Regeln des Binnenmarktes und Wettbewerbes sowie des Primärrechtes anzuwenden. Dies je nachdem, um welche Form der ÖPP es sich handelt. Dadurch kommt jedoch im Wesentlichen der Zwang zur „Ausschreibung“, wenn auch nicht immer in der strengen Form der Vergaberichtlinien, zum Tragen, weil Transparenz, Gleichbehandlung und Verhältnismäßigkeit nicht auf anderem Wege gewährleistet werden können.

Diese Kriterien müssen auch schon bei der Auswahl des Partners beachtet werden.

Es ist erschreckend, dass die Kommission ernsthaft versucht, die in der Realität gegebene Vielfalt an Formen der Leistungserbringung sowie der Nutzung finanzieller Ressourcen und des regionalen Know-hows in ein starres Schema zu pressen. Bedenklich ist, dass auf Kostenelemente, die mit den von der Europäischen Union vorgeschriebenen Verfahren (z. B. der Ausschreibung) verbunden sind (Transaktionskosten), nicht einmal ansatzweise eingegangen wird.

Nach Ansicht des Österreichischen Städtebundes steht fest, dass – obwohl der kommunale Bereich als Ausdruck des Subsidiaritätsprinzips und der kommunalen Selbstbestimmung ausdrücklich durch Rat und Parlament vom europäischen Vergaberecht mit seinem Ausschreibungszwang bezüglich der Dienstleistungskonzession ausgenommen wurde - sukzessive der

Handlungsspielraum der öffentlichen Hand bei der Erbringung von Dienstleistungen von allgemeinem Interesse eingeschränkt und sie gegenüber dem privaten Wirtschaftsteilnehmer krass benachteiligt wird. Dies steht auch im Widerspruch zur Betonung der Beachtung der national statuierten Gegebenheiten.

Der Bildung von Oligopolen und von internationalen Unternehmen mit einer ausgeprägten Marktbeherrschung wird offensichtlich nicht mit der gleichen Akribie nachgegangen wie es bei Aktivitäten der öffentlichen Hand geschieht. Dem unterpreislichen Angebot mit dem Ziel, bestehende Strukturen zu zerstören, wie es bereits jetzt im Markt geschieht, hat die Kommission offensichtlich nichts entgegen zu setzen. Oder sie besinnt sich vielleicht doch, in Bereichen der Daseinsvorsorge nicht harmonisieren zu sollen, wo die europäische Vielfalt angepasst an die sozialen Bedürfnisse der Bürger auf demokratische Weise gelebt wird.

Stellvertretend

für den Generalsekretär:

Dr. Friedrich Slovak e.h.

Dkfm. Dr. Erich Pramböck
Generalsekretär

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Stellungnahme der

Österreichischen Vereinigung für das Gas- und Wasserfach (ÖVGW)

zum Grünbuch der Kommission der Europäischen Gemeinschaften

zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen

Allgemeines

Die ÖVGW ist die Interessensvertretung der Wasserwerke Österreichs. Unsere 205 Mitglieds-Wasserwerke versorgen mehr als 5,6 Mio. Einwohner in Österreich mit bestem Trinkwasser. Die Wasserversorgung in Österreich besteht aus sehr vielen (ca. 3000) kleinen Versorgungsunternehmen. Die Versorgungsstruktur in Österreich hat sich bewährt und bietet den Konsumenten eine qualitativ hochwertige Wasserversorgung zu günstigen Preisen. Die Stellungnahme der ÖVGW zum Grünbuch ÖPP erfolgt ausschließlich aus den Gesichtspunkten der Trinkwasserversorgung.

Die Trinkwasserversorgung erfolgt in Österreich zum größten Teil durch kommunale Unternehmen. Diese Unternehmen sind entweder als Teil der kommunalen Verwaltung (Eigenbetrieb, Regiebetrieb, Magistratsabteilung, etc.) aber vereinzelt auch in Rechtsformen des Privatrechtes (z.B. Aktiengesellschaft, GMBH) organisiert, die aber durchwegs im Mehrheitseigentum der öffentlichen Hand stehen.

Grundsätzlich ist die Vergabe von öffentlichen Bau- und Dienstleistungsaufträgen an Dritte sowie Konzessionen in Österreich seit langem ausreichend gesetzlich und EU-konform geregelt und daher verpflichtend. Konzessionen für Wasserversorgungen wurden allerdings bisher nur in wenigen Ausnahmefällen ausgeschrieben bzw. vergeben. Dies hängt unter anderem auch mit der kleinräumigen Struktur der Wasserversorgung in Österreich zusammen. Vor allem für kleinere und mittlere Einheiten bzw. Kommunen wird die Durchführung einer Konzessionsausschreibung aufgrund des damit verbundenen komplexen Vergabeverfahrens, der notwendigen komplexen rechtlichen Regelungswerke und der damit verbundenen hohen Kosten nicht sinnvoll möglich sein.

Generell ist zu berücksichtigen, dass Wasser eine lokale Ressource darstellt und internationale, weit reichende Wasserleitungsnetze aus technischer Sicht nicht sinnvoll realisierbar sind. Damit handelt es sich bei der Wasserversorgung immer um eine lokale Tätigkeit, die auch in der Regel mit gemeinwirtschaftlichen Auflagen verbunden ist. Daraus folgt, dass die Wasserversorgung generell nicht geeignet ist, den Wettbewerb zwischen den Mitgliedsstaaten zu beeinträchtigen. Auch ist jedenfalls sicherzustellen, dass das Eigentum und die Verfügbarkeit der Ressource Wasser immer in der Entscheidungsfreiheit der Nationalstaaten liegt.

Aus Sicht der ÖVGW sind öffentlich-private Partnerschaften (ÖPP) grundlegend von öffentlichen Aufträgen zu unterscheiden. Bei ÖPP-Modellen handelt es sich um äußerst komplexe und auf einen langen Zeitraum angelegte Partnerschaften, die auch über den Zeitablauf noch optimiert und angepasst werden müssen. Das Risiko und die Verantwortung für das Ergebnis (d.h. eine hochwertige Wasserversorgung zu verträglichen Preisen) liegen in der Regel beim privaten Unternehmer. Damit können ÖPP-Modelle nicht sinnvoll durch die herkömmlichen Ausschreibungsverfahren abgedeckt werden.

Position der ÖVGW

Die ÖVGW lehnt eine Verpflichtung für Kommunen zur Vergabe von Konzessionen oder zur zwangsweisen Durchleitung von Wasser durch fremde Netze im Bereich der Wasserversorgung grundsätzlich ab. Die Kommunen müssen auch in Zukunft die Möglichkeit haben, die Trinkwasserversorgung im eigenen Bereich entsprechend den räumlichen Gegebenheiten und den Anforderungen der Konsumenten selbst durchzuführen und zu gestalten.

Die ÖVGW wendet sich generell gegen eine Verschärfung der Ausschreibungsverpflichtungen, die über die derzeitigen nationalen bzw. EU-Vorschriften hinausgehen würden. Die ÖVGW erachtet die derzeit gültigen Regelungen und Bestimmung für völlig ausreichend bzw. sogar zu umfangreich. Generell ist die ÖVGW der Meinung, dass die Wasserversorgung - als Aufgabe der Daseinsvorsorge und Dienstleistung von allgemeinem Interesse und mit gemeinwirtschaftlichen Verpflichtungen verbunden - nicht dazu geeignet ist, den Wettbewerb zwischen den Mitgliedsstaaten negativ zu beeinflussen.

Die ÖVGW lehnt eine Ausschreibungsverpflichtung bei der Wahl des privaten Partners bei der Gründung von gemischtwirtschaftlichen Unternehmen durch Kommunen ab. Entscheidet sich eine Kommune, einen privaten Partner zu beteiligen, dann muss sie diesen Partner frei wählen können, da eine derartige Ausschreibungsverpflichtung in keiner Weise den Wettbewerb im Wassermarkt fördern und keinen erkennbaren Vorteil für die Kunden bringen würde.
Im Übrigen würde das Selbstbestimmungsrecht der Gemeinden in einer so wichtigen Angelegenheit sehr stark beschnitten.

Die ÖVGW lehnt eine verpflichtende Ausschreibung für die Vergabe von Dienstleistungskonzessionen für die Wasserversorgung ab. Generell müssen die Kommunen weiterhin das Recht behalten frei zu entscheiden, ob sie eine Konzession in einem Ausschreibungsverfahren an Dritte vergeben wollen. Im Fall einer Konzession wird nur das Recht zur wirtschaftlichen Betätigung an ein privates Unternehmen übertragen. Damit liegt kein öffentlicher Auftrag einschließlich Entlohnung für den privaten Unternehmer vor und ist das Vergaberecht nicht anwendbar. Das private Unternehmen agiert in diesem Fall auf eigenes wirtschaftliches Risiko. Die ÖVGW hält diese Vorgangsweise für begründet und schlägt daher vor, dass Dienstleistungskonzessionen auch in Zukunft nicht ausgeschrieben werden müssen. Insbesondere für kleine Versorgungsunternehmen im Umkreis von großen Versorgungsunternehmen gibt es oftmals keine andere wirtschaftlich vertretbare Möglichkeit als mit einem angrenzenden großen Versorgungsunternehmen eine Partnerschaft einzugehen.

Unter dem Hinweis auf die besondere Situation der Trinkwasserversorgungswirtschaft fordert die ÖVGW, dass eine Inhousegesellschaft auch dann als solche anerkannt wird, wenn mehrere Kommunen daran beteiligt sind und diese Inhousegesellschaft die Aufgabenerfüllung für ihre Gesellschafter erbringt. So müssen aus Sicht der ÖVGW beispielsweise Wasserverbände (Zusammenschluss mehrerer Kommunen im Bereich der Wasserversorgung), welche die Aufgabenerfüllung für ihre Verbandsmitglieder durchführen, auch weiterhin ohne Verpflichtung zur Ausschreibung gegründet werden können. Es handelt sich dabei nicht um einen Fall von Übertragung einer Wirtschaftstätigkeit an Dritte und es ist das Vergaberecht daher nicht anwendbar.

Die ÖVGW fordert grundsätzlich, dass eine Ausschreibung von Baukonzessionen nach dem Vergabegesetz nicht erforderlich ist, wenn der Aufwand der Ausschreibung die zu erwartenden wirtschaftlichen Vorteile übersteigt. Hierbei ist insbesondere die gewachsene und kleinräumige Struktur der Wasserversorgung in Österreich zu berücksichtigen. Damit verbunden sollen jedenfalls kleinere Kommunen (z.B. bis 10.000 Einwohner) bei Konzessionssystemen aufgrund der komplexen Vergabeverfahren und notwendigen komplexen rechtlichen Regelwerke nicht dem Vergabe-bzw. Beihilfenrecht unterliegen. Die im Vergaberecht normierten Schwellenwerte für Bau- bzw. Dienstleistungsaufträge wären jedenfalls aus Sicht der ÖVGW für Konzessionssysteme aufgrund der angeführten Komplexität als bei weitem zu niedrig anzusehen.

Zu den Fragen des Grünbuches ÖPP:

Frage 1:

Derzeit existieren in Österreich nur sehr wenige Beispiele für ÖPP-Modelle. Aufgrund der Komplexität der Verfahren ist keine massive Ausweitung dieser Modelle zu erwarten. Für Kommunen besteht die Möglichkeit, die Wasserversorgung auf öffentlich-rechtlicher Basis (im Wege der Hoheitsverwaltung z.B. auf Basis eines Gemeinderatsbeschlusses) oder auf privatrechtlicher Basis (mit den Konsumenten werden privatrechtliche Verträge abgeschlossen) durchzuführen. Die zweite Möglichkeit steht auch privaten Unternehmen grundsätzlich offen. Spezifische Rahmenbedingungen über das bestehende (und EU-konforme) Vergaberecht für ÖPP-Modelle existieren in Österreich nicht. Grundsätzlich gelten die gesetzlichen Bestimmungen des allgemeinen Vertragsrechtes.

Frage 2:

Grundlegend ist zu sagen, dass der wettbewerbliche Dialog ein Verfahren im Zusammenhang mit der Vergabe von öffentlichen Aufträgen ist. Aus Sicht der ÖVGW sind öffentlich-private Partnerschaften (ÖPP) grundlegend von öffentlichen Aufträgen zu unterscheiden. Bei ÖPP-Modellen handelt es sich um äußerst komplexe und auf einen langen Zeitraum angelegte Partnerschaften, die auch über den Zeitablauf noch optimiert und angepasst werden müssen. Das Risiko und die Verantwortung für das Ergebnis (d.h. eine hochwertige Wasserversorgung zu verträglichen Preisen) liegen in der Regel beim privaten Unternehmer. Damit können ÖPP-Modelle nicht sinnvoll durch die herkömmlichen Ausschreibungsverfahren abgedeckt werden. Somit ist auch der wettbewerbliche Dialog aus Sicht der ÖVGW nicht geeignet, die Vergabe von ÖPP-Modellen zu regeln.

Frage 3:

Nein

Frage 4:

Die bisherigen Erfahrungen in Österreich zeigen, dass die Vertragserrichtung zu Konzessionsvergaben sehr umfangreicher Verträge und Regelungen bedarf. Die Kosten der Abwicklung des Vergabeverfahrens sowie die Vertragserrichtung insbesondere bei kleinen und mittleren Kommunen haben daher erhebliche Auswirkungen auf die Gesamtkosten des Projektes und damit auf die Kosten für die Dienstleistung.
Die ÖVGW fordert daher, dass eine Ausschreibung nach dem Vergabegesetz jedenfalls dann nicht erforderlich ist, wenn der Aufwand der Ausschreibung die zu erwartenden wirtschaftlichen Vorteile übersteigt. Die Ausschreibungspflicht für Dienstleistungskonzessionen wird jedenfalls abgelehnt.

Frage 5:

Ja. Auch ausländische Unternehmen haben grundsätzlich die Möglichkeit, Konzessionen in Österreich zu erhalten. Auch besteht für Industrie, Gewerbe, Landwirtschaft aber auch für die privaten Haushalte in Österreich die Möglichkeit, selbst Wasser zu fördern und so den Bedarf durch Eigenversorgung zu decken.

Frage 6:

Nein. Generell ist zu berücksichtigen, dass Wasser eine lokale Ressource darstellt und internationale, weit reichende Wasserleitungsnetze aus technischer Sicht nur in absoluten

Sonderfällen sinnvoll realisierbar sind. Damit handelt es sich bei der Wasserversorgung nahezu immer um eine lokale Tätigkeit, die in der Regel auch mit gemeinwirtschaftlichen Auflagen verbunden ist. Daraus folgt, dass die Wasserversorgung generell nicht geeignet ist, den Wettbewerb zwischen den Mitgliedsstaaten zu beeinträchtigen. Auch ist jedenfalls sicherzustellen, dass das Eigentum und die Verfügbarkeit der Ressource Wasser immer in der Entscheidungsfreiheit der Nationalstaaten liegt. Ein gemeinschaftlicher Rechtsakt wäre nur sinnvoll in einer nach europäischer Hinsicht überregionalen Infrastruktur, welche aber wie vorstehend ausgeführt fast nicht möglich ist. Die allgemeinen Grundsätze Gleichbehandlung, Transparenz, Verhältnismäßigkeit und gegenseitige Anerkennung sind bereits zum gegenwärtigen Zeitpunkt verpflichtend, ein weiterer gemeinschaftlicher Rechtsakt würde keine praktischen Vorteile bringen.

Auch ist bei Dienstleistungen von allgemeinem (wirtschaftlichen) Interesse ein hohes Risiko für den Bürger verbunden, da er auf die Erbringung dieser Dienstleistung angewiesen ist. Damit ist bei der Wahl eines Partnerunternehmens durch die Kommune ein besonderes Vertrauensverhältnis unbedingt erforderlich, was durch eine Ausschreibungspflicht gefährdet wäre. Die bereits bestehenden Regelungen gewährleisten die erforderliche Neutralität seitens der Kommune, weitere Regeln sind nicht erforderlich.

Frage 7:

Nein. Siehe auch Beantwortung Frage 2 und 6.

Frage 8:

Ja

Frage 9:

Grundsätzlich werden privat initiierte ÖPP in Österreich eine untergeordnete Rolle spielen, da eine derartige Initiative zumeist vom kommunalen Wasserversorger ausgehen müsste und aufgrund der kleinräumigen Wasserversorgung oftmals nicht sinnvoll möglich ist.
Sobald Anreize oder Belohnungen für Initiatoren von privat initiierten ÖPP geschaffen werden, wie in Absatz 41 beschrieben ist die Wahrung der Transparenz und Gleichbehandlung nach Meinung der ÖVGW nicht möglich.

Frage 10:

Bisher liegen in Österreich keine Erfahrungen vor.

Frage 11:

Der ÖVGW sind keine Fälle bekannt.

Frage 12:

Der ÖVGW sind keine Fälle bekannt.

Frage 13:

Der ÖVGW sind keine Fälle bekannt.

Frage 14:

Die ÖVGW fordert grundsätzlich, dass eine Ausschreibung von Baukonzessionen nach dem Vergabegesetz nicht erforderlich ist, wenn der Aufwand der Ausschreibung die zu erwartenden wirtschaftlichen Vorteile übersteigt. Hierbei ist insbesondere die gewachsene und kleinräumige

Struktur der Wasserversorgung in Österreich zu berücksichtigen. Damit verbunden sollen jedenfalls kleinere Kommunen (z.B. bis 10.000 Einwohner) bei Konzessionssystemen aufgrund der komplexen Vergabeverfahren und notwendigen komplexen rechtlichen Regelwerke nicht dem Vergabe- bzw. Beihilfenrecht unterliegen. Die im Vergaberecht normierten Schwellenwerte für Bau- bzw. Dienstleistungsaufträge wären jedenfalls aus Sicht der ÖVGW für Konzessionssysteme aufgrund der angeführten Komplexität als bei weitem zu niedrig anzusehen.

Frage 15:

In Österreich sind keine Probleme bekannt.

Frage 16:

Nein

Frage 17:

Nein

Frage 18:

In Österreich werden die Rechtsvorschriften eingehalten.

Frage 19:

Nein

Frage 20:

Zu viele Verfahrensvorschriften verteuern und behindern damit die Einrichtung von öffentlich-privaten Partnerschaften.

Frage 21:

Nein

Frage 22:

Ein derartiges Netzwerk zum Erfahrungssaustausch existiert im Wasserbereich durch die EUREAU bereits.

Stellungnahme des Österreichischen Wasser- und Abfallwirtschaftsverbandes (ÖWAV) zum Grünbuch der Kommission der Europäischen Gemeinschaften zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen

Allgemeines

Der Österreichische Wasser- und Abfallwirtschaftsverband (ÖWAV) ist ein **gemeinnütziger Verein**. Er versteht sich als **unabhängiger Anwalt** für die Erreichung der nachhaltigen Ziele der Wasser-, Abwasser- und Abfallwirtschaft in Österreich und vertritt die Gesamtheit der Wasser- und Abfallwirtschaft in Österreich.

Der ÖWAV bildet eine **neutrale und unabhängige Plattform** aller fachlichen Kräfte mit hoher Sachkompetenz, die den **Interessensausgleich** in der österreichischen Wasser-, Abwasser- und Abfallwirtschaft suchen.

Grundsätzlich sind die Vergabe von öffentlichen Bau- und Dienstleistungsaufträgen an Dritte sowie Konzessionen in Österreich seit langem gesetzlich geregelt und daher verpflichtend. Konzessionen für Wasserversorgung und Wasserentsorgung wurde allerdings bisher nur in wenigen Ausnahmefällen ausgeschrieben.

Position des ÖWAV

Der ÖWAV spricht sich gegen eine verpflichtende Ausschreibung von Konzessionen durch öffentliche Unternehmen aus. Die Kommunen müssen auch in Zukunft die Möglichkeit haben, die Trinkwasserver- und Abwasserentsorgung im eigenen Bereich entsprechend der räumlichen Gegebenheiten und der Anforderungen der Konsumenten zu gestalten. Der ÖWAV wendet sich dabei generell gegen eine Ausschreibungsverpflichtung, die über die derzeitigen nationalen Vorschriften hinausgeht.

Der ÖWAV lehnt eine Pflicht zur Ausschreibung bei der Wahl des privaten Partners im Rahmen der Gründung von gemischtwirtschaftlichen Unternehmen durch Kommunen ab, solange diese Unternehmen hauptsächlich den Ver- oder Entsorgungsauftrag der Kommune erfüllen. Eine derartige Ausschreibungsverpflichtung fördert in keiner Weise den Wettbewerb im Wassermarkt und bringt keinen erkennbaren Vorteil für die Kunden.

Der ÖWAV spricht sich gegen eine Pflicht zur Ausschreibung für die Vergabe von Dienstleistungskonzessionen an ausgegliederte Gesellschaften im Mehrheitseigentum des öffentlichen Auftraggebers (gemischtwirtschaftliche Unternehmen) **aus**, solange diese Unternehmen nur gemeinwirtschaftliche Aufgaben im eigenen Wirkungsgebiet der Kommune wahrnehmen. Derartige Unternehmen werden mit einem begrenzten Unternehmenszweck und Wirkungsgebiet gegründet, um der Kommune die Gestaltungsmöglichkeiten und die Kompetenz der Versorgungsaufgabe zu erhalten. Diese Unternehmen können sich daher nur an einer einzigen Ausschreibung des Mehrheitseigentümers beteiligen.
Durch eine derartige Vorschrift wäre daher keine Belebung des Wettbewerbes im Wassermarkt zu erwarten sondern eher die gegenteilige Wirkung, dass die Kommunen von einer öffentlich-privaten Partnerschaft absehen.

Der ÖWAV ersucht dringend darum, dass eine Ausschreibung nach dem Vergabegesetz nicht erforderlich sein sollte, wenn der Aufwand der Ausschreibung die zu erwartenden wirtschaftlichen Vorteile übersteigt. Diese Möglichkeit besteht bereits bei den geltenden öffentlichen Ausschreibungsverfahren.

Zu den Fragen des Grünbuches ÖPP:

Frage 1:
In den Ballungsräumen gibt es privatrechtliche vertragliche Regelungen über den Betrieb von Wasserver- und Entsorgungsanlagen. Diese Verträge stellen in der Regel für den Auftragnehmer (zumeist große städtischen Ver- und Entsorger) nur einen kleinen Teil der Gesamttätigkeiten dar. Für den Auftraggeber stellen diese Verträge effiziente Lösungen im Interesse der Konsumenten dar.
Für diese Verträge gelten grundsätzlich die gesetzlichen Bestimmungen des Vertragsrechtes.

Frage 2:
Mit der angeführten Beschreibung sind die Folgen insbesondere für kleine und mittlere Wasserver- und Entsorger nicht abschätzbar. Es muss damit gerechnet werden, dass es aufgrund der Komplexität von ÖPP zu einer Überforderung der Betriebe kommt und in weiterer Folge die Transparenz und die Gleichbehandlung im Vergabeverfahren verloren geht. Nach Auffassung des ÖWAV könnte derselbe Zweck mit einem bereits möglichen 2-stufigem Verfahren besser erfüllt werden.

Frage 3:
Nein

Frage 4:
Die bisherigen Erfahrungen in Österreich zeigen, dass die Vertragserrichtung zu Konzessionsvergaben nach dem Vergaberecht sehr umfangreicher Verträge bedarf. Die Kosten der Abwicklung des Vergabeverfahrens sowie die Vertragserrichtung insbesondere bei Kleinanlagen haben daher erhebliche Auswirkungen auf die Gesamtkosten des Projektes und damit auf die Kosten für die Dienstleistung.
Der ÖWAV fordert daher, dass eine Ausschreibung nach dem Vergabegesetz nicht erforderlich ist, wenn der Aufwand der Ausschreibung die zu erwartenden wirtschaftlichen Vorteile übersteigt. Diese Möglichkeit besteht bereits bei den geltenden öffentlichen Ausschreibungsverfahren.

Frage 5:
Ja

Frage 6:
Nein. Ein gemeinschaftlicher Rechtsakt wäre nur sinnvoll in einer nach europäischer Hinsicht überregionalen Infrastruktur.

Frage 7:
Nein

Frage 8:
Ja

Frage 9:
Grundsätzlich werden privat initiierte ÖPP in Österreich eine untergeordnete Rolle spielen, da eine derartige Initiative zumeist vom kommunalen Wasserver- Entsorger ausgehen wird.
Sobald Anreize oder Belohnungen für Initiatoren von privat initiierten ÖPP geschaffen werden, wie in Absatz 41 beschrieben ist die Wahrung der Transparenz und Gleichbehandlung nach Meinung des ÖWAV nicht möglich.

Frage 10:
Bisher liegen in Österreich keine Erfahrungen vor.

Frage 11:
Es sind keine Fälle bekannt.

Frage 12:
Es sind keine Fälle bekannt.

Frage 13:
Es sind keine Fälle bekannt.

Frage 14:
Nach Meinung des ÖWAV (siehe Frage 4) sollte von der Kommission eine Grenze festgelegt werden, ab wann Konzessionsvergaben im Vergabeverfahren durchgeführt werden müssen. Wie bereits ausgeführt können die Kosten für die Vertragserrichtung das Gesamtprojekt unwirtschaftlich machen.

Frage 15:
In Österreich sind keine Probleme bekannt.

Frage 16:
Nein

Frage 17:
Nein

Frage 18:
In Österreich werden die Rechtsvorschriften eingehalten.

Frage 19:
Nein

Frage 20:
Zu viele Verfahrensvorschriften verteuern und behindern damit die Einrichtung von öffentlich-privaten Partnerschaften.

Frage 21:
Nein

Frage 22:
Ein derartiges Netzwerk zum Erfahrensaustausch existiert im Wasserbereich durch die EUREAU und EWA bereits.

Europäische Kommission
Konsultation „Grünbuch zu öffentlich-privaten
Partnerschaften und den gemeinschaftlichen
Rechtsvorschriften für öffentliche Aufträge
und Konzessionen“
C 100 2/005
B-1049 Brüssel

Wien, am 5. August 2004

Dr.S/SE
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**Grünbuch „zu öffentlich-privaten Partnerschaften
und den gemeinschaftlichen Rechtsvorschriften
für öffentliche Aufträge und Konzessionen (ÖPP)“,
KOM(2004)327 endg. vom 30.04.2004;
Anmerkungen aus kommunaler Sicht**

Sehr geehrte Damen und Herren!

Im Nachhang zu der gemeinsamen Stellungnahme des Verbandes kommunaler Unternehmen Österreichs (VKÖ) und des Verbandes der Öffentlichen Wirtschaft und Gemeinwirtschaft Österreichs erlaubt sich der VKÖ, Ihnen noch folgende Überlegungen aus kommunaler Sicht zum Grünbuch ÖPP zur Kenntnis zu bringen:

Zu den erklärten Zielen der Europäischen Union gehört nach eigenen Worten die Schaffung eines „Europas der Bürger“.

Die jüngsten Wahlen zum Europäischen Parlament haben u.a. aber auch gezeigt, dass Europa und das Handeln der Organe der EU enger an die Bürger herangebracht werden müssen, um diesem eigenen Anspruch gerecht werden zu können. Das bedeutet, dass alle Maßnahmen der EU mehr als in der Vergangenheit auf die täglichen Bedürfnisse der Bürger einzugehen haben. Entscheidungen, die sich auf lokaler Ebene unmittelbar auf die Grundbedürfnisse der Bürger auswirken, sollen nicht durch eine allzu rigide Anwendung des gemeinschaftsrechtlichen Wettbewerbsprinzips unterbunden werden.

Zu Recht erklärt die Kommission, „dass Dienstleistungen im allgemeinen Interesse möglichst bürgernah organisiert und geregelt sein sollten und dass dabei das Subsidiaritätsprinzip strengstens eingehalten werden müsse“ (Abschnitt 3.1 des Weißbuches DAI). Zu begrüßen ist ferner, dass die Kommission die essentielle Rolle anerkennt, die den Mitgliedstaaten und ihren regionalen und lokalen Behörden auf dem Gebiet der Dienstleistungen im allgemeinen Interesse zukommt.

In diesem Zusammenhang ist auch Art. I-5 Abs. 1 der EU-Verfassung, die vom Europäischen Rat von Brüssel am 25.6.2004 angenommen wurde, zu beachten: Wenn darin festgelegt wird, dass die Europäische Union die nationale Identität der Mitgliedstaaten einschließlich der Selbstverwaltung zu achten hat, ist an alle Organe der EU, insb. auch an die Kommission die Forderung zu richten, die Erbringung von Dienstleistungen im allgemeinen (nicht)/wirtschaftlichen Interesse durch Städte und Gemeinden nicht nur zu ermöglichen, sondern zu fördern, auch wenn dies Abstriche am reinen Wettbewerbsprinzip erforderlich macht.

In Österreich aber auch in anderen Mitgliedstaaten der EU besitzt die kommunale Selbstverwaltung der Gemeinden eine lange Tradition. Diese politische und wirtschaftliche Selbstverwaltung ist – und dies ist im gegebenen Zusammenhang besonders hervorzuheben – auch ein wesentliches Element bürgernaher, gelebter Demokratie. Die Gemeinden und ihre Unternehmen tragen eine besondere Verantwortung für die Sicherung einer nachhaltigen qualitätsvollen Daseinsvorsorge ihrer Bürger, für die Gestaltung des kommunalen Lebensraumes und für die Stabilität der infrastrukturellen Grundlage wirtschaftlicher Aktivitäten.

Dienstleistungen von allgemeinem wirtschaftlichem Interesse bilden ein Fundament des europäischen Gesellschaftsmodells und leisten einen wichtigen Beitrag für die Zielsetzung der EU bezüglich eines sozialen und territorialen Zusammenhalts. Daher ist entscheidend, dass diese Dienstleistungen von im weitesten Sinn kommunalen Unternehmen örtlich erbracht und auch örtlich verantwortet werden. Über die grundsätzlichen Fragen bezüglich Leistungserbringung, Durchführung von Investitionen, welche Leistungen in welcher Qualität zu welchen Preisen erbracht werden sollen, entscheidet die gemeindliche Volksvertretung, die somit im hohen Maße berufen ist, Wünsche, Bedürfnisse, Interessen der örtlichen Bürgerschaft zu berücksichtigen. Nur auf diese Weise kann auch auf im Zeitablauf sich ändernde Rahmenbedingungen sofort reagiert werden und die erforderlichen Dienstleistungen jederzeit und flexibel angepasst werden.

Grundsätzlich stehen somit die Dienstleistungen der sog. Daseinsvorsorge im Spannungsfeld zwischen dem Subsidiaritätsprinzip – in OE vor allem auch der Gemeindeautonomie (dem Recht der Gemeinden die Organisation der Erbringung von gemeinwirtschaftlichen Dienstleistungen selbst zu bestimmen) –, dem Anspruch auf nachhaltige Versorgungssicherheit und Qualitätssicherung für alle Bürger, der Berücksichtigung traditionell gewachsener Strukturen und lokaler Besonderheiten sowie der Rechtssicherheit in einem gemeinsamen Europa und der Beachtung von relevantem Gemeinschaftsrecht.

An die EU und ihre Organe ist aber die Forderung zu richten, im Rahmen der Möglichkeiten, die der EG-Vertrag (und die künftige EU-Verfassung) bietet, mehr als bisher den Gestaltungsspielraum der Gemeinden zu achten.

Das von der Kommission extensiv interpretierte Wettbewerbsprinzip, das im Ergebnis dazu führt, dass letztlich auch die Erbringung von Dienstleistungen im wirtschaftlichen Interesse im lokalen/ kommunalen Bereich im Wege eines rigiden Ausschreibungsverfahrens vergeben werden muss, zwingt aber nach Auffassung des VKÖ nicht in jedem Fall zu einer derartigen Vorgangsweise.

Unbestritten ist zunächst die Entscheidungsfreiheit der lokalen Gebietskörperschaften/ Gemeinden Dienstleistungen im allgemeinen wirtschaftlichen Interesse wie ÖPNV, Wasserversorgung, Entsorgung und andere Aufgaben der kommunalen Daseinsvorsorge entweder selbst oder durch eigene Unternehmen zu erbringen oder durch Dritte ausführen zu lassen.

Gemäß Der EuGH-Rechtsprechung („Teckal“) kann von einem „Dritten“ dann nicht gesprochen werden, wenn eine Gemeinde ein von ihr wie eine Verwaltungsabteilung beherrschtes Unternehmen mit einer Dienstleistung beauftragt (sog. In-house-Prinzip).

Nach Ansicht des VKÖ ist dieser Beherrschungstatbestand im Sinne einer für die Rechtssicherheit unerlässlichen einheitlichen Begriffsdefinition wie im Art. 2 Abs.1 lit. b der Richtlinie 2004/17/EG des EP und des Rates vom 31.3.2004 (Amtblatt EU – L 134/1 vom 30.4.2004) auszulegen und somit auf qualifiziert mehrheitlich von der/den betreffenden Gemeinde(n) beherrschte Unternehmen, wenn sie überwiegend Dienstleistungen für die Bürger ihrer Trägergemeinde(n) erbringen, anzuwenden.

Wenn die zuletzt angeführten Voraussetzungen vorliegen, ist angesichts des gegenwärtigen Entwicklungsstandes des Gemeinsamen Marktes davon auszugehen, dass eine derartige Beauftragung von in OE vorzufindenden kleinen und mittleren kommunalen Unternehmen seitens der Trägergemeinde weder geeignet ist, den Wettbewerb in der Gemeinschaft spürbar zu verfälschen noch die Entwicklung des innergemeinschaftlichen Handelsverkehrs in einem Ausmaß zu beeinträchtigen, welches dem Interesse der Gemeinschaft zuwiderläuft.

Die Vereinbarkeit einer derartigen Interpretation des den Bürgern dienenden In-house-Prinzips bei Erfüllung von kommunalen Daseinsvorsorgeleistungen widerspricht daher nicht nur nicht den Interessen der Gemeinschaft im Sinne des letzten Satzes von Art. 86 Abs.2 EG-Vertrag bzw. Art. III-55 der künftigen Verfassung der EU, sondern ermöglicht die Erbringung örtlicher vom Bürger/Konsumenten mitgestalteter und beeinflussbarer Daseinsvorsorgeleistungen insb. durch kleine und mittlere kommunale Unternehmen, die bei uneingeschränkter Anwendung eines Ausschreibungszwanges im höchsten Maß gefährdet wäre. Eine solche Gefährdung wäre schon deshalb bedenklich, weil die Gemeindebürger das kommunale Unternehmen über einen großen Zeitraum im Wege ihres Steueraufkommens bzw. durch Selbstfinanzierung über den Preis der Dienstleistung aufgebaut und zum inneren Wert des Unternehmens erheblich beigetragen haben.

Die Kommission sollte daher ihre durch den Vertrag (Art. 86 Abs. 3) bzw. durch die künftige Verfassung (Art. III-55 Abs. 3) eingeräumten rechtlichen Möglichkeiten nutzen, um den oben dargelegten Interessensausgleich herbei zu führen. Mit einer derartigen rechtlich abgesicherten Lösung wäre sowohl dem Wettbewerbsprinzip des Gemeinsamen Marktes Rechnung getragen, als auch Art. I-5 Abs.1 der künftigen Verfassung der EU erfüllt und die Selbstverwaltung der Gemeinden als Element der nationalen Identität der Mitgliedstaaten sichergestellt.

Der Verband kommunaler Unternehmen Österreichs ersucht daher die Kommission, diese Überlegungen in ihre Schlussfolgerungen einfließen zu lassen und verbleibt

mit freundlichen Grüßen

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Ihr Zeichen, Ihre Nachricht vom	Unser Zeichen, Sachbearbeiter	Durchwahl	Datum
-	Rp 1473/04/Dr. Mi/AS Dr. Annemarie Mille	4291	06.07.2004

Grünbuch PPP-Stellungnahme

Die Wirtschaftskammer Österreich erlaubt sich, zum vorliegenden Grünbuch der Europäischen Kommission zu öffentlich-privaten Partnerschaften wie folgt Stellung zu nehmen bzw. die im Grünbuch gestellten Fragen wie folgt zu beantworten:

Im Allgemeinen:

Die Wirtschaftskammer Österreich begrüßt die Initiative der Europäischen Kommission, mit der Vorlage des Grünbuchs zu öffentlich-privaten Partnerschaften (ÖPP) und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen, eine breite Diskussion unter allen betroaffenen Interessengruppen zu diesem Thema zu eröffnen.

Aus Sicht der österreichischen Wirtschaft sollte bei jedem Projekt vorab bewertet werden, ob die Abwicklung über PPP einen Zusatznutzen gegenüber einer klassischen öffentlichen Auftragsvergabe bringt.

Weiters bilden die rein vergaberechtlichen Fragestellungen bei der Realisierung von ÖPP-Projekten nur einen Teilaspekt der rechtlichen Betrachtung. Nach den bisherigen Erfahrungen in Österreich ist festzuhalten, dass auch die Anforderungen aus anderen Rechtsgebieten, die noch aus der tradierten Abgrenzung zwischen hoheitlichem und privatwirtschaftlichem Handeln der öffentlichen Hand resultieren, eine Umsetzung von ÖPP in der Praxis erschweren. Über Erfolg oder Scheitern von ÖPP-Projekten entscheidet auch die Beantwortung von

steuer-, beihilfen-, gesellschafts-, arbeits-, verfassungs- und verwaltungsrechtlichen Fragestellungen.

Zu den Fragen im Einzelnen:

Frage 1: Welche Formen von ÖPP auf Vertragsbasis sind Ihnen bekannt? Gibt es in Ihrem Land spezifische (gesetzliche oder andere) Rahmenbedingungen für derartige Konstruktionen?

In Österreich gibt es – wie auch in anderen EU-Mitgliedstaaten – bis dato keine gesetzliche Definition von ÖPP. Charakteristisch für alle ÖPP-Modelle ist, dass es sich im Unterschied zur klassischen öffentlichen Auftragsvergabe nicht um eine Auftraggeber/Auftragnehmer bzw. Kunde/Dienstleister-Beziehung handelt, sondern dass die öffentliche Hand mit privaten Akteuren Kooperationen zum beiderseitigen Nutzen eingeht.

In Österreich kommen ÖPP-Modelle in zunehmendem Maße vor allem im Bereich Verkehr und Infrastruktur zum Einsatz, was zu einer deutlichen Beschleunigung bei der Realisierung bestimmter Projekte führen sollte. Dies ist besonders im Hinblick auf die noch nicht realisierten erweiterungsbezogenen Verkehrsinfrastrukturprojekte von Bedeutung, bei welchen aufgrund massiver Planungs- und Realisierungsversäumnisse in den letzten Jahren, der Faktor Zeit eine sehr große Rolle spielt.

Die grundsätzlichen Motive für ÖPP-Modelle gelten aufgrund der hohen Investitionskosten in besonderem Maße für Verkehrsinfrastruktur. Die Praxis hat bisher gezeigt, dass ÖPP-Modelle in der Regel dann zum Einsatz kommen, wenn eine gänzliche Überlassung an Private politisch oder wirtschaftlich (Rentabilitätslücke, oftmals auch „Anschubfinanzierung“) nicht möglich ist, auf eine private Beteiligung an der Finanzierung und am Management jedoch aus budgetären Gründen nicht verzichtet werden soll. Der erhebliche Finanzbedarf und die hohen Risiken bei großen Infrastrukturprojekten erfordern somit oftmals ein Zusammenwirken von privaten Unternehmen und öffentlicher Hand, um eine Projektrealisierung zu ermöglichen bzw. zu beschleunigen.

Ungeachtet der Tatsache, dass für jedes ÖPP ein Bündel von speziell auf das jeweilige Projekt zugeschnittenen Verträgen zu erstellen ist, lassen sich ÖPP-Modelle typischerweise in drei Kategorien unterteilen:

- Betreibermodelle
- Konzessionsmodelle
- Institutionalisierte Kooperationsmodelle

Alle drei Kategorien von ÖPP-Modellen wurden in Österreich in der Vergangenheit bereits verwirklicht.

Im öffentlich-rechtlichen Bereich gibt es einige österreichische Sondergesetze, die ausdrücklich den Gebietskörperschaften bzw. den öffentlichen Unternehmen die Umsetzung von ÖPP erlauben, z.B. ASFINAG-Ermächtigungsgesetz, ÖBB-Strukturgesetz, E- und Telekom-Control-Gesetz.

Bisher wurden in Österreich 2 konkrete ÖPP-Modelle im Bereich Verkehrsinfrastruktur realisiert:

B1 (Umfahrung Ebelsberg bei Linz) sowie der

Güterterminal Graz-Süd/Werndorf.

Weitere ÖPP-Modelle befinden sich derzeit in Planung; dies sind im Bereich Straße:

Autobahn A5 (Nordautobahn);

Teile der Schnellstraße S1 (Wiener Außenring Schnellstraße);

Teile der Schnellstraße S2 (Wiener Nordrand Schnellstraße).

Im Rahmen des Projekts „ÖPP-Konzessionsmodell Ostregion“ wird von der ASFINAG bis Ende 2004 eine Ausschreibung für die drei genannten Projekte erstellt. Die Einholung der Angebote der privaten Betreiber und die Ermittlung des Bestbieters soll bis Ende 2005 abgeschlossen sein.

Im Bereich Schiene befinden sich folgende Projekte in Planung:

Summerau-Spielfeld-Straß;

Brenner-Basis-Tunnel;

Bahnhofsprojekte in Wien.

Aus Sicht der praktischen Umsetzung von ÖPP-Modellen im Bereich Verkehrsinfrastruktur liegen die Vorteile derartiger Modelle in der Kombination der jeweils speziellen besonderen Kompetenzen von privatem und öffentlichem Partner. ÖPP-Modelle können dennoch kein Wundermittel darstellen, da auch bei Verkehrsprojekten letztlich die Nachfragesituation ausschlaggebend für die betriebswirtschaftliche Rentabilität des Projekts ist.

Aus Sicht der österreichischen Wirtschaft sollten in jedem Fall die bisherigen Erfahrungen österreichischer Infrastrukturunternehmen, insb. von ASFINAG (Autobahn- und Schnellstraßen Finanzierungs- AG) und SCHIG (Schieneninfrastrukturfinanzierungs-GmbH), mit PPP-Modellen, im Rahmen der durch das Grünbuch initiierten Diskussion entsprechend berücksichtigt werden. Selbst wenn die grundsätzliche Haltung der genannten Unternehmen zu PPP durchaus ambivalent sein kann bzw. sein dürfte, erscheint doch zumindest die Sichtweise der in 100% Eigentum der öffetnlichen Hand stehenden Unternehmen als wichtiger Baustein in der PPP – Diskussion.

In Österreich kann wohl auch die Durchführung der Kfz-Zulassung und Vergabe von Kennzeichen durch private Versicherungsunternehmen als öffentlich-private Partnerschaft bezeichnet werden, die unter der Aufsicht der Behörden erfolgt. Gesetzliche Bestimmungen regeln die Voraussetzungen, unter denen diese Aufgaben von der Behörde an grundsätzlich beliebig viele private Versicherer vergeben werden können.

Frage 2: Nach Auffassung der Kommission wird die Umsetzung des wettbewerblichen Dialogs in einzelstaatliche Rechtsvorschriften den betroffenen Parteien ein Verfahren an die Hand geben, das sich ganz besonders für die Vergabe öffentlicher Aufträge in Zusammenhang mit der Einrichtung einer ÖPP auf Vertragsbasis eignet und gleichzeitig die Grundrechte der Wirtschaftsteilnehmer wahrt. Stimmen Sie dem zu? Falls nein, warum nicht?

Die Durchführung eines Vergabeverfahrens zur Auswahl des privaten Partners stellt gerade bei sehr komplexen ÖPP-Projekten öffentliche Auftraggeber vor erhebliche Probleme. Bei komplexen ÖPP-Projekten wurde daher in Österreich schon bisher auf das Instrument des Verhandlungsverfahrens mit Bekanntmachung zurückgegriffen und mit den ausgewählten Bewerbern ein konkretes ÖPP-Modell als ein Paket von langfristigen Leistungsverträgen hinsichtlich Errichtung, Betrieb, Finanzierung etc abgeschlossen.

Das Hauptproblem bei der Vergabe komplexer Beschaffungsvorhaben kann jedoch auch das Verfahren des wettbewerblichen Dialogs nicht lösen: Die Durchführung – ob im klassischen Verhandlungsverfahren oder nach dem neuen Verfahren des wettbewerblichen Dialogs – erfordert vom öffentlichen Auftraggebern eine Beschreibung seiner Beschaffungsziele, d.h. zumindest eine eindeutige funktionale Leistungsbeschreibung in Form einer konkreten Aufgabenstellung, die den Zweck der Leistung und die an die Leistung gestellten Anforderungen des Auftraggebers in technischer, wirtschaftlicher und unter Umständen gestalterischer Hinsicht klar erkennen lässt (Art 29 EU-Vergaberichtlinie 2004/18/EG als „Bedürfnisse“ des öffentlichen Auftraggebers bezeichnet).

Neu am wettbewerblichen Dialog ist, dass die Phase der Herausarbeitung des Leistungsgegenstandes im Wege von Verhandlungen nunmehr explizit als eigene Dialogphase des Verfahrens gestaltet wurde und das „Last and Best Offer“ aller Bieter in der daran anschließenden Angebotsphase, an der alle Bewerber teilnahmeberechtigt sind, ebenfalls institutionalisiert wird. Für den Bieter könnte der wettbewerbliche Dialog die Gefahr in sich bergen, dass der öffentliche Auftraggeber nach der „Rosinenmethode“ die am Markt verfügbare beste Lösung ermittelt und damit substanzielles Know-How eines (oder mehrerer) Marktteilnehmer(s) an sich zieht, um die so ermittelte Ideallösung in der anschließenden Angebotsphase der „billigsten“ Realisierung zuzuführen. Kritisch muss auch die Möglichkeit des öffentlichen Auftraggebers betrachtet werden, mit dem bereits gekürten Bestbieter „Nachverhandlungen“ in gewissem Umfang führen zu können (Art 29 Abs 7 EU-Vergaberichtlinie 2004/18/EG).

Grundsätzlich sollte für ÖPP die freie Wahl zwischen dem offenen, dem nicht offenen und dem Verhandlungsverfahren bzw. dem wettbewerblichen Dialog möglich sein.

Das neue Verfahren des wettbewerblichen Dialogs kann zwar nach einzelstaatlicher Umsetzung grundsätzlich die Realisierung von ÖPPs erleichtern, allerdings gelingt es nur dann, wenn die geistigen Eigentumsrechte potentieller Bieter entsprechend abgesichert sowie Verhandlungen klar und transparent geregelt werden.

Frage 3: Sehen Sie in Bezug auf diese Aufträge neben der Wahl des Vergabeverfahrens andere Punkte, die mit dem Gemeinschaftsrecht über öffentliche Aufträge in Konflikt stehen könnten? Wenn ja, nennen Sie diese und begründen Sie!

Während vergaberechtliche Verstöße des öffentlichen Auftraggebers, insbesondere die falsche Wahl der Verfahrensart, gemäß den EU-Rechtsmittelrichtlinien vor den nationalen Vergabekontrollinstanzen bekämpft werden können, bleibt ein effizienter Rechtsschutz im Fall der gänzlichen Missachtung des Vergaberechts durch den Auftraggeber (z.B. „Freihandvergabe“ bzw. „Direktvergabe“) weitgehend versagt. Das Problem der Rechtsschutzlücke bei Freihandvergaben stellt sich zwar nicht nur bei der Vergabe von ÖPP, ist hier jedoch von besonderer Tragweite, da typischerweise langfristige Verträge abgeschlossen werden. Zwar kann nach dem österreichischen Vergaberecht ein Bieter im Fall einer zu Unrecht erfolgten Direktvergabe (Freihandvergabe) vor der zuständigen Vergabekontrollinstanz den Antrag auf Feststellung stellen, dass die freihändige Vergabe rechtswidrig war und ein Verstoß gegen das EU-Vergaberecht erfolgte. Der Eingriff in den abgeschlossenen Vertrag ist aber auch durch einen positiven Feststellungsbescheid nicht mehr möglich. Auch der EuGH geht in seiner Rechtsprechung (nach dem Grundsatz „pacta sunt servanda“) von der Bestandskraft unter Missachtung des Vergaberechts geschlossener Verträge aus.

Weiters sind die Abgrenzungsfragen zwischen Bau- und Dienstleistungsaufträgen bzw. Bau- und Dienstleistungskonzessionen nach wie vor nicht klar geregelt. Generell kollidiert die erwünschte frühzeitige Einbindung von Privaten zur Optimierung des ÖPP-Projektes immer wieder mit dem Interesse des Auftraggebers, erst dann zu vergeben, wenn die Leistungsbeschreibung genau präzisiert ist, aber auch mit dem Interesse des Auftragnehmers, keine unbeherrschbaren Genehmigungsrisiken übernehmen zu wollen.

Die Frage der frühzeitigen Verschränkung von privater Seite mit der öffetnlichen Hand muss nicht zwangsläufig eine geänderte Risikostruktur zur Folge haben. So könnte etwa eine Zusammenarbeit ohne weiteres schon vor Genehmigungs- oder Bewilligungsakten stattfinden, ohne dass deswegen das Risiko der Genehmigung auf den Privaten übergeht.

Die oftmals geäusserte Frage „Wie geht ein Privater mit Genehmigungsrisken um, wenn er schon frühzeitig etwa in einer Projektgesellschaft mit der öffentlichen Hand zusammenarbeitet“ kann somit nur mit „gar nicht“ beantwortet werden; soll heissen: öffentliches Risiko muss öffentliches Risiko bleiben, unabhängig davon, ob die PPP Strukturen früher oder später geschaffen werden.

Frage 4: Haben Sie bereits einmal ein Verfahren zur Vergabe einer Konzession in der Europäischen Union organisiert, daran teilgenommen bzw. ein solches organisieren oder daran teilnehmen wollen? Welche Erfahrungen haben Sie gemacht?

In Österreich wurden in der Vergangenheit mehrere große Dienstleistungskonzessionsprojekte umgesetzt. Seit Inkrafttreten des Bundesvergabegesetzes 2002 unterliegt die Vergabe einer Dienstleistungskonzession gemäß der Rechtsprechung des EuGH einem Vergaberegime „light“: Die öffentlichen Auftraggeber sind zur öffentlichen Bekanntmachung und zur Einhaltung der Grundsätze des Vergaberechts verpflichtet, der Rechtsschutz ist in der Regel nicht vor den Vergabekontrollbehörden, sondern bei ordentlichen Gerichten angesiedelt.

Frage 5: Halten Sie das derzeitige Gemeinschaftsrecht für präzise genug, um die konkrete und effektive Teilnahme von Gesellschaften oder Gruppierungen aus anderen Staaten an den Konzessionsvergabeverfahren sicherzustellen? Sind Sie der Ansicht, dass in dieser Hinsicht normalerweise ein tatsächlicher Wettbewerb herrscht?

Verbesserungsmöglichkeiten im Vergaberecht in Bezug auf ÖPP wird es - wie oben unter 2 und 3 erörtert - wegen der Komplexität der Materie immer geben.

Der Wettbewerb bei ÖPP-Projekten in der EU ist unserer Erfahrung nach sehr intensiv. Ohne Kenntnis der Bedingungen vor Ort ist jedoch eine Teilnahme am Wettbewerb wenig erfolgversprechend. Wichtig erscheint, dass es für vergabe- und wettbewerbsrechtliche Verstöße einen raschen und wirksamen Rechtschutz gibt.

Frage 6: Halten Sie einen Vorschlag für einen gemeinschaftlichen Rechtsakt zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe für wünschenswert?

Ein gemeinschaftsrechtlicher Rechtsakt zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe ist nicht erforderlich. Jedoch sollte die Mitteilung der Kommission zu Aus-

legungsfragen im Bereich Konzessionen im Gemeinschaftsrecht noch einige Präzisierungen erfahren. So wurde z.B. in den neuen EU-Vergaberichtlinien zwar eine Definition der Dienst-leistungskonzession eingefügt, aus dieser Definition geht jedoch gerade jenes Tatbestandselement, das nach der Mitteilung der Kommission ausschlaggebend für die Abgrenzung zwischen Dienstleistungsauftrag und Dienstleistungskonzession ist, nämlich die Tragung des wirtschaftlichen Risikos durch den Konzessionsnehmer, nicht explizit hervor.

Frage 7: Allgemeiner gefragt: Wenn Sie ein neues Gesetzgebungsvorhaben der Kommission für erforderlich halten, gibt es dann objektive Gründe dafür, in diesem Rechtsakt sämtliche ÖPP auf Vertragsbasis zu behandeln und sie ein und demselben Regelwerk für die Vergabe zu unterwerfen, ganz gleich ob die Vorhaben als öffentliche Aufträge oder als Konzessionen einzustufen sind?

Ein eigenes Gesetzgebungsvorhaben für ÖPP wird nicht für sinnvoll erachtet.

Frage 8: Ist Ihrer Erfahrung nach der Zugang der ausländischen Akteure zu privat initiierten ÖPP gewährleistet? Für den Fall, dass die Vergabestellen zur Initiative aufrufen, wird dieser Aufruf dann angemessen bekannt gemacht, so dass alle interessierten Akteure Kenntnis davon haben können? Wird für die Ausführung des ausgewählten Projekts ein Auswahlverfahren auf Basis eines effektiven Wettbewerbs organisiert?

Auch privat initiierte ÖPP sind ihrem tatsächlichen Inhalt nach entweder als öffentlicher Auftrag oder als Dienstleistungs- bzw. Baukonzession zu qualifizieren. Entsprechend muss der Aufruf zur Teilnahme am Vergabeverfahren von den Vergabestellen - wie die Vergabe jedes anderen öffentlichen Auftrags - im EU-Amtsblatt bekannt gemacht werden.

Geht die Initiative für ein ÖPP von einem privaten Wirtschaftsteilnehmer aus, der selbst als Partner der öffentlichen Hand an der Realisierung des von ihm entwickelten Projektes interessiert ist, so stellt sich das Problem der Vorarbeitenproblematik für diesen Wirtschaftsteilnehmer. Die Vergabestelle wird in der nachfolgenden Ausschreibung darauf achten müssen, dass allfällige Wettbewerbsvorteile dieses Unternehmens in der Projektierungsphase neutralisiert werden, damit sich das initiierende Unternehmen selbst auch an der Ausschreibung beteiligen kann, ohne dass gegen den Grundsatz der Bietergleichbehandlung verstoßen wird.

Frage 9: Wie könnte Ihrer Auffassung nach die Entwicklung privat initiierter ÖPP in der Europäischen Union unter Wahrung der Grundsätze der Transparenz und der Gleichbehandlung und ohne Verstoß gegen das Diskriminierungsverbot gewährleistet werden?

Privat initiierte ÖPP haben, wie in Punkt 8. bereits ausgeführt, den selben Regeln zu unterliegen wie von der öffentlichen Hand initiierte ÖPP. Eine gesonderte Unterscheidung in „öffentlich initiierte“ und „privat initiierte“ ÖPP ist abzulehnen.

Frage 10: Welche Erfahrungen haben sie in der Phase im Anschluss an die Auswahl des privaten Partners im Rahmen von ÖPP auf Vertragsbasis gemacht?

Wenn in der laufenden Abwicklung eines ÖPP-Projektes zwischen den Vertragsparteien Vertragsanpassungen vorgenommen werden, die eine Neuausschreibungspflicht auslösen könnten, werden die Mitbewerber selten davon Kenntnis erlangen und daher kaum mit vergaberechtlichen Mitteln dagegen vorgehen. Dementsprechend gibt es auch sehr wenige Entscheidungen der Vergabekontrollbehörden im Zusammenhang mit Vertragsanpassungen.

Unbestritten muss jedoch gerade bei komplexen ÖPP Projekten den Vertragsparteien die Möglichkeit zur Vertragsanpassung innerhalb der bereits in den Ausschreibungsunterlagen vorgezeichneten Grenzen möglich sein (ausschreibungsneutrale derivative Vertragsanpassung wie Preisgleitklauseln, Verlängerungsoptionen etc).

Frage 11: Sind Ihnen Fälle bekannt, in denen die Ausführungsbedingungen, einschließlich der Klauseln zur Anpassung im Zeitverlauf, eine diskriminierende Wirkung entfalten konnten oder eine ungerechtfertigte Behinderung der Dienstleistungs- oder Niederlassungsfreiheit darstellten? Falls ja, bitte beschreiben Sie die Art der aufgetretenen Probleme!

Es ist vielfach üblich, dass sich die öffentliche Hand im Rahmen von ÖPP das Recht zur außerordentlichen Kündigung des Vertrages bei Eintritt bestimmter Umstände (z.B. Strukturänderungen des privaten Partner o.ä.) oder andere Kontrollmöglichkeiten bzw. einseitige Möglichkeiten zum Vertragseingriff vorbehält.

Während des laufenden Vergabeverfahrens können derartige in den Ausschreibungsunterlagen enthaltene Klauseln von den Bietern im Wege eines Nachprüfungsverfahrens vor den österreichischen Vergabekontrollinstanzen bekämpft werden, wenn dem Auftragnehmer durch sittenwidrige Klauseln ein unkalkulierbares Risiko auferlegt wird oder es sich um diskriminierende Bestimmungen handelt.

Nach Abschluss des Vergabeverfahrens sind allfällige sittenwidrige oder gröblich benachteiligende Klauseln in den Ausführungsbedingungen eine Angelegenheit der Vertragsabwicklung zwischen Auftraggeber und Auftragnehmer, welche mit Mitteln des nationalen Zivilrechts zu lösen sind.

Frage 12: Sind Ihnen Praktiken oder Mechanismen zur Bewertung von Angeboten bekannt, die eine diskriminierende Wirkung haben?

Typische Fehler betreffen die Verwendung von Eignungskriterien als Zuschlagskriterien, wobei insbesondere die Verwendung von Referenzen als Zuschlagskriterium eine vergaberechtliche Grauzone darstellt. Probleme machen oft die vergaberechtlich grundsätzlich zulässigen subjektiven Kriterien (z.B. Benutzerkomfort, Ästhetik etc.), vor allem bei mangelnder Sachkunde der bewertenden Vergabekommission. Weitere Schwierigkeiten können sich durch die mangelnde Transparenz der Zuschlagskriterien oder Bewertungsmethoden ergeben.

Frage 13: Sind Sie wie die Kommission der Auffassung, dass bestimmte Interventionsklauseln in Bezug auf die Grundsätze der Transparenz und der Gleichbehandlung problematisch sein können? Sind Ihnen andere Typen von Klauseln bekannt, deren Anwendung zu ähnlichen Problemen führen kann?

Siehe Antworten zu den Fragen 2 und 11.

Frage 14: Halten Sie es für erforderlich, dass bestimmte Aspekte der vertraglichen Rahmenbedingungen für ÖPP auf Gemeinschaftsebene geklärt werden? Falls ja, was sollte geklärt werden?

Vertragliche Bestimmungen in ÖPP-Verträgen und deren Zulässigkeitsgrenzen sind Angelegenheit der jeweiligen nationalen Zivilrechte. Eine Regelung der vertraglichen Rahmenbedingungen auf Gemeinschaftsebene ist daher grundsätzlich nicht erforderlich.
Ungeachtet dessen ist bei ÖPP die Wechselwirkung zwischen den betroffenen Rechtsmaterien zu beachten. Die Anforderungen des Vergaberechts sind mit denen des Beihilfenrechts, der Finanzierungsbedingungen, der EUROSTAT-Regeln und dem öffentlich-rechtlichen Rahmen in den einzelnen Sektoren in Einklang zu bringen. Gerade die interdisziplinäre Betrachtung wäre nicht nur auf der Ebene der Mitgliedsstaaten, sondern auch auf der EU-Ebene eine notwendige Aufgabe.

Frage 15: Sind Ihnen bei ÖPP-Konstruktionen besondere Probleme mit der Vergabe von Unteraufträgen bekannt? Welche?

Die Spielregeln für Unteraufträge sind unseres Erachtens relativ klar definiert. Wir vertreten den Standpunkt, dass nur die Auswahl des privaten Partners, nicht aber die Vergabe des Unterauftrages auszuschreiben ist.

Frage 16: Rechtfertigt die Existenz von ÖPP auf Vertragsbasis, die die Übertragung eines Aufgabenpakets an einen einzigen privaten Partner impliziert, ihrer Auffassung nach, dass ausführlichere Regeln für die Vergabe von Unteraufträgen eingeführt werden und/oder dass der Anwendungsbereich erweitert wird?

Unseres Erachtens sollte die Vergabe von Unteraufträgen keiner erweiterten oder detaillierteren Regelung unterzogen werden.

Frage 17: Halten Sie, allgemeiner gesprochen, eine ergänzende Initiative auf Gemeinschaftsebene zur Klärung oder Umgestaltung der Regeln für die Vergabe von Unteraufträgen für erforderlich?

Grundsätzlich wäre eine ausdrückliche Klarstellung im Rahmen einer auslegenden Mitteilung der Kommission sinnvoll, dass sowohl die technische als auch die finanzielle und wirtschaftliche Leistungsfähigkeit durch Beiziehung eines Subunternehmers substituiert werden kann, sofern der Bieter bereits mit Abgabe seines Angebotes verbindlich nachweist, dass ihm die Mittel des Subunternehmers im Auftragsfall tatsächlich zur Verfügung stehen werden.

Frage 18: Welche Erfahrungen haben Sie mit der Einrichtung institutionalisierter ÖPP gemacht? Lassen Ihre Erfahrungen Sie zu der Schlussfolgerung gelangen, dass die gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen bei institutionalisierten ÖPP-Konstruktionen eingehalten werden? Falls nein, warum nicht?

Der typische Fall eines institutionalisierten ÖPP ist die Gründung eines gemischtwirtschaftlichen Unternehmens, an dem sowohl die öffentliche Hand als auch der private Partner beteiligt sind. Hier stellt sich die nach wie vor ungelöste Frage der Reichweite des In-house-Privilegs. Selbst wenn der Vorgang der Gesellschaftsgründung, in die gleichzeitig die Vergabe eines initialen öffentlichen Auftrages an die Gesellschaft verbunden war, EU-weit öffentlich ausgeschrieben wurde, stellt sich die Frage, ob die öffentliche Hand als Gesellschafter ausschreibungsfrei Aufträge an ihr Tochterunternehmen vergeben darf und bis zu welcher Grenze die Gesellschaft ihre Leistungen auch am Markt anbieten darf, ohne dass das In-house-Privileg verloren geht.

Während bei 100% Eigengesellschaften und gemischt-öffentlichen Unternehmen das Vorliegen eines In-house-Geschäfts in der Rechtsprechung bereits ausdrücklich bejaht wurde, bestehen zur Frage der In-house-Vergabe an gemischt-wirtschaftliche Unternehmen noch keine positiven Entscheidungen der Vergabekontrollinstanzen. Das vorliegende Grünbuch verweist zwar allgemein auf den Ausnahmetatbestand des In-house-Privilegs und dessen Voraussetzungen, äußert sich aber nicht näher zu deren Grenzen und Reichweite.

Leider hat die Regelung der In-house-Vergabe auch keinen Eingang in die neuen EU-Vergaberichtlinien gefunden. Zur Beseitigung dieser Rechtsunsicherheit sollte die Kommission eine auslegende Mitteilung veröffentlichen.

Frage 19: Halten Sie eine Initiative auf Gemeinschaftsebene für erforderlich, um die Verpflichtungen zu klären oder zu vertiefen, die die öffentlichen Auftraggeber in Bezug auf den Wettbewerb zwischen potenziell an einem institutionalisierten ÖPP-Projekt interessierten Wirtschaftsteilnehmern haben? Falls ja, welche Aspekte halten Sie für besonders wichtig und welche Form sollte eine solche Initiative haben? Falls nein, warum nicht?

Ein gemeinschaftlicher Rechtsakt ist nicht erforderlich. Die Kommission sollte eine auslegende Mitteilung erlassen, in der dargestellt wird, in welchen Fällen die Gründung eines institutionalisierten ÖPP ausschreibungspflichtig ist und in welchen Fällen eine In-house-Vergabe möglich ist.

Frage 20: Welche Maßnahmen oder Verfahren behindern in der Europäischen Union die Einrichtung von ÖPP?

Behindert werden ÖPP-Modelle oft nicht nur durch vergaberechtliche Notwendigkeiten, sondern auch durch Rechtsprobleme in anderen Bereichen. U.a. können ÖPP-Modelle z.B. mehrwertsteuerrechtlich unerwünschte Konsequenzen nach sich ziehen (Vorsteuerabzug).

Behinderungen für ÖPP ergeben sich weiters durch

- zu zögerliche Liberalisierungen und Marktöffnungen in bestimmten Sektoren, z.B. Schienenverkehr
- finanzielle Restriktionen, z.B. bei der Schieneninfrastruktur
- offene Fragen beim Wachstums- und Stabilitätspakt bezüglich der Kriterien Budgetdefizit und öffentliche Verschuldung
- mangelnde Kenntnis von Best Practices
- überzogene Riskenüberwälzung an Private (die Folge besteht entweder in hohen Risikobepreisungen, beschränktem Wettbewerb bzw. in der Verunmöglichung der Finanzierung – etwa dadurch dass öffentliche Risken überwälzt werden)

Frage 21: Kennen Sie andere ÖPP-Formen aus Drittländern? Kennen Sie aus Ihren Erfahrungen in solchen Ländern bewährte Verfahrensweisen, die auch für die EU beispielgebend sein könnten? Falls ja, welche?

Das sog. Verfügbarkeitsmodell (Konzessionär trägt Planungs- und Ausführungsrisken, nicht aber das Nutzungs- bzw. Frequenzrisiko) ist im Hinblick auf die Risikoverteilung und Bankability zurzeit das am besten nutzbare Modell mit den geringsten privaten Finanzierungskosten. Daher könnte es insbesondere auch im Verkehrsinfrastrukturbereich forciert Anwendung finden.

Frage 22: Denken Sie, dass es nützlich wäre, im Hinblick auf den großen Investitionsbedarf einzelner Mitgliedstaaten zum Erreichen einer sozialen und dauerhaften Entwicklung gemeinsam und in regelmäßigen Abständen über diese Fragen unter den betroffenen Akteuren nachzudenken und bewährte Verfahrensweisen auszutauschen? Sollte die Kommission nach Ihrer Auffassung ein derartiges Netzwerk aufbauen?

In einigen Mitgliedstaaten wird versucht, eine wissenschaftliche sowie praktische Begleitung von ÖPP-Projekten durch spezialisierte Tash Forces und die Evaluierung von Best-Practice-Modellen durchzuführen, da insbesondere in einer umfassenden Wirtschaftlichkeitsprüfung der Schlüssel zum Erfolg von ÖPP liegt. Die Koordinierung eines derartigen Netzwerks unter Einbindung der Auftraggeber- und der Auftragnehmerseite auf europäischer Seite wäre wünschenswert.

Wir befürworten es, wenn in regelmäßigen Abständen ein Gedanken- und Erfahrungsaustausch zwischen den betroffenen Akteuren stattfindet; dadurch könnten insbesondere bewährte Verfahrensweisen aus anderen Mitgliedstaaten diskutiert werden. Ein von der Kommission initiiertes Netzwerk wäre hierfür sehr dienlich.

Wir bitten um Berücksichtigung unserer Überlegungen und verbleiben

Mit freundlichen Grüßen

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Observations à propos du «Livre vert sur les partenariats public-privé et le droit communautaire des marchés publics et des concessions»

Préalable:

Dans un souci de lisibilité, la structure du livre vert est reprise dans les commentaires ci-après. Les titres, sous-titres et paragraphes sont ceux du livre vert. Les textes en italique sont extraits du livre vert.

1. L'ÉVOLUTION DU PARTENARIAT PUBLIC-PRIVÉ: CONSTATS ET DÉFIS

1.1. Le phénomène «partenariat public-privé»

1. Comme le soulèvent les auteurs du livre vert, le terme partenariat public-privé (ci-après «PPP») n'est pas défini dans le droit communautaire.

On s'accorde généralement pour désigner par cette appellation les modes de collaboration qu'entretiennent des autorités publiques avec des entreprises privées dans la poursuite d'un objectif commun.

Des intérêts financiers justifient la plupart du temps le recours à cette technique par l'autorité publique.
Le rôle et la responsabilité de chaque partenaire sont à examiner au cas par cas.

Retenons cependant que la caractéristique principale du PPP est la composante publique-privée du partenariat.

2. Les auteurs du livre vert partent du constat que le développement du PPP s'inscrit dans "*l'évolution du rôle de l'Etat dans la sphère économique, passant d'un rôle d'opérateur direct à un rôle d'organisateur, de régulateur et de contrôleur*".

Nous ne pouvons pas souscrire à ce point de vue. Il existe, en effet, une série de cas dans lesquels l'autorité publique veut encore assurer un rôle d'opérateur direct. Plus précisément, nombre de services publics locaux sont encore fournis directement par les pouvoirs locaux. Songeons par exemple, à tout ce qui a trait à l'exploitation d'infrastructures telles que des centres sportifs, à la distribution d'eau, les bibliothèques publiques, les hôpitaux, …

1.2. Le défi du marché intérieur: assurer le développement du PPP dans des conditions de concurrence effective et de clarté juridique

1. «*Toute attribution de mission réalisée par la voie d'un acte unilatéral échappe à tout encadrement de droit dérivé*», mentionnent les auteurs du livre vert.

Il est important de relever cet élément.

Les autorités publiques doivent pouvoir décider librement de créer seules ou ensemble un nouvel être juridique. Il s'agit du choix du mode d'organisation d'un service public. Or, comme l'a rappelé l'avocat général La Pergola «*il n'y a pas lieu de s'étendre davantage sur le fait qu'une autorité publique est libre de l'organisation de sa structure, de manière à ce qu'elle puisse mieux répondre aux besoins du public. Le choix d'un modèle d'organisation par un service public ne signifie donc pas que l'on doive appliquer des dispositions qui doivent régler une toute autre situation bien déterminée, à savoir la fourniture d'un service par un particulier à une institution publique contre rémunération*» (CJCE, 10 nov. 1988, aff.C-360/99, *Rec.* , 1998, I, pp. 6821 et svtes).

Effectivement, les choix posés en matière de gestion de services publics par l'autorité publique peuvent s'analyser autrement que comme "une attribution de tâches".

Ils peuvent en effet s'inscrire dans une réorganisation administrative, spécialement organisée par le droit interne. Ce type de choix ne peut être qualifié de «marché public» ou de «concession» car il ne peut s'analyser en une *«attribution d'une mission d'activité économique prestée par un tiers au bénéfice de l'autorité et ce, contre rémunération*».

Nous songeons par exemple, à la mise en place d'une entité distincte de la commune (régie, intercommunale) qui aura pour objet une mission particulière d'intérêt général. A défaut de pouvoir exercer cette mission, elle perdrait toute raison d'être. On ne voit pas, alors, quel serait l'intérêt pour les pouvoirs locaux de créer semblables structures, si elles sont vouées à rester des "coquilles vides".

"Soumettre une structure publique locale décentralisée à une mise en concurrence préalable, y compris pour les missions d'intérêt économique général dont les statuts l'ont chargée, n'est-ce pas l'exposer à la possibilité d'être dépouillée de la substance même de ces missions, et donc au risque subséquent de n'avoir plus, à terme, aucune viabilité économique?"[1]

2. Il est fait état de la nécessité d'adopter des règles communautaires applicables au choix des entreprises appelées à coopérer avec une autorité publique dans le cadre d'un PPP.

Il nous paraît que l'application potentielle de la législation relative aux marchés publics ou la communication interprétative de la commission sur les concessions en droit communautaire *(Communication interprétative sur les concessions en droit communautaire, J.O.C.E., C-121*) sont des outils pertinents auxquels il convient de se rallier pour connaître les règles applicables.

La création d'un troisième outil de référence ne risque-t-il pas de créer des confusions? Ne risque-t-on pas de créer des difficultés de qualification juridique des opérations envisagées?

[1] A.L. Durviaux et N. Thirion, Les modes de gestion des services publics locaux, la réglementation relative aux marchés publics et le droit communautaire, J.T., n°6122, 2004, p.25.

2. Le PPP purement contractuel et le droit communautaire des marchés publics et des concessions

2.1. La phase de sélection du partenaire privé

2.1.1. Partenariat de type purement contractuel: acte attributif qualifié de marché public

Il doit être fait application des règles relatives aux marchés publics pour la sélection du partenaire privé, dans la mesure où le contrat peut être qualifié de marché public, le cas échéant en recourant à la procédure de «dialogue compétitif» si l'opération est complexe[2].

Le dialogue compétitif peut s'avérer intéressant, notamment quand le pouvoir adjudicateur ne sait pas très bien techniquement ce à quoi il peut ou doit s'engager.

Il ne semble cependant pas qu'il faille considérer que cette technique soit la panacée, les pouvoirs publics ne risquent-ils pas de perdre la maîtrise de leur marché? Relevons aussi la complexité de ce type de procédure.

2.1.2. Partenariat de type contractuel: acte attributif qualifié de concession

Le régime applicable lors de la phase de passation des concessions de services a fait l'objet d'une communication interprétative à laquelle les pouvoirs publics locaux wallons se réfèrent lorsqu'ils passent semblable convention.

Une réglementation communautaire en la matière n'apparaît pas nécessaire, les objectifs de mise en concurrence étant atteints via l'application des mécanismes de transparence et d'égalité de traitement préconisés.

La mise en place d'une nouvelle législation venant s'adjoindre aux textes existants en matière de concessions ne risque-t-elle pas de porter atteinte à l'efficacité administrative? Enfin, il ne nous semble pas qu'un contentieux particulier existe en la matière.

Par ailleurs, si la Commission estime qu'il faut créer les conditions d'un environnement plus compétitif, il faut également veiller à ce que le service public soit préservé, plus précisément les conditions d'accès de tout un chacun à celui-ci.

2.2. Questions spécifiques à la sélection d'un opérateur économique dans le cadre d'un PPP d'initiative privée

L'hypothèse visée est "*celle d'un opérateur économique formulant une proposition détaillée de projet, éventuellement à l'invitation de l'administration*".

[2] Par dialogue compétitif, il y a lieu d'entendre la procédure à laquelle tout opérateur économique peut demander à participer et dans laquelle le pouvoir adjudicateur conduit un dialogue avec les candidats admis à cette procédure, en vue de développer une ou plusieurs solutions aptes à répondre à ses besoins et sur la base de laquelle ou desquelles les candidats sélectionnés seront invités à remettre une offre (Article 11, c) de la directive du 31 mars 2004 relative à la coordination des procédures de passations des marchés publics de travaux, de fourniture et de services).

Il nous paraît que les mécanismes existants, à savoir les mécanismes prévus par la législation relative aux marchés publics (marchés de promotion, concessions de travaux publics et la publicité en découlant), permettent à suffisance d'assurer les objectifs de mise en concurrence de tous les opérateurs potentiels.

A nouveau, on peut craindre que la mise en place d'une nouvelle réglementation venant s'adjoindre aux textes existants en matière de passation de marchés publics et de concessions, soit susceptible de porter atteinte à l'efficacité administrative.

2.3. La phase postérieure à la sélection du partenaire privé

2.3.1 L'encadrement contractuel du projet

Il ne nous paraît pas qu'il y ait lieu de légiférer sur les modalités d'exécution des PPP.

En effet, dans le canevas proposé, soit il s'agit d'opérations pouvant être qualifiées de marchés publics, auxquels cas les règles d'exécution de ce régime juridique sont suivies.

Soit il s'agit de concessions et ces règles seront alors le plus souvent établies dans les documents contractuels.

D'une manière plus générale, il pourra être difficile de prévoir un cadre juridique d'exécution spécifique aux PPP dans la mesure où chaque projet peut requérir des règles d'exécution propres et adaptées à la situation concrète.

Rappelons enfin que le contrat administratif est particulier en raison du caractère public d'un des deux co-contractants. A ce sujet, l'autorité doit pouvoir en tout temps proposer des modifications liées à des motifs d'intérêt public, "*la faculté dont jouit l'Administration de pouvoir ordonner unilatéralement des modifications aux conditions initiales du marché constitue un droit originaire et inaliénable de la "Puissance publique", justifié par la nécessité d'adapter en toutes circonstances le service public aux besoins forcément changeants de la collectivité*"[3] étant entendu que ces modifications ne doivent pas aboutir à un changement d'objet du contrat.

Ainsi, si comme le souligne les auteurs du livre vert *"… les droits fondamentaux des opérateurs économiques … doivent être préservés*», ceux des autorités publiques et surtout l'efficacité et la simplification administratives, doivent l'être également.

2.3.2 La sous-traitance de certaines tâches

Il ne paraît pas qu'il faille légiférer en matière de sous-traitance. Les marchés publics et les concessions se caractérisent par leur composante *intuitu personae*. Il en découle que la sous-traitance de tout ou partie de la tâche confiée ne pourra intervenir que moyennant l'accord préalable de l'autorité publique.

[3] M.A. Flamme et csrts, Commentaire pratique de la réglementation des marchés publics, éd. CNC asbl, 6è éd. 1996-1997, p. 687

3. Le PPP institutionnalisé et le droit communautaire des marchés publics et des concessions

3.1. Mise en place d'un partenariat impliquant la création d'une entité ad hoc détenue conjointement par le secteur public et le secteur privé

- Ce type de PPP implique la mise en place d'une entité conjointement détenue par le partenaire privé et le partenaire public.

«Si l'opération consistant à créer une entité au capital mixte n'est pas en elle-même visée par le droit des marchés publics et des concessions, ces règles et principes devraient être appliqués lorsqu'une telle opération s'accompagne d'une attribution de mission par le biais d'un acte pouvant être qualifié de marché public, voire de concession.
Le choix d'un partenaire privé appelé à effectuer de telles missions dans le cadre du fonctionnement d'une entité mixte ne saurait donc être fondé exclusivement sur la qualité de son apport en capital ou de son expérience, mais devrait prendre en compte les caractéristiques de son offre – économiquement la plus avantageuse - quant aux prestations spécifiques à fournir».

En pratique, ces règles peuvent être particulièrement difficiles à mettre en œuvre.

Cela étant, à supposer que le droit des marchés publics soit le cas échéant d'application, il n'apparaît pas nécessaire de légiférer spécifiquement en la matière, sauf à prévoir des procédures de mise en concurrence plus souples que celles des marchés publics.

- Le livre vert stipule que «*les autorités publiques ne peuvent pas assortir leur position d'actionnaire dans une telle entité de privilèges exorbitants ne procédant pas d'une application du droit normal des sociétés*».

Nous ne pouvons partager ce point de vue. Ce type de structure n'est pas assimilable à des structures de droit privé du fait, précisément, de la participation d'un partenaire public. A ce titre, il parait indispensable de ménager aux autorités publiques des mécanismes (présidence des organes de gestion, majorité des voix, …) leur permettant de s'assurer que les objectifs à atteindre en termes d'intérêt public, de qualité des services offerts et de politique des prix fixés à l'entité soient respectés.

- Le livre vert considère que "*la pratique visant à confondre les phases de constitution de l'entité et d'attribution de tâches n'est pas satisfaisante au regard des dispositions applicables en matière de marchés publics et de concessions*".

On doit insister sur le fait qu'au niveau local, les communes peuvent prendre l'initiative de constituer une entité distincte en vue de l'exercice de certaines missions de service public d'intérêt général. Ces entités peuvent être constituées à l'initiative d'une commune seule (régie) ou de plusieurs communes (intercommunales). Elles se caractérisent par le fait qu'elles réalisent l'essentiel de leur activité avec la (ou les) commune(s) qui la détient (détiennent).

Le plus souvent, l'objet social de la structure consiste précisément dans l'exercice de la mission. Il s'agit d'un choix d'organisation administrative, lequel échappe au champ d’application du droit communautaire. Ce type d’acte ne peut être donc analysé en tant que mesure économique mais bien comme une prérogative de puissance publique.

La Commission semble ne pas tenir compte de cette réalité, existant depuis des décennies dans nombre d’Etats membres. Ces entreprises publiques sont nombreuses. Ces outils ont été choisis par les autorités publiques dans un souci d’efficacité accrue et donc de meilleur service au citoyen (tant en qualité qu’en termes de prix).

En qualifiant systématiquement "d'économique" toute activité dont l’attribution devrait se faire en respectant les procédures de marchés publics ou de mise en concurrence préalable, on s’engage dans la privatisation absolue de tous les services publics et la disparition des entreprises publiques locales. **De plus, très concrètement, on voit mal comment une autorité pourrait mettre en concurrence avec le marché sa décision de créer une structure publique dotée d’un objet social déterminé**.

Ne s’agit-il pas d’une immixtion dans la liberté de choix qu’ont les Etats membres quant à la définition de leurs services publics, et, corrélativement, du choix du mode d’organisation de ceux-ci?

Il s’agit d’un pan entier de l’autonomie locale qui disparaîtrait, au détriment, in fine, des utilisateurs. Les services publics locaux bénéficient en effet aux citoyens de la collectivité territoriale desservie et leur permettent de profiter de ces services à des conditions accessibles, même là où l'activité est moins rentable et a un coût mutualisé sur l'ensemble de la collectivité.

- Le livre vert rappelle que "*l’application du droit communautaire des marchés publics et des concessions ne dépend pas du caractère public, privé ou mixte du co-contractant de l’organisme adjudicateur. Selon l’arrêt Teckal, celui-ci est d’application dès lors qu’un organisme adjudicateur décide de confier une tâche à un tiers, sauf si l’entité en cause répond aux caractéristiques d’une entité «in house*»" (à savoir: l’autorité publique doit exercer sur l’entité distincte un contrôle analogue à ses propres services et l’entité distincte doit réaliser l’essentiel de son activité avec l' (ou les) autorité(s) publique(s) qui la détient (détiennent)).

Le livre vert n’envisage pas formellement les formes de collaboration public-public. Toutefois, quand il souligne que toute attribution de missions à une entité, quel que soit son statut, privé ou **public**, doit respecter les principes du Traité ou la réglementation relative aux marchés publics, il appréhende cette forme de collaboration.

A cet égard, l’interprétation des critères de relation in house dégagés par la Cour doivent rester raisonnables. Plus précisément, la notion de «contrôle analogue» à exercer par l’autorité publique sur l’entité distincte ne peut signifier un contrôle quasi identique, auquel cas cette condition ne sera jamais remplie. En effet, une entité ne peut, par hypothèse, exercer sur une entité tierce un contrôle identique à celui qu’elle exerce sur ses propres services.

4. CONCLUSIONS

1. Les législations et principes existants sont suffisants pour appréhender les PPP. Il ne paraît pas nécessaire de légiférer davantage. La sur-réglementation induit le risque de qualification erronée de l'opération envisagée et, corrélativement, l'émergence d'une nouvelle forme de contentieux.

Toutefois, s'il devait être décidé de mettre en place un cadre juridique *sui generis* pour l'attribution des PPP, il y aura lieu de veiller à ce que les procédures mises en place ne soient pas trop lourdes afin de favoriser leur développement ainsi que l'efficience administrative.

2. Le livre vert n'envisage pas les formes de collaboration public-public, tout en soulignant que toute attribution de missions à une entité, quel que soit son statut, privé ou public, doit respecter les principes du Traité ou la réglementation relative aux marchés publics.

A cet égard, il est indispensable que le principe d'autonomie locale, dont le choix du mode de gestion est une composante, soit respecté. Soit il est admis que la mise en place d'entités détenues par une ou plusieurs communes constitue une opération de réorganisation administrative échappant au droit communautaire. Soit, si la durée de la structure mise en place ainsi que les éléments de contrôle de l'autorité publique sur son entité sont considérés comme autant d'éléments s'opposant à cette qualification, il y a lieu de qualifier la relation entre l'autorité publique et son entreprise publique locale *d'in house*.

3. Si les droits fondamentaux des opérateurs économiques et la compétitivité doivent être respectés, il en va de même des principes d'efficacité administrative et des caractéristiques propres au caractère public d'un des deux partenaires.

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Voka-input EU-Groenboek Publiek Private Samenwerking

1 Aanpak Voka-inbreng EU-Groenboek Publiek Private Samenwerking

De Europese Commissie stelt vast dat PPS in Europa aan belang wint en onder vele vormen verschijnt. De Commissie stelt zich de vraag of de juridische constructies die voorzien zijn in de Richtlijnen voldoen om PPS mogelijk te maken en of de interne markt niet wordt bedreigd door de verschillende types van PPS-aanpak van de verschillende lidstaten. Daartoe organiseert de Commissie een open debat d.m.v een Groenboek (teksten te vinden op *www.europa.eu.int/comm/internal_market/ppp*)

Het Groenboek van de Commissie bevat een verkennende tekst met 22 vragen. De Voka-werkgroep PPS besloot op een beperkt aantal daarvan te antwoorden. En daarnaast enige algemene bekommernissen weer te geven. De vragen die worden beantwoord zijn de nrs 1,2,7,8,13,19,20.

2 Algemene overwegingen t.a.v Groenboek

PPS is in essentie een procesaanpak om de kwaliteit van een project structureel te verbeteren in termen van prijs/kwaliteit. PPS is daarom niet beperkt tot een specifiek beleidsdomein of type van project. Dit betekent anderzijds echter niet dat alle projecten beter in PPS worden uitgevoerd. Een aantal aspecten van een project en eigenschappen van PPS kunnen toepassing van PPS in een concreet geval de weg staan. Conclusie: het is van primordiaal belang om vooraf te kunnen bepalen of een project als dusdanig voor PPS in aanmerking komt. Als dan ook een beter resultaat (in termen van bvb kwaliteit, snelheid,…) verwacht kan worden dan met een meer klassieke aanbestedingsmethodiek, dan dient de overheid in principe te kiezen voor de PPS-aanpak.

In een aantal nota's van de Vlaamse regering worden sinds 1999 definiërende elementen van PPS geschetst: vroege private betrokkenheid, alternatieve risico-deling of -toewijzing, dienstenconcept i.p.v productconcept voor een project, werken met outcome-criteria, nastreven van scopeverbreding en de combinatie van maatschappelijke en commerciële doelstellingen. Deze definiëring is cruciaal omdat vanuit beleidsmiddens, zowel Vlaams als Europees, onterecht soms de nadruk wordt gelegd op het financierende karakter van PPS. De private sector kan niet en zal niet de verantwoordelijkheid voor de financiering van basisinfrastructuur op zich kunnen nemen. De overheid neigt nog te veel naar de keuze voor PPS voor complexe of moeilijk financierbare projecten. Dit doet afbreuk aan de waarde die PPS voor concrete projecten en voor de sociaal-economische ontwikkeling in het algemeen kan hebben.

PPS is een belangrijke hefboom om de kwaliteit van projecten in een breed veld van beleidsdomeinen te verbeteren. In Vlaanderen is PPS sinds 1999 een structureel beleidsthema. Een Kenniscentrum PPS is opgezet om de introductie in Vlaanderen te faciliteren. En een decreet PPS is door het Vlaams Parlement gestemd om een aantal juridische drempels te elimineren die de toepassing van PPS in de weg staan.

Een aantal concrete projecten zitten in Vlaanderen in de pijplijn op verschillende beleidsterreinen, vb scholenbouw, luchthavenontwikkeling, wegeninfrastructuur, afstandsleren, huisvesting, enz. Grosso modo is

PPS in Vlaanderen in een opstartfase. De nieuwe Vlaamse regering, na de verkiezingen van 13.06.04, dient, wat de werkgevers betreft, een evaluatie van de eerste gerealiseerde projecten door te voeren en op basis daarvan een gecontroleerde verbreding. De werkgevers hebben de aanpak in Vlaanderen rond PPS gesteund en vinden dat PPS in de toekomst nog sterker een beleidsthema moet worden. Een aantal drempels moet echter nog weggewerkt worden.

Voka stelde in het verleden reeds dat voor PPS drie succescriteria bestaan: juridische facilitering en omkadering, operationele ondersteuning en doorbreken van de klassieke rollenpatronen tussen publieke en private partijen in projecten.
In Vlaanderen is aan het eerste aspect gewerkt d.m.v een faciliterend decreet. Het uiterst nuttige initiatief van het EU-Groenboek moet ook als expliciete doelstelling hebben om structureel meer PPS te versterken. Het nieuwe standpunt van Eurostat over de opname in de overheidsboekhouding van PPS-projecten zal eveneens een structurele versterking van PPS mogelijk maken.
Operationele ondersteuning is er in Vlaanderen d.m.v het Kenniscentrum PPS. Dit verkeert nog in de opbouwfase. Maar het heeft al een aantal instrumenten ontwikkeld die de monitoring en evaluatie van PPS mogelijk maken.
Het derde aspect van het doorbreken van de klassieke rollenpatronen in de publieke en private sector is nog weinig opgeschoten, daarvoor is er nog te weinig projectervaring. Daarnaast is er de vraag vanuit de private sector of de PPS-beleidsaanpak structureel van aard is. Dat is een voorwaarde om er zich als bedrijfsleven meer fundamlenteel naar te oriënteren. Het hangt dus ook samen met de 'dealflow' in PPS. Instrumenteel hierbij moet het Kenniscentrum voldoende communiceren over wat PPS betekent en overleggen met de private sector over bevordering en uitvoering van PPS-projecten.

De overheid kan een aantal acties ondernemen om PPS sneller uit de verkennende fase te halen, specifiek met betrekking tot studiekosten, know how transfers, projectenbundeling en transparantie in procedures. Dergelijke vertrouwenwekkende maatregelen zullen het klimaat voor PPS structureel verbeteren. Deze thema's komen ook aan bod in het Groenboek, daarom enige verdere toelichting:
-PPS-projecten vergen door hun innovatieve opzet vaak grotere studiekosten dan klassieke projecten. Die extra kosten kunnen vanuit bedrijfs-economisch perspectief gezien worden als een investering die nodig is om een opdracht binnen te halen. Anderzijds bestaat het risisco dat een aantal bedrijven met know how afhaken omdat er teveel kandidaten worden gevraagd dergelijke kosten te maken in de aanbesteding, terwijl het nog niet duidelijk is of de overheid ook zinnens is om structureel van PPS gebruik te gaan maken op het betreffende beleidsdomein. Dan wordt het onzeker of de investering door bedrijven in andere projecten kan terugverdiend worden. Het risico is dat bedrijven anticiperend niet meer meedoen en dat het aanbod daardoor verschraalt. In Nederland heeft de overheid een 'budgetfaciliteit' ingesteld die bij exorbitante studiekosten kon tussenkomen. Precies om die aanbodverschraling te voorkomen. Ook in Vlaanderen, op het moment dat er veel pilotprojecten zijn op diverse beleidsterreinen en er nog niet echt sprake is van een bundeling van projecten op een bepaald beleidsdomein, dient te worden overwogen of een tegemoetkoming in studiekosten zinvol is. Misschien kan ook Europa hier een stimulerende of co-financierende rol in opnemen, gezien PPS toch ook voor de EU een belangrijk beleidsthema is.
-In PPS-projecten wordt vaak een systeem van aanbesteding gebruikt waarbij de overheid tracht om know how van de private sector te werven om een betere projectdefinitie te maken. Knelpunt is dat de inbreng van de verschillende private actoren dan wordt samengebracht in een nieuw projectvoorstel wat aan de inschrijvers publiek wordt gemaakt. Op dat moment kan men stellen dat de intellectuele eigendomsrechten van private partners wordt misbruikt. Bovendien heeft de aanbestedende overheid vaak de neiging om alle innovatieve aspecten die in het voorbereidende traject boven water zijn gekomen in het definitieve projectvoorstel te cumuleren. Daardoor kan interne inconsistentie ontstaan en vraagt de overheid naar een project dat geen enkele van de kandidaten goed kan uitvoeren en dat sowieso moeilijk uitvoerbaar is.
-PPS kent als dusdanig hogere transactiekosten dan klassieke projecten. Maar door leereffecten kan deze substantieel hogere transactiekost worden teruggedrongen. Bundeling van projecten door de overheid kan hier soelaas bieden. De overheid moet na een (aantal) pilootprojecten op een bepaald beleidsdomein de PPS-aanpak durven prolifereren en met een zekere standaardisering uitpakken van het aanbestedingsproces. Dit biedt voor de private sector perspectief op een daadwerkelijke markt met voldoende volume om zich te

specialiseren. Op die manier is het ook mogelijk om sneller leereffecten te genereren en een groter aantal geïnteresseerden naar de projecten te mobiliseren.
-Transparantie over de aanpak door de overheid van de aanbesteding is cruciaal. In een beleidsdomein waar de overheid op PPS inzet, dient ze meteen ook aan te geven hoe ze in die markt PPS gaat ontplooien en onder welke voorwaarden. Op die manier kan een lange termijn-perspectief ontstaan voor bedrijven waardoor ze eerder geneigd zullen zijn om van begin af aan in die markt te stappen. Aspecten als timing, evaluatiecriteria, omgaan met intellectuele rechten en studiekosten,... zijn voor de private sector fundamenteel om een idee te krijgen van de aanpak van de overheid en de mate waarin ze zelf moeten investeren in de ontluikende markt.

3 Groenboek vraag per vraag

3.1 Vraag 1

Welke soorten strikt contractuele PPS-constructies kent u? Bestaat in uw land voor die constructies een specifiek (al dan niet wettelijk) kader?

-Het onderscheid in het Groenboek tussen contractuele en geïnstitutionaliseerde PPS is slechts tot op zekere hoogte zinvol. Immers ook participaties door publieke en private partijen in een nieuw op te richten of opgerichte entiteit zijn vaak contractueel vastgelegd. Dat beide types PPS misschien wel te onderscheiden zijn naar vereisten i.v.m aanbesteding is dan een puur formele opdeling, die losstaat van de praktijk van projecten. Institutionele PPS is, los van de aanbestedingsmethodiek, intrinsiek complexer als formule dan een innovatieve aanbesteding in contractuele PPS (zoals een combinatie van de elementen uit Design-Build-Finance-Maintain-Operate-Transfer). Onder andere omdat de overheid als participant in een juridisch vehikel de rolverdeling met de private actoren continu ter discussie kan stellen. Bovendien is een publieke actor aan geheel andere wetmatigheden onderworpen dan private actoren wat voor wrijving kan zorgen bij beheer en werking van het vehikel. De overheid behoudt steeds een dubbele pet van enerzijds aandeelhouder/contractant en anderzijds wetgever/beleidsmaker. Het evenwicht vinden in een organisatorische vorm waarin elke partij zich kan terugvinden blijft hoe dan ook een complexe oefening.
-De zin van een wettelijke regeling als dusdanig m.b.t PPS is een heikel punt. Enerzijds is de essentie van PPS precies de flexibiliteit van het concept op het terrein. Een wettelijke regeling kan grenzen maken die de creativiteit van de private sector beknotten. Anderzijds is een wettelijk, juridisch kader wél zinvol om voor bvb financiers en aannemers transparantie te scheppen in projecten. Dat kader is nodig om de transactiekosten zo laag mogelijk te houden en de slaagkans van PPS te vergroten. Voka hoopt dat de Commissie door de publicatie van haar Groenboek niet impliciet reeds gekozen heeft voor een richtlijn of mededeling over aanbesteding i.k.v PPS. Dit debat vergt een evenwichtsoefening tussen voldoende rechtszekerheid voor projecten en de marktontplooiing enerzijds en anderzijds de ruimte voor creativiteit in projecten.
-In Vlaanderen noch België bestaan specifieke wettelijke regelingen m.b.t contractuele of institutionele PPS.
In Vlaanderen is een PPS-decreet gestemd wat een beperkt aantal juridische drempels wegneemt die PPS belemmeren. Zo wordt het domeinrecht enigszins aangepast zodat zakelijke rechten op publiek domein mogelijk worden en wordt het mogelijk om te bouwen vlak naast autosnelwegen of zelfs overheen autosnelwegen. In de memorie van toelichting van het decreet wordt bovendien een omschrijving gegeven van de kenmerken van PPS. Het Kenniscentrum PPS wordt ook aangewezen als 'bewaker' van het concept t.a.v de Vlaamse regering.
Op Belgisch federaal niveau bestaat het systeem van de 'promotie-opdracht', wat een zeer strakke en gedetailleerde procedure is die het mogelijk maakt om een aantal aspecten van een project te integreren.

3.2 Vraag 2

De Commissie is van mening dat de omzetting in nationaal recht van de procedure voor de concurrentiegerichte dialoog de partijen bij het opzetten van een strikt contractuele PPS doet beschikken over een procedure die buitengewoon geschikt is voor het plaatsen van opdrachten die als overheidsopdracht zijn *gekwalificeerd, zonder dat de fundamentele rechten van ondernemingen in gevaar gebracht worden. Deelt u dit standpunt? Zo nee, waarom niet?*

-Er is in België nog geen jurisprudentie of praktijkervaring om de effectiviteit van de concurrentiegerichte dialoog te evalueren, vermits deze Richtlijn nog niet is omgezet in nationaal recht.
-De procedure van de concurrentiegerichte dialoog biedt voor complexe PPS-projecten geen goede oplossing omdat de gunningscriteria bepaald moeten worden vooraleer voldoende inzicht bestaat in de wijze waarop de behoeften kunnen worden ingevuld. Op basis van de ingediende offertes, voorafgaand aan de definitieve keuze, zijn onderhandelingen bovendien uitgesloten. De concurrentiegerichte dialoog voert een overdreven formalisering in van de marktverkenning, die vandaag op relatief informele basis gebeurt.
-In ieder geval blijft de onderhandelingsprocedure een uitzondering, ook met de nieuwe regels, wat intrinsiek een beperking betekent van de mogelijkheden om in de markt de beste oplossing voor een probleem te vinden. De Richtlijn verlegt het zwaartepunt van onderhandelingsmogelijkheden naar vooraan in de procedure. Op die manier is de 'competitive dialogue' een alternatief voor de onderhandelingsprocedure. Maar onderhandelingsmogelijkheden later in de aanbesteding blijven ook interessant, en worden met dit systeem niet toegelaten. De principiële vraag rijst of er niet verder gegaan kan worden om onderhandeling toe te staan bij contractvorming.
-Complexe projecten, in 'culturele' zin, i.e pilootprojecten voor een bepaald beleidsdomein waar men op grote schaal initiatieven plant, moeten gemakkelijker dan vandaag in onderhandelingsprocedure genomen kunnen worden.

3.3 Vraag 7

Meer in het algemeen, indien u een nieuw wetgevend initiatief van de Commissie nodig acht: zijn er volgens u, objectieve redenen om die wetgeving te richten op alle soorten contractuele PPS-projecten, ongeacht of deze als overheidsopdrachten of als concessieovereenkomsten zijn gekwalificeerd, zodat er hiervoor één gunningsregeling komt?

Neen, een wetgevend initiatief is niet per definitie nodig. Maar een interpretatieve mededeling kan zinvol zijn. De overheid als aanbestedende dienst moet eerst wel een idee hebben over de risico's die men wil verdelen of toedelen in een potentieel project, en daarna de gepaste aanbestedingsmethodiek kiezen. Desnoods kan dit door vooraf een procedure te organiseren over de scope en vorm van het project. Om dan pas daarna het uitgewerkte project zelf aan te besteden. Vanuit dat perspectief stelt § 34 uit het groenboek een vals probleem.
Een wetgevend initiatief van de Commissie zou een rem kunnen betekenen op de creativiteit waarmee PPS uitgevoerd kan worden.

3.4 Vraag 8

Hebt u de ervaring dat bij PPS-formules op particulier initiatief de toegankelijkheid voor buitenlandse ondernemers wordt gewaarborgd? Wordt, met name, voldoende bekendheid gegeven aan oproepen aan aanbestedende diensten om een initiatief voor te stellen, zodat alle belangstellende ondernemers op de hoogte zijn? Wordt voor de uitvoering van het geselecteerde project een selectieprocedure op basis van reële concurrentie georganiseerd?

-De huidige reglementering voorziet te weinig mogelijkheden om projecten op particulier initiatief te laten uitvoeren door de partij die het innovatief idee lanceert.
-De drempels naar buitenlandse markten, specifiek de grotere markten als Frankrijk en Duitsland zijn problematisch voor buitenlandse ondernemingen. Vaak worden selectiecriteria toegepast die verhinderen dat buitenlandse bedrijven kunnen meedingen. Projecten worden op maat van een aantal binnenlandse doelpartijen geschreven of geconcipieerd.

3.5 Vraag 13

Bent u het met de Commissie eens dat bepaalde 'step in'-constructies problemen in verband met de transparantie en de gelijke behandeling kunnen opleveren? Kent u andere 'standaardclausules' die soortgelijke problemen kunnen geven wanneer zij worden toegepast?

'Step in'-rechten zijn een fundamentele voorwaarde die, niet alleen in PPS, wordt gebruikt door de financiële sector als ultieme hefboom naar oplossing van een probleem. Intrinsiek is het systeem vergelijkbaar met een hypotheek. Zonder dergelijke verzekeringsconstructie, een vorm van garantie, zal PPS niet kunnen groeien. 'Step in' is geen concurrentie-vervalsende praktijk maar noodzaak om het financiële plaatje van een PPS-project rond te krijgen.

3.6 Vraag 19

Acht u een initiatief op Gemeenschapsniveau nodig ter verduidelijking of precisering van de verplichtingen van aanbestedende instanties ten aanzien van de voorwaarden verbonden aan een oproep tot mededinging tussen mogelijk in een geïnstitutionaliseerd PPS-project geïnteresseerde ondernemingen? Zo ja, met betrekking tot welke specifieke punten en in welke vorm? Zo nee, waarom niet?

Ja, een initiatief wat sterker de proportionaliteit van transparantievereisten zou beklemtonen is wenselijk. Bekendmaking en transparantie vooraf zijn immers de basis van een faire aanbestedingsprocedure.

3.7 Vraag 20

Welke maatregelen of praktijken acht u een belemmering voor de totstandkoming van PPS in de Europese Unie?

Reeds eerder in deze nota werden een aantal globale en specifieke elementen naar voor gebracht die belemmerend werken t.a.v de proliferatie van PPS. De vraag dient echter andersom te worden geformuleerd: '*Welke elementen zullen de proliferatie van PPS ten goede komen?*'.
Globaal verdienen in dit perspectief volgende elementen de aandacht van de Commissie:

-De respectievelijke overheden dienen een niet-opportunistisch en enthousiasmerend discours te voeren over PPS. PPS is als zodanig geen financieringsinstrument voor complexe projecten waarvoor de overheid geen publieke middelen kan of wil vrijstellen. Door dit te insinueren verzwakt de interesse van de private sector en verwatert het concept, PPS wordt dan een containerbegrip. Dit is funest. PPS moet zeer sterk en consistent worden gepromoot als een instrument van bestuurlijke kwaliteit. PPS kan in een aantal situaties een superieure projectuitkomst genereren. Kwestie is te zoeken waar PPS kan, en hoe projecten moeten worden gerealiseerd in PPS. PPS kan snel uitgroeien tot een van de structurele hefbomen voor sociaal-economische ontwikkeling in Europa. Een aanpak om snel tot bundeling van projecten te komen (marktvolume genereren) en zo het vertrouwen van de private sector te vergroten en de transactiekosten van PPS-projecten te verlagen is zinvol.

-Het aspect financiering is in PPS natuurlijk erg belangrijk. Ook daar zou wat meer creativiteit van de Europese en nationale/regionale overheden projecten ten goede kunnen komen. Financiering met budgettaire middelen volstaat niet meer om alle maatschappelijke noden in te vullen, rekening houdend met de strenge Maastrichtnormen. Dat is dweilen met meerdere kranen open. Een debat over bvb. gebiedsgerichte financieringsinstrumenten, over de inzet van fiscale maatregelen, over de aanwending van de middelen van kilometerheffing enz. kan een structurele bijdrage leveren aan de ontwikkeling van projecten. In niet-Europese landen zijn innovatieve financieringsconcepten vaak basis van succesvolle projecten. Een benchmark zou hier ook soelaas kunnen bieden.

-In de klassieke aanbestedingsregels wordt van de private sector geen initiatief verwacht naar projecten. De aanbestedingsrichtlijnen zijn geschreven vanuit het initiatiefrecht van de overheid en een strakke procesregie

die weinig creativiteit toelaat. PPS is een aanpak die precies wél op zoek gaat naar creativiteit in projecten en projectuitvoering.
Klassiek redeneren overheden door de aard van de aanbestedingsregels te vaak in 'product'-termen, i.p.v in 'diensten'-termen. De recent aangepaste ESR-regeling van Eurostat is hier een fundamentele stap in de goede richting en laat toe dat ook overheden net zoals huishoudens en bedrijven meer in een baten en lasten-stelsel gaan redeneren op basis van economische levensduur en dienstverleningsconcepten.
Zowel de private als de publieke sector zijn als het ware 'gerodeerd' geraakt in een rollenpatroon wat tegengesteld is aan de vereisten van een PPS-project. Bij PPS wordt gezamenlijk gewerkt naar een doelstelling. Er is een minder strikte scheiding meer tussen opdrachtgever en opdrachtnemer omdat inbreng wordt gewaardeerd, en zelfs verwacht, van beide partijen. Vertrouwen is de basis van de samenwerking. Het vertrouwen en het gezamenlijk werken naar een doelstelling betekent dat ook veel opener kan gesproken worden over wie welke risico's best draagt in een project. Kortom, PPS staat haaks op de filosofie van de bestaande aanbestedingssystematiek. Dit betekent daarom niet dat de bestaande aanbestedingsregels overboord moeten. De Commissie dient echter wel na te denken over de manieren waarop PPS de grenzen kan aftasten en waar nodig een aanpassing nuttig kan zijn om creativiteit en innovativiteit meer ruimte te bieden. Specifiek de aspecten van transparantie en complexiteit van het aanbestedingsproces en de problematiek van know how transfer verdienen hier aandacht.

4 Conclusie

Voka gaat er van uit dat het initiatief tot Groenboek van de Commissie vertrekt vanuit de vraag hoe PPS kan bevorderd worden om in Europa een structurele hefboom te worden van sociaal-economische ontwikkeling. *Voka steunt dit initiatief voluit en vraagt dat de Commissie PPS sterk zou promoten als instrument van bestuurlijke kwaliteit i.p.v alternatieve financiering.*

De huidige juridische omkadering volstaat mogelijk niet om PPS voldoende ruimte te geven. Maar tegelijk stelt zich de vraag of eventuele aanpassing/concretisering van de aanbestedingsregels op een aantal domeinen niet eerder een belemmering zal zijn voor de creativiteit die PPS precies wil mobiliseren. Anderzijds is dan weer duidelijk dat voor marktpartijen heldere regels een voorwaarde zijn om massaal mee te werken aan een beleidsthema als PPS. *Voka vraagt dat de Commissie op een bijzonder voorzichtige wijze omgaat met deze spanning en terughoudend omgaat met het introduceren van nieuwe juridische regels ten behoeve van PPS.*

De transactiekosten in een PPS-project zijn intrinsiek groter dan bij een 'klassiek' project. De Commisdsie dient een aantal instrumenten te ontwikkelen die de transactiekosten structureel kunnen verlagen. Daarom verdienen aspecten zoals transparantie en complexiteit van de aanbestedingsprocedure, de problematiek van 'know how'-transfer en de ruimte tot onderhandelen in de procedure, aandacht om PPS te faciliteren. Daarbij mag de Commissie niet veronachtzamen dat PPS ook een kwestie is van aangepaste rollenpatronen tussen publiek en privaat. Dit vergt niet alleen een aanpassing in gedrag maar zelfs van de manier waarop ondernemingen zich structureren naar kapitaal, samenwerkingsverbanden, openheid voor maatschappelijke tendensen en signalen enz. *Voka gaat ervan uit dat de Commissie mee nadenkt over de wijzigende rollenpatronen tussen publiek en privaat die vereist zijn om tot succesvolle PPS te komen en specifiek een aantal maatregelen of instrumenten uitwerkt die de transactiekosten in PPS-projecten kunnen verlagen.*

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NOTA

GROENBOEK OVER PUBLIEKPRIVATE SAMENWERKING EN HET GEMEENSCHAPSRECHT INZAKE OVERHEIDSOPDRACHTEN EN CONCESSIEOVEREENKOMSTEN

1. Voorafgaande bedenkingen.

1.1 Publiek of privaat

Een eerste bedenking bij het lezen van het groenboek is de verwarring die er bestaat in het onderscheid tussen publieke en private sector. In de Belgische context worden OCMW-instellingen beschouwd als publiek initiatief, terwijl vzw- en commerciële instellingen worden ondergebracht onder het private initiatief. Dienen algemene en psychiatrische ziekenhuizen en rusthuizen met een vzw-statuut in de Europese context beschouwd te worden als publieke sector of als private sector ?

De Gemeenschap heeft reeds richtlijnen uitgevaardigd om de regels inzake overheidsopdrachten te vereenvoudigen en te verduidelijken. In de Richtlijn 2004/18 wordt een publiekrechtelijke instelling in artikel 1, punt 9 als volgt gedefinieerd:

Onder „publiekrechtelijke instelling” wordt iedere instelling verstaan:

a) die is opgericht met het specifieke doel te voorzien in behoeften van algemeen belang die niet van industriële of commerciële aard zijn;

b) die rechtspersoonlijkheid bezit, en

c) waarvan ofwel de activiteiten in hoofdzaak door de staat, de territoriale lichamen of andere publiekrechtelijke instellingen worden gefinancierd, ofwel het beheer onderworpen is aan toezicht door deze laatste, ofwel de leden van het bestuursorgaan, het leidinggevend of het toezichthoudend orgaan voor meer dan de helft door de staat, de territoriale lichamen of andere publiekrechtelijke instellingen zijn aangewezen.

De bepaling in punt c), met name activiteiten die' in hoofdzaak' door de staat worden gefinancierd, wordt doorgaans geïnterpreteerd als meer dan 50 % financiering. Concreet betekent dit dat niet alleen de ziekenhuizen en de rusthuizen met een openbaar statuut maar ook de ziekenhuizen en rusthuizen met een vzw-statuut (en zelfs rusthuizen met een commercieel statuut) als publieke partner en niet als private partner worden beschouwd.
Een samenwerking tussen twee ziekenhuizen of twee rusthuizen met respectievelijk een OCMW- en een vzw-statuut is, met andere woorden, geen publiekprivate samenwerking maar wel een publiekpublieke samenwerking.

1.2 PPS in het licht van de commercialisering en liberalisering van de gezondheidszorg.

In het witboek over diensten van algemeen belang wordt op pagina 17 verwezen naar het groenboek over publiekprivate samenwerking en het Gemeenschapsrecht inzake overheidsopdrachten en concessieovereenkomsten.

"In de praktijk maken de lidstaten in toenemende mate gebruik van publiekprivate regelingen, zoals ontwerp-bouw-financiering-exploitatiecontracten, concessies en de oprichting van gemengde ondernemingen voor de uitvoering van infrastructuurprojecten of diensten van algemeen belang …"

Het groenboek over publiek private samenwerking sluit nauw aan bij de ideologie van de richtlijn Bolkestein. De bedenkingen die naar aanleiding van deze richtlijn werden doorgegeven, zijn ook van toepassing op het opentrekken van de markt voor private partijen om in een bouwproject van ziekenhuizen en rusthuizen te stappen. Voornamelijk de toepassing van het oorsprongland-beginsel betekent dat de investeringsnormen, de controle en de inspectie van de Vlaamse overheid hiermee op de helling komen te staan.

2. PPS en de Belgische context

Het groenboek is bedoeld om een debat op gang te brengen over de regels die moeten toegepast worden wanneer is besloten een opdracht of een taak aan een derde toe te vertrouwen in het kader van overheidsopdrachten en concessieovereenkomsten op het verschijnsel PPS. In welke mate kan binnen een PPS-project meer ruimte verzekerd worden voor concurrentie zodat meerdere private partners wensen deel te nemen aan het project, hetgeen op zijn beurt de kans op slagen van een dergelijk project groter maakt. De wet op de overheidsopdrachten is een beperking om in alle vrijheid te kiezen waar en wanneer wat gebouwd wordt en door wie maar het is zeker niet de enige factor die bepalend is voor het al dan niet slagen van een PPS-project.

2.1 De subsidiëring en het huidig wettelijk kader.

Vooreerst dient opgemerkt te worden dat in België de wet op de overheidsopdrachten een federale bevoegdheid is terwijl de bouw en de infrastructuur van de zorgsectoren een gemeenschapsbevoegdheid is. Het VIPA (Vlaams Infrastructuurfonds voor Persoonsgebonden Aangelegenheden) is het fonds van de Vlaamse overheid dat 60 % van de investeringen direct subsidieert in de ziekenhuizen en de rusthuizen met een openbaar of vzw-statuut.

Commerciële initiatieven die in de rusthuissector aanwezig zijn, zijn hiervan uitgesloten. De resterende 40 % van de investering wordt gefinancierd via een bankenlening die gewaarborgd wordt door het VIPA. In de rusthuizen worden de financiële lasten van de lening gedragen door de bewoner. In de ziekenhuizen daarentegen worden deze lasten doorgerekend in het gedeelte van de verpleegdagprijs Volksgezondheid, hetgeen een federale bevoegdheid is.

De tussenkomsten onder vorm van subsidie of garantie op kredietverlening moeten ook in een PPS-constructie behouden blijven. Om dit te realiseren zijn er echter nog heel wat aanpassingen nodig aan het wettelijk kader. Maar de trend naar publiek private samenwerking wordt echter gedreven vanuit een eerder neoliberale ideologie waarbij het private initiatief garant staat voor efficiëntie en doelmatigheid. De verschuiving naar de private sector komt dus vooral voort uit financiële overwegingen.

In België zijn de ervaringen met PPS zeer beperkt zodat er vandaag geen cijfergegevens beschikbaar zijn over de effecten van samenwerking tussen private en publieke sector op de kwaliteit, de toegankelijkheid, de kosten enzovoort. Zijn commerciële rusthuizen wel degelijk goedkoper of niet, daarover is niets bekend. Dit betekent echter niet dat zorginstellingen niet samenwerken met de private partner. Sommige diensten waaronder bijvoorbeeld de keuken, het onderhoud, worden uitbesteed.

Vandaag zijn de middelen van VIPA echter ontoereikend wat resulteert in lange wachtlijsten. Omwille van de budgettaire tekorten wordt PPS door de politieke overheden wel degelijk gezien als een wondermiddel. Indien een verlaging van de overheidssubsidiëring echter onvoldoende wordt gecompenseerd door de kostenvoordelen van een PPS-project, zal de patiënt of de bewoner meer zelf betalen hetgeen de betaalbaarheid en de toegankelijkheid in het gedrang kan brengen.

2.2 De markt moet klaar zijn voor PPS

De markt moet ook klaar zijn voor PPS. Dit wil zeggen dat er een minimaal aantal mogelijke aanbieders op de markt aanwezig moeten zijn zodat er in de aanbesteding ook sprake kan zijn van concurrentie. PPS is vooral een mentaliteitsverandering, een andere werkwijze voor zowel de publieke, de private partner als voor de banken. In België is men daar nog niet klaar voor.
De publieke partner moet evolueren van bouwheer naar toezichthouder, de private partner zal een lange termijnvisie moeten ontwikkelen en de banken zullen bij de appreciatie van een kredietverlening rekening moeten houden met de volledige looptijd van het PPS-project.

Niettegenstaande er in Vlaanderen een PPS-decreet en een PPS-kenniscentrum bestaat, is de leercurve voor zowel de private als de publieke partner nog zeer beperkt waardoor de transactiekosten relatief hoog zijn en dit een rem betekent voor de ontwikkeling van PPS. Een standaardisatie van processen en contracten zal belangrijk zijn om de duur van de aanbesteding te verkorten en transactiekosten te verlagen.

2.3 De aard van de investering

In sommige regio's zou het kunnen gebeuren dat bij gebrek aan ruimte een combinatie moet gezocht worden tussen verschillende publieke en private functies. Het bouwen van een serviceflat bijvoorbeeld in het centrum van de stad zou moeten gecombineerd worden met de creatie van winkelruimte en woongelegenheden. Een dergelijk plan zou dan via PPS kunnen uitgevoerd worden waarbij de aanwezigheid van bepaalde marktpartijen soms een gegeven is. De serviceflat zou dan geen andere keuze meer hebben om het door haar opgedragen werk te laten uitvoeren door een bepaalde opdrachtnemer, omdat het gewenste werk anders niet tot stand kan komen.De toepassing van een openbare of niet-openbare procedure heeft dan ook geen zin want anders zou dit toch maar leiden tot schijnmededinging. In functie van de aard van de investering zou er meer duidelijkheid moeten komen wanneer de richtlijnprocedures al dan moeten toegepast worden.

I. MOENS

Summary of the response from the Danish Public Service Unions on the Commission Green Paper on Public Private Partnerships

The Green Paper focuses too much on economic, financial and competitive issues. A horizontal approach would have been more appropriate thus focussing more on workers rights and democratic participation.

Many partnerships do not take workers rights and social conditions into account. Public authorities should highlight and take account of employees' social demands.

In Denmark we have experienced both contractual and institutional PPPs. But public authorities are somewhat uncertain concerning the regulatory basis. Contractual PPPs are not many in Denmark probably because local authorities (wrongly) find EU-regulations limiting.

Negotiated tendering is not much used in Denmark. On the other hand contracts are often adjusted during the contract period as well as they are prolonged. Unfortunately these possibilities cause less transparency for employees and users.

The length of the contract period is often a problem. Long contract periods can hamper competitiveness and cause even bigger lack of transparency.

Institutional PPPs are regulated via EU public procurement rules as well as national regulations. A more clear EU regulation is needed to open up for more use of institutional PPPs.

Experiences in Denmark on PPPs are both positive and negative. PPPs should not be seen as a panacea in regard to openness, transparency, effectiveness and efficiency, quality of public services, social and environmental considerations. Bad public procurement is not automatically solved through PPPs.

There is a lack of national and European evaluation on PPPs. We therefore propose the Commission to set up a task force in order to gather information and exchange knowledge and experience on PPP projects in the member states.

Bengt Rastén
Copenhagen
July 26, 2004

29.07.2004

Strengthening of local public services in the single market

Joint declaration by

the Association of the mayors of French large cities (AMGVF)
the French federation of local public utilities (FNSEM)
the German association of cities and towns (DST)
and the German association of local public utilities (VKU)

1. European framework

The publication of the Green Paper on Services of General Interest and the Green Paper on Public-Private Partnerships/Concessions has given rise to draw up our joint declaration. With the publication of these papers an intensive discussion has centred on the question of how services of general interest should be treated at the European level. For the local authorities and local utilities in France and Germany the future development of these services is of crucial importance because most of the essential utility services are organised at the local level.

Under the system of **local self-government** the local level is in charge of creating, within the scope of its competences, the public facilities required to secure the economic, social and cultural well-being of its inhabitants and the private sector of the economy. Local self-government explicitly includes all local public-sector economic activities based on the right to create and maintain facilities and undertakings for the well-being of residents as part of essential public service provision. This right of local self-government is to be enshrined in the future constitutional treaty (Article I-5) and will thus become a fundamental principle of the European social model. Closely related to this principle is the European Union's principle of subsidiarity, under which the best level for performing a particular function is the one closest to the citizen. The principle of subsidiarity means that it is primarily a matter for the competent national, regional and local authorities to define, organise and supervise services of general interest and to ensure their proper financing. We therefore insist that any rules concerning the question of defining essential services as well as their design, organisation and evaluation should take full account of local self-government and the principle of subsidiarity.

The Treaty of Amsterdam (Art. 16 EC Treaty) as well as the future constitutional treaty (Art. III-6) recognise the important role played by services of general economic interest in connection with the common values of the European Union. For these services contribute significantly to the strengthening of social and territorial cohesion. The local availability of services in the public interest therefore has an important function within the process of European integration. Yet this integration process will be endangered if the EU gives priority to competition rules over the general interest. The signatories to this declaration therefore urge that **public service obligations** be regarded as **equally important** as the need for competition and be adequately safeguarded in Community law.

On the basis of this framework, any future regulations concerning the local should take particular account of the following points:

2. Freedom of choice in the provision of local public services

The provision of services of general economic or non-economic interest is primarily the responsibility of the local level in Germany and France. This level is – unless regulations to the contrary apply under sector-specific laws – free to decide not only whether a need should be fulfilled as a service of general economic and non-economic interest but also how this should be done. The authorities are entitled to a wide freedom of choice as to how they meet their practical social responsibilities for essential services to the local community – either acting alone (direct performance, or by entrusting in-house undertakings and quasi-public local utilities or by contracting out to external third parties in the public and/or private sector) or by acting in co-operation with other local or regional authorities. The local utilities set up to meet these needs are frequently characterised by their primary public service orientation in the provision of essential services. It is decisive in this respect that the providers of local services can be influenced in the place where the service needs actually arise. Such a direct local influence guarantees that the interests, demands and complaints of citizens at the local level are responded to directly and flexibly thanks to very short lines of communication and thus enable consumer interests to be protected effectively. These arrangements also ensure that the services on offer are primarily designed to meet public service obligations rather than serve special interests.

Since the **freedom of choice of the local authorities** in the provision of services helps to secure high-quality delivery to the public without delay and without bureaucratic obstacles, it must be upheld. However, this vital scope for local self-government will be diminished not only by stronger regimentation of municipal public services under new European rules but also by an unbalanced emphasis on competition at the expense of public service obligations at the European level. European laws governing the conditions under which services of general interest are provided threaten to undermine the direct influence of citizens on the services available to them. The implementation of the future constitutional treaty (Art. III-6) must therefore take full account of this freedom of choice of municipalities.

3. A wider scope of in house necessary for local authorities

Rules to make tendering compulsory would be irreconcilable with the above-mentioned freedom to determine public service provision, i.e. with the local authorities' freedom to choose **how** they wish to provide their services. A binding Europe-wide obligation to put local services of general economic interest out to tender would remove the organisational autonomy of local authorities, substantially restricting the capacity for municipal economic activity by in-house undertakings and undermine the existing utility structures.

For in-house undertakings it has to be guaranteed that, whatever the finally agreed definition of "in-house" and its scope will be, local authorities must keep the freedom to choose between different ways of operating. While taking into account the strongly divergent national contexts, criteria for control over an enterprise by a local authority enabling an "in-house" situation should be defined in the light of the principle of subsidiarity. The criteria of at least more than 50 % ownership of the enterprise by the local authority must be fulfilled in every case.

Moreover, a binding Europe-wide obligation to put local services of general economic interest out to tender would boost the trend towards greater concentration, ultimately leading to anti-competitive market domination by a few companies who will then act as an oligopoly. The consequences of compulsory tendering would clearly contradict the principle of subsidiarity as well as the principle of the neutrality as regards the public or private status of companies, since in many cases it would result in the loss of a local authority's own public utilities.

A resolution of this fundamental (constitutional) conflict between European law on competition and the single market, on the one hand, and the obligation of the European Union to uphold the principles of subsidiarity, of faithful observance of Community obligations, of proportionality and of the neutrality of the national systems of property ownership, on the other hand, can only be achieved by granting the local and regional authorities a right of auto-production of their services of general interest. On this point, the local utility associations and local authority associations supporting this declaration welcome the fact that the European Parliament, in its resolution of 14 January 2004 concerning the Green Paper on Services of General Economic Interest, has recognised such a right of auto-production and has explicitly emphasised this right in favour of the municipalities. It is vital that the municipalities, in seeking to perform the functions and services for which they are responsible, continue to be able in future to have the choice of either entrusting these responsibilities (without a tendering procedure) to their own undertakings or awarding contracts (subject to tendering) to private third parties. In the light of the principle of subsidiarity and the organisational autonomy established under this framework, the performance of responsibilities entrusted to undertakings financed and predominantly influenced by the local authority must be treated in the same way as the direct performance of responsibilities by the "local council" itself.

In the markets for local services of general economic interest, the local authorities should therefore be free (without any tendering requirements) to choose to provide such services themselves or via undertakings, of whatever organisational form, that are effectively municipally owned or controlled.

Importantly, this freedom also includes the right to enter into co-operative arrangements with other local authorities in order to perform common municipal duties, again without compulsory tendering. This kind of co-operation, which in Germany, for example, takes the form of a Zweckverband, or inter-municipal utility consortium and acts as an important element of local self-government, is not a procurement mechanism but an arrangement to define the division of responsibilities within the public sector that flow from the organisational autonomy of the authorities. Thus, auto-production in its proper sense means not only the provision of a service by a single authority but also several local authorities acting jointly to discharge their responsibilities.

4. Conclusion

With regard to the above mentioned facts 3 principles are to be emphasized:

- Freedom of choice of local authorities which must continue to be entitled to decide either to directly produce local services or to entrust either enterprises whose shares are held, completely or partially, by the local authority or public and/or private-sector companies with the provision of local public services.

- In-house definition must allow authorities - without any tendering requirements - to freely choose to provide such services themselves or via undertakings, of whatever organisational form, that are effectively municipally owned or controlled.

- Rejection of any solution which would lead to a situation in which the local public enterprise is subject to compulsory tendering procedures on two sides: with regard to the relations with the local authority and with regard to contracts by which the enterprise satisfies its own needs.

RESPONSE OF THE ACE TO THE COMMISSION CONSULTATION
On the
Green Paper on Public-Private Partnerships
Published by the European Commission on the 30th April 2004 – COM(2004)327final

Background

The Architects' Council of Europe (ACE)[1] has taken note of the increasing importance that the European Commission has, in recent years, attached to the concept of Public-Private Partnerships (PPP's) for the acquisition of large-scale public infrastructure and buildings. It has monitored the steps that the Commission has undertaken in relation to this important model for acquisitions by public entities and has participated in public debates and consultations on the subject.

In parallel, the ACE has followed with intense interest and involvement the development and adoption of the new directives on Public Procurement[2]. It is currently engaged in an exercise that will seek to ensure the proper and appropriately considered transposition of the requirements of the directives into national law for the provision of architectural services.

There are strong links between the procedures set down in the Public Procurement directives and the topic of PPP's which cannot be ignored. In this respect it is crucially important that all public authorities are made aware that the rules set down in the Public Procurement directives must be applied to PPP's as these are one form of public procurement.

The Green Paper – General Remarks

There seems to be a commonly held view that the use of PPP's by cash-strapped governments and public bodies is a panacea for the acquisition of important public infrastructure and buildings and that it is a method that provides quality and value for money. The ACE believes that, based on the experience of the architectural profession in Europe, this is far from proven at the present time. In particular, there is increasing evidence that the use of the Private Finance Initiative (PFI – an example of one type of PPP) in the UK for the procurement of public buildings such as schools and hospitals is leading to the creation of a poor quality built environment that it set to be a significant burden on future generations. These concerns about the situation in the UK have been expressed, not only by the architectural profession, but also by the independent Commission on Architecture and the Built Environment (CABE) and in the national press.

The Green Paper sets out a very abstract discussion on a few restricted forms of PPP's using terminology that deliberately obfuscates the subject matter. It is therefore difficult to welcome the Green Paper as a positive contribution to the current debate on the use of PPP's. Furthermore the technique of asking specific questions (22 in all) has the potential to ensure that interested parties are not permitted to express particular points of view that arise from their experience of PPP's, as the questions are not phrased in such a way as to allow for the expression of those points of view.

[1] The Architects Council of Europe (ACE) is an organisation, based in Brussels, whose Membership consists of the professional representative organisations of all twenty-five European Union (EU) Member States and all Accession States as well as Switzerland and Norway. As such it is an organisation that represents the interests of over 450,000 Architects from Europe. The ACE was founded in 1990 and its principal function is to monitor and influence developments at EU level highlighting those areas of EU Policy that have a direct impact on architectural practice, policy and the built environment.

[2] Reference number 2004/18/EC, published in the Official Journal of the EU on the 30th April 2004.

Given these limitations the ACE, in this response, starts by discussing its particular interest in the topic of PPP's, setting down its considerable concerns about the potential impact of these methods of procurement on the quality of the built environment, the impact on sustainability and the impact on the quality of life of the citizens of Europe. An Annexe to this position paper will provide answers, where possible, to the questions posed in the Green Paper, but it is the text of the following pages that should be considered as being the position of the ACE.

The Construction Sector in Europe

Architectural services form an essential part of the professional services required by the construction sector in Europe in the conception and realisation of the projects that lead to the materialisation of the built environment. It is in this environment that the citizens of Europe work, rest and play. It is therefore essential to ensure that the quality of the built environment provides the best possible stage on which we can all live productive and happy lives.

Furthermore the built environment is a principal carrier of the cultural identity of our society and it reflects, in a very permanent way, the aspirations, skills and identity of each succeeding generation. It is crucial that these cultural and social aspects of the world we construct about us is understood and respected as we contemplate how best to procure works that will reflect these values.

Beyond the cultural and social importance of the sector, the construction sector is the single most important industrial sector in Europe today and its economic significance in terms of GDP is very great. Some statistics from 2003 illustrate the point very well:

The Construction Sector in Europe (EU-15), in 2003, represented:

28.2% of industrial employment
7.2% of total employment
9.8% of Gross Domestic Product in the EU-15
51.2% of Gross Fixed Capital Formation
and
its turnover for the year was **€910 billion**[3]

There are various estimates of the proportion of the turnover that is accounted for by public buildings and works, but it can be said with reasonable certainty that it is above 50%. This underlines the importance that should be given to ensuring that any model for procurement in the sector is correctly and equitably devised and administered.

A final factor that forms a crucial aspect of the sector is the fact that 93% of all enterprises active in the industry are Small and Medium-sized Enterprises (SME's). In its position paper on the Green Paper, the European Builders Confederation, that represents the crafts and small contractors sector, estimates that 85% of contracts that their members sign are for publicly funded works. It is therefore essential that any procurement methods do not rob these enterprises of their livelihood.

The Role of the Architect in PPP

All construction projects have an impact on the existing built and natural environments and they each contribute to the quality of life of our citizens. Each construction project requires a team of various persons and companies to work co-operatively together to achieve the objectives of the project on behalf of the client, whilst taking account of its wider impacts. It is essential, for the proper functioning of such a team, that all aspects pertinent to the works in hand are expertly covered by the appropriate professional or craftsman. Each person in the team must clearly understand their role and their duty.

Within such a team the architect generally possesses the skills to be responsible for the conversion of the clients' requirements for space or the housing of a particular function into a design for the building or works that takes full account of all the constraints placed on the project. The architect also learns the skill of being able to see the way in which all parts of the project must be integrated and, thereby, to understand the required input of each of the other persons in the team.

[3] Source: European Construction Industry Federation report "Construction in Europe – Key Figures" published May 2004

Furthermore the architect is, through training and experience, well placed to perceive the wider social, cultural and sustainability impacts of the project and is, finally, bound by deontological rules to act independently of vested interests in the achievement of the best outcome for the works.

For these reasons the ACE believes that the architect has a central and critical role to play in the design and execution of all construction projects including PPP projects, no matter which model of PPP is chosen by the contracting body. The ACE equally believes that it is crucial to the overall success of a construction project that the architect is permitted, by the terms of the contractual arrangement, to effectively take full account of all the economic, environmental, cultural and social aspects of the project in hand. In other words, it is not so important to ensure that the architect has a direct contractual relationship with the client as it is to ensure that the terms of any appointment, contract or sub-contract should impose an obligation on the contracting authority or operator to take full account of these wider, holistic issues.

It is important to be aware that a public body has a binding responsibility to ensure that the expenditure of public funds is carried out in the most economically advantageous way. In this respect the taking into account of the wider range of environmental, social and cultural issues at the outset of a project usually delivers significantly better value for money over the useful lifetime of the building or works. Therefore there is economic advantage to be gained by the use of a more holistic approach to procurement.[4]

The Nature of PPP's in Construction

The forms of PPP's that are generally used in construction projects are "Contractual PPP's" where a single private operator is charged with the design, construction, financing, operation and maintenance of the works. There are, of course, many variations where one or more of these functions is not contracted to the operator, but it is generally the case that all five functions are undertaken by the private operator.

The private operator is recompensed for taking on the contract by being able to levy a charge for the services it provides throughout a defined period of the service life of the project, or by way of monies paid by the public body for the use of the final facilities provided. It effect many of the PPP's in construction are little more than complex hire-purchase agreements between the public body and the private operator.

There are many difficulties with this approach to the procurement of buildings, of which the main ones are:

1. The private operators main interest is the profit margin it can achieve over the life of the contract.
2. As the period for which the private operator is to be responsible for the operation and maintenance of the completed building is defined at the outset, the specification of materials and equipment used in the construction often only have a design life equal to or just greater than this pre-defined period. Therefore the long-term serviceability of the buildings is not safeguarded and, all too often, poor quality materials are used.
3. Public bodies often choose to use a PPP so as to defer the capital costs of the project over a period of years in the belief that this makes good financial sense. In fact the result of engaging in PPP's is to increase the indebtedness of the public body and to increase the sums that must be expended monthly. The fact is that the cost of the contract over its full life will significantly exceed the costs that would have been incurred through traditional procurement as the private operator will ensure that a profit is made on the contract and it will not be able to borrow money at a better rate than the public body. In fact it is possible to envisage that cut-backs to essential services might ultimately result as public bodies struggle to pay the costs of these long-term commitments.
4. As the PPP approach to procurement of a building is a usually only viewed in economic terms (by both parties) the social, cultural and sustainability impacts are frequently missing from the criteria that constitute the terms of the contract. This lacuna is compounded by the false belief, on the part of many public bodies, that it is sufficient for them to simply provide

[4] This fact has been eloquently demonstrated in the contents of the Commission staff working paper entitled "Buying Green! A Handbook on Environmental Public Procurement" dated the 18th August 2004 and referenced SEC(2004) 1050

functional projects that adequately house the required activities desired by their policies or undertakings. This is not the case as it is our public bodies that are responsible to ensure the creation and maintenance of high quality environments for citizens and to ensure that true value for money is achieved when expending public funds.

5. Due to the complexity and scale of PPP projects, it is very costly to prepare a proposal to win a PPP contract. In the preparation of a proposal it is typically necessary to prepare full architectural, structural and services designs for the project, pricing each element fully in order that the proposer can be certain that the offer to be made is realistic. It is clear that it is not possible to succeed in winning every contract competed for and so there is a lot of wasted costs associated with the selection of a contractor for a PPP. These costs must be recuperated somehow and they are added, over time, to the general level of inflation in construction costs. Furthermore an operator can only afford to lose a few bids and so over time it is the large and very large operators that end up bidding with all the medium and smaller operators falling out of the market. This leads to a situation where there are so few operators in the market for PPP's that the principles of fair competition and the free market, so cherished by the European Commission, no longer operate.
6. In the circumstances described above, where the market can no longer provide a wide range of potential bidders for PPP contracts, there are two serious losses that accrue. The first is a loss of flexibility in the manner in which a PPP is executed as these large organisations that can afford to bid generally have heavy, inflexible management structures by which they abide. The second is the fact that there is no longer any viable route through which "new blood" can be brought into the process, thus depriving the public of innovative and creative approaches to these projects that would otherwise be available.
7. Once a PPP contract is awarded the successful bidder knows the bottom line for the contract and knows that any savings it can make along the way will be added directly to that bottom line. This frequently leads to the modification of the approved designs, particularly of the details of those designs, resulting in a significant lowering of the quality and appearance of the finished product. Furthermore the operator will often rely on "in-house" expertise and established approaches to construction at the expense of innovative and creative approaches, thus retarding the overall development of this crucial industry.
8. Some public bodies believe that the use of PPP's means that they do not have to apply the EU rules for Public Procurement as it is private money that is being used to construct a project. The Commission has been very clear on this point and has stated that the full requirements of the public procurement directives do apply to PPP's. The ACE believes that this message must be reinforced to ensure fair competition in the use of PPP's.

On the positive side it is the case that some PPP's can deliver much needed large-scale infrastructure and buildings more quickly than traditional procurement methods permit, particularly where several separate projects are "bundled" into one PPP. However this "bundling" further restricts competition and closes the market to potentially better contractors or operators for individual buildings.

The Position of the ACE

It is the view of the ACE that there is a limited role for the PPP procedure in the procurement of some large-scale infrastructures and buildings. In fact the ACE can see that the PPP model is suited to the procurement of large-scale infrastructure (such as roads, tunnels, tram systems etc) whereas it is not suited to the procurement of buildings. This is because of the specific cultural and social impact of buildings on their immediate surroundings and the need for their expression to be linked to the region in which they are located. Such factors cannot be readily incorporated into the criteria and clauses of legally binding contracts and yet they are essential to the long-term success of such works.

The manner in which a PPP is conceived and structured is crucial to the result that is delivered to the client. The ACE firmly believes that the architect must be involved in all stages of a building project regardless of the model used by the client to procure the project. In particular the architect must be:

a. The principal interlocutor between the client and the project team as it is the architect who is best equipped to comprehend the overall factors and impacts of the project.
b. Permitted to act independently to conceive of the best design solution to the problems posed by the project proposal whilst taking into account the extended impact of the project in economic, environmental, social and cultural terms.

c. Closely involved in the detail design of the building.
d. Permitted to monitor works on site and be able to influence the manner in which the works are executed, regardless of the PPP model chosen. This role is particularly crucial in the event of a design-build solution where the need to have regard for the life cycle costing is more acute.
e. Adequately remunerated for the work and services provided.

In return the ACE believes that the architect must shoulder the responsibilities and consequences of the decisions he or she takes and that those decisions must be taken with the best interests of society at their heart.

Specifically, in relation to the involvement of the architect in the preparation of proposals for PPP's, the ACE believes that remuneration for the giving of ideas and designs must be guaranteed by the terms of the call for proposals and that the architect used in the preparation of a successful bid is retained for the later stages of work. In this way, it is possible to ensure that the ideas encapsulated in the project design are carried forward by their initiator.

Conclusions

Given that the annual value of the Public Procurement market in the EU is approximately €1,500 billion and that the annual value of the Public Procurement in construction is approximately €450 billion, it is imperative that the writing and structure of PPP contracts for this significant sector are properly conceived to ensure that the resulting works are fit for their function, contribute positively to the environment, encourage social cohesion and provide long-term value for money.

The achievement of this objective is a truly challenging, but the architectural profession is ready to do its part to succeed in this goal.

End of paper
20th September 2004

ANNEXE 1

Answers of the ACE to the specific questions in the Green Paper on PPP's:

1. What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?

Most of the PPP's that architects are involved in are contractual in nature and the ACE is aware that there are a variety of set-ups for such PPP's. There are various typical set-ups for PPP's used in the procurement of buildings ranging from "design and build" to "design, build, finance, operate and maintain". The variations between the various forms usually relate to the number of functions committed to the operator.

Other variations arise with the method for financing the realisation of the project. Some PPP's rely on full financing by the private sector, some are fully financed by the public body and others are mixes of the two. On rare occasions the operator designs and builds for the public body in return for the acquisition of publicly owned land on which the contractor then builds a commercial scheme (such as housing) to recuperate all the costs it has incurred.

The ACE, as a European representative organisation, does not have any particular knowledge of specific legislation in the various Countries of the EU to which contractual PPP's are subject.

2. In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

The ACE does not share this point of view. The new Directives on Public Procurement bring in the possibility that competitive dialogue may be used in the case of "particularly complex" projects. Such a procedure foresees that the public body would enter into discussions with a limited number of bidders and that all aspects of the projects would be open for discussion. These bidders are pre-selected on the basis of generic information such as track record, economic status and other technical factors. For construction projects it is the quality of the architectural concept that counts the most and it is frequently the case that the best solutions to complex projects come from micro or small architectural firms who would not pass the criteria of the selection phase. Therefore the competitive dialogue process is discriminatory and brings with it the risk that the best design solution will not be achieved for the project.

The ACE believes that the use of processes that permit the emergence of the best design solution are the only processes that should be used for construction works. One such process is the architectural design contest which, unlike the competitive dialogue procedure, permits the selection of the top performer based on substantial material grounds. This arises because of the requirement for anonymity of the participants, which results in the fact that only the "offer" is available for assessment. Furthermore, the selection process used to decide on the best contribution (prize-winner) is undertaken by a qualified, competent and independent jury, which is an essential precondition for a purely quality-based selection.

3. In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.

It is clear that PPP's can be conducted on the basis of already existing Community law. However, it is questionable whether the common legal framework of the Community is rightly balanced in this respect since a PPP has to be conducted under the requirements of the public procurement directive, but they are often categorised as services concessions or franchises. It is hard to understand the reason why building concessions are regulated in the new Community law on public procurement in great detail, but services, service concessions and franchises are only subjected to primary Community law. The existing legal status could therefore be used by public authorities to "escape" into primary Community law.

4. Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

As the ACE is a European representative organisation, it is not in a position to organise, participate in any such procedure. Therefore the ACE offers no response to this question.

5. Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?

It appears to the ACE that the approach of the Commission and of the Community legal framework robustly strives to ensure that there is effective participation of non-national companies in the awarding of PPP's. However, the ACE is concerned that genuine competition is not guaranteed by the current framework as it allows for the use of many criteria that could permit the elimination of viable candidates from consideration. The factor that needs to be underwritten to improve this situation is the transparency of the assessment procedures used by awarding authorities in the decision on whom to award a contract. An extension of the use of the PPP model will further reduce the opportunities for genuine competition as it is a model that inherently favours the large scale organisation. It must be recalled that about 93% of all enterprises in the construction sector are either micro or small enterprises and that they do not have the resources required to prepare bids for PPP's.

6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

Following on from the answer to question 5 above, a Community legislative initiative is desirable only if it can lay down procedures that take account of the structure of the construction sector and thereby allow for the participation of the majority of enterprises in such procedures. It is highly undesirable that procedures might emerge over time that would mean the majority of public works contracts would become PPP's.

7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPP's, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

See answer to question 6.

8. In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?

This is a difficult question to answer due to lack of statistics. However, it is clear that the procedures foreseen by EU legislation in the field of public procurement (of which PPP must be seen as a sub-set) do open national markets to competition from other EU countries. Unfortunately it is not possible to assess whether the restrictions and requirements set down by national laws for the participation of such extra-national competitors do, in fact, provide for genuine competition.

9. In your view, what would be the best formula to ensure the development of private initiative PPP's in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?

The selection of a contractual partner in a private initiative PPP has to be carried out under the basic rules of equal treatment and non-discrimination, as a private initiative PPP is also a form of public procurement. In cases where the participants develop project proposals without the request of the public administration, the application of the rules on public procurement is indeed rather difficult and problematic. Such propositions might be of high quality, and consist of high technical, innovative and economic solutions for existing problems. But the use by public authorities of such proposals as the basis of a PPP is usually impossible, if only for reasons of copyright. Acquisition of the rights of use on the other hand must, once again be seen, and treated, as a public procurement in itself. A call for tenders concerning such a project could lead to the use of parts of the developed proposal by competitors as if they were their own concepts, without being covered by copyright law. Naturally, in this case it is not guaranteed that the initiator of the proposal will be awarded the contract. There is a need here for a remedy of compensation through the law on public procurement in favour of the initiators of such private PPP's.

10. In contractual PPP's, what is your experience of the phase which follows the selection of the private partner?

The ACE offers no response to this question.

11. Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?

The ACE offers no response to this question.

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

The ACE is not aware of any such practices that could not be dealt with through the remedies procedures foreseen by EU law..

13. Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other "standard clauses" which are likely to present similar problems?

The ACE sees that there is a need, in certain limited cases, to have a "step-in" procedure. However, it believes that any such arrangement should be governed by the same level of transparency and non-discrimination as the parent procedures for the relevant PPP

14. Do you think there is a need to clarify certain aspects of the contractual framework of PPP's at Community level? If so, which aspects should be clarified?

The ACE, through its Members and in discussions among delegates from those Members, is aware of significant problems with the use of the PPP model for construction contracts. Principal among these has been the belief, on the part of many public bodies, that because the financing of a project was being sourced from private funds, no use of or recourse to the requirement of the Public Procurement procedures was necessary. This has led, in many cases, to the award of significant contracts of public works without the making of an open call for tenders or expressions of interest from suitable parties. This is clearly anti-competitive and discriminatory, closing many opportunities to both national and non-national operators and is therefore in breach of community law.
There is a need to clarify the fact that the use of the PPP model falls within the scope of the requirements of the Public Procurement directives, even when the money is coming from private sources.

15. In the context of PPP's, are you aware of specific problems encountered in relation to subcontracting? Please explain.

The ACE is aware of specific problems that arise in relation to the use of sub-contracting within PPP agreements. The PPP model for the procurement of buildings is the one model where the architect is often a sub-contractor to the building contractor. This is a problematic situation as it dis-empowers the architect from influencing, in an effective way, the manner in which the construction on site is carried out and on the specification of the materials to be used. It also means that the architect is not permitted to act in the best interests of the client as there is no direct contract (and sometimes not even direct contact) with the client.
This situation carries the risk that the building that results form a PPP will not adequately achieve the requirements of the client and will not be of sufficient quality to give long-term value for money.

16. In your opinion does the phenomenon of contractual PPP's, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

Yes – this is particularly the case because of the fact that when a public body hands over the fulfilment of a public duty to a private body, that private body must then be treated, for the purposes of the particular transfer, as a public body. Rules and procedures will have to be devised to ensure that these duties are then adequately fulfilled by such a private body. See also the answer to question 15.

17. In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

For the current procedures on Public Procurement there is probably no need for further initiatives to clarify or adjust the rules on sub-contracting. However if the Community decides to initiate legislation on PPP's then careful consideration of the rules on subcontracting will most certainly be needed.

18. What experience do you have of arranging institutionalised PPP's and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not ?

The ACE offers no response to this question.

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

The ACE believes that an initiative does need to be taken, as the principles of public procurement should have an effect in this regard. Especially important is the need to clarify the extent to which the private bidder appears as a "public authority" within an institutionalised PPP.

20. In your view which measures or practices act as barriers to the introduction of PPP's within the European Union?

The ACE offers no response to this question.

21. Do you know of other forms of PPP's which have been developed in countries outside the Union? Do you have examples of "good practice" in this framework which could serve as a model for the Union? If so, please elaborate*.*

The ACE offers no response to this question.

22. More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

The exchange of best practice and the regular review of the uptake of new approaches to procurement is always useful. It is therefore desirable that a properly balanced network of actors within the field be established so that these matters can be kept under review.
This question stands out from al the other questions in the use of the phrase *"…social and sustainable economic development"* and it is a surprise to the ACE that it is the only time that it has been mentioned in the set of questions. Clearly the principle objective of the EU at this time is to find the means through which such development can take place and so this matter of equitable social and sustainable development should be at the heart of the debate. Given the dis-empowerment of the architect in the usual approach to PPP's for construction projects, the ACE is very concerned that the widespread use of this model will lead to a noticeable and significant deterioration of the quality of the built environment and hence in the quality of life for the citizens of the EU.

CEDAG

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REACTION TO THE COMMISSION GREEN PAPER ON

PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND
(COM(2004) 327 FINAL OF 30.4.2004)

Brussels, July 30th, 2004

1. CEDAG [1] welcomes this initiative from the Commission, which aims at submitting to a large consultation the crucial issue of public-private partnerships (PPP), because of the importance of this topic in the European social model as well as within a series of debates currently going at that level, as is the case for services in the internal market or services of general interest.
2. CEDAG regrets, on the other hand, that the green paper remains silent on the issue of diversity of entrepreneurial forms, which is central in the European social model. Social economy enterprises are indeed a part of the private sector, but deserve particular consideration. Still, contrary to the companies where the last say always remains with the shareholder, social economy enterprises are characterized by their accountability towards a wide range of stakeholders, what qualifies them in the first place for missions where one cannot take the risk of letting private interests take the lead on the general interest.
3. This is particularly the case in issues like health care, personal services, education and long life learning, whose contribution to the knowledge economy and to the Lisbon objectives may never be overlooked. In those domains, one may consider both types of arrangements evoked by the green paper, contractual and institutional partnerships.
4. CEDAG thus considers that any initiative taken by the Commission in this respect should include an impact analysis, particularly for services provided by social economy enterprises. It indeed needs :
    - to be avoided that social economy enterprises would be discriminated in their access to PPP operations, for instance by procedures which would be only meet the needs of private for-profit companies ;
    - to make sure that those partnerships take into account the whole range of needs at stake (risks of de-budgeting or of unequal risk-sharing between the "partners", …).
5. CEDAG also stresses the ambiguity of the term « partnership » which tends to make lose out of sight that the prime responsibility of the public sector does not so much lie in engaging in partnerships with the private sector than in a regulatory role without which neither economic efficiency, nor social cohesion can find any profit. It is clear that this regulating function will be so the more efficient where it will go together with a large involvement of the organised civil society, according to what is regularly recalled by the Commission in her proceedings on governance.

[1] CEDAG (European Committee for non-profit organizations) is an international non-profit organization under Belgian law, whose members are about 30 national, regional or sectoral associations coming from 12 member countries of the European Union, and whose main aim is to promote and implement active citizenship.

6. CEDAG is also concerned by the growing use of the tender calls procedures as it is used in public contracts, and tends to be referred to as the main or unique way to have a partnership with public bodies.

   If one may not challenge the need for those public bodies to secure their contracts by using this framework, tender calls should not become the only way of having contractual partnerships with them.

   Associations may not be considered as mere providers competing with other types of providers. They have to keep command on their programmes, including their implementation. This principle of autonomy is at the heart of their dynamics. Financial relations between public bodies and associations have to give priority to grants based on a preliminary framework agreement where objectives play a central role.

7. As a conclusion, CEDAG calls for decision criteria where the contribution of social economy enterprises is better taken into consideration, as well as for their better involvement in the follow-up of the PPP process.

Confédération Européenne des Distributeurs d'Energie Publics Communaux
Europäischer Dachverband der öffentlichen kommunalen Energieversorgungsunternehmen
Confederazione Europea dei Distributori Comunali d'Energia

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Livre vert sur les partenariats public-privé et le droit communautaire des marchés publics et des concessions

AVIS DE LA CEDEC

La CEDEC – Confédération Européenne des Distributeurs d'Energie Communaux – représente au niveau Européen des entreprises municipales qui distribuent e.a. l'électricité et le gaz. Ces entreprises fournissent un service d'intérêt économique général et se sentent particulièrement concernées par la consultation lancée par la Commission européenne dans le cadre du Livre Vert sur les PPP.

La CEDEC a pris connaissance du Livre vert de la Commission sur les partenariats public-privé (ci-après «PPP») avec beaucoup d'intérêt. Ce livre vert a pour objet d'amorcer un débat sur la meilleure façon d'assurer que les PPP puissent se développer dans un contexte de concurrence efficace et de clarté juridique.

La CEDEC se réjouit qu'un débat ait été lancé sur les services d'intérêt général (Livre Blanc SIG de mai 2004). Elle souhaite faire remarquer qu'étant donné que les PPP sont principalement utilisés, soit pour réaliser des infrastructures de services d'intérêt général, soit pour fournir le service, SIG et PPP sont indissociables. Il convient dès lors de lier les réflexions sur le PPP et les SIG. En tout cas, il y a lieu de veiller à ce que d'éventuelles propositions législatives en matière de PPP ne devancent pas le débat sur les SIG.

Les PPP sont, dans la majorité des cas, utilisés pour répondre à des besoins de services d'intérêt général, fournis sous la responsabilité publique et comportant des missions spécifiques avec, par conséquent, des obligations particulières pour les entreprises qui souhaitent fournir ces services.

Les auteurs du livre vert partent du postulat que le développement du PPP s'inscrit dans l'évolution du rôle des autorités publiques dans la sphère économique, passant d'un rôle d'opérateur direct à un rôle d'organisateur, de régulateur et de contrôleur.

Toutefois, il existe de nombreux cas dans lesquels les autorités publiques locales souhaitent continuer à assurer un rôle d'opérateur direct. En témoigne le grand nombre de services publics locaux fournis directement par les pouvoirs locaux.

La CEDEC est d'avis qu'une initiative législative communautaire visant à donner un caractère obligatoire à la procédure de passation de concession, n'est pas nécessaire, ni souhaitable, ce pour les raisons qu'elle développe ci-dessous.

- *Respecter l'autonomie locale*

  Les SIG ne constituent pas un simple enjeu économique mais participent au modèle social européen, à la cohésion économique, sociale, territoriale de l'Union.

  Le modèle consistant à mettre en concurrence toute activité économique que l'autorité publique souhaiterait confier à un tiers, ne s'accorde pas avec la réalité dans beaucoup d'Etats membres où les entreprises publiques fournissent leurs services à l'intérieur des limites de chaque collectivité territoriale respective.

Conformément à l'article I.5 du Traité constitutionnel, l'Union respecte l'autonomie régionale et locale. Les Etats membres doivent garder la liberté de choix quant à la définition de leurs services publics, et, corrélativement, du choix du mode d'organisation de ceux-ci.

L'autorité publique doit pouvoir disposer d'une réelle liberté contractuelle, d'une véritable possibilité de négociation avec les entreprises, afin de prendre en compte les spécificités locales d'intérêt général.

- *Eviter l'appauvrissement des services offerts aux citoyens*

  Si la Commission estime qu'il faut créer les conditions d'un environnement plus compétitif, il faut également veiller à ce que le service public soit préservé, plus précisément les conditions d'accès de tout un chacun à celui-ci.

  En effet, les services publics locaux profitent aux citoyens de la collectivité territoriale desservie et leur permettent d'avoir accès à des services de qualité à des conditions abordables.

  Les marchés publics classiques sont des contrats de court terme et ponctuels où le critère d'attribution essentiel du marché est le prix. Or, une mission d'intérêt général touche le long terme et le critère du prix ne peut pas être le seul à entrer en considération.

  Il y a lieu en effet d'éviter que le prix soit le seul critère déterminant pour l'octroi de concessions. Les critères d'appréciation des différentes offres doivent porter non seulement sur les prix, mais aussi sur des paramètres qualitatifs comme la qualité du service, les conditions de l'emploi et le respect de l'environnement. En outre, l'exécution de missions d'intérêt général implique la continuité du service.

- *Eviter la création de nouveaux oligopoles privés*

  En qualifiant systématiquement toute activité "d'économique" dont l'attribution devrait se faire en respectant les procédures de marchés publics ou de mise en concurrence préalable, les autorités publiques courent le risque de perdre leurs propres entreprises publiques quand elles lancent un PPP, parce qu'elles ne savent pas qui, finalement, obtiendra l'adjudication.

  L'obligation de mettre en concurrence n'importe quel service économique établira (d'une manière irréversible) et accélérera le processus de privatisation. La disparition d'entreprises publiques spécialement créées pour offrir un service d'intérêt général conduira en effet à réduire le nombre d'acteurs présents sur le marché. Ce processus conduira à la création de nouveaux oligopoles privés.

La Commission doit veiller à ce que les entreprises locales puissent combattre à armes égales. À défaut, le risque réel existe que nombre de services publics locaux de qualité soient demain privatisés au grand dam des citoyens et au détriment de l'intérêt général.

Toutefois, si l'autorité locale souhaite recourir à une entreprise privée parce qu'elle estime que cela peut contribuer au renforcement du fonctionnement de l'autorité locale, il semble acceptable que des règles et procédures communes soient établies visant à encadrer les procédures d'établissement de partenariats.

L'Arrêt Teckal

Le fait que l'autorité publique responsable de la fourniture du service puisse rester libre de créer un organe spécifique pour ses besoins d'intérêt général est essentiel à sa capacité de choix. Les conditions actuelles de la jurisprudence Teckal sont trop restrictives à cet égard.

L'interprétation des critères de relation in house doit rester raisonnable. Plus précisément, la notion de «contrôle analogue» à exercer par l'autorité publique sur l'entité distincte ne peut signifier un contrôle quasi identique, auquel cas cette condition ne sera jamais remplie. En effet, une entité ne peut, par définition, exercer sur une entité tierce un contrôle identique à celui qu’elle exerce sur ses propres services.

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CEEP ANSWER TO THE GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS (COM (2004) 327 – 30.04.2004)

Centre européen des Entreprises à Participation Publique et des Entreprises d'Intérêt Economique Général

European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest

CENTRE EUROPÉEN DES ENTREPRISES
A PARTICIPATION PUBLIQUE
ET DES ENTREPRISES
D'INTERET ECONOMIQUE GENERAL

EUROPEAN CENTRE OF ENTERPRISES
WITH PUBLIC PARTICIPATION
AND OF ENTERPRISES
OF GENERAL ECONOMIC INTEREST

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CEEP ANSWER TO THE GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS (COM (2004) 327 – 30.04.2004)

INTRODUCTION

On 30 April 2004 the European Commission published a green paper on « Public-Private Partnerships and Community Law on Public Contracts and Concessions ». CEEP takes note of this initiative, as PPP have, and will continue to have, growing importance in the European and even global economic arena. The Commission has always encouraged PPP, as evidenced by a number of texts issued since 1993, and we support this. However we expected the long-awaited green paper to address this major theme in a broad manner, and not just within the limitations of the relations between PPP and the law on public contracts.

We refer to the CEEP Opinion from July 2003 on Contractual Public Private Partnerships (see Annex 1), where we exposed the economic side of PPP, namely the problems of high transaction costs, the need for democratic control (especially with long-term contracts), the effects on public budgets and on the stability pact as well as the commercial problem to deal with, caused by the binding to one single contractor.

On the following pages, we will try to respond to the green paper itself and to the 22 questions, despite of the fact, that we are confused about the different policies of the General Directorates of the Commission: on the one hand encouraging PPP, on the other hand complicating the setting up of institutional PPP via public procurement and concession policy. We believe that every entity that wants to establish a PPP should not be hindered by a restrictive legal framework.

Not to legislate on concessions

The very recent directives 2004/17 and 2004/18 about «procurement» introduce new modalities, which may improve flexibility in public procurement allowing for innovation to be extended to PPP. It is necessary to give time for Member States to transpose and to enterprises to experiment these new modalities. It would be confusing to operators and suppliers to assimilate a new directive on PPP including concessions. It could be interpreted as an inclination on the part of the Commission, to outline in a complete and definite manner the notion of concession, which however has the merit in its current configuration of having been in use over a long time, according to national regulations and traditions, and has contributed to many achievements which have been beneficial to the community.

Such an eventuality would then go much further than the «Commission's Interpretative Communication on concessions in Community law», of April 2000. This document was essentially meant to recall the principles of the EC Treaty, especially as regards transparency and equality of treatment, in other words the obligation to put into competition in a non-discriminatory manner the awarding of public contracts. The planned framing of the law on concessions would in fact consist in applying to them in addition procedures for putting into competition similar to those required by the «public procurement» directives. In particular, the new procedure of «competitive dialogue» would be highlighted.

Yet these procedures are particularly complex and costly, especially the competitive dialogue. Certainly the latter appears to be relatively flexible in that it allows exchanges of views for the purpose of clarifying the issues and the content of invitations to tender. However, it remains stuck in complex precaution procedures and subject to delays and administrative, legal and technical costs. Barring exceptions, we believe one can be satisfied, in the field of concessions, with the general provisions figuring in the Treaty, firstly because most contracts of concessions do not have the lack of precision supposed in the cases subject to public procurement procedures (including the compettitve dialogue planned in the Directives 2004/17 and 2004/18 that is not meant to be used for awarding concessions), and concessions can be adequately controlled by the awarding authorities after a more flexible contraction process, secondly because operators are expected to bear a certain degree of risk represented by the direct remuneration contributed by users, and are thus given a sense of responsibility in due proportion, and thirdly because the EC Treaty must be able to be self-sufficient as often as possible, which seems to be the case here. Moreover it is preferable that over-regulation does not discourage private operators from entering into a PPP. We actually believe that there is no need for a new European legislative framework.

It should be noted that the provisions of the Treaty are complemented in some cases (without changing them), by national law, which in general does not seem to us to have presented a problem so far, given the very limited number of disputes observed in this area. We are therefore surprised that the green paper states (without any other explanation), that «several representatives of interested groups consider that the Community rules (…) are insufficiently clear and lack homogeneity between the different Member States».

Thus, if ever a community regulation was to be absolutely established in spite of our recommendation, it ought to be as flexible, light and mere as possible. Transparency, non-discrimination and equal treatment are the important principles to be fulfilled.

The long life of PPP and their uncertainties

PPP are for the most part long-term, even very long-term projects, which indeed is one of the basic reasons for their social usefulness. As the future is unpredictable, the risks are higher both for awarding authorities and for operators alike. Of course, prudence requires these risks to be evaluated, anticipated and covered as best as possible in the terms of the contracts. But with growing uncertainty over time it is impossible to predict everything even by multiplying the pages of these contracts, and at the same time increasing their complexity and technical costs.

The green paper tends to compensate for these drawbacks by proposing to limit the term of contracts in such a way that the remuneration of operators is «reasonable». But it does not explain this concept, which in our view should rather derive from the laws of the market: the winning competitor is in fact supposed to have offered the most reasonable conditions. Furthermore, according to a very solid financial principle, it is normal that the remuneration be commensurate with the risk taken. These considerations mean that the economic problem posed by the advent of the distant future has no solution: to be convinced of this, one only has to observe that Community law says nothing on the life of such contracts.

Under these conditions, one has to rely on stronger principles than those of the internal market and of competition: this is the sense of article 16 and 86-2 of the EC Treaty which states that the performance of a service of general economic interest shall not be hindered by the rules on competition. The concrete consequence of all this is that in the case of a possible unpredictable event, classical rules of public order relating to public services have to be put into practice (continuity, equality, adaptability, quality etc.), which legitimates the further establishment by the public authorities of additional clauses to the basic contracts, although risking at the same time the inevitable loss of a certain degree of market power. Failing this, long-term contracts no longer have any justification, as they are liable to be called into question along the way.

Relaxing the conditions of auto-production

By the means of a fresh laid notion, the green paper rightly distinguishes between contractual PPP and «institutionalised» PPP (IPPP). With regard to the latter it is worth noting that historically, certain Member States have had and still have a strong and longstanding tradition of auto-production, with services of general interest being generally carried out within local administrations. Then came the gradual formation of public enterprises distinct from the public authorities but 100 % owned by them. In a third stage some of these enterprises acquire to some degree private capital.

A very sensitive problem facing the appropriate public authorities at this stage and given these very gradual changes lies in the possibility which they wish to retain, of awarding their public services unhindered to enterprises with which they are associated. This can be explained not only by cultural, regional or traditional reasons, but by the wish of the public authorities to retain direct influence on the provision of public services in the general interest permanently, without refraining, in the case of public enterprises, from the efficiency gains of an entrepreneurial provision of the service and, in case of institutionalised PPPs, additionally from the advantages from the use of private know-how, private co-financing, etc. Besides, public authorities on the local level may risk, because of national legislation prohibiting their entities from operating outside of their territory, the disappearance of such an entity in case that it looses the tendering procedure in its home territory.

In the light of these considerations the problem arises of the scope of **«in house»** activities, being able to receive their missions without having to be subject to the uncertainties of being put into competition. And yet, as stated in paragraph 63 of the green paper, the Teckal case dating from end 1999, which is the current legal reference, imposes very draconian constraints for admitting IPPP in its definition of «in house». The green paper adds, but unfortunately without providing other explanations, that three prejudicial questions have been referred to the Court of Justice with the aim of obtaining additional clarifications on the impact of the Teckal case ; but it would appear that these prejudicial questions will not fundamentally change the existing situation. It seems to us to be high time to give the floor to the politicians so that they can go beyond the purely legal aspects or «economic considerations», and act appropriately. We feel in fact that there are margins for manœuvre, which would enable

the «Teckal» criteria to be made more flexible, without calling into question the full control by public authorities over their IPPP operators.
In particular this could be obtained by a simple majority of public funds at the level of 51 %. In this respect the directive 2004/17 (Art. 23) provides us with an example in retaining the concept of «affiliated undertaking», in other words in the case in point, «any enterprise on which the awarding authority can exert, directly or indirectly, a dominant influence» through one of the three criteria of simple majority defined in article 2, paragraph 1, point b.
Similar considerations could be made on the legal basis of article I-5 of the text of the Constitution for Europe which states as follows: "The Union shall respect the national identity of the Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including those for ensuring the territorial integrity of the State, and for maintaining law and order and safeguarding internal security". In other words, the sense of regional and local responsibility, (which is moreover acknowledged by the Union), is so strong for certain Member States, that one have to pay attention not to question their equilibrium of subsidiarity. The state is still playing a role in the economy and the observation of the Commission that the state is "moving from a role of direct operator to one of organiser, regulator and controller" cannot be supported in a general way.
Furthermore, it is difficult to understand the geographical conditions of speciality (principle of territoriality) imposed by case law on «in house» enterprises (when meantime business conditions of speciality are not required), which in fact run contrary to the principles of freedom of establishment and of circulation of capital.

In this field, there should be also some reflection on the establishment of **de minimis rules** particularly on the application of public procurement law concerning small and mainly locally acting PPP. This could provide for more flexibility and legal security in the process of setting up PPP. Possible criteria could be the pure local dimension, the criteria laid down in the Monti-package, a public legal form, etc. Alternatively, less strict rules for those PPP could be taken into account.

For innovative public contracts

In the field of IPPP, there are other eventualities, which are not explored, in the green paper. The concerned cases where several public authorities form a group or cooperate with one another in order to entrust missions of public service or of general interest which would be common to them. This eventuality is far from being theoretical in the increasingly complicated context of the modern economy and of the promotion of cooperation between local authorities in many suburban zones. It must be stressed that many IPPP are in fact «public-public partnerships» and to be considered like in-house activities. Public-public partnerships like "intercommunalles", "Zweckverbände" and numerous French société economique mixte are a form of pure administrative reorganisation and should not implicate any awarding and therefore no procurement.
Generally, if at all necessary, it would be neither fair nor pertinent to require a double round of putting into competition. It would be possible in certain cases, such as observed in Italy for example, to expand the methods of putting into competition when these are necessary, by choosing either a competitive selection of the private partner (with an appropriate visibility of the tasks to be accomplished in fine), or a competitive selection of the entities awarded the charge of a public service.

Much more generally it seems to us that the green paper is too rigid in its economic and legal categories, which does not encourage innovative industrial and financial initiatives. Thus the reduction of the scope of public contracts to public procurement and concessions alone does not in our view leave sufficient place and consideration for the diversity of the current (PFI, new French ordinance on partnership contracts between public and private sectors, right of local self-administration in Germany, Merloni law in Italy, etc) or future formulas.

For soft instruments

To sum up, it should be noted that the subject of the fulfilment of public projects is very old. It first appeared when the concept of a state took shape and when these new entities carried out or had executed missions of collective interest (army, granaries, *panem et circences*, royal workshops etc.). We should therefore not be surprised that certain Community rules of relatively recent creation can be or have been «not applied or badly applied». Should one react to this situation by over-regulation or by coercive and contentious measures? We do not think so, and recommend rather less harsh measures. We believe that the Communication of 2000 on concessions has already been most beneficial in promoting awareness on the part of many of those involved in the articles of the treaty. Similarly let us note that in France for example the technique of 'adossement', described in substance at the end of paragraph 50 of the green paper[1], is no longer used. In the same way it is probable that directives 2004/17 and 18, which were under discussion for a long time before being adopted, will accelerate the dissemination of Community concepts relating to transparency and equality of treatment for public procurement contracts.
We therefore advocate non-aggressive actions such as a reminder and re-circulation of the rules of the treaty, and compendiums of good (or bad) practices. If one were at all costs to legislate further on concessions– which itself would constitute a failure – it would be advisable to envisage rules which are as light and flexible as possible, and in any case much more flexible than the rules on public procurement contracts. Finally also, the subject of **«in house»** seems in our view to require significant and urgent measures in the direction of more flexibility.

Along the same lines, let us add that for their part the particularities, especially industrial ones, of public enterprises, which manage networks, have been taken into account in directives 93/38/EEC and 2004-17/EC. The rules are more flexible than those imposed on State administrations or local municipalities. Measures relating to public–private partnership relations should not be equated with procedures concerning "*tendering authorities*" and those concerning "*tendering bodies*" in the sense of directives 93/38/EEC and 2004-17/EC.

Other issues that should have been addressed by the green paper

The green paper addresses 22 formal questions but lots of practical questions remain, especially in the field of IPPP, such as,

[1] Extension of the period of an already existing motorway concession, in order to cover the cost of works to complete a new section (generally with a worse profitability)

- As long as only cases falling under the application of the public procurement directives are concerned, there is no major problem. But how to shape the procedure when a third partner must be found ? In the ex novo case : One call for tender? Or two (if the transparent method for the search for the private or public partner can be considered as a call for tender)? More difficult: How to define the procedure when a concession is in question when looking for a partner?

- How to harmonise company law with the necessity to limit temporally the participation of the private or public (third) partner? Company law assumes that such participation is of a long-term nature.

- What will happen to PPP currently set up without any prior call for tender and what about PPP set up according to national legislation that do not (fully) comply with the EC rules? Fines? Amnesty? Transition periods? Re-completion of the different contracts and economic entities taking into account all the financial risks and those concerning the continuity of the services in question? This would mean that both the private and the public partner lose their investments.

- Why should, under such circumstances, a private partner be interested in setting up a PPP?

- What could be the benefit for the public partner if the private partner invests no more than what it gets back once the contract comes to an end?

ANSWERS TO THE QUESTIONS

1. What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?

The term PPP applies to a large number of issues and investments, and operation projects. Contractual PPPs are often an answer to specific rules and reflect a huge diversity. Consequently, various forms (from privatisation, outsourcing, financing) and different models (operating model, concession model, management model, …) of PPPs exist. PPPs respond to a broad spectrum of needs. In general, they are successful, like the large number shows. However, there are also some examples for failures.
The scope of the Green Paper is too small to answer the question with all its various aspects in an adequate way. However, we collected some examples (contractual as well as institutionalised PPP) of good/bad practices (see below the annex 2). Also in the annex 2 we provide three national set-ups and regulation on PPP. CEEP will be happy to provide more information if needed.

In the context of question number one, CEEP thinks that a more precise definition of the term "public" would be interesting and should perhaps even be compulsory. Why are there, for example, different definitions in the transparency directive and other documents of the Commission? We noted that the official papers of the Commission do not give the same meaning to "public". We think that it is essential to give a more precise definition of what is called "public".
The problems of a common understanding and common definitions apply, by the way, to many terms, which play a key role in this Green Paper.

2. In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

Some elements of the newborn "competitive dialogue" can be regarded as a potentially adequate instrument, but its scope of application is too restricted. For example there is no need for a prognosis (as foreseen in Art. 29 par.1) or at least three candidates (following Art. 44 no 3 par. 2). Its preconditions have to be widened (e.g. allowing sub criterion like quality) and the competitive dialogue must be tailor-made for its use as a means of supporting the public authorities as well as their public or private contractors when creating public procurement type PPPs. One crucial sub criterion must be 'trust'. Furthermore, no a link must be made between service concessions and the competitive dialogue. In this field, the negotiated procedure must remain the normal procedure and must not be replaced by a new tool, which is not tried out and for which the specifications are not known yet. We suppose that the competitive dialogue could be a useful instrument within the public procurement legislation. It has the advantage of being flexible in the sense that a discussion can take place between public contractor and operator. However, it has the disadvantage of being complex, heavy and costly. Therefore one has to be prudent.

The competitive dialogue in the public procurement directive is aimed at a situation where the contracting authority does not know what to do relatively to its contract. However, in the case of most PPPs and most concessions, the public authority perfectly knows its needs and what it wants. On the contrary, our experience on concessions shows that the principles of the Treaty are sufficient.

In the unlikely case that the Commission does not share our view, any procedure has to be light and easy, and the freedom of choice of the public authority, which is close to the needs of the citizens, has to be respected. There would be a strong need for flexibility with the definition of award criteria (like trust).
As far as they are concerned, public enterprises managing networks, as'' "*tendering bodies*", content themselves with the procedures set out in directives 2004-17/EC when awarding contracts which could be described as PPP. These procedures do not reflect that of the competitive dialogue which is much more cumbersome. Public network enterprises should therefore not come within the scope of application of any new provisions with regard to PPP, while the current rules already ensure respect of the basic principles of the Treaty.

3. In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.

CEEP sees no problematic point as concerns service concessions, because public procurement law should not be applied unto them for the moment present and never should. Furthermore it is not suitable in the mentioned case. One reason among others is that service concessions imply a constant providing and are not a single case of procurement. That is in particular the case of public transport services in city regions. The same applies for the institutional PPPs.
But there is a general problem rising from some national laws: certain national provisions at municipal level in some Member States forbid local enterprises from being active outside the area of municipality.
Last but not least and becaue of the very diverse conditions of risk and risk transfer, Member States need a flexiblility to adapt to adequate solutions.

4. Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

See question one and Annex 2 and 3 in regard to IPPP.

5. Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?

The sectoral legislation as well as horizontal law (competition law, revised directive on public procurement, etc) allow *a priori* to ensure effective participation. In the case of the

revised public procurement law, this is too recent as if we could answer the question appropriately. We need some time in order to first gain experiences for us to and establish a true opinion.
Looking at Services of General Economic Interest (SGEI), we have to consider that the requirements are very complex and, for this tendering procedure, must be as flexible as the situation given. There might be some problems contracting SGEI; which need special consideration. The public tendering procedures are just not flexible enough regarding the performance of SGEI.

Competition is guaranteed through European law, and the existing legal framework allows participation. If there are sometimes no offers/competitors, it is due to the high costs and low interest from private investors. Sometimes, there are simply no real, solvable markets.

One can assume that as time goes on, more and more responses originate from non-national and overseas suppliers.

6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

In principle we do not see a need for new legislative initiatives. Especially not, if it implies public procurement rules. We refer to our introduction part where we stressed that we are not in favour of rules for concessions. However, we have to consider, that in some cases some interpretation of European standards (e.g. in-house and de minimis rules) is desirable.
Within the existing system, there is no room for considering aspects such as self-administration of authorities or local democracy (including some freedom on how to organise services at the respective level). Therefore, it should be discussed how to introduce the target of more respect towards, and better compliance with, national political and constitutional structures in the context of Community law on public procurement contracts and concessions. This would be a new category within the single market concept. Such an argument could be based, as a sort of pre-impact, on the draft Constitutional Treaty, particularly on its article I 5. The first two sentences of this article read as follows: *“The Union shall respect the equality of Member States, before the Constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including those for ensuring the territorial integrity of the State, and for maintaining law and order and safeguarding national security”.*

The optimal recognition of the principle of self administration (that includes the right of self organisation) of public authorities would be the acknowledgement of a right of choice for the public authorities providing them with more freedom to decide under certain conditions (which have to be defined more accurately) whether they submit a service to tender or not.

7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPP, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

The reasons and the establishing of PPPs are as different and individual as those of concessions, contractual and institutionalised PPPs. There is **only one common feature: Transparency of the reasons should be guaranteed**.

There are **no objective grounds** for the mentioned act, for:

- the nature of concession consists in the (partial or total) **risk transfer** from public authorities to private contractors, and the formal agreement by which to shape the risk sharing has to be left to contractual initiatives by parties, due to the enormous difficulties related to the classification and examination of all the possible risk causes in all different contexts and the possible contractual mechanism to manage them, being a basic condition to give up a Community legislation on this subject ;
- the **duration of the concession** agreement, has to be determined considering the investment depreciation and remuneration, but could also involve some renegotiation procedure related to monitoring activities carried out by public authorities that are quite difficult to regulate on Community basis ;
- an obligatory public tendering for contractual PPPs and service concessions would contribute to oligopoly markets and discriminate SMEs, which cannot pay strategic prices.

8. In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?

CEEP agrees with the principle that everybody should have access. However, the proposed service directive and its “country of origin principle” may pose various problems of coherence in this field.

We also believe that equality of treatment does not only mean adequate advertising, but it implies other relevant difficulties, among which we mention

- the formal assignment of task that may lead to the exclusion of a bidder from a procedure, since the nature of the formal assignment of task is not really clear that may lead to the exclusion of a bidder from a procedure (the participation criteria should be designed in order to allow the maximum possible number of participants)
- the possibility of potential equal knowledge among participants is not only related to procedure advertising, but it relies on the immediate availability of all relevant material concerning the awarding procedures, including public funds’ availability and regulation. Meanwhile it is sure that progress has to be made on the advertising in advertising issues: e-procurement is in particular a good way to contribute to this improvement.

9. In your view, what would be the best formula to ensure the development of private initiative PPP in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?

The principles of transparency, non-discrimination and equality of treatment have to be respected at any time, but it does not only mean including the PPP initiatives only under the field on public contracts, since it involves many other relevant aspects. CEEP is convinced that it would be **unrealistic to apply calls of tender** for private initiative PPPs: private companies would be very reserved regarding the risk that its idea is probably performed by another company that would get the performance contract as a result of being successful in a public tendering procedure, even if there was a kind of reward for the initiating company. On the contrary, **introducing the public procurement procedure could lead to the end of any private initiatives** (like organisation of social and cultural projects and so on).

To manage such initiatives **the related legislation has to adequately balance many different problems**, one of which – but not the only one – is the respect of public procurement legislation.
On this matter, an interesting example is the Italian law on Project Financing, concerning the realization of public works through public authorities initiatives in which there is an adequate consideration for private proposals also on the definition of the projects to be realized. There were huge expectations about the effects of this legislation (called Merloni Law), but the final results achieved are disappointing, due to the very limited use of these instruments by operators. The main reason is related to a **"crowding out normative effect"**, consisting of the great attention that the Merloni Law pays to the respect of public contracts' legislation that has lead to neglect the financial implications.

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

There is no overall answer to this question because every single case has to be considered differently. Generally spoken it can be stated that a positive result depends a lot on a good preparatory work. A risk and cost balance has to be prepared in advance, and SGI's adaptability principle has to be put in action for further modifications to be dealt with.

11. Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?

CEEP is not aware of such cases.

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

CEEP is not aware of such practices or mechanisms.

13. Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other "standard clauses" which are likely to present similar problems?

"Step-in" arrangements are **usual and necessary instruments** developed in the field of civil law and are necessary to adapt the theoretical conceptions and contracts to reality and the further developments. The arrangements do not cause problems while guaranteeing transparency and equality of treatment.

"Step-in" arrangements are a consequence of reality, which cannot be completely governed by bureaucracy. PPP contracts are normally long-term contracts. Should there be changes in condition, a normal contract adjustment should be possible. An obligatory public procurement would endanger the continuity of services. For lack of these requisites, no private investor would be willing to participate in a PPP.

14. Do you think there is a need to clarify certain aspects of the contractual framework of PPP at Community level? If so, which aspects should be clarified?

Transparency of the intention should be guaranteed. Besides, the public partner should have the greatest possibility of selection of a partner and to create the legal framework (the contract) and the conditions. Creating complicated rules in this field would reverse the aim of a PPP: Instead of avoiding inefficiency and heaviness, this would lead to even more bureaucracy (publishing all the aspects and states, surveyance etc.). Today there are already examples where the costs are higher than the value of the contract. The principle of appropriateness should be strictly applied.

15. In the context of PPP, are you aware of specific problems encountered in relation to subcontracting? Please explain.

A PPP can be a contracting authority, therefore subcontracts have to be awarded; this is not the case for service concessions. Recently it has been observed that social and employment rules are bypassed through subcontracting. Certainly one of the reasons is, that the longer the chain of subcontracts, the less control the contracting authority has regarding the public service (loss of quality, non-sustainable handling) can be assigned.

16. In your opinion does the phenomenon of contractual PPP, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

The performance of a private partner, which has been found in accordance with the EC rules, falls under its responsibility. There is no further need for even more rules and procedures that has to be fulfilled. Tendering out of subcontracts would lead to a more expensive main contract. Every additional obligation applies more efforts, inappropriate expenses and delays.

17. In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

A further initiative would mean completely regulated markets and limit personal initiative. Therefore we see no need for a supplementary initiative.

18. What experience do you have of arranging institutionalised PPP and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not?

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

Combined answer to questions 18 and 19:

The consideration by the European Commission for the first time of the existence of the institutional PPP constitutes a happy and significant advance. This type of frequent PPP is in fact on the rise throughout the European Union (more than 3000 enterprises out of the 17000 EPL listed). At the local level, an increasing number of IPPPs contribute to improving the services. As a consequence, they feel that a good and trustful cooperation with a third partner is of utmost importance and that the authority should be able to keep its direct influence on the supply of a service.

In Annex 2 and 3 we provide some examples of national set-ups on PPP and some practical examples.

CEEP is of the opinion that there is **no need for a European directive or regulation**, but some clarifications are necessary in positive EU legislation, like a clear definition of in-house and de-minimis rules. Sometimes, national legislation is needed. It is up to the Member States to decide **how to shape** their PPP legislation. In some countries, the legislators have adapted to European rules on PPP by introducing a separate national legislation (e.g. Italy).

In the field of institutionalised PPPs, the free mode of a partner should be guaranteed. Not only legal but also practical aspects point to this: The public entities are responsible for the result of an institutionalised project or the performance of an SG(E)I. So, they have a crucial interest in the success of the project and should also be able to have a strong influence upon it. They can control public enterprises for instance; whereas this is not sure when the choice of a partner is just the result of a fix procedure and a public entity is nothing else than the administrator of such a procedure.
CEEP underlines that the choice of the partner has always to follow the principles of transparency and non-discrimination. Furthermore, a **balance of interest** with the competition rules and with Aritcle 86 II and 16 of the Treaty has to be made.

Having in mind the principle of subsidiarity, we notably present the "**freedom of choice"** criterion, which is based on the Article I-5 of the future constitution and already practiced in the field of national constitutional and positive law. It gives the public authority the choice between three solutions in order to organize SGIs. Within the range of solutions, the public authority guarantees the Treaty principle and is responsible for democratic control.

Freedom of choice means several options, among which we mention the following three:

1. Public procurement

or

2. The establishment of a mixed ownership enterprise (MOE), ensuring the complete and rigorous respect of national and community legislations; in case public authorities want to entrust their own enterprise there must be a possibility without public tendering;

or

3. The setting up of a totally public enterprises (auto-production),

The first option is a literal implementation of the community law on public contracts to the concession of SGIs.

The second solution, the mixed owned enterprises or IPPPs, is more complex, involves more opportunities and risks. The following illustrates this:

The Italian reform approved by the end of 2003 is based on the fundamental idea of allowing to public authorities a range of solutions within the framework of EU Treaty principles, balancing different questions in a way that appears very forward-looking. According to such reform, the organization of SGI's prescribes three forms: a) public procurement; b) MOE with the compulsory tendering procedure for the selection of the private partner, according to Italian and European legislation; c) in house providing (IHP) in the literal definition of the Teckal Case.

The efficient functioning of mixed ownership enterprises (MOE) asks for a clear and certain legal framework concerning the forms of cooperation between public and private partners, probably identifying this solution with what has been called Institutional Public Private Partnership (IPPP). This solution requires an adequate ruling on:

- - the boundaries between the management activities, on one hand, and programming, monitoring and regulating activities on the other hand, providing for a coherent separation of roles and responsibilities among the different subjects involved, with particular attention to the contract administration and the assignment of tasks, that should also introduce rules on risks allocation and management between the service provider (Institutionalised PPP) and the authority entrusted of controlling (contracting authorities);

- - the appropriate degree of flexibility in defining the allocation of management tasks and responsibilities between the partners when the selected private partner does not have the control over the enterprise, because of a minority shareholding participation ;

- - the selection procedure, that has to be simplified as much as possible, to meet in the short term the requirement and the ever increasing needs and expectations of the citizens;

- - the subject-matter of the contract or concession, in order to clarify in advance that the activities carried out by the company are the ones foreseen in the selection procedure;

- - the concession duration, in order to establish ex ante that the procedure refers to a service provision for a predetermined and not extendable period of time, unless the repetition of the initial procedure.

In the third option, public authorities currently exercises a control over its own enterprise, which is similar to that which they exercise over their own departments and, at the same time, that enterprise carries out the essential part of its activities with the controlling authorities. The third option is the application of the commonplace concept elaborated in the Teckal Case by the European Court of Justice (note CEEP proposes below and in the introduction “relaxing the conditions of autoproduction” to enlarge the Teckal criteria). The third option includes the notion of public public cooperation (intercommunales, Zweckverbände, etc).

Whatever the finally agreed definition of “in-house” and its scope, local authorities must keep the freedom to choose between different ways of operating and the extremely divergent national contexts have to be taken into account. Therefore, CEEP believes that it is up to each Member State to define the criteria for control over an enterprise by a local authority enabling an “in-house” solution to be established. Only the criterion of at least 50 + X % ownership of the enterprise by the local authority must be retained for all Member States.

20. In your view, which measures or practices act as barriers to the introduction of PPP within the European Union?

Our experience shows that the barriers differ widely. Within national conditions incertitude, there is no interest for the private sector to invest. Other barriers mentioned are the fiscal aspects, state aid aspects, problems with VAT if a private company receives financial support, etc. Furthermore, public authorities sometimes lack the human and financial resources to define the criteria.

On the other hand, the large and increasing number of PPPs shows that there are no major problems and that too strict rules lead to a restriction of flexibility. The more, we fear that there would be even more barriers through new European rules

21. Do you know of other forms of PPP, which have been developed in countries outside the Union? Do you have examples of "good practice" in this framework, which could serve as a model for the Union? If so, please elaborate.

We agree that an exchange of views in order to find models of good practices is desirable and that it should not only be looked at PPPs from a purely legal viewpoint. Thanks to the freedom of organisation of PPPs we have lots of experience and many people outside Europe as visitors are, keen on getting information about how our PPP work. This shows the necessity of free organisation under the Treaty principles. Structural funds for PPP and the exchange with the new Member States have had positive effects. The same applies for development aid and joint ventures.

22. More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

CEEP proposes that an observatory of PPPs should be put in place at European level. Such an observatory should be independent and look at public procurement, contractual PPPs, concessions and institutionalised PPPs. We feel a need for results from an observatory before considering further improvements. The observatory in question could be combined with the SGI observatory and monitor transparency, non-discrimination and the proper functioning of PPPs, which contribute to the quality of services. Such an observatory should involve the social partners and the civil society.
The observatory should analyse and provide a platform of exchange of good practices. It should not have any prejudicing effect and comply with the principle of subsidiarity.
We draw the attention of the Commission to the fact that an interesting network of exchange and benchmarking in the mentioned field exists already within CEEP.

ANNEX 1
to the CEEP Answer to the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions

CEEP OPINION ON CONTRACTUAL PUBLIC PRIVATE PARTNERSHIP (CEEP.2003/AVIS16)

CEEP POSITION ON CONTRACTUAL PUBLIC PRIVATE PARTNERSHIPS (PPPs)

1. Introduction

There is a trend towards an increased involvement of the private sector in the development and funding of operation and investment for services of general interest (SGI). This should be welcome as in certain circumstances it may bring improvements in the quality of these services and, by making available resources which could not be obtained by other means, notably for capital investment, thus making it possible to implement projects considered vital in socio-economic terms. However, this shift towards the private sector can only be accepted under the condition that there is no systematic promotion or policy towards fulfillment of public tasks through the private sector instead of the public sector. The concerned state or sub-state level must have the possibility to choose how the services are operated and provided, including provision with their own enterprises or through various forms of PPPs. The limitations which the Stability Pact places on the level of government debt also provides an inducement to governments to adopt such forms of partnerships. The EU indeed supports the use of private funding, for example for the development of Trans-European Networks as reiterated in the Commission's communication "Developing the trans-European transport network: Innovative Funding Solutions – Interoperability of Electronic Road Toll Collection Systems" of April 23rd 2003.

There are cases in which greater reliance on the private sector has been rather successful (e.g., the liberalization of air transport), for example in effecting changes in management culture. In other cases, however, the consequences have been extremely damaging, not only in terms of the effects on ultimate costs to public authorities but also on the quality of service provided. The privatisation of rail infrastructure in the UK is a case in point.

This position statement aims to set out the potential difficulties in the use of such partnerships, and to identify the conditions for the successful use of private funding for services of general interest. Because of the adverse impact which some forms of PPP may have on public finance and on the quality of public services provided, it raises the question to what extent the appropriate use of PPPs can be a matter of European concern. Or should it better be kept at national level, according to the principle of subsidiarity? Which added value could a European framework provide, given the fact that a legal basis for Community action is not obvious and that the Commission is committed to article 295 of the treaty which guarantees the ownership structure of a Member State?

Finally this paper defines the field of action in which the EU, within the scope of the communities competencies could help ensure that the users of SGIs and the taxpayers who in part finance them may reap the benefits of public private partnership while avoiding the risks it may pose. 2

The paper addresses primarily the form of contractual PPPs. The neighbouring sector of institutional PPPs needs a separate consideration. In particular, given the special interest of mixed economy companies in the perspective of public private financing, the CEEP plans to issue a specific opinion paper on that subject at a later point of time as well as some reflections about the relation between public procurement and PPP.

2 Definition

Various definitions coexist concerning PPPs, illustrating the wide margin for interpretation of the concept. One of the broadest is used by the United Nations Development Program UNDP: « The term PPP describes a spectrum of possible relationships between public and private actors for the co-operative provision of infrastructure and/or services ».

PPPs can take various organisational forms, some of them institutional such as mixed economy companies, some of them of more contractual form like concessions.

Mixed economy companies are public private partnerships that are not limited to a more or less formal method of co-financing. They take the form of enterprises, which are both financed and managed jointly, and to which the implementation of the common project is entrusted jointly by public and private actors. The CEEP considers this form of PPP as particularly adapted to the operation of SGIs, as experience has shown that it distinguishes itself from other forms of PPPs by its stability and security over time. Given the special interest of mixed economy companies in the perspective of public private financing, the CEEP plans to issue a specific opinion paper on that subject at a later point of time.

Based on a few core characteristics of PPPs, the present note outlines some of the problems that contractual PPPs most commonly face. In this respect, we consider the situation of a public authority, which, respecting its obligations wishes or has to retain the overall responsibility for a service or infrastructure.

This applies to among others SGIs which cater for a social demand which has been commonly acknowledged as vital for the collectivity and which cannot be satisfied by private initiative alone. In this situation, it is up to the public authority to meet this demand by an “in-house” solution or by relying on public, private or mixed operators to provide the service on its behalf and who are, in exchange, compensated financially or otherwise for the cost of meeting those public service obligations which cannot be provided on a purely commercial basis.

All forms of PPPs differ from public procurement contracts in the degree of cooperation between the operator and the public authority: from the funding to the conception and realisation of a project, or the provision of a service, the operator plays a vital role going

[2] At a later point in this paper CEEP tries to asset closer the legal basis of any EU action, especially with regards to subsidarity and Art. 295 of the treaty.

far beyond a classic client/supplier relationship.3 PPPs involve a greater transfer of responsibility to the contractor. Instead of the placing of contracts for individual parcels of work or services, on a “gross cost” basis, PPPs tend to involve a much broader package, with remuneration including a greater degree of risk – e.g. an annual service charge including incentives for performance, or from direct receipts from final users, or infrastructure usage charges.

Compensation by the public authorities may take a number of forms:

1. At the minimum, it may involve non-financial compensation – for example the granting of exclusive rights, e. g. to compensate for a requirement to provide universal service, or the grant of commercial or land rights (e. g. property development at stations on a new rail line)
2. Financial assistance to cover operational losses
3. Direct financing of infrastructure by the authority: The authority may pay directly (or via the operator) an annual service charge to an infrastructure manage charged with building, maintaining and/or renewing the infrastructure. Here there is a choice from a whole variety of combinations concerning the functions of design, build, finance, manage, transfer. In each case public financial support covers not only the direct financial shortfall expected on a particular operation but also the funding of investment required and the risk borne by the contractor involved.
4. Transparent internal or external cross subsidies

3 The risks posed by private involvement

The varied experience gained in recent years of different forms of public-private partnerships highlights the problems to which they may give rise and helps in identifying the factors conducive to success or failure in implementing PPPs. Past experience points to a number of factors that should be considered in the design and evaluation of any proposed PPP:

Specification risk

The creation of a PPP requires that public service requirements be incorporated within a long-term contract, e. g. through contractual obligations or through appropriate incentives or penalties. It is however in many cases very difficult to draw up a contract which caters for all the combinations of circumstances affecting the provision of a public service at a given moment. – let alone one which will allow for changes in public service requirements, operating constraints, economic circumstances etc. over time.

- Private partners may be tempted to do work to minimum acceptable standard, in order to reduce expenditure (note the case of Railtrack);

- It is a major challenge to integrate such factors as environmental, social, safety, and aesthetic aspects within the contract, to measure performance in these areas, to transform them into legally enforceable terms and to make appropriate financial allowance for them.

[3] See also : Interview with Jonathan Todd ; Commission’s spokesman in : *Le Moniteur* ; april 25th 2003

- It may prove difficult to ensure that the contractor gives due weight to impacts arising after the end of his contact and in particular to activities with long-term and uncertain pay-offs which depend on research and/or development and long-term environmental and social liabilities.

Technological risk

Private lenders are reluctant to lend if a project is dependent on new or unproven technology. With many PPPs it is necessary to select consortia, typically including suppliers of key equipment, to undertake the work. This inevitably imposes a constraint on the technical choices available to the client, who cannot “cherrypick” for example the individual suppliers offering the best technical solutions to his main requirements.

Meanwhile technical innovations arising after a contract has been placed may either:

- Allow a contractor to reduce his costs, in which case it may be difficult for a client to obtain a share in these gains; or
- Create the possibility of improving the service to users - which however it may only be possible to achieve through a contract variation, at disproportionate cost.
- If the contractor is unwilling or unable to procure the new technology concerned, it may be necessary to forgo such improvements completely. In general, by locking the client into a single supplier, the client will suffer over time because he will not be able to go to the market periodically in order to flush out the best available technology and the most competitive prices then prevailing.

Contract management risks

- Depending on the organisational form of the project, the necessary division of responsibility between infrastructure and service providers, may blur lines of responsibility and make it difficulty to achieve an optimal adjustment between client requirements and the facilities provided.

- Inflexible contractual obligations may take precedence over real user requirements and priorities as well as their possible evolution: often, the public authority may have almost no right to intervene if no special provisions are made in the contract.

- The legal efforts to enforce contracts in practice, or, in the worst cases, to terminate contracts due to unsatisfactory performance, have proven to be considerable and result in the diversion of efforts on both sides.

Completion risk

Experience has shown that one of the key issues concerning PPPs is the risk whether or not completion will be achieved, known as completion risk. This risk is rarely accepted by commercial project lenders/investors, who will tend to cover themselves by turning towards other private sponsors (guarantors) or possibly other parties.

Even if this risk can be absorbed in a number of different ways, it generally results in complex financial arrangements.

In the simplest structure, project sponsors would guarantee repayment of the loan until completion is achieved. A contract for infrastructure project financing would give the project lenders recourse to the company responsible for construction of the project if completion is not achieved on time.

The remedies awarded to banks for breach of the contract will usually include a level of liquidated damages sufficient to cover the debt service. Among other methods of covering completion risk, we can quote “the analysis of the bankability of the project".

Such complex financial arrangements obviously require from the public partner specific skills in this field for financial analysis purposes.

Market considerations

Where investment is involved, private finance usually requires a long-term contract concession to be given to a single supplier or consortium. Not only does this reduce the range of contractors who are able to compete (excluding de facto small and medium enterprises) and effectively suspends competition for the period concerned, but it also locks the public authority into a single supplier. In this regard, one can identify risks of:

- Setting up a rigid contract, which may become increasingly out of line with public service requirements as time goes on.
- Higher costs and constraints on choice in dealing with improvements requested by client, new legal requirements etc. in a “single contractor” situation.
- The opportunity for the contractor or consortium to make excess profits, which can be used to help, lower the prices of bids they may make for other projects.

Even when mitigated by the possible intervention of a regulator, these impacts cannot be fully excluded.

Financial implications

Private contractors require a higher return on capital and need also to charge sufficient to outweigh the risks they are taking on: because of the scale of their activities, governments are much better able to bear major risks. The use of private finance is thus usually considerably more expensive than raising funds through government borrowing.

In practice, moreover, private finance creates new risks, in terms of the bankruptcy or failure to perform of the supplier. In addition to the very heavy set up time of some PPPs, they more generally require a long-term commitment of annual funding by government which cannot be reduced except at heavy cost e.g. in the event of a financial crisis or if the asset concerned becoming redundant. That long-term commitment may be so heavy (e.g. €1.5 billion per annum for the London Underground PPP) as to risk crowding out other investment in future and adding significantly to future government indebtedness.

Private finance may thus – as in the case of Railtrack - result not only in higher annual outlays in the future, but also increase the potential liabilities if things go wrong. One has to be careful about contract clauses referring to excess profits, gifts of land but also to some forms of state guarantees, which might be considered as state aids.

During the contract period, the potential financial benefits of private finance due to e.g. sub-contracting or technical developments accrue to the contractor, not to the funding authority. Meanwhile, the involvement of private finance in services of general interest might, in some cases, lack transparency and accountability, as cost and performance data may be treated as “commercially confidential”.

4. How real is Risk sharing ?

One of the key justifications used for the employment of private finance is the transfer of financial risk away from government and taxpayer to the private sector. Such financial failures, however, as that of Railtrack or Air Traffic Control in the UK clearly showed the limits on the ability of private operators to bear the different types of risk (mentioned in paragraph 2) involved in providing many public services.

In the end, where a service is essential, government will simply have to spend whatever is necessary to ensure the service continues (if for example a private supplier goes bankrupt or fails to deliver the required service, or cannot raise funding because of the collapse of the stock market). Indeed, many PPPs include some form of explicit government guarantee.

Such a guarantee can be justified in terms of public opinion and consumer satisfaction since it is the public authority that is held responsible if a PPP gives unsatisfactory results (financially speaking or, more often, in terms of service quality).

This means that in such cases the transfer of risk to the private sector is illusory. The resort to private finance does not avoid debt: it simply disguises them potential debts by turning them into “contingent liabilities”. The risks should be fully recognised in evaluating the use of private finance.

5. Conditions for success of public-private partnerships

The prime objective in using private partnership should be to make use of the potential efficiencies of the private sector and its ability to deliver and not simply to use it as a method of raising finance. This requires appropriate expertise and resources for the public sector client to manage the contract effectively.

The **specifications** should be as clear as possible, but have to be sufficiently complete, however, to **fully reflect public service requirements** and cater for principal risks, even at the stake of complex contractual clauses. Beyond the necessary tools for performance measurement, the specification should include incentives, which align the profitability for the operator as closely as practicable with the public interest. The specifications should be readily enforceable and allow for the evolution of requirements to meet potentially changing needs during the life of the contract.

The **duration** of the contract should allow for reasonable compensation of the investments made in order to secure the necessary investment and to compensate the contractor for the up-front effort (training, marketing etc.) involved and to allow for the necessary learning curve.

On the other hand, the relatively long duration required by these financial considerations must avoid locking the client (e.g. the public authority) into a single supplier and allow for maximum play of competition e.g. through the right of clients to require sub-contracting.

In cases where the involvement of private finance cannot be achieved while observing these guidelines, there may be serious doubts about the advantages of using that form of finance. EU rules on public indebtedness must not tend to induce governments into economically disadvantageous transactions with the private sector. This means that governments should not be allowed to disguise the real liabilities, which may arise through the resort to private funding. The strict definition of government debt should be completed by a realistic assessment of the probability, likely timing, and scale of the ultimate liabilities to government under both private and public regimes.

6 Conclusion

Having looked at the contractual PPPs, the CEEP recognizes the contribution that private sector involvement can make in the provision of public services, or large scale projects where such partnerships might add value by e.g.

- Encouraging the use of management methods combining “private” know-how and approaches towards some aspects of customer awareness with experienced public service management.
- allowing more effective control of costs
- making available additional funding, at reasonable cost, which could not otherwise be procured.

However, in many cases, experience has shown that the use of private finance fails to achieve these objectives, and that it may create very large financial risks. Whether due to lack of experience or financial pressures, it may also sometimes undermine the service provided.

PPPs may offer less transparency to the client than is required of publicly funded projects, as much of the information concerned might be claimed to be commercially sensitive by the contractor, making it difficult for example to establish whether excessive profits are being made or whether the financial position of a private partner is deteriorating to the point where the public service could be at risk.

Extreme care is therefore needed in selecting which projects are suitable for the use of PPP. It is vital that a full, and realistic, analysis is made of the benefits, the costs, and the scale and timing of the risks which may be incurred.

In any case, to ensure the long term development of the partnership considered, adequate provisions must be made in particular with reference to both:

- the specifications of services of general interest : complete freedom to specify in details what service characteristics are needed and the associated requirements for the private partner to comply with relevant charters or certification requirements, even if they may conflict with the public procurement directives.
- the selection of partners : the choice of the most appropriate award criteria should be left in the hands of the public authority with respect to the crucial aspect of the competencies and of the technical and financial means required for ensuring the

project completion as well as other criteria ("soft criteria") that the public authority considers as relevant.

The CEEP considers it to be necessary to point out the fundamental differences between public procurement contracts and PPPs. Public procurement is essentially limited to set up a classic client/ supplier relationship whereas PPPs are generally based on long-term financial and management cooperation. This aspect of PPPs confronts EU procurement law with a major challenge, as recently pointed out by Commissioner Frits Bolkestein.[4]

Therefore, the CEEP has the view that the existing public procurement rules within the directives existing frame are often inappropriate for contractual PPPs which are long term or complex projects and require sound relations between parties. CEEP stresses the close link between PPP and service concessions. It calls on the Commission to clarify this ambiguity without damaging the advantages and characteristics of the setting up of PPPs and to develop with the parties concerned other possibilities (e.g. the "competitive dialogue", already mentioned by Commissioner Bolkestein).

The CEEP considers that the legal basis of any EU legislation is rather narrow and basically limited to PPPs that involve EU funds, for example concerning Trans-European Networks.

As far as a legal basis may exist, any form of EU action should be defined the most precisely possible and target a limited number of key aspects of PPPs in order to ensure its added value to current practices:

- The Commission's Green paper on concessions and public-private partnerships should strictly apply the principle of subsidiarity. It could be used to define possible indicators for identifying projects and activities which are likely to benefit from the use of private finance, and, if necessary, recommendations for the successful implementation of PPPs.
- It is of utmost importance that PPPs will not influence the provision of services of general interest in a way that their quality or sustainability is reduced. Possible EU recommendations should ensure that PPPs will not have any negative impacts on the quality, the social and/or environmental aspects of a service or infrastructure project as well as in the perspective of research and development, transparency and ethics.
- Any eventual EU action should provide legal certainty for public authorities and contracting parties without limiting the variety of organisational forms of PPPs by further EU legislation.
- There is a degree of inconsistency between competition rules and some forms of PPPs. Indeed, depending on their organisational form, PPPs may create little opportunity for smaller companies to compete for contracts and, once concluded, close down substantial markets for decades.
- PPP projects should fully conform to EU orientations regarding transparency and be based on a realistic view of the potential impact on medium/long-term government indebtedness. Any eventual EU action should include new criteria and procedures for estimating impacts on government indebtedness, requiring a clear and frank

[4] Speech by Commissioner Frits Bolkestein, Holland, Noordijk, 08 November 2002

assessment of the liabilities associated with both public and private finance and an estimate of the impact on government finances beyond annual budgets.

ANNEX 2

Some examples of national set-ups on PPP

1.1. FRENCH case on IPPP:

Since 1926 **France** has had a legal system allowing the collaboration of public and private partners within so-called « mixed economy » enterprises (SEM). In parallel to types of contractual partnerships in the form of concession, since the beginning of the (20th) century institutionalised forms have been offered to the public authorities as a response to the exercise of public services (social housing, water, transport etc). In 1983, it is the legal status of the local mixed economy enterprise which is given a legal framework. France thus decides that local municipalities will hold the majority capital and be within the decision-making bodies and that these local public enterprises will be commercial companies in common law .

The Green Paper addresses institutionalised PPP in a limited number of forms. The example in France of constitution of local public enterprises shows us a broader diversity. In fact, four types of institutionalised PPP can be defined :

- a PPP where a large enterprise holds a stake and in the end carries out the mission assigned to the EPL (a large international proxy group of SGEI). This is the only type of IPPP taken into account by the Green Paper which analyses it in simplistic and even theoretical terms, as it only considers the very precise case where only a public municipality and a private partner are involved. Such a situation does not exist in France as a Sem must contain at least seven shareholders.
- PPP with participation of a private partner for the operation of a public service (contributing know-how, local involvement of small and medium sized enterprises, etc.). The initial impetus is public and the search for a partner in the enterprise project comes later. It is possible to make an evaluation of this public involvement in a context which goes beyond simple economic inventory but follows a method of global assessment measuring the impact of these enterprises with regard to sustainable development, town and country planning, solidarity, balance of population and so on. The EPL can in the case in point be the criterion for the execution of a mission by a public enterprise.
- PPP with other public partners and the involvement of local municipalities. Some sectors of activity do not have economic prospects which are sufficient for acquiring an interest. The absence or low degree of return on capital investment prevent participation in these PPP from becoming attractive. The long period of operations for development and urban renewal without prospects for profit is an example which can justify the strong involvement of public partners.
(example: Sem of development and of management of social housing)
- Public Private Partnership with public funding that help to secure ideas of firms build up initially thanks to private funding and which justify an implication of public authorities. Economic interventionism by a Public Private Partnership (local authorities and communities and local firms) by appreciating the benefits for the territories that is more important than the capital used.

EPLs do not suffer in France from the system of exception with respect to the rules of putting into competition for operating a SGEI or the provision of a service by a local municipality.

In the framework of the « Sapin law » in force since 1993 for the rules of transparency of concessions, the municipality which decides to call on the Sem to carry out the mission proceeds according to the rules of common law. From this perspective, a recognition of the Sem as a fully-fledged means of management of local public services

might need legislative modification by an initial attribution without putting into competition, while the private partner would probably be selected through invitation to tender.
Except in cases of « in house » services which correspond to the current case law definition from the CJEC, EPLs apply in the context of responses to municipalities' invitations to tender for the provision of works, supplies or services in accordance with the market directives 2004-17 and 2004-18 and the national Code of public procurement, transposition text.

1.2. FRENCH case on CPPP:

Until France's recent adoption of specific legislation on PPP contracts (order of 4 September 2003 on hospital long leases, order of 19 June 2004 on PPP contracts) France had already equipped itself gradually with legislation aiming primarily at offering more guarantees to private investors likely to participate in the development of the public domain and to provide more flexibility to local public authorities in their real estate investments.

Thus it was that the law of 5 January 1988 on improvement of decentralization came to limit the scope of the principles of inalienability and non-applicability of statutory limitation to the public domain by defining a specific system of long lease, which could be granted on the public or private domain of local authorities. The law of 25 July 1994 reformed the system of occupation of the public domain by the State in order to favor the revival of economic activity, and opening up the right of granting occupants of the domain securities with real rights.
Moreover it opens up the possibility of financing works through leasing agreements, constructions and installations carried out in the framework of occupation authorizations containing real rights. In addition in some areas the legislator has created contractual instruments specific to certain sectors: the law of 29 August 2002 on directions and programming for internal security, while extending the scope of application of the administrative long lease, not only authorizes the State to take a lease, with option to purchase, on works required for the needs of justice, police and national constabulary developed on the basis of an authorization of temporary occupation of its public domain, but also allows the financing of these constructions through leasing agreements. The law of 27 January 2003 relating to military programming extends the procedure of rental with option to purchase to buildings to be constructed on the public domain of the State for army needs. Lastly, the law of 18 March 2003 on internal security adopts the same system as that applicable for internal security.

Two recent orders have established more global legislation on public-private partnership contracts, firstly in the hospital area, the order of 4 September 2003 authorizing from then on the conclusion of long leases on real estate properties belonging to a health establishment, and the order of 19 June 2004 instituting in France a third category of administrative contracts, called partnership contracts, characterized by a public payment throughout the contract period, capable of being linked to performance criteria assigned to the contracting partner.

All this legislation responds in particular to the concern for legal security expressed both by the public authorities and by investors. A number of so called complex arrangements had in fact developed aiming at providing an operational solution to the difficulty, and even impossibility of mounting certain operations. These arrangements, such as long lease completed by a non-detachable convention and a leasing contract, presented the complexity of which derived from the flood of contracts what presented an juridical insecurity, was in fact the object of different doctrinal interpretations and random case law.

2. GERMAN case

Over the past few years a trend has been seen in Germany as in other Member States of the European Union toward Public Private Partnerships (PPPs) for constructing public infrastructures and providing public services. PPPs are one of several options that can be chosen by German public authorities on the national, the regional and – guaranteed by the German Constitution – the local level to fulfil public tasks. Other options are own provision within the public administration, including regies, with own enterprises or enterprises under the common control of more than one public authority, and the commissioning of third parties. With the latter option a variant of a PPP can also be concerned, namely if contractual relations exist between the public and private actors for the **cooperative** provision of infrastructures and/or services. These PPPs are called contractual PPPs; they are distinguished from mixed-ownership enterprises with the participation of public authorities and private actors – called institutional PPPs (IPPPs).

Mixed-ownership enterprises in Germany represent a special form of PPPs organised for long-term partnership cooperation, to the extent that they are formed according to the rules of company law and are not simply oriented toward single commissions by public authorities. Public authorities choose this organisational form in order to retain their **direct** influence on the provision of public services in the general interest **permanently**, without giving up advantages from the use of private know-how, private co-financing, etc. This type of PPP is of great importance especially on the municipal level in Germany.

In the choice entitled to public authorities as to what services they will offer and which structure they are going to choose, it is a matter of decisions on a case by case basis which are taken by them in the light of national, regional or local conditions. This freedom in regard to organising public services is taken in Germany as part of the fundamental political and constitutional structure of the member states, including regional and local self-government, which has to be respected by the European Union according to Article I-5 of the future European Constitution.

IPPPs come into being in Germany either through public authorities founding a new enterprise in the legal form of a private law company jointly with private actors, or through the selling of company shares of existing companies by public authorities to private actors resp. the acquisition of shares in private companies by public authorities, whereby public enterprises can also take the place of public authorities. The degree of formalisation and the institutionalisation of the partnership are quite varied.

The private partners in IPPPs also vary considerably: in part they are SMEs that are specialised in the management of public services, in part they are regional enterprises as partners above all of local authorities or enterprises, and in part they are large enterprise groups operating nationally, EU-wide or world-wide.

To the extent that German public authorities do not enter into IPPPs for fiscal purposes alone, they are in the main concerned with eliminating or at least with reducing the disadvantages of the private sector as well as the public sector: Purely private-economy enterprises are primarily profit oriented; as far as they are also dealing with the supply of citizens with public services, this is not in the foreground of their activity. Public enterprises in Germany, on the other hand, are obligated to an optimum provision with public services – an obligation that they have to satisfy according to the principle of economic efficiency. Services of general economic interest, which are subject to various European regulations, are primarily concerned here, but services of general interest that are non-economic, for which EU competences do not exist, are concerned as well.

IPPPs involve both chances and risks for the provision of public services. Amongst the opportunities seen by public authorities in Germany are the fact that IPPPs can offer them the possibility of pursuing strategic objectives such as for example gaining external know-how, common use of synergy effects with private partners, improvement of sales channels, more efficient provision of service or increases in profitability. In contrast with the complete handover of the fulfilment of tasks to third parties, IPPPs are chosen to make it possible for public authorities, even in the event of budget problems that stand in the way of purely public provision of service, to retain direct influence on the provision of services and direct monitoring rights. In order to take the chances and to limit or avoid the risks, great attention is paid to the choice of the appropriate private partner and to the contractual formulation of the IPPP. In order for an IPPP to be successful, care is taken in the choice of the private partner for example so that a certain complementarity of objectives of both partners is present, that there is a basis for trust, and that the risk of insolvency of the fellow shareholder is low. To avoid a situation where the public authorities are dependent on the private partner in the future, their possibility for decisive influence is guaranteed in the consortium contract; for risks such as insolvency of the private partner or its intention to sell its shares on – in the case of IPPPs at regional or local level additionally the withdrawal of activities from the region or district – usually unambiguous regulations are taken which make the further guaranteeing of the service possible for the public authority and avert dangers to it. In the weighting of chances and risks, in addition to regional and local conditions, the respective sectors and the kind and extent of the private participation play a considerable role. As far as the chances are made use of, IPPPs in Germany allow in general both the goal of optimum supply and that of economic efficiency to be pursued.

3. ITALIAN case:

By the end of 2003 Italian Parliament approved a Reform of Articles 113 and 113 bis of the Legislative Decree of 18 August 2000, N° 267 (comprehensive legal text governing local activities) and Article 35 of the Law of 28 December 2001, N° 448 (Finance 2002), whose main innovations are the following:

Abrogation of transition period

All the provisions originally made in paragraphs 2, 3, 4, 5 and 16 of the said Article 35 (Art. 14, §3, LD 269/2003), have been removed, introducing a provision stating that the concessions assigned without transparent procedures shall lapse by 31 December 2006, without the necessity of any further deliberation by public authorities.

Separation of infrastructure and service management

To improve competition, the Reform provides for the separation between the infrastructure and the service management, asking for liberalization of the latter whenever the technical conditions are not of natural monopoly.

Management of SGI's

The most interesting innovation is certainly the enlargement of the range of possible organization modes of SGI's management, according to the following three forms (Art. 113, § 5):

1) Public procurement procedures;

2) the establishment of a mixed ownership enterprise (MOE) in which the private partner has to be selected through competitive bidding procedures, assuring the complete and rigorous respect of national and community legislations;

3) the establishment of a completely public enterprise (100% public ownership) in which public authorities exercise over it a control which is similar to that which they exercise over their own departments and, at the same time, that enterprise carries out the essential part of its activities with the controlling authorities (in house providing, IHP)

Point 2) has been introduced following some of the more recent examples of the organisation of SGI's, that has raised the interest of both public authorities and multinational enterprises.

4. Portuguese case on PPP:

During the 90's several initiatives were launched to build infrastructures under PPP concepts. Budget consolidation needed to respect the Stability and Growth Pact lead the Portuguese Government to opt for private financing of infrastructures. The first large contract was the Vasco da Gama Bridge inaugurated in 1998. It was followed by several high-way projects. The intention of the Portuguese Government of applying contractual PPP proceedings to other sectors (Health for instance) raised the question of coordination by the Ministry of Finance. So, dated 26th April, Decree-Law 86/2003 was published. This Decree defines PPP as "a contract or a group of contracts through which a private partner accepts the obligation before a public partner of developing an activity that fulfils a collective objective, with the financing the responsibility for the investment and the operation belonging to the private partner". This definition applies if instead of a private partner the partnership involves a public enterprise, a cooperative or a non for profit organisation.

A PPP is justified if it compares favourably with a public sector comparator in terms of efficiency and cost of the service to be supplied. The PPP must ensure an effective transfer of risks to the private sector and the creation of new risks must be prevented if they cannot be compensated by the reduction of other risks.

Any Ministry that intends to launch a PPP must notify formally the Minister of Finance (or the entity in charge). The Minister of Finance and the Minister of the sector involved issue a joint order that creates a Commission to assist and follow the preparation of the process. Once the process is complete the two Ministers approve together the conditions to be respected in the launching of the partnership, including the model of procurement, the demonstration of public interest, the justification for the adopted model of PPP and the long term financing with explicit reference to impact on public budget.

PARPUBLICA, a public joint stock company, was designated by the Minister of Finance to coordinate the PPP process.

ANNEX 3

Some application examples with negative consequences:

One can think that the current complicated rules of the public procurement procedures constitute an obstacle because they create a fix and rigid and costly system and superfluous administrative work.

Some examples of Germany:

- The public Transport Enterprise of the City of Leipzig is also a public authority in the sense of past Dir. 93/37. After many years of application of the procedure and experience with it, one can state that the Enterprise never received an acceptable offer (concerning the price) from outside Germany. Moreover, the cheapest offers came always by the region itself. It seems that the tender candidates are just overcharged (above all the small enterprises); a participation of all the tender procedures all over Europe is just too complicated and too expensive form them; they seem to prefer to make business in the fields they know.

- In March 2003, a procedure following Dir. 92/50 took place for the public rail transport system of the region 'Nord-Harz' of the German Land 'Sachsen-Anhalt (e. g., for the routes Magdeburg-Halberstadt-Thale, Halle-Halberstadt, Halberstadt-Vienenburg, Halle-Körnern-Bernburg and Halberstadt-Blankenburg with a total of 2,8 millions of train kilometres per year) for the period 2005 – 2017. This was the first step of the pursuit of putting to tender 40 % of the total regional train net within the next six years pursuant to a contract between the Deutsche Bahn and the Land Sachsen-Anhalt. This contract aims at introducing a fully competitive system. Next steps will be the rest of the Diesel net, the whole x net and the electric net. However, on 30th September 2003, the contracting entity (The Nahverkehrsservice Sachsen-Anhalt, NASA), stopped the procedure because no one of the received offers fulfilled the formal conditions. The chairman of NASA, explained that the rules would not allow to demand or to ask for subsequent improvements. Furthermore, he explained that there were serious doubts from the very beginning of the procedure whether the service put to tender would be too complex and too long-termed; but meanwhile the relevant legal obligation to do so has been lightened by national courts. This example shows clearly that the formal conditions of procedures are sometimes so complicated that it hinders the conclusion of a contract.

- The Ministry of Economy of the German Land (independent region) Hessen instructed the competent authorities in March 2004 to conclude contracts for public transport only on the basis of tendering procedures. As a reason there was communicated that this would be the consequence 'of European Law and its recent developments'. There is no basis for an absoluteness of a tendering procedure in national law: It can be made, but it is no general duty. Moreover, it is neither the consequence of European Primary Law nor of European Secondary Law (Reg. 1191/91 or Dir. 93/38). A tendering procedure can be made, but there is no absolute and forcing duty for this. On the contrary, a direct award is possible as another possibility (the corresponding paragraphs of Dir. 93/38 and the new Dir. 04/17 are already mentioned in this paper). This possibility was also confirmed by the ECJ in its decision Altmark Trans, C-280/00. This abuse of European Law for a modification of national rules without any further legal basis leads to a major confusion and to serious difficulties on national level.

- A specialised Leipzigian (public) enterprise participated in a public procurement procedure concerning the business management of facilities of water supply of a municipality (that was also the contracting authority). One of the preconditions for the candidates was a proven experience in business management of facilities of water supply of a municipality with a number of inhabitants that was the double of this of the contracting authority. The Leipzigian candidate could haven proven experiences concerning facilities of a municipality with the number of inhabitants comparable to this of the contracting authority, but no experience as demanded in the procedure. So, the Leipzigian Enterprise was excluded from the procedure.

- In connexion with sub-contracting there have been noted certain difficulties concerning equality of treatment. In some tendering procedures (as to public procurement as well as to PPP), the contracting authorities exclude as a precondition that the contractors may conclude sub-contracts, although this is not forcing following the European Law. This leads to a discrimination of these candidates who would only able to fulfil a contract by concluding sub-contracts and means a preference for those companies that are capable to fulfil the contracts also exclusively by own forces. The noted problems could be solved through the creation of a right for candidates to conclude also sub-contracts if they want to or the condition that an exclusion of sub-contracts could be only made on the basis of a good reasoning.

Some practices in Sweden

- Sports-, events-arena, The City of Sundsvall (Mid-North Sweden = 100.000 habitants) - a kind of contractual PPP.

The municipality faced too high investment-costs, 3 times more than the financial restraints permitted, when it intended to renovate the arena. It was – a strong popular interest in the local regional community to carry out this improvement of quality and to maintain and develop the brand of the City as an attractive centre for sports, leisure and thus for business location and economic prosperity and employment.

The local business community called on the City to initiate discussions how a desired complete renewed arena with new modern facilities could be accomplished- and financed. The first step was to confirm the eligibility for EU- funding through the structural funds, as the city is located in such a region. But- the EU-structural funds prescribe a significant private part of a “project”. This led to the animation of interest from a private real estate company, with its main activities in the region to take the third part of the costs. This was possible as the private company through building -and then let as any landlord - new commercial premises (offices and restaurants) in connection to the arena-park. The City and the real estate company made a contract where all the tendering –responsibility was given to the latter, thus all the sub-contractors were outside any public procurement law as the responsible body was not the city in question. It has been regarded as a successful project-design of PPP, according to an independent evaluation, concerning most of the objectives, which were set up. It has encouraged the City to continue with this partner- model in a next project- to build a new theatre.

The national law concerning public procurement and the tools to follow up are since more than 10 years integrated and are regarded as a natural element of public daily life. Or-as in this first case- a kind of surrender from the traditional public authority –role in favour of a more private business- dominated procedure could by some be regarded as a way to by-pass-legally- rules at the National level, which are seen as sometimes more strict than only in accordance with EU- legislation. The report from this case gives at least no new arguments for the need of European interference to remove any obstacles for private involvement in originally public projects.

- Another somewhat similar project is “the new Norrlandsopera”, the City of Umea, also in the north of Sweden (100.000 habitants)

The slogan of this University-City was “Culture as a driving force for growth”. One main difference from case 1 above was that a private real-estate company bought the old opera- building and the surrounding site, where the latter could also be an object for the developer/ new landlord to get an opportunity to commercial land-use. The same everlasting financial constrains for the municipalityto invest was also in this case a significant reason for this contract. Thus, the City now has a leasing-contract for the Opera house. The private investor was particularly happy to get a reliable tenant on long term (25 years) and estimates that their professional know- how in land- use and management will be profitable.
Although the costs to run the Opera- and new facilities for even concerts, restaurant and so fort- from the public-side increased it has not been more expensive net. Thanks to mainly increased state-aid from the state -government and the regional authorities.
One result or conclusion is also that a PPP- solution can have as an implication that the local authorities let land go to private interests. Nothing particular in EU- or National legal framework has been reported to neither hinder nor encourage this PPP- case.

- Haparanda-a joint Sewage Plant Company.

This case is quite another IPPP- body. The municipality (10.000 habitants) is also situated in the North of Sweden. What is unique is that it is also based on a cross-boarder co-operation, with the Finnish City of Tornea (25.000 habitants), as the main object was to purify the sewage water from both sides of the common river, the latter also constitutes the national boarder line. The third part besides the two public “P”s was a brewery, a subsidy company of the biggest brewery- group in Finland.
The background was briefly the needs of investments in order to fulfil strong requirements to reduce pollution and get a large –scale cost-effective solution for all the partners. In the case of the brewery – it would otherwise be forced to invest in an own sewage plant to purify its sewage. That would have been a very expensive and also complicated, according to the representatives of the brewery. The rates of the use of the former sewageplant, located on the Swedish side were: Haparanda (Sweden): 25 %, Tornea (Finland) 50%, the private brewery (Lapin Kulta –Hartwalls), 25%. When finally a joint company is set up the private partner only owns 10% of the shares. It should be reminded that it is a non- profit company without any dividend, also in accordance to national water and sewage –act.
Another reason from the private partner to join the project was to get more of right of access, control and impact on the sewage- matters, through its member of the board of directors. It had some experiences of having been sometimes “-not quite fair”- criticised concerning its pollution by the authorities, including the local; Now when it is under the

same “umbrella” as the authorities it feels more comfortable and safe, as the control measures from the environmental authorities have the joint public-private company as *one* object. The brewery could also escape the higher costs it would have got by investing and run an own sewage plant.

From the public side this project is regarded as only one in a kind of new and successful tradition of national cross-boarder co-operation. Other such objects will be joint district heating and waste treatment, also including private partners.
Concerning the EU- dimension you can- once again- not find any report on remarkable problems nor in this third case concerning the legal frame work- needs or obstacles. EU is however really present as the internal market and other new stipulations since 1994 and the membership of the two countries are seen as facilitating more of cross- boarder co- operation and thus contribute to cost-effective solutions and contributing to prosperity in an otherwise even more thinly- populated or remote area close to the North polar circle.

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COUNCIL OF EUROPEAN MUNICIPALITIES AND REGIONS
EUROPEAN SECTION OF UNITED CITIES AND LOCAL GOVERNMENTS

CEMR Response to the European Commission's Green Paper on

PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON CONTRACTS AND CONCESSIONS

Background document:

Green Paper on PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON CONTRACTS AND CONCESSIONS

COM(2004) 327

Introduction

1. The Council of European Municipalities and Regions (CEMR) welcomes the Commission's initiative in publishing the Green Paper on Public-Private Partnerships. Given the growing role and importance of PPPs, it is timely to commence a discussion about the legal framework and options for the future, to ensure that the positive role of PPPs across the 25 EU countries, and at all levels, can be promoted. Local and regional governments across Europe value the opportunities that, in many circumstances, PPPs offer to increase investment and to achieve creative and cost-effective infrastructure and service developments. PPPs have been shown to provide many advantages, and often yield important savings to the public sector partner; but this is not always the case, and it is also important to learn the lessons from less successful ones. We therefore feel that the Commission needs to engage in a wider consultation process that examines this broader experience, to help all of us to learn.

2. We note that, in his speech of 17th May 2004, to a Brussels conference on PPPs and concessions, Commissioner Bolkestein emphasized that the Green Paper

> "s'inscrit dans le cadre de l'initiative lancée l'année dernière par la Commission, avec la Banque Européenne d'Investissement, pour stimuler la croissance en Europe. Il s'agit notamment pour la Commission d'étudier les meilleurs moyens d'accroître la par-

> ticipation du secteur privé au financement de projets qui stimuleront la croissance et créeront des emplois ».

He commented that in this context, PPPs are an attractive tool, used more and more by national or local governments to carry out infrastructure projects or the management of missions of general interest. He then emphasized the importance for the actors of legal security, given the long duration of most PPPs, and the important financial stakes involved.

3. The Green Paper, accordingly, is about the European-level legal rules that apply, or should apply, to PPPs. In this context, we think it is worth citing, at the outset, paragraph 17 of the Green Paper, which raises issues to which we will return:

> "The aim of this Green Paper is to launch a debate on the application of Community law on public contracts and concessions to the PPP phenomenon. Once underway such a debate will concentrate on the rules that should be applied when *taking a decision to entrust a mission or task to a third party*. This takes place downstream of the economic and organisational choice made by a local or national authority, and can in no way be perceived as attempting to make a value judgement regarding the decision *to externalise the management of public services or no*t; this decision remains squarely within the competence of public authorities. Indeed, Community law on public contracts and concessions is neutral as regards the choice exercised by Member States to provide a public service themselves or *to entrust it to a third party*." (Our italics)

4. Though not the only issue of interest to us, the definition of what is a "third party", and what European rules do or should apply, in the context of public-sector undertakings or publicly controlled mixed entities (institutional PPPs), is at the heart of our concerns.

5. Moreover, it is important to bear in mind the aim of the Green Paper – it is to "launch a debate". This debate, we believe, will be greatly enhanced by the quality and content of responses to the Green Paper – but we believe the next stage will be even more important. Once the Commission has considered the responses, it is vital that (unless there is an overwhelming consensus) clear options for the future are more clearly identified and subjected to a wider dialogue.

6. We would wish to make a final point by way of introduction. Our response to this Green Paper is for the most part of a rather technical nature, which itself reflects the somewhat technical nature of the Green Paper itself. But we believe that there is a need for a wider political debate about the future of local and regional public services within the EU. Several wholly inter-connected issues are currently being treated separately by the different services of the Commission. There is the

debate on the future of Services of General Interest, where the Commission has now published its White Paper. There is the debate on the relationship between public service compensation and state aids (the current "Monti package"). And now there is the Green Paper on PPPs, raising key questions in relation to wholly owned, as well as mixed public-private, local government undertakings. We believe it is time to discuss openly the proper balance that needs to be struck between, on the one hand, the principles of local and regional self-government and of subsidiarity, and on the other, the rules of competition that need to apply in the European interest.

The local and regional perspective

7. In our response to the Green Paper on Services of General Interest, CEMR emphasized that our members, of different political parties and coming from different national and local traditions, have no a priori view on whether services should be provided in-house or externally. For us, what is important is that the choice is made by the democratic processes at regional or local level, in the interests of the citizens.

8. Moreover, we cannot accept the sweeping generality of the proposition, in paragraph 3 of the Green Paper, that:

   > "The development of the PPP is also part of the more general change in the role of the State in the economy, moving from a role of direct operator to one of organiser, regulator and controller".

   This may be true to some extent, in particular in relation to certain national governments. But a very high proportion of the most fundamental public services are delivered by local authorities, and we are clear that there is no absolute rule about the advantage of externalising all or most services. It is on the contrary necessary to be pragmatic, to consider the pros and cons of the different modes of service delivery, in each practical context.

9. In general terms, we see advantages and disadvantages in each of the possible methods of service delivery. We may summarise them, highly indicatively, as follows:

   (a) Direct provision by the public authority itself

   Possible advantages: retention of ongoing democratic control, with ability to make changes and to innovate without rigid contractual framework; more flexibility to adapt level of service to changing citizen needs and to the financial situation of the authority; better in-house understanding of the service.

Possible disadvantages: less state of the art management know-how; possible higher cost base and less efficiency; no access to private investment to enhance service.

(b) Outsourcing to the private sector through contract:

Possible advantages: sector-specific private management know-how and experience; increased productivity and efficiency, leading to lower costs; access to private capital investment to improve service; release of public authority's senior management from the day-to-day management responsibility for major services.

Possible disadvantages: rigidity of contractual framework, which restricts major innovation and new developments during the life of the contract; loss of democratic control over the service for the life of the contract; risk of service failure in mid-contract if the contractor gets into financial difficulties; lock-in to an annual contract price which may lead to cuts in other higher priority services if the authority hits financial problems in subsequent years.

(c) Mixed public-private entity, with public control

Possible advantages: a combination of private sector management know-how and investment, allied to a greater degree of democratic involvement and sensitivity to citizen needs; greater internal flexibility to respond to public authority's changing circumstances.

Possible disadvantages: disagreements between public and private partners; lack of commercial experience on the public authority's side.

(d) Mixed public-private entity, with private control

In general, the advantages and disadvantages in this case approximate to those set out in (b) above.

10. Of course, these are to some extent generalisations that do not apply in many cases. Many publicly run services are efficient, innovative and high quality, whilst some private sector operators are less than competent. On the other hand, some directly provided services are in practice quite rigid, with change being seen as unacceptable, and the interests of the workforce taking precedence over citizens' needs. But our key point is that there is, and must continue to be, a range of possible means of delivering a public service which Community legal rules should avoid restricting, and where over-regulation will have damaging consequences. We must avoid hollowing out local democracy by removing the key decisions from locally elected people.

The existing legal framework for PPPs

11. Within the overall purpose of the Green Paper, we find the distinction drawn between contractual PPPs and institutional PPPs to be helpful conceptually (though some of our members indicate that a few PPPs may combine both aspects). For local and regional government, a key problem area at present relates to the uncertainty that applies to the institutional PPP, i.e. the mixed public-private legal entity. In order to explore the issues and our proposed way forward, it is useful to recap our understanding of the current legal position, which is not wholly identical to that of the Commission as set out in the Green Paper.

12. The principal Community legal framework is now provided (once operational) by the Public Procurement Directive 2004/18/EC, which regulates, in particular where the value exceeds the defined threshold:

    - Public works contracts
    - Public supply contracts
    - Public service contracts
    - Public works concession contracts (on a more limited basis),

    which are let by a "contracting authority", which includes national, regional or local authorities, or bodies governed by public law (such bodies being, per Article 1(9) of the 2004 Directive, legal entities established to meet general interest needs, not of an industrial or commercial character, and mainly financed, managed or controlled by public authorities).

13. In any event, for such contracts, the contracting authority is legally obliged to follow the procedures laid out in the Directive. For contracts below the financial threshold, Article 2 (headed "Principles of awarding contracts") provides that:

    > "Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way."

14. The difference between a public works contract and a public works concession is that, in the case of a concession, the consideration for the works to be carried out consists either solely in the right to exploit the work (i.e. in particular to charge end users), or in this right together with payment. Likewise, in the case of a public service concession, the consideration is the right to exploit the service, or in that right plus payment.

15. Most importantly for the purpose of the discussion on PPPs, whether contractual or institutional, *"service concessions" are explicitly excluded from the ambit of the Directive (Article 17)*, save for one limited point. Even Article 2 does not apply as such. To give one simple example of

a service concession, a contract to another legal entity to run a municipally owned-swimming pool, under which the operator charges fees to users, is a service concession, not covered by the Directive's rules, even where the operator receives a compensation from the local authority for the purpose (say) of subsidising swimming by the elderly or unemployed.

16. For contracts that are covered by the Directive, the contracting authority must follow the prescribed rules for the tendering and letting of the contract, subject only to the few special cases set out in the Directive. There is only one exception to this obligation, which does not appear on the face of the Directive, but which results from European Court of Justice case law, based on very similar previous respective Directives. This is the ***Teckal*** case, which is of great interest, for obvious reasons, to local government. The crucial point of the judgement, in this context, is at paragraph 50:

> "…it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which *is similar to that which it exercises over its own departments* and, at the same time, *that person carries out the essential part of its activities with the controlling local authority or authorities*." (Our italics).

As the Green Paper indicates, this issue of controlled entities (often known as "in-house", though this is a confusing term) is currently the subject of several pending cases before the ECJ. The Commission is seeking to place a very narrow interpretation on the Teckal exception (in our view to the point of defining the exception out of existence), whilst we suggest it should be given an effective meaning, namely whether the control is broadly similar to that exercised if the service were run directly by the municipality – i.e. does the local authority really control the legal entity in question.

17. We now come to the question – what if any are the European-level legal rules that apply to service concessions, given that they are not covered by the Directive (not even Article 2)? If we look to the Treaties, there is no explicit reference to them. Paragraph 8 of the Green Paper asserts the following:

> "It nonetheless remains true that any act, whether it be contractual or unilateral, whereby a public entity entrusts the provision of an economic activity to a third party must be examined in the light of the rules and principles resulting from the Treaty, particularly as regards the principles of freedom of establishment and freedom to provide services (Articles 43 and 49 of the EC Treaty), which encompass in particular the principles of trans-

> parency, equality of treatment, proportionality and mutual recognition."

18. This very broad claim, which the Commission considers arises from the totality of the case law, was also reflected in the Commission's Interpretative Communication on Concessions under Community Law, issued in 2000. It is to be noted that this interpretation appears at first sight curious, since Article 43 of the Treaty relates to freedom of establishment, and Article 49 prohibits restrictions on the freedom to provide services within the Community. Neither Article, therefore, bears any direct relationship to the issues in question. We are not able to accept that the sweeping generalisation in paragraph 8 is a fully accurate summary of the legal position. We acknowledge that the ECJ has gone some way to accept the Commission's view in the ***Telaustria*** case of 2000, but we note that this relies mainly on the principle of non-discrimination. The key passage is the following (paragraphs 60 – 62):

> "In that regard, it should be borne in mind that, notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of [the Directive], the contracting entities concluding them are, nonetheless, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular.
>
> As the Court held in [another case], that principle implies, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with.
>
> That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed."

19. It is important to note that the Court's decision in the Telaustria case explicitly referred to the fact that the beneficiary undertaking under the service concession was a *private* undertaking, and one can understand the Court's concern to ensure that the non-discrimination principle applied via advertising etc. This is crucial. It does not in any way follow, in our view, that a decision by a local or regional government to grant a service concession to its own wholly-owned public undertaking, or to a mixed undertaking in which it has the controlling interest, is unlawful. Since there is no Community law requiring a local authority to tender or privatise services which it chooses to deliver itself (a principle emphasized in paragraph 19 of the Green Paper), it would be quite wrong – save in a blindly legalistic world that ignores all other realities - to con-

sider a wholly owned undertaking, wholly or mainly serving the local authority's territory, as being a third party for such a purpose.

20. Likewise, we consider that a mixed enterprise over which the local authority has a dominant control is itself to be considered as an extension of the local authority for the purposes of the general principles of the Treaty, or as a legitimate exercise of its democratic and administrative power of decision over its own affairs. After all, since the principle of non-discrimination does not apply to a decision to run a service in-house (even though that prevents other service providers from being able to tender for the task), it is quite illogical to prevent the authority from deciding to run the same service concession through a body over which it has legal and effective control.

21. That said, we accept that all public authorities should act transparently, that is, they must be able to justify decisions made (including a decision not to tender) on proper public interest grounds. But as we have set out above, the choice of means of service delivery is a pragmatic one, based on the perceived advantages and disadvantages of each of the options. This is also the essence of local self-government. Provided the authorities act for proper public interest purposes, the existing law, in our view, does not require every service concession to be tendered – but where a service concession is opened to private undertakings (or privately controlled mixed undertakings), the principle of non-discrimination must apply, as per the Telaustria case.

Should Concessions be regulated by European Community Legislation?

22. From the above analysis – on which we are willing to continue a dialogue with the Commission’s services – it is clear that the present distinction between public works and service contracts on the one hand, and public works and service concessions on the other, is fundamental, whether we are discussing relationships with private sector operators, or with public-private undertakings.

23. It is relevant to note that the new public procurement legislative package is extremely recent, and the European legislators (Parliament and Council) have therefore very recently declined to use the opportunity to include concessions in the new Directives, save to the limited extent referred to above in relation to works concessions. So we believe this places a high burden of proof on the Commission in any event to justify a new legislative package, with all the costs associated with the endeavour.

24. We believe that no such case is remotely made out in the Green Paper, even as the basis of consultation at this stage. On the other hand, we see strong reasons to maintain the existing legal distinction in relation to concessions. Of course, there may be some cases which are borderline as to their definition – but that is quite normal. In general, the rule in such cases is to err on the side of caution, i.e. in this area, to

treat the transaction as a service *contract* if there is a reasonable chance that it will be so defined.

25. The main objective reason for the distinction between contracts and concessions (as respectively defined) is the transfer of risk in the case of concessions. By definition, the “concessionaire” needs flexibility downstream of the letting of the concession in order to achieve the necessary income from users of the service. The service concession contractual documentation is not normally as complex and prescriptive as that which is required in the case of classical service contracts for which the operator does not receive payments from users of the service. Yet the Directive – and the Green Paper – make clear that there is only very limited scope to vary the terms of a contract without requiring a retendering (which by its nature is lengthy, costly and, if translated to the world of concessions, likely to deter making what would otherwise be sensible changes to a service in the light of practice).

26. Accordingly, most of our members are strongly against the concept of new Community legislation to regulate concessions. If, contrary to our conclusion, the Commission considers following full consultation that there is a case for some European-level legislation, we propose that it be limited to complex, long-life, high value concessions (which can be the case with some kinds of contractual PPPs) where the contract/concession borderline might be unclear at the outset. In all other cases, we believe the value of having a more simple, cheaper and more flexible process – taking into account advice such as that contained in the Commission’s 2000 Interpretative Communication on Concessions - far outweighs any benefits of the Community public procurement regime. Furthermore, if there is to be any such legislation, it is essential that there be a clear exemption for local and regional publicly-owned or controlled undertakings (i.e. going beyond the Teckal exception), on the grounds set out above.

Purely Contractual PPPs

27. In essence, the concept of purely contractual PPPs raises few issues of principle – though many of practice – which do not apply to all forms of public procurement processes geared towards the involvement of the private sector. As we have seen from the analysis of the current European Community legislative and Treaty framework, contractual PPPs are either public contracts or concessions, as respectively defined. Since the very notion of contractual PPPs is rather inchoate (see paragraph 21 of the Green Paper) it would not seem possible or desirable to legislate specifically for them, separate from other analogous contracts.

28. Accordingly, we agree that for PPP contracts that fall within the Public Procurement Directive, the new competitive dialogue procedure appears to offer an appropriate means of enabling the respective parties to resolve the issues satisfactorily. Of course, this will need to be kept

under close review of the coming years, in order to check whether in the light of experience any specific modifications in the procedure are required. This is where trans-national exchange of experience will be particularly important.

29. In relation to PPP concessions, since the partner is by definition a private one, the Treaty rules laid down in the Telaustria case will apply, in relation to transparency, advertising and impartiality of procurement procedures. For the reasons set out above, most of our members oppose any new legal regulation at European level of concessions. We suggest that further guidance is given by the Commission to public authorities in relation to possible borderline issues that have arisen or may arise, to use the Procurement Directive process in any case of reasonable doubt.

30. We are not aware of any cases of particular difficulty in relation to the phase following the selection of the private partner such as to justify new legislation. We have already raised the complex issue of the need, on the one hand, to enable sensible variations to the contract to reflect real needs in the light of experience (but without changing the contract's character), and on the other hand to prevent any unjustifiable benefit to the successful candidate/partner, that substantially disadvantages the unsuccessful tenderers. These are competing public interests, and we believe the existing law on contracts and concessions is sufficiently robust. Again, transnational exchange of experience over the coming years will help to identify problems, of over-rigidity or of excessive flexibility.

31. The issue of "private initiative PPPs" causes us some concern. We appreciate the need for common basic rules to apply to procurement, chief amongst which is the need for advertising and competition for the private contractor/partner. Yet there are circumstances where it is positively in the public interest for a private company to propose an innovative way of resolving an investment problem or new service solution, e.g. in relation to a piece of contaminated land. We are not convinced that the solutions put forward in the Green Paper are sufficient to ensure the continued interest of the private sector in making such proposals, if the only result is to be sucked into a complex and lengthy procurement process in which they have no better chance of success than others who, by definition, have not come up with the creative concept. We have not reached a final view on this issue, and believe that options should be kept open during a fuller debate than the limited period of this Green Paper.

Institutionalised PPPs

32. This section of the Green Paper raises extremely important issues, in particular for local and regional authorities which – as paragraph 35 of the Paper indicates – often choose to have recourse to mixed public-private legal entities for the delivery of public service tasks and mis-

sions. As indicated above, such mixed entities may combine the advantages of access to private sector investment and know-how with public control and adaptability. We confess that we have found this section of the Green Paper in places somewhat difficult to follow and therefore to address. We hope that what follows deals with the key issues nonetheless.

33. Fundamentally, we have a basic concern to avoid an excessive administrative and financial cost that would be involved in any legal situation that would or might involve a double tendering – i.e. one process of competitive tendering for the selection of the private partner, followed by another tendering process for the attribution of the public contract or concession. This is particularly onerous in the case of public contracts under the Public Procurement Directives, but also important in the case of concessions.

34. We have experience of involvement in double tendering situations, which confirms our worries in this regard. We may cite an example under then (early 1990s) applicable UK practice and legislation, in relation to the letting of a major contract for the reconstruction of a large waste incineration plant, which had been owned and run by a public waste authority covering seven London boroughs. The plant required major investment to meet EU environmental standards, and the authority considered that this would be best achieved by a public-private joint venture company. The authority advertised for possible partners, and went through a selection process. Because of the legal, financial and administrative complexity, it was essential to use external consultants and lawyers to assist, which was itself expensive. The process was lengthy. In tandem, the letting of the contract itself had to be prepared, including creation of a detailed technical specification etc. Once the joint venture company was formed, the formal public procurement process was opened, under which the JV company had to compete with other (private sector) companies. Following evaluation, the JV company was awarded the contract, not without the threat of legal proceedings from one of the competing bidders (though this was not pursued). The whole process lasted about 4 years, took up an huge amount of organisational energy and focus, and cost a great deal of money just to get to the stage of award of contract.

35. We propose that, in order to avoid cost and unnecessary regulation, double tendering should be avoided. One way to do so is to enable public authorities to decide, if they consider it appropriate, to invite tenders to carry out a defined task by using a public-private company only. The tender documentation would make clear the proposed legal format, as well as the technical specification etc., and the competitive dialogue procedure would be used to make the choice. In this way, all private sector partners would have the chance to bid without discrimination etc., but the public sector's choice of legal construction and means of delivery would be respected.

36. We now look at more specific scenarios. The Green Paper identifies two different situations in relation to public-private legal entities. The first (3.1) deals with “partnerships involving the creation of an ad hoc entity held jointly by the public sector and the private sector.” The second (3.2) deals with “control of a public entity by a private operator”. In our view, each of these needs to be subdivided into two scenarios. Under the first, the creation of the new entity may involve the private sector controlling the new entity, or it may involve the public sector controlling the new entity. Likewise under the second – where the title is misleading – there are two scenarios. The first involves an existing wholly publicly owned legal entity which becomes a mixed public-private entity by the new involvement of one or more private sector partners, but in which the public authority retains the controlling interest. The second involves cases where the private sector is granted a controlling interest in a legal entity that was previously owned, or controlled, by the public authority. We take each scenario separately.

(a) The creation of a new mixed entity controlled by the private sector

37. In this case, we consider that a public authority wishing to let a contract or concession to such a mixed but privately controlled legal entity should have two options. First, to treat the new entity as if it were a private undertaking, and follow the requisite legal procedures in relation to public contracts and concessions, as per the legal analysis set out above. The mixed entity takes its chances in the marketplace. The second option would be that outlined above – the key decision would be made at the outset to award the contract to a mixed entity, and the advertising and tendering (according to the relevant legal processes for contracts or concessions) would be for a private sector partner which best met (a) the requirements as legal partner in the company, and (b) the requirements in relation to the technical specification etc.

(b) the creation of a new mixed entity controlled by the public sector

38. In this case, the considerations should we believe be somewhat different. There is a fundamental difference between a publicly controlled, and a privately controlled, company. In the case of potential concessions, we consider that it must be the right of the public authority to decide whether to run a service itself, to do so via a legal entity it owns or controls, or to tender it. In the case of public contracts covered by the procurement Directives, the Teckal case provides a limited exception to the duty to tender etc., and if the private sector owns more than a modest interest in the company, the Teckal exception may not be deemed to apply.

39. In such a case, we propose that it should be possible to tender on the basis set out in (a) above, i.e. via a single tendering process which covers the choice of legal partner, and the award of the contract to carry out to the task. We should add that, if and when the Public Procurement Directives fall to be amended, the opportunity should be

taken to expressly permit the grant by public authorities of tasks to publicly controlled legal entities, whether wholly or dominantly owned by the public authority, and thereby broaden and make explicit the Teckal exception.

40. In the case of concessions, we strongly believe that the existing law enables (and in principle should enable) the public authority to grant to its publicly owned or controlled legal entity the task of running the concession, without an obligation to advertise or tender. This is part of the freedom of choice which logically derives from the principle that it is not for the EU to define what services should be run by the public sector itself, directly or via its undertakings, and what services it should put out to tender or privatise. This general principle is now all the more relevant, given the direct reference in Article 5.3 of the new European Constitution to the principle of local and regional self-government. The essence of local self-government involves a choice of how services within the municipality's competence are to be delivered, in the interests of its citizens.

41. This leaves the question of whether there are, at EU level, legal rules that require a specific process in relation to the selection of the private partner for the mixed legal entity. We believe that any public democratic authority must be able to justify to its citizens the reasons why it has made a decision – i.e. it should comply with the principle of transparency as a matter of good public administration. Whilst this will often involve advertising in some form, there may also be good reasons to select a partner without recourse to advertising. One example (though not involving a profit-making partner) might be the creation of a mixed entity involving a locally-operating charity that specialises, for example, in the care of children in need. There may be powerful reasons, based on local circumstances and knowledge, to grant a relevant concession to a partnership between the local authority and the charity, without advertising for other possible bidders.

(c) changing a wholly owned public legal entity to a mixed public-private entity, still controlled by the public authority

42. This case involves an existing wholly publicly owned legal entity which becomes a mixed public-private entity by the new involvement of one or more private sector partners, but in which the public authority retains the controlling interest. By definition, the legal entity will already have a public service task allocated to it, which – unless the law requires otherwise – will continue after the injection of a private sector dimension, either for an indefinite period, or until the end of the prescribed term already foreseen.

43. If the wholly-owned legal entity has previously been selected following a tendering process, then the choice of private partner raises no major issue in terms of European legal rules. Here again, the key principles are transparency and good public administration, i.e. the selection of

the private partner must be made on clear public interest grounds. Whilst this will often involve advertising etc., as stated in paragraph 41 above, there may also be rational grounds for selecting a particular partner without advertisement, though the decision should be explicit, and demonstrate clearly the advantage of the selection. The principle of non-discrimination must of course be adhered to, i.e. the selection of the private partner must be fully justifiable in the public interest on grounds other than national origin.

44. If on the other hand, the publicly owned legal entity has been granted a public service task without taking part in a tender, the situation requires further consideration. In the case of public works and service contracts, under existing law the Teckal exception, as currently understood, may no longer apply. In such a case, the duty under the Directive to tender may arise. Once again, we recommend that the need to double tender should be avoided, so that the public authority letting a contract should be able to tender on the basis that the service will be delivered by an institutional PPP, uniting the phases of choice of partner and award of contract (see above) in a single process. We also recommend that the Directives should be amended to widen the Teckal exception to cover all publicly controlled companies delivering public services limited to a specific locality. In other cases (service concessions etc.), where the Procurement Directives do not apply, the issue is simpler, i.e. the choice of the private sector partner needs to follow the principles of transparency and good public administration.

(d) changing a wholly owned public legal entity into a mixed public-private entity, controlled by the private sector partner

45. In this case, and following the logic of our basic distinction between publicly controlled companies and privately controlled ones, we believe that the principles should in general follow those set out at paragraph 37 above, unless the public legal entity has already won the contract under a tendering process, in which case the only issue relates to the choice of private partner (see paragraph 43 above). To recap, there should be two options available for the public authority. First, from the time of change of control to treat the mixed entity as a private undertaking, and to follow the relevant legal procurement processes in relation to public contracts or concessions, as the case may be. Or second, from the outset – and before selecting the private partner - to decide to award a contract to a mixed entity. Accordingly, the advertising and tender selection would be for a private sector partner who best met the combined requirements as legal partner in the company and the service / technical requirements of the contract(s) to be delivered.

46. To complete the picture, there is logically a final scenario, in which an existing mixed entity, controlled by the public sector, changes to a mixed entity controlled by the private sector, usually by one or more existing private partners taking an additional equity stake. The same principles apply, we suggest, as in relation to the previous scenario.

Public-Public Partnerships: inter-communal structures

47. Whilst this Green Paper is about Public-Private Partnerships, we wish to comment briefly on the legal position of local / regional institutional Public-Public partnerships. We are aware that the Commission has over recent months engaged in correspondence with certain governments in which, amongst other matters, the legality of the attribution of public service tasks to inter-communal legal entities without tendering has been challenged - for example the letter of Commissioner Bolkestein to the Belgian Minister of Foreign Affairs of 16th December 2003. We have major concerns about the nature of the legal arguments put forward by the Commission in this correspondence, which in our view go, at certain points, well beyond anything justified by the clear terms of the Treaty, Directives or case law. We are in particular concerned at the implications for inter-communal structures, in which several local governments combine together to deliver important public services for their joint areas, which in their view are more efficiently and effectively delivered through such vehicles than by each commune alone.

48. Without reiterating the arguments set out above, we believe that local and regional self-government must involve freedom on the part of the local / regional authority to decide the means by which a service should be delivered, including via inter-communal co-operation arrangements and inter-communal joint legal entities. In relation to service concessions, the principles we have set out and proposed above should equally apply to publicly controlled inter-communal undertakings. We believe that the Teckal "in-house" exception, in the case of public works and contracts, should apply mutatis mutandis to inter-communal legal entities, where the control exercised by the local authorities is broadly analogous to the control each would have if the service were delivered directly, *and provided that the entity does not compete or offer services outside its constituent municipalities' areas*. If this is not existing law, then the law needs to be amended.

Conclusions

49. In our introduction, we recalled that the express aim of the Green Paper is to launch a debate, and we believe that the issues we have raised - and there are many we have not touched on - demonstrate the need for such a public debate, based on better and wider information and understanding, before any new legislation is proposed at Community level.

50. Indeed, we note and share the perspective of Commissioner Bolkestein, who in his speech of 17th May queried whether, at least at the outset, the "most classical instrument" - legislation - was the best way forward; he suggested rather that at this stage we should seek prag-

matic solutions to such problems as exist, and actively promote exchange of good practice.

51. We make this point in particular because the Green Paper has a relatively narrow agenda - the legal rules - rather than a wide one about how best to promote knowledge and understanding of the roles and possibilities afforded by different models of PPP. Any changes to the law - and we have recommended some, in particular in relation to the current Teckal exception - should flow from a wider information-base and understanding of the current uses of PPPs, the advantages and disadvantages they offer, and the obstacles to their wider use where it might be beneficial to do so. They should also take into account the principles of subsidiarity and local self-government. The law should not be seen simply through an abstract economistic prism of "eliminating barriers to competition", but as a more pragmatic tool to enable the public and private sectors to work together for common advantage, respecting the roles of each, in the interests of the citizens.

ANSWERS TO QUESTIONS

[We have summarised the questions for the sake of brevity.]

1. What types of purely contractual PPP set-ups do you know of; are they subject to supervision?

The principal common kinds. As a European organisation, we are not aware of any special innovative types of PPP. We are not aware of national supervision arrangements.

2. For purely contractual PPPs, will the transposition of the competitive dialogue procedure into national law provide a well-adapted procedure in relation to public contracts?

We believe so, for most cases, but this will need to be tested in practice.

3. In the case of such contracts, are there other points which may pose a problem in terms of Community law on public contracts?

We are not aware of any.

4. Have you organised, participated in, a procedure for the award of a concession within the EU? What was your experience of this?

Our members' authorities have of course organised procedures for the award of concessions. The general experience is that the procedures for granting concessions are generally simpler and less costly than those under the public procurement Directives.

5. Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? Is competition normally guaranteed in this framework?

The simple answer is "yes". Given the nature of most works and services required by local and regional authorities, our general experience is that even when going through the processes required for public contracts, few non-national companies show interest, except for those who already have a presence in the country of the authority, for most contracts.

6. Is a Community legislative initiative to regulate the award of concessions desirable?

For reasons set out in our response, we do not favour a new Community legislative instrument for concessions.

7. If the Commission should propose new legislative action, should such legislation cover all contractual PPPs, whether designated contracts or concessions, and make them subject to identical award arrangements?

Even if we were in favour of a new Community legislative instrument for concessions, we would not favour using the same award arrangements for all. It is true that some types of PPP may be difficult to define at the outset as contracts or concessions; we believe that in any case of doubt, the public authority should assume from the outset that the Directive applies. To make all contractual PPPs subject to the identical award arrangements would involve a clear legal definition of what is a PPP in this context, something not attempted in the Green Paper, and which may be difficult to get agreement on. The only other way of doing so would be to make all concessions subject to the same detailed procedures as public contracts, which we would strongly contest

8. Are non-national operators guaranteed access to private initiative PPP schemes? Is there adequate advertising? Is the selection procedure genuinely competitive?

We do not have sufficient information to answer this point.

9. What would be the best formula to ensure the development of private initiative PPPs while guaranteeing compliance with the relevant principles?

As indicated in our response, we do not yet have a fixed view on this point, and believe a fuller debate is required.

10 - 14 These deal with the phase following the selection of the private partner

We are not generally able to assist on these points. However, some of our members have indicated that they do not fully share the Commission's concern over step-in arrangements (Q13), which may be necessary to ensure that a project (which has been tendered) is carried through. In general, we consider that the approach taken in this part, both in the text and the questions, is rather one-sided and rigid. Everything seems to be looked at from the point of view of "barriers" to freedom of establishment etc., rather than looking at what is the correct balance between contractual certainty and the need for a reasonable degree of flexibility to deliver, and even adjust, a project over its lifetime.

15. Are there specific problems in relation to subcontracting?

We are not aware of any.

16. Does the phenomenon of contractual PPPs, involving transfer of a set of tasks to a single partner, justify more detailed rules for subcontracting?

No.

17. Is there a need for a Community level initiative to clarify or adjust the rules on subcontracting.

We believe not, subject to the product of this consultation.

18. What experience do you have of arranging institutionalised PPPs, and do you think that Community law on public contracts and concessions is complied with in such cases? If not, why not?

Our members across Europe have a wide and diverse experience, under differing national legal systems, of institutional PPPs (i.e. public-private mixed entities). In general, we and they consider that they comply with Community law on public contracts, and with relevant national and, so far as applicable, Community law on concessions. However, many of our members do not agree with all aspects of the Commission's opinion on the current Community law on concessions (see our main response), in particular in relation to public service missions assigned to their publicly controlled legal entities.

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

No. We believe that where there is a requirement or a choice to advertise to find an institutional PPP private partner, it is for the public authority in question to carry out. This is an area where exchange of good practice may be beneficial.

20. Which measures or practices act as barriers to the introduction of PPPs within the European Union?

We do not believe that it is helpful to look at the question in terms of "barriers". What is needed, at least for local and regional authorities, is a European exchange of practice and guidance for public bodies on the pros and cons of different types of PPP, assistance with legal documentation, etc. The issues are pragmatic and technical. Most of the support needs to be provided at national level, but a European dimension would be beneficial.

21. Do you know of other forms of PPP developed in countries outside the EU?

No

22. Would a collective consideration of these questions pursued at regular intervals among the actors concerned, also allowing for exchange of best practice, be useful? Should the Commission establish such a network?

We strongly support this point. We believe it would be useful for the Commission to take the initiative in setting up such a network, including of course local and regional government involvement. CEMR would be pleased to cooperate in this.

C C R E

C E M R

CONSEIL DES COMMUNES ET REGIONS D'EUROPE
SECTION EUROPEENNE DE CITES ET GOUVERNEMENTS LOCAUX UNIS

COUNCIL OF EUROPEAN MUNICIPALITIES AND REGIONS
EUROPEAN SECTION OF UNITED CITIES AND LOCAL GOVERNMENTS

CEMR Response to the European Commission's Green Paper on

PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON CONTRACTS AND CONCESSIONS

Background document:

Green Paper on PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON CONTRACTS AND CONCESSIONS

COM(2004) 327

EXECUTIVE SUMMARY

Introduction

1. We welcome the publication of the Green Paper on Public-Private Partnerships (PPPs) and Community law on contracts and concessions. Noting that the present Green Paper concentrates on the technical legal issues, ***we hope that the Commission will launch a wider debate to examine the positive and negative experience of PPPs to date, in order to promote their best use across Europe.***

2. We do not fully accept, as regards local and regional government, the Green Paper's proposition that "the development of the PPP is also part of the more general change in the role of the State in the economy, moving from a role of direct operator to one of organiser, regulator and controller." There are advantages and disadvantages to each of the methods of service delivery - whether by the public authority itself, by outsourcing to the private sector, or by using public-private mixed companies or other forms of PPP. For each service, local and regional governments need to make pragmatic decisions based on their own circumstances. ***We consider that the principle of local and regional self-government - now expressly recognised in Article I – 5 of the European Constitution - must enable local and regional authorities to decide democratically the best means of delivering each service, including decisions to use companies they own or control.***

3. We also believe that ***there needs to be a wider political debate about the future of local and regional public services within the EU, to discuss the proper balance between, on the one hand, local self-***

government and subsidiarity, and on the other, the rules of competition that need to apply in the European interest. Several connected issues – the White Paper on Services of General Interest, the “Monti package” on the relationship between public service compensation and state aids rules, and now this Green Paper – need to be seen and debated politically as a coherent whole.

The existing legal framework for PPPs

4. A principal concern for European local and regional government relates to the uncertainty that applies to what the Green Paper calls "institutional PPPs", i.e. mixed public-private legal entities. ***Our response therefore sets out our understanding of the current main legal rules that apply, which differs in some important respects from that of the Commission*** as set out in the Green Paper.

5. The new EU Public Procurement Directive of 2004 lays down a clear code of rules for the tendering of public works and service contracts, which accordingly apply also to many contractual PPPs. However, the Directive does not apply to service concessions, where the private party his given the power to "exploit" the service, i.e. to charge users of the service (with or without additional payment from the public authority). A key issue raised in the Green Paper is whether service concessions should be brought under the same or similar legal rules as works and service contracts. ***CEMR believes that service concessions should not be subject to the detailed and complex EU procurement regime***, since the nature of most concessions, with the additional risk passing to the private party requires more flexibility than is possible under the current Directive.

6. The European Court of Justice (in the ***Teckal*** case) decided that, under the public procurement Directive, all relevant contracts must be tendered out by local authorities wherever a contract is to be concluded between it and "a person legally distinct" from the authority. The only exception the Court permits is where the authority exercises over the company a control similar to that it exercises over its own departments, and the company carries out the essential part of its activity with its parent authority. ***CEMR considers that the Commission gives an unduly limited interpretation to this exception, and in particular believes that, when the Directive falls to be amended, this exception should be expanded to cover companies owned or legally controlled by the local authority.***

7. The Green Paper expresses the Commission's view that, in relation to service concessions, and despite the absence of any Directive, there are Treaty rules that require all concessions to be tendered, including (it appears) the case of local authority controlled public-private mixed legal entities. ***CEMR on the other hand believes that there is no EU law that requires local services to be tendered, if the local authority chooses to allocate the concession task to a company it wholly owns, or a mixed public-private entity that it controls.***

Purely contractual PPPs

8. ***We agree that for purely contractual PPPs that fall within the public procurement Directive, the new "competitive dialogue" procedure appears to offer an appropriate means to enable the parties to work out the best solution and to select the best private partner for the task.*** This will need to be kept under review as this procedure is a new one, not yet operational. We recommend that the Commission issues guidance to public authorities in relation to complex cases where it may not be fully clear at the outset whether the proposed PPP will be a works or service contract, or a concession. Public authorities should err on the side of caution, and use the Directive's procedure in case of doubt.

9. We believe that further consideration needs to be given before reaching a view on whether further incentives should be given by law to promote "private initiative PPPs", i.e. where the concept for the proposed PPP comes from a particular private sector body.

Institutionalised PPPs (public-private mixed legal entities)

10. This section of the Green Paper raises very important issues for local and regional government, since our authorities use a very wide range of legal entities which they either wholly own, or which are mixed public-private companies. These companies to date have a wide range of public service tasks and missions entrusted to them, often because they can combine the benefits of access to private sector investment and know-how, together with public control and adaptability to meet new needs and circumstances.

11. In the light of the Commission's legal analysis (which we do not wholly share), ***CEMR is in particular concerned to avoid an excessive administrative and financial cost and delay that would be involved in any legal situation that would require a "double tendering"*** - i.e. one process of competitive tendering for the selection of the private partner, followed by another such process for the award of the public contract or concession. Our experience shows that the costs and delays are very real in such a scenario.

12. ***We therefore propose that, to avoid costs and unnecessary regulation, double tendering be avoided, by permitting authorities to invite tenders to carry out a defined task or service by using a public-private company only***. The tender documentation would make clear the proposed legal format, as well as the technical specification etc., and the competitive dialogue process could be used to make the choice. In this way, all private sector companies could bid, but the public sector's choice of means of delivery would be respected.

13. Our response looks more specifically at the Green Paper's comments in relation to (a) the creation of an ad hoc legal entity jointly owned by the public and private sector, and (b) the control of a public entity by a private

entity. We point out that in fact there are two scenarios under each heading. When a new legal entity is created, it may be controlled by the public or by the private sector. Likewise, in the second case, an existing company wholly owned by an authority may become a mixed public-private entity, with legal control either remaining with the public authority, or passing to the private sector

14. ***CEMR believes, in relation to these scenarios, that there is a clear distinction between publicly controlled companies, and privately controlled ones.*** In either case, the authority should be able to use the process of a single tender (as outlined above) for the choice of partner and attribution of the contract / concession. In general, a privately controlled mixed entity should be treated similarly to other private sector companies. However, we consider that local and regional authorities have, and should have, more discretion over companies they own or control, e.g. they may (where appropriate) lawfully entrust concessions for local services to such entities without a tendering process.

15. ***In relation to the choice of private sector partner for mixed legal entities, we consider that the principles of transparency and good public administration should apply.*** Any public authority must be able to justify its decision to its citizens. Whilst we envisage that the private sector partner will often be selected via an advertising process, but there may also be proper grounds, based on local circumstances, for selecting an individual partner.

Inter-communal structures

16. We draw attention to one form of public-public partnership where we have concerns about the approach currently being taken (outside the Green Paper process) by the Commission. This relates to inter-communal structures, where two or more municipalities jointly establish a legal entity to deliver specific services solely for their joint area and population. The Commission has challenged the legality of local authorities entrusting services to such structures without those services being tendered out. ***We believe that it normally is, and should be, lawful for the relevant municipalities to entrust local public service tasks to such structures, on the same basis (mutatis mutandis) as a single local authority can do in relation to its own company, and the Teckal case should be interpreted on this basis.***

Conclusion

17. We share the view of Commissioner Bolkestein who in a speech on the launch of the Green Paper queried whether "the most classical instrument" - new legislation - was, at least at the outset, the best way forward. He suggested that at this stage we should seek pragmatic solutions to such problems as exist, and actively promote exchange of good practice.

18. We believe this is right, even though we have proposed amendments to legislation (to extend the Teckal exception), in particular because the Green Paper has a relatively narrow agenda, namely the legal rules. ***We consider that any changes to the law should flow from a wider information-base and understanding of the current uses of PPPs, their advantages and disadvantages, and the obstacles to their wider use where it may be beneficial to do so. They should also take into account the principles of subsidiarity and local self-government***. The law should not be seen simply through an abstract economistic prism of "eliminating barriers to competition", but as a more pragmatic tool to enable the public and private sector to work together for common advantage, respecting the roles of each, in the interests of the citizens.

26 July 2004
CER filing: 01.04.03

European Commission Green Paper on Public-Private Partnerships

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A general response from CER

The *Community of European Railway and Infrastructure Companies* (CER) welcomes the discussion initiated by the European Commission in their recent Green Paper[i] on Public-Private Partnerships (PPPs).

In order to meet the objectives contained in the Commission's 2001 White Paper on Transport Policy[ii], the European railway market requires new investment along key trading corridors, such as the TEN-T. PPPs are a relatively new financing opportunity, at least in the rail sector. CER recognises that, in specific cases, PPPs may usefully broaden the existing range of financing instruments available to governments to fund new investment. Moreover, as with all contracts, PPPs impose a welcome discipline on the public sector: once the project is agreed, governments are not able to change the project design for short-term political gain.

However, we do not see this discussion on PPPs as applicable to public service transport contracts, or regional franchise agreements. These are already regulated under Regulation 1191/69[iii] which applies tailored procedures to these rail services[iv]. Public service contracts should therefore be excluded from the Commission Green Paper on PPPs.

As the Green Paper makes clear, even in the context of funding new infrastructure, 'PPPs cannot be presented as a miracle solution…' (para 5). PPPs may help with the *financing* of new rail infrastructure – that is spreading current expenditure needs over future budgets, but they will not replace the basic need for public funding, commitment and risk-participation. Indeed, examples of PPPs within the rail sector remain scarce[v]. We stress two potential general difficulties in applying PPPs to the rail sector:

- Borrowing money from the private sector is more expensive than raising public money: the government ends up paying a 'mark-up' in order to provide infrastructure. The size of the mark-up increases as the private partner bears more risk. In addition, the high degree of integration and interdependency required within the rail network (e.g. technical standards, safety requirements and access points) can make the involvement of a private company, other than the national infrastructure manager, difficult: for instance, a recent report by *PricewaterhouseCoopers*[vi] argues that the upgrading of high-speed rail lines within Europe is unlikely to be done at lower cost by the private sector.
- If a few links within a national rail network are owned and operated by a separate private company other than the national infrastructure manager, complex contractual arrangements are required in order to satisfy the performance regime requirements of Article 11 of Directive 2001/14 on access charging. This will reduce the attractiveness of the project to the private sector, or, equivalently, increase the 'mark-up' that the government has to pay to secure private financing of the project.

The Green Paper largely avoids this discussion on PPPs, however, by recognizing that this is ultimately a question for Member States. Instead it questions whether there is a need to harmonise the national legal bases of

PPPs. For CER, the need for harmonisation is most apparent in cross-border rail projects. This view is also supported by the recent *PricewaterhouseCoopers* report, which states that: 'the alignment of legal requirements in different Member Countries…, for example relating to procurement, property and planning, and risk sharing, would facilitate cross-border TEN-T projects.' (pg 19).

The Green Paper asks a number of specific questions on the experience of participants in PPP processes within Europe. We have the following comments:

- On the 'competitive dialogue' procedure: the complexity of negotiations surrounding PPP projects requires a flexible approach to specifying the project and timing of negotiations. We are concerned that the competitive dialogue might increase the complexity, and hence cost, of a project. We support its use only as a case of last resort i.e. where current 'negotiated' procedures demonstrably fail.

- The problem of low bids: the range of bids for a particular project may contain one extremely low bid. This bid may reflect genuine lower production costs from a particular supplier. However, it can also reflect either predatory pricing or poor judgement. This latter case may lead private operators to run into financial difficulties. Renegotiating these contracts is time consuming and costly to the public budget. Creditworthiness, amongst other qualitative and quantitative decisive factors, should therefore be an important criterion when selecting PPP partners.

- Duration of the partnership: the Green Paper states that the duration of the relationship must be fixed in terms of the need to guarantee the economic and financial stability of a project, while securing that it does not limit open competition beyond what is required to ensure that the

> investment is paid off and there is a reasonable return on invested capital. CER is concerned that setting an undifferentiated 'duration cap' applicable to all sectors of the economy is unrealistic. Rail projects typically take tens of years to mature.

In conclusion, CER supports the discussion within the Green Paper, provided that it does not cover public service transport contracts and regional franchise agreements. We see the objective of Community legislation as simplifying the administrative and legal complexities of cross-border TEN projects. We also support exchange of information between Member States on applying novel financing instruments, including PPPs, to develop national rail infrastructure.

[i] COM (2004) 327 Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions.

[ii] COM (2001) 370 White Paper on European Transport Policy for 2010: a time to decide.

[iii] Regulation on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road, and inland waterways, as amended by Regulation 1893/91, OJ L 169 of 26 June 1991.

[iv] Further, Regulation 1191/69 is currently in the process of being revised (see COM (2000) 7 and COM (2002) 107. The proposal put forward by the European Commission maintains specific tendering rules in the sector in order to take into account the flexibility needs when awarding public service contracts.

[v] Italy and the UK have taken a lead with PPP financing. Well known rail examples include the Dutch High-speed rail project (HSL Zuid); the Messina road-rail bridge, linking Sicily with mainland Italy; the French-Spanish Perpignan-Figueras link; the UK Channel Tunnel Rail Link and the Danish-Swedish Øresund link.

[vi] PricewaterhouseCoopers, 2003, The trans-European Transport Network: from aspiration to reality' pg 18 reads: '..An example…is an upgrade of an existing railway line, where it may be more practical and cheaper for the incumbent operator and maintainer to take responsibility for the new infrastructure, particularly where it is closely integrated with existing infrastructure'.

USSP
CESI

OPINION

of the Association of Public Sector Trade Unions of CESI

on the

Green Paper

on public-private partnerships and Community law on public contracts and concessions

(presented by the Commission)

COM(2004) 327 final

Rapporteur: Klaus Geiser

EN Brussels, 27 July 2004

USSP

Brussels, 27 July 2004

Opinion

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(presented by the Commission)

COM(2004) 327 final

The Association of Public Sector Trade Unions of CESI,

given the Green Paper on public-private partnerships and Community law on public contracts and concessions (presented by the Commission), COM(2004) 327 final;

acknowledging the sovereignty of the Member States of the European Union as regards the definition, organisation and financing of their public services;

acknowledging the principle of subsidiary embedded in the European conventions;

considering that the USSP/CESI, in its capacity as the umbrella organisation of public sector trade unions, is commenting on this Green Paper from the whole European perspective and is therefore not giving an opinion on the individual issues – which affect the Member States in varying ways – relating to the tensions between European and national law when defining public-private partnerships;

adopted the following resolution on 27 July 2004.

1. The USSP/CESI acknowledges that, in its Green Paper, the European Commission is for the first time tackling the increasingly important issue of whether, and if so how, competition can also embrace original local and regional organisational forms.

2. The USSP/CESI demands – as it did in its resolution on "Public Services in Europe" of 19 March 2003 (DOC/CESI-158/2003-DE) – that European citizens should benefit from high quality public services at affordable prices and that the issues relevant to supply reliability, complete and fair access and quality guarantees must continue to be solely the responsibility of Member States, regions and local authorities.

3. The USSP/CESI therefore advocates a very cautious approach to the liberalisation envisaged by the Green Paper and a meticulous investigation into its effects.

4. The USSP/CESI points out that there is no need for regulation as regards service concessions, nor is there any competence at European level in this regard. Furthermore, there is no regulatory competence for local organisational decisions.

5. The USSP/CESI expects that, in the continuing decision-making process with regard to the Green Paper, the following basic positions will be borne in mind:

   - The structures of the system of property ownership and of local political autonomy – which will be constitutionally guaranteed following the ratification of the treaty and are protected by the constitutional principles of the recognition of local and regional political autonomy (Art. I-5 of the draft treaty) and the subsidiarity clause (Art. I-9) – must be respected;
   - The freedom of the local authorities to determine how public services are provided by particular companies or by mandated third parties must be preserved;
   - The "In-house Principle" at public-public enterprises and locally controlled public-private partnerships must be recognised.

Brussels, 27 July 2004

Christian Chapuis	Helmut Müllers
President of the USSP/CESI	Secretary General

Brussels, 23 July 2004

EBC POSITION

regarding the

Green Paper on Public-Private Partnerships
Published by the European Commission on the 30th of April 2004, Com (2004) 327 final.

The E.B.C. (European Builders Confederation) is the European professional organisation that represents national associations of SMEs and craft enterprises working in the construction sector. E.B.C was set up in 1990 and currently has thirteen member organisations representing approximately 400.000 craftsmen and small and medium-sized enterprises in the building sector.

These are the EBC answers to the Commission's questions on the Green Paper on Public-Private Partnerships.

****

1. What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?

Here are two examples provided by our French and English members:

> At present two types of contractual PPP are recognised by French legislation:

- The sub-contracting of public procurement, where the party executing the works insures his return on investment, through the management of the facilities over a certain amount of time (concessions). The tender procedures for these contracts are specified in the "loi Sapin".

- The partnership contracts introduced by an order, dated 17th of July 2004, despite the opposition of craftsmen and SMEs in the construction sector, supported by architects, a law enabling PPP has recently been introduced. In fact all the above professions consider that the current law, giving all responsibility for the project including conception, financing, construction and maintenance, to a private supplier, is destined to prevent free competition. Moreover they consider that this would limit direct access to public procurement for craftsmen and SMEs, although, up to now, it represented close to 85% of their contracts.

> In the UK, the Private Finance Initiative has been in operation since 1992, although it is only since 1997 that projects have been started. PFI provides for what is effectively the hire purchase by the Government of capital assets over a period of 30 years. The scheme is attractive to Government, as it shifts the capital assets out of Government borrowing, and therefore improves

the apparent state of Government finances. However, there are increasing concerns about the value for money of PFI projects, especially as the borrowing costs of private sector operators are invariably higher than those of Government. Most UK PFI projects are schools, hospitals and roads.

2. In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

EBC agrees with the Commission on the two fundamental points of the question:

- *maintain the distinction "public procurement/concession" dependant on the payment modes*
- *include the PPP in the competitive dialogue procedure destined only to projects of particular complexity, as in the Public Procurement Directive 2004/18/EC.*

If this were not to be the case, SMEs would progressively be excluded from direct access to public procurement.

3. In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.

The PPP because of their global character are not accessible to SMEs, as they do not have the financial or administrative resources to bid for very large, long-term contracts. The procedure is therefore inherently discriminatory, even though SMEs and craftsmen supply the majority of services and production in the construction industry. In consequence PPPs limit the competition to only a few large firms.

4. Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

Due to the characteristics of the enterprises that are represented by EBC, they are not likely to be candidates for such concessions, but neither does this procedure result in any particular prejudice.

5. Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?
No response

6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?
No response

7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual

PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?
No response

8. In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?
No response

9. In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?

EBC is not favourable to the further development of PPPs. On the contrary EBC would like to see them limited to exceptional situations (see Question 2).

10. In contractual PPPs, what is your experience of the phase which follows the selection of the private partner?
No response

11. Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?
No response

12. Are you aware of any practices or mechanisms for evaluating tenders which have a discriminatory effect?
No response

13. Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment.? Do you know of other "standard clauses" which are likely to present similar problems?
No response

14. Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?
No response

15. In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.

The public procurement PPPs generally result in the fact that SMEs are reduced to acting as sub-contractors. Yet, sub-contracting companies do not have the possibility to negotiate with large contractors. In consequence they are sometimes forced to accept pricing levels that are beneath their profitability levels. This does not only endanger their company but also represents a clear *abuse of a dominant position and a breach of the rules relative to the access to public procurement.*

Beyond the pricing of sub-contracts, the behaviour of the main contractor with regard to delays in payment and in a general manner regarding the management of the project, may also put the existence of the sub-contracting companies at risk.

16. In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

YES. EBC has prepared the following suggestions:

- *In the case of a PPP the total amount of the sub-contracted works should be known by the private or public person in charge of the public procurement, and should be published in an official journal.*
- *A public invitation to tender should be published by the party holding the PPP in order to insure fair competition between sub-contractors.*
- *Precise work schedules should be supplied by the holder of the PPP to the companies undertaking the works.*
- *The contracts should be attributed in batches organised by profession.*
- *The sub-contractor should be protected from unfair competition by selection procedures based on the economically most advantageous tender, avoiding abnormally low bids.*
- *The holder of the PPP should have to publish a notice in an official journal, giving the results of the tender process*

17. In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

YES. EBC considers that there is a need for European Legislation to clarify and adjust the rules on subcontracting.

To avoid their social and employment obligations, many companies sub-contract works out to craftsmen and small enterprises on which they impose pricing levels and execution conditions beneath profitability and economic feasibility levels.

A European legislation on this subject seems to be needed in particular to help enterprises in the countries where such legislation does not exist and thereby assist in the proper functioning of the Internal Market.

18. What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not ?

No response

19. Do you think that an initiative needs to be taken at Community level to clarify or define the obligations of the contracting bodies regarding the conditions requiring a call for competition between operators potentially interested in an institutionalised project? If so, on what particular points and in what form ? If not, why not?
No response

In general and independently of the questions raised in this document:

20. In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?
No response

21. Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of "good practice" in this framework which could serve as a model for the Union? If so, please elaborate*.*
No response

22. More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

EBC maintains that PPP should be applicable only to complex, large scale operations. If further collective consideration should be organised on the subject of PPPs, EBC would like to take part and is further of the opinion that the Commission should establish such a network.

EBC approves of the consultative procedure instigated by the Commission through the publication of this green paper and would like to see the results published. In particular EBC would like them to show the differences in opinion between Member States and between the roles of the respondents.

EBU·UER

EUROPEAN BROADCASTING UNION **UNION EUROPEENNE DE RADIO-TELEVISION**

Legal Department ***Département juridique***

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Mr Matthias Petschke
Head of Unit
European Commission
100 av. de Cortembergh
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Belgium

DAJ 04-318
jev

16 July 2004

Dear Mr Petschke,

Consultation on the Green Paper on public-private partnerships and Community law on public procurement

As we believe that possible follow-up actions to the Green Paper are unlikely to target or affect the broadcasting sector, we have not felt the need to prepare a formal contribution on the Green Paper.

Nevertheless, we would like to submit some comments just in case the Commission should decide to draw up a horizontal framework on public-private partnerships *and* extend it beyond infrastructure projects – i.e. the traditional area of public-private partnerships – so as to apply it to general interest services. We believe that the inclusion of broadcasting in such a horizontal framework would be incompatible with the European audiovisual model.

While it is true that public broadcasting services are considered as services of general interest under Community law, they are significantly different from the normal type of such services, in particular the network industries. This has just recently been recognized again in the draft Community Framework for state aid in the form of public service compensation. (In its Communication of 15 November 2001 on the application of State aid rules to public service broadcasting, the Commission stated that public service broadcasting was "not comparable to a public service in any other economic sector".) Various aspects of this specificity have been explained in the EBU Reply of 9 September 2003 to the Green Paper on Services of General Interest, to which we should like to refer here (see attachment).

According to the Amsterdam Protocol on the system of public broadcasting in the Member States, "the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism". The public service remit in broadcasting is thus closely linked to imperatives such as independence from the government, media pluralism, cultural diversity, and support for creativity.

According to the same Protocol, it is for the Member States to define the public service remit, to confer the remit to particular broadcasters, and to decide on the organization of public service broadcasting. As far as broadcasting is concerned this would certainly rule out the option of drawing up detailed Community rules on the entrustment of a public service remit.

With regard to the awarding of contracts by public service broadcasters, it should be noted that the latter's independence from the government, their organizational structure and the way they carry out their activities, as decided by the Member States, often mean that they do not fall under the category of "contracting authorities" under the Public Procurement Directive. Even when they are considered as such authorities, they benefit from the specific exclusion of contracts for "the acquisition, development, production or co-production of programme material intended for broadcasting by broadcasters and contracts for broadcasting time" (Article 16(b) of Directive 2004/18/EC). As explained in Recital 25, "the awarding of public contracts for certain audiovisual services in the field of broadcasting should allow aspects of cultural or social significance to be taken into account which render application of procurement rules inappropriate".

Outside the scope of the PP Directive and in the absence of relevant legal provisions, self-regulation would seem to be the most appropriate way of defining a transparent framework for awarding contracts, and applying tendering procedures where they are appropriate – but only where appropriate. This makes it possible to ensure that financial resources are used in the most rational and economic manner possible, without affecting the independence of broadcasting, programme autonomy, diversity and pluralism of programmes and information sources, journalistic and artistic freedoms, or – last but not least – the need for rapid decision-making in media organizations which produce and broadcast a large number of news and current affairs programmes.

It may be argued that in the new digital environment there is a case for extended forms of cooperation between public service broadcasters and commercial companies which are active in converging sectors, especially with regard to multimedia or new distribution platforms. Here, however, the primary problem lies in finding ways to reconcile such forms of cooperation with the existing restrictive regulations on public service broadcasting. In practice, moreover, it seems that such partnerships, where they exist, have more of an experimental character. The lack of experience and the variety of national broadcasting systems therefore do not permit any general conclusions at this stage. Nevertheless, it is fair to say that in view of the strong content-related aspects normally inherent in such partnerships the choice of the partner cannot be subject to any rigid or purely economic parameters.

We should be very grateful if the Commission could be most attentive to the points mentioned above when it draws conclusions from the consultation and considers options for Community intervention.

Yours sincerely,

Michael A Wagner

Michael A. Wagner
Deputy Director
Legal Department

1 Annexe

EBU·UER

EUROPEAN BROADCASTING UNION **UNION EUROPEENNE DE RADIO-TELEVISION**

Legal and Public Affairs Department ***Département des affaires juridiques et publiques***

9.9.2003
DAJ/AF/MW/mp
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Annexe
DAJ 04-318
July 2004

EBU Reply to the Green Paper on Services of General Interest

Introductory comments

The EBU welcomes the opportunity to comment on the Green Paper on Services of General Interest presented by the Commission on 21 May 2003. It supports the Commission's idea of launching a debate on the scope of possible Community action on services of general interest, including any action that can contribute to greater legal certainty.

The EBU appreciates the fact that the Green Paper recognizes the role and importance of services of general interest (SGI) and of general economic interest (SGEI) within the European Community. We also welcome the Commission's recognition of the specificity of broadcasting and, in particular, public service broadcasting and the significance accorded to the Amsterdam Protocol in treating broadcasting within the concept of SGI.

From the broadcaster's viewpoint, a higher profile for SGI in general is certainly a positive step. However, the limited role of the Community with regard to the system of public service broadcasting in the Member States needs to be borne in mind:

- The Green Paper recognizes that it is "primarily for the competent national, regional or local authorities to define, organise, finance and monitor services of general [economic] interest" (paragraph 31).

- Beyond this, it has to be taken into account that public service broadcasting is covered by the Amsterdam Protocol, whose importance for the regulation of SGEI is acknowledged by the Green Paper (paragraphs 8 and 31). The Protocol clearly limits the application of the Treaty by clarifying that conferring, defining, organizing and funding of public service broadcasting are primarily a matter for the Member States.

- Furthermore, it is established in the case law of the Commission and the European Court that Article 86(2) of the EC Treaty is applicable (to broadcasting and in particular) to public service broadcasting, with the consequence that it provides for (partial) protection of SGEI from the application of Treaty rules, and particularly from the rules on competition law.

Our understanding is that this legal framework will remain unchanged under the new draft Constitutional Treaty.

The EBU also welcomes the Commission's efforts to take up the issue of media pluralism, explicitly relating it to the protection of freedom of expression in order to ensure that the media reflect a range of views and opinions as is required in any democratic society (paragraph 73).

Independent public service broadcasting plays a major role in protecting and enhancing media pluralism in Europe. Pluralism of opinion and cultural diversity are at the heart of the public service broadcasting remit. The Amsterdam Protocol recognizes explicitly that the system of public broadcasting in the Member States is directly related to the need to preserve media pluralism.

The EBU thus supports the idea of recognizing the need to safeguard media pluralism also at the European level, to allow for consideration thereof, particularly vis-à-vis media concentration, within any action under the Treaty. On the other hand, it may be wondered whether it is appropriate and feasible to address the concept of media pluralism within the framework of SGEI. Moreover, since there is currently no genuine Union competence for regulatory measures regarding media pluralism, there needs to be discussion of whether and, if so, how an appropriate legal basis for Community action might be created.

What kind of subsidiarity?

(1) Should the development of high-quality services of general interest be included in the objectives of the Community? Should the Community be given additional legal powers in the area of services of general economic and non-economic interest?

The EBU appreciates the fact that the Green Paper stresses the importance for the European Union of services of general interest (SGI) and of general economic interest (SGEI), including broadcasting and, particularly, public service broadcasting. It agrees with the idea that within any action at the European level the role of public services should be taken fully into account, so as to allow Europe's common values to be preserved and the goals of the Union to be achieved. This would correspond to the services' contribution to the objectives of the Union as defined under Article 3 of the current draft Constitutional Treaty as drawn up by the European Convention.

On the other hand, the draft Constitutional Treaty does not change the limited character of Community competences as described above. It mentions SGEI in the clauses of general application, and in the Fundamental Charter, without it being necessary to give the Community a genuine competence for regulating SGEI. Our understanding is that the new sentence two in Article III-6 would enable the Union, where it has competences (but only there), to use those competences to regulate SGEI in a European law. Irrespective of the explicit inclusion of SGEI as an objective of the Union, it should be feasible for the Community to take into account the objective of developing high-quality services of general economic and non-economic interest in any action throughout its areas of competence. The first sentence of Article III-6 should provide a sufficient basis for this task.

(2) Is there a need for clarifying how responsibilities are shared between the Community level and administrations in the Member States? Is there a need for clarifying the concept of services without effect on trade between Member States? If so, how should this be done?

Responsibilities are defined in the new draft Constitutional Treaty (Articles I-11 to I-16). Under these rules there is no genuine competence for the Commission to regulate services of general interest. With regard to Member States' specific competences for many SGEI sectors on the one hand and the horizontal competences of the Union in such other areas as competition law and the internal market on the other (paragraph 31 of the Green Paper), a carefully balanced approach vis-à-vis each area seems necessary. The specificity of the broadcasting sector and, in particular, public service broadcasting, vis-à-vis other SGI and SGEI needs thereby to be taken into account.

In terms of the effect on trade between Member States it should be noted that this concept is currently understood and applied by the Commission and the Court so broadly, by accepting any possible international dimension (which can always be found in a liberalized market), that it has become virtually meaningless. Thus, any initiative to restore the relevance of this criterion would be welcome, as it would go hand-in-hand with strengthening the subsidiarity principle. It should be borne in mind that public service broadcasting provides, unlike other general interest services such as supply of electricity, gas or telecommunication, a service which is - owing to its national character - not substitutable between Member States.

(3) Are there services (other than the large network industries mentioned in para. 32) for which a Community regulatory framework should be established?

The EBU agrees with the Green Paper's assessment that there is a difference between large network industries and other industries. If the idea of a framework Directive is pursued, it should be limited to such networks with similar characteristics. As far as broadcasting is concerned, the Amsterdam Protocol on the system of public broadcasting in the Member States clarifies substantially how responsibilities are distributed between the Union and the Member States.

Broadcasting has little in common with larger network industries. An example of this is the specific regulation of broadcasting in the Television without Frontiers Directive as mentioned in paragraph 32 of the Green Paper. The EU Communications Directives also provide a specific framework, thereby distinguishing between content services and network services and acknowledging in this regard the different regulatory needs. In the case of State aid regulation, the Commission Communication of 15 November 2001 on the application of State aid rules to public service broadcasting provides for a specific regulation which cannot be applied more generally to other services.

As noted in Recital 6 of the 15 November 2001 Communication, public service broadcasting "is not comparable to a public service in any other economic sector", and a framework Directive would not be appropriate.

(4) Should the institutional framework be improved? How could this be done? What should be the respective roles of competition and regulatory authorities? Is there a case for a European regulator for each regulated industry or for Europe-wide structured networks of national regulators?

As indicated by the previous answer above, there is no case for improving the institutional framework or for establishing a European regulator for broadcasting.

Sector-specific legislation and general legal framework

(5) Is a general Community framework for services of general interest desirable? What would be its added value compared to existing sectoral legislation? Which sectors and which issues and rights should be covered? Which instrument should be used (e.g. directive, regulation, recommendation, communication, guidelines, inter-institutional agreement)?

Regardless of whether there will be a respective Community competence, because of the Member States' competences and the specificity of the broadcasting sector, as pointed out above, it would not be appropriate to apply the rules of a *horizontal* framework Directive or other instrument to this sector.

(6) What has been the impact of sector-specific regulation so far? Has it led to any incoherence?

The EBU is currently aware of no incoherence arising from the sector-specific approach, as applied, for example, in the Television without Frontiers Directive and in the Communication on the application of State aid rules to public service broadcasting (which is discussed in the reply to question 21 below). As noted above, the Commission has characterized the public service broadcasting sector as not being comparable with any other public service in other sectors.

Economic and non-economic services

(7) Is it necessary to further specify the criteria used to determine whether a service is of an economic or a non-economic nature? Should the situation of non-for-profit organisations and of organisations performing largely social functions be further clarified?

The Green Paper acknowledges that in recent decades more and more activities have become of economic relevance and that, for an increasing number of services, this distinction has become blurred (paragraph 45). Since any kind of general interest service may have economic implications, the distinction would lose its purpose if it resulted in including all kinds of general interest services in the concept of SGEI. It thus seems debatable whether such a rigid distinction between services of general economic or non-economic interests is feasible for regulatory purposes.

However, there is a clear difference between, on the one hand, the economic significance of large network industries, such as electricity, gas and transport, and, on the other, the economic activities of organizations such as public service broadcasters. For the regulation of economic and non-economic services the EBU therefore proposes considering - with respect to each sector and separately for each area of regulation (such as competition or internal market rules) - the differences in economic significance, including the different economic orientation, i.e. whether an entity has, predominantly, a profit-making or a common-interest objective.

(8) What should be the Community's role regarding non-economic services of general interest?

The Green Paper properly states that there are different rules applicable to SGEI and SGI. The EBU agrees with the principle that the Community should have no jurisdiction over SGI, unless provided for in sectoral provisions. In any case, the graduated approach as mentioned in the reply to question 7 above, should enable the regulatory authorities to allow a flexible assessment of the application of Articles 16 and 86(2) of the Treaty to SGEI and SGI, depending on their economic significance; at the same time due account needs to be taken of the specificity of public service broadcasting as recognized in the Amsterdam Protocol.

A common set of obligations

(9) Are there other requirements that should be included in a common concept of services of general interest? How effective are the existing requirements in terms of achieving the objectives of social and territorial cohesion?

(10) Should all or some of these requirements be extended to services to which they currently do not apply?

(11) What aspects of the regulation of these requirements should be dealt with at Community level and which aspects left to the Member States?

(12) Have these requirements been effectively implemented in the areas where they apply?

(13) Should some or all of these requirements also be applied to services of general interest of a non-economic nature?

(9)-(13): As pointed out in our reply to question 3, there are various sector-specific regulations dealing with broadcasting. Broadly speaking, the Community's sector-specific regulation of the audiovisual sector is satisfactory overall. With regard to the current review of the Television without Frontiers Directive we would refer to our contribution to the public consultation by the European Commission.[1] Concerning the EU Communications Directives, it seems too early to draw even initial conclusions, since Member States have only just begun to transpose the package into their national laws.

The EBU agrees with the Commission that criteria such as the universal service, continuity, quality, affordability and user/consumer protection have been developed for certain network industries. These criteria are relevant also for broadcasting to a certain extent and in a specific way. However, they address the cultural, democratic and social functions of broadcasting in

[1] See EBU Position paper of 15 July 2003, which is available at the EBU website under http://www.ebu.ch/departments/legal/position.php

only a very limited manner. The discussion on the review of the Television without Frontiers Directive has established and confirmed the need for a specific regulation for broadcasting. With regard to the specificity of this sector, see the replies to questions 3 and 5 above.

Sector-specific obligations

(14) Which types of services of general interest could give rise to security of supply concerns? Should the Community take additional measures?

With regard to broadcasting, security of supply can be an issue, especially in emergencies. However, the EBU is not aware of any relevant occurrences which would justify any legal measures.

(15) Should additional measures be taken at Community level to improve network access and interconnectivity? In which areas? What measures should be envisaged, in particular with regard to cross-border services?

Access and interoperability issues also arise in broadcasting, and particularly digital television. The EU Communications Directives provide the basis for national legislators and regulators to address these issues.

(16) Which other sector-specific public service obligations should be taken into consideration?

The underlying principle of public service broadcasting is that it is made for the public, funded by the public and controlled by the public. Thus all groups in society must be served by the programme output. Fulfilment of the public service remit requires independence from government and public authorities, as is recognized by the Council of Europe in the Recommendation No. R (1996) 10 on the guarantee of independence of public service broadcasting and in the Recommendation Rec. (2000) 23 on the independence and functions of regulatory authorities for the broadcasting sector. These principles have to be respected by the Commission too.

Media pluralism

(17) Should the possibility to take concrete measures in order to protect pluralism be reconsidered at Community level? What measures could be envisaged?

As commented above, the EBU shares the Green Paper's view on the importance of media pluralism. However, as recognized in the Green Paper itself, guaranteeing media pluralism is primarily a task (and an obligation) for the Member States, so that all citizens can fully exercise their freedom of expression and information. Within its fields of competence, it is also an obligation for the Union (see Article 11 of the Charter of Fundamental Rights and Article 10 of the European Convention on Human Rights).

Member States achieve this objective by a variety of means, including the setting of legal limitations on media ownership and cumulative control of media outlets, the drawing-up of national or regional policies on the award of broadcasting licences and frequencies, and, last but not least, the guaranteed existence and development of public service broadcasting with internal pluralism safeguards.[2]

Consequently, and despite the role of public service broadcasting as a cornerstone of media pluralism as acknowledged, for example, by the Amsterdam Protocol, the protection of media pluralism cannot simply be translated into a public service obligation for broadcasting organizations. It is thus questionable what kind of added value can be expected from addressing the issue of media pluralism in the context of SGI regulation only.

At the time the 1992 Green Paper was discussed the EBU had considerable reservations about Community initiatives on media pluralism undertaken solely in terms of internal market policy. Similar reservations may be justified now vis-à-vis Community action in terms of SGI policy.

In view of the current discussions on the need to preserve and promote cultural diversity, media pluralism should be addressed in the same context. The concepts of cultural diversity and media pluralism are very closely linked. Both the Council of Europe Declaration on Cultural Diversity and the UNESCO Universal Declaration refer to the links between cultural and media policies and make it very clear that media pluralism is one of the essential elements for guaranteeing cultural diversity.[3] Consequently, the EBU considers that placing media pluralism in the cultural context would seem the most appropriate solution.

With regard to the draft Constitutional Treaty, consideration should be given to, for example, an explicit mention of media pluralism in the horizontal cultural clause (Article 151(4) of the EC Treaty and Article III-181 (4) of the draft Constitutional Treaty). Such an amendment would make it possible to address the issue of media pluralism in an appropriate way independently of the concept of SGI.

The proposed amendment would furthermore make it easier to take into account the concept of media pluralism when competition law is applied to the broadcasting sector. This would permit the Commission to include media pluralism aspects in a transparent manner when dealing with a merger proceeding or within a State aid proceeding, whilst still leaving it to each Member State to apply specific rules against media concentration within the scope of Article 21(3) of the merger regulation. To achieve transparency, the Commission could publish a list of criteria related to media pluralism which it intends to apply.

[2] For further details see Sections 350 and 375 of the 2003 UK Communications Act, as well as Sections 25-34 of the German Broadcasting Treaty.

[3] See, in particular, Article 6 of the UNESCO Universal Declaration on Cultural Diversity.

Definition of Obligations and Choice of Organization

(18) Are you aware of any cases in which Community rules have unduly restricted the way services of general interest are organised or public service obligations are defined at national, regional or local level? Are you aware of any cases in which the way services of general interest are organised or public service obligations are defined at national, regional or local level constitutes a disproportionate obstacle to the completion of the internal market?

The Green Paper is correct to highlight the importance of the Amsterdam Protocol, which, as pointed out above, clearly limits the application of the Treaty to public service broadcasting. Despite this clarification, there is still some degree of uncertainty regarding the Commission's application of Community rules; this is discussed further in our reply to question 21 below since the issue of organization cannot be separated from financing.

(19) Should service-specific public service obligations be harmonised further at Community level? For which services?

Under the Amsterdam Protocol it is for each individual Member State to define the remit of public service broadcasting. This, together with Article 151(5) of the EC Treaty, excludes any harmonization of public service broadcasting at Community level. It should be clear that differences among public broadcasting services are inevitable to a certain extent, and even intentional and necessary in view of the differing national media systems and markets.

(20) Should there be an enhanced exchange of best practice and benchmarking on questions concerning the organisation of services of general interest across the Union? Who should be involved and which sectors should be addressed?

Under Article 23a of the Television without Frontiers Directive a Contact Committee has been set up *inter alia* to facilitate an exchange of information between Member States and the Commission on the situation and development of regulatory activities regarding television broadcasting services, taking into account the Community's audiovisual policy, as well as relevant developments in the technical field. Concerning the specificity of broadcasting, the EBU regards this exchange platform as sufficient, but would encourage the Commission to make the Contact Committee's work more transparent.

Financing

(21) Are you aware of any cases in which Community law, and in particular the application of State aid rules, has impeded the financing of services of general interest or led to inefficient choices?

With regard to the application of State aid rules to broadcasting, the sector-specific provisions of the Amsterdam Protocol and the Communication on the application of State aid rules to public service broadcasting need to be respected. The Green Paper acknowledges this by defining the Commission's competences as "the duty to check abusive practices and the absence of over-compensation according to the specific criteria as laid down in the Communication" (see paragraph 32, Footnote 17).

However, there is still some degree of uncertainty in the Commission's application of State aid rules. This uncertainty potentially compromises the stability and dependability of the funding of public service broadcasters and could make it more difficult for them to fulfil their remit. Notification procedures can also lead to unjustified delays.

As a measure to enhance legal certainty as far as public service broadcasting is concerned, the EBU therefore suggests that the Commission should recognize control mechanisms, set up by Member States under national law, which ensure the absence of over-compensation for discharging the public service. Such a solution, which could be included in the above-mentioned Commission Communication, would take up, in an appropriate manner, the Commission's case law, which has accepted and relied on scrutiny of the funding needs of public broadcasters by independent national bodies.[4] In the absence of any specific circumstances which would justify the Commission's control of abusive practices, the existence of such a mechanism ensuring the economic reasonableness of the funding should preclude the applicability of State aid rules.

The introduction of such a rule could also be regarded as an appropriate reaction to the recent C-280/00 *Altmark* decision of the European Court of Justice, and to the earlier cases C-379/98 *Preussen Elektra* and C-53/00 *Ferring/Acoss*. It would, furthermore, be in line with the Commission's Report of 5 June 2002 to the Seville European Council on the status of work on the guidelines for State aid and services of general economic interest, where the Commission stated that, depending on confirmation of the *Ferring/Acoss* decision, the funding of public services will have to be regarded as not constituting State aid under Article 87(1) of the EC Treaty in the absence of over-compensation (see Report, end of paragraph 12).

(22) Should a specific way of financing be preferred from the point of view of transparency, accountability, efficiency, redistributive effects or competition? If so, should the Community take appropriate measures?

The Green Paper explicitly recognizes the Member States' competence to choose and define the system for financing the SGEI. It therefore does not seem possible for the Community to favour one specific way of financing.

As far as public service broadcasting is concerned, the Amsterdam Protocol leaves the choice of the funding system to the Member States, within very broad limits. The current funding systems of public service broadcasting in Europe are characterized, on the one hand, by a strong and indispensable element of public funding and, on the other, by a plurality of sources. Member States must have the freedom to choose the system which is the most suited to evolving national circumstances.

(23) Are there sectors and/or circumstances in which market entry in the form of "creamskimming" may be inefficient and contrary to the public interest?

The remit of public service broadcasting includes the obligation of universal programming, which covers all kinds of output, such as news, culture, entertainment and sport. This obligation is, in principle, independent of whether or not there are commercial broadcasters which are free to concentrate on certain programming areas, such as entertainment and sport. "Creamskimming" is therefore unlikely to occur where the obligation of universal programming exists.

[4] NN 70/98 of 22 March 1999: *Kinderkanal/Phoenix*, pages 12-13.

(24) Should the consequences and criteria of solidarity-based financing be clarified at Community level?

The compulsory broadcasting fee paid by viewers and listeners may be regarded as a form of "solidarity-based financing". However, for the reasons mentioned above, it would certainly not be appropriate to regulate the details at Community level.

Evaluation

(25) How should the evaluation of the performance of services of general interest be organised at Community level? Which institutional arrangements should be chosen?

(26) Which aspects should be covered by Community evaluation processes? What should be the criteria for Community evaluations? Which services of general interest should be included in an evaluation at Community level?

(27) How could citizens be involved in the evaluation? Are there examples of good practice?

(28) How can we improve the quality of data for evaluations? In particular, to what extent should operators be compelled to release data?

(25)-(28): An evaluation at Community level is justified in areas of particular cross-border relevance, such as major infrastructure networks, or in areas where the Union has certain competences. In contrast, broadcasting is not primarily a network service but a content service. As pointed out in our replies to questions 2 and 3 above, broadcasting, and particularly public service broadcasting, cannot be compared with large network industries.

Moreover, the various definitions of the public service broadcasting remit at Member States' level make a common evaluation at Community level rather pointless, quite apart from other differences between the national media systems and markets.

Trade Policy

(29) Is there any specific development at European Community internal level that deserves particular attention when dealing with services of general interest in international trade negotiations? Please specify.

The EBU greatly appreciates the inclusion of international trade aspects in the Green Paper. Although we broadly share the Green Paper's analysis, we are slightly less confident that international trade rules will never have an impact on how services of general interest are regulated and financed in Europe. Despite the "bottom-up approach" and the flexibility of GATS described in the Green Paper, there are (and will probably be an increasing number of) horizontal trade rules, disciplines and principles (including the principle of progressive liberalization) which apply across sectors, irrespective of whether market access commitments have been made; moreover, the dynamics of trade negotiations may create inherent risks of trade-offs between different sectors, and between trade interests and other public policy objectives.

As the Union made clear in spring 2003 when presenting its initial offer on trade liberalization of services within the current round of GATS negotiations, it is important fully to preserve public services within the Union and also to maintain the ability to design and implement appropriate institutional and regulatory frameworks aimed at ensuring, for example, equitable access to essential services. More generally, it will be important to ensure that trade rules will not prejudge the way public services are defined, organized and financed.

As far as broadcasting and other audiovisual services are concerned, these "public service" considerations are overlaid - and reinforced - by cultural considerations (in particular, cultural diversity and media pluralism), which have so far excluded any commitments for trade liberalization in this sector. It is of crucial importance to maintain this position, so as to preserve the European audiovisual model and the ability to adapt audiovisual and cultural policies to future developments.[5] Cultural diversity, as well as the exchange of cultural and audiovisual goods and services, can be better served and promoted by means of an international convention on cultural diversity than by trade liberalization.

Development Co-operation

(30) How can the Community best support and promote investment in the essential services needed in developing countries in the framework of its development co-operation policy?

As far as the audiovisual sector is concerned, an international legal instrument on cultural diversity (question 29) can also help to support and promote investment in developing countries (e.g. through co-productions). The same applies to other bilateral or multilateral agreements entered into by the European Union and/or its Member States with third countries.

[5] See EBU Position paper of 17 January 2003 entitled "Audiovisual services and GATS negotiations", which is available at the EBU website under http://www.ebu.ch/departments/legal/position.php

EUROPEAN ECONOMIC AREA

STANDING COMMITTEE

OF THE EFTA STATES

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SUBCOMMITTEE I ON THE FREE MOVEMENT OF GOODS

EEA EFTA COMMENTS ON THE GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS (COM(2004) 327 FINAL)

I EXECUTIVE SUMMARY

The EEA EFTA States welcome the public consultation on the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions. The issues that are raised in the Green Paper are of great importance and the EEA EFTA States provide some of their comments in this paper. The EEA EFTA Comments concern the definition of Public-Private Partnership contracts (II), the transposition of the competitive dialogue procedure into national law (III), the Community legal framework (IV), the desirability of Community initiative (V) and "step-in" clauses (VI).

II DEFINITION OF PUBLIC-PRIVATE PARTNERSHIP CONTRACTS

The EEA EFTA States do not have a common legal definition of Public-Private Partnership (PPP) contracts in their national legislation, but have based the PPP on characteristics similar to those described in the Green Paper item 1.1.2. Since the concept of PPP contracts is based upon a plan to constantly improve and find more efficient ways to handle public tasks, the legal framework needs to allow sufficient flexibility with respect to the content and nature of the contracts. Because of this, the EEA EFTA States are of the opinion that a common legal definition of PPP contracts should not be developed. A fixed legal definition may exclude similar contracts that should be dealt with in the same legal framework as a typical PPP. However, the EEA EFTA States welcome further discussions, examples and clarifications concerning the characteristics of PPP contracts.

III TRANSPOSITION OF THE COMPETITIVE DIALOGUE PROCEDURE INTO NATIONAL LAW

In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

At this point in time, no contracting authority has legal or practical experience with respect to the new "competitive dialogue" procedure, so predictions are hard to make. However, provided that the interpretation of “particularly complex contracts” is subject to reasonably broad understanding, the EEA EFTA States expect the introduction of this procedure to meet the need for dialogue on complex contracts in general and on several types of PPP contracts. In fact, the experience from the EEA EFTA States indicates that when contracting authorities have awarded PPP contracts, they have conducted the negotiated procedure in a manner similar to that described in the new procedure. This new procedure is, therefore, welcomed and should be regarded as a positive step towards meeting the needs of several types of PPP contracts. However, the competitive dialogue may not fit all types of PPP contracts. The EEA EFTA States still regard the negotiated procedure and current legal framework for work and service concessions to be appropriate for certain PPP contracts. In this respect, the EEA EFTA States welcome further discussions, examples and clarifications concerning the type of contract that may follow the new "competitive dialogue" procedure.

IV THE COMMUNITY LEGAL FRAMEWORK

Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?

With regards to concessions, fundamental principles in the Treaty seem to provide sufficient legal procedures for interested parties. The governments of the EEA EFTA States have not received any complaints concerning minimum requirements (non-discrimination, predictability and public announcement) from potential participants. However, it is possible that the current legal framework for remedies and enforcement in this area do not provide adequate legal basis when authorities fail to respect the principles.

V THE DESIRABILITY OF COMMUNITY INITIATIVE

In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

Reference is made to the previous paragraph. The EEA EFTA States do not believe that a Community legislative initiative to regulate the procedure for the award of public works concessions is necessary.

For service concessions or concessions in general, a clear EU-wide definition, demarcation and explanation of the term "concession" needs to be established before it is possible to consider the effect and need of such procedures. For example, the real impact on national regulation has proven difficult to identify, since it remains unclear what the term “concessions” covers. Furthermore, as the Commission points out, some important sectors are already subject to specific sector legislation (ex. EEC No 2408/92 and No 3577/92). This makes the need for general rules less imperative.

VI “STEP-IN” CLAUSES

Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other "standard clauses" which are likely to present similar problems?

"Step-in" clauses do represent a challenge with respect to transparency and equality of treatment. However, it is often necessary to include such clauses in order to achieve proper and reasonable financing for the project. When "step-in" clauses are initiated, it is usually as a result of serious financial or management problems that constitute a possible breach of the PPP contract. Under such circumstances, the main objective must be to secure investments for all parties and bring the project back on track. In this context, it is imperative that the Procurement directives allow such capital investments to be handled without obstacles, so that appropriate business solutions can be found. It is the EEA EFTA States’ opinion that the risk of financial parties misusing "step-in" clauses, or basing their decisions on non-economical considerations, must be regarded as low.

30 July 2004

EFCA RESPONSE TO THE COMMISSION CONSULTATION ON ITS GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON CONTRACTS AND CONCESSIONS

Q 1. **What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?**

The concession model is prominent: many of the new investments are contracted in the form of Design – Build – Finance – Operate – Maintain (DBFOM) with a direct or an indirect toll / payment system.

In some countries public authorities established a Public Private Partnership Knowledge Centre designed to assist in the set up and monitoring the PPP projects. These Centres collect and share information on the development of different types of PPP. This information would be available to the public and private sector.

Most of the combinations of DBFOM seen in contractual PPPs also apply institutional PPPs.

There are already many general contract documents available which have a relation to PPP projects.

Examples of existing national legislation:

- In Germany in the so-called Kreislaufwirtschaftsgesetz (Krw-/AbfG) and a specific regulation for Water and Waste Management.
- Italian legislation on public concessions, including concessions related to project finance initiatives (law 109/94) or “the promoter legislation” as it is sometimes called, is an advanced law that encourages private investments in public works which are suitable for management by companies. In particular, the current law in force mixes the need for transparency and free competition with the need to guarantee a certain freedom to the concessionary in his following subcontracting.
- In Spain, the new legislation (law 13/2003) provides a good framework for the whole process and most precisely for the private financing method.
- In France concession legislation is strongly developed and specific new legislation is currently being introduced.

Q 2. **In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?**

PPPs are not necessarily complex by nature and therefore don't necessarily require the use of the competitive dialogue. An excessive use of the competitive dialogue as the basic procedure may induce distortion of competition.

The excessive use of the competitive dialogue procedure impairs fair competition and evaluation of tenders. A true dialogue between the partners of any contract is only possible if they are at the same level of knowledge and practice. With an extensive use of the competitive dialogue some knowledgeable private partners might influence less experienced public authorities. There is a need for involvement of both independent advisors and skilled consulting engineers to assist awarding authorities.

Experience with PPPs shows that procurement needs to be strictly framed. To be transparent and fair the awarding authority has to be able and capable to define its project, its needs and the technical specifications in a way that secures the comparability of bids.

The possible use of the competitive dialogue procedure provided for in national legislation may be advantageous in extra-ordinary complex PPP's. But this does not mean that the competitive dialogue procedure should be automatically favoured or recommended above more traditional instruments. The project definition and the specifications can be made so clear and concrete in many cases that a straight decision would be possible without further consultation.

Tenderers and operators will be very anxious in safeguarding their intellectual property. Great emphasis has to be put on the compensation of the tenderers' expenses in the dialogue phase. If the contracting authority expects to receive solutions which are based on the use of the tenderers' know-how to the full extent and also requiring the solutions to comply exactly or even better with the functional specifications, the contracting authority has to safeguard the interests of the bidding competitors. The risk of cherry picking has to be minimised.

Long-term key performance indicators will have to be developed to make the procedure and the selection decisions more transparent.

Criteria as to how long this competitive comparison (if any) is allowed to take, and to what extent the contracting authority is obliged to publish beforehand the decisive criteria according to which the contract shall be awarded, will be essential for the success of this dialogue.

However the same pros and cons of this new procedure would also apply to the award of public contracts in the form of both contractual and institutionalised PPPs. Institutional PPPs often handle particularly complex projects too.

Q 3. **In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.**

Difficulties could be encountered in specifying the focus of a public contract awarded in the context of a PPP where this is – as is typical of a PPP – a mixed-type contract with public works, supply and service components. According to the "focus theory", developed by the European Court of Justice, clear solutions are not provided in all cases.

It will be very challenging to elaborate more detailed legislation for a contract type where long-term and unforeseeable later political and economic developments could have retrospectively a lot of influence on the level of transparency during the evaluation before contract award.

In line with the focus theory it would have to be ensured that the substantial know-how contribution of the “engineer” in the tendering and the award dialogue be adequately and even separately rewarded.

This is particularly relevant with regard to the design and realisation of an economically outstanding and most advantageous solution with a very good economic result. As the share / participation of the technical and or economic consultants’ service in the initial investment of a project is usually below 10 percent of the costs and the effect of a good or bad design in the operational phase can be enormous, the protection of intellectual property should be taken into account duly.

The effect of independent, intellectual, conceptual thinking is not sufficiently considered and sometimes underestimated in PPP thinking.

PPPs might be a source of reducing competition by some public authorities thus awarding the contracts to a restricted group of private partners. Since PPPs might also be considered as a barrier to market access in some national legislation (France Conseil constitutionnel 2003), it might be of interest to examine these laws and the risks they entail. In addition an assessment of the use of PPPs would be required prior to choosing this procedure.

Q 4. **Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?**

As this is a report of 25 engineering associations with a great number of very successful projects in which members participated the experience is enormous.

A number of issues are worth mentioning when considering developing legislation:

- The required audit of the evaluation for the private partners.
- Key specifications are not always clearly defined at the invitation stage or even clear before contract signature. Problems come later in the execution and financing of the project.
- Political risks - which are normally public risks and sometimes too high risks - were allocated to the private partner and consequently costs increased extremely. These costs could have been foreseen and taken into account in the contract or even been avoided.
-The process of building up trust and confidence between the two parties was sometimes extremely harmed because of lack of key specifications in the bidding phase.
-Existing national laws regulating similar processes are laws on concessions. They are very strict on deadlines (for example: 90 days for reaching a financial close is not enough to reach success). The procedures are not always clearly stipulated.
- More specifically EFCA would like to draw the attention to frequent imbalance of risk allocation between the financier / contractor and the designer (consulting engineer / architect) – see Q 15.

Q 5. **Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?**

Although it is probably possible to exclude non-national companies or groups in the procedures for the award of concessions, more detailed legislation is not required. National contracting authorities have to publish tenders and use clear selection criteria in addition to developing commercial key performance indicators which have to be known at the start of tender procedure.

Nevertheless secondary EU legislation simply refers to principles of the EU Treaty such as non-discrimination, transparency etc.; this causes uncertainty with persons concerned, even with national legislators. The Community law at hand should perhaps be more precise instead of prescribing more detailed rules.

Q 6. **In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?**

A Community legislative initiative to regulate the procedure for the award of public works concessions is not believed to be necessary.
If the Commission decides to initiate something in this field it should consider looking at the legal framework in the long term and its influence on the evaluation. These effects are hardly to be regulated in detailed Community legislation.

In any event Community law should be more precise, more clear but not more detailed and stricter. The definition of quality criteria for intellectual services should be more concrete.

For service concessions, a clear EU-wide delineation of the term concession needs to be laid down first.

Q 7. **More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?**

See Q 5 & 6

Q 8. **In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?**

The legislation and the procedures are sufficient.

It appears necessary to face a more general type of problem that is the level of existing competition in concessions and particularly in the concessions for motorways and public services, especially on a local level (municipality transportations, water, gas, etc). The decreasing number of market players and the growing monopolies in some countries are becoming a problem.

Q 9. **In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?**

Generally it is felt that the application of the existing open or restricted procedures can guarantee compliance with the principles of transparency, equal treatment and non-discrimination in private initiative PPP’s as well. But understanding the words transparency, non-discrimination, level playing field, equality of treatment and audit can be difficult in so many languages.

If a contracting authority wants to realise a given project based on fair competition and in the PPP context, it's possible to oblige them to publish their invitation at European level and to follow the standard award procedures. Nothing wrong with that.

The solution for the success of the PPP has to be found in the initial phase and the development of a genuine market interesting for many players, small and large, consultants, engineers, facility managers, contractors and financiers in joint companies, joint ventures whatsoever.

The actual problem with private initiative PPP's is rather to gain sufficient companies as initiators. In the meantime companies proposing their ideas are not given any guarantee that they will be involved in the execution of the PPP. The proposal to pay the initiators for their efforts and their intellectual property at an attractive level (see No. 41 of the Green Paper), is right and necessary and will create many initiatives.

Private initiatives require tactful treatment. The author of the idea should be rewarded and protected, which could represent at the same time a non-genuine competence practice and contracting authorities should compensate for generating projects and perform control in a non-restrictive way.

A proposal is to act as follows: if there is a private initiative, it shall be detailed, then on that basis the public partner could launch a tender with the exclusion of the initiating private partner, but agreeing in advance what happens if there are better offers / solutions. The outcome can be as follows: no better solution then the contract is awarded to the initiating partner. If there is a better solution then there should be compensation for the initiating partner and / or striving to set up an agreement / co-operation between the winner and the original initiating party.

Q 10. **In contractual PPPs, what is your experience of the phase, which follows the selection of the private partner?**

Some countries complain that no clear risk allocation was possible as the technical and organisational framework was too unclear and there was only little experience on the public side.

Comparability of the bids was hardly reached, as the framework of the bids did not comply with the specifications. In addition even during the negotiations new circumstances appeared (tax changes environmental requirements, competing new public projects affecting the cash flow of the concession takers).

Q 11. **Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?**

There are no examples or statistical information yet. This has to be developed. No country organisation will disclose negative information.

An example is that in long-term projects technical innovations appear. Consequently the legal situation is not clear; if the contract contents are changing the contract has to be re-negotiated or even according to for example the German Procurement law a new tender would be required. This is unrealistic in a PPP, but could lead to monopoly situations which are harmful in their nature if not open to new bids.

Q 12. **Are you aware of any practices or mechanisms for evaluating tenders which have a discriminatory effect?**

By using complex selection criteria for the evaluation of tenders it's probably well possible to create a discriminatory effect. However there are no clear examples available.

Many factors can influence this phenomenon: insolvency, liquidation, selling of companies during the concession phase can easily disrupt the original contract. Contract clauses can solve these "problems". But including or excluding new partners in the later phase cannot be regulated by legislation.

Q 13. **Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other "standard clauses" which are likely to present similar problems?**

The change of a single project manager (personnel) doesn't present a problem, but the forced cancellation of a concession and subsequent change of the private companies can. Especially if the involvement of the private company in the PPP is considerable.
It could be impossible to create regulation, tender and award procedures in which the later change of the partners can be completely excluded. That is against the nature of economy.

EFCA does not share the Commission's view. The PPP's singularity, mainly in financial aspects, requires flexibility and a field of application as wide as possible. The real competence is already demonstrated in the awarding phase with step-in conditions specified in the contract clauses. Furthermore, financial markets act under standards which make it possible to set up project under their conditions.

Q 14. **Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?**

According to EFCA the national contract law and regulations for the execution of PPP's are more than sufficient. Most member countries do not think that any action is necessary here.

Many other countries are still developing momentum in PPP's. They require framework and guidelines to create their national legislation on this subject.

Q 15. **In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.**

Comparable to Q13 (changing commercial partners) subcontracting of substantial parts of the works in the contractual (concession) arrangement should be limited, but also subject to the approval of the original awarding public authority within the framework of the EU rules.

Is the Concession Company allowed to transfer all risks, works and services to a number of different sub-contractors suppliers and facility managers? Is the Concession Company then becoming the contracting authority? Legally this cannot be avoided. There should be guidelines at national level.

In case architects and designers are assumed to take up responsibility for tasks in the general interest, EFCA suggests that such professions could be directly contracted by the public authority. When they are part of the contractor team, the proposal must point out clearly their position, responsibility and tools all along the project duration, in order to put to the public authority in the position to clearly select its partners.

Q 16. **In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?**

At the moment there are too many possibilities to escape from the basic legislation. See further Q15

Some countries oppose further legislation. They believe that the private partner should manage the project in freedom since the contract contains specific terms of functional requirements and performance.

However, it might be a possibility in some cases to have the national contracting body force the concessionaire to award a part of the public works to third parties. This subcontracting would concern solely the works, and not the whole concession. The reasons for stipulating this is that if it concerns an economically important work it could of a public interest to have various companies execute those works.

In some countries there is already the risk of abuse of a dominant position.

Q 17. **In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?**

See Q16.

Q 18. **What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not?**

Cooperation between private companies is governed by market economy, competition, profitability, and private law. As most institutionalised PPP's are founded to facilitate monopolies for private companies supervised and influenced by public authorities improper, unrealistic economic conditions are temporarily created which normally cause great output insufficiencies and at the end financial overruns.

Initially attempts were made to circumvent the application of procurement law through specific company law made up in the context of institutionalised PPP's. The verdict of the EJC in the case C 107/98 (Teckal) and the restrictive decision-making practice of the national procurement inspection bodies based on this, however, caused the number of cases to drop significantly.

How to implement private, legal and economic principles in cooperation with public authorities. The participation of public authorities should be in the initiative phase only on transparent conditions and complying with all procurement laws and regulations. Most institutionalised PPP's can be replaced by purely contractual PPP's.

In many PPP projects private companies have already a commercial position which is introduced as an asset to create an institutionalised PPP. Ground positions and the like. To solve this issue in the European procurement legislation is a very challenging task for the Commission in order to create clarity for many public-private initiatives.

Q 19. **Do you think that an initiative needs to be taken at Community level to clarify or define the obligations of the contracting bodies regarding the conditions requiring a call for competition between operators potentially interested in an institutionalised project? If so, on what particular points and in what form? If not, why not?**

Yes. See the answer to Q18 This could be done in the form of a guidelines document for companies statutes, business principles, business ethics, legal form of the business, and the required minimum capital in relation to risk involved and the maximum involvement of the public authorities etc.

Q 20. **In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?**

The non-willingness of public parties, civil servants more than politicians, to involve private parties can be a barrier. The reasons can be various: no trust in private parties, loss of control etc., loss of public jobs and lack of experience in assessment of private business.

If the need exists and the law requires to comply with the regulations of public procurement law, then this could unnecessarily constrain even the effort to explore the creativity of both contracting authorities and private tenderers.

Also a lack of information and uncertainty among the contracting bodies as to when it makes sense to form PPP's, and the expertise how to structure them successfully;

A lack of willingness on the part of the public contracting authorities to give up intervention rights and commercial opportunities for the treasury and transfer these to private companies.

At national level political discussions and decisions to pay toll instead of taxes. At national and international level investors could simply decide not to invest in contractual PPP's, concessions, preferring to invest only in PPP's with involvement of public authorities and covered by public guarantees.

Q 21. **Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of "good practice" in this framework which could serve as a model for the Union? If so, please elaborate.**

Q 22. **More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?**

Yes, the exchange of best practice in the form of market consultations can be very successful. EFCA created for this particular consultation a task force, consisting of project managers / engineering consultants from many member states, who are already working on this subject before the green paper was publicised. This proved to be a very interesting exercise, especially when you take the big differences in implementation between member states into account.

The establishment of a European network by the Commission would only be useful if the consulting industry was involved in a partner-like manner. The focus of such a network should be the exchange of information and experiences.

These considerations should extend to those PPP projects, which enjoy non-refundable EU support e.g. from the Cohesion Fund, which are becoming a part of the national budget, and no particular supervision by the Commission on these funds can be observed.

EIC Position Paper

on the

EU Green Paper on Public Private Partnerships (PPP)

Introduction

European International Contractors (EIC) is an industry association that represents the interests of the European construction industry in all questions related to its international activities. It has as its members construction industry federations from 15 European countries and the annual revenue of the international business carried out by those contractors affiliated to EIC's Member Federations amounts to more than 50 billion € annually, i.e. without the revenue from inside the European Union. A significant portion of the national and international turnover of EIC member companies is already generated through PPP infrastructure projects.

One of the main priorities of our association is the **promotion of new financing techniques, including PPP models**. Since most PPP infrastructure projects have a substantial construction component, the construction industry was among the first industries to be involved – as investors and concessionaires – in this new market, and is now among the first industries with a broad knowledge of the political, legal and financial prerequisites, the administrative and regulatory needs and the required risk control and mitigation measures to make PPP projects successful on a long-term basis. Hence, most internationally active players among the European contractors – exactly the group represented by EIC - have in recent years developed significant activities in the fields of infrastructure development and services as well as in public buildings. For further information about EIC, its organisation and objectives, please contact our website under http://www.eicontractors.de.

With its **"Green Paper on Public Private Partnerships"** the European Commission has launched a public consultation intended to verify whether the rules and principles deriving from Community law are sufficiently clear and suitable for the requirements and characteristics of PPPs. Since the term public-private partnership is not a defined term at Community level, the Commission seeks advice on whether there is a need for further legislative action, in particular in the field of public procurement laws.

EIC submits its comments on the questions put forward by the Commission on the basis of the **broad international experience** of our member companies which could be applied by the Commission for the preparation and implementation of more privately developed and financed infrastructure and building schemes in Europe.

Against this background, a clear signal of caution has to be given right from the outset: It is today universally acknowledged in the relevant World Bank, UNIDO and UNCITRAL documents that, from a procurement point of view, **PPPs cannot be regulated in exactly the same way as conventional construction projects**. This is, firstly, because of the important role played by third parties, such as commercial lenders, developers, accountants, legal advisers, etc., and, secondly, because of the long-term nature of the PPP contract. Due to the complexity and the long duration of PPP projects, it is highly unlikely that the contracting authority and the selected bidder agree on the terms of a draft project agreement without discussing in detail the technical, legal and financial details of the project. This is particularly true for projects involving the development of new infrastructure where the final negotiation of the financial and security arrangements takes place only after the selection of the concessionaire. Therefore, the traditional relationship between contracting authority and bidders, as regulated in the Directives 2004/17/EC and 2004/18/EC on the co-ordination of procedures for the award of public works, etc., has to be adapted to the specific requirements of a PPP contract.

The need for regulation must not be limited to the issue of ensuring competition, but should include best practice principles for the procurement and implementation of PPP projects in the European Union. EIC supports the opinion that the European Commission has an important role to play in order to further improve the legal framework for PPPs in the Union. In our view, this **role of the Commission should be "catalytic"** rather than that of a European regulator. When defining this role, the Commission has to carefully analyse in which areas regulation on the European level would be conducive to the various PPP policies in its Member States and which areas are better addressed by the Member States directly. As a next step, EIC would recommend that the Commission set up a **catalogue of principles for PPP projects**.

Based on the international experience of its member companies, EIC has tried to highlight the most important risks and pitfalls which occur during the crucial stages of any PPP project in the **"EIC White Book on BOT / PPP"**, published April 2003 (Attachment), and has offered advice how to avoid or effectively mitigate the many obstacles and risks through the careful preparation and structuring of PPP projects. We would like to quote from the Outlook of our publication: "In order for the PPP concept to be successful on a broader basis**, new skills in the public sector** and a **new risk sharing philosophy between commercial and public risk** have to be developed. If private funds are to be a major portion of the financing of the infrastructure project, it is necessary that the public sector understands the financial instruments that bankers use to bind these deals together."

We would in particular like to point out that the EU should make an effort to support the development of PPP in the new EU Member States in Eastern Europe. In those states there are threefold needs: There is a huge need for upgraded public infrastructure to support the economic development, there is an urgent need to attract private capital to invest in such infrastructure and there is a sustained need to strengthen the legal and institutional framework in order to implement such PPP projects. Particularly in the last of these, the EU could make an important contribution, drawing from experiences in the "old" EU member states. Experience from PPP in developing countries has not been encouraging and we would all like to see a better development in the new member states.

Please find below our detailed comments:

Comments

1. What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?

   Numerous project models, e.g. PFI, DBFO, BOT, etc., have been created and implemented globally throughout the past years. They are all aiming at private sector participation in the project and are normally regulated by specific laws or Acts of the country. It is important to note that PPP describes many variants. The appropriateness of a particular variant for a given type of infrastructure is a matter to be considered individually by each EU Member State for each and individual project in view of the national needs for infrastructure development.

2. In the Commission's view, in the context of a purely contractual PPP, the transportation of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

   When considering the "Competitive Dialogue", EIC generally welcomes that the European Commission has acknowledged the need for **more flexibility in the procurement of PPP projects** as compared to the conventional construction projects. Crucial differences in the project set-up have to be addressed appropriately: PPP projects are output-driven rather than input-driven and they involve a potentially complex contractual structure. Last but not least, financial and legal issues take precedence over technical issues.

   As pointed out already in Chapter 3.1 of our *"EIC White Book"* (Enclosure), a **variety of strategies exists** for the definition of the project objectives and requirements of a contract which in turn have an impact on the structure of the tender procedure used for a particular PPP project. The options for the contracting authority range from a case where the objectives of a contract and the means to achieve it are strictly defined by the Authority - which leaves few or no possibilities for the bidders to differ from the predetermined technical and commercial project parameters - to a case where the Authority defines the objectives of the contract but leaves essential project parameters such as the development and optimisation of technical and commercial solutions open to proposals from and negotiation with the candidates.

   The former is inspired by the traditional public procurement methods and requires increased pre-tender efforts by the Authority (technical investigations and design, investment and financing models, etc.) and thus a longer preparation time. If the tender period itself can be reduced, bid results are often easier to control and the Authority has a high influence on the technical and commercial solutions offered and finally selected.

However, in our experience most PPP projects are highly complex and involve elaborate technical, financial and commercial considerations with which public authorities are not best equipped to deal. **A strategy of the second type gives bidders more freedom and flexibility in selecting the means to achieve the project, therefore increasing chances that creative and optimised technical, financial and commercial solutions are identified and offered.** This option, naturally, requires a longer tender period and makes it necessary that the Authority establishes and strictly abides by highly professional procedural regulations for the tender process itself in order to safeguard comparability of the bids and procedural fairness.

Past experience has shown that valuable and innovative contributions can be obtained through an open dialogue about the project and the tender structure between the public and the private sector prior to issuing the final invitation for tender. Indeed, contractors enjoy a considerable amount of technical, financial and commercial expertise and it is the essence of a partnership to create the necessary environment to enable them to specify in co-operation with the Authority the most appropriate means to meet the identified objectives. Involvement of the private partners at tender stage is one of the best guarantees for promoting innovation and maximising Value for Money. The conduct of such an open dialogue requires a transparent and non-discriminatory framework. **The Authority must define minimum mandatory requirements in terms of objectives, quality, timeframe and special features of the contract. Those should remain unchanged throughout the entire procedure.** The dialogue procedure should also provide for a mechanism to answer queries and to disseminate to all bidders any additional information supplied to one of them.

Hence**, the "Competitive Dialogue" as defined in the new "Legislative Package" must be applied with great skill and care**. Whilst it allows bidders to optimise their offers in line with the contracting authority's potential review of the initial project specifications, it sets equally the danger that entrepreneurial ideas and innovations being circulated to competitors during the tender process **("cherry picking")**. Such practice clearly deters qualified bidders from competing for PPP projects. The "Competitive Dialogue" should not disrupt one of the great benefits with PPP, which is that essentially what is tendered is the provision of a service to cover a need and not the procurement of a specific "technical, legal or financial solution". To develop the solution is part of the bidders know-how and frequently involves considerable costs and efforts. There must be procedural rules making clear to the bidders how the "Competitive Dialogue" is supposed to work in the relevant procurement situation. It should be avoided that the technical solution developed by one bidder be disclosed to competitors. Instead, the purpose of the dialogue should be for the contracting authority to adjust the description of its needs, functional specifications, or contract conditions to allow bidders to be even more innovative or to allow them to confirm that the proposed solutions likely cover the need.

3. In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.

No comments.

4. Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

It is common knowledge that the practice of awarding concessions is rather heterogeneous across the globe and also throughout the European Union. Such differences in the legal implementation **are based on the Member States' different legal and administrative systems** and can hardly be prevented by Community law. As a matter of fact, if the Commission can establish through this survey that some Member States are more open to foreign competition than others, it should try to ensure a level playing field through appropriate measures.

5. Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?

As the Commission has found out in its "Report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future" (Doc. 03/02/2004), **direct cross-border procurement** within the European Union only amounts to **3%**, whereas 67% of the total number of bids are submitted by national firms in their home countries. EIC would guess that for construction projects the share of direct cross-border procurement is even well below the 3 %. This again confirms the **importance of indirect cross-border procurement** through **subsidiaries**.

On the other hand, the figures of direct and indirect cross-border procurement seem to have improved since the late 1990s and that may be evidence that the Community legal framework is generally fostering participation of non-national bidders in the procurement procedures. It is our conclusion then that there must be **additional conditions other than the Community's procurement directives which are having an influence in the grade of foreign competition** in the different segments of public procurement. One must also not forget that concession of infrastructure services are globally politically sensitive and sometimes explicitly excluded from competition under the rule of **"Services of General Interest"** which are not open to competition.

6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

For large and complex contracts as well as transnational projects there might be added value in having clear European competition rules. EIC would suggest that the Commission, as a first step, updates its "Interpretative Communication on Concessions in Community law" of April 2000.

In our view, any new Community legislation on PPPs should provide, in the first place, for a **clear and reliable framework for the protection of investment**, which should be taken for granted particularly in case of the EU's financial involvement in the PPP project, e.g. through the structural or pre-accession funds.

7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

   No comments.

8. In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?

   In our perception, there have not been too many cases in the past within the European Union where PPP projects were granted directly to a private company without some form of prior competition. However, some countries encourage private sector initiative under the assumption that it may help a country's PPP programme to better or quicker succeed. If the contracting authority should decide to pursue the proposal further, it should be required to award the project by the normal tender procedures, **acknowledging**, however, in some form the **up-front investment of the private company**.

9. In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?

   EIC has stated in the *"EIC White Book on BOT / PPP"* (Enclosure) in Chapter 4.6 that in cases where PPP projects are admissibly identified and/or promoted by a private sponsor – i.e. "Unsolicited Proposals" – the sponsor that finances the preliminary studies runs the risk that the concession contract – after a public invitation for tenders issued by the contracting authority – may eventually be won by a competitor. Thus, the **cost of producing a proposal, associated with the risk of not being awarded the contract, may act as a deterrent to the private sector** to spend the considerable resources required for the elaboration of an unsolicited proposal. At the same time, it should be stressed that the public sector may significantly benefit from the creativity of private sector initiatives and should consequently encourage unsolicited proposals.

   The market knowledge and market presence of private companies together with their ability to spot and identify public and private demands for services of various kinds can be exploited to the benefit of the public sector and private users. It is therefore recommended that private sector efforts in connection with project identification and preparation be encouraged through the **grant of incentives to the private sponsor**, should the contracting authority wish to carry on with the project and launch a competitive award procedure. Such incentives may take a variety of forms, the most relevant being the award of an advantage in the tender evaluation phase or the so-called "first refusal" right. Alternatively, in case of failure some form of financial compensation may be awarded.

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

As an industry association, EIC does not have a direct experience on this issue other than made public in the *"EIC White Book on BOT / PPP"* (Enclosure). What can be said in short, though, is that in those countries where the Government is deeply committed politically to a fully-fledged PPP programme and has introduced a **"deal flow" or a "pipeline" of projects** as well as a solid institutional framework, well-developed tender procedures, and follows an adequate risk-sharing or partnering philosophy, the PPP contracts are normally running smoothly and create "Value for Money" due to the efficiency gains of private sector involvement.

On the other hand, where PPP projects are one-offs lacking adequate preparation by the contracting authority and have to be implemented under relatively unstable political, legal and financial conditions, successful implementation of PPP projects has proven to be much more difficult. There are certainly examples of failures of PPP projects and even programmes which, if analysed closely, appear to be caused through a poor project set-up.

11. Are you aware of cases in which the conditions of execution - including the clauses on adjustments over time - may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?

In our experience, it is almost impossible to exactly define in large and complex PPP projects which conditions of execution may have a "discriminatory effect" or represent an "unjustified barrier". The contracting authority should strive to achieve the fundamental principles of equal treatment, non-discrimination and transparency also in PPP projects.

Therefore, **each contracting authority has the responsibility to prepare the project with due care and to share all relevant information at its disposal with all the bidders in order to provide for a level playing-field**. With reference to Chapter 3.2. of our *"EIC White Book on BOT / PPP"* (Enclosure) EIC demands that the documents to be circulated shall at least include the following data:

- General technical information, including geo-technical conditions;
- Demand study;
- Financial and economic feasibility study;
- Environmental impact assessment;
- Service performance indicators;
- Availability of facility and capacity output;
- Security and environmental standards and norms;
- Construction specifications, standards and norms;
- Duration of design and construction phase;
- Operation and maintenance standards;
- Duration of operation and maintenance phase.

Moreover, the tender documents should also include a **detailed outline for a concession contract** in which the main principles regarding performance guarantees, non-performance penalties (in both construction and operation phases), conditions for property transfer, liabilities and liability limits, insurance requirements, Force Majeure, changes in law, compensation, termination, indemnification, dispute resolution, etc., are stated. Eventually, the request for proposals and its related documents should clearly and unambiguously provide all necessary specifications on project performance and evaluation criteria in order to enable comparability of bids in an objective and fair manner.

If all these conditions are met, there will be left little room for any distortion of competition, and the tender process will pass a **threefold filter**: first, technical advisers will duly go through the due diligence process, second, banks (also advised by their experts) will duly analyse the economic viability of the project and finally, the contracting authority will select the contractor duly on the basis of the "economically most advantageous tender".

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

In case the contracting authority does not follow the process described under Question No. 11, there might be cases where not all bidders have the same level of information at their disposal, which in turn can lead to unsustainable bids so that the Contracting authority can not base its award on the "economically most advantageous tender".

13. Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other "standard clauses" which are likely to present similar problems?

EIC does not at all share the Commission's view that step-in rights present any kind of problem in terms of transparency and equality of treatment. Conversely, **step-in type arrangements are absolutely normal and common place in PPP projects**. This is because commercial lenders are the most common source of debt financing, and, therefore, it is self-evident that their concerns have to be addressed and reflected in the contract structure. Since the operations of commercial lenders essentially revolve around the creditworthiness of borrowers and the security of their loans, they put much stress on prudential lending and precautions aimed at ensuring loan repayment also in case of interruption or termination of the concession contract. That means that any security package in connection with a commercially financed PPP project typically contains step-in rights, supplemented usually by a direct agreement between the Contracting authority and the lenders. The main purpose of such clauses is to allow the lenders to avert termination by the contracting authority when the concessionaire is in breach by substituting a concessionaire that will continue to perform under the project agreement in place of the concessionaire in breach.

Similarly , EIC also would like to make clear that changes in the course of PPP contracts as well as additional works are normal and foreseeable characteristics of long-term contracts (up to 30 years) and should not be put into question by the Commission (*cp. paragraphs 49 and 50 of the survey*).

14. Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?

A **catalogue of general principles on the European level**, e.g. on guarantees, penalties, conditions for property transfer, protection of investment, liabilities, insurance, Force Majeure, changes in law, compensation, termination, indemnification, dispute resolution, etc., would be helpful to promote the PPP concept and to reduce the sometimes prohibitive transaction costs.

15. In the context of PPPs, are you aware of specific problems encountered in relation to sub-contracting? Please explain.

When addressing the question of sub-contracting, EIC recommends that the Commission applies the same rule as the World Bank in 3.13 of their Procurement Guidelines, i.e. **if the concessionaire has been selected already on the basis of international competitive bidding, *"which may include several stages in order to arrive at the optimal combination of evaluation criteria"* then it is free to procure the goods, works, and services required for the facility from eligible sources, using its own procedures**. Only such liberty allows the concessionaire to manage properly the construction, operation and supply risks he usually assumes with a PPP contract. The risk and reward structure of PPP projects has to be taken into consideration when regulating the rules of sub-contracting.

16. In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of sub-contracting?

Not at all. Any limitations and restrictions of a non-economic nature on the concessionaire to select his suppliers and subcontractors may easily result in a reduction of project efficiency.

17. In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on sub-contracting?

No. See above.

18. What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not?

In the case of institutionalised PPPs, the policy of the European Commission should aim at **abolishing and preventing all regulations** which could **lead to a distortion of the competition between public and private companies**. Such policy could take a variety of measures, such as equal information to all bidders, the requirement of full cost calculation for public companies, rather than administrative cost, or the interdiction of public companies to participate in the competition, neither alone nor in consortia with the private companies.

19. Do you think that an initiative needs to be taken at Community level to clarify or define the obligations of the contracting bodies regarding the conditions requiring a call for competition between operators potentially interested in an institutionalised project?

EIC holds the opinion that institutionalised PPPs should be introduced where this brings Value for Money to the public and is preferable to other PPP forms due to the specifics of the project. We have noticed on a number of markets an increased interest to create mixed entities for performing institutionalised PPPs. In the UK for instance, the Government has launched a program "schools for the future" in which it is proposed that the public and private sector partners will set up a joint company to be responsible for the building and maintenance of schools in the relevant authority area.

It could be useful to have **a clarification regarding the conditions requiring a call for competition**. In this connection, EIC cannot fully agree with the last sentence in paragraph 64, as the stipulated principle may in some cases contradict the purpose of creating the mixed entity in the first place. The private partner should at all times have the right to reserve certain tasks, such as executing the works, for itself, provided that certain requirements are fulfilled. If a direct negotiation was not permitted, then the very purpose of the mixed entity could be lost. This form of co-operation could be preferred where it e.g. is of value to reduce the time to procure work and reduce bid costs.

Any new rules should cover this situation. There are manners in which to ensure fairness. If already the competitive selection of the private partner included reference to prices and conditions for work earlier performed for the contracting authority by the private entity, then such prices and conditions could be used as a benchmark when the mixed entity negotiates for work to be performed by the private entity partner.

20. In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?

There is not yet a comprehensive fiscal accounting and reporting standard for PPPs. Therefore, EIC recommends that the EU adopt a modern accounting system that takes the complexity and particular characteristics of the PPP model into account. An inadequate accounting system might give a distorted view of the risks and rewards of such contracts and could lead to difficulties in raising finance for such projects.

21. Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of "good practice" in this framework which could serve as a model for the Union? If so, please elaborate.

The most frequently cited example for a successful PPP programme is Chile where a significant portion of the sizeable infrastructure gap has been filled. Since 1994, the government has engaged the private sector in 36 PPP projects with a total value of 5 billion US$. The projects contracted thus far comprise 24 transport projects, 9 airports, 2 prisons, and a reservoir. Over 20 of these projects are already in the operation phase. We suggest that the EU closely analyse the genesis of the **Chilean PPP programme**.

In the **U.S.**, the long tradition of toll road revenue bond issuance through quasi-public authorities has provided a solid foundation for the launching of new PPPs in the 1990s, as federal and state laws changed to accommodate private capital.

As a general remark it must be pointed out that the legal and policy framework for PPP projects differs greatly across the world, reflecting the wide range of political, historic, and cultural traditions. For instance, in **China** some bond financing of toll roads has taken place, but the security required for bonds, including tested legal protections, is simply lacking.

22. More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

EIC would welcome such an institutionalised dialogue between all interested parties in PPP and would, of course, be pleased to participate in such a network.

Enclosure: **EIC White Book on BOT / PPP**

PUBLIC
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European Federation of Public Service Unions

Initial response to the Green Paper on PPPs and Community law on public contracts and concessions

The European Federation of Public Service Unions (EPSU) is a federation of the European Trade Union Confederation. It represents 8 million public service workers in 193 trade unions in Europe.

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The Green Paper: A tunnel-vision approach to PPPs

1. EPSU's initial response draws principally on the points raised in the attached PSIRU paper "*PPPs: A critique of the Green Pape*r".

2. EPSU regrets the fact that the Green Paper does not seek to develop a coherent EU policy on PPPs. It follows a rigorous tunnel vision approach and is concerned only with competition policy and extending the Internal Market in public services. The Green Paper misses the more fundamental questions: How can the social and economic impact of the risks and future liabilities created by PPPs be evaluated?[1] Why and on what criteria should PPPs be preferred to public sector investment and operation of services? How can democratic control and transparency be assured? To answer these questions a wide range of public interest concerns and policies need to be taken account, including the need for quality public services, employment, sustainable development, cohesion…. Only in this way will public authorities be in a position to assess whether PPPs do provide the best option for investment and the best option for operating services.

3. Despite some helpful suggestions in relation to tendering of concessions (paras 31 – 38) this is not the Green Paper on PPPs that Europe needs. The Commission should produce a report which addresses:

   - The risks and problems experienced with PPPs
   - The dangers for public authorities in entering into long-term deals with the private sector
   - The need to protect public services, their workers, and citizens from erosion of quality by commercial opportunism
   - The economic and social case for public sector investment and provision of services.

4. The Green Paper turns a blind-eye to the risks and future liabilities that are being created by PPPs. This is astonishing when in many countries arguments about public debt and consequent liabilities for future generations are being used to make cuts in public services. The Paper does not take account of remarks by DG Economic and Financial Affairs[2] about the dangers of PPPs, especially when used to avoid fiscal restraints. Indeed, it seems that it is encouraging them for exactly this purpose. Nor does the Green Paper integrate the experiences of DG Regio regarding how PPPs can be put together in the central and eastern Europe[3] and still be eligible for cohesion funds.

5. The Green Paper claims that it does not make any "*value judgment*" on the decision whether or not to externalise services (para 17), and that the rules it is concerned

[1] The European Parliament in its resolution on the Internal Market Strategy - Priorities 2003-2006 also called on the Commission to evaluate the impact of Private/Public Partnerships on the democratic accountability of public authorities in providing public services, and the long-term viability of PPPs, to assess the social consequences for workers and users and to consult with relevant societal organisations, including the social partners, through the inter-sectoral and sectoral social dialogue structures.

[2] See Public Finances in EMU 2003 report "*there is the risk that the recourse to PPPs is increasingly motivated instead by the purpose of putting capital spending outside government budgets, in order to bypass budgetary constraints. If this is the case, then it may happen that PPPs are carried out even when they are more costly than purely public investment*." (summary of part III, p.102) http://europa.eu.int/comm/economy_finance/publications/european_economy/2003/ee303en.pdf

[3] See for example *"Resource Book of PPP Case Studies*" published in June 2004 http://europa.eu.int/comm/regional_policy/sources/docgener/guides/PPPResourceBook.htm

with apply "*downstream of the economic and organisational choice made by a local or national authority*" on whether to use the private sector. However, encouraging PPPs by removing obstacles to them and by offering guarantees to entice private contractors, clearly implies discouraging the use of alternatives, namely the public sector. It also implies a preference for private ownership. The asset financed by a PPP needs to be classified as a private asset, off the public sector balance sheet, and so escaping the curbs on government debt. Encouraging PPPs entails encouraging the formation of privately owned assets over the alternative of publicly owned assets. This seems, in principle, to be a breach of the Treaty's neutrality on public or private ownership (Article 295 of the Treaty).

6. The Commission argues that it is only facilitating the development of PPPs *"under conditions of effective competition and legal clarity"* (1.2). However, while it is a matter of public policy for the European Union to aim for effective competition (and of course legal clarity), there is no public policy objective to facilitate the development of PPPs. Effective competition can exist irrespective of the number of PPPs. There is no public interest in increasing the number of PPPs for their own sake. The Green Paper however acts as though this was the case, and this is reflected in the language: e.g., "*obstacles*" to PPPs, "*develop*" PPPs, "*remove barriers*" to PPPs (paras 14,16, 19).

7. Furthermore, the Green Paper strays beyond the issue of PPPs by including comments on the *Teckel* judgment[4] (para 63). The Commission concludes that work should be submitted to compulsory tendering before it can be assigned to arms-length public entities. However this would seriously distort the choices available to public authorities. It is highly contentious and has no place in a Green Paper that is supposed to be concerned with PPPs.

Beyond the Green Paper: evaluating PPPs against the public interest

8. The two elements of a PPP are normally (1) financing a public sector capital investment project through a private company and (2) a contract for services, usually operating the capital assets financed under (1). The two central questions on PPPs, for public authorities, are therefore:
   - Is the PPP a better way of financing the capital investment involved than alternatives?
   - Is the PPP a better way of operating the service than alternatives?

9. The key choice is between public sector provision and a PPP, or other variants on these options. The Green Paper acknowledges that *"recourse to PPPs cannot be presented as a miracle solution for a public sector facing budget constraints. Experience shows that, for each project, it is necessary to assess whether the partnership option offers real value added compared with other options…"* (para 5). However, it fails to discuss these other options, and does not elaborate at any point on how this assessment should be carried out, or on what principles such an evaluation should be made.

10. This weakness can be seen in the discussion of risk. The question that should be addressed is whether the PPP option carries more risks (and benefits) than the alternatives of public sector provision (or other forms of contracting). In the context of this choice it is important that PPPs are not made too easy or attractive, e.g. by offering exemption from fiscal restraint, or from procurement disciplines, or providing state-backed guarantees which are not properly costed. These inducements can

[4] Case C-107/98 on the definition of " in-house". Several other cases on the same point are currently before the European Court of Justice.

distort any evaluation between a PPP and a public sector provision. Thus the Eurostat ruling, which is noted by the Green Paper as helping make PPPs more attractive, should in fact be criticised for making PPPs too easy[5].

11. Rather, if the fiscal rules of the EU are preventing enough public investment from being made, or preventing it being made in the most efficient way, then the rules themselves need to be reviewed and changed. Evading the rules by using PPPs, when they may be a more costly, more risky, less equitable and less effective option than public provision, does not solve the problem: it makes it worse.

Long-term effects on provision of services

12. The Green Paper takes the view that *"The success of a PPP depends to a large extent on a comprehensive contractual framework for the project, and on the optimum definition of the elements which will govern its implementation. In this context, the appropriate assessment and optimum distribution of the risks between the public and the private sectors, according to their respective ability to assume these risks, is crucial."* (para 45)

13. There are two great weaknesses in this position. Firstly, it ignores the key 'top-level' choice between public provision or PPPs – the key question is not allocation of risk within PPPs, but the riskiness of PPPs compared with the alternative of public sector provision. Secondly, in reality it is impossible to specify everything in a contract, because unforeseen circumstances will arise. This is especially important in the case of public services, because the State can never transfer responsibility for assuring the public interest to a private operator. Entering into long-term PPP contracts limits the ability of public authorities to respond to future changes in the public interest.

14. The Green Paper's belief in complete contracts is repeated when it addresses the question of contract revisions (para 49). This need for constant renegotiation is often seen as an opportunity for the private partner to improve the terms of their contract, but for the public partner it is normally disadvantageous, partly because the greater knowledge and legal expertise of the private companies leads to contract revisions more favourable to the contractor. In any case the real problem is the need for a comparative evaluation of PPP proposals with other public sector options: the risk to the public authority of this kind of future deterioration in the terms of the contract has to be quantified.

Damage to staff: working conditions, morale and public service ethos

15. The Green Paper makes no reference to the employment effects of PPPs, yet public services are responsible for generating high levels of employment. EU policies need to take this more into account if the Lisbon targets are to be met.

16. The quality of employment is also intrinsically inked to the quality of services provided. One effect of PPPs is often to damage the working conditions and morale of workers. A survey carried out by EPSU in 2003 found that in a number of

[5] The IMF also commented that the "*recent Eurostat decision on accounting for risk transfer gives considerable cause for concern, because it is likely to result in most PPPs being classified as private investment. …. Since most PPPs involve the private sector bearing construction and availability risk, they will probably be treated as private investment, even though the government bears substantial demand risk (e.g., when it guarantees to the private operator a minimum level of demand for the service provided through the PPP). …the recent decision …. thus could provide an incentive for EU governments to resort to PPPs mainly to circumvent the Stability and Growth Pact (SGP) fiscal constraints*."
http://www.imf.org/external/np/fad/2004/pifp/eng/031204.htm

countries workers were displaced outside sectoral agreements on pay and conditions, or forced onto worse conditions. The development of outsourcing in energy has displaced workers from mainstream energy companies to contractors who have an incentive to cut costs to retain the next contract: as a result there is a training crisis throughout Europe for energy workers.

17. Damaging effects on labour have been noted by a number of reports of experience with PPPs in the UK. A recent review of the impact of PPPs on labour in the UK observed that the tendering process, based on lowest price, had damaged the security and conditions of the workforce, especially of women, as well as the quality of service; in the case of prison service Public Finance Initiatives (PFI) schemes, the effect had been to reduce wages, increase hours, and increase staff turnover.

Conclusion

18. EPSU reiterates that the Green Paper not the right starting point to develop EU policy on PPPs. It ignores the main question that needs to be addressed, namely not whether a PPP should be done this way or that, but whether it should be done at all. While the Green Paper acknowledges that *"recourse to PPPs cannot be presented as a miracle solution for a public sector facing budget constraints. Experience shows that, for each project, it is necessary to assess whether the partnership option offers real value added compared with other options…"* (para 5), it fails to discuss these other options, and does not elaborate at any point on how this assessment should be carried out, or on what principles such an evaluation should be made.

19. The Green looks at PPPs exclusively from the perspective of competition policy and the interest of private economic operators. It ignores issues linked to the broader, long-term public interest and to social and employment concerns. It does not evaluate PPPs or show that they provide "value for money". It assumes that the private sector is better than the public sector and so it can ignore all evidence to the contrary.

19.07.04

Public Services International Research Unit (PSIRU) www.psiru.org

PPPs: a critique of the Green Paper

by David Hall, PSIRU on behalf of the
European Federation of Public Service Unions (EPSU)

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1. Introduction

A Green Paper on PPPs was published by the EC (DG Markt) on 30 April 2004 [1]. It is related to a series of papers that seek to develop the Commission's position on how the private sector can operate in public services. These include reports from DG Markt, DG Regio and Eurostat (the statistical arm of the EC) that seek to encourage PPPs as a way of raising investment, through financial and administrative incentives, with the encouragement of private interests which stand to gain from PPPs. Other public interests concerns are not addressed by these approaches, but are of great importance, including the fundamental question of whether PPPs are a better way of financing investment public services than the public sector.

2. One-sided approach: promoting PPPs

The background to the Green Paper is a series of initiatives aimed at extending the role of the private sector in public services, promoting PPPs, and especially ensuring that PPPs have access to public funds. These initiatives have come from a number of divisions of the EC, with the support of the private sector. They are motivated by a wish to expand the internal market into public services, use PPPs as a way of avoiding fiscal restraints, and providing the private sector with more business.

2.1. Extending internal market into public services

The main origin of the paper is DG Markt's current strategy for developing the internal market of the EU, set out in May 2003, which prioritises public services as the next sectors for liberalisation[2]. Part of that strategy is "*to facilitate public-private partnerships*", based on the belief that "*The private sector will play an increasingly important role in financing infrastructure and in modernising our vital services and ensuring that they are affordable and of the highest possible quality.*" The strategy promised a Green Paper to "*ensure that such partnerships are compatible with public procurement rules*", as well as to clarify the relationship between PPPs and state aid rules, as part of a general commitment to review EU legislation in order to facilitate the greater role of the private sector in public services. [3] The paper also addresses the issue of the current exemption from procurement rules of concessions, which are the oldest form of PPP: this has been the subject of previous communications from the EC.[4]

2.2. Promoting PPPs in accession countries: accessing EC funds

DG Regio has also published papers that are concerned to support and facilitate the use of PPPs, especially in new member states and accession countries, so that the grants for investment in environmental and transport infrastructure can be available to PPPs. The first DG Regio paper, in 2003, was a guide to "*developing successful PPP projects in the candidate countries*" so that they were compatible with the rules for providing ISPA funds, stating that "*The European Commission has an interest in promoting and developing PPPs within the framework of the grants it provides*" [5]. In June 2004 DG Regio published a collection of case studies intended to demonstrate that "*it is possible to successfully manage these constraints [of ISPA and cohesion fund rules] and integrate the needs of all parties*". [6]

[1] Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions. COM(2004) 327 final. Brussels 30.04.2004 . http://europa.eu.int/comm/internal_market/publicprocurement/docs/ppp/greenpaper/com-2004-327_en.pdf

[2] Internal Market Strategy Priorities 2003 – 2006 . Communication From The Commission May 2003 http://www.europa.eu.int/comm/internal_market/en/update/strategy/index.htm

[3] Speech by Commissioner Frits Bolkestein Member of the European Commission in charge of the Internal Market and Taxation , at the 3d annual Public-Private Partnership Global Summit Holland, Noordijk, 08 November 2002: **"**European Commission's current policy on public-private partnerships and its future projects" http://europa.eu.int/comm/internal_market/en/speeches/021108-bolkestein_en.htm

[4] Commission Interpretative Communication on Concessions in Community law, OJ C 121, 29.4.2000, p. 2. http://europa.eu.int/eur-lex/en/archive/2000/c_12120000429en.html

[5] *Guide to Successful Public-Private Partnerships* . DG Regio March 2003 http://europa.eu.int/comm/regional_policy/sources/docgener/guides/pppguide.htm

[6] Resource Book On PPP Case Studies. DG Regio June 2004. http://europa.eu.int/comm/regional_policy/sources/docgener/guides/pppguide.htm

2.3. Eurostat: easing conditions for fiscal exemption

A key motive for public authorities' interest in PPPs, as stated in the green paper, is that PPPs are seen as enabling governments, constrained by the EU's own fiscal rules, to make more investments in public services: "*In view of the budget constraints confronting Member States, it meets a need for private funding for the public sector…*".

The problem however has been a lack of clarity over the circumstances in which PPPs are officially recognised as being outside the categories of public borrowing and public assets and debts that are constrained by the EU rules. This has been considerably eased, for supporters of PPPs, by a ruling by Eurostat, the Statistical Office of the EC, in February 2004, that the assets involved in a PPP should be classified as non-government assets, and therefore recorded off balance sheet for government, if the private partner bears the construction risk, and the private partner bears either availability or demand risk. [7] This is an easy requirement – availability risk simply means that the private sector accepts responsibility if its own asset stops working at a time when it is needed.

2.4. EC support for PPP financing of international transport links

The EC itself is encouraging PPP schemes as a way of financing the large-scale capital investment needed for the planned trans-European networks. A report from the commission in 2003 [8] proposed that more use could be made of concessions for this purpose, referring to historical precedents. This report saw the purpose of the Green Paper on PPPs as being *"to launch a major public consultation regarding the rapid development of various forms of PPP and the legal regulation of public contracts through Community law."*

2.5. Private sector encouragement

The expansion of PPPs is naturally supported and encouraged by the private companies that gain from the growth in such projects, especially in sectors such as water and construction of transport links such as roads and tunnels. The market for the private sector grows as PPPs replace public sector investment and operation, and this is an especially attractive market where it can be combined with government guarantees that secure the returns on investment, and with access to EC level grants that increase the total value of schemes. A good summary of this market-seeking approach can be seen in the paper published by PriceWaterhouseCoopers in June 2004 [9], which sees PPPs as an important market, seeks greater certainty about EU rules on procurement and funding in relation to PPPs, and recommends that the EU funds the creation of special PPP units, and a central EU task force to assist member states "tackle the issues involved in integrating EU funding and grant requirements with private sector finance and PPP approaches".

2.6. The other side: economic and social concerns with PPPs

This encouragement for PPPs however ignores a range of concerns about PPPs based on public interest considerations. Most fundamentally, there are questions about whether PPPs should be preferred to public sector investment and operation of services, and the need to evaluate the social and economic impact of the risks and future liabilities created by PPPs. There are a number of specific public interest concerns: about the way PPPs transfer the costs of paying for investment from present generation to future generations; about the dangers of fragmenting, casualising and worsening conditions of employment of public service workers employed in them; about the transparency of the processes by which PPPs are established, operated, and

[7] New decision of Eurostat on deficit and debt Treatment of public-private partnerships 11/02/2004 http://europa.eu.int/rapid/pressReleasesAction.do?reference=STAT/04/18&format=HTML&aged=0&language=EN&guiLanguage=en

[8] Developing the trans-European transport network: Innovative funding solutions; Interoperability of electronic toll collection systems: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the widespread introduction and interoperability of electronic road toll systems in the Community. COMMUNICATION FROM THE COMMISSION Brussels, 23.4.2003. COM(2003) 132 final 2003/0081 (COD). http://europa.eu.int/comm/transport/themes/network/doc/com_2003_0132_en.pdf

[9] Developing Public Private Partnerships in New Europe. PriceWaterhouseCoopers. May 2004 . http://www.pwcglobal.com/ie/eng/about/svcs/corp_finance/pwc_ppp04.pdf ; an executive summary is at http://www.pwcglobal.com/Extweb/service.nsf/docid/6FDD654BE69A4B3385256BDC00527C30/$file/pwc_PPP_Exec_Summ.pdf

terminated, including the dangers of corruption; and about the comparative economic consequences of PPPs and public sector options.

2.7. Green Paper and beyond

This paper starts with some comments about the Green Paper itself and some of its recommendations, and then raises some key issues concerning PPPs, including the need for an assessment of how PPPs impact on public interests, and the ability of public authorities to come to the best decisions for the public interest.

3. The Green Paper

3.1. Missing the procurement directives

There is a general question about the relationship between the Green Paper (GP) and EC policy initiatives. The bulk of the paper is concerned with possible changes to the public procurement regime of the EU, yet it was published one month after the enactment of the new, comprehensively revised procurement directives 2004/17 and 2004/18.[10] The Green Paper itself had been delayed 18 months from its originally announced date. The opportunity of including relevant provisions in the revised directives has thus been lost: any changes relating to PPPs would need a further revision to the directive.

3.2. Concessions

At present, concessions fall outside the scope of the procurement directives, which leaves many major contracts not subject to full rigours of competitive tendering. There is a public interest in such competition, however, to help avoid corruption and favouritism, and it is a serious anomaly that major contracts in water supply or toll roads should not be subject to these rules. It is therefore welcome that the GP argues that service concessions should be subject to tendering rules like other contracts, and suggests that EC legislation should impose this requirement (paras 31-36). Previous EC communications on concessions had been prepared to allow the current favoured regime to continue.

3.3. Structured selection methods and 'competitive dialogue'

The GP also makes a strong statement of principle of the public interest in rigorous procurement procedures, even in relation to PPPs : *"structured selection methods should be protected in all circumstances, as these contribute to the objectivity and integrity of the procedure leading to the selection of an operator. This in turn guarantees the sound use of public funds, reduces the risk of practices that lack transparency and strengthens the legal certainty necessary for such projects."* (para 26). Unfortunately, this is in the context of a discussion of the new 'competitive dialogue' procedure of the revised procurement directive (article 29), which does not exhibit many of these virtues: it allows confidential discussions with tenderers after the contract notice has been issued, and even after the best tender has been identified. The time for DG Markt to insist on rigour was before the introduction of this kind of 'dialogue' into the directive.

3.4. First movers: a recipe for corruption?

The Green Paper endorses proposals that 'first movers' should have some privileged treatment to maintain the incentive to initiate proposals for public spending on their projects. (paras 37-41). Such proposals have always been made b y private companies in the hope of the proposer getting extra contracts, or less competitive contracts (not, as naively suggested in para 39 *"to develop or apply innovate technical solutions, suited to the particular needs of the contracting body"*). There are serious dangers in these initiatives, not least of corruption and higher costs from the resulting contracts precisely because they are less rigorously scrutinised and subjected to competition and evaluation of alternatives, as a recent World Bank paper warned, concluding: *"The many negative experiences with unsolicited proposals for private infrastructure*

[10] DIRECTIVE 2004/18/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts Official Journal of the European Union EN 30.4.2004 L 134/133 http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_134/l_13420040430en01140240.pdf

projects may lead some governments to see blanket refusals as the only way to safeguard against potential problems with corruption and lack of transparency.”.[11] The GP should take heed of that advice.

3.5. Sub-contracting

The GP rightly raises the question of sub-contracting as creating potential problems (paras. 51-52). Sub-contracting in its various forms has led to worsening of conditions, loss of training and unreliable and dangerous work in many public services in many countries - the examples of the Hatfield train crash in the UK, and the recent collapse of the airport building at Charles de Gaulle airport in France, both illustrate the dangers of this practice. These problems are general to all sub-contracting, however, whereas the Green Paper considers them only in the context of whether a PPP partner can restrict sub-contracting to its own affiliates.

3.6. Proposal of compulsory tendering of public sector work

The Green Paper includes a paragraph (para 63) that claims that work has to be submitted to compulsory tendering before it can be assigned to arms-length public entities, referring to one of the cases heard by the ECJ that affects this issue. The para asserts that: *“Only entities that fulfil these two conditions at the same time [subject to the same kind of control as an in-house entity, and carrying out the essential part of its work for the authority] may be treated as equivalent to "in-house" entities in relation to the contracting body and have tasks entrusted to them without a competitive procedure.”*

If applied, this policy would seriously distort the choices available to public authorities. Inter-municipal companies, and similar arms-length corporatised public sector bodies, have often been developed to take advantage of perceived economies of scale, accounting and managerial disciplines analogous to the private sector, and an ability to borrow without being constrained by the EU limits on government borrowing and debt (which do not apply to public sector trading entities). The Green Paper’s policy would rule these out as policy options, as any such arms-length form would have to be subject to tender against commercial private operators able to make strategic bids and operate cross-subsidies between divisions (as was done by all major refuse collection contractors entering the UK market under the Thatcher compulsory tendering regime in 1989 (and, in the other direction, by Vivendi in 2000, when it loaded all the debts of its acquisitions in telecoms and media onto its existing concessions in water, waste and other public services). The development of the public sector would be strangled by removing such arms-length options.

The GP’s position threatens to force compulsory tendering on a high percentage of public sector operators, and is highly contentious: it has no place in a Green Paper that is supposed to be concerned with PPPs.

While this would be a welcome development from the point of view of private contractors seeking to capture business from the public sector, it is not a welcome development for public authorities, as it reduces their ability to choose the best option for public services.

3.7. Definitions

The PPPs Green Paper states that the term PPP is not defined at Community level, and then goes on to give a remarkably vague account of the elements normally characterising PPPs. However, a definition in the EC report on EMU in 2003 refers to more precise characteristics. The recent IMF paper also provides more technically specific definition, based on the elements of a Design, Build, Finance and Operation (DBFO) contract; a similar approach to an earlier PSIRU definition (see Annexe 1)

While it is correct that the term PPP is used to cover a wide variety of arrangements, any policy-oriented paper needs to provide itself with precise terms that define its subject matter and what it is acting upon. The definitions in paras 1 and 2 include the vague phrase: “forms of cooperation between public authorities and the world of business” with six alternative objectives. This is far too wide a definition, and would include for

[11] Unsolicited proposals : the issues for private infrastructure projects. John Hiodges. Public Policy for the Private Sector. Note no 257. http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/08/19/000160016_20030819180828/Rendered/PDF/263990PAPER0VP0no10257.pdf

example joint seminars. This is followed by a list of four elements, which are the "relatively" long duration – relative to what? Funding partly from the private sector "sometimes by means of complex arrangements"; the "important role" of the economic operator; and the "distribution of risks" – which is a feature of any contract. [12]

More precise definitions are already available, for example in the EC report Public finances in EMU 2003, or the IMF paper on PPPs, which defines the category as projects involving the private partner in DBFO of an asset, which constitutes a clear framework for discussion.

3.8. Private and public interests: encouraging PPPs and private ownership

The public interests in the subject are most fundamentally concerned with getting the best option for investment, and the best option for operating a service. There are also other public interests and policies, some specified in the treaty, such as the freedom for companies to compete with each other throughout the EU, but also the community objectives of quality public services, high employment etc.

There are also private interests at stake with PPPs. There is the natural interest of contractors in relevant sectors in maximising the size of the market available to them, which would be achieved by increasing the use of PPPs for public investment. There is a similar natural interest from financiers, who are interested in a potentially larger market for investment finance that may be secured by government guarantees. It is to be expected that these groups will seek to encourage the use of PPPs, on terms as favourable as possible to themselves.

Private interests are not the same as the public interest objective of fair competition. That objective can be sought whether there are 2 PPPs in Europe, or 2 million. There is no public interest in increasing the number of PPPs for their own sake. The Green Paper however acts as though this was the case: section 1.2 is headed "The challenge for the Internal Market: to facilitate the development of PPPs under conditions of effective competition and legal clarity." : while it is a matter of public policy for the EC to aim for effective competition (and of course legal clarity), there is no public policy objective to facilitate the development of PPPs. The same mistake occurs elsewhere (paras 14,16, 19) which talk of "obstacles" to PPPs, "develop" PPPs, "remove barriers" to PPPs.

3.8.1. Not neutral on public or private

One reason why this matters is because of the importance of the Treaty's principle of neutrality on public or private ownership (under article 295 of the Treaty). At one point the Green Paper claims that it does not make any "value judgment" on the decision whether or not to externalise services (para 17), arguing that the rules it is concerned with apply "downstream of the economic and organisational choice made by a local or national authority" on whether to use the private sector. But encouraging PPPs, removing obstacles to them, clearly implies discouraging the alternative, of using the public sector.

It also involves a preference for private ownership. The asset financed by a PPP needs to be classified as a private asset, off the public sector balance sheet, and so escapes the curbs on government debt. Encouraging PPPs entails encouraging the formation of privately owned assets over the alternative of publicly owned assets. This seems, in principle, a breach of the treaty's neutrality. [13]

[12] This vagueness is consistent with an approach based on the private interest of expanding the market – to those interested in market opportunities, it does not matter much exactly what are the features of the contract.

[13] This preference is also implicit in the fiscal rules of the growth and stability pact themselves.

4. Beyond the Green Paper: evaluating PPPs against public interest

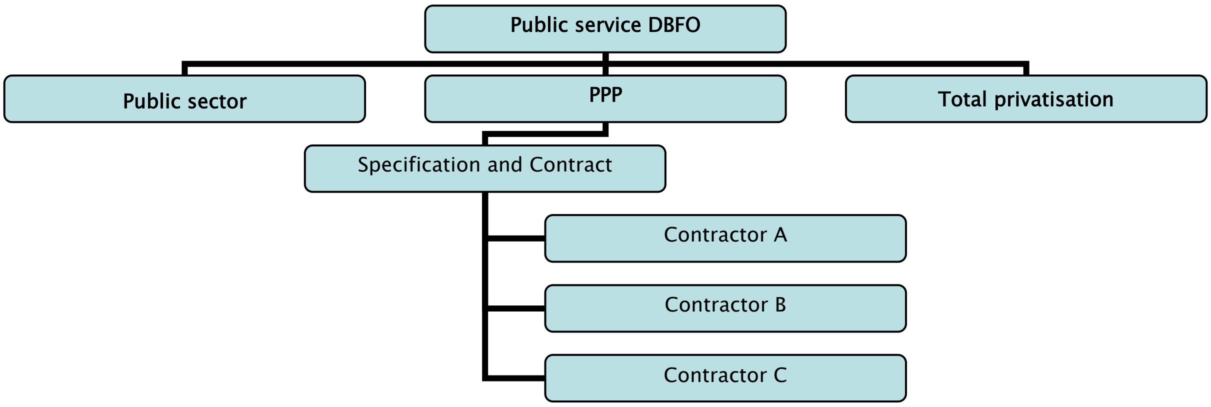
4.1. Two central comparative questions

The two elements of a PPP are normally (1) financing a public sector capital investment project through a private company; (2) a contract for services, usually operating the capital assets financed under (1).The two central questions on PPPs, for public authorities, are therefore:

- Is the PPP a better way of financing the capital investment involved than alternatives?
- Is the PPP a better way of operating the service than alternatives?

Both the IMF and the EC report on EMU 2003 agree that the key questions are these comparative ones. They stand at the peak of a decision-tree, where the public authority can evaluate options for carrying out a public service involving design, building, and financing some capital assets, and operating the service. (DBFO). Thus the key choice is between public sector provision and a PPP, or other variants on these options, as the IMF insists: "When considering the PPP option, the government has to compare the cost of public investment and government provision of services with the cost of services provided by a PPP" (PPPs, para 23).

Chart A: Different levels of decision on the best way to achieve public service objectives



DG Markt's Green Paper however largely ignores these key questions, and assumes that a PPP has been chosen as the way forward. It acknowledges that "*recourse to PPPs cannot be presented as a miracle solution for a public sector facing budget constraints. Experience shows that, for each project, it is necessary to assess whether the partnership option offers real value added compared with other options…*" (para 5). However, it fails to discuss these other options, and does not elaborate at any point on how this assessment should be carried out, or on what principles such an evaluation should be made. Ignoring this top level choice is dangerously similar to assuming, with Mrs Thatcher, that "there is no alternative" (TINA).

As a result, the paper easily slips into claiming that the point is to encourage PPPs, and remove obstacles to them: but doing this may have the effect of distorting the higher level choice, for example by offering guarantees to entice private contractors.

This weakness can be seen in their discussion of risk. The comparative question addressed by others is whether the PPP option carries more risks (and benefits) than the alternatives of public sector provision (or other forms of contracting). So the question of guarantees for example is treated by the IMF as a comparative one e.g. "*it is also possible that the government overprices risk and overcompensates the private sector for taking it on, which would raise the cost of PPPs relative to direct public investment*"[14]. The Green Paper however ignores this comparison, and discusses the question of how risks are distributed

[14] International Monetary Fund Public-Private Partnerships March 12, 2004 p.14 http://www.imf.org/external/np/fad/2004/pifp/eng/031204.htm

within a PPP, as a search for the 'best' allocation between the public and private partners: *"In this context, the appropriate assessment and optimum distribution of the risks between the public and the private sectors, according to their respective ability to assume these risks, is crucial."* (para 45).

4.2. Making PPPs too easy

In the context of this choice it is important that PPPs are not made too easy or attractive, e.g. by offering exemption from fiscal restraint, or from procurement disciplines, or providing state-backed guarantees which are not properly costed. These inducements would distort any evaluation between a PPP and a public sector provision.

Thus the Eurostat ruling, which is noted by the Green Paper as helping make PPPs more attractive, should rather be criticised for making PPPs too easy. This is the view taken by the IMF, in March 2004, when it described the Eurostat decision as *"problematic"* [15], and declared that the *"recent Eurostat decision on accounting for risk transfer gives considerable cause for concern , because it is likely to result in most PPPs being classified as private investment. …. Since most PPPs involve the private sector bearing construction and availability risk, they will probably be treated as private investment, even though the government bears substantial demand risk (e.g., when it guarantees to the private operator a minimum level of demand for the service provided through the PPP). …the recent decision …. thus could provide an incentive for EU governments to resort to PPPs mainly to circumvent the Stability and Growth Pact (SGP) fiscal constraints."* [16]

This echoed the general concern expressed in the EC's own report on EMU in 2003 (produced before the Eurostat ruling): "there is the risk that the recourse to PPPs is increasingly motivated instead by the purpose of putting capital spending outside government budgets, in order to bypass budgetary constraints. If this is the case, then it may happen that PPPs are carried out even when they are more costly than purely public investment." (summary of part III, p.102) [17]

These anxieties may be predictable on the part of fiscal authorities, but they form part of a wider debate about the appropriateness of those policies themselves. The EMU 2003 report devoted a whole section to the question of public investment, how it is affected by PPPs, and whether the fiscal rules of the EU are constraining public investment and, if so, whether they should be changed. The IMF papers of March 2004 have a similar agenda, and indeed the IMF has proposed a significant alteration in its own fiscal rules, precisely in order to facilitate public investment by public authorities and public sector operators.

If the fiscal rules of the EU (or the IMF) are preventing enough public investment from being made, or preventing it being made in the most efficient way – as both bodies acknowledge may be happening - then the rules themselves need to be reviewed and changed. Evading the rules by using PPPs, when they may be a more costly, more risky, less equitable and less effective option than public provision, does not solve the problem: it makes it worse.

4.3. Capital investment: private borrowing is more expensive

The Green Paper, as stated above, shares the view that PPPs are helpful because they allow public investment outside the fiscal guidelines. The report on EMU 2003 points out two crucial weaknesses in this position: the by-passing of better alternatives, and the failure to make a long-term assessment of the implications of PPPs: *"First, it does not address why PPPs should be preferred to alternative schemes to finance capital formation with public purposes that do not imply an increase in government borrowing (for*

[15] International Monetary Fund Public-Private Partnerships March 12, 2004 para 38 http://www.imf.org/external/np/fad/2004/pifp/eng/031204.htm

[16] International Monetary Fund Public Investment and Fiscal Policy March 12, 2004 para 36 http://www.imf.org/external/np/fad/2004/pifp/eng/PIFP.pdf

[17] European Economy No 3 / 2003 Issn 0379-0991 European Commission Directorate-General For Economic And Financial Affairs. Public finances in EMU 2003 http://europa.eu.int/comm/economy_finance/publications/european_economy/2003/ee303en.pdf

example, classical privatisation [author's note: or borrowing through a corporatised public sector entity, which is also outside the EU definition of government borrowing]*). Second, even if the impact on current budget balances of PPP schemes is most likely to be smaller compared with the alternative of pure public procurement, the long-term impact of PPPs on public finances is to be assessed carefully*." [18] PPPs have to be demonstrated to be a better option than other ways of investing and delivering the same service.

PPPs have a fundamental disadvantage as a way of financing capital expenditure, compared with finance raised by government borrowing: governments can invariably borrow money more cheaply than any private company, As the IMF puts it; *"private sector borrowing generally costs more than government borrowing. ….. This being the case, when PPPs result in private borrowing being substituted for government borrowing, financing costs will in most cases rise …"*[19] This means that the PPP has to demonstrate that there are significant efficiency gains from involving the private sector, in order to offset the borrowing costs. The EMU 2003 report agrees: "*The rationale for the use of PPP schemes is rather that of microeconomic efficiency*."

4.4. The efficiency argument

The Green Paper has nothing to say on the subject of efficiency. It assumes from the outset that the public sector will benefit *"from the know-how and working methods of the private sector."* (para 4) but does not at any stage justify this. But there is no systematic evidence that the private sector is more efficient than the public sector. The IMF, by contrast, is aware that the evidence does not support a general assumption of superior private sector efficiency: *"Much of the case for PPPs rests on the relative efficiency of the private sector. While there is an extensive literature on this subject, the theory is ambiguous and the empirical evidence is mixed."* [20]

A good summary of this mixed evidence is contained in a review by Finnish economist Johann Willner of empirical evidence from comparative studies in a range of sectors. This shows that public ownership is at least as efficient in more than half of the studies, and developed a theoretical analysis that concludes that political intervention may actually produce better results in oligopolistic markets, even if it creates 'over-manning'.[21] And in infrastructure sectors where monopoly is common and competition in the market is weak, there is little theoretical justification for the normal presumption that competition makes the private sector more efficient.

4.5. Long-term impact: guarantees and contingent liabilities

Both the IMF and the EMU 2003 report note the importance of assessing the real value of the contingent liabilities taken on by governments through the various guarantees commonly offered to PPPs. The EMU report notes that "given the possible relevant debt impact of contingent liabilities, the inclusion of information (also quantitative when possible) on each provision giving raise to contingent liabilities in supplementary budgetary documents is recommended in international codes of fiscal transparency" (5.3.3, p.131).

The use of government guarantees in PPPs is also an extra burden on the public authorities, which should be taken into account when comparing them with other possible options. The IMF paper notes that : "….resort to guarantees to secure private financing can expose the government to hidden and often higher costs than traditional public financing…." (PPPs para 40). The use of government guarantees is also an obvious potential source of corruption, if politicians or public officials are induced to provide guarantees that protect the private partner but offer no benefit to the public. To try and make guarantees more transparent, the IMF proposes that the public policy objectives and the intended beneficiaries of all guarantees should be stated: "Good disclosure practice is to publish detailed information on guarantees. This should cover the public policy purpose of each guarantee or guarantee program, the total amount of the guarantee classified by sector

[18] EMU 2003 The economics of PPPs, p.129
[19] IMF PPPs, para 22
[20] IMF PPPs, para 25
[21] Johan Willner, "Ownership, efficiency, and political interference", in *European Journal of Political Economy*, vol.17, no. 4, (2001), pp.723-748

and duration, the intended beneficiaries, and the likelihood that the guarantee will be called. Information should also be provided on past calls of guarantees." [22] Both the IMF [23] and the OECD [24] have produced codes on fiscal transparency that require these liabilities to be clearly stated.

In 2002 the government of China took the decision not to offer any kind of guarantees in future to international companies operating in China. This poses a more fundamental question, as to why the EC, and European governments, in a supposedly more liberalised market, regard state guarantees for private operators as acceptable. It has been pointed out that in the UK, "future service payments under PFI contracts amount to an explicit off-balance-sheet liability totalling £100 billion which has significant implications for future borrowing or taxes.[25]

5. Long-term effects on provision of services

5.1. Uncertainty and incomplete contracts

A problem with all outsourcing is the uncertainty of the future, which means that contractual relations have to be renegotiated, limiting the range of options and flexibility of the public authority. The Green Paper takes the view that what happens after the contract can be determined by provisions in the contract itself, and in this way the allocation of risks can be defined and controlled: *"The success of a PPP depends to a large extent on a comprehensive contractual framework for the project, and on the optimum definition of the elements which will govern its implementation. In this context, the appropriate assessment and optimum distribution of the risks between the public and the private sectors, according to their respective ability to assume these risks, is crucial."* (para 45)

There are two great weaknesses in this position. Firstly, it ignores the key 'top-level' choice between public provision or PPPs – the key question is not allocation of risk within PPPs, but the riskiness of PPPs compared with the alternative of public sector provision. Secondly, in reality it is impossible to specify everything in a contract, because unforeseen circumstances will arise.

This is a key reason why businesses are vertically integrated instead of outsourcing core activities, and by the same logic provides a reason for public ownership rather than use of PPPs:*"ownership does matter when contracts are incomplete: … ownership gives the government special powers in the form of residual control rights."* [26] This is especially important in the case of public services, because the state can never transfer responsibility for the public interest that the service is serving, and so entering into long-term PPP contracts limit the state's ability to respond to uncertain future changes in the public interest – the state is reducing its own powers to act. [27]

5.2. Renegotiation: unequal opportunities

The Green Paper's belief in complete contracts is repeated when it addresses the question of contract revisions. *"In general, changes made in the course of the execution of a PPP, if not covered in the contract documents, usually have the effect of calling into question the principle of equality of treatment of economic operators. ……… any substantial modification relating to the actual subject-matter of the contract must be considered equivalent to the conclusion of a new contract, requiring a new competition"* (para 49).

[22] IMF PPPs , section VII, para 48, p.28

[23] The IMF's *Code of Good Practices on Fiscal Transparency* and the related *Manual on Fiscal Transparency* require statements as part of the budget documentation that describe the nature and significance of all contingent liabilities.

[24] OECD *Best Practices for Budget Transparency;* IPSAS 19, *Provisions, Contingent Liabilities and Contingent Assets*, issued by IFAC; *GFSM 2001.*

[25] IMF, PPPs, para 78 and footnote 74, pp 38-39, referring to The Times, July 7, 2003

[26] Oliver Hart. Incomplete Contracts And Public Ownership: Remarks, And An Application To Public-Private Partnerships. The Economic Journal, 113 (March), C69–C76.

[27] Julie Froud, "The Private Finance Initiative: risk, uncertainty and the state", *Accounting, Organizations and Society* 28 (2003) 567–589

This need for constant renegotiation is often seen as an opportunity for the private partner to improve the terms of their contract, but for the public partner it is normally disadvantageous, partly because of the greater knowledge and legal expertise of the private companies leads to contract revisions more favorable to the contractor. In France, which has the longest experience of such concessions to build roads, water works and other infrastructure, an official report observed that the system *"left elected councillors on their own, without support, to deal with conglomerates wielding immense political, economic and financial power"* [28]

The Green Paper's solution is hardly practicable however: if every substantive revision has to be retendered, then PPPs will become so uncertain that private companies will lose interest. This real problem should rather be addressed in a comparative evaluation of PPP proposals with other public sector option: the risk to the public authority of this kind of future deterioration in the terms of the contract has to be quantified.

5.3. Uncertainty of outcome: secrets, corruption, lies and mistrust

The uncertainty of the future is compounded because of strategic behaviour by the companies designed to improve their own position, and exploit omissions and failures by public authorities. There is real experience of these problems – none of them noted by the Green Paper.

PFI schemes in the UK show common exaggeration of costs or reduction in quality. An official audit report on PFI in schools warned that expected savings were not being delivered, and that "there is a strong case for changing capital funding incentives to enable options other than PFI to be pursued equally advantageously. This would open up the PFI mechanism itself to competition"[29]: one PFI project to improve schools in north London resulted in an extra costs of £6.25m for the council, due to lack of provision for items like desks, chairs and cabling for computers.[30] With hospitals, the cost of PFI schemes has invariably been higher than originally forecast, requiring 30% cuts in bed capacity and 20% reductions in staff in hospitals financed through PFI. [31]

Corruption is a common problem with public sector contracts, and PPPs are at least as susceptible as others. The Portuguese hospital PPP, Amadora-Sintra has been the subject of allegations of over-charging, use of fraudulent expense claims (a state auditor in mid-2003 found over-charging of €75m, although an arbitration court controversially overturned this), and allegations of misuse of hospital property for private clinical services, reinforced by the fact that the contract with the hospital was signed in 1995 by the outgoing health minister, who, after the electoral defeat of the government, subsequently went to work for the de Mello Group which was the private partner in the hospital.[32] In water, executives of the major groups Suez and Veolia have been convicted of corruption in Grenoble, Angouleme and Reunion (France) and in Milan (Italy).[33]

The impact of strategic behaviour by companies has also been demonstrated in a global study of infrastructure construction contracts for railways. The study found that the actual final cost of these contracts was always consistently far higher than the original estimates: a statistical analysis confirmed that the one coherent explanation of this phenomenon is "systematic lying" on the part of the companies. [34]

[28] "Cour des Comptes: La gestion des services publics locaux d'eau et d'assainissement", in *Rapport public particulier*, (Janvier 1997), http://www.ccomptes.fr/Cour-des-comptes/publications/rapports/eau/cdc72.htm

[29] Audit Commission: PFI in Schools 30 Jan 2003 http://www.audit-commission.gov.uk/subject.asp?CatID=ENGLISH^LG^SUBJECT^LG-EDU

[30] A costly free lunch. Melanie McFadyean and David Rowland The Guardian Tuesday July 30, 2002

[31] BMJ 2002;324:1205-1209 (18 May) Private finance and "value for money" in NHS hospitals: a policy in search of a rationale? Allyson M Pollock, Jean Shaoul, and Neil Vickers. This article contains references to many other detailed critiques of PFI.

[32] Pravda online, 11 July 2003, "BLOCO EXIGE RESCISÃO DO CONTRATO DO AMADORA SINTRA", http://port.pravda.ru/portugal/2003/07/11/2564.html

[33] Private to Public: International lessons of water re-municipalisation in Grenoble, France. Lobina and Hall. PSIRU. http://www.psiru.org/reports/2001-08-W-Grenoble.doc

[34] Underestimating costs in public works projects: Error or lie? by Bent Flyvbjerg; Journal of the American Planning Association; Summer 2002; Vol. 68, Issue 3; pg. 279

A recent study of the use of PPPs in defence in the UK concluded that PPPs do not necessarily lead to efficiency gains and that there are significant costs and disadvantages: “*The conclusion of the analysis is that the use of PPPs will not necessarily lead to improved economic efficiency in defence procurement and that considerable care will need to be taken both in terms of negotiating PPPs, monitoring their performance, and in their renewal. The UK defence sector illustrates that PPPs involve significant transaction costs which must be set against any benefits in terms of economic efficiency incentives*”[35].

5.4. Damage to staff: working conditions, morale and public service ethos

One effect of PPPs is often to damage the working conditions and morale of workers. A survey carried out by EPSU found that in a number of countries workers were displaced outside sectoral agreements on pay and conditions, or forced onto worse conditions.[36] The development of outsourcing in energy has displaced workers from mainstream energy companies to contractors who have an incentive to cut costs to retain the next contract: as a result there is a training crisis throughout Europe for energy workers. [37]

Damaging effects on labour have been noted by a number of reports of experience with PPPs in the UK. A recent review of the impact of PPPs on labour in the UK observed that the tendering process, based on lowest price, had damaged the security and conditions of the workforce, especially of women, as well as the quality of service; in the case of prison service PFI schemes, the effect had been to reduce wages, increase hours, and increase staff turnover. [38] The study of UK defence contracts (see above) found that there had been damaging consequences for staff morale. [39] And a similar result emerged from a study of PPPs in the health and municipal services sectors in the UK: “*a vicious circle of monitoring and distrust between partner organizations, in place of the old faith in bureaucratic process*”. The study also concluded that PPPs present a significant threat to the ‘public service ethos’. [40]

5.5. Eternal concessions

The Green Paper states that a fixed contract length has to be set to provide a form of guarantee for the private partner in PPPs – the longer the better, for the private partner: “*the period during which the private partner will undertake the performance of a work or a service must be fixed in terms of the need to guarantee the economic and financial stability of a project.*” (para 46). Certainly, public services and those that work in them benefit from security and stability, an environment that facilitates service delivery: public sector operations in general can provide this stability. However, fixing contract length in a PPP creates risks for the public sector that are not present if the work is done by the public sector itself.

http://pqasb.pqarchiver.com/planning/128776261.html?did=128776261&FMT=ABS&FMTS=FT:TG:PAGE&desc=Underestimating+costs+in+public+works+projects:++Error+or+lie%3f

[35] Transaction costs, relational contracting and public private partnerships: a case study of UK defence David Parker and Keith Hartley Journal of Purchasing and Supply Management
Volume 9, Issue 3 , May 2003, Pages 97-108
http://www.sciencedirect.com/science?_ob=JournalURL&_cdi=12893&_auth=y&_acct=C000027518&_version=1&_urlVersion=0&_userid=634187&md5=c5218be5e9f78f1fd27ddb01b951c843

[36] EPSU Survey on PPPs 2004

[37] Restructuring and outsourcing of electricity distribution in EU. Thomas and Hall. PSIRU
http://www.psiru.org/reports/2003-05-E-distriboutsource.doc

[38] Paying the cost? Public Private Partnerships and the public service workforce. By Sanjiv Sachdev. June 2004. Catalyst. http://www.catalystforum.org.uk/pdf/ppp.pdf

[39] Transaction costs, relational contracting and public private partnerships: a case study of UK defence David Parker and Keith Hartley Journal of Purchasing and Supply Management
Volume 9, Issue 3 , May 2003, Pages 97-108
http://www.sciencedirect.com/science?_ob=JournalURL&_cdi=12893&_auth=y&_acct=C000027518&_version=1&_urlVersion=0&_userid=634187&md5=c5218be5e9f78f1fd27ddb01b951c843

[40] PPPs and the changing public sector ethos: case-study evidence from the health and local authority sectors . Gail Hebson, Damian Grimshaw, Manchester School of Management, Mick Marchington
Work, employment and society Volume 17 n Number 3 n September 2003

One such risk, implicitly acknowledged in the Green Paper, is the risk of the private company having no incentive to work efficiently, because it will not be exposed to competition for a long time. The paper makes the obscure suggestion that *"An excessive duration is likely to be censured on the basis of the principles governing the internal market or the provisions of the Treaty governing competition"* (para 46), but does not say by whom it will be censored, or what sanctions will be applied. PPPs which are in effect eternal already exist in the EU: the Barcelona water concession has been running continuously for 136 years, without ever being retendered, and there is now no prospect of it being competitively tendered because the costs of compensation to the incumbent are too high. In the UK, all the private water companies hold monopoly concessions which now require 25 years notice of termination: it is very unlikely that in practice such notice can ever be given effectively.

A second risk is not noted in the Green Paper but is very real: the risk that terminating the contract early will be impossibly costly because of compensation claims. An example is the experience of the Hungarian city of Szeged, where water supply was privatized under a concession PPP involving the French multinational Veolia. After a few years the municipality re-evaluated the scheme, which had legal flaws, and found it would be cheaper and preferable to carry it out in-house. The change proved impossible however as Veolia brought a court case for compensation equivalent to all expected profits from the remainder of the contract. Szeged had to settle for renegotiation with Veolia. [41]

6. Summary and conclusion

There appears to be no coherent overview being taken of PPPs by the Commission. DG Economy is raising concerns about the dangers of PPPs, especially when used to avoid fiscal restraints, whereas DG Markt (and Eurostat) are encouraging them for exactly this purpose. DG Regio spends large amounts of time and energy explaining how PPPs can be arranged in central Europe and still be eligible for cohesion funds, while being more aware than most of the risks and problems involved. The Green Paper itself follows a rigorous tunnel vision principle: DG Markt is concerned with ensuring competition and extending the internal market in public services, and has no responsibility at all for the public services themselves, those who work within them, or the evaluation of public sector and PPP options.

Despite some helpful suggestions in relation to tendering of concessions, this is not the paper on PPPs that Europe needs. The Commission should find a way of producing a report that includes:

- the risks and problems experienced with PPPs
- the dangers for public authorities in entering into long-term deals with the private sector
- the need to protect public services and their workers from erosion of quality by commercial opportunism
- the economic and social case for public sector investment and provision of services.

[41] Problems with private water concessions: a review of experience. Emanuele Lobina e.lobina@gre.ac.uk and David Hall d.j.hall@gre.ac.uk . June 2003. www.psiru.org/reports/2003-06-W-over.doc

7. Annexe: extracts from papers

7.1. Hart on contradictions with theory of firm

INCOMPLETE CONTRACTS AND PUBLIC OWNERSHIP: REMARKS, AND AN APPLICATION TO PUBLIC-PRIVATE PARTNERSHIPS Oliver Hart. The Economic Journal, 113 (March), C69–C76. _

"…the issues of vertical integration and privatisation have much more in common than not. Both are concerned with whether it is better to regulate a relationship via an arms-length contract or via a transfer of ownership. Given this, one might have expected the literatures to have developed along similar lines. However, this is not so. Whereas much of the recent literature on the theory of the firm takes an 'incomplete' contracting perspective, in which inefficiencies arise because it is hard to foresee and contract about the uncertain future, much of the privatisation literature has taken a 'complete' contracting perspective, in which imperfections arise solely because of moral hazard or asymmetric information.
……. this is unfortunate. One of the insights of the recent literature on the firm is that, if the only imperfections are those arising from moral hazard or asymmetric information, organisational form – including ownership and firm boundaries – does not matter: an owner has no special power or rights since everything is specified in an initial contract (at least among the things that can ever be specified). In contrast, ownership does matter when contracts are incomplete: the owner of an asset or firm can then make all decisions concerning the asset or firm that are not included in an initial contract (the owner has 'residual control rights').
Applying this insight to the privatisation context yields the conclusion that in a complete contracting world the government does not need to own a firm to control its behaviour: any goals – economic or otherwise – can be achieved via a detailed initial contract. However, if contracts are incomplete, as they are in practice, there is a case for the government to own an electricity company or prison since ownership gives the government special powers in the form of residual control rights."

7.2. Parker and Hartley on risks and defence PPPs in UK

Transaction costs, relational contracting and public private partnerships: a case study of UK defence David Parker and Keith Hartley Journal of Purchasing and Supply Management Volume 9, Issue 3 , May 2003, Pages 97-108
http://www.sciencedirect.com/science?_ob=JournalURL&_cdi=12893&_auth=y&_acct=C000027518&_version=1&_urlVersion=0&_userid=634187&md5=c5218be5e9f78f1fd27ddb01b951c843

Organisational boundaries are becoming much more fluid, involving networking, joint ventures, strategic alliances, partnership sourcing, and the like ([Van Tulder (1999]). PPPs including in the UK PFIs are part of this new 'relational contracting' environment aimed at reducing costs, speeding up time to market, and promoting innovation. They involve a change in the boundary of government, blurring the distinction between public and private provision. Not surprisingly, the early entrants to PPP contracts in the UK 'tendered on the basis that the political risks were high and construction costs were likely to overrun……' ([Financial Times, 6 April 2000b]).
PPP is a new policy initiative in need of economic analysis and evaluation. The paper has developed a framework for assessing PPPs drawing on transaction cost theory, supplemented by resource-based theory and an understanding of the roles of reputation and trust in contracting. The implications from this framework have been considered using a case study of the UK defence sector. The defence sector was chosen because it has been a leading user of PPP/PFI initiatives in recent years and, prima facie, involves a number of significant problems for long-term contracting given the uncertainties surrounding defence from both supply and demand perspectives.
PPPs involve agreeing long-term contracts characterised by incompleteness in their specification, asset specificity and scope for opportunism because of asymmetric information. The case study has highlighted a number of major potential transaction costs in defence procurement, arising from incomplete information, asset specificity and the resulting scope for opportunistic behaviour, which cannot be obviously offset by developing trust relationships. It has particularly illustrated the tensions between competition to reduce costs,

the need for contractors to generate profits, and the building of partnerships and trust. The study has also drawn attention to motivation in the public sector. PPPs can be distorted by the incentives within the Armed Forces; it does not necessarily follow that military personnel will behave efficiently. They neither share in any profits from efficient behaviour or experience losses from poor performance. Military personnel may pursue their own utility, shunning those schemes that adversely affect their own status.

The conclusion of the analysis is that the use of PPPs will not necessarily lead to improved economic efficiency in defence procurement and that considerable care will need to be taken both in terms of negotiating PPPs, monitoring their performance, and in their renewal. The UK defence sector illustrates that PPPs involve significant transaction costs which must be set against any benefits in terms of economic efficiency incentives. This conclusion has significance going beyond the defence sector to other forms of PPPs sharing the same sort of uncertainties, both in the UK and internationally. The study suggests that the costs and benefits of PPPs must be carefully balanced against the costs and benefits of more traditional forms of public sector procurement. Future research could usefully focus on better quantification of PPP costs and benefits and identification of the circumstances in which information asymmetry problems can be overcome by developing true partnership relationships.

7.3. Hebson et al on ethos

PPPs and the changing public sector ethos: case-study evidence from the health and local authority sectors .
Gail Hebson, Damian Grimshaw, Manchester School of Management, Mick Marchington
Work, employment and society Volume 17 n Number 3 n September 2003

ABSTRACT

This article explores the extent to which a new contractual approach to delivering public services, through public private partnerships (PPPs), is transforming the traditional values underpinning the public sector ethos among both managers and workers. Drawing on two detailed case studies of PPPs – a Private Finance Initiative in the health sector and the outsourcing of housing benefit claims in the local government sector – we identify a range of new pressures impacting on five key elements of a traditional notion of the public sector ethos. Our findings demonstrate that the contractual relations of PPPs have led to a clear weakening of traditional notions of managerial accountability and bureaucratic behaviour, reflecting both a shift to new lines of accountability (private sector shareholders) and a vicious circle of monitoring and distrust between partner organizations, in place of the old faith in bureaucratic process. Among workers, certain traditional values – especially a concern for working in the public interest – continue to inform the way they identify with, and understand, their work in delivering public services. However, the cost cutting and work intensification associated with PPPs present a significant threat to these values. The article identifies examples of short-term resilience of the traditional public sector ethos, as well as developments that threaten its long-term survival.

Discussion and conclusions

Our case-study evidence demonstrates that the contractual arrangements accompanying PPPs have exerted transformative pressures on the traditional public sector ethos. By exploring the five principles identified by Pratchett and Wingfield, this article isolates specific pressures that may challenge the public sector ethos as well as reasons why it may be more or less resilient to change. Interviews with managers reveal that principles of accountability and bureaucratic behaviour are threatened under PPPs. The transparency in decision- making that is the hallmark of accountability and bureaucratic behaviour, albeit often at the price of time-consuming structures, has been replaced with contract-led decision structures that are negotiated and fought over. Although managers may not have always agreed with decisions in the past, they were respected because they were made in accordance with impartial rules governing traditional public administration. Such respect for decisions has withered. Instead, decisions are openly questioned, with a view among managers that it is the most strategic (and, perhaps, opportunistic) partner that wins. Private and public sector managers have conflicting priorities, and this encourages manipulation and strategic behaviour. The contract limits the opportunities for high trust relationships, since one partner is responsible for monitoring the contract and this inevitably leads the other to use their expertise to evade this. There is also greater scope for managerial discretion, which facilitates an abuse of trust. In both case studies, there was an initial sense of mutual trust, but as this broke down public sector managers intensified monitoring practices and adapted their behaviour in order to secure 'value for money'. Faced with this evidence, the optimistic view that private sector managers will learn from their public sector counterparts (OPSR, 2002) is misplaced. Instead public sector managers mimic private sector techniques and so threaten the traditional values of accountability and bureaucratic behaviour. Among non-managerial workers transferred to the private sector, the evidence is less clear-cut. One might expect the public sector ethos to erode as it has always been premised on a two-way relationship – the provision of certain working conditions in exchange for a specific form of commitment. Indeed, our evidence demonstrates that workers have experienced a decline in working conditions and there has been some weakening of values associated with a public sector ethos. In particular, notions of loyalty have changed, with greater emphasis on loyalty to 'the service' and less to either the public sector as former employer (now as client) or their new private sector employer. But workers' values of public interest and altruistic motivation seem relatively resilient. Emphasis on contractual performance targets often conflicts with workers' customary emphasis on working for the public interest. Examples of such conflicts, together with evidence that workers often negotiate ways around strict performance targets, suggests that the principle of public interest and altruistic motivation have not been eroded.

8. Annex: definitions of PPPs

8.1. EC DG Markt Green Paper 30 April 2004 :

“**The “public-private partnership” phenomenon**

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

2. The following elements normally characterise PPPs:

- The relatively long duration of the relationship, involving cooperation between the public partner and the private partner on different aspects of a planned project.
- The method of funding the project, in part from the private sector, sometimes by means of complex arrangements between the various players. Nonetheless, public funds - in some cases rather substantial - may be added to the private funds.
- The important role of the economic operator, who participates at different stages in the project (design, completion, implementation, funding). The public partner concentrates primarily on defining the objectives to be attained in terms of public interest, quality of services provided and pricing policy, and it takes responsibility for monitoring compliance with these objectives.
- The distribution of risks between the public partner and the private partner, to whom the risks generally borne by the public sector are transferred. However, a PPP does not necessarily mean that the private partner assumes all the risks, or
even the major share of the risks linked to the project. The precise distribution of risk is determined case by case, according to the respective ability of the parties concerned to assess, control and cope with this risk.” (1.1, p.3)

8.2. EC DG ECONOMIC AND FINANCIAL AFFAIRS Public finances in EMU 2003

“There is no unambiguous definition of what constitutes a PPP. Broadly speaking, PPPs concern the transfer to the private sector of investment projects that traditionally have been executed or financed by the public sector (see, for example, Grout, 1997). Four elements, however, seem required to qualify PPPs:

- the project should concern the construction or the operation of physical assets in areas characterised by a strong public function (for example, transport, urban development, security, etc) and involve the public sector (general government) as the principal purchaser. Although PPPs are especially relevant in transport infrastructure, examples of public–private partnerships can be found in the provision of defence, health, education and cultural services, the building and operation of prisons or the area of water and waste management;

• the PPP must involve a corporation outside the general government (normally a private corporation) as the principal operator, that is, the agent that carries out the project;
• the principal finance of the project should not come from public debt but from other sources, such as private bonds;
• by way of the partnership, the way the project is executed must change compared with the alternative of pure public supply. This means that in PPPs, the private operator provides significant inputs in the design and conception of the project and bears a relevant amount of risk." (5.3, p.128)

8.3. IMF: Public-Private Partnerships March 12, 2004

"9. **A typical PPP takes the form of a design-build-finance-operate (DBFO) scheme.** Under such a scheme, the government specifies the services it wants the private sector to deliver, and then the private partner designs and builds a dedicated asset for that purpose, finances its construction, and subsequently operates the asset and provides the services deriving from it. This contrasts with traditional public investment where the government contracts with the private sector to build an asset but the design and financing is provided by the government. In most cases, the government then operates the asset once it is built. The difference between these two approaches reflects a belief that giving the private sector combined responsibility for designing, building, financing, and operating an asset is a source of the increased efficiency in service delivery that justifies PPPs.
10. **The government is in many cases the main purchaser of services provided under a PPP.** These services can be purchased either for the government's own use, as an input to provide another service, or on behalf of final consumers; a prison, a school, and a free-access road would fall into these respective categories. Private operators also sell services directly to the public, as with a toll road or railway. Such an arrangement is often referred to as a concession, and the private operator of a concession (the concessionaire) pays the government a concession fee and/or a share of profits." (3A, p.7)

8.4. PSIRU Terminology of Public-Private Partnerships (PPPs) March 2003

In terms of getting an overview and an international comparison, it is useful to divide the elements that can make up a PPP scheme into four parts: Construction, Operation, Finance and Ownership (see Table 1 below).

Outsourcing of services just involves a contract to operate a specific service, e.g. refuse collection, without any construction or financing of a capital investment. Under UK PFI schemes (private finance initiative)a private company designs and builds specific investments on the basis of finance provided by it, and recoups the money by a contract to provide services for a period of years, usually decades, while the asset itself remains owned by the public sector. Concessions e.g. in water are similar, but the finance is recouped through charges to the users. With leases (affermage in French) the company does not make its own investments but operates and maintains the system for the municipality, financed by charging users. Under BOT schemes (build, operate, transfer.), the investment asset is built and owned by the company for the period of operation, and later transferred to the public sector. …" (section 2.1)

Table 1: ***Elements of different PPP schemes***

		Out-sourcing	**PFI**	**Concession**	**Lease**	**BOT**
Operation	Operation of service	X	X	X	X	X
Finance	Capital investment financed by private operator		X	X		X
	Recouped by user charges			X	X	
	Recouped by contract from municipality	X	X			X
Construction	Construction of asset by private company		X	X		X
Ownership	public during and after contract	X	X	X	X	
	private during contract, public after			X		X
	Private indefinitely					

9. Annex: extracts on PPPs from EMU report 2003

5.3 Public-private partnerships
5.3.1 Definition, taxonomy, and recent experiences The involvement of private sector corporations to build and operate public projects has become an increasingly widespread practice in EU countries. The rationale for the use of PPP schemes is rather that of microeconomic efficiency. Even assuming that competitive tenders for the selection of private counterparts are feasible and efficient, pure privatisation schemes may not be optimal when there are reasons that justify a form of control on the design of the project by the public sector. This is the case when the project concerns the delivery of pure public goods (e.g., a prison), when externalities are particularly relevant (e.g., when projects have a considerable environmental impact) or when the distributive consequences of the project are a major concern (e.g., the provision of health facilities). In those cases regulation mechanisms may not be sufficient to ensure that public objectives are satisfactorily met. The standard alternatives are direct public provision or public procurement through competitive tenders. In many instances public procurements (contracting out) guarantees higher cost efficiency than direct public provisions.126 In both alternatives, however, it is the public sector that provides the financial funds to carry out the project and that exercise the control on the design of the asset. PPP schemes offer a third alternative. In such a case, the finance of the project is provided by the private sector, as in privatisation schemes, but the public sector plays a relevant role as client of the services provided by the asset. In particular, PPP contracts may specify that the private operator will be remunerated only if the actual supply of services is judged to be successful. The fact that the object of PPP contracts is the supply of services rather than the provision of the asset can make a major difference with respect to public procurement schemes. Specifying and monitoring the desired characteristics of services is normally easier than specifying and monitoring those of assets. Thus, contracts that have as their object the flow of services rather than the build of assets help to reduce the incentives that the private supplier may have to cut on quality, while preserving the incentives to contain costs (Grout, 1997). 127
5.3.3 Contingent liabilities normally arise when in PPP contracts governments offer a guarantee to the debt issued by the private operator to finance the project. Public guarantees do not constitute effective government liabilities because there is no certainty that they will translate into increased debt in the future. However, this may be the case if certain contingencies occur, i.e., in the case of default of the private counterpart. Since with public guarantees there is no certainty concerning the impact on public debt, they are recognised only under cash accounting, if and when the contingent event (the PPP counterpart default) actually occurs and payment is made.

125 The conditions under which external constraints on budget deficits can effectively reduce public investment have been discussed in section 5.2.1. 126 The reasons are well-known (see, e.g., Domberger and Jensen (1997) for a survey). In particular, bureaucracy theories suggest that government officials tend to focus on objectives different than that of cost minimization (e.g. maximising the size of their budget). 127 Hart Shleifer and Vishny (1997) develop an incompletecontracts model of public procurement and show that, compared with direct public provisions, private operators will in general have higher incentives to keep costs low but lower incentives to keep quality high. They provide supporting evidence in the context of prisons in the US.

10. Annex: selected provisions of new procurement directive

DIRECTIVE 2004/18/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts Official Journal of the European Union EN 30.4.2004 L 134/133 **http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_134/l_13420040430en01140240.pdf**

The coverage of the directive is defined by reference to two lists of services attached in the annexes. Article 20 says that services listed in the first annexe, IIA, (referred to in the Green Paper para 11 as “defined as having priority”) have to be subject to public tendering open to companies from all member states, governed by the rules in articles 23-55; those listed in the second annexe, IIB, (referred to in the Green Paper para 11 as “non-priority”) are subject only to the requirement of article 35(4)to report the contract. These lists and phrases are unchanged from the first directive on procurement of services, EC 92/50.

ANNEX II A (1)
1 Maintenance and repair services
2 Land transport services , including armoured car services, and courier services, except transport of mail
3 Air transport services of passengers and freight, except transport of mail
4 Transport of mail by land and by air
5 Telecommunications services
6 Financial services: (a) Insurance services (b) Banking and investment services
7 Computer and related services
8 Research and development services
9 Accounting, auditing and bookkeeping services
10 Market research and public opinion polling services
11 Management consulting services (6) and related services
12 Architectural services; engineering services and integrated engineering services; urban planning and landscape engineering services; related scientific and technical consulting services; technical testing and analysis services
13 Advertising services
14 Building-cleaning services and property management services
15 Publishing and printing services on a fee or contract basis
16 Sewage and refuse disposal services; sanitation and similar services

ANNEX II B
17 Hotel and restaurant services
18 Rail transport services
19 Water transport services
20 Supporting and auxiliary transport services
21 Legal services
22 Personnel placement and supply services
23 Investigation and security services, except armoured car services
24 Education and vocational education services
25 Health and social services
26 Recreational, cultural and sporting services
27 Other services (2) Except contracts for the acquisition, development, production or co-production of programmes by broadcasting organisations and contracts for broadcasting time.

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GREEN PAPER ON PUBLIC PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS

ETF OPINION

The Green Paper intends to start a discussion on PPP at European level. The ETF principally welcomes a debate on PPP including experiences and good practices. However, we regret that the European Commission did not use the chance of the Green Paper to identify and discuss the advantages and disadvantages/risks of PPP in general.

The ETF is reacting to the following questions only:

6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

and

7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPP, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

The underling philosophy of the Green Paper and among others questions 6. and 7. give priority to the principle of competitive awarding of any kind of contract between public and private partners. This concerns Services of General Interest and Services of General Economic Interests.

The ETF is of the opinion that priority has to be given to the definition of a framework for SGI and SGEI.

Public authorities principally must have the choice to decide how to organize SGI and SGEI. Consequently they must have the freedom to choose with which partner of their confidence they work together.

EU Public Procurement legislation is clearly defined and must be applied. Beyond that there is no need to legislate concession procedures and definitely no service contracts.

The judgment of the European Court of Justice on the so-called Altmarkt case (C-280/00) confirmed that direct award of compensation for public service obligations is possible without tendering when certain criteria are respected.

Also the European Parliament decided in favor of the right of choice of public authorities how to organize public services in the context of the draft regulation on public service obligations in passenger transport (1st reading on 14 November 2001; OJ 140 from 13 June 2002).

The treatment of PPP shall follow those guidelines.

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

As already stated in the answer to questions 6 and 7, public authorities must have the right to choose how to organize public services and with which partner.

A Community initiative is not necessary.

European Transport Workers' Federation
29 July 2004

COMMENTS ON GREEN PAPER ON PPP AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS

1. General

The European Dredging Association is pleased to respond to the Commission Green Paper COM(2004)327.

EuDA notes with satisfaction that the Commission confirms that public procurement law does not cover all forms of public-private partnerships. As underlined in the Green Paper, it is important to define the Public-Private Partnership at Community level.

The Economic and Social Committee, in its advice CES 1192/2000 concerning public-private partnerships, has confirmed this unequivocally : 'A clear definition of concessions and a suitable framework for these (PPP) contracts are needed in order to enable them to develop'.

1.1. Definition

The Commission proposes to make a distinction between two groups of PPP :

- The "purely contractual", with as sub-division BOT (Build-Operate-Transfer), DBFO (Design-Build-Finance-Operate), etc. contracts and public works concessions.
- The "institutional PPP" involving the formation of a separate organisational entity with mixed public and private participation.

While it is true that there is no formal definition of PPP at Community level, several valuable attempts have been made to clarify the matter; Table 1 lists pertinent examples. It may be helpful to use different names for contractual PPPs (public-private cooperation ?) and institutional PPPs.

Table 1 : Defining Public-Private Partnerships

Public-Private Cooperation (definition)	Comments
An agreement between a public body and contractor(s) to provide comprehensive works infrastructure and services, including project finance, while sharing project risks and benefits. *EuDA proposal*	A PPC may be realised in the form of Build-Operate-Transfer (BOT) contracts, Design-Finance-Build-Operate (DFBO) contracts or similar contracts where the private party takes responsibility for a considerable part of the project risk and the parties develop a relationship of mutual trust and respect.

Public works concession (definition)	Comments
(1) : A contract between a public body and a concession party for the execution or the design and execution of works whereby the compensation consists in the right to exploit the construction for a period of time, or in this right together with payment. *Dir. 93/37/EEC*	This definition seems to group concessions with works contracts, which makes no sense. Specific for the concession are : – Delegation – Public authority retains ownership
(2) : An act (whether by contract or unilateral) whereby a public authority delegates to a private organisation the task of designing, constructing, financing, maintaining and operating an infrastructure for a predetermined extended period. *CES 1192/2000*	One could clarify by adding ‘while retaining ownership’.

Public-Private Partnership (Broad definition)	**Comments**
A public-private partnership is a partnership between various public administrations and public bodies on the one hand and legal persons subject to private law on the other, for the purpose of designing, planning, constructing, financing and / or operating an infrastructure project. *Kinnock High Level Group on PPP financing of Trans-European Networks (1997)*	Under this definition the involvement of the private party can take a variety of forms such as concession agreements for design and operation, the commitments taken under the private finance initiative (PFI), or the forming of a dedicated project company where the public party has a seat on the Board.

Public-Private Partnership (Narrow definition)	**Comments**
A public-private partnership is a sustained, collaborative effort between government agencies and private organisations in which each of the partners shares in the planning of projects and programmes designed to meet a public need and contributes a portion of the financial, managerial and technical resources needed to implement those plans. *Fosler & Berger (1982)*	This definition implies the forming of a joint undertaking between the public and the private party. The mixed undertaking becomes a private entity with public service responsibilities. It could be argued that such an undertaking falls under the scope of Dir. 93/38/EC as a ‘utility’. This forms the typical category of institutionalised PPPs.

1.2. Classification

In Fig. 1 public works contracts are classified in terms of responsibility for design work and project finance. This leads to 3 different groups of contracts; the differentiating feature, in terms of procurement, will be the drawing-up of tender specifications, the distribution of risks and responsibilities and the complexity of the negotiations. For a BOT type of contract long negotiations are typical before finalising contractual details, while a traditional public works contract can be concluded with comparative ease.

Fig. 2 adds to the figure the hatched area that covers the class of contracts where closer public-private cooperation and partnerships are required. Fig. 2 also clarifies the notion that PPPs may take a variety of contractual forms.

Fig. 1. : Classification of construction contracts

BOT = Build-Operate-Transfer

DBFO = Design-Build-Finance-Operate

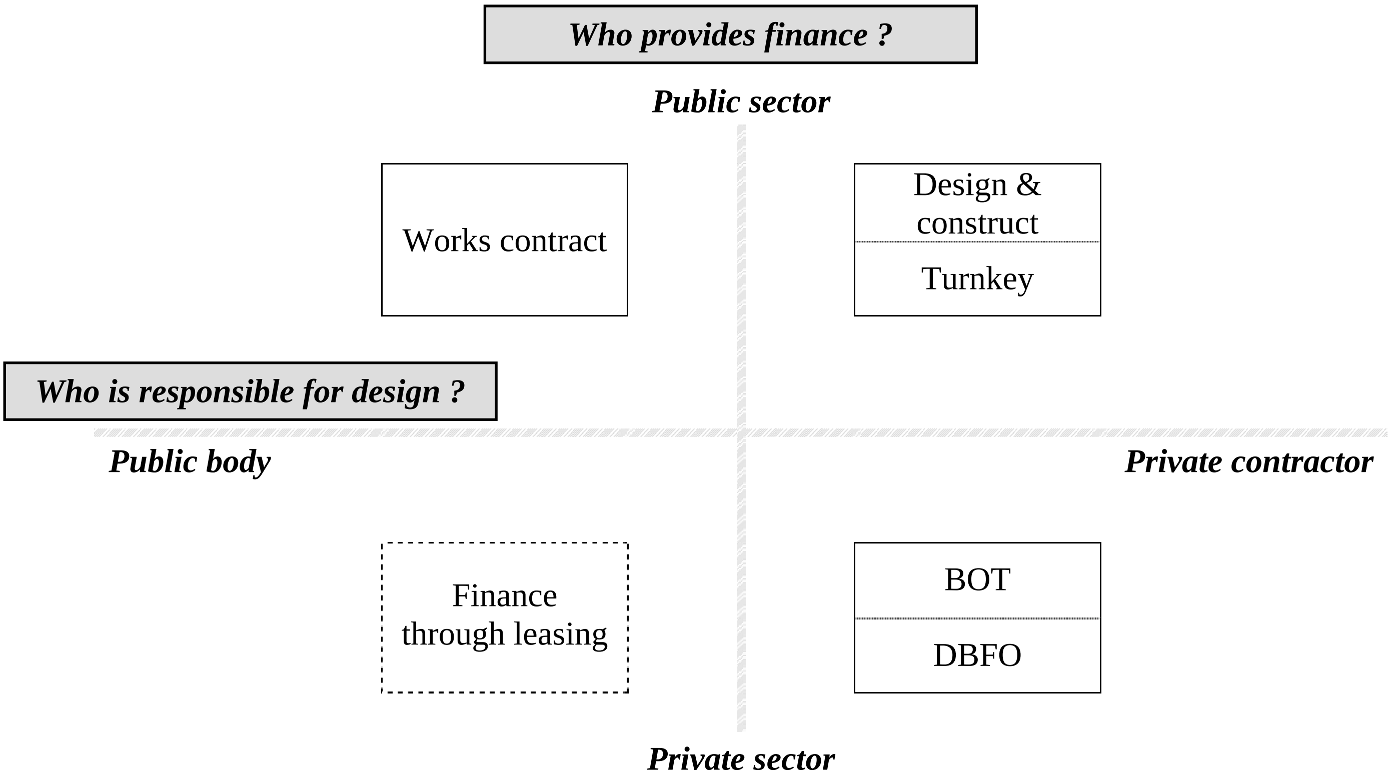
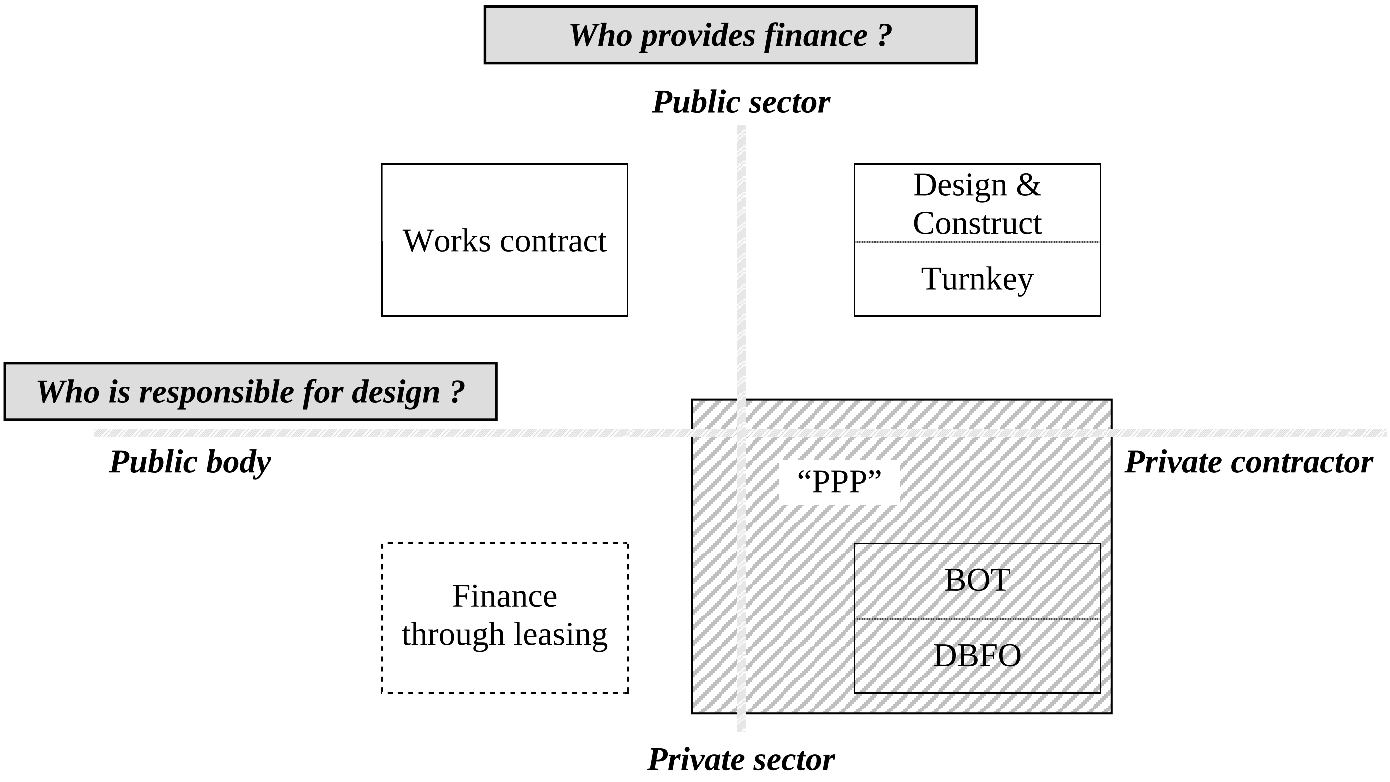

Who provides finance ?
Public sector
Works contract
Design & construct
Turnkey
Who is responsible for design ?
Public body
Private contractor
Finance through leasing
BOT
DBFO
Private sector

Fig. 2. : Classification of construction contracts vs. PPP

BOT = Build-Operate-Transfer

DBFO = Design-Build-Finance-Operate


Who provides finance ?
Public sector
Works contract
Design & Construct
Turnkey
Who is responsible for design ?
Public body
Private contractor
"PPP"
Finance through leasing
BOT
DBFO
Private sector

2. Questions raised in the Green Book

2.1. Contractual PPPs

1) What type of purely contractual PPP set-ups do you know of ? Are there set-ups subject to specific supervision (legislative or other) in your country ?

EuDA as a European trade association is not in a position to answer the question. We are however pleased to note that the Green Book makes a distinction between the public works concession and the institutionalised PPPs. In several EU Member States a tendency exists to equate public works concessions with institutionalised PPPs; in the EU context they must be treated differently if only because of the differing legal (contractual) frameworks in e.g. northern and southern European countries.

2) In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view ? If not, why not ?

In the case of complex technology or advanced technology projects the competitive dialogue has certain advantages compared to the open or restricted procedure, in particular for the procurement of products. However :

– Contractors are still very concerned that the competitive dialogue provides insufficient guarantees to protect their intellectual property rights or innovative ideas. The alternative to offer design variants as supplement to a base tender provides more protection.

– It is not always optimal to proceed with the procurement process until the design is frozen. Our sector has positive experiences with an approach where the client selects a contractor on objective grounds in order to define the optimal technical solution. A reference price is set with a proviso of gain sharing. If the final price is lower the benefit is shared; if the price is exceeded, both parties share the excess costs. A gain-sharing scheme is always to be preferred to an inadequate tender specification.

– A PPP requires complex contractual and financial arrangements. The final result cannot be achieved via a single firm pricing round at the end, as seems to be the case in the competitive dialogue, but will be the outcome of a negotiated procedure.

– The compensation for often significant amounts of proposal engineering (in PPP projects also the costs of legal and financial advisors) should be an obligatory requirement.

3) ***In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts ?***
If so, what are these ? Please elaborate.

Contractual PPPs involving financing are of interest for the realisation of larger (infrastructure) works. This favours large contractors and thus reduces the role of smaller contractors to that of subcontractors.

4) ***Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union ? What was your experience of this ?***

N.A.

5) ***Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions ? In your opinion is genuine competition normally guaranteed in this framework ?***

EuDA wishes to remind that public works concessions require long-term stability, financial strength and local presence and we would normally expect that bids are prepared involving, as a minimum, local subsidiary companies.

There have been examples of non-national groups that obtained contracts for PPPs (usually with the involvement of the EIB) and which also include concessions for exploitation. A very practical constraint for non-national tenders is that the period for bid preparation is usually insufficient to prepare a quality bid.

6) ***In your view, is a Community legislative initiative designated to regulate the procedure for the award of concessions desirable ?***

Community law should not be detailed, only be a guideline.

The new Directive 2004/18 on ‘Coordination of procedures for the award of public works contracts, public supply contracts and public service contracts’ covers the concessions under Title III. The Directive essentially requires a public announcement of the wish to award a concession. The award procedure that is to be used is not specified and it would seem quite normal to apply the negotiated procedure for a candidate that has been selected on objective grounds.

Provided the principles of the Treaty on these matters as highlighted in the “Interpretative Communication on Concessions under Community Law” (April 2000) can be respected, we see no need for further legislation.

7) ***More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements ?***

EuDA is not in favour of further European rules for concessions or complex contracts. The award procedures for institutionalised PPPs and contractual public-private agreements are likely to differ. As concessions appear both as public works concessions in their own right and as an element of some institutionalised PPPs, one may expect more problems than solutions from adding legislation. The main concern is that all forms of PPP contracts are complex and sufficient flexibility in contract award is needed.

8) ***In your experience, are non-national operators guaranteed access to private initiative PPP schemes ? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators ? Is the selection procedure organised to implement the selected project genuinely competitive ?***

No opinion; it would seem odd that an initiative developed by the private sector is subsequently advertised for open competition.

9) ***In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment ?***

The mere phenomenon of a private initiative PPP underlines the fact that private entities seek to serve the public purpose by developing entrepreneurial initiatives and opportunities.

Prior to discussing transparency, non-discrimination and equal treatment, it should be clarified how parties developing private initiatives for public needs may be rewarded. The fact that a solution is developed with private means to solve a problem with infrastructure should be recognised publicly as beneficial for society. A private initiative PPP should lead to a competitive advantage for the initiator.

In this case we plead for clear guidance that recognises the private initiative and includes one or more of the following elements :

- Compensation for preliminary engineering work at the time of award.
- Preferential treatment in the award procedure.
- “Right of first refusal”.

All 3 measures represent ‘unequal treatment’; it would be intellectually honest to clarify that a private initiative that leads to the solution of a public problem is hardly compatible with the concept of equal treatment of other, less entrepreneurial contractors. In this case unequal treatment is not equivalent to discrimination !

We consider it urgent to resolve the uncertainty surrounding private initiative PPPs and remove hurdles that make contracting authorities hesitate about their appropriate response. Practice has shown that lower (regional) authorities are very uncertain about the way they may respond to private initiatives.

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

No comment.

11) Are you aware of cases in which the conditions of execution - including the clauses on adjustments over time - may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment ? If so, can you describe the type of problems encountered ?

No comment.

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

We refer to the comments on this Green Paper submitted by the European International Contractors (EIC) : The contracting authority must provide comprehensive information to all bidders.

13) Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment ? Do you know of other "standard clauses" which are likely to present similar problems ?

No. PPP arrangements are by definition complex and involve contractual relationships between project developer and contracting authority, lenders, contractors, operators, etc. It is up to these parties to decide what should be in the contracts (market practice). The delicate balance of this structure could change over time, the financial commitments must be protected, the position and strength of the project developer may evolve over the years.

The European legislation can guide the award of contracts, but it is impossible to legislate all the developments that may take place during the course of the concession period nor is this the role of the Commission. Step-in clauses (required by lenders) and other provisions to protect the future health of the project are common practice and should not be discouraged.

14) ***Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level ? If so, which aspects should be clarified ?***

    As contract law is embedded in national law we see no reason to clarify the structure of PPP contracts at EU level.

15) ***In the context of (contractual) PPPs, are you aware of specific problems encountered in relation to subcontracting ? Please explain.***

    The project developer accepts major risks, both in the contractual PPP form and under the institutionalised PPP. The management of these risks must not be constrained by specific requirements on contracting. Even the option in Art. 60 of Dir. 2004/18/EC on public procurement to specify a minimum of 30% subcontracting for concessions is not appropriate.

16) ***In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and / or a wider field application in the case of the phenomenon of subcontracting ?***

    /

17) ***In general, do you consider that there is a need for supplementary initiative at Community level to clarify or adjust the rules on subcontracting ?***

    We do not see any need for further rules. It should be understood that a private contractor having obtained the contract for a contractual PPP must be free to subcontract work in accordance with its own procedures, but within the restrictions laid down in the tender documents.

2.2. Institutionalised PPPs

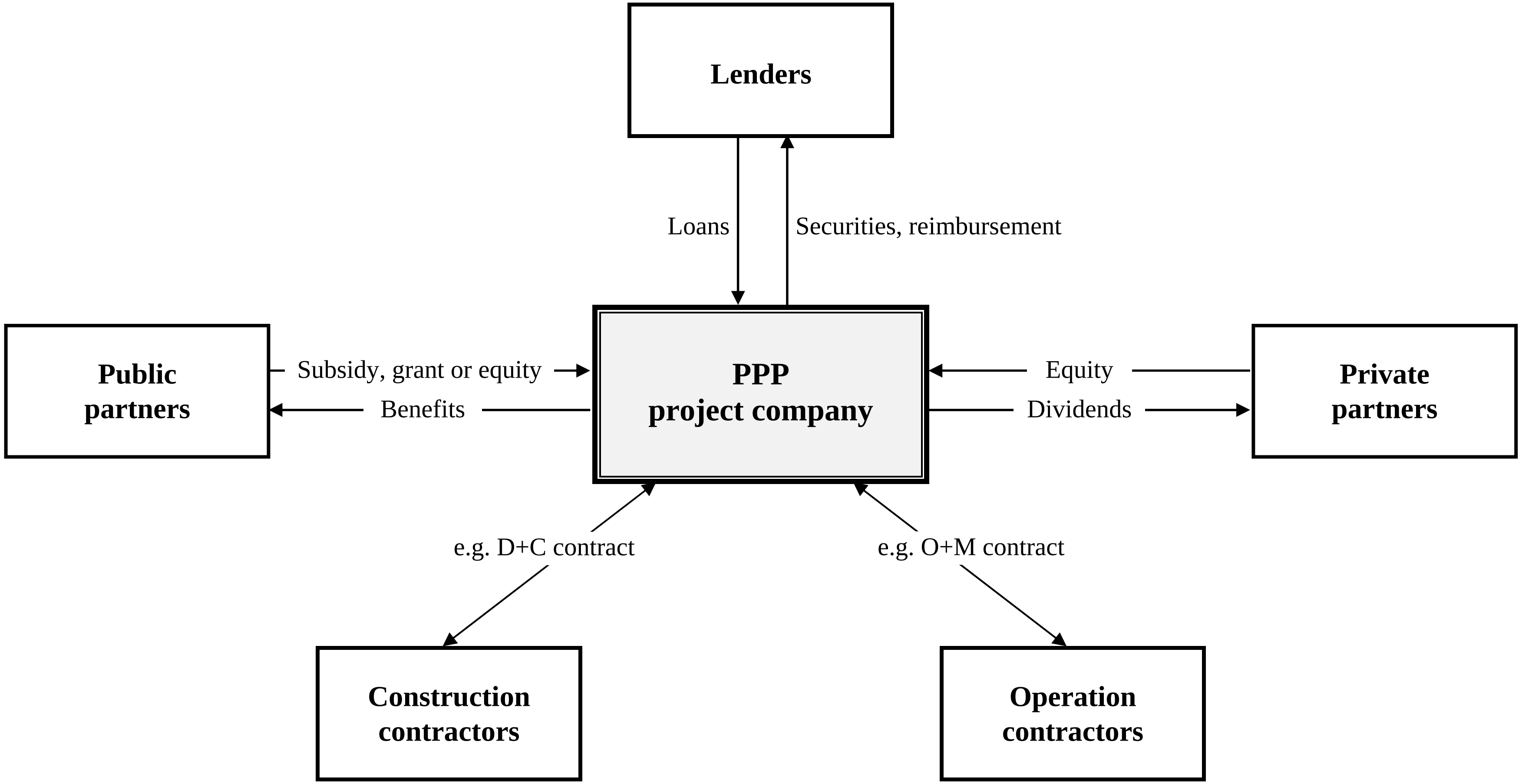
The institutionalised PPP is characterised by the creation of a mixed public-private entity to form the project company; this joint undertaking will put in place the necessary contractual agreements with other stakeholders. An example of such a relationship between (groups of) stakeholders is shown in Fig. 3.

This procedure is very much a 2-step process : the selection of the private partner and the negotiation on ownership participation and other arrangements comes first. This will normally be done on the basis of a project outline plan, but without contract in place.

The detailed contractual arrangements will develop after the establishment of a mixed project company. The focus of Community law should be on a fair process of partner selection.

The private partner will often be a holding company with diverse in -house capabilities that may be utilised in the project realisation; alternatively it may be a general contractor that maximises the amount to be subcontracted.

Fig. 3. : PPP - Role of Stakeholders


Lenders
Loans
Securities, reimbursement
Public partners
Subsidy, grant or equity
Benefits
PPP project company
Equity
Dividends
Private partners
e.g. D+C contract
e.g. O+M contract
Construction contractors
Operation contractors

We submit that the PPP project company with majority private ownership is no longer comparable to a public contracting body and should not be subject to the same rules for tendering. At most one could consider obligations similar to the “utility” directive, but one could also argue the case that a mixed PPP falls under private contract law.

18) ***What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases ?***
If not, why not ?

As outlined in the introduction on institutionalised PPPs, we are of the opinion that the initial partner selection is subject to the general principles of community law, but the subsequent phase of contract placement with partners, in-house divisions or subcontractors should leave maximum freedom to the PPP project company. We see no conflict with Community law.

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

The only obligation that may have to be clarified is the requirement to publish the search for partners followed by a transparent and fair selection process.

20) ***In your view which measures or practices act as barriers to the introduction of PPPs within the European Union ?***

The main barrier to the introduction of PPPs at a wider scale within the EU is a widespread uncertainty amongst contracting authorities on which rules to apply to what kind of public contract. This represents legal uncertainty and potential exposure for the contracting bodies as well as for private partners. In particular the lack of guidance on how to treat private initiative PPPs acts as a formidable barrier to tapping entrepreneurial iniatives.

21) ***Do you know of other forms of PPPs which have been developed in countries outside the Union ? Do you have examples of “good practice” in this framework which could serve as a model for the Union ? If so, please elaborate.***

No comment.

22) ***More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful ? Do you consider that the Commission should establish such a network ?***

An example of reflection at EU level on PPPs was the Kinnock High Level Group. In the final reports one finds a fairly complete overview of good practices, reference models and implementation problems. We have seen little evidence from the side of the Commission to deal with the Kinnock recommendations during the past 8 years. Prior to forming new networks the existing analysis should be evaluated and the recommendations implemented.

In summary, when reflecting on the position of PPP under community law, the most urgent issue to clarify is the nature of the existing obligations for each separate category. Our understanding is the following :

	Works contract (BOT, DBFM, etc.)	Public works concession	PPP with mixed project company	Private initiative PPP
Notification procedure	PP	PP (publication)	PP (publication)	??
Tendering	PP	Com Law	Com Law	?
Selection / award procedure	PP	Com Law	Com Law	?
Requirements for subcontracting ?	No	(PP) *	No	No

PP = Public Procurement Directive 93/37/EEC resp. 2004/18/EC.

CL = Community Law : transparency, equality of treatment, proportionality.

* The Directives contain options, but no requirements for subcontracting.

The position of the public works concessionaire and the mixed PPP project company is not entirely clear under public procurement law. A case could be made that both forms of project companies should be treated as ‘Utilities’ as in Dir. 2004/17/EC. This, however, would require an amendment to the Directives.

More generally it is the opinion of EuDA member companies that for such complex contractual arrangements as PPPs only minimal regulatory obligations at Community level should apply. The opportunity must be published and the partner selection must be made on objective grounds, with maximum transparency. Once the partner has been selected the contract can be negotiated following the negotiated procedure.

In some Member States it is common practice to require potential subcontractors to a PPP project company to take an equity position in the project company. This demand could lead to the obligation for "subcontractors" to consolidate part of the financing debt on the balance sheet. This practice may be seen as discriminatory and limits in any case the enthusiasm of potential subcontractors for PPPs.

The practice can be circumvented by providing state guarantees, but this in turn undermines the principle of private financing.

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CONTRIBUTION TO THE GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIP AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS – COM(2004) 327

Eureau is the federation of national associations of drinking water suppliers and waste water services. It brings together the views of water operators across twenty EU countries, the three EFTA countries, and three candidate countries, which collectively provide sustainable water services to around 400 millions European citizens[1].

Eureau's members reflect the very diverse way in which the European water sector has been organised. Some operators are departments of local government, and some are joint-stock or private companies whose shares are being traded on the stock-exchange. Some are water boards, that combine the operation of waste water treatment with the granting and suspending of the licenses to discharge, and some are holding a fixed-term concession to operate the water assets of local governments. Some are serving an area in which only some hundred people live, others serve millions.

PPPs have a long tradition in the European water industry. More recently we have seen the introduction of new types of PPP like the DBFO-schemes. PPPs can be instrumental in obtaining a good solution when insufficient knowledge or institutional capacity is available to meet local necessities through usual public procurement. PPPs, however, can also create complex situations of assignments of tasks and responsibilities between multiple parties and setting up a PPP often requires extensive legal, technical and financial expertise. It is the task of the local or regional authority responsible for water services to meet the local needs in an optimal way, both in the short run (building infrastructure) and in the long run (operation and maintenance). Eureau fully agrees with the Green Paper that a miracle solution does not exist and welcomes the debate about the application of EU law to this domain in order to increase legal certainty.

Due to the variety of "models" of PPP for water services throughout Europe, some of the questions of the Green Paper cannot be answered at Eureau level. National associations of water operators are better placed to answer them.

1. *What types of purely contractual PPP sets up do you know ? Are these sets-up subject to specific supervision (legislative or other) in your country ?*

The diversity of situations in the member States corresponds to history, to legal tradition, and to local and technical aspects of water organisation. Water is a local resource and competence[2] for organising the service is entrusted, in nearly all EU countries to municipal/ inter-municipal, or to regional bodies.

See also the annexed table (page 9) on the individual situation of Member States

[1] More information is available on the website www.eureau.org
[2] *Aqualibrium* Report, Study on European Water management published in 2003 by the European Commission

2. *In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not ?*

First of all, this question includes a risk of confusion between public procurement and PPP. Competitive dialogue is a procedure described in the Public Procurement Directive. In the following paragraph we only give a point of view on the question whether this procedure is suitable for public procurements issues - not for PPP issues, since the Public Procurement Directives do not cover PPPs, which considerably differ from public procurements.

Eureau members think that this competitive dialogue procedure - for public procurements - can favour the search for appropriate solutions to complex issues - e.g. strategy for continuous provision of drinking water under difficult circumstances (water scarcity, polluted resources, technical failures etc). The competitive dialogue as it is described in the Directive 2004/17/EC seems to take into consideration the necessary principles such as flexibility of discussions and transparency of the results of the discussions, and also protection of innovation which has to be taken into consideration. These objectives can be met with the competitive dialogue procedure provided that further negotiations be possible, in other words the competitive dialogue should not be considered as the preliminary step for a "formal" tender. Referring to some recent cases where the transposition of the competitive dialogue in national law (e.g. France) resulted in procedures which were neither flexible nor stimulated innovation, Eureau wants to express its concerns about the way this procedure may be transposed under national law.

Eureau considers, in this perspective, that the competitive dialogue procedure may be a suitable solution for situations where contracting authorities need to identify and define the most appropriate technical solutions that would best satisfy their needs (provided that confidentiality and protection of innovation are respected) for contracts of purchase of goods, works or services.

A PPP is much larger than a public procurement (contract of purchase of goods, works or services). Eureau members stress that the competitive dialogue procedure is not necessarily adapted to encompass all elements that characterise PPPs, particularly in the case of concessions. Indeed, this procedure gives no answer to the necessity to define the precise content of the missions - and responsibilities - entrusted to each of the parties. This procedure appears also insufficient to cover situations where some complex and long-term missions need to be optimised over time so that they continue to respond to the needs of the contracting authority and of the populations.

3. *In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.*

Awarding a PPP and awarding a Public procurement must not be the same procedures. Management of water services is more complex, the responsibilities are broader and on a longer term, than providing a service in the sense of Public procurement of services. However, general principles behind Public Procurement rules – such as transparency, non-discrimination, equality of treatment, free circulation of capital – also apply to PPPs.

After the award of the contract, rules that govern the implementation of the contract must also be appropriate for PPP : sub-contracting (question 16), adaptation of the contract in case of major change or difficulty, duration of the contract (water management issues and water network issues rely on mid/long term time scale, not only on the investments life time).

Formalism must be avoided in order to allow adaptation in the course of time, under the responsibility of the selected operator. Water services must be continuously adapted to evolving circumstances : development of EU legislation (enforcement of the water Framework Directive, revision of the Drinking Water and Bathing Water Directives), degradation of water resource, technological progress, change in the economic context, or more simply for necessity of upgrading/ renewing the installations and infrastructures.

4. *Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?*

   See the annexed table (page 9) on the individual situation of Member States

5. *Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?*

   Due to the variety of national situations, the national associations of water operators are better placed to answer this question.

6. *In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?*

   Eureau thinks that any answer to this question would be premature as far as the water sector is concerned. Eureau suggests the Commission to have further reflection on the desirability and/or necessity of a Community legislative initiative after analysing the national legislations on concessions and other forms of PPP.

7. *More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?*

   We would like to emphasize that awarding PPP should not be subject to identical arrangement as awarding public contracts other than PPP, since PPP and public procurement are very different - considering criteria such as shared responsibilities, risks, investments, complexity of the tasks, duration of the contract, obligation of result. All these elements explain the difference between PPP and “simple” contracts of purchase of services. Any further work to clarify the definition of PPP, regarding their differences from public procurement (in the sense of purchasing of goods or services), is to be encouraged.

8. *In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?*

   Eureau knows very few private initiatives in water sector which would not end with a public selection procedure. This question would be better addressed at the level of public authorities.

9. *In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment covered below: the contractual framework of the PPP and sub-contracting.*

   Projects in water services are mostly public-driven. As a matter of fact the public authorities are almost always the owners of the drinking water/waste water infrastructures (exceptions are England and Wales, and, in the acceding countries, the city of Tallinn). Public authorities are always very much involved in monitoring/protecting quality of raw water, and monitoring/controlling quality of drinking water and effluents. When discussing PPP, it is important to distinguish these regulatory functions from operating and infrastructure development activities, for which, generally, PPP initiatives could be well suited. The confusion between these functions makes it more difficult for private sector to launch real "initiatives". There are a few exceptions. It happens that waste water plants for the treatment of industrial process water offer part of their capacity to treat municipal waste water. Eureau welcomes these private initiative PPP's, provided they help to find the optimal technical and economic solution for a particular situation when there is insufficient knowledge or institutional capacity to meet local necessity (not only in new member States).

   Having said that, how could "private initiative PPP" be promoted ? How can the one that brings the idea/efforts and takes the risk, get the advantage of developing it ?

   Firstly, Eureau's members highlight that there should be at least no discrimination, no restrictive rules applying to public/European funding of PPP (given the fact that water prices paid by households are in some countries not able to finance the entire cost of investments for water and waste water infrastructure.

   Secondly, there should be a positive counterpart offered to the private party which takes risks and assumes costs in developing proposals of solutions on its own initiative. There seems indeed to be a real contradiction between the ideas of promoting private initiative PPP by granting some advantage (easier access to European Funds, even refunding of preliminary studies? Easier awarding rules, such as right of preselection or right of first refusal ? less formalism for sub-contracting ?) and, at the same time, with some formal rules that EC law imposes on public contracts/European funding.

   To be able to propose answers to this major question, which deserves in-depth sector by sector reflection, Eureau's members suggest to give support to the proposal made in question 22.

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

Eureau has no direct experience. According to the general feeling among its members, PPPs are characterised, before and after the selection, by the consolidation of the partnership between the public authority and the private operator. Considering the needs for mid/long term PPP, possibilities must be left to adapt the contract to new situations (evolution of the needs of population, ”force majeure”) which might arise, after the selection of the private partner. As the operator is responsible for the execution of the contract, he needs flexible procedures in the choice of sub-contractors, due to the complexity of the tasks and to the transfer of responsibility to the private partner.

11. *Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?*

Eureau has no direct experience.

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

Eureau has no direct experience.

13. *Do you share the Commission’s view that certain “step-in” type arrangements may present a problem in terms of transparency and equality of treatment.? Do you know of other “standard clauses” which are likely to present similar problems?*

“Step in” arrangements may be necessary to organise solutions in case of economic difficulties, only in exceptional circumstances - it does not mean substitution of a water operator by a bank - and does not harm competition. They are in principle covered from the beginning by provisions in the contract. It is important to avoid discontinuity or economic bankruptcy in a water services contract.

Eureau supports the idea that conditions of stepping in or taking over from the failing operator must be - and in fact, are - subject to clear and transparent provisions, formally agreed by the partners and with the authorisation of public authorities - but stresses that in practice “ step-in” arrangements do not lead to non-competitive succession of water operators.

Other “standard clauses” which endow an external actor (e.g. not signatory of the contract) with significant rights to control or to give an opinion are often more problematic than pure step-in arrangements. It can be the case when an international or European funding authority interferes with decisions agreed between the operator and the public authority responsible for water services.

14. *Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?*

Eureau welcomes the recognition of a general need for clarification of definitions as well as the criteria that are mentioned for PPPs in the Green paper. However, Eureau would like to point out that there is an additional criterion which deserves attention : obligation of result. We also underline the necessity to distinguish PPP and Public Procurement - definitions and procedures. More generally, PPP in the water sector highlight the different tasks of public authorities. They either produce and control the legal rules applicable to water services (e.g. national or more local administrations, regulators, jurisdictions), or they have the responsibility to organise water services at local level (e.g. municipalities, or other local authorities). PPP are in principle concluded with these last authorities. Eureau is in favour that European authorities take up responsibility for further clarification on these responsibilities reflecting diversity of situations and missions of authorities for assuring a good governance of PPP.

15. *In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.*

We again plead in favour of flexibility in the choice of sub-contractors and adaptation to complexity of the tasks devoted to PPP.

16. *In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?*

Eureau's members think that detailed/new rules for subcontracting are not required.

No additional rules should be requested for subcontracting in particular if PPPs are awarded after transparent/competitive procedures. Two levels of competition (upstream and downstream the main PPP contract) are not justified.

Too much formalism does not necessarily allow to choose subcontractors in due time, with the exact skills : not only complex tasks are transferred to the private partner, but also the responsibility for proper management of the service.

17. *In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?*

No need for additional rules (same answer question 16) than the existing ones.

18. *What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not ?*

See the annexed table (page 9) on the individual situation of Member States

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

The general principles behind Public Procurement rules – for instance on transparency, non-discrimination, equality of treatment, free circulation of capital – must apply to institutional PPPs. However, the Public Procurement rules themselves cannot be directly applied to PPPs.

Public Procurement law is not adapted to govern constitution of public-private bodies. The major question is the link between the mixed body and the act that entrusts to operate the service. It is important to match the duration of the mixed-parties body and the right to operate the service.

Both the constitution of such bodies and the awarding of the right to operate the service should respect Treaty principles.

20. *In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?*

The procedures and administrative practices that govern eligibility of projects for European funding - ISPA, Cohesion Fund, Regional Fund - (for the benefit of public authorities partners of a PPP) can be incentive /deterrent to PPP. Undue reluctance from the European Commission to fund public water equipments being then operated by private sector, which has been observed in the past, can lead to a lack of projects. Eureau thinks that this Green Paper should be completed by a review of European funding rules when PPPs are involved.

21. *Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of "good practice" in this framework which could serve as a model for the Union? If so, please elaborate.*

European water operators are and have been involved in water operations all over the world already from the 19th century. In our experience it is very important to adapt to the local conditions, there is no single solution that could serve as a model for the European Union.

22. *More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?*

Yes, Eureau is in favour of building such an exchange network on best practices.

For any further information on this paper, please contact:

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		Question 1		Question 4		Question 18
		A	B	A	B	
		What type of purely contractual PPP set ups do you know in your country?	Are these set-ups subject to specific supervision (legislative or other) in your country?	Have your members already participated in a procedure for the award of a PPP in your country	Have your members already participated in a procedure for the award of a PPP in an other EU country	Do “institutional PPP” exist in your country?
Austria		- up to now no experiences available	No	No	Yes	No
BE	Flanders	- water services for industry	Yes[i]	No	No	Yes
	Brussels	- B.O.O.T	Yes	No	No	No
	Wallonia	- /	Yes	No	No	No
Cyprus		- B.O.O.T. (e.g. desalination plants)	Yes	Yes	No	No
Estonia		- Sales of shares in municipal water company (Tallinn) - Operating contract	Yes	Yes	No	
Finland		- DBFO[ii]	No[iii]	No	No	No
France		- Concession - Affermage - Affermage à îlots - Régie intéressée (in certain cases) - Gérance (in certain cases)	Yes	Yes	Yes	Yes

	Question 1		Question 4		Question 18
	A	B	A	B	
	What type of purely contractual PPP set ups do you know in your country?	Are these set-ups subject to specific supervision (legislative or other) in your country?	Have your members already participated in a procedure for the award of a PPP in your country	Have your members already participated in a procedure for the award of a PPP in an other EU country	Do “institutional PPP” exist in your country?
Germany	- Betreibemodell - Betribsführungsmodell - Concession - Kooperationsmodell	Yes	Yes	Yes	Yes
Greece	- B.O.T. - Joint Venture Companies	Yes	No	No	Yes
Hungary	- Management contract and lease (typical at small systems), - Share in operating company and lease (eg.Szeged, Pécs, Dunaujváros), - Share in company owning the system (eg. Budapes), - Full concession (Szolnok)	Yes	Yes	No	Yes
Ireland	- Design – Build - Design, Build, Operate - Design, Build, Operate, Finance	Yes	Yes	No	No
Italy		Yes[iv]			Yes[v]
Luxembourg	- Operating of public owned car parks by private contractors; - operating of public owned power plants by private contractors; - operating of public owned waste-to-energy plant by a private contractor; - operating of public communication routes by private carriers	no	no	no	no[vi]

		Question 1		Question 4		Question 18
		A	B	A	B	
		What type of purely contractual PPP set ups do you know in your country?	Are these set-ups subject to specific supervision (legislative or other) in your country?	Have your members already participated in a procedure for the award of a PPP in your country	Have your members already participated in a procedure for the award of a PPP in an other EU country	Do “institutional PPP” exist in your country?
Netherlands		- Concessions (DFBM/DFBO/BOT) - Joint development	No	yes	No	yes
Spain		- Mixed economy company - Concession[vii]	Yes	Yes	No	Yes
Switzerland		- None	_	No	No	No
UK	England	- None	No	Yes[5]	Yes	Yes
	Wales	- None	No	Yes[5]	Yes	Yes
	Scotland	- Water & Waste Water Projects	Yes	Yes	No	Yes
	Northern Ireland	- Water & Waste Water Projects	N	Yes	No	Yes

[i] Legislation on intercommunal collaboration

[ii] They are however not largely used in water and waste water services

[iii] Local Government Act and the legislation on public procurement have to be taken into account in governmental decision making

[iv] On this subject, an interesting example is the Italian law on Project Financing, concerning the realization of public works through public authority’s initiatives. There were huge expectations about the effects of this legislation (called Merloni Law), but the final results we have obtained are disappointing, due to the very limited use of these instruments by operators. The main reason is related to a “crowding out normative effect”, consisting of the great attention that the Merloni Law has on the respect of public contracts’ legislation that has lead to neglect the financial complications.

[v] Our more relevant experience is the Italian Reform approved by the end of 2003. The fundamental idea of the reform is to allow to public authorities a range of solutions with respect to the organization of SGIs: the public procurement procedure (PP); the establishment of a mixed ownership enterprise (MOE) in which the private partner has to be selected through competitive bidding procedures, assuring the complete and rigorous respect of national and community legislations; the establishment of a completely public enterprise in which public authorities exercise over it a control which is similar to that which they exercise over their own departments and, at the same time, that enterprise carries out the essential part of its activities with the controlling authorities (in house providing, IHP).

[vi] There are some private companies having the Luxembourg state as one of the shareholders or even as the only shareholder

[vii] According to the Royal Decree 2/2000, of 16th June, there are two other contractual forms: "**gestión interesada**" and "**concierto**". Moreover, in Spain still exit different types of "**leasing contracts**" between private companies and local councils.

EUROCHAMBRES

Position Paper

2004

EUROCHAMBRES Response to the Green Paper on Public-Private Partnerships

July 2004

EUROCHAMBRES
ASSOCIATION OF EUROPEAN CHAMBERS OF COMMERCE AND INDUSTRY

EXECUTIVE SUMMARY

EUROCHAMBRES, the European Association of Chambers of Commerce and Industry, sees Public Private Partnerships (PPPs) as a useful tool to **increase efficiency** in public services, to **promote competition** and open up new markets. We welcome the discussions on this **emerging phenomenon**

EUROCHAMBRES' VIEW

We believe that the Commission should refrain from imposing legal regulations and instead encourage **further dialogue** and an **exchange of best practices** in order to develop **more efficient PPP models throughout Europe.**
An interpretive Communication to **clarify the key issues** may be useful as well as increased co-operation and harmonisation between the Member States on this issue. Finally the Union must address the other factors within the economy which hamper the developments of PPPs

Introduction

EUROCHAMBRES, the Association of European Chambers of Commerce and Industry, has member organisations in 41 countries representing a network of 2,000 regional and local Chambers with over 17 million member companies. EUROCHAMBRES is the sole European body that serves the interests of every sector and every size of European business - due to the multi-sectoral membership of Chambers - and the only one so close to business, as a result of the Chambers' regional focus.

The European Chambers see Public Private Partnerships (PPP) as a useful tool to **increase efficiency** in the provision of public services or goods as well as a way to **promote modernisation**. Furthermore, they are a means of increasing competitiveness and innovation in the economy as PPPs often give private companies access to areas where solely public entities or companies have been operating before.

EUROCHAMBRES therefore welcomes the latest discussions concerning Public-Private Partnerships and hopes to see **further dialogue** and an **exchange of best practices** in this area in the future, as a way of encouraging such partnerships and increasing transparency and cross-border participation in PPPs. The **wealth of different experiences** across Member States should be seen as a positive thing and by exchanging information, these experiences can lead **more efficient PPPs models** throughout Europe.

However, PPPs are still an **emerging phenomenon** and we believe that the development of this concept should not be restricted by legal regulations at this stage. Effective PPPs often depend on finding a creative solution to a unique set of circumstances in each individual case and a Europe-wide set of rules would hamper the scope for this.

We therefore believe that the Commission continue to **lead the debate on PPPs and promote co-operation** but that it should refrain from imposing the restrictions associated with a Directive in this area.

Detailed Response

EUROCHAMBRES believes that some level of **co-operation and even harmonisation** in the area of PPPs would be reasonable to improve the basic conditions throughout Europe and we would appreciate the existence of a European network combining both parties of PPP contracts to encourage the **exchange of experience and ideas**. However it is important to **avoid over-regulation** and guidelines need to be restricted to cover only basic and necessary conditions.

At European level, the discussions on PPPs and the Green Paper on the services of general interest show that there are **different approaches** to public service provision and services of general interest and therefore a regulatory framework at European would not be appropriate. Many aspects of PPP contracts are already **covered by existing regulations**, including the basic treaty obligations such as freedom of establishment and freedom to provide services as well as more specific provisions within the Community Directives on public works contracts and it is important to **avoid duplication** and additional bureaucracy. When dealing with public works at a national level we believe that the **principle of subsidiarity must be respected** to take into account the different experiences and stages of PPPs development in each Member State.

EUROCHAMBRES would welcome the involvement of the Commission in promoting actions to **improve the co-ordination** of national practices and to encourage closer co-operation between the national authorities. However as an appropriate model has to be negotiated on a case by case basis between the private and public partners, it is not possible to legislate as to the model to be used. For complex PPP projects contract adaptations must be possible and there needs to be a **degree of flexibility** within certain limits.

With regard to the **competitive dialogue procedure** EUROCHAMBRES does not believe it is an appropriate method for resolving the major problems in the context of complex PPP projects where the search of private partners is very complicated. The procedure requires a detailed description in the form of tasks and technical and economical specifications which may not be possible in such cases. This procedure may also **imply risks** for private companies in delivering their know-how to the awarding authority who will then ultimately choose the cheapest offer.

Although there is no need to create a legal framework at the European level we would suggest that the Commission issue a Communication to **clarify the interpretations** of concession in European law and other key issues. In addition the use of financial assistance within the public sector needs to be standardised within the Internal Market.

The use of PPPs to provide public services and goods **promotes competition** and can be seen as the first step towards opening up the market in areas which were previously controlled by public monopolies. However, when PPPs are established it is important that **checks exists** to consider to what extent competition in the sector will be hindered as monopoly position of the state will be handed to a private company.

Finally it is also important to address the other key factors which hamper the developments of PPPs in Europe including the **slow liberation** of some public sectors, the **level of risk** transfer to private partners, **lack of experience** or knowledge of best practice and complex financial restrictions.

EUROCITIES STATEMENT ON PUBLIC-PRIVATE PARTNERSHIPS AND CONCESSIONS

Response to the European Commission Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions

14 SEPTEMBER 2004

EUROCITIES

EUROCITIES is the network of European large cities, representing 120 cities from across Europe. These cities are home to more than 100 million inhabitants. Membership is open to democratically elected governments in cities. They should be important regional centres with an international dimension and a population of more than 250 000.

POLICY CONTEXT

In most European Union Member States, cities have a crucial role in ensuring social inclusion and territorial cohesion, and in working towards sustainable development. Across the European Union, local governments are the public authorities closest to the citizens, and they are also responsible for delivering a wide range of services of general interest. They are expected to guarantee that high quality services of general interest are accessible to all and are provided at a reasonable price.

EUROCITIES' response to the European Commission Green Paper on public-private partnerships and Community law on public contracts and concessions should be seen in the framework of its Strategic Objectives, and it follows from EUROCITIES' contribution to the Commission's consultation in 2003 on the Green Paper on services of general interest. It has been elaborated by EUROCITIES' Working Group on Services of General Interest on behalf of EUROCITIES' Executive Committee. The response entails a series of general reactions in a first part, and answers to the specific questions of the Green Paper in a second part.

1. **Access for all to high quality services** is a fundamental dimension of the social and economic model in each of the Member States. As to the form of provision of the services, the choices vary from one country to another. In most of the Member States, local and regional authorities are able to choose how services will be provided, whether directly through their own administration or by entrusting the service to a third party (which can be either public, private or a mixed entity).

2. **Cities today face a wide range of challenges** which, together, are difficult to meet. They include: delivering high quality and affordable public services to the citizens, promoting innovation and competitiveness, and creating an attractive environment for businesses and people.

3. **Cities do not reject existing or future competition** with the private sector, but rather demand **fair conditions for all market participants**. Successful cooperation with private suppliers already exists in many sectors. Cities, however, want to make **political decisions on how to provide services**. Cities promote competition and economic development in the interest of citizens.

4. In this perspective, EUROCITIES aims to contribute to a European context where **cities can be inclusive, prosperous, creative, and sustainable, with democratic and effective governance**. In order to carry out its mission, EUROCITIES, at the occasion of its EUROCITIES AGM in Porto in 2003, has identified

a series of long-term strategic objectives in five main policy dimensions, among which "The prosperous city" represents the economic dimension.

5. **Prosperous cities** provide a positive environment for business to grow and expand. They aim to cooperate with private companies, universities and research institutes to promote innovation, growth and competitiveness. They supply water management, waste disposal, housing, education, social and health services, as well as a wide range of cultural and leisure facilities. They invest in maintaining a modern infrastructure for transport and other network industries.

6. An integral part of the prosperous city is the **commitment to ensuring that all citizens are able to access a wide range of high-quality services** with regard to efficiency, reliability and affordability.

PART I

INTRODUCTION

The issues of great importance to local authorities are: respect for the principle of subsidiarity; freedom of choice of local authorities as to the form of provision of services; the need for greater legal certainty; and the promotion of social, economic and territorial cohesion and sustainable development.

1. **EUROCITIES welcomes the European Commission's idea to launch a consultation on public-private partnerships (PPP) and concessions**. While the Green Paper is a basis for the dialogue on the use of PPPs, EUROCITIES notes that its scope is focussed mainly on the legal framework, especially procurement and concessions, and it does not genuinely address **the political significance of PPPs**. The Green Paper concentrates on Community legislation on the procedures for the award of public contracts.

2. To achieve **a balanced approach on PPP** both the public and the private interests should be given their proper weight. The Green Paper rather focuses on the private company perspective while the challenges of public authorities do not appear to have been taken into account sufficiently.

3. The aim of Community measures should be to encourage authorities to **elaborate new and innovative means to finance the services required by citizens** and to reduce barriers that prevent authorities from using PPPs, without necessarily expanding the Community legislation on public contracts.

4. The use of PPP can offer a valuable means to introduce funding, know-how and working methods from the private sector into the public sector, particularly in those cities in new EU Member States suffering from budget constraints. PPPs can bring added value in relation to a wide range of local services, such as urban transport, waste and water management, urban regeneration, schools and sports facilities. They may represent **a funding alternative** that can make the use of public resources more efficient.

5. Nevertheless, it is important to evaluate the fields in which PPPs can be a valuable alternative, given the differences between various sectors and different cultural and legal frameworks. **The aims of PPPs should be to improve the level of quality of services to the public and to make service provision more cost efficient.** The public sector may have important lessons to learn, for example in terms of cost efficiency, from private companies. However, in practice in the PPPs of most European countries, **the public sector remains responsible for quality, continuity, affordability, accessibility and security** of the whole range of services which are fundamental to citizens' basic needs.

6. A number of **legal, financial and political concerns** need to be taken into account when considering the use of PPP. One should be careful **not to consider PPP as the only or ultimate solution to any financial constraints.**

7. The following aspects, in particular, are of importance for local authorities when considering the choice of a PPP or concession as a means to finance a service or infrastructure:

- **Political aspects**;
- **Financial aspects**; and
- The **legal framework**.

POLITICAL ASPECTS

EUROCITIES is committed to reinforcing the rights and the responsibilities of local public authorities across the enlarged European Union. A decentralised and democratic decision-making system can provide the necessary flexibility, responding to lo cal circumstances and to the demands of citizens.

1. **The principles of subsidiarity and of local self-government** are fundamental for democracy in the European Union. In accordance with these principles, **the choice as to the form of provision of local services of general interest, including whether or not to tender out, is best made at local level**. The right of local authorities to choose the most appropriate form of provision should therefore be maintained and enforced in line with the principle of subsidiarity. The Cities demand sufficient financial means to provide the necessary level of services and reject budget constraints as a force for PPP.

2. Local authorities have a **responsibility**, which is normally not shared by a private partner, towards **fulfilling the public interest and maximising the added value of these actions for the citizens**. This responsibility includes compliance with a number of basic principles governing the relationship between the public authorities and the citizens, such as transparency, accessibility, sustainability, participation etc. **The citizens' quality of life** must be at the centre of the debate on how to finance the services required by the citizens, taking these guiding principles for public administration into account.

3. **With a view to providing the best services to its citizens**, a public authority may consider the possibility of establishing a **partnership with a private entity for the delivery of the services**. From a public authority perspective, there can be a number of reasons behind the choice of cooperating with a private entity – budget constraints requiring the involvement of private investments in the financing of services or infrastructure, or the appreciation of the know-how, technique or experiences of the private sector within a particular field.

4. Before choosing PPP as a model of financing or operating, **the global impact** of this choice such as **accessibility, quality and safety of the service** must be carefully assessed. Special provisions have to be made regarding the aspects of local responsibility as well as ability to continue and finance the service after the end of the contract.

5. When considering the possibility of entering into partnership with a private entity, a public authority needs to bear in mind the basic principles laid down in the EC Treaty in order to assure the **freedom of establishment and freedom to provide services** (Article 43 and 49 TEC). They apply to all acts whereby a public entity entrusts the provision of an economic activity to a third party: transparency,

equality of treatment, proportionality, and mutual recognition. A public authority also needs to consider a similar set of **basic principles in relation to the citizens: transparency, accessibility** etc. These principles may not be explicitly referred to in the current Treaties although they are an integral part of the Community responsibility for ensuring a high level of employment and of social protection, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion (Article 2 TEC). A private company does not have the same responsibility vis-à-vis the citizens.

6. When starting PPP negotiations, **public authorities** are well aware of the fact that they **do not free themselves entirely from their responsibility vis-à-vis the citizens**. On the basis of this knowledge, both **advantages and risks** of entering into a partnership with a private entity must be carefully assessed before signing a contract, particularly considering the substantial contractual or practical changes of circumstances that may appear throughout, often long, duration of a PPP or concession and which could be difficult to foresee initially.

7. **From a democratic point of view, the influence of the political bodies and the local government** must be maintained in the interest of the citizens. Before losing direct influence and control, the necessary instruments to keep the major political influence on the provision of the service have to be established. Public authorities also need to consider that they often commit, when agreeing on a long term PPP contract, not only themselves but also future political majorities and developments.

8. When entering a PPP **the role of the local authority** moves from the delivery of the service to **controlling the legal, economic and technical aspects**. Accepting this change of role and implementing new tools is crucial for the success of every PPP. Local authorities need to ensure that private partners not only benefit from profits but also assume responsibility for any losses incurred.

FINANCIAL ASPECTS

PPPs can offer positive economic effects for the whole society. By reducing the spending temporarily and postponing the payment of costs, public authorities risk, however, encountering unforeseen and additional costs which will limit its choices for future investments.

1. A PPP should gain from the effects of **increased incentives, innovation, and the use of the commercial competence of the private sector** when planning, developing and providing public services.

2. If managed in the right way, through appropriate and efficient economic governance, the use of PPP should lead to a **more effective use of resources**.

3. Before choosing PPP as a model of finance, **the total cost** of this choice must be carefully **assessed and compared with other alternatives**. The cost over the whole period of the contract and the cost at the end of the contract have to be fully and honestly calculated. **The long duration of many PPPs may make it difficult to foresee changes in management and related costs.**

4. Local authorities must calculate what **the cost for the citizens** will be in the end, whether they pay through taxes, other redistribution schemes or through direct fees. If choosing to enter into partnership with a private entity, the most effective type of PPP structure must be identified.

LEGAL FRAMEWORK

EUROCITIES does not consider any additional Community legislation on concessions, or the extension of current public procurement rules on service concessions, as desirable.

Initiatives that aim at simplifying or clarifying the use of existing legislation, as a way of reducing legal uncertainty, are supported.

Services provided "in-house" must remain exempt from Community legislation on public contracts and concessions.

1. To allow the public sector to gain from increased involvement of private sector incentives, innovation and competence, for the maximum benefit of the citizens, **the legal framework must not bring obstacles but facilitate the use of PPPs and concessions** as a third way between solely public delivery and private operations.

2. **Provisions on public procurement**, both at national level and at European level, provide a very **complicated and restrictive legal framework for PPPs**, which is generally difficult as well as both time and resource consuming to apply. The situation of concessions in this framework is particularly unclear.

3. EUROCITIES does not consider that additional legislation at European level would facilitate the use of PPP. In particular, **an extension of the current public procurement rules to cover service concessions is not desirable**. The Commission's actions to assist and encourage the **exchange of experiences and knowledge** are welcome.

4. PPPs cannot be defined in a single concept at EU level as they represent a **large variety of structures and contracts**. It would be impossible for public authorities to implement a single concept defined at EU level.

5. EUROCITIES therefore does not favour a decrease of choice as to the range of different contracts and structures behind the term of PPP through a single EU definition and framework, which applies a strict and narrow use of the concept. It is inherent in the concept of PPP that this instrument should offer valuable ways of identifying new and innovative tools to finance and provide services to the citizens.

6. Finally, EUROCITIES insists that all **services provided "in-house"** should continue to be **exempt from Community legislation on public contracts**. The ad-hoc regulation of the "in-house" issue on a case-by-case basis through the European Court of Justice should be avoided and the European Commission should work towards correcting the lack of political oversight and accountability.

PART II

RESPONSES TO COMMISSION QUESTIONS

1. What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?

PPP as a concept represents a large variety of contracts and partnerships without any single, coherent definition. A few examples of contractual PPP set-ups in which cities are involved:

- **The United Kingdom**: The idea of PPP originates from the UK, through the "private finance initiative" (PFI), which gradually has developed into the public-private partnership. The local government PFI is regulated through special PFI regulations in the Local Authorities (Capital Finance) Regulations 1997 (SI 319/1997).

- **Austria** and **Germany**: The "Betreibermodell" refers to a contract, by which the private partner takes over, in cooperation with the municipality but under its own responsibility and bearing the economic risk, the planning, development, and operation of a service or infrastructure, receiving payment from the municipality. The private partner becomes the owner of the property. In the case of the "Betriebsführungsmodell", on the other hand, the public partner remains the owner of the installation/infrastructure. Through the contract, which regulates the rights and obligations of the partners, the running of the service is transferred to the private partner.

Another example is the "leasingmodelle"/"leasinggeschäfte", by which a third (private) partner assures the financing and development of the project, renting the installation to the municipality.

- **France**: Public services and utilities in France have long been based on concessions. At national, regional and local level, many basic networks (railway, gas, electricity and water distribution) have been built and operated under concession. Many of the urban rail transport systems (metros, tramways and similar) are also based on concessions.

The "marché d'entreprise de travaux publics" (METP) is a form of contract, by which a public body charges a company with building, financing and operating a utility or other asset to be used for public purposes in exchange for payment over time by the public body. Waste disposal facilities built for local authorities are a typical example of METPs.

Apart from the laws transposing the EU Directives on public procurement into French law, a law generally known as the "loi Sapin" contains rules regulating the procedure for grant of concessions and similar contracts, "délégations de service public". It also lays down certain substantive rules, particularly concerning their duration and renewal. The distinction between "délégations de service public" and public procurement contracts/"marchés publics" is complex but important, since the procedures for the award of contracts of the former category are less complex than those imposed by the rules applicable to public procurement contracts. The law known as the "loi MURCEF", "Mesures urgentes de réformes à caractère économique et financier", adopted in 2001, has clarified the definition of "délégation de service public".

Additionally, certain countries have a kind of "supervisory" body, such as the PPP Knowledge centre (Ministry of Finance) in the Netherlands and the Italian PFI Task Force (Ministry of the Economy and Finance).

2. In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

The competitive dialogue procedure may be a useful tool. So far no real experience exists. Most cities do not yet see the added value of the competitive dialogue procedure, and therefore they do not share the Commission's view that this particular procedure will allow for simplification of awarding procedures and that it would render awarding more efficient and/or more adapted to local administrative needs. Additionally, cities find it difficult to distinguish the characteristics and effects of the competitive dialogue from those of the negotiated procedures.

3. In the case of such contracts, do you consider that there are other points, apart from these concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.

Alongside Community law on public contracts and concessions, aspects of tax regulations, contract law, company law, and state aid provisions also need to be taken into account and, in cases when individual provisions are in conflict, weighed against each other. Each case needs to be considered on the basis of its individual circumstances and of the different national legal frameworks of different countries in relation to the award of PPPs and concessions.

4. Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

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5. Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?

The Community legal framework on the procedures for the award of concessions is sufficiently precise to allow the participation of non-national companies. The obstacles to an increased degree of trans-national tenders and participation of non-national companies in award procedures caused for example by the impact of tax legislation at both national and Community level, could however be considered by the Commission.

6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

EUROCITIES does not consider that additional legislation at European level would facilitate the procedures for the award of concessions and/or help in applying the existing Community rules. There is, subsequently, no need for a further extension of the Community legal framework.

Alternative measures to reduce legal uncertainty, such as interpretative communications etc. can be considered. Initiatives that aim at simplifying or clarifying the use of existing legislation are useful.

The aim and effect of any Community initiative on PPPs and concessions, should be a reinforcement of the capacity at local level to use and gain from partnerships with private entities. In particular, improved tools for financial and administrative management correspond to the need for strengthened control capacity at local level.

7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

PPP cannot be defined as one single concept at EU level, as it represents a large variety of structures and contracts. It would be impossible for public authorities to apply a single concept defined at EU level.

The use of PPP depends to a large extent on the sector in question, the national legal framework and the competences of the particular public authority. The variety of contexts, in combination with the wide range of different forms of PPP, makes it inconvenient to develop further European legislation on PPP.

8. In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to

implement the selected project genuinely competitive?

Generally, the advertising and selection procedures of tenders are organised in such a way that non-national operators have access to private initiative PPP schemes, although the interest fro m non-national operators is usually quite low.

9. In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?

The selection of a private partner on the basis of a private initiative should not necessarily be made subject to a strict procurement regime. In any case, the basic Treaty provisions ensure a transparent process without discrimination.

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

If all terms of reference are given in the tendering procedure, this phase is no longer subject to legislation on public contracts. At this stage, the relationship between the public and private partner becomes strictly contractual. It is therefore subject to contract law.

The particular difficulty for local authorities is that the contract may be subject to substantial change over time, in terms of cost, law and management, considering that the duration of PPP contracts is generally long.

11. Are you aware of cases in which the conditions of execution - including the clauses on adjustments over time - may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?

No.

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

No.

13. Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other "standard clauses" which are likely to present similar problems?

Notwithstanding their effects, certain "step -in" arrangements are necessary from a local perspective, in order to give a local authority the possibility to keep control over a private partner stepping into the contract.

14. Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?

Contract law remains a national competence.

15. In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.

The problems that may appear in relation to subcontracting relate to the issue of responsibility that a public authority cannot avoid. Given this responsibility, the public authority also needs to be able to keep a certain level of control over its partner(s). This may be difficult in the case of subcontracting.

From a strictly legal point of view, subcontracting is subject to national legislation and normally does not cause any problem in relation to Community legislation on public contracts.

16. In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field of application in the case of the phenomenon of subcontracting?

No.

17. In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

No.

18. What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not?

Examples of institutionalised PPPs:

The French “société d’économie mixte” (SEM) is one the most frequent examples of institutionalised PPPs. The performance of the SEMs concerns the inhabitants of the French cities in their everyday lives, as they provide daily services in a wide range of areas: water, energy, tourism, parking places, sports and culture facilities etc.

Other forms of institutionalised PPPs exist for example in Germany and Austria, e.g. the “Kooperationsmodell” or “Beteiligungsmodell” by which a public authority and a private partner set up a company, in which the public authority is the major shareholder. The model occurs for example for projects in the sector of energy and waste disposal.

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

The relationship between the contracting authority and the joint contractor is exempt from the Community legislation on public contracts and concessions in certain cases – "in-house" contracts.

EUROCITIES insists that joint entities created in the future as institutionalised PPPs must still come within the framework of local self-government and benefit from the particular legal situation of "in-house" services. The "in-house" character of such an entity must not be given a restrictive interpretation in the application of European Community Law.

20. In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?

The real barriers to enhanced introduction of PPPs in the European Union include the national and European tax legislation as well as a number of other detailed provisions at national and European level, restricting rather than supporting the use of PPPs. Considering the great risks connected with long term PPPs and concessions and the difficulties in foreseeing the total costs of these projects, local authorities will not engage in PPPs if it requires too complex and costly procedures. The main barrier for local authorities is their budgetary position in combination with their responsibility vis-à-vis the citizens.

21. Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of "good practice" in this framework which could serve as a model for the Union? If so, please elaborate.

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22. More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

The Commission's actions to assist and encourage the exchange of experiences and knowledge are welcome. (E.g. The DG REGIO initiative to publish a Resource Book on PPP.) The establishment of a network specifically for this purpose is, however, not needed. EUROCITIES as a European platform of cities, and other existing thematic or geographic networks, already serve this purpose.

Fragen aus dem Grünbuch zu PPP und den EU Rechtsvorschriften für öffentliche Aufträge und Konzessionen

Frage 1

Frage 1.1 **Welche Formen von PPPs auf Vertragsbasis sind Ihnen bekannt?**

Antwort 1.1 Uns sind folgende Formen von PPPs auf Vertragsbasis bekannt:

Nach rechtsspezifischer Unterscheidung:

- Betreibermodelle (BOT-Modelle)
- Kooperationsmodelle
- Betriebsführungsmodelle
- Konzessionsmodelle
- Contractingmodelle
- Mautmodelle

Nach finanzspezifischer Unterscheidung:

- Leasingmodelle
- Forfaitierungsmodelle
- Fondsmodelle
- Miet-/Mietkaufmodelle

Frage 1.2 **Gibt es in Ihrem Land spezifische (gesetzliche oder andere) Rahmenbedingungen für derartige Konstruktionen?**

Antwort 1.2 Da wir in den neuen EU-Mitglieds- und Beitrittsländern tätig sind, gibt es teilweise rechtliche Rahmenbedingungen für PPP-Projekte. Falls Sie existieren, werden sie aufgrund der erst neuen kommunalen Verwaltungsstrukturen, noch nicht richtig umgesetzt. Für die dringend notwendigen Infrastrukturmassnahmen fehlt auf kommunaler Seite nicht nur das Kapital, sondern auch das Know-how.

Frage 2

Frage 2.1 **Nach Auffassung der Kommission wird die Umsetzung des wettbewerblichen Dialogs in einzelstaatliche Rechtsvorschriften den betroffenen Parteien ein Verfahren an die Hand geben, das sich ganz besonders für die Vergabe öffentlicher Aufträge in Zusammenhang mit der Einrichtung einer PPP auf Vertragsbasis eignet und gleichzeitig die Grundrechte der Wirtschaftsteilnehmer wahrt. Stimmen Sie dem zu?**

Antwort 2.1 Wir stimmen diesem **voll** zu.

Frage 2.2 **Falls nein, warum nicht?**

Antwort 2.2 -

Frage 3

Frage 3.1 **Sehen Sie in Bezug auf diese Aufträge neben der Wahl des Vergabeverfahrens andere Punkte, die mit dem Gemeinschaftsrecht über**

öffentliche Aufträge in Konflikt stehen könnten? Wenn ja, nennen Sie diese und begründen Sie!

Antwort 3.1

Diese sehen wir bei den neuen EU Richtlinie 2004/17/EG und 2004/18/EG nicht.

Frage 4

Frage 4.1

Haben Sie bereits einmal ein Verfahren zur Vergabe einer Konzession in der Europäischen Union organisiert, daran teilgenommen bzw. ein solches organisieren oder daran teilnehmen wollen?

Antwort 4.1

Da wir im Vorfeld und Anbahnungsphase eines PPP Projektes tätig sind konzentriert sich unsere Arbeit auf folgende Tätigkeitsfelder:

- PPP-Konsortiumbildung aus fünf Standardpartnern:
  - Planer
  - Baufirma
  - Anlagenbauer
  - Investor
  - Betreiber

EuroPPP

Hierbei heisst unsere Initiative **EuroPPP – A Branche for Europe**. Dabei können sich verschiedene europäische Firmen in Konsortien einbringen, die, als Europäische wirtschafliche Vereinigungen (EWIV) organisiert, sich bei Ausschreibungen beteiligen oder durch Eigeninitiative mit PPP-Projektvorschlägen an lokale Regierungen herantreten.

MASTERPLAN

Für die Regionen heisst unsere Initiative **MASTERPLAN – A Region for Europe**. Dabei können sich lokale kommunale Interessensgruppen in eine regionale Wirtschaftförderagentur anschliessen. Ein **MASTERPLAN** ist somit

- eine Stadt- und Regionalentwicklungsgesellschaft nach EUREK-Kriterien
- ein PPP Kompetenzzentrum
- städtetechnologisches Kompetenzzentrum
- ein EIC (europäisches Informationszentrum)
- eine Investionsförderagentur
- exekutives Organ der lokalen Verwaltungen.

Frage 4.2

Welche Erfahrungen haben Sie gemacht?

Antwort 4.2

Auf allen Seiten, sowohl bei der privaten als auch bei der öffentlichen Hand herrscht grosser Informationsbedarf. Leider kennen sich über Verfahren und Prozesse bei einer PPP-Auschreibungen die wenigsten aus, da es zu viele nicht standardisierte Verfahren gibt. Zudem gibt es keinen neutrale Institution, die beide Parteien als eine Art **PPP-Mediator** bei diesem komplexen Prozess begleitet und bei den zahlreich auftretenden Interessenkonflikten schlichtend einwirkt.

Frage 5

Frage 5.1

Halten Sie das derzeitige Gemeinschaftsrecht für präzise genug, um die

konkrete und effektive Teilnahme von Gesellschaften oder Gruppierungen aus anderen Staaten an den Konzessionsvergabeverfahren sicherzustellen?

Antwort 5.1

Wir halten das derzeitige Gemeinschaftsrecht für **nicht** präzise genug, da Rechte, Pflichten, Einstieg und Ausstieg der beiden Parteien für ein PPP-Projekt nicht geregelt sind. Desweiteren werden der langfristige Horizont der Zusammenarbeit und die Innovationsgeschwindigkeit bei Infrastrukturprojekten nicht berücksichtigt.

Frage 5.2

Sind Sie der Ansicht, dass in dieser Hinsicht normalerweise ein tatsächlicher Wettbewerb herrscht?

Antwort 5.2

Hier herrscht kein Wettbewerb, da nur Grosskonzerne an PPP Ausschreibungen teilnehmen. Hierbei sehen wir enorme Chancen für europäische Mittelstandsunternehmen, die ohne Probleme die Aufgaben in einem Konsortium erfüllen können,wenn sie entsprechendes PPP-Know-How in ihren Unternehmen aufbauen könnten. Hier scheitern die meisten Unternehmen zudem an der mangelnden finanziellen Kraft und an fehlenden Referenzprojekten im PPP-Bereich.

Frage 6

Frage 6.1

Halten Sie einen Vorschlag für einen gemeinschaftlichen Rechtsakt zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe für wünschenswert?

Antwort 6.1

Wir halten einen gemeinschaftlichen Rechtsakt zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe für **sehr** wünschenswert, da eine integrierte Vergabe von Bauherren-, Projektmanagement-, Planungs-, Bau-und Finanzierungsleistungen sowie Leistungen für den Betrieb von Immobilien- und Infrastrukturobjekten und somit für Life-Cycle-Projekte ungenügend geregelt ist.

Frage 7

Frage 7.1

Allgemeiner gefragt: Wenn Sie ein neues Gesetzgebungsvorhaben der Kommission für erforderlich halten, gibt es dann objektive Gründe dafür, in diesem Rechtsakt sämtliche PPPs auf Vertragsbasis zu behandeln und sie ein und demselben Regelwerk für die Vergabe zu unterwerfen, ganz gleich ob die Vorhaben als öffentliche Aufträge oder als Konzessionen einzustufen sind?

Antwort 7.1

Objektive Gründe sind:

∉ Durch eine europäische Festlegung von Verfahrensregeln bei einem PPP-Projekt wird eine rechtssichere, transparente und interessensausgleichende Vergabe sichergestellt.

∉ Weiterhin ergeben sich Kosten- und Zeitersparnisse durch eine standardisierte Regelung.

∉ Das Risiko des Scheitern eines PPP-Projektes wird insgesamt minimiert, da die Ursachen für die meisten Probleme bei einem PPP-Projekt bei der Ausschreibung und Vergabe zu finden sind.

Frage 8

Frage 8.1

Ist Ihrer Erfahrung nach der Zugang der ausländischen Akteure zu privat initiierten PPPs gewährleistet?

Antwort 8.1

Der Zugang ist nicht gewährleistet, da die Zuständigkeiten für ein kommunales PPP-Projekt und die verantwortlichen Verwaltungssstrukturen in den jeweiligen Ländern nicht eindeutig sind. Es fehlen One-Stop-Shops zum Thema PPP in den jeweiligen Ländern, die national und regional organisiert sind. Somit fehlen den ausländischen Konsortien die fachkundigen Ansprechpartner.

Frage 8.2

Für den Fall, dass die Vergabestellen zur Initiative aufrufen, wird dieser Aufruf dann angemessen bekannt gemacht, so dass alle interessierten Akteure Kenntnis davon haben können?

Antwort 8.2

Der Aufruf wird angemessen bekannt gemacht, jedoch sind viel zu wenige Anbieter mit PPP-KnowHow , um bei diesen Ausschreibungen mitzumachen. Hier stellt sich die Frage: Wie kann ein neues PPP-Konsortium, das ein neues Life-Cycle-Infrastrukturprojekt anbietet, Referenzen vorweisen, die zwar in den einzelnen Abschnitten des Projektes vorhanden sind, jedoch nicht in der Gesamtheit.

Frage 8.3

Wird für die Ausführung des ausgewählten Projekts ein Auswahlverfahren auf Basis eines effektiven Wettbewerbs organisiert?

Antwort 8.3

Ein effektiver Wettbwerb wird nicht durchgeführt, da viele Präqualifikationen für PPP-Projekte in den neuen EU-Mitglieds- und Beitrittsländern sich auf allgemeine Prospektsammlung der einzelnen Unternehmen beschränken. Die Auswahl der Bewerber erfolgt unter kulturspezifischen Aspekten des jeweiligen Landes wie z.B. Religion, Bürokratie, Kriminalität, Korruption usw. und hängt somit stark vom lokalen Partner im jeweiligen Land ab.

Frage 9

Frage 9.1

Wie könnte Ihrer Auffassung nach die Entwicklung privat initiierter PPPs in der Europäischen Union unter Wahrung der Grundsätze der Transparenz und der Gleichbehandlung und ohne Verstoß gegen das Diskriminierungsverbot gewährleistet werden?

Antwort 9.1

Ein mögliches Verfahren könnte folgendermaßen ablaufen:

1. Privates Konsortium geht an eine öffentliche Hand und bekundet Interesse für ein PPP-Projekt.
2. Öffentliche Hand macht eine Ausschreibung für Interessensbekundung für dieses PPP-Projekt.
3. Die ersten 3 Bewerber werden von der öffentlichen Hand ausgewählt.
4. Die 3 Bewerber beauftragen einen neutrale Consulting-Gesellschaft die Ausschreibungsunterlagen zu erstellen.
5. Die 3 Bewerber erstellen das konkrete Angebot.
6. Öffentliche Hand wählt ein Konsortium aus.
7. Der Gewinner entschädigt gemeinsam mit der öffentlichen Hand die Verlierer der Ausschreibung.

Frage 10

Frage 10.1

Welche Erfahrungen haben Sie in der Phase im Anschluss an die Auswahl des privaten Partners im Rahmen von PPP auf Vertragsbasis gemacht?

Antwort 10.1

Nach Auswahl des privaten Partners fangen die Probleme erst richtig an, da sich beide Parteien ohne eine eindeutige Regelung in unendliche Nachverhandlungen verstricken. Hierbei sind ganzheitliche, unparteiische und auf der EU-Ebene verankarte **PPP-Mediatoren** notwendig, die bei Interessenskonflikten eine **Win-Win-Situation** herbeiführen.

Frage 11

Frage 11.1

Sind Ihnen Fälle bekannt, in denen die Ausführungsbedingungen, einschließlich der Klauseln zur Anpassung im Zeitverlauf, eine diskriminierende Wirkung entfalten konnten oder eine ungerechtfertigte Behinderung der Dienstleistungs- oder Niederlassungsfreiheit darstellten? Falls ja, bitte beschreiben Sie die Art der aufgetretenen Probleme!

Antwort 11.1

Bei den Ausführungsbedingungen sind uns keine diskriminierenden Klauseln bekannt.

Frage 12

Frage 12.1

Sind Ihnen Praktiken oder Mechanismen zur Bewertung von Angeboten bekannt, die eine diskriminierende Wirkung haben?

Antwort 12.1

Uns sind folgende diskriminierende Praktiken bekannt:

∉ Ein Unternehmen ist in zwei Bietergemeinschaften vertreten mit zwei unterschiedlichen Angeboten.

∉ Zu kurze Ausschreibungsfristen

∉ Zu hohe finanzielle Sicherheiten bei Angebotsangabe

∉ Referenzobjekte im Ausschreibungsland als Auswahlkriterium

∉ Angebotsabgabe in landesspezifischer Sprache

Frage 13

Frage 13.1

Sind Sie wie die Kommission der Auffassung, dass bestimmte Interventionsklauseln in Bezug auf die Grundsätze der Transparenz und der Gleichbehandlung problematisch sein können?

Antwort 13.1

Wir sind der selben Auffassung wie die Kommission.

Frage 13.2

Sind Ihnen andere Typen von Klauseln bekannt, deren Anwendung zu ähnlichen Problemen führen kann?

Antwort 13.2

Uns sind solche Klauseln nicht bekannt.

Frage 14

Frage 14.1

Halten Sie es für erforderlich, dass bestimmte Aspekte der vertraglichen

Rahmenbedingungen für PPP auf Gemeinschaftsebene geklärt werden? Falls ja, was sollte geklärt werden?

Antwort 14.1

Es sollten folgende Rahmenbedingungen für PPPs auf Gemeinschaftsebene geklärt werden:

∉ Rechte und Pflichten der jeweiligen Partner

∉ Festlegung einer Verpflichtung der Vergabestelle zum Vergleich der Vorteilhaftigkeit von öffentlicher und privater Trägerschaft

∉ Aufhebung der Benachteiligung zwischen betriebswirtschaftlichen Berechnungsgrundsätzen von Privaten und dem Gebühren- und Beitragsrecht.

Frage 15

Frage 15.1

Sind Ihnen bei PPP-Konstruktionen besondere Probleme mit der Vergabe von Unteraufträgen bekannt? Welche?

Antwort 15.1

PPP-spezifische Probleme bei der Vergabe von Unteraufträgen sind uns nicht bekannt.

Frage 16

Frage 16.1

Rechtfertigt die Existenz von PPPs auf Vertragsbasis, die die Übertragung eines Aufgabenpakets an einen einzigen privaten Partner impliziert, Ihrer Auffassung nach, dass ausführlichere Regeln für die Vergabe von Unteraufträgen eingeführt werden und/oder dass der Anwendungsbereich erweitert wird?

Antwort 16.1

Für Unteraufträge müssen keine neuen Regeln eingeführt werden, da diese bereits im bisherigen Gemeinschaftsrecht genügend dokumentiert sind.

Frage 17

Frage 17.1

Halten Sie, allgemeiner gesprochen, eine ergänzende Initiative auf Gemeinschaftsebene zur Klärung oder Umgestaltung der Regeln für die Vergabe von Unteraufträgen für erforderlich?

Antwort 17.1

Für Unteraufträge müssen keine neuen Regeln eingeführt werden, da diese bereits im bisherigen Gemeinschaftsrecht genügend dokumentiert sind. Desweiteren kann die Art und Menge von Unteraufträgen als Entscheidungskriterium bei den Ausschreibungsunterlagen festgelegt werden.

Frage 18

Frage 18.1

Welche Erfahrungen haben Sie mit der Einrichtung institutionalisierter PPPs gemacht?

Antwort 18.1

Wir haben folgende Erfahrung gemacht:

∉ Generell scheuen Unternehmen die Einrichtung institutionalisierter PPPs.

∉ Die Europäische wirtschafliche Interessenvereinigung (EWIV) hat sich als ein sehr gutes Instrument erwiesen auch die öffentliche Hand unkompliziert und schnell einzubinden.

Frage 18.2

Lassen Ihre Erfahrungen Sie zu der Schlussfolgerung gelangen, dass die gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen bei institutionalisierten PPP-Konstruktionen eingehalten werden? Falls nein, warum nicht?

Antwort 18.2

Die Rechtsvorschriften werden nicht eingehalten. Durch die institutionalisierten PPP-Konsortien werden die gemeinschaftlichen Rechtsvorschriften viel leichter ausgehebelt, da die Intransparenz steigt.

Frage 19

Frage 19.1

Halten Sie eine Initiative auf Gemeinschaftsebene für erforderlich, um die Verpflichtungen zu klären oder zu vertiefen, die die öffentlichen Auftraggeber in Bezug auf den Wettbewerb zwischen potenziell an einem institutionalisierten PPP-Projekt interessierten Wirtschaftsteilnehmern haben? Falls ja, welche Aspekte halten Sie für besonders wichtig und welche Form sollte eine solche Initiative haben? Falls nein, warum nicht?

Antwort 19.1

Wir halten eine solche Initiative auf Gemeinschaftsebene für erforderlich. Es sollten dabei folgende Aspekte berücksichtigt werden:

∉ Die öffentliche Hand muss den wirtschaftlichen Vorteil eines PPP-Projektes auf Joint-Venture-Basis im Vergleich zur Vertragsbasis dokumentieren.

Hierbei können Einheitsvergabemuster und – formblätter verwendet werden, die ein PPP-Projekt in drei verschiedene Richtlinien aufteilen:

∉ PPP-Modellspezifische Richtlinie
∉ Branchenspezifische Richtlinie
∉ Länderspezifische Richtlinie

Frage 20

Frage 20.1

Welche Maßnahmen oder Verfahren behindern in der Europäischen Union die Einrichtung von PPPs?

Antwort 20.1

Folgende Maßnahmen oder Verfahren behindern die Einrichtung von PPPs in der EU:

∉ Deminimis-Regelung für PPP-Projekte muss aufgehoben werden, um mehr Anreize insbesonder für mittelständische Unternehmen zu geben, sich aktiv an PPP-Projekten zu beteiligen
∉ International Accounting Standard (IAS) ist auf PPP-Projekte noch nicht abgestimmt.

Frage 21

Frage 21.1

Kennen Sie andere PPP-Formen aus Drittländern? Kennen Sie aus Ihren Erfahrungen in solchen Ländern bewährte Verfahrensweisen, die auch für die EU beispielgebend sein könnten? Falls ja, welche?

Antwort 21.1

Die Nationalpark-PPPs aus den USA können sehr gut für das Europäische Raumentwicklungskonept (EUREK) verwendet werden.

Frage 22

Frage 22.1

Denken Sie, dass es nützlich wäre, im Hinblick auf den großen Investitionsbedarf einzelner Mitgliedstaaten zum Erreichen einer sozialen und dauerhaften Entwicklung gemeinsam und in regelmäßigen Abständen über diese Fragen unter den betroffenen Akteuren nachzudenken und bewährte Verfahrensweisen auszutauschen? Sollte die Kommission nach Ihrer Auffassung ein derartiges Netzwerk aufbauen?

Antwort 22.1

Es wäre sehr nützlich mit Hilfe der europaweiten Erfahrungen aus schon durchgeführten Projekten Standardregeln für PPP-Projekte aufzustellen. Zu diesem Zweck soll die Kommission eine **Europäische PPP-Agentur** etablieren, die für folgende Tätigkeiten zuständig wäre:

∉ Ausbildung und Zertifizierung von **PPP-Mediatoren**, die bei der Anfangsphase eine unparteiischen Schiedsrichterfunktion bei diesem komplexen PPP-Verhandlungsprozess übernehmen.

∉ Fortführung unserer **EuroPPP**-Initiative, die eine **PPP-Matchingdatenbank** enthält, in der sich Regionen und Unternehmen eintragen können.

∉ Visualisierung und Wissensvermittlung des komplexen Themengebietes rund um PPPs durch **Topic Maps** und **semantische Netze**

∉ Definition von PPP-Projekten als **lernende Organisationen**

∉ Definition von **kybernetischen Modellen** für PPP-Projekte

∉ Fortführung unserer **MASTERPLAN**-Initiative zur Etablierung von nationalen und regionalen PPP-Kompetenzzentren.

∉ Projektmanagement und Koordination in der Anbahnungsphase eines PPP-Projektes, da dies als **Katalysatorfunktion** am besten von der übergeordneten EU-Ebene aus möglich ist.

Kontakt

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FIEC contribution to the Green Paper on public-private partnerships and Community law on public contracts and concessions

FIEC welcomes the publication of the Green Paper on public-private partnerships (PPPs) and the opportunity to comment on behalf of the European construction industry.

As previously stated, FIEC supports the idea of a European Internal Market for public procurement, implementing and safeguarding fair and transparent competition.

The Green Paper is clearly limited to only those aspects relating to the rules governing the award of PPPs in a context of compliance with the rules of competition and the proper functioning of the internal market. However, the global and complex nature of the PPP model means that other economic, financial and accounting factors particularly those relating to the transfer of risks etc., should be taken into account in order to enable PPPs to contribute usefully to:

- full realization of the internal market;
- the success of the growth initiative, in particular through realization of the TENs;
- greater involvement of SMEs;
- broad dissemination of PPPs among local authorities and other public entities.

By way of introduction, it is important to emphasize that Community law does not at the present time provide a definition of PPPs. Contrary to what was announced in the draft interpretative communication on concessions under Community law on public contracts[1], the interpretative communication published in 2000[2] did not address the specific distinctions between the other forms of partnership.
Before addressing the specific questions raised in the Green Paper, we would like to make a few general comments:

1. Based on the distinctions made in the paper between contractual and institutionalised PPP models, we believe that the Commission's approach to contractual PPPs should - subject to further remarks made below - allow a broad consensus to be achieved. On the other hand, the approach to institutional PPPs raises fundamental questions, which FIEC considers are insufficiently covered in the relevant chapters of the Green Paper. Therefore, FIEC wishes to contribute comments which, in its view, should facilitate appropriate treatment of the cases of distortion of competition to which institutional PPPs can lead.

2. As some areas raised in the Green Paper relate to the newly agreed EU procurement directives, we would urge that after implementation the Commission allows sufficient time for national use before any assessment is made that could bring about further legislative changes in the area of procurement.

[1] OJEC C94 of 7 April 1999 (« *Draft Commission interpretative communication on concessions under Community law on public contracts* »)
[2] OJEC C121 of 29 April 2000 (« *Commission interpretative communication on concessions under Community law »)*

1. What types of purely contractual PPP set-ups do you know of ? Are these set-ups subject to specific supervision (legislative or other) in your country ?

From the various currently applied forms of PPPs as understood in the Green Paper, we have identified in a non-exhaustive manner, being a European federation, and without going into the details of national rules, the following underlying principles :

- the delegation of a public service (concession, lease etc.), under the control of the contracting authority, for which the company is, besides any subsidy, remunerated mainly by the users;
- an overall general interest task of public administration, the remuneration of which is guaranteed mainly by the public authority.

PPPs are generally characterized by the multiplicity of their tasks (design, construction, financing, exploitation), their long performance duration and other specificities such as : transfer of risk and responsibilities, differed payment, performance, etc.

Their implementation of the legislative framework differs according to the method of payment which can be guaranteed either by the user or by the public authority.

As a result, the definition contained in the interpretative communication on concessions is too limitative inasmuch as it sums up this type of contract as consisting only of assumption of a risk of exploitation.

In some EU countries there are already some legislative provisions governing such various types of contracts.

2. In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

The competitive dialogue procedure can prove to be suited to certain partnership contracts. It is important that the new procedure does respect confidentiality and safeguards the technical solutions during the discussion phase with the contracting authorities, as well as that the rules governing advertising, which are likely to safeguard the fundamental rights of operators.

However, most of the PPPs contracts (mainly concessions) fall outside the scope of the public procurement directives and therefore have to follow specific procedures which take into consideration the specific character of PPPs, as is currently the case in some countries.

3. In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.

Generally speaking, particular points of conflict have not arisen. However, in some countries infringements have been noted in cases where the original consultation which was to result in a contractual PPP was transformed into institutionalisation of the partnership with other actors on the pretext of a lack of success thus permitting the re-use of technical solutions identified upstream.

On this assumption and in accordance with the fundamental rules and principles deriving from the Treaty, provision should be made for a new call for competition under conditions of equality of treatment as between competitors who may have submitted tenders. This is particularly true as regards their cost structures which, in order to allow a fair comparison, should be drawn up in accordance with the common principles of a market economy, as publicly financed or controlled entities may be able to benefit from more favorable financing and costs structures not available to private companies.

4. Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

FIEC, as a European trade association, is unable to provide detailed comment.

5. Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?

Yes. The fundamental rules governing advertising, transparency and non-discrimination are likely to ensure effective participation by non-national competitors.

As regards the texts under discussion within the European institutions, the greatest vigilance is, on the other hand, called for (in particular the proposal for a Directive on services in the internal market - COM (2002) 2 which is based on the country of origin principle).

In practice the largest share of construction cross-border procurement is carried out through subsidiaries.

In any case operators will accept to participate in PPPs on foreign markets only if there is a clear and reliable framework guaranteeing the protection of their investment against any form of arbitrary frustration by the local authorities.

6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

No, as things stand at present, legislation does not appear to be necessary.

The new public procurement directives have just been adopted and it is therefore important to allow a “bedding down” period before any evaluation of further policy is considered.

7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

Not applicable (see answer to question 6).

8. In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?

The practice of an invitation to present an initiative is, for the time being, used mainly in Italy. Generally speaking, where Directives and related fundamental rules governing advertising, transparency and non-discrimination are complied with, there should not be obstacles to effective participation by non-national competitors, although as mentioned in item nr. 5 most of the access to PPPs on foreign markets is carried out through subsidiaries.

9. In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?

Some countries encourage private sector initiative under the assumption that it may help a country's PPP programme to better or quicker succeed. It is therefore recommended that private sector efforts in connection with project identification and preparation be encouraged through the grant of incentives to the private initiator.

Compliance with these principles should be ensured by the granting of a “right of first refusal” to the initiator of a proposal. Failing acceptance of the benefit of this right by the tenderer, compensation should be granted to him in an amount not covering all of the costs involved with a view to avoiding certain forms of distortion of competition generated only by the purpose of such compensation.

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

FIEC, as a European trade association, is unable to provide detailed comment.

However as regards the phase which follows the selection we would like to draw the Commission's attention to the items 3, 4 and 5 of our conclusive remarks, concerning the duration of contracts, the changes taking place during the performance of the contract and the cases of early termination.

11. Are you aware of cases in which the conditions of execution - including the clauses on adjustments over time - may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?

In order to avoid such barriers and discrimination, it is essential that the contract documents should be sufficiently detailed as regards compliance with the functionalities required and the performance to be achieved and also as regards the general conditions governing performance of the service as well as the clauses on adaptation over time.

The terms of the response to the invitation to tender by the selected candidate, which will be recorded in the contract, should be applicable to him.
On the other hand, the award criteria may not impose unreasonable conditions as regards the tariff level or the requirements to be met.

In any case, each contracting authority has the responsibility to prepare each project with due care and to share all relevant information at its disposal with all the bidders in order to provide for a level-playing field.

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

Practices or mechanisms for evaluating tenders which have a discriminatory effect have been observed where the conditions laid down in Point 11 are not complied with.

13. Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment.? Do you know of other "standard clauses" which are likely to present similar problems?

No, the construction sector does not share the Commission's view regarding "step-in" arrangements which are involved in lenders' confidence.

A change in recipient in the case of bankruptcy of the candidate selected does not appear to be a problem if the terms of the initial contract are maintained and if all of the initial candidate's commitments are fulfilled. The ability of lenders to obtain a reasonable reimbursement of the loans granted should be stated in order to maintain both a sufficient degree of competition among the financial institutions and to offer acceptable margin conditions.

That means that any security package in connection with a commercially financed PPP project typically contains step-in rights, supplemented usually by a direct agreement between the Contracting authority and the lenders.

14. Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?

As indicated in Point 6, the new public procurement directives have just been adopted and it is therefore important to allow a “bedding down” period before any evaluation of further policy is considered.

Once experience is made on these new directives, before envisaging any new legislative initiative at the EU level, it could be useful to elaborate an informal document which would cover, amongst others, the following aspects :

- *force majeure* and unforeseen events;
- conditions governing early termination (unilateral or on grounds of fault);
- right to compensation;
- the procedures for regulating conflicts and lawsuits;
- adaptation of the accounting rules;
- etc.

In other words, the main principles which are usually included in PPPs contracts.

15. In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.

No, the practice of subcontracting in the context of PPPs has not, to our knowledge, given rise to any particular difficulty.

16. In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field of application in the case of the phenomenon of subcontracting?

Additional rules do not appear to be desirable as long as, as is foreseen in Directive 2004/18 (Art.60 regarding public works concession), the contracting authority may set a minimum share of the amount of investment which can be awarded to third parties.

17. In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

See item 16.

18. What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not ?

The concept of an institutionalised PPP covers very different realities from one country to another. As regards semi-public companies, it is possible in some cases to observe distortions of competition as emphasized by the Green Paper. Semi-public companies, both existing and newly created entities, benefit from preferential access to information and from a cost structure unrelated to economic reality (i.e. publicly financed or controlled entities may be able to benefit from more favorable financing and costs structures not available to private companies). In addition, they can enlarge their field of activity by simply amending their statutes and this is the cause of the distortion previously emphasized.

It cannot be accepted that an operation should be entrusted by the contracting authority to a new company prior to its formation, irrespective of who the shareholders are, as mentioned in paragraph 60 of the Green Paper .

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

As indicated in item 6, it is important to allow a “bedding down” period before any evaluation of further policy is considered.

Once further experience is made, if the need arises, it could be useful to elaborate at the EU level a clarifying document which would address the following concerns :

- introduction of a specific procedure which will make it possible to demonstrate the actual failure of the private sector to respond to the service project envisaged and justify recourse to an institutionalised PPP;
- compliance with fair conditions of competition in determining the reference cost structure, in particular by the use of equipment, means and public staff at market costs and by the use of the data required for prior evaluation (see Point 1 of the additional observations);
- equality of access to public subsidies;
- guarantee of absence of interest as between the contracting bodies and the governing bodies of the semi-public companies.

As regards the acquisition of an interest by a private-sector operator in a public entity, the basic principles of transparency and equality of treatment should be complied with.

20. In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?

In general, the risk of loosing control, especially from contracting authorities, on each single part of a PPP contract (conception, financing, works execution, supply, management once the project is completed and so on) seems to be the highest barrier for the development of PPPs. Therefore, the decisions taken in this area belong more to ideological positions adopted by the contracting authorities than to the wish not to comply with the principles of free competition in an open economy.

Another relevant problem is the need to have a clear and stable legal framework, which would facilitate the access of private finance to public works initiatives.

21. Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of "good practice" in this framework which could serve as a model for the Union? If so, please elaborate.

FIEC, as a European trade association, is unable to provide detailed comment.

22. More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

We do support the Commission's suggestion to establish a network of experts to facilitate the exchange of best practice and of value for money considerations.

It is important, however, to set clearly the task and the operating and monitoring rules in the recommendations for this network when it is being established.

The questions addressed by the Green Paper do not exhausts all of the subject specific to PPPs and, as emphasized in the introduction, taking account of the economic, financial and accounting factors and those relating to the transfer of risks etc. gives rise to the following additional observations.

1. Prior evaluation of the PPP contracts

A prior evaluation should be carried out by the contracting authority with a view to choosing the procedure which is most favorable as regards the proper management of public funds.
It should also include a scale of criteria making it possible to check the balance of the tenders submitted by the tenderers, thereby precluding distortions of competition arising from cost structures which do not reflect economic reality.

2. The most economically advantageous tender

As is the case for the competitive dialogue, it is essential to promote and encourage at the EU level the award of PPPs according to the principle of the most economically advantageous tender on the basis of previously announced award criteria.
Any clarification as to the methods which could be applied, in particular the weighting of these criteria, is highly desirable.

3. Duration of contracts

Determination of the duration of the contracts should not be based solely on conditions relating to depreciation and a reasonable profit. To be operative, these two ideas should be defined more precisely in accordance with the economic and financial characteristics of the projects and the extent of transfer of risks.

4. Effect of changes taking place during performance of the contract

Provided that the initial object defined by the public authority is complied with, this type of contract should allow changes to be made in accordance with changes (environmental and technical constraints, development of demand by users etc.) which may take place throughout its performance without having to call into question the award to the holder. That is why it is highly desirable that competition and the contract resulting therefrom should relate to the functionalities and performance to be obtained from the competitors rather than locking the latter into a "detailed-design" resulting from public contracts and not from this spirit of a PPP. Failing this, the essential conditions for confidence in the private-sector operator and lenders would not be fulfilled.

5. Cases of early termination

The contract documents should provide for procedures for compensating the holder in cases of early termination, in particular those related to a change taking place in the conditions governing the execution of the project.

6. Access by SMEs to PPPs

It is important to make sure that the size of these projects as well as the conditions governing their award will permit actual access by SMEs.

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IPFA Summary of the Green Paper on Public-Private-partnerships and Community Law on Public Contracts and Concessions

The Green Paper has been issued by the Commission for consultation; inviting comments on the questions set out in the paper by 30th July 2004.

The paper, which is relatively brief, outlines the history of Public-Private-Partnerships within the member states and emphasises the term Public-Private-Partnerships (‘PPP’) is not defined at community level.

As most procurement Directives have been developed to deal with traditional contract procurement, the evolving concept of PPP is not adequately covered within the EU legislation and this inevitably leads to uncertainty in the procedures to be adopted.

However, the Commission recognised at European level that the issue of PPPs could help to develop trans-European transport networks, which had fallen behind schedule, mainly owing to the lack of funding. The Council has approved a series of measures in support of PPPs for that reason.

The commission does not see PPP’s as a miracle solution for a public sector facing budget constraints but for each project real value should be identified.

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The paper addresses the effect of community legislation on public contracts and concessions on PPPs. In particular the principles of freedom of establishment and freedom to provide services under the Treaty (Articles 43 to 49) which encompasses the principles of transparency, equality of treatment, proportionality and mutual recognition. Directives have been introduced which deal with coordination of procedures for the award of public contracts which reflect these principles.

The fact remains that many representatives of interested groups consider that the Community rules applicable to the procurement of PPPs are insufficiently clear and lack cohesion between the member states.

This situation is proving an obstacle to the creation or success of PPPs which in turn restricts member states in the development of badly needed infrastructure projects.

The paper is intended to provoke a debate to ensure that PPPs can develop in effective competition and have legal clarity.

The commission emphasises that the concept of a transfer of a service from the public sector to the private sector is an economic and political decision which, as such, falls within the sole competence of the member states.

The paper is therefore examining the procedure after the decision by a local or national authority to transfer the service from the public to the private sector.

The paper separates PPPs into two models:

- Contractual nature – contract provides a partnership between the public and private sectors.
- Institutional nature_– cooperation or venture between the public and private sector within a distinct entity

Contractual Nature

Often referred to as the 'concession model' with a direct link between the private sector and final user – the private sector provides a service to the public 'in place of', though under the control of the public sector.

Other types include the right for the private sector to carry out and administer an infrastructure for the public (eg; school, hospital, prison), the UK PFI model and the German Betreibermodell are examples. Community Directives lay down detailed rules on advertising and participation. The Directives state that the public authority should follow the open or restricted procedure to choose its partner. Negotiated procedure is an exception but sometimes possible when 'the nature of the works or the risks attaching do not permit prior overall pricing'.

The commission are of the view that difficulty of prior pricing owing to the complexity of the legal and financial package is not to be treated as an exception.

Directive 2004/18/EC has introduced a new procedure known as 'competitive dialogue' to be used when awarding particularly complex contracts. It can be used if it is not possible to define the technical means that would best satisfy the needs of the project or where it is not possible to define the legal and/or financial form of a project. The new procedure will allow the contracting bodies to open a dialogue with the candidates to identify solutions to meet the needs of the project, at the end of the dialogue the candidates then submit their final tender based on the solutions identified.

The Commission considers that the rules resulting from the treaty can be summed up:

- fixing rules for selection of private partner
- adequate advertising of proposed concession and rules for selection to monitor impartiality
- introduction of genuine competition
- Compliance with equality of treatment through procedure and selection.

The Report questions the duration of the concession – the duration of the relationship must be set so that it does not limit open competition beyond what is required to ensure that the investment is paid off and that there is reasonable return on invested capital. An excessive duration is likely to be censured on the

basis of the principles governing the internal market and Treaty provisions on competition
“Step in” clauses, may result in changing the private partner without a call for competition. This is acceptable only if made through unforeseen circumstances or public policy grounds. Substantial modification must be considered equivalent to a new contract, requiring a new competition.

The report reviews the anomalies in the sub contract arrangements.

Institutional PPPs

The joint entity (public and private) delivers the service for the benefit of the public (eg; water supply, waste collection). The public authority participates in the decision making body.

The law on public contracts and concessions does not apply to a transaction creating a mixed – capital entity. However, the Treaty and the Directives, if applicable, do apply.

The selection of the partner should take into account the most economically advantageous offer in terms of the services to be provided. The absence of clear and objective criteria on selection could constitute a breach of the law on public contracts and concessions. The conditions governing the creation of the entity must be clearly laid down when issuing a call for competition.

The report raises the problems surrounding an award of contract prior to the incorporation of the entity which can be confused with the phase of allocating the tasks.

The report states that such formulae do not appear to offer satisfactory solutions in terms of provisions applicable to public contracts. Competition can be distorted by the privileged position of the company being incorporated, and likewise the private partner. In addition the subject matter of the contract is often insufficiently clear until after incorporation of the company. This raises issues on the principles of transparency and equality of treatment, are these principles being correctly followed?

Where tasks are awarded for an unlimited period, competition issues arise. Joint creation of these entities must respect the principle of non-discrimination in respect of nationality in general and free circulation of capital in particular.

Tasks allocated to the private partner after the entity has been formed must be put out to competition, if they were not included in the original competitive tender. To do otherwise would breach the law on public contracts and concessions.

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Issues

1. Are the Commissions objectives under the Treaty and Directives being achieved in the PPP process within the Member States? If not, why not? What differences arise within the member states?

2. Has the introduction of Directive 2004/18/EC on ‘competitive dialogue’ resolved issues or added to them?

3. The issues surrounding subcontracting remain complex – would new legislation clarify the uncertainties?

4. How should the duration of projects and step-in rights be dealt with? At the present time they appear open to challenge by the Commission in the future

5. The issues surrounding joint public/private entities appear complex and ambiguous and open to Commission challenge after a deal has been competed. Is legislation necessary to clarify the issues?

6. Should the EC adopt a new Directive with the aim of introducing new rules on concessions and PPPs for all Member States?

7. Is there a lack of effective competition in the market? Has the Treaty and Directives contributed to this? Are other measures needed to produce a more competitive environment?

8. A concession contracted after negotiation may be redefined as a public contract. How can this legal uncertainty be resolved?

9. Are non – national operators guaranteed access to the PPP schemes? Are they adequately advertised? Do the selection procedures produce genuine competition?

10. Are there any practices for evaluating tenders which have a discriminating effect?

11. Is there a good PPP model in another country which the Union could adopt and develop?

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International Project Finance Association (IPFA) submission to the Commission of the European Communities on the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions

United Kingdom Branch Submission

30th July 2004

The IPFA has circulated the Green Paper to its members and invited comments. In the limited time for consultation, the IPFA has held two branch meetings, in London and Holland, to facilitate discussion of the issues raised.

This Submission represents the views of the members in those branches raised at the meetings, including subsequent individual Submissions. The Submission concentrates on the main issues raised.

Has the introduction of Directive 2004/18/EC on 'Competitive Dialogue' resolved issues or added to them?

There are few people who are aware of the 'Competitive Dialogue' Directive. When the Consolidated Procurement Directive was first published by the EU and the implications of the Directive were reviewed it appeared to a number of UK contractors to raise more questions than answers. Even the title of the procedure, "Competitive Dialogue", is a dramatic departure from established PPP concepts in the UK of full-blown negotiation, when conducting contractual discussions.

The Dialogue procedure centres on “very complex contracts”, which is not defined in the Consolidated Procurement Directive. Under the procedure, there must be a minimum of three bidders to ensure fairness. Each of these three bidders applies in response to an Authority’s advertisement; each of the bidders are then asked to enter into exclusive dialogue with the Authority to arrive at a fully developed technical solution. At this point, the Authority then looks at each of the three tenderers submissions and is then able to pick either one bidders solution or retain ‘the best’ aspects of the tenders and use this as a hybrid tender. Once the final specifications are confirmed by the Authority, the Authority then goes back to the bidders and asks them to submit new bids based upon the “hybrid” final specification, or “best” bidders solution, as the case may be. It begs the question as to what extent there will be latitude to negotiate following the issue of this tender. In the UK’s experience post selection of preferred bidder stage is used as an important part of the contractor’s due diligence in order to finalise issues such as staff transfer and legacy equipment assessment.

Another issue that UK contractors are concerned about relates to each bidders’ intellectual property rights. The Consolidated Procurement Directive merely states that each awarding Authority must “observe the law on protection of intellectual property”. How will each bidder view the possibility of its best ideas/trade secrets being shared with its rival bidders? How will the costs of licensing such intellectual property rights be approached? Will this be part of bid costs?

Clearly, the “Competitive Dialogue” is a much more complicated procedure than the traditional Negotiated Procedure. Will this procedure have an impact on deal flow in the PPP sector?

The main issue that concerns the contracting community is the likely huge rise in bid costs. In addition, the cost of issuing and holding separate negotiations for a minimum of three strands of tenders is likely to be huge. Do the Local Authorities have the resources to undertake the “Competitive Dialogue”? If not will they be provided with such resources? It has been reported, as an initial assessment that bid costs in UK PFI schemes are likely to increase to 20 to 25% as a result of this process. However, this is viewed by many as a conservative estimate and the actual increases could be much higher.

How will the bid costs be paid by the Authorities in the initial stages? There is some provision for bid costs or compensation within the text of the “Competitive Dialogue” procedure as set out in the Directive, but how will these be paid, will costs be capped? Can any public body afford to sign up and agree to pay these costs if the project never reached financial close? Will the Commission agree to pay these costs on behalf of the Local Authorities?

Unfortunately, a large number of these uncertainties will not be resolved until the Consolidated Procurement Directive is incorporated into National law which is scheduled for the third quarter of 2005.

A further concern is the ability of the Commission to intervene in a process where no bidder feels aggrieved by the Negotiated Procedure. The only reason why the EC feel there is a need to interfere is due to concern over corruption. It is agreed that “Competitive Dialogue” can identify corruption; however, there is no real concern in the UK market on this issue. The utilities industry is one of the main sectors and they are able to use the Negotiated Procedure; what is the “Competitive Dialogue” going to achieve for other sectors?

The Commission is simply creating more complex procedures for the procurement of projects in the industry which are neither cost effective nor justified on competition grounds. The Commission wishes to restrict the Negotiated Procedure for reasons that may not be warranted. They have set themselves against the Negotiated Procedure but “Competitive Dialogue” simply will not work.

The Paper focuses hard on transparency and fairness, but very little on innovation and the efficiency of the bidding process; the “Competitive Dialogue” procedure could have a significant adverse impact on innovation (due to the loss of bidders’ intellectual property) and by increasing bidding costs, could deter companies from participating in bids. In addition, whilst there have been no changes to the Negotiated Procedure, the Green Paper reinforces the EU’s view that this should be very rarely used, so it remains to be seen whether the UK’s use of that Procedure can be sustained in the long-term.

The Consolidated Procurement Directive does appear to set out that in **“**very complex contracts” where the “Competitive Dialogue” is used, it may be possible to revert back to the Negotiated Procedure where there is a reduction in the number of bidders or an increase in discontinued bids, but at what level will that decision be made? Can a local government Authority be confident to make this decision under the current regime?

Further clarification and guidance is required on the ‘particularly complex contracts’ aspect of the new Directive. When can a contracting Authority legitimately consider a proposed contract to be "particularly complex" such as to allow it to adopt the “Competitive Dialogue” procedure?

When using the “Competitive Dialogue! procedure, where should the contracting authority be required to "draw the line" on the "clarification", "specification" and "fine-tuning" of tenders? When will such communications be considered to have the effect of "modifying substantial aspects of the tender or the call for tender" such as to risk distorting competition?

The issues surrounding subcontracting remain complex - would new legislation clarify the uncertainties?

There appears to be some general confusion on sub-contracting that requires clarification. As it stands, the new Directive provides essentially for two separate provisions on sub-contracting: (i) contracting Authorities may be required to insist in contract documents that tenderers indicate the share of the contract that they intend to sub-contract to third parties (Article 25); and (ii) contracts that are not awarded by contracting Authorities but which are nevertheless subsidised by more than 50% by contracting Authorities have to be awarded in accordance with the procurement rules (Article 8).

Conceptually why do we need to require subcontracts to be tendered on a similar basis as the project concession? This level of uncertainty created by the Green Paper does not assist the stability of the PFI/PPP market.

The added value of PFI/PPP projects is an integral approach to the activities and risks of all participants. Tendering subcontracts thereby undermines the very approach that provides for the added value of PPP projects and presents projects with the additional interface risks that PFI/PPP has managed to eliminate.

The Green Paper appears to be concerned with Institutional PPPs. What is the future for NHS LIFT projects? The industry perhaps should be a lot more concerned with the future than originally thought. Could signed NHS LIFT projects be challenged? How can the original concept of LIFT work if the Commission starts interfering?

Within the variation mechanism, one project can lead onto the signing of others, however, in principle these may well be in breach of EC procurement. As one project has spawned another and they won't have been put out to tender, such exclusivity may be found to be illegal; will the EC forbid the extension of contracts?

There appears to be a complete lack of harmony on how EC legislation is being adopted domestically and the UK market could be penalised for introducing new innovative concepts which are both cost effective and in the interest of fostering local investment.

The Paper as we have mentioned, raises many more questions then it proposes solutions. From a UK perspective we have an established oversight within the National Audit Office and an excellent framework within bodies such as Partnerships UK and the Office of Government Commerce. A ‘one size fits all’ policy will not achieve the model contract.

It would be far more helpful if the Commission stop using the term ‘concessions’ in a general manner. It must be more clearly and specifically defined.

How should the duration of projects and Step-in rights be dealt with? At the present time they appear open to challenge by the Commission in the future

Further clarification and guidance is required on Step-in provisions. Will the enforcement of so-called "Step-in" clauses, whereby a financial institution reserves the right to replace the project manager in the event of poor performance or similar solutions, constitute the award of a new contract, constituting a new procurement event? Surely not, this process is included in contracts to remove inefficient practices and prevent delays and cost overruns occurring on the project.

This is an issue raised by the Commission in the Green Paper (paragraph 48), but it seems possible to solve the issue by ensuring that the contract awarded includes the contracting authority's consent to the "step-in" provision. Would it not follow that, provided that the award process was conducted in accordance with the rules, the "economic opportunity" to provide the works or services would have been effectively advertised and awarded and the enforcement of the step-in provision would not constitute a new procurement event for the purposes of the rules? The parties would, however, have to be careful to ensure that when consenting to a new project manager, the scope of the works/services to be provided are not revised substantially or that the contract term is extended (or that any other terms and conditions were to be substantially revised).

Step-in rights are the key to ensuring bankable contracts; any interference will cause a disruption to project deal flow.

Limiting the concession to a fixed maximum period would affect bankability and economic viability and is not common practice in the rest of the world.

The doubts raised over the future legality of step-in rights could severely impact the future financing of public projects on a PPP basis as step-in rights are a key element of the protection sought by banks and are routine in any project financing.

With regard to contract duration, together with the Commission, the National Administrations need to produce guidance on appropriate contract duration. This should be done using as a guiding principle the objective requirements of the provider to make a reasonable return on his investment (to be decided on a case-by-case basis).

Should the EC adopt a new Directive with the aim of introducing new rules on concessions and PPPs for all Member States?

Given the point that we have reached within the market, more rules can only burden the industry and have a negative effect on the market.

Unfortunately the industry will not know the full cost of the Commissions intervention until after it has been implemented. There is little point in introducing new rules with which the industry as a whole will not and cannot comply.

The history of PPPs that is described in the Green Paper does not reflect or consider the experience and history of the UK PFI market, nor does it consider the UK Best Practice developments, such as standard form contracts and guidance, networks of Private Finance Units and the role of Partnerships UK. The Commission has not touched upon the experience and work of such important groups as Partnerships UK.

For example South Africa and Italy have adopted the UK model and adapted it to suit their needs and objectives. They used and followed the guidelines set by

Partnerships UK. It is fundamental that the Commission do not ignore these guidelines as they have been used successfully by other countries.

The Green Paper does not touch upon the role of Accession Countries, in particular the likely investment required for infrastructure over the next 10 years. There is also nothing in the Green Paper that relates to the possibility of EU financial support in the form of co-funding and potential Co-Funding from EU sourcing.

The Commission should certainly consider developing a central EU Task force to make available and encourage best practice. This knowledge could improve the use of PPP's in many countries, and ease their implementation, rather than the current situation where ad-hoc advice has to be gathered by potential procurers from many different sources and advisors. It is felt that this would naturally enhance open competition and transparency to a far larger degree than by restricting this development top down by implementing new EU Directives.

In an ideal world, it would be good to remove the inconsistencies between the different existing Directives – for instance, why should there be different fundamental rules governing "concessions", other forms of Contractual PPP's, and Institutional PPP's? The Commission should recognise that the PPP industry is working satisfactorily in a number of EU countries without the need for further EU intervention. The EU role should be to set up an EU Knowledge Centre which can act between governments and the private sector.

The issue was raised that although in principle it is agreed that this is the best way forward, the Commission would have to set up an EU PPP department initially as at present there is no central department or executive responsible for the promotion of PPPs within the EU. The Commission needs a distinct and identified PPP Department and Centre of Excellence with responsibility for policy and co-ordination within the EU Administration itself.

One issue that was raised by the Netherlands members was with regard to the possible standardisation of document language. At the present time the initial advertisement of the project in the OJEC would be in English. However, all of the supporting documentation is normally in the local language. This approach leads to high translation and other costs and favours local bidders. Consideration could be given to standardisation of processes and use of a common language for all the project documentation.

Are there any practices for evaluating tenders which have a discriminating effect?

Put simply the UK industry is working, competition is very genuine and the bidders for each contract are trying hard to win. The UK has experienced twelve years of trial and error, what is the benefit of a third party trying to change things?

One area which could be reviewed is whether Award Criteria are specified clearly enough, to introduce sufficient objectivity into the tendering process.

Together with the Commission, National Administrations urgently need to consider developing review systems that can operate effectively within procurement processes (i.e. prior to the actual award of the contract). Together, they may also consider producing guidance for contracting Authorities when planning the procurement of PPP projects.

Additional Comments

The most important issue for the UK is one that is addressed only indirectly in the Paper. That is that, although the Paper suggests that PPPs are likely to be of increasing importance in the delivery of infrastructure projects throughout the European Union, their use is likely to be made much more difficult, if not impossible by the negative attitude adopted by the Commission to the use of the Negotiated Procedure for ‘run of the mill’ PFI projects, and the unavailability and unsuitable nature of the “Competitive Dialogue” for such projects. The UK has led the way in developing innovative structures and procurement procedures for PPP projects, but the Commission has not kept pace with this development by adapting the procurement rules to legitimise procedures which, in practice have worked extremely well in encouraging competition. It is ironic that the very people who suffer from the Commission’s inability to keep pace with developments in the UK are those whom the rules are intended to protect, that is the potential bidders for the future PPP projects, which now appear to be at risk.

Concern has been expressed by most people at the meeting about the implications for the PPP/PFI market arising from the ideas contained in the Green Paper. There is no reason to believe from reading the Green Paper that the authors have ever had any direct experience of what is involved in a PFI deal or understand the time and effort required to develop a track record in delivering deals which gives confidence to investors in the process. Moreover, there is virtually no recognition of the interests of private sector investors whose capital will be used for the benefit of a project used by the public sector.

While the intentions underlying the Green Paper may be laudable, in terms of facilitating the use of PPPs more widely in European markets, one has to be concerned about the effect on the existing market for PFI/PPP deals which are complex and don't readily fit into the existing categories of public procurement contracts. The doubts cast by the Green Paper on important commercial rights and issues simply create uncertainty, which is extremely unwelcome in any area which relies on financial markets.

It is generally acknowledged that the UK model of contractual PPP arrangements is covered within the scope of the revised Directive 2004/18. However, there is still considerable confusion (as there is under the existing "classic" Directives) as to how contractual PPPs should be awarded under the procurement rules. Specifically, how a proposed PPP project should be defined for the purposes of the rules (public works, services or works concession contract?) and what procedure the contracting authority is permitted to follow to award the contract (use of the new “Competitive Dialogue” procedure and the circumstances in which they can use the Negotiated Procedure?). In particular, the award of PPP contracts is characterised by a series of negotiations with providers and, once a preferred bidder has been appointed, a series of further negotiations to agree the final terms of the contract. Also, the scope and value of the contracts is such that providers are required to invest a considerable amount of resource to participate in these tender processes and the priority for our members is to have legal certainty as to the award process to be followed in each case.

The introduction of a new draft Directive on PPPs is likely to create more confusion rather than less, and less clarity rather than more. The new Directive 2004/18 provides an adequate and proportionate framework within which contractual PPPs should be awarded in an open and transparent fashion. The Commission should focus its resources on assisting the National Administrations to effectively transpose this new Directive into national legislation.

From the UK perspective, an institutionalised PPP arrangement agreed between a contracting authority and a third party provider (i.e. who is not under the *de jure* or *de facto* control of the contracting Authority) and under which the provider is funded at least partially by the Authority, will necessarily involve the award of a contract of some description. Where this is the case, these arrangements should be considered under the existing public procurement rules in the new Directive 2004/18 and the case-law of the European Court of Justice (*the Teckal case*).

In situations where a private legal entity is simply entrusted with a public mission, the act of entrustment may not necessarily involve a contract and may simply be effected by means of a specific legislative act (regional/local). In this situation the Authority does not award a "public contract" for the purposes of the procurement rules. This situation is already specifically addressed in the new Directive 2004/18. Article 3 provides that where a contracting Authority grants special or exclusive rights to carry out a public service activity to an entity other than another public body, the act by which the right is granted has to include a requirement on the provider to comply with the principle of non-discrimination on the basis of nationality ("non-discrimination clause"). This issue has also been discussed by the Commission in the recent White Paper on services of general economic interest (*COM(2004)374 final*) and there is now a serious risk that the debate on PPPs will confuse the services of the Commission and the National

Administrations currently transposing Directive 2004/18, thereby creating even more legal uncertainty.

Rather than initiating this debate on PPPs, the Commission should focus its resources on assisting national administrations transpose the new Directives to ensure the new rules are implemented and applied effectively. For example, further guidance would be welcomed from the Commission on what is meant by a "concession". Importantly, a clear distinction has to be made between a concession awarded as a form of "public contract" and a concession awarded as an "act" granting a special or exclusive right to perform a service in the general economic interest.

THE INTERNATIONAL
PROJECT FINANCE
ASSOCIATION

The Netherlands Branch Submission
30th July 2004

These comments are specifically from the viewpoint of IPFA members in the Dutch market.

The stated aim of the Green Paper is to launch a debate on the best way to ensure PPPs can develop in a context of effective competition and legal clarity (paragraph 16). Whilst the aim is a laudable one, the new Public Sector Directive (Directive 2004/18) and the general EC Treaty rules already provide an adequate and proportionate legal framework to protect the interests of traders established in other Member States who wish to participate in PPP projects. At this stage, more legislation would simply risk confusing the new framework currently being implemented across Europe. What is required is a concerted effort by the Commission and by the national administrations to transpose the new Directive effectively into national law and, in particular, to provide for adequate enforcement and review procedures to ensure the rules are complied with.

It appears that on one hand the Commission want to promote the Trans-European Network and promote PPPs. On paper at least, the European Commission has proposed to encourage Public Private Partnerships (PPPs). PPPs, the Commission has agreed, are a viable but under-used option for financing transport infrastructure in Europe, and measures are therefore required to make them more attractive both to private investors and reticent Member States.

However, there is still a wide spread feeling that not enough is being done to promote and create awareness of PPPs.

It is recommended that the only way that PPPs can work is if the public sector; both the European Commission and Ministries start pushing forward and begin to be seen to commit to PPPs. They must demonstrate a strong and clear political will.

The issues surrounding joint public/private entities appear complex and Ambiguous and open to Commission challenge after a deal has been completed. Is legislation necessary to clarify the issues?

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

It is very important to make a clearer distinction between contractual and institutional PPPs. Contractual PPPs - created on the basis of purely contractual links and arrangements involving the joint participation of a public partner, are not working and that Institutional PPPs - private partner in a mixed-capital legal entity, already exist in the form of Joint Ventures between, for example, banks and cities etc. These have worked well, is there any benefit from third party interference?

The principle of institutional PPPs has been growing for a long time. The industry has to set itself goals. It is important that the institutional PPP must be and remain a private enterprise and not a public one.

One suggestion is that there needs to be a distinction between large and small projects. Large projects have international competition; however, the smaller projects have just national level competition. It is becoming a difficult balance between domestic and international companies.

One issue that was raised was with regard to the possible standardisation of document language. Should PPPs have a directive to help investors and bidders to standardise documentation, where all documentation is in the same language?

The language in contractual documents should be seriously addressed by the European Commission. Any document one level below the main document is almost always written in local language. This can be extremely difficult and is a contributing factor between the balance of national and international firms. Standardisation may well be needed in order to ensure that competition is fair and all interested parties can understand the documents. This issue could be dealt by developing a Centre of Excellence.

With reference to the principle of open transparency, the Treaty lays down a commendable concept but in practice the rules of implementation inhibit the project process and the industry suffers as a result.

In the Netherlands for instance there are not too many projects being put out onto the market. The Commission must try and come up with unilateral rules. In small entities PPPs work well – do we need to have EU guidelines that are very strict? Or do we need to have models for specific entities for example the Dublin model.

Has the introduction of Directive 2004/18/EC on 'Competitive Dialogue' resolved issues or added to them?

Considerable concern has been voiced as to whether this was to be an additional public procurement tool or whether it would replace the Negotiated Procedure.

Within the Negotiated Procedure for example the Dutch projects of the A59 & N31 could not have used the standard procedure; it is not just contractual issues that should be looked at but the whole process.

Competitive Dialogue is not to be introduced until 2006, however it can be included if it complies with current laws. One of the main points made by the IPFA members was that we need more freedom for the Negotiated Procedures.

Competitive Dialogue focuses on technical innovations and an open and transparent fashion to promote these, whilst failing to realise that PPP/PFI projects are more concerned with an integral approach of technical solutions, risks and rewards that together provide for value for money for the procuring entities. Without negotiation the correct balance of all these aspects is unachievable and leaves procuring entities worse off.

The procedures for PPPs are just not adequate enough. There have been five projects in the Netherlands that have all ended at the Negotiated Procedure. “Competitive Dialogue” will not be helpful as the problems with it will just contribute to the breakdown of procedures.

The European Public Procurement Directives say very little indeed about Negotiated Procedures. The Dutch *Uniform Aanbestedingsreglement*, **UAR**-EG 1991 contains more detailed rules (articles 40-53).

In the consultation period each tender is discussed separately, this can be very frustrating during consultation stage as too much creativity is allowed. We must try and set in stone the consultation stage but still allow for negotiation. There is a need to build a project Negotiated Procedure.

The issues surrounding subcontracting remain complex - would new legislation clarify the uncertainties?

There is substantial confusion in the Green Paper in relation to issues surrounding subcontracting. Conceptually why do we need to require subcontracts to be tendered on a similar basis as the project concession? This level of uncertainty created by the Green Paper does not assist the stability of the PFI/PPP market.

The added value of PFI/PPP projects is an integral approach to the activities and risks of all participants. Tendering subcontracts thereby undermines the very approach that provides for the added value of PPP projects and presents projects with the additional interface risks that PFI/PPP has managed to eliminate.

How should the duration of projects and Step-in rights be dealt with? At the present time they appear open to challenge by the Commission in the future

An important point discussed was the duration of project and Step-in rights, the position of financial players is quite clear; Step-in rights would deprive them of a key contract remedy.

Interference with step-in rights and limiting the concessions to a certain time period will affect bankability and economic viability and is not common practice in the rest of the world.

In terms of duration it is very country specific, some countries have a maximum duration ie; France, Spain have 60 years. Why should the Community interfere with local practice which has been successfully used in the financing and operation of existing projects?

Step-in rights are a mechanism required by the banks to deal with default. What alternative protection would the Commission suggest be applicable if these were deemed inappropriate under the Treaty or Directives?

From the pubic sector side prices are fixed, if by step-in rights the new contractor replaces the former, will it be the same price?

The members attending the meeting in Holland were concerned that some issues raised by the Commission in the Green Paper indicated that the writers did not fully understand the negotiation and operation of a typical PPP project, including the role of the banks and operators. In parts the Report adopted a theoretical approach to the project as opposed to a practical approach.

Step-in rights are not used to let projects without being tendered, but are a last resort measure to save distressed projects and as such provide for more competitive PFI/PPP projects, as they decrease the risks for banks.

There is a need for clarity of the overall system; however, due to the different status of countries, from a practical perspective standardisation can not apply.

There should be a general rule but the issue should ultimately be up to the individual country, policies should keep to the main principles and then each country should be allowed to set its own rules under these guidelines.

It is just not feasible to have ‘one size fits all’ single EU contract for all countries. There appears to be little advantage of the EC producing a global model, even if it does make a one size fits all, changes will have to be made constantly over the years in order to keep up. A ‘one size fits all’ policy will not achieve the model contract.

In terms of EU standardisation of PPP/PFI contracts, the UK model and standard documents could be used as guidance in other EU Member States. The Netherlands branch was surprised that the Commission had not referred to the UK experience and the work carried out by important groups such as Partnerships UK. A great deal of the guidance was being used in other countries outside the EU.

It has been demonstrated by the UK Highways Agency DBFO road model that well drafted and practical documents used for the first project can be improved for subsequent projects. When understood and accepted by the private sector operator and banks this can enable additional risks to be transferred from the public to the private sector.

Complete standardised documents in the Netherlands is premature with only five projects completed.

However, risk profile and analysis of projects are resulting in high costs. Standardisation of risk profiles could cut bidding costs considerably.

The best approach would be to utilise 'best practice'. The UK is the most advanced in this regard. However, the UK approach may not suit all countries. .

Does the market standardise itself? For example the German 'A' model consists of twelve programmes that are all using the same model. If the market is working well by itself why intervene? Lessons are still being learned, the Commission should leave the market to regulate itself; what is the benefit of a third party interfering?

The key to moving forward as an industry in the Netherlands is through active public sector participation at the government departmental level.

The public sector fails to maintain a dialogue on key issues with the private sector. Active dialogue could lead to an early solution of issues as and when they arise.

The branch believed that the Netherlands required a platform to enable the public and private sectors to have the ability to discuss issues affecting projects. The benefits would be reduced bidding costs and an improved deal flow.

The Commission should form or encourage the formation of a European PPP Knowledge Centre – representatives from each country would set general guidelines and would be able to determine which models work best.

This Knowledge Centre should have a clear agenda, focus on the key issues within the industry and provide training sessions to less experienced member states, it should consist of experienced representatives form various countries.

The International Project Finance Association

IPFA Recommendations Based on IPFA Member Comments

Following a consultation period with IPFA members and two meetings held in the Utrecht, Holland and London, England the IPFA offer the following comments on the Green Paper for consideration by the Commission.

- We recommend that the Commission carry out a cost benefit analysis to clarify the potential increase of bid costs in bidding costs as a result of implementation of the "Competitive Dialogue" procedure. If a procuring Authority is required to take a minimum three bidders through the initial bidding stage, it may well lead to an increase in bidding costs in excess of 20 to 25%. It is very difficult to see any advantage requiring separate confidential negotiations with a minimum of three bidders. What is going to be gained by the use of “Competitive Dialogue”, other than bidders incurring substantial additional costs? We also question whether public awarding authorities in the EU Member States have the resources to undertake these separate negotiations?

- We would suggest that the principles of “Competitive Dialogue" can be captured by use of PPP convergence/consultation phases within a PPP project timetable in order to test market responses to a PPP project. As a result the whole market would be able to comment on how the project can be structured without the need for formalistic expensive parallel bidding discussions. In addition, potential concerns of bidders to the use of their intellectual property rights would be removed. Under this convergence/consultation phase approach, procuring Authorities would not be restricted to the views of at least three formal bidders, but potentially the entire PPP market.

- It is accepted that the objective of the Green Paper is to provoke discussion and debate on the procurement issues surrounding PPP projects. However, the Paper is disappointing in that it identifies problems but offers no solutions. In addition, the comments on Step-in rights, concession duration and sub-contracting have caused concern within the PPP community throughout Europe. This Paper questions fundamental principles of project finance adopted throughout the world.

- We would recommend that the Commission review the Treaty and Directives and suggest positive proposals to make changes to them so that they fall in line with the existing market for PPPs in Europe.

- We would recommend that extensive consultation takes place before the Commission introduces further Directives affecting the PPP industry in Europe.

The introduction of the ‘Competitive Dialogue’ procedure in Directive 2004/18/EC was not subject to detailed consultation with PPP participants. As a result the industry is now faced with a procedure which will prove to be cumbersome, ineffective and expensive for participants – both public and private sectors.

- We would recommend that further consideration is given to the increased use of the ‘ Negotiated Procedure’. The Commission has not provided any valid grounds to restrict its use and it has proved to be a resilient and cost effective process to conclude PPP projects in Europe.

- We would recommend that the Commission set up an EU PPP Taskforce - a centralised force consisting of experienced representatives from various countries. The Taskforce should have a clear agenda, focus on the key issues within the industry and provide strategic direction - The taskforce should provide clear and specific guidance on how it proposes to assist the Member States with the development of PPPs, in particular the implementation of pilot projects. It should identify key issues that the Member States may face when implementing any new guidelines or legislation for projects and suggest how they can minimise risk.

- In addition to the Taskforce we would recommend that the Commission sets up a Centre for Excellence with a permanent staff under the control and guidance of the Taskforce. The Centre would develop best practice procedures, produce guidelines to assist Member States and be empowered to resolve any differences that may arise between national law and EU law in respect of sector issues or project issues.

- The Commission needs to provide the industry with far more clarity and guidance as to its existing concerns and future intentions on the issue of

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- Step-in rights and Project Duration. The present uncertainty created by this report will have an impact on financing of future public projects.

- The comments regarding sub-contracting and contract duration seek to address a perceived "evil" which in practice is difficult to recognise, at least in the UK market. There is substantial confusion in the Green Paper in relation to issues surrounding subcontracting. This level of uncertainty created by the Green Paper does not assist the stability of the PFI/PPP market. The Commission must react to this concern by providing a much clearer set of guidance not legislation. Additional legislation should be avoided.

Geoff Haley
Chairman
IPFA

ISUPE
Initiative pour des services d'utilité publique en Europe

POSITION D'ISUPE SUR LE LIVRE VERT SUR LES PARTENARIATS PUBLIC-PRIVE ET LE DROIT COMMUNAUTAIRE DES MARCHES PUBLICS ET DES CONCESSIONS

Bruxelles, le 22 juillet 2004

Introduction

ISUPE (Initiative pour des services d'utilité publique en Europe) est une association sans but lucratif regroupant de grands opérateurs locaux, nationaux ou européens de services publics en réseaux (transport, énergie, poste, télécommunications…). Son but est de promouvoir une conception moderne des services d'intérêt économique général (SIEG) tant au plan national qu'européen.

ISUPE souhaite présenter ses observations sur le Livre vert sur les partenariats public-privé (PPP) et le droit communautaire des marchés publics et des concessions publié le 30 avril dernier par la Commission européenne.

ISUPE se félicite de l'objectif poursuivi par le Livre vert visant à assurer plus de sécurité juridique aux utilisateurs des PPP. Les membres d'ISUPE participent très largement aux montages de PPP, voire sont à l'origine de tels montages. Les secteurs représentés par ISUPE, comme l'énergie et le transport, sont en effet riches en infrastructures et missions de services publics ouverts aux possibilités offertes par les PPP.

ISUPE regrette cependant que l'approche adoptée par la Commission ne relève que de la seule perspective juridique des marchés (et semble déjà assez directive pour un Livre vert) et oublie de traiter des volets économiques, industriels, sociaux et financiers des PPP. A ce titre, le guide intitulé « *guidelines for successful public-private partnership* » publié à l'initiative de la Direction régionale politique régionale de la Commission en mars 2003 remplit plus complètement ce rôle d'information et de clarification des pratiques.[1]ISUPE est ainsi favorable à l'élaboration de communications de ce type par la Commission, communications qui aident les opérateurs dans leur démarche de montage et de constitution de PPP au plan européen.

[1] Ce guide est publié sur le site de la Commission : http://www.europa.eu.int/comm/regional_policy/sources/docgener/guides/ppp_en.pdf

ISUPE souhaite mettre l'accent sur trois points et laissent aux opérateurs le soin de détailler leur approche dans le cadre de leurs propres positions :

1. Non assimilation des PPP concessifs aux marchés publics
2. Application des principes communautaires aux PPP concessifs
3. Clarifications souhaitées sur les PPP institutionnels

Non assimilation des PPP concessifs aux marchés publics

ISUPE estime que la réglementation applicable aux marchés publics n'est pas parfaitement adaptée aux PPP de forme concessive. Le type de relations entre la collectivité et les opérateurs, la complexité des montages, la durée de la relation contractuelle, les formes de rémunération, le risque encouru, la nécessité de rechercher des formules innovantes plaident pour une prise en compte des particularités des PPP concessifs par rapport aux traditionnels marchés des autorités publiques.

De plus, la forme concessive a été créée en Europe pour répondre aux besoins spécifiques des délégations de service public en réseaux auxquels les marchés ne pouvaient seuls faires face.

ISUPE estime par ailleurs que la mise en place de la procédure de dialogue compétitif dans les marchés ne peut apparaître comme une procédure satisfaisante pour les PPP de forme concessive (les concessions ne peuvent être assimilées ispo facto aux marchés complexes). En effet, cette procédure n'a pu encore être pratiquée à grande échelle et il est mal aisé de savoir si elle offre la flexibilité souhaitable en matière de PPP concessifs.

De plus, aux dires des praticiens, la procédure de dialogue compétitif pose d'importants problèmes de confidentialité des savoir-faire et des procédés inclus dans les offres. Or, le renforcement de la confidentialité rendrait complexe cette procédure et donc en grande partie inadaptée aux nécessités des PPP concessifs.

De même, la procédure de dialogue compétitif suppose une formalisation poussée et a été élaborée pour répondre aux besoins spécifiques des marchés publics. La procédure négociée qui offre la flexibilité la plus forte ne s'applique qu'à des contrats bien spécifiques et ne saurait concerner les PPP concessifs dans leur ensemble.

Enfin, la soumission des PPP concessifs au régime actuel des concessions de travaux serait contraire à la différence de nature entre la réalisation d'un ouvrage et l'accomplissement d'une mission de service public.

ISUPE souhaite ainsi que les PPP à caractère concessif conservent leurs spécificités au plan communautaire, dans le respect des règles de concurrence de l'UE, et ne soient pas soumis aux règles communautaires des marchés publics.

Application des principes communautaires aux PPP concessifs

ISUPE soutient pleinement l'objectif de transparence de la Commission en matière de PPP. Il s'agit en effet d'un objectif indispensable pour assurer le bon fonctionnement des montages et permettre la meilleure utilisation des fonds publics.

ISUPE estime que cet objectif est parfaitement rempli par l'application des principes du Traité aux articles 43 et 49 dans le respect des règles de concurrence. En particulier, lorsque les conditions d'octroi de subventions publiques à un PPP concessif sont remplies, celles-ci ne peuvent avoir pour effet de distordre le marché par rapport aux autres opérateurs.

Les principes de transparence, d'égalité de traitement, de proportionnalité et de reconnaissance mutuelle forment un corpus de règles indispensables pour assurer le succès des PPP. Plusieurs pays européens, dont la France, ont d'ailleurs mis en œuvre ces principes dans des législations nationales (loi Sapin de 1993 et récente ordonnance de 2004 sur les PPP en France).

Le montage des PPP doit pour sa part garder la plus grande flexibilité possible afin de ne pas décourager les opérateurs face à des encadrements réglementaires trop stricts. Il appartient aux autorités publiques, mais aussi aux organismes financiers, chambres de Commerce, associations professionnelles de promouvoir des outils souples permettant d'assurer le bon fonctionnement des PPP.

ISUPE estime, sans préjudice de l'application des règles de concurrence de l'Union, que la mise en place d'un encadrement communautaire trop précis des PPP concessifs n'apporterait pas de valeur ajoutée par rapport aux instruments existants au plan européen et national.

Un tel encadrement pourrait par ailleurs compliquer l'application de régimes juridiques aux PPP au lieu de simplifier la situation et de garantir la sécurité juridique: réglementation nationale ou règles communautaires sur les concessions (si aucun seuil n'est prévu) ou encore règles sur les marchés publics selon le type de PPP.

Par contre, ISUPE pense qu'un exercice d'évaluation, de consolidation, d'inventaire et de communication sur les outils juridiques à la disposition des opérateurs pourrait aider les acteurs des PPP (en particulier une communication exposant des cas concrets et des exemples de modèles contractuels à titre facultatif).

De même, une communication de la Commission qui clarifierait la distinction et les définitions des PPP de forme marché ou concessive serait très utile aux opérateurs dans le but d'éviter les contentieux.

Le Commissaire Bolkenstein a d'ailleurs soutenu cette approche d'évaluation des bonnes pratiques relatives aux PPP dans une intervention récente sur le livre vert[2].

[2] Discours publié par la Commission sous : http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/04/253&format=HTML&aged=0&language=FR&guiLanguage=en

Clarifications souhaitées pour les PPP institutionnels

En matière de PPP institutionnels, la Commission ouvre des voies nouvelles s'agissant de la question de l'attribution des missions aux entités juridiques créées en partenariat par les autorités publiques et le secteur privé.

ISUPE estime que des réflexions plus poussées doivent avoir lieu s'agissant de ce champ nouveau d'investigation pour la Commission. En effet, ce dernier touche de très prés près au principe de libre administration des collectivités locales (rappelé dans le nouvel article I.5.1 du Traité de Constitution européenne).

Les collectivités doivent rester libres de travailler sous la forme de régies (« in house »), de délégations de service public ou d'entités mixtes sans se voir imposer des contraintes qui les dissuaderaient de choisir une forme juridique plutôt qu'une autre. Si le livre vert ne semble pas vouloir forcer au choix d'une technique juridique par rapport à une autre, il n'en demeure pas moins qu'une réglementation en ce domaine pourrait avoir un effet similaire.

Les membres d'ISUPE participent à l'activité d'entités mixtes et souhaitent ainsi que cette forme juridique reste disponible dans sa souplesse actuelle.

ISUPE demande ainsi qu'avant toute initiative de la Commission dans ce domaine, une étude détaillée et une communication de la Commission soient réalisées visant à évaluer le champ en Europe de ces pratiques (en particulier le champ juridique du « in house »), les données économiques et sociales à prendre en compte et l'évaluation de la dimension communautaire en cause dans ce champ de la politique locale.

Conclusion

ISUPE rappelle que l'Union européenne doit veiller à ce que les services d'intérêt général (SIG) fonctionnent de la manière la plus satisfaisante en Europe comme l'a rappelé le récent livre blanc sur les services d'intérêt général (SIG)[3] publié par la Commission en mai dernier.

Il s'agit maintenant de mettre en œuvre cette prescription de l'article 16 du Traité, repris et amplifiée par l'article III-6 du nouveau du Traité constitutionnel.

Le livre vert PPP, à l'instar d'autres textes récents de la Commission, doit constituer un premier signe de la volonté de la Commission en la matière.

C'est pourquoi ISUPE espère que les suites du livre vert PPP confirmeront la volonté indiquée par le livre blanc SIG[4] et prendront en compte les préoccupations émises par ISUPE dans sa position.

[3] Publié sous :
http://www.europa.eu.int/comm/secretariat_general/services_general_interest/docs/com2004_374_fr.pdf

[4] ISUPE a pris position sur le livre blanc SIG, position publiée sous : www.isupe.org

The Green Paper consultation process

OGNETs experience on PPP

1. The *Competitive Dialogue* is a process that has been used to choose players in Contractual PPP's. Why isn't this system also used as a guideline for Institutionalised PPP's? The case of Liverpool[1]-UK shows that using a competitive dialogue for Institutionalised PPP can be very useful.

2. Public local actors tend to work mainly with Contractual PPPs rather than Institutionalised PPPs. It seems that the reason for this is the lack of understanding—from public actors—on when it is convenient / appropriate to use a Contractual PPPs and/or Institutionalised PPPs. How can the EC help local authorities better understand the differences between them? The EC could play an important role in explaining local authorities what are the main differences between these contracts, especially in terms of the level, detail and the destination of the product.

3. It seems that PPPs are now being geared more towards privatization and use of international players rather than public local players. The problem with such an approach is that this could be inhibiting further Local Economic Development and/or Territorial Development. Why not establish an obligation where public authorities have to justify their choice? It is important that local players can compete at both local and international levels. The EC, for example, could make an obligation concerning transparency and/or justification of why such actor/player was chosen for that specific PPP.

4. In regards to the purchase/selling of public lands, no clear guidelines have been established until now. Because of this, there is a potential lack of transparency—which many times leads to corruption—because the land is being sold out without a proper competition. A lot of example show that public lands are sold sometimes with not enough concurrency and in a second stage the new owner is in a monopolistic state for the set-up of a PPP. Therefore, it is important that clear guidelines are established in order to prevent this. An idea could be to establish a rule that when a public land is sold out, there is an interdiction of approximately 5 years for the set up of mixed bodies for Contractual and/or Institutional PPPs.

5. Important financial institutions such as the European Investment Bank, World Bank, etc tend to work mainly with international players rather than small local players. In what ways can we help these global institutions work more closely with local players (e.g. construction firms, NGOs, etc)? It is important that they also have the possibility to have access to these funds.

[1] An Institutional PPP setup between the Livelpool city council and a private company in order to improve the organizational efficiency and the services offered (i.e. high costs, poor services, "do nothing" option) by the city council. The PPP was a success because of the partnership fundamentals, because it had effective structures supporting it and because it was carefully designed and implemented.

RICS

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July 2004

Green Paper on public-private partnerships and Community law on public contracts and concessions: COM(2004)327

Dear Sir

RICS welcomes the opportunity to comment on the European Commission's *Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions*. RICS is the world's leading professional body on all aspects of land, property, construction and the associated environmental issues, and regulates, represents and promotes 110,000 individually qualified chartered surveyor members in 120 countries worldwide. An independent, not-for-profit organisation, RICS acts objectively and in the public interest, providing authoritative advice on issues affecting business and society worldwide.

Chartered surveyors are neither architects nor engineers nor property lawyers, but the qualification and training of the chartered surveyor combines many of the skills and competence of these professionals with other skills relating to construction, land use planning and management of the natural and built environment. As well as their training and experience, chartered surveyors are bound by rules of conduct on matters such as client confidentiality and conflict of interest.

Our members work across both the public and private sectors, and are frequently affected directly or indirectly by the rules relating to Public-Private Partnerships (PPPs). Principally this is through their work in the construction industry, in which we have over 40 000 qualified surveyors active in Europe, but also includes their work in urban regeneration, the planning and financing of infrastructure projects and facilities management.

General comments

PPPs are an important delivery mechanism for the public sector, and an increasingly significant source of contracts within the wider construction industry. Many of our members interface with the current Community level regulations that impact upon PPPs and the national laws governing their use. While there are many case studies of effective PPP projects, there are also numerous examples where the current regulations and guidelines hinder their use. **RICS welcomes any attempt to remove barriers to the use of PPPs** and to create a more practicable and appropriate regulatory environment. RICS also **supports the promotion of PPPs as a vital model for financing and delivering infrastructure and other public projects**.

RICS supports the current overall strategy of DG Markt for developing the internal market, prioritising the public services for further liberalisation, as set out in the Communication in May 2003[i]. RICS believes liberalisation of public services can, with the right guidance and regulations in place, increase both efficiency and delivery quality. However, the facilitation of PPPs as part of that strategy is not properly followed through by the Green Paper.

The various models of PPPs that have developed over the last 10-15 years are increasingly critical tools for the funding, construction and management of key social infrastructure, and the regeneration of our urban fabric. Many public authorities are now looking to initiate PPPs as a means of funding projects, and preferring models of PPP over other potential funding mechanisms such as developer levies, taxes and user charges. PPPs offer scope for increased infrastructure investment without significant risk of inducing macro-economic instability. PPPs also have benefits in linking the payment for infrastructure with its use over time, which essentially helps to shift debt from public to private balance sheets.

PPPs are not the only option for funding and delivery, nor are they appropriate in every case. However, the full potential benefit of using PPPs to deliver infrastructure, as a means of contracting construction projects and of securing public service delivery, is not being achieved. RICS believes that PPPs can play a very significant role right across Europe in financing and delivering infrastructure and other capital-intensive projects in the future, providing the right regulations are in place.

The current problems stem from deficiencies in the operation of the internal market for the tendering and procurement of construction contracts, confusion regarding national and European laws, high levels of complexity and an overall perceived lack of transparency. The rules applied to PPPs vary between different Member States and this creates difficulties for many potential private sector partners to work cross-border on such projects. The uneven playing field is also reflected in a lack of common understanding regarding the form and definition of PPPs, their potential benefits and risks, and wariness between both the public and private sectors of forming long-term contractual partnerships.

The rules relating to public procurement, and particularly how they impact on often large and very complex construction projects, remain a concern of our members. Despite the steps taken to modernise procurement, through initiatives such as the competitive dialogue procedure, the current regulations still fail to reflect the particular complexities and requirements of PPP projects.

In addition to removing unnecessary regulatory barriers, **RICS supports a far more proactive promotion of PPPs** as a valuable model where individual projects are deemed to be appropriate. The goal stated in the May 2003 Communication to clarify the relationship between state aid and PPPs has also not been tackled by the Green Paper and remains a cause of concern for many practitioners in both the public and private sectors.

Given the potential benefits that a better understanding and utilisation of PPPs could bring, RICS welcomes the Green Paper as a step towards creating a more consistent and appropriate regulatory system for the creation and management of PPPs in the future. We also support the Commission’s goal to create greater legal clarity and effective competition in the sector.

We support the Commission’s acknowledgement that any act whereby a public entity entrusts the provision of an economic activity to a third party must be examined in the light of the rules and principles resulting from the Treaty, particularly regarding the principles of freedom of establishment and freedom to provide services, encompassing the need for transparency, equality of treatment, proportionality and mutual recognition.

We regret to note the continued lack of central definition of PPPs in Community legislation, and the lack of a specific Community level policy relating to PPPs.

Given their importance and the experience and best practice that has been developed by organisations and professionals such as our members, RICS encourages the Commission to consider developing further specific policies relating to PPPs for construction, urban regeneration and the delivery of public services. Although the form and types of PPPs can also be complex, **RICS strongly supports the creation of a set of common definitions** or taxonomy of what constitutes a PPP, and of the common models that have been developed, with particular reference to the form of contract applied. Particular emphasis should be placed on developing a Community level definition of the term public-private partnership at the earliest opportunity, and we encourage the Commission to move towards this as a next step.

This would help foster common understanding and transparency, a foundation for more consistent national regulations and facilitate competition within the internal market and, therefore, more competitive procurement. This could build upon the wealth of good work already carried out in this area by projects such as URBACT's research on PPPs in regeneration[ii], work by UNECE's Build-Operate-Transfer Group, the Commission report Public finances in EMU 2003[iii], recent work carried out on PPPs by the IMF, and the nascent but useful definitions already included in the Green Paper itself.

RICS believes the Commission should encourage the development of new and innovative forms of contract and facilitate the dissemination of such developments and other emerging best practice. For example, the work carried out in the UK by the Joint Contracts Tribunal alongside members of RICS in defining a groundbreaking approach to construction, the Major Project Form. This type of contract is shorter and less complex than traditional forms of construction contracts, flexible in the type of projects it can be applied to, and is compatible with current national and European private finance initiative (PFI)/PPP procedures.

RICS specifically welcomes

- The current strategy of DG Markt for developing the internal market, prioritising public services for further liberalisation, as set out in the Communication in May 2003 (internal Market strategy: Priorities 2003-2006).

- The attempt to understand how procurement rules impact upon the creation, management and delivery of PPP projects.

- The highlighting of the potential of PPPs for international transport infrastructure developments, particularly relating to TENs.

- The acknowledgement of PPPs as an important market in their own right, particularly within the construction sector.

- The need for the regulatory framework at the European level to reflect the experience of partners in PPPs at ground level.

- The need for transparency and a consistent approach.

- The continued application of structured selection methods. Common, well structured, standardised procedures contribute to objectivity and integrity of the selection process.

Concerns

RICS also has a number of concerns, and would therefore like to highlight some areas that would benefit from further consideration and where further clarity is required. These include:

- The lost opportunity represented by the significant delays in launching the Green Paper. This led to its publication one month after the adoption of the revised procurement directives, losing the opportunity to amend the directives in response to the current consultation.

- The lack of clear linkages between current PPP regulations and the Green Paper, and current state aid rules and the review of regional funding. This will be particularly critical in the new Member States. For a good discussion of the main issue, we highly recommend the recent report by PricewaterhouseCoopers 'Developing Public Private Partnerships in New Europe'[iv].

- RICS supports the Commission's promotion of PPPs within the accession states in the DG Regio paper 'Guide to Successful Public-Private Partnerships'[v] launched in March last year. We believe the accompanying information set out in the 'Resource Book on PPP Case Studies'[vi] launched in June this year sets out in detail some of the linkages between cohesion funding and operational PPPs, and is a valuable resource for policy makers and practitioners alike. Yet the Green Paper does not build upon this. We encourage the Commission to address this need for greater clarity in more detail in the period following the Green Paper consultation.

- The issue of 'first movers' (Paragraph 39). Many innovative and technical solutions are developed by the private sector, and many in direct response to the specific needs of a contracting, public body. Such innovation and forward thinking approaches do require nurturing, and therefore we welcome the suggestion that first movers have some form of incentive for their actions in initiating proposals for a project. However, it is difficult to see how this can be reconciled with need for an overall, horizontal structured approach to procurement and selection processes. The principles of scrutiny, transparency and best value must also be applied in the case of first movers and private initiatives. This is a complex problem that requires further analysis and examples of best practice to be identified.

RICS would appreciate the opportunity to discuss possible solutions with you further. We will also endeavour to provide you with case studies to illustrate and amplify the issues raised in our response and to provide possible solutions. In the meantime, we remain at your disposal for any further details you may require.

Yours faithfully

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[i] *Internal Market Strategy Priorities 2003 – 2006* . Communication From The Commission May 2003: http://www.europa.eu.int/comm/internal_market/en/update/strategy/index.htm
ii See attached - *Public Private Partnership in Europe: A base-line study of the network's participating cities* URBACT research programme 'PPPs in Regeneration: Draft Progress Report Stage 1'. April 2004: http://www.urbact.org/srt/urbacten/espacepublic?location.id:=3819&forumtogo=46&flb=yes&flbclean=yes&projectname=Partners4Actions
iii *Public Finances in the EMU 2003*. DG Economic and Financial Affairs: http://europa.eu.int/comm/economy_finance/publications/european_economy/2003/ee303en.pdf
iv *Developing Public Private Partnerships in New Europe*. PriceWaterhouseCoopers. May 2004: http://www.pwcglobal.com/ie/eng/about/svcs/corp_finance/pwc_ppp04.pdf
v *Guide to Successful Public-Private Partnerships* . DG Regio March 2003 http://europa.eu.int/comm/regional_policy/sources/docgener/guides/pppguide.htm
vi *Resource Book On PPP Case Studies*. DG Regio June 2004 http://europa.eu.int/comm/regional_policy/sources/docgener/guides/pppguide.htm

1. What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?

The main types of purely contractual relationships have been outlined in the Green Paper quite comprehensively. There are of course many slight variations to these main relationships depending on the particular circumstances of the project in hand.

The UK has a Task Force which specifically looks at PPP Contracts, and offer best practice advice. The UK National Audit Office also performs regular reviews of PPP and PFI contracts, and is available to offer advice and support. Many of the PPP are very complex and raise many previously unexplored issues, for example in terms of levels of service and Public Sector Borrowing Requirement comparators.

2. In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

RICS supports the concept of competitive dialogue procedure. Too many PPP/PFI projects have in the past been contracted without really understanding the other parties view of the nature and requirements of the project. Engaging the private partner at the earliest stage can ensure that a great deal of money and expense can be saved by avoiding protracted negotiations at the end. Many RICS members have seen the frustrations on projects which take years to get from Issue of the Invitation to Tender and then to Award, in some cases taking as long as 6 years.

3. In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.

There always seems to be a great deal of debate about EU Procurement rules and how this will affect the PPP tendering process and the operation of the PPP. It would seem that further clarity is required as outlined in this paper.

4. Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

Many of our members have been involved in PFI and PPP contracts for both public and private partners, and in a range of capacities. The overall lack of clarity and guidance, or knowledge of sources of guidance, and the continued confusion on EU rules and how they may apply are common difficulties identified by our members. The need for considerable legal expertise in the procurement process is also deemed to be excessive, adding to both the cost and timescale for commencing the project.

5. Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?

RICS does not believe that there is any active discrimination. However, it is apparent that many contracting authorities are not always sufficiently aware of developments in best practice and delivery of projects developed outside of their national boundaries, or of suitable partners available in other countries.

A general advertisement is often sufficient to encourage a competitive procurement process. However, we believe that a more focused knowledge base of other PPP/PFI contracts across the EU would be of benefit when initiating advertisement and the selection process.

6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

Yes. Clearer guidance would be very useful to practitioners and would go far towards ensuring compliance with the relevant regulations.

7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

This would be desirable.Consistency in the form and application of rules relating to PPPs would be of benefit and, in the opinion of RICS, do much to encourage greater competition and cross-border tendering. A horizontal, non-sectoral approach would do most to harmonise and simplify existing rules and create a level playing field for all prospective partners in PPP arrangements, from both the public and private sectors.

8. In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?

There is little evidence of any active discrimination however, as stated above in Q5, there is not sufficient awareness of the advantages and possible benefits of a broad, international tender process. A more focused knowledge base of other PPP/PFI contracts in the EU would help to increase awareness and competition.

9. In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?

Better sharing of knowledge, best practice, successful case studies, exemplars, and information on the companies active in this field, together with improved and clearer legislation, would be a major step towards facilitating PPPs across the EU25.

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

Long drawn-out negotiation is a major feature. This often involves reviewing/challenging some of the core concepts/principals of the project. This process may take several months, however, by the end of this process all partners will have a better understanding of the projects and the issues involved in its delivery.

11. Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?

Long-term contracts with periodic or annual reviews are more likely to feature the problems outlined in the Green Paper. In long-term PPPs the whole environment and context surrounding the project may well change radically. As a result of this process the project may unintentionally develop into some other form of project, with different requirements and characteristics. It is difficult to prevent this from happening, but in some cases this may be interpreted as a barrier to the freedom to provide services.

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

No evidence.

13. Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment.? Do you know of other "standard clauses" which are likely to present similar problems?

The point raised in the Green Paper is valid and needs to be addressed. Step In, Periodic Review, Annual review, break clauses, etc are all clauses which need careful consideration, due to perceived lack of transparency and equality of treatment.

14. Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?

There is a need to clarify a number of points, raised elsewhere in this response. The need for clarity and simplification is such that options for the future review of the whole contractual framework should be considered.

15. In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.

The problems our members encounter often involve the issue of contracts to sister companies, or affiliated companies who are part of the successful consortium. Many seem to take the view that the regulations only apply to the head agreement and they are free to subcontract how they wish. Others take an opposing view.

In operation it is not uncommon for every single subcontract to be the subject of debate and discussions because people are unclear as to the rules which may affect them. This is good news only for lawyers, seldom for the project itself or the interests of the contracting authority.

16. In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

Yes

17. In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

Yes

18. What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not?

The experience of our members is that most parties do try to ensure that they comply with the regulations.

19. Do you think that an initiative needs to be taken at Community level to clarify or define the obligations of the contracting bodies regarding the conditions requiring a call for competition between operators potentially interested in an institutionalised project? If so, on what particular points and in what form? If not, why not? In general and independently of the questions raised in this document:

It needs to be clarified overall, not just on particular points.

20. In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?

The practice and requirement to advertise, although adhered to, do not always seem to reach the widest or most appropriate target audience. The main issues holding back PPPs at the EU level are the confusion between the regulations on PPPs and other community policy, for example the links to state aid and the use of EU funding. The lack of a common definition and common taxonomy are also barriers, as is the lack of a clear network/framework for the dissemination of information.

21. Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of “good practice” in this framework which could serve as a model for the Union? If so, please elaborate.

No, although there is a great deal of research being carried out in the US and Australia as well as by UNECE and the UN Habitat programme.

22. More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

The EU should play an active role in promoting best practice in the field of PPPs. Getting together the key players working cross-border on PPPs in the EU may potentially bring many benefits to the EU Member States through the sharing knowledge and learning.

National and/or regional PPP units, such as those established in Italy, France and UK (the Treasury Taskforce and subsequently Partnerships UK, and the Financial Partnerships Unit established by the Scottish Executive) have had many benefits in terms of understanding of the issues, clarification of national and EU regulations, and the dissemination of best practice. The creation of such units should be encouraged. The creation of a European PPP Unit would also be supported by RICS. This would enable a regular re-evaluation of the regulatory framework and dissemination of best practice and innovative contractual and delivery models.

Restoring the Past U.E.P.C. Building the Future

GREEN PAPER ON PUBLIC PRIVATE PARTNERSHIPS

COM(2004)327

UEPC COMMENTS

UEPC represents more than 30,000 developing and house building companies, affiliated with its 13 member federations. Directly or indirectly the activities of these developers and house builders represent 10% of gross national product and employment in Europe. Together, they annually build and develop several millions m² of offices and shopping centers as well as more than 1.000,000 new homes.

EXECUTIVE SUMMARY

UEPC wishes to emphasize the need to improve delivery in PPP, ensuring at the same time value for money and flexibility in privately financed projects.

Therefore the Commission should stimulate/facilitate EU Member States :

- to ensure the development of effective legislative and regulatory provisions before developing PPP relationships;
- to improve efficient organization and transparent frameworks to streamline the process of delivering PPP projects;
- in improving the general procurement skills of the public sector to deliver value for money in investment;
- to put in place an information resource, accessible to all public authorities and private partners, providing accreditation of PPP advisers to ensure the PPP-partners appoint experienced and qualified advisers who have performed well on other procurements;
- to enforce the standardization of PPP contracts across the public sector to reduce the length and cost of PPP procurements;
- to promote the sharing of best practice;
- to promote the communication with stakeholders

By improving the role of the public sector client, the EU will help to:

UNION EUROPEENNE DES PROMOTEURS-CONSTRUCTEURS
EUROPEAN UNION OF DEVELOPERS AND HOUSE BUILDERS
EUROPÄISCHE UNION DER FREIEN WOHNUNGSUNTERNEHMEN

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- enable authorities to focus more effectively on securing overall value for money, taking in whole-of-life costs, allowing scope for innovative design and using discretion and good judgment in evaluating procurement options;
- increase the speed with which investment is delivered to the public by reducing time spent in procurement;
- reduce the cost to the public sector of procuring PPP projects, improving their value for money; and
- by being a better client, encourage the private sector to bid for PPP projects, strengthening competition and innovation in PPP

According to UEPC, the Commission should clarify the principles of transparency, equality of treatment, proportionality and mutual recognition in relationship with the award arrangements of all kind of PPP-projects, whether institutional or pure contractual. A clarification of these principles should itself respect the principles of non-discrimination and equal treatment, meaning that a different approach is only accepted if there are enough objective reasons for a separate treatment and in respect of the principle of proportionality.

According to UEPC, PPP projects can only be successful if the partners can negotiate in a sufficiently flexible manner*, regardless the (final) formal juridical structure of these projects*. Therefore, negotiations should be considered as the standard rule for PPP-projects.

In principle there is no need to petrify such clarification through purely legislative action. However, an informal clarification document could lead to the necessity of modifying existing regulations that are considered to be too restrictive for successful PPP.

Finally, if the EU considers it necessary to establish itself a contractual framework, such a framework should only cover the basic issues and certainly not all the aspects of the contractual PPPs. This framework may determine some measurable standards such as technical capacity, human resource capacity, financial ability, experience, bidding process (costs), and confidentiality of innovative know-how.

1. UEPC AND THE GREEN PAPER ON PUBLIC PRIVATE PARTNERSHIPS

UEPC is a European association created in 1958. It represents the national federations of developers and house builders and is recognized by the European Authorities. UEPC is a Non-governmental Organisation with consultative status in the Economic and Social Council of the United Nations. It is also a member of the European Construction Forum, the Construction Contact Point and one of the founding members of the European Housing Forum. UEPC is also a member of the Working Group on Sustainable Construction in the Framework of the European Commission Study on the Competitiveness of the Construction Sector as well as of the Expert Group on Accessibility (DG Employment of the European Commission).

The Green Paper of the Commission analyses the phenomenon of PPPs with regard to Community law on public procurement and concessions. Under Community law, there is no specific system governing PPPs. The aim of this Green Paper is to launch a wide ranging debate to find out whether the Community needs to intervene to ensure that the economic operators in the Member States have better access to the various forms of public private partnership in a situation of legal certainty and effective competition.

The Green Paper does not propose any particular option or set of options for Community intervention. The instruments available for improving the opening of PPP operations to competition are in fact very diverse: Community legislative instruments, interpretative communications, measures aimed at better coordination of national practice, or the exchange of best practice between Member States. In fact, The Commission has no wish to prejudge the outcome and will take the fullest possible account of the results of the debate.

The Green Paper contains a list of 22 questions. UEPC decided to elaborate some general considerations and to answer, thereafter, some specific and general questions regarding the experience of UEPC, the need for clarification of the principles of equal treatment, transparency and non-discrimination in relationship with PPP projects, mainly concerning the award arrangements and the contractual framework.

2. GENERAL CONSIDERATIONS

2.1. PRIVATE SECTOR PARTICIPANTS SEEK TO FIND REASONABLE PROFITS

UEPC wishes to emphasize that, for private sector participants, the first requirement for any type of involvement is the potential to derive a reasonable profit. In addition, in return for greater risk exposure, the private sector will also require the potential for commensurate increases in profit potential. Similarly, before committing its own capital in the development of projects, it will require clear legal and regulatory structures, and will want to see the potential for future economic growth, together with reasonable levels of political support and stability.

Some procuring authorities are pursuing an approach to risk transfer that is unsustainable, seeking to transfer too much risk to the private sector. The Government's approach to risk sharing in PPP should be to seek to transfer only those risks that the private sector can more effectively manage. It should not seek to maximise risk transfer, as this would offer poor value for money.

2.2. POLICY INITIATIVES AND MEASURES

According to UEPC, the EU needs to put in place policy initiatives and measures designed to make the public sector a better client in all PPP procurement. UEPC supports the initiatives already taken on the EU-level (guidelines for successful PPP, adoption of the statute for a European Company, Eurostat's recent recommendation that the assets involved in a PPP should be classified as non-government assets, and therefore recorded off balance sheet for government if both of the following conditions are met : 1. The private partner bears the construction risk, and 2. The private partner bears at least one of either availability ord demand risk.).

EU should further stimulate/facilitate all Member States:

1. to ensure the development of effective legislative and regulatory provisions before developing PPP relationships

In this respect UEPC supports the Commission's point of view set forth in its "Guidelines for successful Public-Private Partnerships" of March 2003.

UEPC thinks it would be wise for Member States to institute an assessment of the potential value for money of procurement options when overall investment decisions are being made in the context of the Spending Review, to ensure PPP is only used when it is the best option and has a good prospect of offering value for money. By making a value for money assessment of all procurement options at an early stage, as investment programmes are being considered, this new initial stage will allow maximum flexibility in the choice of procurement options in these areas.

It is wise to use PPP only where it represents the best procurement option. This is unlikely to be the case for projects with a small capital value. It is important then that local authorities have the flexibility to develop such projects through a wide range of procurement routes, choosing the most appropriate option that delivers the best value for the project. This flexibility is part of a wider commitment to devolve responsibility to local councils to meet local priorities, increase local choice and improve performance by removing unnecessary controls that stifle local innovation.

Delivery of the Member States' objectives for housing are dependent on significant programmes of capital investment. In some States PPP is already contributing to delivery of that objective, but its role could also be expanded. Affordable housing provision could benefit from PPP investment because:

- it involves the provision of capital assets where effective project management incentivised by appropriate risk-sharing would bring significant benefits; and
- because of their long life, these assets could benefit from design, construction and costing made on a whole of life basis by private sector parties incentivised to ensure best value.

2. to improve efficient organization and transparency to streamline the process of delivering PPP projects

The private sector should be provided with the confidence to invest in the additional capacity necessary to facilitate several public plans to increase investment in new public sector infrastructure. Local authorities in several Member States have encouraged to bring PPP projects forward, as a limited amount of central government revenue support has been available, but there has been no (clear) basis for allocating such support between different local authority schemes. Projects have therefore been taken forward at considerable risk to the local authority, incurring development costs on the procurement process, with no assurance about the availability of revenue support. Bidders, similarly, have had to bid on schemes whilst uncertain whether they would receive necessary Government support or not. A framework to streamline the allocation of the of central government revenue support should therefore be established.

To ensure value for money and flexibility in privately financed projects, the different governments should explore the provision of framework funding, to make available a faster, cheaper funding solution for bundled small schemes.

UEPC also promotes the establishment of public sector procurement centra specialized in structuring and delivery of PPP projects, which will work with local public sector managers in certain suitable areas to procure such projects, to increase the quality of specifications and reduce delays in the process.

These procurement centra can then support local procuring authorities in particular markets. By increasing the public sector's ability to procure quickly robust and effective PPP projects, these supporting centra will also allow the introduction of PPP into new areas as well as offer a way to increase the number of PPP projects in existing areas. However, there is no need for these centra to become themselves PPPpartners. Their task should be limited to support (local) procuring authorities.

These specialized centra could design a range of new procurement models to bring all the necessary expertise and experience to locally procured PPP projects, providing procuring authorities with the support they need to obtain value for money, while maintaining local control and local accountability in the delivery of public services and public service investment. These models are therefore likely to be most applicable where small projects can be grouped together, and there is no obvious centralized procuring authority.

3. in improving the general procurement skills of the public sector to deliver value for money in investment

It should be an overall EU priority to improve general procurement skills across the public sector. A lasting step-change in the quality of public services in the EU can only be achieved if the public sector has the skill sets necessary to ensure that public investment projects deliver value for money improvements in frontline public service facilities. Improvements in this area need to focus on both the quality of public sector procurement skills and on the way in which they are used. Public sector managers need to:

- be skilled enough to assess procurement options over the long term;
- effectively identify the value for money option, not simply opt for the least-cost option, including taking full account of the quality of design in bids;
- negotiate effectively with the private sector;
- apply skills with sufficient confidence to ensure that appraisal is a real test of procurement, and not an exercise in fulfilling set criteria without regard to a wider view of which option is in the public interest; and
- carry out the evaluation and management of investment delivery in a way that ensures that the public sector is accountable for both the public money which it spends and the public services which it provides.

4. to put in place an information resource, accessible to all public authorities and private partners, providing PPP advisers to ensure the PPP-partners appoint experienced and qualified advisers who have performed well on other procurements

UEPC believes that it is important that public sector managers are well advised, especially when undertaking complex procurement projects such as PPP. Poor advice contributes to slowing the procurement process, can inflate procurement costs, and will impair the ability of the public sector to identify value for money in options appraisal and negotiation.

To assist in meeting these objectives, the EU could seek to put in place a single information resource, covering advisers who have demonstrated their expertise and performance in PPP projects in fields such as law, commercial structuring or finance. This resource will be developed over time, reflecting the experiences of PPP-partners, thus also departments and public sector managers. It is crucial to its successful implementation that this single point of information and experience in hiring and managing professional advisers reflect the qualitative judgment of PPP clients on the standard of the advice they have received, rather than representing simply a list of potential advisers in different areas of expertise.

5. to enforce the standardization of PPP contracts across the public sector to reduce the length and cost of PPP procurements

The European Commission should stimulate Member States to implement general and specific guidance for public authorities on a standardized contractual approach to the most common issues likely to feature in PPP schemes. Standardized Contractual Guidance (as in the UK) should intend to enable public authorities to strike a balanced contractual position that is commercially deliverable for the private sector and can provide value for money for the public sector. In providing a common understanding and approach to common issues, it is also hoped that it will help further reduce the time and cost of negotiations of PPP contracts. This will enable the focus of negotiations to be on the deal specific issues rather than on issues that are generic to PPP projects generally.

UEPC believes that he process of standardizing PPP contracts helps spread best practice, improving PPP procurements across the public sector, and significantly reduces the length and cost of PPP procurement. However, these standard terms should maintain the individual flexibility of a particular procurement to set its needs and requirements, but provide a standard form for those aspects of PPP common to all its procurements. Member States should also be stimulated to produce a ‘procurement pack’ for different contractual PPP projects, such as a “Procurement Pack housing PPP”. The Pack should be intended to provide a guide for public authorities procuring contractual PPP projects and should include template or model documentation.

There should also be a regular dialogue with the private and public sectors over how successfully the standardized PPP contract is being applied.

6. to promote the sharing of best practice

European Centre for Public-Private Partnerships

UEPC believes there is a need for a European Centre for Public-Private Partnerships. The mission of this Centre is to advocate and facilitate the formation of public-private partnerships and to raise the awareness of governments and businesses of the means by which their cooperation can cost effectively provide the public with quality goods, services and facilities.

The objective of the European Centre for Public-Private Partnerships is to foster innovative forms of cooperation between the public sector and the private sector, for the benefit of all Europeans.

The Centre's vision is to influence the way in which public services are financed and delivered in Europe by:

- Encouraging public-private partnerships
- Providing information on public-private partnerships

- Sponsoring conferences and seminars on partnerships
- Stimulating dialogue between public and private sector decision-makers on the financing and delivery of public services
- Educating the public
- Conducting objective research on key issues that influence the effective use of partnerships

The Centre should concentrate on the following activities :

- Promotion and facilitation of public-private partnerships across Europe
- Compilation of a resource library on PPP issues and projects
- An annual conference and regional events on a wide variety of PPP topics
- Informative newsletters (Public-Private Bulletin) on Centre activities, news and issues discussed at the national conference
- Workshops and seminars that allow participants to share innovative ideas and solutions through a national network
- Centre-sponsored publications, including research papers, case studies, guidelines, opinion surveys and national inventories on key public-private partnership subjects

Supporting Authorities Through Project Networks

In the UK, “4ps” supports local authorities developing and delivering housing PFI projects in part through project networks. Networks are seen as an important way of facilitating an exchange of information between project staff. The project networks also have access to 4ps’ hosted ‘extranets’ through which local authority project staff can share, electronically, project documentation. This practice should be stimulated in all EU countries.

Consulting the Market European Housing Practitioners Group

UEPC and the Commission could convene a small working group or ‘practitioners group’ from the housing bidding side as a consultative forum to discuss ‘technical’ and commercial issues related to large housing PPP projects.

7. to promote the communication with stakeholders

More people will be affected by a partnership than just the public officials and the private-sector partner. Affected employees, the portions of the public receiving the service, the press, appropriate labor unions and relevant interest groups will all have opinions, and frequently significant misconceptions about a partnership and its value to all the public. It is important to communicate openly and candidly with these stakeholders to minimize potential resistance to establishing a partnership.

2.3. THE DISTINCTION BETWEEN PURELY CONTRACTUAL PPS AND PPS OF AN INSTITUTIONAL NATURE

The distinction made in the Green Paper between PPP of a purely contractual nature and PPP of an institutional nature makes sense only to a certain point. In fact, institutional PPS is commonly set up on the basis of contracts. A distinction that is made in function of the procurement requirements, and thus based on a purely formal criterium, does not take into account the practical side of different projects. Intrinsically, and apart from the procurement methods, an institutional PPP is more complex as a formula than an contractual PPP (such as a combination of Design-Build-Finance-Maintain-Operate-Transfer), for the public partner can always discuss on the role and the risk sharing as a participant in a juridical vehicle. Moreover, as the public partner is subject to other regulatory measures than private partners, this could create problems in the management of the vehicle.

3. QUESTIONS

3.1. QUESTIONS REGARDING THE EXPERIENCE OF UEPC

1. What types of purely contractual PPP set-ups do you know of?

In its “guidelines for successful public-private partnerships” the European Commission distinguishes four main groupings of PPP relationships: (1) DB and variant forms; (2) BOT and variant forms; (3) DBFO and variant forms (4) Concession (page 28). In its actual Green Paper on PPP, the Commission also refers to PFI-contracts and concessive models (DBFOMT). UEPC-members have experience with these PPP relationships.

Assessing the mean features of this four groupings set out by the Commission in the above mentioned EU guidelines, UEPC concludes that, according to the Commission, those four groupings have all in common that the public facility remains in public ownership or is handed back to the public sector after a period.

However UEPC has also experience with relationships where public facilities do not necessarily have to be transferred to the public authority, but remain in private ownership. According to UEPC these relationships can also be defined as “contractual” :

Turnkey

A public agency contracts with a private investor/vendor to design and build a complete facility in accordance with specified performance standards and criteria agreed to between the agency and the vendor. The private developer commits to build the facility for a fixed price and absorbs the construction risk of meeting that price commitment. Generally, in a turnkey transaction, the private partners use fast-track construction techniques (such as design-build) and are not bound by traditional public sector procurement regulations. This combination often enables the private partner to complete the facility in significantly less time and for less cost than could be accomplished under traditional construction techniques.

In a turnkey transaction, financing and ownership of the facility can rest with either the public or private partner.

Buy/lease, develop / renovate, operate

The private sector buys or leases an existing asset from the public authority, renovates, modernizes and/or expands it, and then operates the asset with/without obligation to transfer the ownership back to the government.

Build-Own-Operate (BOO)

The private sector finances, builds, owns and operates a facility or service in perpetuity. The public constraints are stated in the original agreement and through on-going regulatory authority.

The contractor constructs and operates a facility without transferring ownership to the public sector. Legal title to the facility remains in the private sector, and there is no obligation for the public sector to purchase the facility or take title.

Buy-Build-Operate (BBO)

A BBO is a form of asset sale that includes a rehabilitation or expansion of an existing facility. The government sells the asset to the private sector entity, which then makes the improvements necessary to operate the facility in a profitable manner.

Transfer of a public asset to a private or quasi-public entity usually under contract that the assets are to be upgraded and operated for a specified period of time. Public control is exercised through the contract at the time of transfer.

Sale/Leaseback

This is a financial arrangement in which the owner of a facility sells it to another entity, and subsequently leases it back from the new owner. Both public and private entities may enter into a sale/leaseback arrangements for a variety of reasons. An innovative application of the sale/leaseback technique is the sale of a public facility to a public or private holding company for the purposes of limiting governmental liability under certain statues. Under this arrangement, the government that sold the facility leases it back and continues to operate it.

Finally, UEPC wishes to point out that Member States often select a DBFOMT or concession contract for highway infrastructure, meaning the private partner bears the risk associated with traffic demand, whilst after a certain regulatory measures are taken to stimulate public railway traffic and discourage the use of the motor highway on the basis of environmental considerations.

21. Do you know of other forms of PPPs which have been developed in countries outside the Union?

United Nations Development Program - www.undp.org/ppp/

UNDPs Public-Private Partnerships for the Urban Environment (PPPUE) facility supports the development of innovative partnerships between public and private actors at the local level. Focusing on assisting small and medium-sized cities, PPPUE works with all potential stakeholders to meet the challenge of providing basic urban environmental services.

USA National Council for Public-Private Partnerships - www.ncppp.org

The national organization on PPP in the U.S., the NCPPP website contains up-to-date news, publications, case studies, issue papers and upcoming events south of the border.

Privatization Center - www.privatization.org

Provided through the Reason Public Policy Institute, this is an excellent resource on the issue, including: definitions; statistics and trends; practices and strategies; over 20 specific service areas at three levels of government; details of comprehensive government programs; and the pros and cons of privatisation. It also includes a long list of studies, publications and a directory of private providers in the U.S.

Partnerships Victoria - www.partnerships.vic.gov.au

This site, provided by the State of Victoria Government in Australia, includes guidance materials, information on projects and details of contacts in departments.

Republic of South Africa National Treasury – www.treasury.gov.za

Tenders, manuals, reports and project summaries related to PPP in South Africa (Hint: click on "public-private partnerships" from the homepage).

Japan - www8.cao.go.jp/pfi

Private Finance Initiative Cabinet Office for the Government of Japan

Korea Research Institute for Human Settlements – www.krihs.re.kr

Activities, news and publications from South Korea's main centre of economic promotion and PPP activity (Hint: English version available by clicking link on top navigation bar).

The Canadian Council for Public-Private Partnerships : http://www.pppcouncil.ca

Do you have examples of "good practice" in this framework which could serve as a model for the Union? If so, please elaborate.

The main law for the PPP projects in Turkey is known as "Concerning the Provision of Certain Investment in the Build-Operate-Transfer Model" (Published June 8, 1994, Law No: 3996). More detailed information can be found in enclosure n°1 of this UEPC- report.

8. In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?

The actual regulations provide few opportunities for the private candidate launching the innovative idea to really execute his proper idea.

Our Turkish member wishes to stress that, Turkey, especially after the 1980's, has liberated almost all sorts of in and out capital movements radically. Therefore, one can easily say that Turkey has a fully liberal regime for the non-national candidates for the PPP's in hospitals, schools, bridges, rail networks, tunnels, airports, water and sanitation plants etc. and access to the private initiative PPP for a foreign entity is easy. In their application a request for qualification is distributed mostly in a national newspaper. After receiving applications, the contractual body selects a few companies or consortia to get their proposals and amongst these a company or consortium is chosen. After this step, the High Planning Council approves the bid.

11. Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?

UEPC has no bad experience regarding this issue.

With certain PPP/PFI, the contract entered into at the outset recognizes that there will be a need for changes over the 15-30 year life of the contract. The key flexibility rights given to the public sector are:

- the public sector has a right to change any aspect of the building or service provision, subject to agreement with the PPP/PFI contractor on cost;
- to ensure that value for money is maintained, for changes over a certain amount in value the public sector can require a competitive tender for any works; and
- where there is a requirement to change service configuration, there is a similar right for the public sector to change any aspect of service provision, subject to agreement on costs, with the ability to require a competition as set out above.

It is important for the public sector to retain flexibility in delivering services. For example, if there is new technology which could improve service delivery, a desire to change the service configuration of the facility such as a shift from in-patient to out-patient care or an expectation that the volume of support services required may change, the public sector needs to retain the flexibility to manage such changes efficiently.

There will always be constraints on the public sector in facilitating such changes whichever procurement method is employed in delivering new infrastructure. Once complete, a new building inevitably presents a degree of inherent inflexibility by its very design.

UEPC therefore recognizes that the public sector client should have the ability to incorporate flexibility mechanisms into (standard) PPP contracts. However this flexibility should never result in juridical uncertainty and loss of reasonable profit for the private partner. In fact, any change is also likely to require new funds to finance any new construction work needed, so affordability could also constrain.

3.2. QUESTIONS REGARDING THE NEED TO CLARIFY THE TREATY PRINCIPLES IN RELATIONSHIP WITH THE AWARD ARRANGEMENTS OF ALL KINDS OF PPP

5. Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?

6. In your view, is a Community legislative initiative, designed to regulate the *procedure* for the award of concessions, desirable?

7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

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

2. In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

UEPC first wishes to point out that any act, whether it be contractual or unilateral, whereby a public entity entrusts the provision of an economic activity to a third party must be examined in the light of the rules and principles resulting from the Treaty, particularly as regards the principles of freedom of establishment and freedom to provide services, which encompass in particular the principles of transparency, equality of treatment, proportionality and mutual recognition.

UEPC further wishes to emphasize that the EU legislative framework governing the choice of private partner is based on the distinction between different types of *contracts*, defined at the EU-level. The contracts denoted as public works or public services contracts, defined as having priority, are subject to detailed provisions of Community Directives. The concessions of so-called "non-priority" works and public services contracts are governed only by some sparse divisions of secondary legislation. Lastly, some projects, and in particular services concessions, fall completely outside the scope of secondary legislation. The same is true of any assignment awarded in the form of a unilateral act.

According to UEPC, the Commission should clarify the principles of transparency, equality of treatment, proportionality and mutual recognition in relationship with the award arrangements of all kind of PPP-projects, whether institutional or pure contractual.

A clarification of these principles should itself respect the principles of non-discrimination and equal treatment, meaning that a different approach is only accepted if there are enough objective reasons for a separate treatment and in respect of the principle of proportionality.

According to UEPC there are no objective reasons to provide in Directive 2004/18 particular rules on “subsidised” housing schemes, thus excluding the non-subsidised housing schemes. In fact in the case of public contracts relating to the design and construction of a housing scheme, - *whether subsidised or not* - the size and complexity of which, and the estimated duration of the work involved require that planning be based from the outset on close collaboration within a team comprising representatives of the contracting authorities, experts and the contractor to be responsible for carrying out the works, a special award procedure may be adopted for selecting the contractor most suitable for integration into the team.

According to UEPC, PPP projects can only be successful if the partners can negotiate in a sufficiently flexible manner*, regardless the (final) formal juridical structure of these projects*. Applying negotiations into the bidding process is a good idea since the dialogue process will lead to a clear understanding between the parties, avoids misunderstandings, gives a great chance to see the real abilities and approaches of the construction companies, in turn, both contracting authority and contractors and the consumers enjoy the benefits of well established PPP projects based on this clear understanding. This process will also give a great chance to the authority not the finalize the tender by evaluating only tender documents which may lead to wrong decisions. Having negotiations would be an important step to choose the best company.

In principle there is no need to petrify such clarification through purely legislative action. However, an informal clarification document could lead to the necessity of modifying existing regulations that are considered to be too restrictive for successful PPP.

Since the adoption of Directive 2004/18/EC, criteria for the award of the contract should also be indicated in the contract notice. It is clear that to comply with the new regulations, public authorities will have to develop award and selection criteria much further in advance of the contract notice than is the current practice, which is to define criteria during the award procedure.

The negotiated procedure allows contracting entities to discuss contract terms and conditions with tenderers on receipt of their offers, and is intended to allow for flexibility and cost savings in the preparation of tenders. However, the use of this procedure is restricted to strictly defined circumstances, and is an exception to the rule that contracting authorities should award their contract under either an open or restricted procedure. It is still uncertain as to whether PPP contracts qualify for the negotiated procedure.

Actually the discussion will start whether to applicate the competitive dialogue or the negotiated procedure. UEPC wishes to stress that there is a major problem in defining the scope of application between the negotiated procedure and the competitive dialogue.

In its « guidelines for successful Public-Private Partnerships » the Commission stated that the case for the use of the negotiated procedure is difficult to make in a Design and Build or BOT contract. According the Commission there will usually be adequate project definition and the nature of the works or the risks attaching to them will usually permit overall pricing. According to the Commission the factors which influence a decision in favour of the use of the negotiated procedure tend to exist in those projects where it is intended to utilise private finance or to achieve a greater degree of risk transfer than is normally anticipated. The Commission also stated that, where private finance is involved, the use of the negotiated procedure is likely to be appropriate for major projects so that optimal value for money proposals are received.

However in the « green paper on public private partnerships » the Commission seems to consider that the use of private finance is no longer a valid argument for the negotitated procedure, as the latter is, according to the Commission, « to cover solely the exceptional situations in which there is uncertainty *a priori* regarding the nature or scope of the work to be carried out, but is not to cover situations in which the uncertainties result from other causes, such as the difficulty of prior pricing owing to the complexity of the legal and financial package put in place.” In a footnote the Commission states that the negotiated procedure may apply when the works are to be carried out in a geologically unstable or archaeological terrain and for this reason the extent of the necessary work is not known when launching the tender procedure.

The Commission seems to be determined that the scope for the negotiated procedure is not to be extended. UEPC wants to point out to the Commission that there is a great difference between an unregulated negotiated procedure without a call for competition and a regulated competitive negotiated procedure with a call for competition in which there are rules on equal treatment, transparency, debriefing, etc.

According to UEPC, PPP projects can only be successful if both parties can negotiate through the PPP-process on the basis of flexible general principles. Therefore, negotiations should be considered as the standard rule for PPP-projects.

3.3. QUESTIONS REGARDING THE NEED TO CLARIFY THE CONTRACTUAL FRAMEWORK PPP PROJECT AND SOME SPECIFIC ASPECTS OF IT (APART FROM THOSE CONCERING THE SELECTION OF THE TENDERING PROCEDURE)

3. In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.

Bidding Costs

The cost of bidding for PPP projects can be a consideration as important as the funding of an investor's equity and subordinated debt investments. In funding such costs, a key consideration for the private sector is its success rate in winning bids. Irrespective of success, however, the aggregate level of bid costs expensed in a year does limit the number of bids a company can undertake in that year, usually determined by the overall financial capability of the contractor.

UEPC wishes to warn for increased bidding costs by using the "competitive dialogue"-procedure. Since the contracting entity will have to keep up to 3 bidders in the "race" until the final award, unless there is only one compliant bid after the Competitive Dialogue, the new process may result in increased bidding costs. It was initially proposed that contracting entities would pay a contribution of up to 15% towards the cost of tendering, so as to keep bidders in reserve and allow more competition, but this was rejected. The text is now extremely vague, stating that contracting entities may provide for a "price or payment" for participation to the competition. Potential tenderers should therefore assess whether the contribution to bid costs offered by the contracting entity is sufficient and does not create a risk of unrecovered expenses and costs. More equitable cost sharing deals should become increasingly common in the EU PPP-market.

Some Member States are providing budget facilities for bid costs, others do not reimburse these costs. UEPC believes the Commission should provide Member States with common basic rules regarding the reimbursement of bid costs.

UEPC is quite aware that reimbursing the bid costs of losing bidders will in effect subsidise less successful PPP companies or artificially discourage them from redeploying resources to other PPP opportunities where this could be more successful. Therefore, Member States should priorly aim to reduce these costs by improving public sector capacity : (improve the enforcement of standardisation, develop new procurement models and reinforce procurement expertise to the public sector, to ensure all departments operate as best practice clients, improve the transparency of future PPP programmeS to encourage private sector investment, and continue to encourage new entrants into the PPP market, including non-national operators)

Confidentiality

A further risk is that the contracting authority will cherry-pick the best ideas of tenderers from their Outline Submission for incorporation into an optimum set of output specifications in the invitation to negotiate. Why would potential bidders take the risk that someone else may implement the innovative technical/artistic solution they put forward during the Competitive Dialogue? Under Article 29 of Directive 2004/18, the Competitive Dialogue must be carried out without disclosing the solutions proposed or any confidential information to any candidates without the participant's consent (Article29(3)). However, it is debatable as to whether this includes any information in the outline proposal.

UEPC finds a clarification necessary. Innovative technical/artistic solutions should not be transferred to concurrent parties without the consent of the party that established the innovation.

14. Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?

The Commission has already published a standard lexicon of common terms for drafting and advertising the award of a contract.

The European Commission should further stimulate Member States to implement general and specific guidance for public authorities on a standardised contractual approach to common issues likely to feature in PPP schemes. Guidance should intend to enable public authorities to strike a balanced contractual position that is commercially deliverable for the private sector and can provide value for money for the public sector. In providing a common understanding and approach to common issues, it is also hoped that it will help further reduce the time and cost of negotiations of PPP contracts. This will enable the focus of negotiations to be on the deal specific issues rather than on issues that are generic to PPP projects generally.

If the EU considers to establish itself a contractual framework, such a framework shoud only cover the basic issues and certainly not all the aspects of the contractual PPPs. This framework may determine some measurable standards such as technical capacity, human resource capacity, financial ability, experience, bidding process (costs) and confidentiality of innovative solutions.

13. Do you share the Commission’s view that certain “step-in” type arrangements may present a problem in terms of transparency and equality of treatment.? Do you know of other “standard clauses” which are likely to present similar problems?

UEPC refers to the Commission’s “Guidelines for successful Public-Private Partnerships” in which the Commission states that main contractual documents also should include collateral warranties, allowing the contracting Authority for step-in rights.

UEPC also believes that “lenders”step-in clauses will enhance financial aspects of certain PPP projects. The concern of the lenders is that they have financed the project on the basis of projected cash flows and if the Contract (under which these cash flows are agreed to be paid) is terminated, they will not, typically, have any rights to sell the Assets, as would be the case in many types of secured financings. Where direct agreements are required such documents are increasingly seen as advantageous to the public sector, in that they give lenders an opportunity to “revive ” the Project and, therefore, to avoid the disruption that invariably follows termination. If the Project can be restored with minimal disruption to the Service and there is no need for the Authority to get involved to ensure that this occurs, then both the Authority and the lenders benefit.

In some Member States, step-in clauses are part of a standardised contractual approach to common issues likely to feature in PPP schemes. In this context transparency and equal treatment can be secured.

16. In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

17. In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

The Authority often has the perception that it must retain a large degree of control of a subjective nature over Sub-contractors. An Authority may feel it needs to use the contract to allow it to intervene at Sub-contractor level to protect its interest if a Sub-contractor is underperforming (e.g. the Authority may want the right to direct or require the replacement of the Sub-contractor).This approach is not recommended as it should be for the Contractor to manage its Sub-contractors and intervention by the Authority will affect the degree of risk transfer achieved.The Authority should instead rely on the payment mechanism and its termination rights to address sub-standard performance.

UEPC ’s wishes to stress that the private partner who originally selected these Sub-contractors and has taken risk on their performance, should be entitled to change them at will (for example,if they are not performing).

In general, any attempt by the Authority to control Sub-contractors is to be discouraged as it is in most cases unnecessary and may dilute the level of risk transfer achievable by the Authority.

Only in certain limited cases, there may be overriding reasons why the Authority should have a degree of control over Sub-contractors. For example, there may be national security issues (particularly in some defence projects), other public interest issues (e.g.regarding who should be allowed to be involved in schools), or the Authority may have a statutory duty that it needs to carry out. In such cases, the criteria that a replacement Sub-contractor must satisfy should be reasonable (for example, they should require that the potential Sub-contractor is not a threat to national security or other relevant aspect of the public interest).Any judgment that the potential Sub-contractor does not satisfy the criteria should be based on objective evidence.

In cases in which there is no specific reason to control Sub-contractors, the Authority may still want some control on the basis that it placed reliance on the original Sub-contractor 's identity and ability to perform in awarding the Contract to the Contractor. In such cases, satisfaction of a limited set of *objective* criteria should prove an acceptable level of control to the Authority and the Contractor.Any such criteria should include:

- technical ability and competence;and
- financial strength (including any willingness to give guarantees to the Contractor)

Rarely will further criteria be needed.

3.3. General questions

9. In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?

20. In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?

22. More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful?
Do you consider that the Commission should establish such a network?

We do not think there is a magic or best formula to develop the private initiative PPPs, however, a harmonization of the following items will help to have far better results :

- PPP should be promoted as an instrument to enhance quality and should not be presented as an approach to risk transfer that is unsustainable, seeking to transfer too much risk to the private sector;
- Under a PPP approach, a cooperation between government and private parties is achieved where the government works “together” with the private sector, not “over” or “against” the private sector. Therefore political commitment is essential.
- The classical procurement regulations are not established on the basis of a private initiative but on the basis of a public’s initiative and strict procedures, giving few opportunities for innovative action. However, the main issue of PPP is to seek for innovative actions in project(execution).
- **As a result of these classical procurement rules, governements and procuring bodies think too much in terms of “product”-specifications in stead of “service”-specifications.**
- Good governance, and economic stability seem as preconditions for the success of PPP programs. Any uncertainty leads to more risky environment which makes difficult the long-term business decisions.
- Together with this, an appropriate legislative framework is essential if PPP’s are to succeed. Probably most of the authorities accept as a general rule that, challenges in the developing countries would be greater than the developed EU countries to prepare such appropriate legislation.
- Both foreign and national investor must know that the government will be fair in the deal and meet the commitments.
- The responsibilities of both private sector and the government must be pre-determined clearly and objectively.

- Transparency and accountability must be accepted by all the parties as a must.
- A proper communication way must be set-up.

In general, the EU needs to put in place policy initiatives and measures designed to make the public sector a better client in all PPP procurement. UEPC refers to its general considerations.

Enclosure N° 1 : Turkish Practice

TURKISH PRACTICE

I. Introduction

II. Constitutional Amendments and the Public Service Concept

III. Private Participation in Infrastructure under Turkish Legislation

a) Built-Operate-Transfer-BOT Model

1. Law No. 3096

2. Law No. 3996

3. Parties and Agreements in BOT Model

b) Built-Operate-BO Model

- Law No. 4283

c) Transfer of Operation Rights-TOR Model

d) Auto-production Model

IV. Treasury Guarantees and Risk Allocation in the PPI Contracts

V. Municipal Services and Legal Impediments

VI. Conclusion

I. INTRODUCTION

The last decade or so has witnessed what amounts to a worldwide revolution in the funding of infrastructure projects. For much of the twentieth century, the implementation of such project tended to be viewed as primarily or even exclusively the responsibility of national governments. Nevertheless lack of sufficient financial resources and idea of economic liberalization for the sake of ensuring competiton in relevant areas caused the governments to bring private sector into the infrastructure sector. In virtually every region of the globe, governments have in recent years been looking for new ways of implementing these projects, and new techniques for funding them, which place less emphasis on government resources and involvement. As a result of these changes several models have been created in this area ranging from Built-Operate-Transfer (BOT) to Built-Lease-Transfer (BLT) models.

Turkey has not totally been distant form these global developments. Turkey is one of the countries that focused on the alternative models for the involvement of the private sector in infrastructure projects.

II. CONSTITUTONAL AMENDMENTS AND THE PUBLIC SERVICE CONCEPT

There had been some legal obstacles in the BOT model. Turkish Constitutional Court ruled previously that generation, transmission and distribution of energy constituted “public services” and as such, if not provided by state, they could only be entrusted by the state to private companies pursuant to the “concession” contracts. Under Turkish Constitution, concession contracts had to be reviewed by the State Council. In light of this requirement, The Minisrty of Energy and Natural Resources were to submit these contracts to the State Council’s review and approval. There are several concession contracts for locally financed and operated plants. Nevertheless, the concession contracts approved by the State Council differed from the earlier BOT projects. The major problem here for the foreign investors and creditors was the arbitration issue. The State Council, as a feature of the administrative law, did not allow having an arbitration clause in the concession contracts, maintaining that concession contracts were administrative contracts and that therefore all disputes arising thereto could only be resolved by the State Council.

The State Council had taken this approach based on the Constitutional Court's decision that the production, transmission and distribution of electricity was "public service" and therefore subject to concession. the State Council was mainly concerned with ensuring the continuity of such public service and emphasized this concern in the implementation contracts. We also want to draw your attention to the following: Once the IC is agreed among the parties including the State Council, any amendment would need to be reviewed and approved by the State Council as well.

This bottleneck has precluded the concession contracts from being realized for a lengthy period of time and finally the Parliament resolved in 1999 through an amendment to the Constitution that concession contracts may be decided by the judiciary to be in the form of implementation contracts and thus could be made subject to international arbitration. In the aftermath of this decision the Parliament has further enacted some other laws for adopting this change into the Turkish legal system. As a result, Law No. 3996 now stipulates that the contracts made in accordance with this Law are implementation contracts and thus subject to arbitration if the parties to the contract wishes as such. This, for sure, has caused some concerns over the fate of "public service" concept as set forth in our administrative law terminology, but as a matter of "current legislation in force" now it seems there is no legal impediment in this specific sense.

III. PRIVATE PARTICIPATION IN INFRASTRUCTURE UNDER TURKISH LEGISLATION

Apart from direct privatization applications, there are four alternative ways of private project financing allowed by the Turkish Legislation. These are;

a) Build-Operate Transfer (BOT)

b) Build-Own-Operate (BO)

c) Transfer of Operation Rights (TOR)

d) Autoproduction methods

a) BUILD-OPERATE-TRANSFER (BOT) MODEL

Turkey is one of the first countries introducing BOT model to the marketplace during the early 1980's. Although discussions of the model started as early as 1980's, the first contract on BOT structure was only signed in 1995. This was due to lack of legal framework of the BOT model, which took quite a long time to develop. It is the first model launched in Turkey for public and private partnership in the public service related activities (electricity energy).

There are two laws enacted for BOT implementations; Laws No. 3096 and 3996.

1. Law No. 3096

This Law regulates the BOT model in energy sector and was issued in 1984 with the aim of attracting private sector funds to large-scale energy investments. By means of the above-mentioned Law, domestic private sector as well as foreign sector were encouraged to produce electricity.

According to the Law, the Ministry of Energy and Natural Resources submits a proposal to the Council of Ministers and the letter nominates and authorizes the Company for this purpose.

The Company is required to be established as a limited liability company with the participation of Turkish and foreign private sector, if any, in which public companies and agencies (including State Economic Enterprises) may also participate as shareholders.

Electricity produced by the Company could be sold only to TEAŞ (the Turkish Electricity Co. Inc.) or to the company nominated by TEAŞ at a certain district. The tariff for the electricity is fixed between the Ministry of Energy and Natural Resources and the company.

The contract signed between the Ministry of Energy and Natural Resources and the company may have duration up to 99 years, but actually the amortization period of the power plant defines the duration, which can be extended if requested by the company and accepted by the Ministry of Energy and Natural Resources.

At the end of the duration, the power plant with all of its assets is to be transferred to the Ministry of Energy and Natural Resources. The contract between the Ministry of Energy and Natural Resources and the company can be cancelled before the end of its duration under certain conditions, which are defined in the contract.

The tariff is set by the Ministry of Energy and Natural Resources and the Company and includes operation and maintenance costs, reserved funds for new investments, exchange currency differences, technical and capital amortizations, other costs and expenses and a normal rate of profit for the shareholders.

An energy sales agreement ("ESA") needs to be signed between TEAŞ and the company. ESA includes certain articles for determination of the tariff.

If there is a need for the power plant site to be expropriated, this will be done by the Ministry of Energy and Natural Resources but the cost will be undertaken by the company and included in the total investment cost.

2.Law No. 3996

The BOT model gained momentum in Turkey with the execution of the Law No: 3996 enacted on June 1994.

The purpose of this Law is the provision of certain investments and services which used to be realized through public institutions and corporations (including state economic enterprises) before and which require high technology and substantial financial resources, to be realized via involvement of the private sector within the framework of the BOT model. These investments and services include, inter alia, bridges, tunnels, dams, irrigation, water supply and treatment plants, sewerages, communications, transportation, transmission and distribution of energy, highways, railways, ports, etc.

As it is the case with the Law No. 3096, again the executing company is required to be established under the Laws of the Republic of Turkey, in which public companies and agencies may also participate as shareholders.

The company is permitted to operate pursuant to the provisions of the Law No. 6224, being the Encouragement of Foreign Capital. Therefore, the company benefits from the investment incentives.

A separate company is to be established for each specific BOT project.

The Decree No. 94/5907 issued on October 1994 determines the implementation procedure and rules for the Law No. 3996. This Decree also outlines in detail the required characteristics of the executing company, scope and duration of contracts and the principles to be applied in determining tariff for the goods and services provided.

The investments and services covered under the BOT model are to be
presented to the Supreme Board of Planning via the relevant ministry. Upon such application, the Supreme Board of Planning determines the administration authorized to implement the BOT project, the investments and services which will be handled on the BOT basis and grants a permit to such administration.

The administration and the investing company sign an implementation contract.

Duration of the contract covers investment and operating periods, beginning from the effective date as set forth in the implementation contract. The duration may never exceed a total of 49 years including any possible time extensions granted due to force majeure or the reasons attributable to the administration's failure.

The investing company is obliged to design and finance the investments and services, build and operate, maintain and repair the facilities and premises within the contractual duration and transfer the facility in a serviceable, useable and operating condition free from any kinds of liabilities and obligations to the administration at the end of the contract period.

3. Parties to and Agreements in the BOT Model

BOT is a significantly more complex model than classic finance, both in structure and documentation.

To give some examples of the parties involved in the BOT model we can exemplify the following:

- sponsors and shareholders
- project company
- authorizing agency
- project implementing agency
- Treasury
- supplier of input
- buyer of output
- operation and maintenance contractor
- construction contractor
- insurance company

- financiers, banks and export credit agencies
- legal and financial advisers
- trustee and escrow agent

One reason the government plays a large role in BOT projects is that it turns over an activity it would otherwise engage in itself to the private sector. The Project company enters into several contractual relations with the governmental agencies. Initially the project company will enter into an implementation agreement with the administration in charge, aiming at setting out the framework of the project and the obligations of the parties. The main issues addressed in this agreement are as follows:

- the authorization of the project company for a period of time including the construction and operation period,
- provisions enabling the company to have usufruct rights on land of site,
- the obligations of the project company and the host government in scope of the agreement and the penalty for not fulfilling these obligations,
- the provision regarding the cost and financing of the project,
- the provision regarding the cancellation of the agreement,
- the tariff of the product or services to be provided by the project,
- transfer after the end of the contract,
- the other agreements that will be entered into for the project,
- governning law and jurisdiction

The project company will in most instances enter into agreements with other governmental agencies for the supply of raw materials and/or the purchase of the project output or for related guarantees.

The government or its agencies may enter the picture also for the financial aspects of the project through its contribution in equity, by providing loans and/or by other means of financial support such as guarantees.

In such a complex structure concerning different ministries it is a difficult task to eliminate the inconsistencies which may arise. Therefore in the process of implementing a BOT project, the implementing authority undertakes a very important role in minimizing -if not totally discharging- any inconsistencies via timely obtaining necessary contribution from all relevant parties.

b) BUILT-OPERATE (BO) MODEL

The Built-Operate (BO) model was developed in 1996 in response to the Constitutional Court decision dated 1996 and was designed to avoid the concessional limitations in the BOT model. This model may also be viewed as a further attempt in favor of privatization of the energy sector since it does not foresee the transfer of the electricity generation plants back to the state.

Law No. 4283 authorizes the Treasury for granting guarantee to the payment obligations of TEAŞ under energy sale contracts. Thereafter, Council of Ministers Decree dated August 29, 1997 aligned details of the implementation.

In general the BO model is based, according to the new legislation, on granting permission to generation companies other than TEAŞ to establish, own and operate plants to produce energy. An implementation contract is signed between TEAŞ and the company.

The company applying to TEAŞ or at least one of its shareholders must have previously performed investment or operation activities in the same field of work. Any other requirement sought should be mentioned in the tender announcement. Announcing a tender is at the discretion of TEAŞ but companies wishing to establish generation facilities may also apply to the TEAŞ, indicating the consumers to whom they intend to sell the electricity which they are planning to produce. After evaluation of the bidding proposals by TEAŞ, the Ministry grants the permission for power generation.

Issues such as the extent of buy-back guarantee of TEAŞ; the price for which determination of the unit price and the criterion of yearly price adjustment; the authorization period -not to be more than 20 years- with the option of an extension at the end of the authorization period; dispute resolution mechanisms and governing law shall be articulated in the Agreement.

The Law No. 4283 regarding the Build-Own model excludes the hydroelectric, geothermal and nuclear energy production and the idea behind this was not to create any links with the concession concept. Thus, these areas of energy production will be the concentration of the BOT model applications.

Treasury guarantee will be provided only for the payment obligations of TEAŞ under the ESA for BO projects, and, implementation contracts for such BO projects will not need to go to the State Council for preliminary review.

c) TRANSFER OF OPERATION RIGHTS (TOR) MODEL

Transfer of Operational Rights (TOR) model is also based on the same legislation as the BOT and the Constitutional Court also labeled the TOR's as concessionary. the Ministry of Energy and Natural Resources had to submit these concession contracts to the State Council for rewiev and approval.

According to the Article 5 of the Law No. 3096, the operation rights
of the power plants owned by the public sector in a certain district can be transferred to the private companies. The decision of the transfer of operational rights is to be taken by the Council of Ministers.

Then the private companies that are entrusted with the operational right should perform according to the Law No. 2983, being the “Encouregement of Savings and Promotion of Public Investments”.

The “transfer value” of the plant is to be agreed upon between TEAŞ and the private company according to the economic and technical specifications of the plant. The transfer value covers all of the operation costs of the plant, including the interest on the loans obtained to pay the transfer value.

The transfer value is the basic figure in the tariff, together with a profit. Insurance of the plant is necessary. The beneficiary of the insurance policy is the public authority.

The term of the operational rights is 20 years. The tariff is fixed at the outset of the transfer and does not change throughout the operational period.

The Treasury also provides guarantee for this model for the payment obligations of TEAŞ arising out of the ESA in due course.

The plant will be transferred back to the Government at the end of 20 years in good operating conditions and without any debts or damages.

d) AUTOPRODUCTION MODEL

Auto-production model in electricity was allowed through Regulation No. 85/9799 dated September 1985 for industrial own use.

An auto-producer can be one industrial company or a group of companies. Authorization for auto-production is given by the Ministry of Energy and Natural Resources to the auto-producer subject to approval of the responsible administration of the district or TEAŞ.

The Council of Ministers has issued a Decree No. 96/8269 in May 1996 to establish rules and regulations for electricity auto-production.

According to the said Decree, a contract will be signed between the auto-producer company and TEAŞ to define the amount of excess energy to be bought by TEAŞ, its tariff, duration and other related issues.

Treasury guarantee may be provided for the excess energy to be bought by TEAŞ.

According to the above-mentioned Decree, the auto-production contract is exempt from the State Council approval, and an international arbitration clause for disputes to arise among the parties is allowed.

The auto-producer is allowed to sell the energy, other than its own use, to;

- companies who own transmission lines,
- distribution companies with the condition of paying transmission cost to the transmission companies,
- organized industrial districts,
- small industrial areas,
- companies with more than 4000 kwh established capacity.

IV. TREASURY GUARANTEES AND RISK ALLOCATION IN THE PPI CONTRACTS

If requested by the authorizing agency**,** in support of properly structured and implemented projects, Turkish Treasury is authorized to provide guarantees for BOT, BO and TOR models according to Laws No. 4180 and 4283. There are 5 different types of guarantees provided for BOT and TOR projects. These guarantees are as follows:

1.Guarantee of payments to be made to the project company for the goods and services purchased by the related administration.

2.Guarantee of full and partial payment to the lenders for any subordinated loans to be supplied from the financial institutions, or guarantees in favor of the funds undertaking financial liabilities for subordinated loans for the project company.

3.Guarantee in favor of the lenders for repayment of any senior loans in case of an early transfer of the facilities to the related public administration.

4.Guarantee of provision of input to be supplied by the related administration.

5. Payment guarantees to be made by the electricity energy fund.

These are all payment guarantees and no performance guarantees are allowed.

Guarantee of foreign exchange currency risk is not covered under the guarantee law, therefore Treasury is not allowed to extend such a guarantee. However, since there are no foreign currency controls or restrictions and the tariff payments were determined to be made in foreign currency in most of the BOT projects, we have not encountered any problems because of our not extending such a guarantee.

For the BO and auto-production, there is only purchase of electricity guarantee on a take-or-pay basis to be provided to the project company.

WHERE THE TREASURY STEPS IN

The terms and conditions of agreements between the project company and governmental agencies are in the responsibility of the relevant government agency within the scope of its legal authority. Therefore, relevant governmental agency determines the project company and prepares the Implementation Contract (IC) that would, inter alia, also cover the basis of the Treasury guarantees. Before an IC is prepared, the project company should have submitted all required feasibility reports, cost-benefit and similar studies.

We would like to stress that the Treasury should be involved in negotiations of all the related documents so long as and to the extend that its guarantees are effected.

Experience shows that most of the times Treasury went beyond its responsibilities to find constructive solutions when the negotiations among the government institutions, companies and creditors got stuck.

All parties to a BOT-project should realize that the Treasury Guarantee letter is the final document to be signed during the course of the project, but a critical and important one. Therefore necessary action should be taken from the outset of negotiations and the Treasury should go over every agreement signed between the parties.

V. MUNICIPAL SERVICES AND LEGAL IMPEDIMENTS

Municipal infrastructure services has been traditionally covered within the scope of Law No. 1580 dated April 1930. Referring again to the century old "public service" concept, the Law stipulates that "concessions" may be given to private parties regarding such municipal services as electricity, natural gas and water provision, and light rail transportation services. Nevertheless, Law No. 3996 transferred the scope to this new law and as clearly referring to the BOT model this new law started to be the main legislative reference for provision of such municipal services.

In the light of the new Constitutional amendments, it may be asserted that by now there are no legal impediments at least in the context of international arbitration for municipal PPI applications. Nevertheless, this new law has some deficiencies in itself, in that it requires approval by the central authority for any specific project, thus allowing a discretionary power to be used by the central administration. For example, even for a simple multi-storage car parking facility, municipalities need to submit their PPI project to the central authority and need to get approval.

Furthermore, this law refers to the BOT projects that require high technology and amounting to high investment figures. On the other hand, not all the BOT projects are necessarily of this kind. Therefore, some changes into the Law No. 3996 should be considered to further ease realization of minor-scale regular PPI applications, especially in the municipal level.

VI. CONCLUSION

The previous experience has helped us understand the pitfalls for private participation in infrastructure. In the past we have unfortunately created a ground whereby the investors were provided with unnecessarily extensive guarantees. Therefore it is now a good opportunity to start taking steps towards a more liberal and risk-balanced era for attracting private investment into infrastructure investments in line with the international experience that proved to be successful in this respect.

uni europa

European Commission,
C 100 2/005
B - 1049 Brussels

Tuesday, 13 July 2004

Dear Sir/Madam,

Re: Consultation on the Green Paper on Public-Private Partnerships and Community law on public procurement

Please find enclosed UNI-Europa's response to the public consultation and a selection of our materials of relevance to this matter.

UNI-Europa believes that high-quality, universal, well-developed and well-financed services of general interest are essential in a knowledge-based economy and are a precondition to achieving the Lisbon goals on employment and social and territorial cohesion.

UNI-Europa's main concerns about PPPs and public procurement are focused on employees' rights and working conditions, particularly those within outsourced or quasi-public service providers. On the basis of experience amassed by our affiliates in different countries our approach to PPPs is a very cautious one.

We welcome the opportunity to participate in this consultation, and are available to clarify any questions arising from this submission.

Yours sincerely,

Bernadette Ségol
Regional Secretary

Public-private partnerships and Community law on public contracts and concessions

UNI-Europa's response to the Green Paper

UNI-Europa is a European trade union federation for services and communication. UNI-Europa has 320 affiliates and speaks for 7 million organised workers in the commerce, finance, telecommunication, postal, graphical, cleaning, security, business services, IT, personal services, social protection, leisure, sport, media and entertainment sectors. UNI-Europa develops a horizontal approach to cross sectoral issues confronting the service sector. UNI-Europa is a recognised social partner in the EU. UNI-Europa is a member of the European Trade Union Confederation.

UNI-Europa est une fédération syndicale européenne pour les services et la communication. UNI-Europa compte 320 syndicats-membres et représente 7 millions de travailleurs syndiqués dans le commerce, la finance, les télécommunications, les postes, le nettoyage, la sécurité, les services aux entreprises, la protection sociale, les loisirs, le sport, les médias et spectacles. UNI-Europa élabore une approche horizontale aux questions auxquelles est confronté le secteur des services. UNI-Europa est un partenaire social reconnu par l'Union européenne. UNI-Europa est membre de la Confédération européenne des syndicats.

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UNI-Europa response to the Commission's consultation on public-private partnerships and Community law on public contracts and concessions

High-quality, universal, well-developed and well-financed services of general interest are essential in a knowledge-based economy and are a precondition to achieving the Lisbon goals on employment and social and territorial cohesion.

Employees are key stakeholders in the development of high-quality services of general interest. UNI-Europa represents 320 member unions and speaks for 7 million organised workers in the commerce, finance, telecommunication, postal, graphical, cleaning, security, business services, IT, personal services, social protection, leisure, sport, media and entertainment sectors. UNI-Europa is also a recognised social partner in the EU. We welcome the opportunity to participate in this consultation.

Funding panacea or privatisation by stealth?

Public authorities are increasingly under pressure to deliver high-quality, universal services of general interest in an economic context characterised by reducing use of direct taxation and fiscal stringency. As public authorities at all levels search for means to secure future sources of funding for services of general interest and increase the efficiency of service delivery, PPPs are increasingly touted as a solution, particularly for the new member states and accession countries.

UNI-Europa is concerned that PPPs may neither fulfil their promise as a future panacea of public funding nor the promise that private participation will bring greater efficiency and high-quality service provision.

Rather, although there are a number of success stories, public authorities and the taxpayer often end up shouldering heavy financial burdens resulting from misuse or misapplication of PPPs. While employees often bear the brunt of contracting companies aiming to reduce overheads and their overall bids for public sector contracts. Furthermore, research conducted by the ETUC and CEEP on services of general interest in the new member states and candidate countries, confirms our experience in the older member states that the privatisation of services does not lead per se to more efficient and cost-effective services or a better performance.

These experiences highlight some of the very real threats associated with PPPs, particularly as far as infrastructure funding is concerned. We welcome the Commission's recognition of this fact: '…recourse to PPPs cannot be presented as a miracle solution for a public sector facing budget constraints' (pp.4).

In conjunction with European rules on competition and market liberalisation, the development of PPPs could constitute a means to further liberalisation of public services in the long run and the increased commercialisation of national welfare states. The emergence of PPPs raises fundamental questions about the future of the European social model based on solidarity and universal high-quality public services. PPPs should not be used as a vehicle for privatisation of public services.

Therefore, UNI-Europa believes that certain basic principles should underpin the development of policies on PPPs. Fundamentally, a PPP:

- Must demonstrate that it brings about desirable outcomes such as efficiency and best value for money in reality;
- Must be compatible with wider economic, social and environmental objectives, and therefore must include employee information, consultation and participation at all stages; and
- Must not be a vehicle for privatisation of public services.

Providing high-quality services and respecting employees: contractual v. institutional PPPs

UNI-Europa's main concerns about PPPs and public procurement are focused on employees' rights and working conditions, particularly those within outsourced or quasi-public service providers. UNI-Europa absolutely opposes the emergence of a two-tier workforce.

It must be stated that these experiences differ greatly between EU member states, generally the worse experiences stem from the UK. UNI-Europa demands that employment and working conditions be taken into account in the elaboration of a regulatory framework on PPPs.

Contractual PPPs

Evidence, collected respectively by CoESS and UNI-Europa for the private security sector and EFCI and UNI-Europa for the industrial cleaning sector, overwhelming demonstrates that the vast majority of contracts are awarded on the basis of lowest bid. In the private security industry, 90% and more of Austrian, Belgian, Danish, Finnish, French, German, Irish, Luxembourg contracts were awarded to the cheapest bid in 1998. This has a direct effect on the quality of the service, and the workers concerned, since these services are highly labour intensive. In most cases, this is due to a lack of available guidance to contracting authorities.

Although rules on the transfer of undertakings apply to externalised contracts, staff have a much better chance of maintaining jobs, terms and conditions and trade union organisation where a local authority has a strong commitment to retaining services in-house than with outsourcing.

The contracting-out or outsourcing of 'in-house' services more often than not alters conditions for staff. A growing mass of evidence demonstrates that private sector restructuring and relocation have resulted in changes to pension entitlement, pay and conditions, holidays and sick leave, trade union representation and negotiation, equal opportunities, job satisfaction, training and career development in all cases of externalisation. It does not remove the uncertainties facing staff working in local government but rather is likely to create new ones.

In the cleaning sector, wage disparities between 'in-house' and private employees are often unacceptably high. Many hospital cleaners who work for outsourcing companies, such as ISS Mediclean, are paid 'poverty wages' in effect. ISS Mediclean provides hospital cleaning, portering and other non-medical services in many British NHS hospitals (Newham, Hairmyres, etc.) on a contractual basis. Industrial disputes have occurred throughout the UK due to the differences between wages for 'in-house' cleaners and their private sector counterparts, which demonstrates a company policy rather than individual instances.

In the private security sector, Group4 Falck (and its current and former subsidiaries: Falck, GSL etc.) provide contracted private security services in many EU countries. While GSL run some custodial institutions in the UK, they also have contracts to transport prisoners to and from courts. Recent empirical evidence from the UK think-tank Catalyst demonstrates, while the custodial services have been championed as a success story of public-private partnership, in reality 'only a small part of the cost-savings achieved by private prisons are the result of innovative management practices. By far the larger part can be related to employees working longer hours, with fewer holidays, for lower pay and inferior pensions and other benefits' (Sachdev, 2004).

On the other hand, Falck provides virtually all ambulance and rescue services in Denmark and is expanding in Sweden and Norway. In Denmark the effective PPP in rescue services stretches back to 1901 and the founding of Falck's predecessor company. About two-thirds of Falck's business is derived from servicing local government contracts to provide 'basic' emergency services to the Danish population. Workers are covered and protected by sectoral collective agreements according to the Danish industrial relations system, and trade unions have a strong role in the company.

Institutional PPPs

Our experience suggests that the freedom to innovate has been greater where authorities have looked at restructuring in-house services.

UNI-Europa believes that joint ventures are more genuinely partnerships that those in which the contractor is kept at arms length with a formal client-side relationship. There are concrete examples where institutional PPPs have been created which do not resort to outsourcing and these should be explored further.

A renowned example is that of Liverpool City Council's joint venture company with BT, in which BT has effectively invested in the improvement of ICT skills amongst call centre workers for Liverpool Direct (local authority information and service line), while the employees remain local authority in-house staff.

Alternatively, the joint venture company created by London Borough of Islington and Accord – Islington Cleansing Services Limited – represents a good example of how outsourced workers can be involved in the management of a service provider. Within this joint venture company, employees are included in the decision-making process through a stakeholder review committee at board level, which includes their trade union representatives, and ultimately the local authority has a 'golden share' with the power of veto over key decisions.

On the basis of the experience amassed by our affiliates in different countries our approach to PPPs is a very cautious one.

Application of EU rules to the selection process

Our primary conclusion from all these different experiences is that much depends on the definition of the PPP concerned and the selection process.

A number of our affiliates have highlighted the lack of transparency and coherence in terms of the role and applicability of EU rules on public procurement, and the confusion that reigns at local authority level.

UNI-Europa believes that EU rules and regulation on public procurement, as revised by Directive 2004/18/EC should apply equally to PPPs. This is essential to ensure not only for transparency in this field, but also to ensure that local authorities are able to select partners on the basis of non-economic social and environmental conditions.

Selecting best practice in contracted cleaning and security services

Beyond these broad principles, UNI-Europa would like to draw the Commission's attention to the joint guides on selecting contractors for public authorities, produced by UNI-Europa and our respective employers organisations in the cleaning (EFCI) and private security (CoESS) sectors (attached to this paper). See: www.securebestvalue.org for more details about the private security sector's initiatives.

In both broad sectors, public contracts account for an increasing proportion of sectoral turnover. In 1997 research demonstrates that public procurement accounted for an average of 33% of turnover in the industrial cleaning sector, in those countries concerned (Belgium, Spain, France, the Netherlands, Portugal and the UK). While in the private security sector that figure was closer to 30%. However, in both cases the overwhelming majority of public contracts are awarded on the basis of lowest cost bid.

UNI-Europa and our employer counterparts are in the process of challenging this trend. Our common concept of *best value* seeks to take into account not only a favourable price, but weighs this up with the quality elements of a bid for service provision.

The jointly agreed manuals on '*Selecting best practice*' provide public authorities with guidelines on identifying selection criteria for high-quality bids. UNI-Europa demands that the Commission take into account, endorse and promote these sectorally agreed guidelines.

Need for a EU Observatory on SGIs collecting information on PPPs

It is crucial that more evidence and experience be accrued from the examples already undertaken. We reaffirm our commitment to the creation of an Observatory at European level analysing services of general interest, which should investigate the use of PPPs and support local/regional authorities in their definition of proposals. UNI-Europa believes that such an organisation should be tripartite in nature, like the European Foundation for the Improvement of Living and Working Conditions, to ensure that employees and their representatives are heard and involved.

UNICE
THE VOICE OF BUSINESS IN EUROPE

29th July 2004

UNICE RESPONSE TO THE COMMISSION CONSULTATION ON ITS GREEN PAPER ON

PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON CONTRACTS AND CONCESSIONS

UNICE primarily wishes to stress that many of the questions in the Commission's Green Paper referring to possible legislation cannot be answered without first having a clear definition of what a Public Private Partnership (PPP) is in the sense of the Community. In this context, we would like to point to the UNICE paper **Recommendations for Promoting Public/Private Partnerships (PPP)** published on the 25th February 2002 which addresses this matter.

Question 1.

What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?

Examples of purely contractual PPPs are the operator model (with varying works scope) the concession model and institutionalised PPPs. They correspond to the models listed in Nos. 22 and 23 of the Green Paper.

With the exception of the Spanish Law 13/2003, which regulates and creates a specific framework for public works concessions we are not aware of any other framework conditions for contractual PPPs that are in existence.

Question 2.

In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

Competitive Dialogue is intended for use in any contract which is complex, howsoever that complexity may have arisen. PPPs, by their very nature, are likely to be complex. It is thus probable that Competitive Dialogue will need to be used in most PPPs.
However, it is not logical that this new procedure should, as contemplated by the phrasing of the Commission's question, only apply to purely contractual PPP. Institutionalised PPPs often handle particularly complex projects too.

It is to be hoped that the regulations in Article 1 Para 11 Letter c and Article 29 of the Directive 2004/18/EC provide sufficient legal certainty to enable Competitive Dialogue to be used for PPPs. Article 29 Para. 8 only allows for the possibility but not the obligation to pay candidates who are then not involved in the contract. The tendering process for PPPs is very expensive; at the end of the day the purchasers pay the cost – there is no other source of revenue – and it makes sense for the Contracting Authority to pay the reasonable costs of tendering at the time. Should they not offer to do so, it may stop many companies from participating in such a tender.

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Question 3.

In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.

Difficulties could be encountered in specifying the focus of a public contract awarded in the context of a PPP where this is – as is typical of a PPP – a mixed-type contract with public works, supply and service components. The “focus theory” developed for this by the European Court of Justice does not provide for clear solutions in all cases. There are other areas which might pose difficulty, for example the application of Public Procurement rules on PPPs (to the leasing/acquisition of property) or the lack of legal protection in the case of complete contempt of the public procurement rules, which can be of particular importance in the field of PPPs, since these are typically long-term contracts.

Question 4.

Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

Experience gathered so far in the award and processing of works concessions has, in general, been positive.

Question 5.

Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?

In the field of works concessions, the relevant regulations of the Public Works Directive have proven to be sufficiently precise. In any case, no criticism has been received so far. In the absence of any proof to the contrary, it is assumed that there is general competition in this area as well.

Question 6.

In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

Repeating the content of our reply to question 5, we do not believe that a Community legislative initiative to regulate the procedure for the award of public works concessions is necessary. For service concessions, a clear EU-wide delineation of the term “concession” needs to be laid down first.

Question 7.

More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

The regulations in the existing directives, apart from the present exclusion of service concessions, are sufficient for the purpose. With regard to PPPs which are not concessions, there is as yet insufficient experience for sound regulations to be drawn up. UNICE recommends that the question might be revisited in due course when more experience has been gained. It is of the view that, should additional regulation for non-concession PPPs prove to be necessary, it may well have to be different from that for concessions, but only time will tell.

Question 8.

In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?

As far as we know, PPP schemes are generally publicly tendered so that in this context – if they are above the EU threshold – access for foreign operators is ensured.

Question 9.

In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?

As already mentioned in our answer to question 8, it is assumed that the application of an open or restricted procedure will guarantee compliance with the principles of transparency, equal treatment and non-discrimination in private initiative PPPs as well.

The actual problem with private initiative PPPs is to find companies willing to develop ideas without any guarantee that they will be involved in the execution of the PPP realising that idea. The proposal to pay the initiator for their efforts in such a case (see No. 41 of the Green Paper) would therefore seem useful.

The public authority has to take care that eventual advantages of the company initiating the PPP are neutralized, in order to put it in the position to participate in the tendering, without violating the principles of equal treatment and non-discrimination.

In general there should be no different rules for public or private initiative PPPs.

Question 10.

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

Since competitors rarely become aware of possible adjustments to contracts (which might properly require a new tendering procedure), they have no chance to take legal action. Accordingly, the regulatory authorities do not become aware of many of these cases. However and especially in very complex PPPs, adjustment to the contract should be possible.

Furthermore, unlike public purchase contracts, PPPs (whether or not they are concessions) need adjustment over the duration of the PPP. Indeed, it is necessary to adapt PPP conditions over its life to take account of changes in the environment, in the priorities of the public authority, in technical changes, and other circumstances largely without the control of the operator

Question 11.

Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?

The automatic contract renewal clauses which have come up in several cases could lead to the object of contract being closed for competition permanently if the term for which the contract is renewed when the option to terminate is not exercised is lengthy.

Question 12.

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

Question 13.

Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other "standard clauses" which are likely to present similar problems?

UNICE feels, in line with the Commission's view, that "step-in" type arrangements as they are currently constituted can be a problem and as such steps should be taken (e.g. more transparency and easily understood rules) which will guarantee the compatibility of such actions with Community law on public contracts and concessions.

It is also UNICE's view that private companies involved in PPPs should also have the right to transfer their contracts subject to the compatibility of such actions with Community law.

Question 14.

Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?

A stipulation at Community level would, in our opinion, necessarily lead to rejections of national regulation of contract law and cause problems without a European contractual framework actually bringing any tangible benefit. The national contract law regulations for the execution of PPPs are wholly sufficient. We do not think that any action is necessary here.

Question 15.

In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.

We see no need for more extensive regulations for the award of subcontracts in the context of a PPP. It would, at most, be conceivable to include an obligation whereby subcontractors may not be submitted to worse conditions than those agreed in relation between the contracting authority and the main contractor.

Question 16.

In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

Question 17.

In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

See answer to question 15.

Question 18.

What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not?

UNICE feels that the Commission ought to be aware of the possibility to use institutionalized PPPs to circumvent the application of procurement law.

It is also the case that sometimes if there has been a correct tendering procedure for the initial contract, there is still the question of whether the public authority as associate can conclude a contract with a subsidiary without tendering and to which limits the subsidiary can operate on the market without loosing its in-house privilege. Therefore a clear guideline to which extent the Teckal[1] criteria are applicable to such cases would be welcome.

Question 19.

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

It would be very welcome if the Commission's Green Paper and the collected answers from the consultation resulted in detailed Commission guidelines on PPPs which sets out obligations to apply Community law on public contracts and concessions in the setting up of a PPP.

[1] *Teckal SRL v Commune di Viano & Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia,* Judgement of the ECJ 18/11/1999, C-107/98.

In general and independently of the questions raised in this document:

Question 20.

In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?

- ❑ A lack of information and experience as well as uncertainty among the contracting bodies as to when it makes sense to form PPPs, and how to structure them successfully;
- ❑ A lack of political will to give up intervention rights and opportunities and transfer these to the private partner;
- ❑ Protection of in-house interests (interpreted in the strictest possible terms) against foreign participation and application of public procurement rules,
- ❑ Too hesitant liberalisation and opening of the market in certain sectors, e.g. railway;
- ❑ Open questions regarding the stability and growth pact concerning criteria budget deficits and national debt;
- ❑ Tax discriminations against private companies;
- ❑ Unequal access to local, national and European subsidies between public and private operators;
- ❑ Current accounting harmonisation proposals, if not appropriately adapted, could prove to make the PPP process impossible.

Question 21.

Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of "good practice" in this framework which could serve as a model for the Union? If so, please elaborate.

Question 22.

More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

The establishment of a European network by the Commission would only be useful if industry was involved in a **partner-like manner**. The exchange of information in such a network should not take place "anonymously" but be gathered and included in the position papers put forward by the parties involved, i.e. the contracting bodies and the executing industry, before Commission's recommendations, communications or other statements based on these are made. The focus of such a network should therefore be the exchange of information and experiences.

UNICE

THE VOICE OF BUSINESS IN EUROPE

25 February 2002

UNICE RECOMMENDATIONS FOR PROMOTING

PUBLIC / PRIVATE PARTNERSHIPS (PPP)

Today more and more countries are turning to private financing for infrastructure and service projects in order to overcome the lack of public funds or to reserve public funding for other priority areas. In the current public deficit situation of most developed and developing countries, private financing becomes a means for public action. PPP is also an alternative to privatisation for dismantling infrastructure or service monopolies. PPP constitutes a mechanism for having a range of suppliers delivering public services, bringing new sources of innovation and management and creating a healthy competitive pressure on all providers to improve their performance.

Private participation in public infrastructure projects is not an innovation; it has existed for several centuries and was particularly used during the 19th century in railways. But operators face more and more difficulties in Europe when they try to set up PPPs, and they are convinced that these difficulties come in part from an uncertain legal and financial environment and from the lack of knowledge and skill of some public authorities, this second reason being partially a consequence of the first.

For these reasons several members of the UNICE Public Procurement Working Group have been asked by their organisations to discuss the issue within UNICE and with the European institutions.

The UNICE PPP Task Force (“TF”) was set up at the beginning of 2001 with the objective of promoting concessions and other public-private partnerships as one of the means to liberalise some sectors, services in particular, and to examine whether or not the existing legal environment is favourable for the development of these schemes in Europe.

The TF has interviewed several experts listed in the annex.

A large majority of these experts have expressed the view that the lack of consistent rules in Europe can hinder or slow down the setting up of PPPs; major and significant public infrastructure projects are thus postponed, to the detriment of citizens.

For instance, in the area of European transport networks the lack of financing is estimated at between € 40 and 50 billion. The delay in implementation of projects, in particular transborder infrastructure projects, is regularly pointed out by the EU Commission’s Transport Directorate General[1].

For the candidate countries facing the acquis communautaire, the need for investment is huge. As stated in the Communication from the Commission “The challenge of environmental

[1] Draft proposal from the Council and the EP on the development of the Trans-European transport network (2001).

financing in the candidate countries": "Even if recent estimations place the total cost of compliance for the ten Central and Eastern European Countries lower than initially estimated – between € 79 and € 110 billion instead of € 120 billion - the need for investment planning remains crucial. The new legislation adopted in 2000 and expected in 2001 will add to the financing needs, since it includes some investment heavy pieces of law, such as a new directive on power plants"[2]. This evaluation for the environmental and energy sectors confirms the potential of PPP as a tool, among others, for the development of infrastructure and services of general interest.

The results of interviews with experts and discussions in TF meetings lead UNICE to the following observations:

- PPPs are complex and take various forms but characteristics common to all PPPs constitute a basis on which common principles can be formulated. Hence, for example, the United Nations Commission on International Trade (UNCITRAL) recently adopted a Legislative Guide to Privately Financed Infrastructure projects (Part I).

- The current legal status of PPPs in Europe does not allow the proper development of PPP projects and the EU needs to examine the means for facilitating PPP transactions. (Part II).

In conclusion, UNICE will add a few recommendations based on points which have been raised regularly during the TF discussions (Part III).

I. Various forms of PPP with common elements

Public-Private Partnerships (PPP) may take different forms, depending on countries, sectors and the parties' preferences. More and more sectors are now becoming involved; not only the infrastructure sector, but also services sectors such as transport, water, waste, municipal services, electronic delivery of public services, prisons, hospital-building, etc.

PPP agreements may cover all or part of a very large range of tasks relating to a public service or an infrastructure: design, building, operating, financing, management and customer care.

Concessions, Build-Operate-Transfer, Build-Own-Operate, PFI and others are all variations of the same basic scheme: an agreement between a public authority and a private entity for the implementation of a project relating to an economic activity. There are different levels in the transfer of management, responsibilities and asset ownership, but the operating risk is always assumed by the private entity. In some cases, the end-user funds or partly funds the cost through direct user charges. In other cases, the public sector client pays – sometimes taking on volume or demand risk and sometimes not.

UNICE does not intend to describe all these forms of PPP in detail. Appropriate definitions and descriptions can be found in many relevant books, guides and regulations.

However, it seems important to underline the following key points:

1. **Current Public Procurement rules are not adapted to the requirements of PPP,** in that PPPs are based on long-term and complex agreements involving three or four parties: the public authority, the private entity, possibly the provider of finance and the

[2] Commission Communication 501PC0304

end-user. Moreover, current public procurement rules concern only the award phase of the contract while PPPs and concessions include the award and execution of the contract.

2. PPP schemes are not the same as privatisations in which the public authority transfers all duties and ownership of the asset to the private entity.

3. All PPPs **have the following common elements:**

   1. they are based on a contract between a public authority and a private entity,
   2. they generally provide for long-term commitment,
   3. the duties are shared between the public authority and the private entity,
   4. the private entity operates, invests and assumes financial risk,
   5. the public authority defines requirements, manages the relationship with the private provider and holds the provider to account for delivering the agreed outputs under the agreed terms. In some cases, the public authority also regulates.

4. PPPs have **advantages** for the parties involved:

- For the public entity :

  - PPP may be the best response to a public need for a long period of time,
  - it may be a means to provide a better quality of service,
  - it requires a “best value for money” approach,
  - it constitutes a means for the better use of the public budget,
  - the public entity does not bear the major risks of a project because they are transferred to the private entity; and
  - the public entity is thereby able to control its costs better.

- For the private entity :

  - it is intended to be profitable;
  - it provides a long-term source of income;
  - it can be a means to diversify activities; and
  - it is a means to export know-how.

- For the user:

  - it may be the only means to obtain a missing infrastructure or service, and
  - to benefit from a better infrastructure or service.
  - development of PPPs should diminish the overall tax burden; and
  - it may also reduce the prices paid by the end-user as a result of the introduction of competition in sectors where monopolistic conditions prevailed before.

5. But PPPs may also raise **difficulties and criticisms:**

   (a) In the opinion of the public, PPPs can suffer from a poor image, frequently because of bad public relations. PPPs are sometimes criticised as being a means to transfer public service to private management with a negative impact on quality, employment, social protection or environment. In such cases, political and ideological reasons can lead to the wrong economic decision that the project should be abandoned, or that it should be financed by the public authority, thereby finally putting an additional burden on taxpayers.

(b) For the parties involved, PPPs are often unduly complex because, in addition to the project and its technical difficulties, many other elements are involved including social, environment, financial and legal aspects. The drafting of the agreement may sometimes require negotiations over several years. The lack of clear rules, combined with a lack of knowledge from some public authorities, contributes to this unnecessary complexity.

Better communications and proper rules on transparency, economic balance between the parties and political certainty should help to overcome these difficulties.

II. Legal status

(a) **Some EU Member States** have specific rules, regulations or systems applicable only to some kinds of PPPs. For example, in France, concessions were developed in many sectors during the 19th and 20th centuries and are regulated by statute and detailed case law. The UK has recently developed a successful tool for attracting investors: the Private Finance Initiative (PFI). PFI deals are also expanding in Ireland, Finland, Norway and Denmark.
(b) **At EU level** there is no global and coherent approach to PPPs. The only provision can be found in the Works Directive 93/37, which concerns publicity before award of a public works concession. There is no provision relating to service concessions.

The Interpretative Communication on Concessions of 26 April 2000 was a first attempt by the EU Commission to clarify the legal regime, but covered only concessions and did not give practical information to operators.

Further articles, reports and seminars have been added to the debate. The following publications have more particularly attracted UNICE's attention:

- Mr A. Mattera's article "La communication interprétative de la commission sur les concessions de services d'utilité publique: un instrument de transparence et de libéralisation" published in issue 2/2000 of the "Revue de Droit de l'Union Européenne".

- The EU Economic and Social Committee Report of 16 January 2001 "Strengthening the law on concessions and PPPs".

- The EU Commission Questionnaire on PPPs to the Consultative Committees (June 2001).

(c) **At International level** organisations like the World Bank or UNCITRAL have adopted rules or guidelines which are useful tools for operators and states and which constitute a framework suitable for privately financed infrastructure projects.

The recent UNCITRAL Guide, adopted in July 2001 after four years of work, constitutes the most interesting set of recommendations because, rather than proposing a model law, it contains recommended legislative principles intended for use as a reference to assist national authorities and legislative bodies when preparing their own laws and regulations.

III. UNICE recommendations

As mentioned above, several international organisations have acknowledged the economic benefit that PPPs can bring to countries and have adopted modern rules or guidelines in order to encourage and promote PPPs. But in Europe, public authorities sometimes mistrust

PPPs or are not aware of the benefits they can bring. They often lack the skills to feel comfortable negotiating on an equal level with experienced operators. PPP programmes often take too long to develop and individual contracts often take too long and cost too much to establish.

This is why UNICE believes that some action at EU level would help to:

1) clarify the issues through **definitions and descriptions of the different PPP schemes**: project agreements, concessions, BOT, Build-Rent-Operate-Transfer (BROT), Build-Own-Operate-Transfer (BOOT), etc. This work would simply consist of collecting the definitions which have been published by several organisations and are used by operators. Collection of these definitions would be very helpful to create a common language and improve communication between interested parties.

2) introduce more transparency in the process leading to these deals and on their technical, legal and financial aspects through the setting-up of **an information exchange system**, for example a website including data about these contracts.

3) ensure **flexibility, transparency and fair treatment in the awarding of PPPs**.

   (a) flexibility because many provisions must be decided by the parties according to the nature of the project and should be adapted to the evolution of the project or of its environment. A freedom of contract approach to the content of the PPP contract is essential in order not to discourage privately financed infrastructure projects.

   (b) transparency and fair treatment must be present at all stages of organising a PPP: bidding, negotiation, contract, economic balance and review.

   Setting up a mechanism for the exchange of good practice would help to accelerate learning across Europe, without jeopardising innovation or slowing down the inevitable and desirable evolution of new models of PPP. The Commission's approach must recognise that PPPs are typically based on contracts which must be adapted to the specific nature of each project.

4) **Introduce the following principles** which have been identified in most of the case studies and presentations as being particularly important.

- The PPP agreement should be set up in a written contract.
- The PPP should be awarded through a transparent and a fair procedure, according to clear selection criteria.
- Ample room for negotiation should be left to the parties because PPPs are based on contracts which must be adapted to the specific nature of each project. Negotiations must respect each party's interest.
- Allocation of risks is an important part of the negotiation: as the UNCITRAL Guide recommends, unnecessary regulation should not limit the ability of the contracting parties to allocate risks as they best see fit.
- It must be possible to modify the PPP contract according to the evolution of the project or of the context. For example, a road concession contract should include a clause providing for the revision of the agreement in case of traffic reduction.
- The parties must be free to set the duration of the contract, the conditions for its extension, its termination and the consequences of termination.
- Mechanisms for settlement of disputes should be part of the recommendations to the negotiator and left to the parties to decide according to the needs of the project.

- In order to ensure the stability of the contract, no change of the legal and regulatory framework by the public authority without agreement of the private entity should be possible.

We recommend that **the EU Commission sets up a panel of specialists** including representatives of operators, public authorities and experienced international organisations to promote the exchange of good practice. In this exercise, particular care is needed to involve practitioners and Government experts from across Europe and to avoid taking any action that would inhibit the evolution of PPPs. It must be recognised that this evolution will occur at different speeds and in different directions across Europe, depending on each country's needs and procurement strategies. The Commission's approach should recognise the benefits of such evolution and aim to accelerate learning.

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Annex

HOW UNICE PPP TASK FORCE HAS PROCEEDED

UNICE had adopted an earlier position, on 23 June 1999, in which it expressed the wish to see a consistent approach to all forms of concessions and PPPs and the need for further regulation on this matter.

A new UNICE PPP Task Force ("TF") has been set up at the beginning of 2001 with the objective of promoting concessions and other public-private partnerships as one of the means of liberalising some sectors, services in particular, and of examining whether or not the existing legal environment is favourable for the development of these schemes in Europe.

Presentations on case studies in different countries and sectors and presentations of the work done in other international organisations have enabled the TF to understand better the difficulties which arise when PPPs are being organised.

The TF work programme included the following presentations:

- the World Bank guidelines and experience by Pierre Guislain, World Bank;
- the French system of concession by Xavier Bezançon, Entreprises Générales de France-BTP;
- the UK Private Financing initiative ("PFI") system, by Timothy R. Steadman;
- the work completed by the Syndicat des Entrepreneurs Français Internationaux (SEFI) "For new public-private partnerships in infrastructures and public facilities" by Roger Fiszelson, VINCI;
- ONDEO's experience and case studies by Jack Moss, ONDEO;
- Hochtief's experience and case studies by Bernard Kulle, Hochtief;
- public-private competition in the waste sector in Europe by Paul Huggard, SITA Group;
- the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Privately Financed Infrastructure Projects by Mark Reichel, consultant for the World Bank.

UNIFE
Association of the European Railway Industries

UNIFE Position Paper on PPPS

UNIFE recognises that major infrastructure investment of any kind (not only rail, but also road, airport, utilities etc.) is typically a public sector task. Private sector investment in such schemes requires that investors secure reasonable rates of return based on the level of risk being transferred.

PPP models cannot be standardised across different sectors. The provision of railway infrastructure requires unique solutions.

Regulatory measures taken at European level should establish guidelines clarifying the benefits that an effective private/public partnership in the rail sector can offer and key issues to be addressed. Structuring the preferred approach and setting the regulatory and contractual framework should remain under national responsibility and control.

The PPP concept should encourage the maximum participation of suppliers and sub-suppliers.

Note: This paper replays to the EC public consultation from the April to July 2004, on its Green Paper COM(2004)327
16/07/04
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What is UNIFE?
UNIFE is the European association for railway suppliers based in Brussels. Its members come from leading edge industries, covering the rail system supply chain, such as major rolling stock system integrators, sub systems suppliers and component manufacturers, suppliers and integrators of rail infrastructure systems and signalling. Furthermore, thousand small- and medium-sized companies are represented at UNIFE through their national associations. Rail track-work contractors are represented through EFRTC, as associated member of UNIFE.

UNIFE key statistics:
The rail supply industry generates €36 billion in revenue per year (excluding infrastructure, which counts for another €25 billion) and employs 100.000 people. UNIFE members manufacture 70% of the world-wide production of rail equipment.

UNIFE mission:
UNIFE represents its members' interests towards the European institutions, rail operators and other business organisations. UNIFE works in partnership with other European and world-wide entities to promote sustainable rail transport. UNIFE supports its members with products and services, as promoting pre-competitive joint innovation solutions for the European transport system.

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Paris, le 20 juillet 2004

Contribution au Livre Vert sur les partenariats public-privé et le droit communautaire des marchés publics et des concessions

A titre liminaire, il importe de souligner que le droit communautaire ne fournit pas, à l'heure actuelle de définition des PPP. Contrairement a ce qui avait été annoncé par le projet de communication interprétative sur les concessions en droit communautaire des marchés publics en 1999[1], la communication interprétative publiée en 2000[2] n'a pas appréhendé la problématique spécifique des autres formes de partenariats.

Les définitions suivantes sont proposées :
Le contrat ou l'acte par lequel une autorité publique confie une mission globale à une entité tierce -en général privée- de concevoir, construire, financer, entretenir et exploiter un ouvrage ou un service (en totalité ou partiellement) pour une période longue et déterminée est

- **soit une délégation de service public (concession**, **affermage, etc.) lorsque l'entreprise est, au-delà d'une subvention éventuelle, rémunérée à titre principal par les usagers** ;
- **soit un contrat de partenariat lorsque la rémunération est assurée majoritairement par l'autorité publique**.

Deux critères caractérisent, par conséquent, ce type de contrat :

- la nécessité d'un transfert de responsabilité de l'autorité publique à l'entité tierce avec objectifs de performance ;
- la globalité du contrat qui inclut de nombreuses missions sur une longue durée.

1. Quels types de montage de PPP purement contractuels connaissez-vous? Ces montages font-ils l'objet d'en encadrement spécifique (législatif ou autre) dans votre pays ?

En France, les contrats de délégation de service public (concession, affermage, etc.) et autres contrats de partenariat peuvent entrer dans la notion de PPP telle qu'appréhendée par le Livre Vert, ce qui n'est pas le cas des marchés publics.
Ils se caractérisent par la multiplicité de leurs missions (conception, construction, financement, exploitation) et leur longue durée d'exécution.
Leur encadrement législatif diffère en fonction du mode de paiement qui peut être assuré soit par l'usager soit par l'autorité publique.

S'agissant des contrats à paiement par l'usager, le droit de la passation des contrats est régi par la loi du 29 janvier 1993, dite "loi Sapin".

S'agissant des contrats à paiement public, les dispositions législatives sectorielles suivantes s'y appliquent :

- loi n° 88-13 du 5 janvier 1988 d'amélioration de la décentralisation;
- loi n° 94-631 du 25 juillet 1994 complétant le code du domaine de l'Etat et relative à la constitution de droits réels sur le domaine public;
- loi n° 2002-1094 du 29 août 2002 d'orientation et de programmation pour la sécurité intérieure;
- loi n° 2002-1138 du 9 septembre 2002 d'orientation et de programmation pour la justice;
- loi n° 2003-73 du 27 janvier 2003 relative à la programmation militaire;
- loi n° 2003-591 du 2 juillet 2003 habilitant le gouvernement à simplifier le droit qui a donné lieu à l'ordonnance n° 2003-850 du 4 septembre 2003 portant simplification de l'organisation et du fonctionnement du système de santé;
- loi n° 2003-1119 du 26 novembre 2003 relative à la maîtrise de l'immigration, au séjour des étrangers en France et à l'immigration.

[1] JOCE C94 du 7 avril 1999.
[2] JOCE C121 du 29 avril 2000.

Dans le cadre de la loi n°2003-591 du 2 juillet 2003, une seconde ordonnance, au champ d'application plus général, s'appliquant tant à l'Etat qu'aux collectivités locales, est en cours d'adoption**.**

Il en résulte que la définition issue de la communication interprétative sur les concessions est trop partielle en tant qu'elle résume ce type de contrats à la seule prise de risque d'exploitation**.**

2. **De l'avis de la Commission, la transposition en droit national de la procédure de dialogue compétitif permettra aux parties concernées de disposer d'une procédure particulièrement adaptée à la passation de contrats qualifiés de marchés publics lors de la mise en place de PPP purement contractuels, tout en préservant les droits fondamentaux des opérateurs économiques. Partagez-vous ce point de vue ? Si non, pourquoi ?**

En France, le cadre des marchés publics n'a pas vocation à donner naissance à un PPP. En conséquence, la question posée ne peut concerner que les délégations de service public et les autres contrats de partenariat.
Or, les délégations de service public font l'objet de procédures déjà adaptées.
Il n'en reste pas moins que la procédure de dialogue compétitif pourra se révéler adaptée pour certains contrats de partenariat, pour autant que les règles de publicité, de nature à préserver les droits fondamentaux des opérateurs, soient respectées et qu'une plus grande sécurité soit apportée à la préservation du savoir-faire des entreprises.

3. **En ce qui concerne ces contrats, existe-t-il selon vous des points autres que ceux relatifs au choix de la procédure d'adjudication, susceptibles de poser problème au regard du droit communautaire des marchés publics ? Si oui, lesquels et pour quelles raisons ?**

Des entorses ont été observées dans les cas où la consultation d'origine qui devait aboutir à un PPP contractuel s'est transformée en une institutionnalisation du partenariat avec d'autres acteurs, sous prétexte d'infructuosité, permettant la réutilisation des solutions techniques identifiées en amont.
Dans cette hypothèse, et conformément aux règles et principes fondamentaux découlant du Traité, il convient de prévoir une nouvelle mise en concurrence de compétiteurs qui présenteraient des offres dans des conditions d'égalité de traitement, notamment quant à leur structure des coûts qui, pour permettre leur comparaison, devraient être établis selon les principes communs d'une économie de marché.

4. **Avez-vous déjà organisé, participé, ou souhaité organiser ou participer à une procédure d'attribution de concession au sein de l'Union ? Quelle expérience en avez-vous ?**

Sans objet.

5. **Estimez-vous que le cadre juridique communautaire actuel est suffisamment précis pour assurer la participation concrète et effective de sociétés ou groupements non-nationaux aux procédures de passation de concessions ? Une concurrence réelle est-elle, selon vous, habituellement assurée dans ce cadre ?**

Les règles fondamentales de publicité, de transparence et de non discrimination sont de nature à assurer une participation effective des compétiteurs non-nationaux.
S'agissant de textes en discussion au sein des Institutions européennes, la plus grande vigilance est, en revanche, à apporter (notamment la proposition de directive relative aux services dans le marché intérieur – COM(2002)2).

6. **Pensez-vous qu'une initiative législative communautaire, visant à encadrer la procédure de passation de concessions, est souhaitable ?**

En l'état actuel, un encadrement législatif ne paraît pas indispensable.
En revanche, l'adoption d'une nouvelle communication interprétative, qui prendrait en compte les observations du présent document, est souhaitable, notamment pour distinguer les marchés publics des contrats de délégation de service public et des contrats de partenariat..

7. **D'une manière plus générale, si vous estimez qu'il est nécessaire que la Commission propose une nouvelle action législative, existerait-il à votre avis des raisons objectives de**

viser dans cet acte tous les PPP de type contractuels, qu'ils soient qualifiés de marchés publics ou de concessions, pour les soumettre à des régimes de passation identiques?

Sans objet.

8. **Selon votre expérience, l'accès des opérateurs non-nationaux aux formules de PPP d'initiative privée est-il assuré ? En particulier, lorsqu'il existe une invitation des pouvoirs adjudicateurs à présenter une initiative, cette invitation fait-elle généralement l'objet d'une publicité adéquate permettant l'information de tous les opérateurs intéressés ? Une procédure de sélection véritablement concurrentielle est-elle organisée pour assurer la mise en œuvre du projet retenu ?**

La pratique de l'invitation à présenter une initiative observée en Italie n'est pas mise en œuvre en France pour l'instant. La législation en cours d'adoption devrait la prévoir, ainsi que le respect des règles fondamentales de publicité, de transparence et de non discrimination.

Dès lors, il ne devrait pas y avoir d'obstacle à la participation effective des compétiteurs non-nationaux.

9. **Quel serait selon vous la meilleure formule pour assurer le développement des PPP d'initiative privée tout en assurant le respect des principes de transparence, de non discrimination et d'égalité de traitement ?**

Le respect de ces principes doit être assuré par l'octroi d'un droit de premier refus à l'initiateur de la proposition. A défaut de l'acceptation du bénéfice de ce droit par le soumissionnaire, une indemnisation, pour un montant ne couvrant pas la totalité des coûts engagés, devrait lui être accordée.

10. **Quelle expérience avez-vous de la phase postérieure à la sélection du partenaire privé dans les opérations de PPP contractuels ?**

Sans objet.

11. **Avez-vous connaissance de cas dans lesquels les conditions d'exécution – y compris les clauses d'adaptation dans le temps – ont pu avoir une incidence discriminatoire ou ont pu constituer une entrave injustifiée à la libre prestation de services ou à la liberté d'établissement? Si oui, pouvez-vous décrire le type de problèmes rencontrés ?**

Pour éviter de telles entraves et discriminations, il est indispensable que le cahier des charges soit suffisamment précis sur le plan du respect des fonctionnalités demandées, de la performance à atteindre mais également sur les conditions générales de délivrance de la prestation ainsi que des clauses d'adaptation dans le temps. Les termes de la réponse à l'appel d'offres du candidat retenu, qui seront repris dans le contrat, doivent pouvoir lui être opposables.

En revanche, les critères d'attribution ne pourront pas imposer de conditions déraisonnables en matière de niveau de tarif ou d'exigences à satisfaire.

12. **Avez-vous connaissance de pratiques ou de mécanismes d'évaluation d'offres ayant des incidences discriminatoires ?**

Des pratiques ou mécanismes d'évaluation discriminatoires sont observés dès lors que les conditions posées au Point 11 ne sont pas respectées.

13. **Partagez-vous le constat de la Commission selon lequel certains montages du type "step-in" peuvent poser problème en termes de transparence et d'égalité de traitement? Connaissez-vous d'autres "clauses types" dont la mise en œuvre est susceptible de poser des problèmes similaires ?**

Le secteur de la construction ne partage pas la position de la Commission sur le "step-in", qui participe à la confiance des prêteurs.

Un changement d'attributaire en cas de défaillance du candidat retenu n'apparaît pas problématique si les termes du contrat initial sont préservés.

La capacité des prêteurs à obtenir raisonnablement le remboursement des prêts consentis doit être affirmée pour maintenir tout à la fois un degré suffisant de concurrence entre les institutions financières et offrir des conditions de marge acceptables.

14. Estimez-vous nécessaire de clarifier au niveau communautaire certains aspects relevant du cadre contractuel des PPP ? Si oui, sur quel(s) aspect(s) devraient porter cette clarification ?

Comme indiqué au Point 6, il est souhaitable de clarifier la nature propre et la définition des PPP contractuels au moyen d'une communication interprétative.

15. Dans le contexte des opérations de PPP, avez-vous connaissance de problèmes particuliers rencontrés en matière de sous-traitance ? Lesquels ?

La pratique de la sous-traitance dans le cadre des opérations de PPP n'a entraîné, à notre connaissance, aucune difficulté particulière.

16. Le phénomène des PPP de type contractuel, impliquant le transfert d'un ensemble de tâches à un unique partenaire privé, justifie-t-il selon vous que des règles plus détaillées et/ou d'un champ d'application plus large soient mis en place en ce qui concerne le phénomène de sous-traitance?

Des règles supplémentaires ne paraissent pas souhaitables dès lors que le pouvoir adjudicateur conserve la possibilité de fixer une part minimale du montant d'investissement devant donner lieu à sous-traitance.

17. De manière générale, estimez-vous qu'une initiative complémentaire devrait être prise au niveau communautaire en vue de clarifier ou d'aménager les règles relatives à la sous-traitance ?

Cf. Point 16.

18. Quelle expérience avez-vous de la mise en place d'opérations de PPP de type institutionnalisé ? En particulier, votre expérience vous conduit-elle à penser que le droit communautaire des marchés publics et des concessions est respecté dans le cas de montage de PPP institutionnalisé ? Si non, pourquoi ?

Historiquement, la création des sociétés d'économie mixte se justifiait pour répondre aux besoins spécifiques de l'économie d'après-guerre alors que la capacité du secteur privé était insuffisante.

Cette situation a perduré et conduit à des distorsions de concurrence que souligne le Livre Vert. Les sociétés d'économie mixte, tant existantes que les entités créées *ex novo*, bénéficient d'un accès privilégié à l'information et d'une structure de coûts sans lien avec les réalités économiques. Elles peuvent élargir leur champ d'activité par simple modification de leurs statuts ce qui est la cause de la distorsion soulignée précédemment.

Il ne peut être accepté qu'une opération soit confiée par le pouvoir adjudicateur à une nouvelle société, préalablement à sa constitution, et ce quels qu'en soient les actionnaires.

19. Estimez-vous qu'une initiative doit être prise au niveau communautaire en vue de clarifier ou de préciser les obligations des organismes adjudicateurs quant aux conditions dans lesquelles doivent être mis en concurrence les opérateurs potentiellement intéressés par un projet de type institutionnalisé? Si oui, sur quels points particuliers et sous quelle forme? Si non, pourquoi ?

Une initiative s'impose d'urgence pour préciser les obligations des organismes adjudicateurs.

Elle pourrait s'inscrire dans une communication interprétative, dont l'intérêt a déjà été souligné au Points 6, et devrait notamment couvrir les aspects suivants :

- la mise en place d'une procédure spécifique permettant de démontrer la carence effective du secteur privé à répondre au projet de prestation envisagé et de justifier le recours à un PPP institutionnalisé;
- le respect des conditions équitables de concurrence dans la détermination de la structure des coûts de référence, notamment par l'utilisation d'équipements, de moyens et de personnels publics à des coûts de marché, et par l'utilisation des éléments de l'évaluation préalable (Cf. Point 1 des observations complémentaires);
- l'égalité d'accès aux subventions publiques;
- la garantie d'une absence d'intérêts entre les organismes adjudicateurs et les organes sociaux des sociétés d'économie mixte.

En ce qui concerne, la prise de participation par un opérateur privé dans une entité publique, les principes fondamentaux de transparence et d'égalité de traitement doivent être respectés.

20. **Quelles sont les mesures ou les pratiques que vous estimez constitutives d'entraves à la mise en place des PPP au sein de l'Union européenne ?**

D'une manière générale, les décisions prises dans ce domaine relèvent plus de positions idéologiques des pouvoirs adjudicateurs que de la volonté de ne pas respecter les principes de la libre concurrence dans une économie ouverte.

21. **Connaissez-vous d'autres formes de PPP développées dans les pays en dehors de l'Union? Connaissez-vous des exemples de "bonnes pratiques" développées dans ce cadre, dont l'Union pourrait s'inspirer? Si oui, lesquelles ?**

Néant.

22. **De façon plus générale, et compte tenu des besoins importants d'investissements nécessaires dans certains Etats membres, afin de poursuivre un développement économique et social durable, estimez-vous utile une réflexion collective sur ces questions qui se poursuivrait à des intervalles réguliers entre les acteurs concernés, et qui permettrait un échange des meilleures pratiques? Est-ce que vous considérez que la Commission devrait animer un tel réseau ?**

Un réseau d'experts pourrait, en effet, alimenter utilement la réflexion de la Commission, notamment dans la perspective de l'élaboration de la Communication interprétative envisagée.

Il importe, toutefois, de fixer clairement la mission, les règles de fonctionnement et de suivi des recommandations de ce réseau lors de sa mise en place.

Les questions posées n'épuisent pas la totalité des sujets spécifiques aux PPP et le secteur de la construction souhaite faire part de ses observations sur les différents points suivants :

1. **Evaluation préalable des contrats de PPP**

Une évaluation préalable doit être réalisée par l'autorité adjudicatrice afin de choisir la procédure la plus favorable à une bonne gestion des fonds publics.

Elle doit également comprendre une grille de critères permettant de vérifier l'équilibre des offres remises par les soumissionnaires, interdisant par là les distorsions de concurrence provenant de structures de coûts ne reflétant pas la réalité économique.

2. **Offre économiquement la plus avantageuse**

Il est essentiel qu'une communication interprétative vienne rappeler la nécessité, dans l'attribution d'un PPP, de pratiquer le choix de l'offre économiquement la plus avantageuse, à partir de critères d'attribution annoncés préalablement.

Toute clarification quant aux méthodes susceptibles d'être appliquées, en particulier de pondération de ces critères, est vivement souhaitable.

3. **Durée des contrats**

La détermination de la durée des contrats ne doit pas uniquement s'appuyer sur des conditions d'amortissement et de rentabilité raisonnables. Pour être opératoires, ces deux notions devraient faire l'objet d'une définition plus précise, en fonction des caractéristiques économiques et financières des projets et de l'ampleur du transfert de risques.

4. **Incidence des changements intervenant au cours de l'exécution du contrat**

Pour autant que l'objet initial défini par l'autorité publique soit respecté, ce type de contrat doit permettre qu'il lui soit apporté des modifications en fonction des changements (contraintes environnementales, techniques, évolution de la demande des usagers,…) pouvant survenir tout au long de son exécution sans avoir à remettre en cause l'attribution au titulaire, à défaut de quoi les conditions de confiance indispensables à l'opérateur privé et aux prêteurs ne seraient pas remplies.

5. **Cas de résiliation anticipée**

Le cahier des charges doit prévoir les modalités d'indemnisation du titulaire pour les cas de résiliation anticipée, en particulier ceux liés à un changement intervenant dans les conditions d'exécution du projet.

FÉDÉRATION DES Sem

Maires de grandes villes

LIVRE VERT SUR LES PARTENARIATS PUBLIC-PRIVE ET LE DROIT COMMUNAUTAIRE DES MARCHES PUBLICS ET DES CONCESSIONS

REPONSE COMMUNE DE :

- L'Association des maires des grandes villes de France (AMGVF)
- La Fédération nationale des sociétés d'économie mixte (Fédération des Sem)

29 juillet 2004

INTRODUCTION

- Avec 89 villes et agglomérations de plus de 100 000 habitants, l'Association des Maires de Grandes Villes (AMGVF) de France représente plus de 16 millions de personnes, soit 28 % de la population française. Elle entend promouvoir l'urbain en général et notamment traiter des problématiques liées à la gestion des services publics locaux. Elle agit également pour faire reconnaître l'Europe des villes comme un espace privilégié de dynamisme économique, d'innovation sociale et de citoyenneté.

  La Fédération des Sem rassemble les 1198 entreprises publiques locales françaises qui emploient 65700 personnes et génèrent un chiffre d'affaires annuel de 13 milliards d'euros. Tout en étant présentes et actives sur l'ensemble du territoire, c'est dans les grandes villes que les Sem développent le plus fréquemment dans son intégralité toute la palette de leur activité, au service des populations comme de la cohésion et de l'attractivité des territoires : transports publics, renouvellement urbain et aménagement, logement social, loisirs, tourisme, développement économique, environnement (réseaux d'eau et d'énergie, déchets), télécommunications.

- En rédigeant cette réponse commune, l'AMGVF et la Fédération des Sem ont tenu à manifester la convergence de vues entre des élus des collectivités locales d'une part, les opérateurs d'autre part, sur le partenariat public-privé.

- L'AMGVF et la Fédération des Sem se félicitent de la publication de ce Livre vert. Il lance un large débat sur le cadre juridique le plus approprié aux concessions et aux autres formes de partenariat public-privé (PPP). Or si le droit européen s'applique d'ores et déjà pour une large part aux PPP, c'est jusqu'à présent sur la base de textes pour la plupart élaborés sans que les parties directement concernées aient été associées (principes du Traité, jurisprudence de la Cour, communication interprétative)

  Cette concertation est d'autant plus opportune que contrairement à ce qui est précisé en page 3 du Livre vert, on n'assiste pas en France, au niveau des collectivités locales, au passage « d'un rôle d'opérateur direct à un rôle d'organisateur, de régulateur et de contrôleur ». Dans ce pays de décentralisation très récente (20 ans à peine) et à ce jour inachevée, les collectivités locales et leurs élus restent très attachés à un suivi efficace et au « plus près » de leurs nouvelles compétences, ce qui les conduit fréquemment à opter pour la gestion directe, via des régies ou des entreprises qu'ils contrôlent.

  Si le présent avis tend à répondre aux propositions de la Commission qui visent directement les entités mixtes, l'Association des Maires de Grandes Villes de France n'en demeure pas moins attentive aux conséquences qu'une action législative ultérieure pourrait avoir sur les modes de gestion directe. Comme l'atteste l'étude jointe en annexe 1 sur les services publics locaux des grandes villes et de leurs groupements, il apparaît que la régie reste l'outil privilégié dans certains secteurs, comme l'eau et l'assainissement où la gestion directe avec autonomie financière est majoritaire (47 % pour la distribution d'eau et 58 % pour l'assainissement).

- On peut regretter que pour une première analyse au plan communautaire des PPP, l'approche retenue soit exclusivement juridique, sous le seul angle des marchés publics et des concessions alors que la problématique est bien plus large, renvoyant au champ économique mais aussi politique et social.

- En revanche, la reconnaissance pour la première fois au niveau européen de l'existence d'un «PPP institutionnel », qui en France prend la forme de la société d'économie mixte, constitue un point nettement positif.

- Compte tenu du très vif intérêt qu'elles portent au sujet traité, l'AMGVF et la Fédération des Sem ont jugé opportun de répondre aux 22 questions posées en les illustrant le plus possible par des exemples concrets. Dans un souci de clarté et de synthèse, elles n'en tiennent pas moins à résumer ici l'essentiel de leur contribution.

- L'analyse distincte du PPP contractuel et du PPP institutionnalisé est pleinement justifiée car ces modes de partenariat sont tout à fait différents. Ils ne sauraient par conséquent être traités de la même manière par le droit communautaire, hormis la nécessité, dans les deux cas, d'insérer dans le droit dérivé une définition claire et pérenne du in house.

  Pour les concessions, une nouvelle législation européenne n'est pas nécessaire, car un tel cadre juridique existe déjà. Il a commencé à se constituer, par les apports successifs du Traité, de la Cour de justice et de la Commission. Il est globalement adapté aux situations qui se caractérisent dans chaque Etat membre par leur diversité et leur complexité. En France, ce cadre juridique communautaire a été complété par une législation conforme aux prescriptions communautaires. Une initiative supplémentaire risquerait de rendre le corpus existant trop complexe et inadapté aux réalités du terrain.

  La situation est inverse pour les PPP institutionnalisés, car leur essor très récent n'a pas jusqu'à présent permis qu'ils soient pris en compte par le droit communautaire. Dans un souci de clarté comme de sécurité, un certain nombre de précisions pourraient opportunément être apportées par un cadre législatif élaboré en codécision et dans le respect du principe de libre administration des collectivités locales :

  - reconnaissance du PPP institutionnel comme un mode de gestion à part entière des services publics locaux, la création d'une Sem pouvant constituer un critère de l'exécution d'une mission par une entreprise
  - mise en égalité des Sem avec les autres modes opératoires, par l'impossibilité d'une double concurrence en amont et en aval
  - garantie de la liberté pour chaque Etat membre de préciser les modalités de désignation des représentants des collectivités locales actionnaires dans les instances dirigeantes des sociétés d'économie mixte.

- L'AMGVF et la Fédération des Sem entendent par la présente contribution marquer leur satisfaction à l'égard d'un document qui constitue une occasion privilégiée de clarification comme de réelle sécurité pour les différentes formes de PPP. Elles se tiennent à la disposition de la Commission pour poursuivre l'échange engagé.

REPONSES AUX QUESTIONS DU LIVRE VERT

(1) Quels types de montages de PPP purement contractuels, connaissez-vous ? Ces montages font-ils l’objet d’un encadrement spécifique (législatif ou autre) dans votre pays ?

Si l’adoption d’un cadre législatif par la France des partenariats public-privé contractuel est récente, on peut cependant considérer que nombre de relations contractuelles visaient déjà à une collaboration de savoir faire privés aux missions que doivent assurer les personnes publiques, Etat et collectivités locales.

Il existe, en effet, une large gamme de contrats administratifs, présentés dans le tableau qui suit, et que le droit identifie au sein de trois grandes catégories que sont :

- les marchés publics ;
- les délégations de service public ;
- les conventions d’occupation du domaine public.

DELEGATIONS DE SERVICE PUBLIC ET AUTRES CONTRATS ADMINISTRATIFS

	Définition	Caractéristiques	Rémunération	Sources juridiques
DSP	Contrat par lequel une personne morale de droit public confie la gestion d’un service public dont elle a la responsabilité à un délégataire public ou privé, dont la rémunération est substantiellement liée aux résultats de l’exploitation du service.	· Gestion d’un service public confiée à un délégataire public ou privé ; · Risques commercial et financier assumés par le délégataire avec participation financière possible de la collectivité délégante selon le type de délégation ; · Autonomie du délégataire vis-à-vis du délégant dans la limite du contrôle dudit délégant sur l’exécution du contrat.	Le cocontractant perçoit une rémunération substantiellement liée aux résultats de l’exploitation du service délégué dite « rémunération sur l’usager ».	Loi n° 93-122 du 29 janvier 1993. Décret n° 93-471 du 24 mars 1993. Loi n° 2001-1168 du 11 décembre 2001 (article 3-1).
Marché public	Contrat conclu à titre onéreux avec des personnes publiques ou privées par l’Etat, ses établissements publics autres que ceux ayant un caractère industriel et commercial , les collectivités territoriales et leurs établissements publics, pour répondre à leurs besoins en matière de travaux, de fournitures ou de services.	· Leur conclusion n’est pas conditionnée par l’existence d’un service public ; · L’entrepreneur de travaux, le fournisseur ou le prestataire de services n’ont pour seul interlocuteur que la collectivité publique avec laquelle ils ont contracté.	La rémunération du cocontractant est un prix payé par la collectivité publique en contrepartie des prestations réalisées pour cette dernière.	Code des marchés publics (décret n° 2004-15 du 7 janvier 2004).

Contrat de partenariat	Nouvelle catégorie de contrat, le contrat de partenariat permet de confier à des entreprises privées, par un contrat global, la conception, la réalisation, le financement et la gestion de certains équipements. Il devrait être réservé à des montages complexes auxquels les maîtres d'ouvrage publics ne savent répondre dès la définition du cahier des charges.	. Conception, réalisation, financement, gestion des équipements publics par un cocontractant privé. . C'est un contrat de longue durée (au moins 5 ans) . Suppose une répartition des risques (technique et commercial) entre public et privé.	La rémunération du cocontractant privé n'est pas fondée sur l'exploitation de l'ouvrage ou du service rendu. Elle reposera sur des critères de performance. L'opérateur privé sera essentiellement rémunéré par l'Administration moyennant le versement d'un prix pendant la durée du contrat.	Ordonnance du 16 juin 2004 sur les contrats de partenariat entre le secteur public et les entreprises privées prise en application de l'art.6 de la Loi du 2 juillet 2003.
Bail emphytéotique administratif (BEA)	Convention par laquelle une collectivité territoriale donne à bail une dépendance de son domaine public ou privé à un preneur dénommé « emphytéote » en vue de l'accomplissement pour le compte de celle-ci d'une mission de service public ou de la réalisation d'une opération d'intérêt général.	· L'équipement réalisé est remis, au terme du bail, à la collectivité bailleresse et devient sa propriété ; · Risque de requalification en DSP si le bail est accompagné d'une convention d'exploitation non détachable confiant au preneur l'exploitation de l'ouvrage construit par lui, et que ledit ouvrage constitue le lieu d'activité d'un servie public.	L'emphytéote tire sa rémunération de l'activité pour laquelle le bail lui a été consenti (loyers issus de la location de l'ouvrage réalisé par exemple).	Loi n° 88-13 du 5 janvier 1988 codifiée aux articles L. 1311-2 et suivants du Code général des collectivités territoriales.
Concession d'occupation du domaine public	Contrat par lequel une collectivité territoriale permet à un particulier d'occuper une parcelle de son domaine public dans un but déterminé, de manière exclusive mais précaire et révocable et moyennant le paiement d'une redevance.	Le titulaire de la concession n'a pas de droit acquis à son maintien et l'autorité administrative qui l'a octroyée peut la retirer à tout moment	La rémunération du cocontractant découle de l'activité pour l'exercice de laquelle il a sollicité l'autorisation d'occupation privative du domaine de la collectivité concédante.	Voir article L. 2122-21 du CGCT sur les attributions de l'exécutif local au nom de la collectivité publique.

On peut aujourd'hui conclure que la forme nationale des contrats PPP consiste en un contrat global qui permet à une personne publique d'associer un tiers au financement, à la conception, à la réalisation voire à l'exploitation et à la maintenance d'un équipement public mais que la pratique révèle une grande diversité de relations contractuelles pour ce type d'opérations développées ci-après.

La forme usuelle de partenariat contractuel que constitue la délégation de service public (DSP), consacrée par voie législative en 1993 dans le cadre de la loi Sapin doit rester la forme privilégiée de collaboration des intervenants privés pour répondre aux besoins de professionnalisme, d'externalisation de financement ou de compétence des personnes publiques.

Les conventions de délégation de service public constituent une catégorie autonome de contrats administratifs. Il convient donc de ne pas les confondre avec d'autres types de contrats dont les personnes publiques sont amenées à faire usage.

On se doit de différencier la DSP des autres relations contractuelles que peut avoir la personne publique avec l'intervenant privé ou public.

- **Distinction avec le marché public**

Contrairement à la DSP où le délégataire assure la maîtrise d'ouvrage et le financement d'éventuels travaux, le titulaire du marché, opérateur public ou privé, fournit une prestation à une collectivité publique moyennant le paiement, par elle, d'un prix convenu au contrat.

Le titulaire du marché n'est pas responsable de l'exécution d'un service public, et à ce propos, la présence d'une activité de service public n'est nullement nécessaire à la qualification de marché public. Partant, il n'assume pas de risque d'exploitation et la durée du contrat est strictement limitée à celle nécessaire à la fourniture des prestations convenues.

- **Distinction avec les contrats de partenariat**

Les contrats de partenariat ne visent que la nouvelle catégorie de contrats qui est prévue dans l'ordonnance du 16 juin 2004 sur les contrats de partenariat entre le secteur public et les entreprises privées et permettant une maîtrise d'ouvrage privée et un financement privé d'équipements.

A la différence des marchés publics, ces contrats peuvent s'étendre sur le long terme, comprendre une prestation globale.

A la différence des DSP, l'exploitation de l'ouvrage ou du service n'est pas le principal critère de rémunération du partenaire privé de l'Administration. Celle-ci pourra comprendre des éléments annexes. Elle reposera sur des critères de performance.

- **Distinction avec le bail emphytéotique administratif (BEA)**

Celui-ci semble se rapprocher de la convention de DSP, à un détail près, et non des moindres : le critère de rémunération du cocontractant titulaire du bail.

En effet, bien que le BEA doive toujours se rapporter à une opération d'intérêt général, son titulaire n'est pas substantiellement rémunéré par les résultats de l'exploitation de l'équipement public construit ou de la parcelle dont il bénéficie.

- **Distinction avec la concession d'occupation du domaine public**

Ces deux types de convention obéissent à deux logiques différentes :

Dans le cadre d'une concession domaniale, le contrat est conclu, d'une part, en vue du profit exclusif de l'occupant privatif du domaine public et, d'autre part, cet occupant n'est soumis à aucune contrainte de service public.

La délégation de service public, quant à elle, vise à satisfaire un intérêt public avec des obligations de service public à la charge du délégataire.

Mais il peut arriver que l'une et l'autre formule contractuelle se superposent. Reste alors à déterminer quel est l'intérêt dominant.

(2) De l'avis de la Commission, la transposition en droit national de la procédure de dialogue compétitif permettra aux parties concernées de disposer d'une procédure particulièrement adaptée à la passation des contrats qualifiés de marchés publics lors de la mise en place d'un PPP de type purement contractuel, tout en préservant les droits fondamentaux des opérateurs économiques. Partagez-vous ce point de vue ? si non , pourquoi ?

(3) En ce qui concerne ces contrats, existe-t-il selon vous des poins autres que ceux relatifs au choix de la procédure d'adjudication, susceptibles de poser problème au regard du droit communautaire des marchés publics ? Si oui, lesquels et pour quelles raisons ?

- **Enjeux et définition du dialogue compétitif :**

Le dialogue compétitif est introduit à l'article 29 de la Directive 2004/18/CE du Parlement européen et du Conseil relatif à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services en date du 31 mars 2004.

Il intéresse le pouvoir adjudicateur lorsqu'il réalise des projets exceptionnellement complexes et qu'il ne réussit pas à définir les moyens nécessaires à la satisfaction de ses besoins en lui offrant la faculté de dialoguer avec les candidats afin de définir le cahier des charges et l'offre la plus adaptée à leurs besoins.

La France, par l'ordonnance du 16 juin 2004, a adopté une législation spécifique aux contrats de PPP visant prioritairement à encadrer et à sécuriser certains montages dits complexes. Celle-ci est caractérisée par un paiement public pendant toute la durée du contrat, pouvant être lié à des critères de performance assignés au cocontractant.

En ce sens, le décret n°2004-15 du 7 janvier 2004 portant Code des marchés publics, a institué le dialogue compétitif qui remplace l'appel d'offres sur performances.

Présentant de nombreux avantages, le dialogue compétitif apparaît être un outil très utile pour la réalisation de projets complexes. Toutefois, il semble devoir être limité à ce type de projets dans le cadre des marchés.

- **Une procédure qui se veut efficace :**

De prime abord, le dialogue compétitif semble introduire une certaine souplesse, par rapport aux procédures de marché, permettant aux collectivités d'adapter au mieux l'offre à leurs besoins.
De plus, cette procédure entraînera, très certainement, un accroissement des possibilités pour les collectivités publiques de développer des relations partenariales avec leurs prestataires.
Enfin, le dialogue compétitif permet aux entreprises de valoriser leur savoir-faire et d'utiliser des réponses innovantes.

- **Une procédure qui suscite des questionnements :**

Tout d'abord, il convient de signaler que le dialogue compétitif ne dispose pas de véritable tradition dans la législation des Etats membres et notamment en France. Il constitue plutôt une procédure très récente dans le droit communautaire comme dans le droit français**.** Une application contrainte et directe de cette nouvelle procédure risquerait de bouleverser l'économie générale de la passation des concessions et des PPP, fondé en France sur la négociation.

En outre, cette procédure pourrait conduire à des inégalités de traitement entre les candidats. En effet, le dialogue compétitif permet aux pouvoirs adjudicateurs de recueillir plusieurs solutions et de choisir parmi cet éventail celle qui convient pour la rédaction du cahier des charges. Cette rédaction peut résulter d'un «cherry picking», qui consiste à choisir parmi les différentes offres des éléments de solutions parfois confidentiels.

De plus, nous tenons à signaler que cette procédure fut élaborée pour les cas où l'autorité publique n'est pas en mesure soit de définir les moyens techniques pouvant répondre à ses besoins, soit d'établir le montage juridique ou financier d'un projet. Or, de manière générale, concernant les PPP et les concessions, l'autorité publique connaît ses besoins et peut parfaitement définir ses objectifs.

Par ailleurs, la Fédération des Sem et l'Association des Maires des Grandes Villes de France estiment regrettable le caractère restrictif des critères du choix définitif de l'adjudicataire dans la procédure de dialogue compétitif. En effet, il convient de rappeler que celle-ci se décompose en plusieurs phases et que ce n'est qu'après la phase de dialogue et la remise du cahier des charges que le choix de l'adjudicataire interviendra. Or, il est prévu que celui-ci se fera à partir d'un classement des offres économiquement les plus avantageuses, l'adjudicateur apparaissant privé de tout autre critère de choix, notamment technique. La procédure de dialogue compétitif ne permet pas de prendre en compte toutes les perspectives des propositions des candidats, restreignant le choix à un unique critère économique.

- En conclusion, la Fédération des Sem et l'AMGVF estiment que le dialogue compétitif est un instrument utile pour les marchés publics mais qu'il constituerait un dispositif complexe, lourd et coûteux, et par conséquent inadapté, pour les concessions.

  Nous considérons donc, à titre principal, que le cadre réglementaire existant doit rester inchangé. Si la Commission décidait cependant d'élaborer une législation, il conviendrait qu'elle privilégie, dans le respect des principes du Traité la procédure négociée, du même type que celle décrite dans la Loi Sapin (cf réponse à question 7).

  Nous souhaiterions à titre subsidiaire, dans l'éventualité d'un complément législatif au sujet de la procédure de dialogue compétitif, en sécuriser la mise en œuvre.

  Il conviendrait que le recours au dialogue compétitif soit toujours réservé à des cas où la collectivité n'est objectivement pas en mesure de définir les moyens techniques à mettre en œuvre ou de faire le montage juridique et financier, c'est à dire dans des opérations réellement complexes ou mettant en œuvre des techniques particulières qui ne sont maîtrisées que par le secteur privé.

  Au regard de la nouveauté de cette procédure pour les droits des Etats, nous estimons préférable que le dialogue compétitif voie ses premiers résultats appréciés sur les marchés avant d'envisager de l'appliquer aux concessions. Une évaluation pourrait opportunément être engagée au plan communautaire, dans le cadre d'un observatoire européen afin d'envisager à terme des améliorations du dispositif et son éventuelle extension aux concessions.

(4) Avez-vous déjà organisé, participé ou souhaité organiser ou participer à une procédure d'attribution de concession au sein de l'Union ? Quelle expérience en avez-vous ?

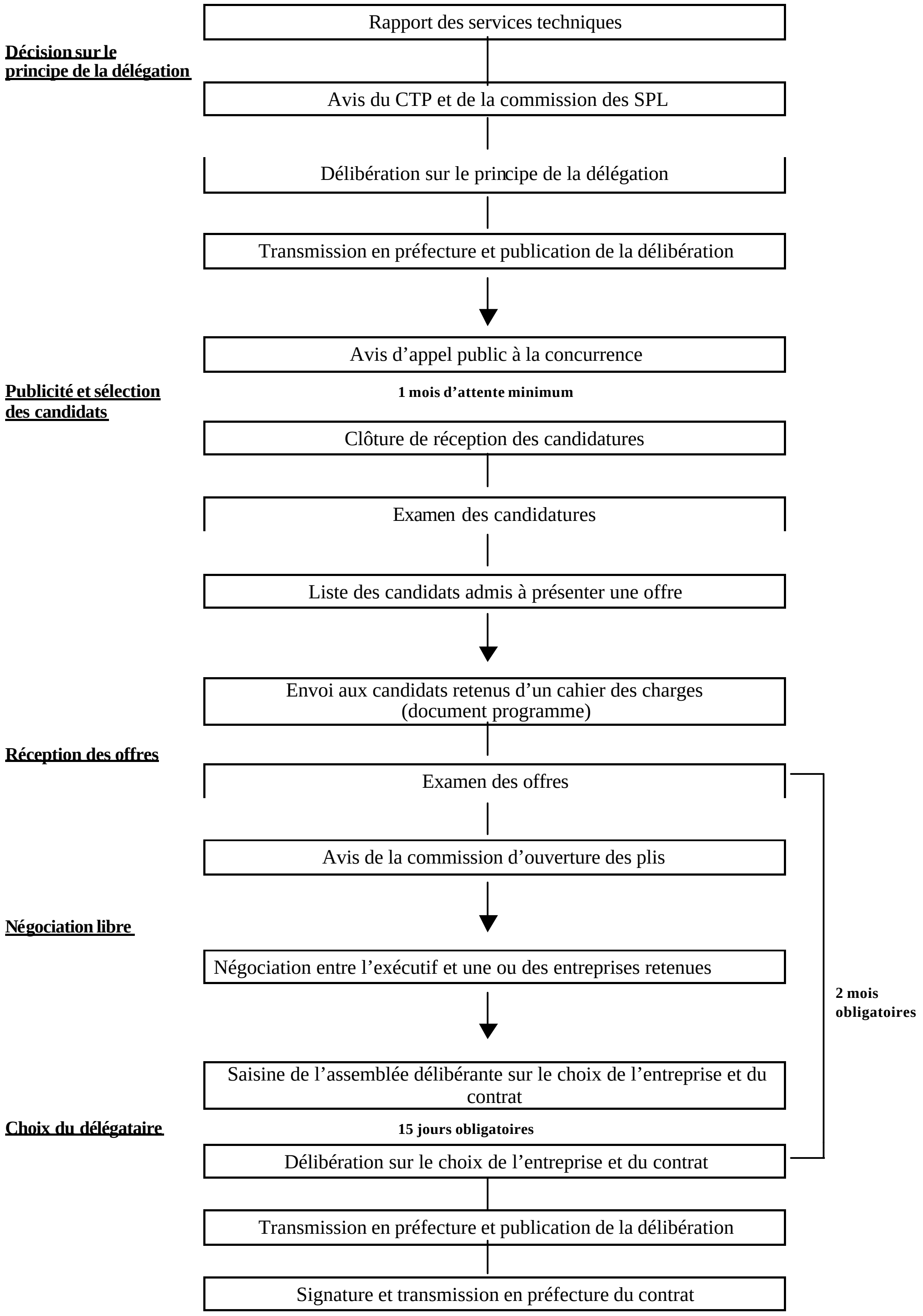
La loi française du 29 janvier 1993 (dite loi Sapin) organise la procédure de passation des contrats entre les autorités délégantes et les entreprises chargées d'assurer ces prestations :

- soit en portant elles mêmes l'investissement ("concession de service public")
- soit en se voyant confier l'exploitation d'un équipement déjà construit ("affermage" ou "régie intéressée")

  Dans les deux cas le délégataire doit se rémunérer de façon substantielle par des droits perçus sur l'usager du service.

LES CINQ ETAPES DE LA PROCEDURE DE DELEGATION DE SERVICE PUBLIC

POUR LE CHOIX DU DELEGATAIRE



Décision sur le principe de la délégation

Rapport des services techniques

Avis du CTP et de la commission des SPL

Délibération sur le principe de la délégation

Transmission en préfecture et publication de la délibération

Publicité et sélection des candidats

Avis d'appel public à la concurrence

1 mois d'attente minimum

Clôture de réception des candidatures

Examen des candidatures

Liste des candidats admis à présenter une offre

Réception des offres

Envoi aux candidats retenus d'un cahier des charges (document programme)

Examen des offres

Avis de la commission d'ouverture des plis

Négociation libre

Négociation entre l'exécutif et une ou des entreprises retenues

Choix du délégataire

Saisine de l'assemblée délibérante sur le choix de l'entreprise et du contrat

15 jours obligatoires

Délibération sur le choix de l'entreprise et du contrat

2 mois obligatoires

Transmission en préfecture et publication de la délibération

Signature et transmission en préfecture du contrat

Cette législation donne globalement toute satisfaction : elle trouve son application dans de très nombreux services locaux pour lesquels l'usager acquitte un droit d'usage finançant tout ou partie du coût du service. Elle permet la remise en compétition périodique, dans une procédure qui allie transparence, libre choix et contrôle des autorités publiques.
Cette émulation a permis de construire des services performants, avec une grande souplesse dans les montages financiers entre partenaires publics et privés.

(5) Estimez-vous que le cadre juridique communautaire actuel est suffisamment précis pour assurer la participation concrète et effective de sociétés ou groupements non-nationaux aux procédures de passation de concessions ? Une concurrence réelle est-elle, selon vous, habituellement assurée dans ce cadre ?

En ce qui concerne les concessions qui relèvent du nouveau cadre communautaire des marchés publics, la transposition dans le droit français de la procédure de dialogue compétitif doit permettre de couvrir les marchés globaux et complexes. Pour le reste, le principe de subsidiarité prévaut. La procédure de passation d'une concession de service public prévoit une publicité préalable dans le Journal Officiel de l'Union Européenne avant la diffusion d'un avis dans une publication habilitée à recevoir des annonces légales et dans une publication spécialisée.

(6) Pensez-vous qu'une initiative législative communautaire, visant à encadrer la procédure de passation de concessions, est souhaitable ?

Un droit communautaire des concessions existe déjà, il s'est progressivement bâti sur la base des règles du Traité, de la jurisprudence de la Cour de justice, et de la communication interprétative de 2000. Il présente l'avantage d'être bien adapté à la situation des concessions, qui est à la fois complexe et diverse, et de respecter la subsidiarité.

Ces règles communautaires ont fait l'objet en France d'une transposition nationale dans le cadre de la loi Sapin dont le bilan, 10 ans après son entrée en vigueur, est jugé positif par l'ensemble des acteurs concernés.

L'AMGVF et la Fédération des Sem ne sont donc pas favorables à une initiative législative communautaire supplémentaire dont la plus-value reste à démontrer. Le risque serait plutôt de voir «s'effondrer le millefeuille » existant, qui donne satisfaction, mais supporterait difficilement un étage supplémentaire. Le résultat serait par conséquent contre-productif puisque contraire à l'objectif affiché d'encourager le PPP.

(7) De manière plus générale, si vous estimez qu'il est nécessaire que la Commission propose une nouvelle action législative, existerait-il à votre avis des raisons objectives de viser dans cet acte tous les PPP de type contractuel, qu'ils soient qualifiés de marchés publics ou de concessions, pour les soumettre à des régimes de passation identique ?

- Dans l'éventualité d'une nouvelle action législative, les signataires sont d'avis que la Commission devrait proposer, en complément de l'appel d'offres traditionnel et de la procédure du dialogue compétitif, une troisième voie de passation mieux adaptée à la nature des concessions (longue durée, risques pris par le partenaire, adaptation future du contrat, intuitu personae,....). La Commission pourrait s'inspirer de l'expérience reconnue et confirmée de la loi française du 29 janvier 1993 (dite loi Sapin), ou de la loi Merloni en Italie, qui, tout en garantissant le libre choix du délégataire dans la phase finale de la procédure, assurent le respect des principes du Traité (égalité de traitement, non discrimination, transparence).

- En outre, l'opportunité qui s'offrait dans le cadre du « Paquet législatif marchés publics » n'ayant pas été saisie**, il demeure nécessaire d'insérer une définition claire et pérenne du in house dans le droit dérivé.**

  Celle-ci ne relève en effet actuellement que de la jurisprudence de la Cour de justice. Un ancrage dans le droit dérivé offrirait une plus grande sécurité juridique.

  Cette nécessité d'une reconnaissance claire du droit à l'autoproduction a récemment été soulignée par le Parlement européen lors de l'adoption le 14 janvier 2004 du rapport sur le livre vert relatif aux services d'intérêt général.

  L' AMGVF et la Fédération des Sem proposent une définition reposant sur deux critères cumulatifs :

  - Le contrôle doit être caractérisé dès lors que le(s) pouvoir(s) adjudicateur(s) possède(nt) la majorité des droits de vote dans les instances dirigeantes de l'entreprise publique locale et exerce(nt) notamment de ce fait, un contrôle effectif.

  - Le chiffre d'affaires doit être réalisé :
    → soit au moins à 80% pour le(s) pouvoir(s) adjudicateur(s) actionnaire(s)
    → soit en totalité à l'intérieur des limites territoriales du (ou des) pouvoirs(s) adjudicateur(s) actionnaire(s), puisqu'il n'y a pas dans ce cas d'affectation des échanges entre les Etats membres.

    et sur une condition :

    L'entreprise publique locale applique, pour la sélection de ses propres co-contractants les règles de mise en concurrence dont elle est dispensée, en amont, pour ses relations avec le(s) pouvoirs(s) adjudicateur(s) actionnaire(s)

- Dans l'esprit du récent projet de décision de la Commission relative à l'application de l'article 86 du Traité destiné à apporter plus de sécurité juridique aux acteurs locaux, il pourrait être opportun, comme cela est proposé pour les aides d'Etat, d'envisager l'instauration d'un seuil de minimis aux contrats de concessions et autres PPP de faible montant. Cela ne dispenserait pas, naturellement, du respect des principes du Traité dès le premier euro.

- Pour que les collectivités locales continuent de pouvoir assumer leurs missions dans des conditions satisfaisantes, il pourrait également être opportun d'envisager que le recours à des contrats de partenariat public-privé soit précédé d'une évaluation démontrant que cette formule présente un réel avantage en terme d'intérêt général et de coût global. L'évaluation serait soumise à l'assemblée délibérante de la collectivité avant que celle-ci ne prenne la décision de recourir au partenariat public-privé

(8) Selon votre expérience, l'accès des opérateurs non-nationaux aux formules de PPP d'initiative privé est-il assuré ? En particulier, lorsqu'il existe une invitation des pouvoirs adjudicateurs à présenter une initiative, cette invitation fait-elle généralement l'objet d'une publicité adéquate permettant l'information de tous les opérateurs intéressés ? Une procédure de sélection véritablement concurrentielle est-elle organisée pour assurer la mise en œuvre du projet retenu ?

Les contrats de partenariat public-privé s'apparentent le plus souvent à des conventions par lesquelles une collectivité confie à un opérateur privé le soin d'exécuter une mission d'intérêt général. Si elle est importante à la bonne conduite du projet, la dimension économique n'est pas à l'origine du projet.

Dans ce cadre, les formules de PPP d'initiative privée doivent être clairement réglementées, notamment le recours à un conseil extérieur et la production d'un projet de référence dans la phase des études préalables qui doivent faire l'objet d'une publicité adéquate. Faute de quoi, le fait de procéder à des études de marché pourrait engendrer un risque de favoritisme ultérieur lorsque, au moment de la mise en concurrence, le maître d'ouvrage cherche à rentabiliser l'investissement ainsi réalisé.

A l'heure actuelle, lorsque l'initiative revient aux collectivités locales, en particulier aux grandes villes et à leurs groupements, les règles de publicité sont strictement observées et font l'objet d'un contrôle de légalité de la part des autorités préfectorales. Il semble normal qu'il en soit de même lorsque l'initiative provient du secteur privé.

(9) Quelle serait selon vous la meilleure formule pour assurer le développement des PPP d’initiative privée dans l’Union européenne tout en assurant le respect des principes de transparence, de non discrimination et d’égalité de traitement ?

L’AMGVF et la Fédération des Sem n’ont pas de suggestion à faire valoir sur ce point et soulignent leur attachement au développement des PPP, quel qu’en soit l’initiateur (public ou privé).

(10) Quelle expérience avez-vous de la phase postérieure à la sélection du partenariat privé dans les opérations de PPP contractuels ?

Le PPP contractuel, dont la forme la plus proche en France est la délégation de service public, est un outil attrayant, que les administrations nationales ou locales utilisent de plus en plus pour la réalisation d'infrastructures ou la gestion de missions d'intérêt général. Les personnes privées sont ici, amenées à contribuer directement à la mission de service public, ces formes de coopération apportant un savoir-faire et des méthodes de fonctionnement qui font parfois défaut à la sphère publique.

Mais, cette forme de commande publique ne pourra prospérer que dans un contexte de réelle sécurité juridique : les parties à ces contrats, de longue durée et portant sur des enjeux financiers importants, ne peuvent courir le risque d'un contentieux.

Ainsi, l'AMGVF et la Fédération des Sem, représentant respectivement des adjudicateurs et opérateurs de DSP, souhaitent, dans le cadre de l'examen de la phase postérieure de la sélection du candidat, mettre en exergue, pour les Sem, les différentes formes de marchés susceptibles d'être conclus dans le cadre des PPP contractuels ainsi que la procédure de contrôle destinée à sécuriser leur passation et leur bon déroulement.

- **Sur les différentes formes de contrats conclus par les Sem**

Les contrats passés par les Sem, agissant en qualité de délégataires des collectivités publiques, sont soumis à des procédures de publicité et de mise en concurrence prévues par l'article 48-1 de la Loi du 29 janvier 1993. Ces mêmes procédures sont applicables lorsque la Sem agit dans le cadre d'une convention publique d'aménagement.

Par conséquent, il convient de constater que les marchés des Sem entrent dans le champ d'application de la Loi Sapin, garantissant ainsi le respect des règles de passation gouvernées par les règles de publicité, de transparence et de mise en concurrence.

- **Sur les procédures de contrôle des opérations de PPP contractuels**

Que ce soit lors de la passation, en cours d'exécution ou à son terme, la convention de DSP peut être amenée à subir des contrôles tant internes qu'externes à l'opérateur lorsque celui-ci est une Sem.

Les Sem sont soumises de par leur double nature de société anonyme d'une part et d'entreprise publique d'autre part, à de multiples contrôles qui relèvent du droit des sociétés, du droit public, du droit financier et du droit communautaire. Cette addition de contrôles à la fois internes et externes, qui différencie les Sem des autres opérateurs, assure un climat de sécurité juridique particulièrement appréciable au regard des exigences de transparence.

- *Les contrôles internes à l'opérateur*

Ils sont exercés par les dirigeants et organes délibérants, le commissaire aux comptes et les actionnaires de la Sem. Les actionnaires minoritaires disposent d'un droit d'information garanti par le droit des sociétés. Plusieurs moyens de contrôle s'offrent à la collectivité délégante afin de s'assurer de la bonne exécution du service délégué.

Ainsi et tout d'abord, l'autorité délégante peut exercer des contrôles ponctuels en dépêchant, à tout moment, des agents sur place afin de vérifier le fonctionnement du service ainsi que l'état des installations qui en dépendent.

Ensuite, l'autorité délégante peut exercer des contrôles périodiques qui contribuent directement à la transparence des relations entre délégant et délégataire. Dans cette perspective, la loi impose au délégataire de produire, tous les ans, avant le 1er juin, un compte d'exploitation destiné à la collectivité et devant lui permettre d'apprécier l'équilibre économique du contrat : il s'agit du rapport annuel du délégataire. Ce rapport annuel comprend «notamment les comptes retraçant la totalité des opérations afférentes à l'exécution de la DSP et une analyse de la qualité du service. Ce rapport est assorti d'une annexe permettant à l'autorité délégante d'apprécier les conditions d'exécution du service public». Il sera obligatoirement soumis à la commission consultative des services publics locaux ainsi qu'à l'assemblée délibérante de la collectivité.

- *Les contrôles externes à l'opérateur*

Les contrôles externes auxquels sont assujettis les Sem sont nombreux et de nature variée.

En effet, malgré son statut de SA, la Sem a la charge de missions d'intérêt général qui donnent vocation à plusieurs juridictions ou instances de contrôle pour conduire des investigations tendant à vérifier la satisfaction des objectifs imposés à la société. Des contrôles administratifs sont ainsi exercés à plusieurs niveaux.

Tout d'abord, le représentant de l'Etat exerce un contrôle accru. En effet, le Code général des collectivités territoriales (CGCT) impose aux autorités territoriales la transmission au préfet ou au sous-préfet des conventions de DSP.

De plus, les Chambres régionales des comptes (CRC) peuvent s'immiscer dans la relation délégant/délégataire puisque, dans le cadre du contrôle des comptes de la collectivité délégante, la CRC peut exiger que lui soit transmis le rapport annuel du délégataire prévu à l'article L.1411-3 du CGCT.

Par ailleurs, le Conseil de la concurrence, même s'il a été jugé incompétent en matière de contrôle des actes de dévolution du service public telle qu'une convention de DSP, demeurera compétent en cas d'entente entre entreprises ou d'abus de position dominante.

(12) Avez-vous connaissance de pratiques ou de mécanismes d'évaluation d'offres ayant des incidences discriminatoires ?

La nouvelle directive 2004/18/CE offre aux organismes adjudicateurs la possibilité de formuler des « spécifications techniques en termes de performances ou d'exigences fonctionnelles » et ainsi d'apprécier plus finement les offres selon le critère d'attribution de «l'offre économiquement la plus avantageuse », ce qui permet d'intégrer dans la grille d'évaluation, aux côtés du critère de prix, des critères sociaux et environnementaux. De ce point de vue, la législation européenne est souple et adaptée à la procédure itérative de la passation des contrats. En France, l'ordonnance sur les contrats de partenariat permet ainsi de prendre en considération dans chaque offre la part de marché accordée aux petites et moyennes entreprises de la région.

Le nouveau cadre communautaire permet également de valoriser les offres dites du «mieux disant social » grâce à des mécanismes de discrimination positive à l'attention de publics défavorisés.

(13) Partagez-vous le constat de la Commission selon lequel certains montages du type « step in » peuvent poser problème en termes de transparence et d'égalité de traitement ? Connaissez-vous d'autres « clauses types » dont la mise en œuvre est susceptible de poser des problèmes similaires ?

L'AMGVF et la Fédération des Sem n'ont pas eu connaissance de difficultés de cette nature.

(14) Estimez-vous qu'il est nécessaire de clarifier au niveau communautaire certains aspects relevant du cadre contractuel des PPP ? Si oui, sur quel(s) aspect(s) devrait porter cette clarification ?

cf réponse à la question 7

(15) Dans le contexte des opérations de PPP, avez-vous connaissance de problèmes particuliers rencontrés en matière de sous-traitance ? Lesquels ?

La France s'est dotée de systèmes de passation des marchés qui se conforment aux normes de transparence et d'une concurrence ouverte et loyale. Le principe-clef, généralement accepté, est donc celui de la libre-concurrence. Ces principes sont valables pour toutes les activités relatives à la passation des marchés pour le secteur public, qu'il s'agisse des marchés publics, des délégations de service public ou encore des activités de sous-traitance.

- Les obligations de publicité et de mise en concurrence des sous-traités

  En application de la procédure issue de la loi Sapin, une convention de subdélégation doit être soumise aux obligations de publicité et de mise en concurrence (*CGCT, art. L.1411-1 et s.*). Sont invoqués à l'appui de cette position, plusieurs arguments. D'une part, la conclusion d'un sous-traité d'exploitation constitue une nouvelle délégation en modifiant substantiellement le contrat de délégation initial puisqu'il opère un transfert de droits et d'obligations à un nouvel exploitant. D'autre part, le sous-traité comporte généralement des stipulations spécifiques à l'exécution du service qui n'apparaissent pas dans le contrat de délégation initial .

  En l'état actuel, les sous-traités dans le cadre des PPP et notamment des Sem, tout comme les DSP, sont également soumis aux obligations de publicité et de mise en concurrence. Ainsi, à ce premier niveau de concurrence, qui touche l'acte de création lui-même du PPP, intervient un deuxième niveau de concurrence, qui touche à l'attribution des missions du sous-traité du PPP le délégataire du service public ayant lui-même été sélectionné par l'autorité publique.

  En ce sens, les Sem peuvent, elles aussi, être soumises à une double procédure amont et aval puisqu'elles ont en général la qualité d'organisme adjudicateur, cette qualité leur imposant le respect des règles de concurrence lorsqu'elle souhaite confier une ou plusieurs missions à un sous-traitant.

  Par ailleurs, la directive 93/36 impose aux opérateurs de réseaux titulaires d'un droit exclusif l'application des règles de mise en concurrence.

- Selon nous, la question est posée de la nécessité de cette double procédure de mise en concurrence. Un tel dispositif, faisant intervenir deux niveaux de concurrence en amont et en aval, nous paraît excessif.

  Nous estimons, en effet, qu'il y a là une distorsion de concurrence entre opérateurs selon leur statut et qu'il s'agit d'une entorse au libre accès des entreprises au marché, notamment les entreprises moyennes et petites. Cela encourage une structuration en oligopoles.

(16) Le phénomène des PPP de type contractuel, impliquant le transfert d'un ensemble de tâches à un unique partenaire privé, justifie-t-il selon vous que des règles plus détaillées et/ou d'un champ d'application plus large soient mise en place en ce qui concerne le phénomène de sous-traitance ?

(17) De manière plus générale, estimez-vous qu'une initiative complémentaire devrait être prise au niveau communautaire en vue de clarifier, ou d'aménager, les règles relatives à la sous-traitance ?

En France, la loi sur la sous-traitance oblige les collectivités publiques à procéder au paiement direct des sous-traitants . Lorsque le PPP a pour objet principal la réalisation d'un équipement public, il serait normal que les sous-traitants bénéficient de la même protection pour les paiements correspondant à la phase d'investissement.

Les Maires de Grandes Villes de France et la Fédération des Sem refusent que toute évolution de la commande publique se fasse aux dépens du tissu économique local. Les petites et moyennes entreprises ainsi que les artisans risquent à terme d'être mis en position d'infériorité dans des partenariats public-privé qui privilégient des entreprises à forte capacité d'ingénierie.

(18) Quelle expérience avez-vous de la mise en place d'opérations de PPP de type institutionnalisé ?

- L'AMGVF et la Fédération des Sem constatent avec satisfaction que le Livre vert est le premier document communautaire à traiter du partenariat public-privé institutionnalisé, c'est-à-dire en France la société d'économie mixte (Sem). Il s'agit d'une avancée significative dans un contexte où ce mode de PPP est en plein essor dans l'Union européenne.

- Lors d'un premier recensement des entreprises publiques locales (EPL) effectué en 1998, la Fédération des Sem et Dexia avaient identifié environ 1400 EPL à capitaux mixtes, essentiellement en France et en Belgique, les autres EPL, soit plus de 11 500, étant à 100% publiques.

  Une nouvelle étude réalisée en 2002, et qui figure en annexe 2, attestait du doublement en quatre ans du nombre de Sem locales, et cette tendance s'est poursuivie depuis, particulièrement en Allemagne et en Italie. Les collectivités locales décident le plus souvent de rester majoritaires dans ces entreprises, alors même que nombre d'entre elles percevaient initialement cette ouverture du capital comme une étape vers la privatisation complète. Ce mode de gestion des services publics locaux permet en effet comme cela est précisé au paragraphe 54 du Livre vert de concilier expertise et financements privés avec contrôle public.

  Le partenariat public-privé sous la forme d'une Sem ne consiste donc pas simplement en un lien contractuel ou financier plus ou moins formalisé et renégocié à des échéances précises. Il s'agit sans doute de la forme la plus aboutie du PPP puisqu'il est sociétal. Il se traduit par la constitution d'une personnalité juridique commune, l'opérateur. Un tel mode de fonctionnement, où les actionnaires se choisissent librement contribue à la sécurité comme à la stabilité du PPP, ce qui est particulièrement nécessaire pour des opérations risquées de développement et de cohésion territoriale.

- La France a mis en œuvre dès 1926 un régime juridique permettant la collaboration de partenaires publics et privés au sein d'entreprises dites «d'économie mixte ». Parallèlement à des formes de partenariats contractuels sous forme de concession, dès le début du siècle des formes institutionnalisées ont été proposées aux pouvoirs publics pour l'exploitation de services publics (logement social, eau, transport…). En 1983, le statut juridique de l'entreprise d'économie mixte locale est défini par la loi. La France décide alors que les collectivités seront majoritaires au capital (mais ne pourront détenir 100%, et devront toujours associer au moins 15% d'autres actionnaires) comme au sein des organes de décision et que ces entreprises publiques locales seront des sociétés commerciales de droit commun. Leur nombre est passé de 600 en 1982 à 1158 en 2004. Cet essor s'inscrit dans le sillage de la décentralisation française et de la volonté des collectivités locales, au premier rang desquelles les grandes villes, de disposer d'outils adéquats pour exercer leurs nouvelles compétences.

- L'analyse du PPP institutionnel effectuée dans le Livre vert apparaît comme une première étape vers une analyse nécessairement plus approfondie.

  Elle tend en effet à définir ce PPP comme une coopération entre un partenaire public et un partenaire privé, selon seulement deux cas de figure :

  - la création d'une entité détenue conjointement par le secteur public et le secteur privé
  - la prise de contrôle d'une entreprise publique existante par le secteur privé,

  l'acteur privé assurant dans les deux cas le management effectif de la société ainsi créée.

La réalité est autrement plus diverse et complexe, comme l'atteste la situation française où l'on peut recenser, toujours sous la forme de Sem, quatre types de PPP institutionnalisés illustrés par des exemples concrets :

- un PPP où se trouve partie prenante une grande entreprise (privée ou publique) qui exerce parfois la mission confiée à la Sem

La Sem **Colmarienne des Eaux**, est organisée selon une structure proche de celle exposée dans le Livre Vert PPP. En effet, créee à l'initiative de diverses collectivités locales, elle possède un actionnariat composé, pour 30%, de différents acteurs privés, au premier rang desquels, Suez-lyonnaise des Eaux avec un apport de plus de 50 000 euros au capital de l'entreprise soit 18% de l'actionnariat.

C'est le seul type de PPP institutionnel pris en compte par le Livre vert dont l'analyse demeure pour le moins réductrice car ce cas de figure ne se trouve que dans une centaine de Sem en France au maximum, dans les réseaux principalement.

- le partenariat public-public, particulièrement fréquent dans les Sem d'aménagement public et de logement social. Dans ces secteurs, l'absence de réelle perspective de rentabilité du capital comme de l'activité ne contribue pas à mobiliser des actionnaires réellement privés. Aussi les collectivités locales, nettement majoritaires, ont-elles comme partenaires dits privés, des organismes ou institutions publics ou para-publics (Caisse des Dépôts et Consignations, chambres de commerce ou autres organismes consulaires, des organismes de logement social,…) qui souscrivent au capital au titre de leurs missions d'intérêt général.

La **SEMAPA** se consacre à l'aménagement de Paris Rive Gauche avec le double parti de conserver les aménagements urbains existants et de réaliser de nouveaux quartiers en continuité avec l'environnement urbain existant afin de poursuivre le rééquilibrage économique de la capitale vers l'Est. Ce projet ambitieux, de par son ampleur n'a pu se développer que grâce à la confiance et à l'actionnariat commun entre les collectivités territoriales détenant 61.96% du capital, l'Etat et divers entreprises et organismes publics qui représentent 30.01% de l'actionnariat. Ainsi la composition de l'actionnariat de cette Sem fait apparaître une grande majorité d'acteurs publics.

Le partenariat public-privé réside alors dans le choix, par la collectivité locale, à travers la formule Sem, d'une forme juridique de droit privé, offrant plus d'efficacité que la régie directe ou d'autres formes existantes (établissement public, …).

- le PPP territorial, qui associe collectivité(s) locale(s), banques et PME. Dans ce cas de figure, le plus fréquent parmi les 1158 Sem françaises, des PME souscrivent au capital d'une Sem non dans l'attente d'un retour sur investissement direct du capital investi ou pour assurer la gestion effective, mais pour participer au financement et au management d'un outil qui par son activité contribuera, fréquemment avec l'appui de fonds structurels, au développement comme à la cohésion du territoire sur lequel ces PME exercent l'essentiel de leur activité.

La **Semeccel** gère la Cité de l'espace à Toulouse. Elle a pour mission d'articuler le développement touristique de ce grand site culturel français et d'effectuer la promotion du savoir-faire du secteur aéronautique et spatial. La composition de son actionnariat témoigne de cette double finalité. En effet, la Ville de Toulouse et la Région Midi-pyrénées s'engagent à hauteur de 57% du capital, avec la volonté de hisser Toulouse au rang de destination culturelle et touristique à part entière. A leurs côtés, plusieurs partenaires privés parmi lesquels Aérospatiale, Matra, Alcatel Espace totalisent 30% de participations avec l'intention de constituer une vitrine de leurs compétences technologiques.

Dans le cadre d'un vaste programme de modernisation du centre ville d'Amiens, la Sem **Amiens Aménagement** assure les missions d'aménagement et de développement économique. Amiens Aménagement est créée en juin 1999 sur la base d'un actionnariat diversifié et équilibré à la fois public et privé permettant, ainsi de mettre en place des moyens importants et efficaces. Ainsi, les collectivités territoriales et les acteurs publics et parapublics détiennent 66% du capital. Les actionnaires privés sont principalement l'Omnium générale Laborde, Proxidev. Ils prennent part à la partie restant du capital, dotant ainsi l'agglomération d'un outil puissant, capable de s'adapter aux sujétions des grands projets.

Dans un souci de mieux faire connaître et d'appuyer ce type de PPP, la Fédération des Sem a mis en place un instrument d'évaluation intitulé « bilan global » qui permet d'évaluer la contribution d'une Sem au développement économique de son territoire, au delà des seules informations fournies par le bilan comptable de la société. Cet instrument d'évaluation des entreprises de services d'intérêt général pourrait opportunément figurer parmi les différentes méthodes utilisées par la Commission européenne.

- le PPP où la collectivité locale vient au secours d'une initiative privée en difficulté en rachetant une participation – forcément majoritaire du fait de la loi française – dans l'entreprise.

La Société organisatrice du Vendée Globe, course nautique en solitaire sans escale et sans assistance, a été placée en liquidation judiciaire en 2003. Les actifs du Vendée Globe ont été mis en vente laissant l'avenir de la course entres les mains d'un éventuel repreneur. Le Vendée Globe représentant pour la région un intérêt économique et touristique majeur, la **Sem Vendée**, caractérisée par un actionnariat à 82% public, a été désignée, à l'issue d'un appel d'offres, comme repreneur de la course permettant ainsi de préserver la pérennité de la course.

Ce cas de figure n'est autorisé que si l'activité de l'entreprise présente un caractère d'intérêt général, afin d'éviter une intervention excessive des collectivités locales sur le marché.

(18) bis En particulier, votre expérience vous conduit-elle à penser que le droit communautaire des marchés publics et des concessions est respecté dans le cas de montages de PPP institutionnalisé ? Si non , pourquoi ?

Les expériences de PPP institutionnels existants montrent que le droit communautaire des marchés publics est respecté ainsi que les principes fondamentaux du Traité de l'Union européenne.

Les Sem ne bénéficient pas en France de régime d'exception quant aux règles de mise en concurrence pour l'exploitation d'un service d'intérêt général ou la prestation de service par une collectivité publique. Dans le cadre de la loi Sapin mise en œuvre dès 1993 pour les règles d'attribution des concessions, la collectivité qui décide de recourir à la Sem comme mode d'exécution de la mission procède selon les règles de droit commun.

Sauf cas de prestations in house qui répondent à la définition jurisprudentielle actuelle de la CJCE, les Sem interviennent dans le cadre de réponses à des appels d'offres des collectivités pour les prestations de travaux, fournitures ou service conformément aux directives marchés 2004-17 et 2004-18 et de leur transposition en droit français dans le Code des marchés publics.

(19) Estimez-vous qu'une initiative doit être prise au niveau communautaire en vu de clarifier ou de préciser les obligations des organismes adjudicateurs quant aux conditions dans lesquelles doivent être mis en concurrence les opérateurs potentiellement intéressés par un projet de type institutionnalisé ? Si oui, sur quels points particuliers et sous quelle forme ? Si non, pourquoi ?

- Compte tenu de leur très récent essor et à la différence des concessions, les PPP institutionnels n'ont pas été pris en compte, jusqu'à présent par le droit communautaire. Cela n'a pas pour autant empêché des pays comme la France et l'Italie de les doter d'un cadre juridique qui garantit dans le droit national une application du droit communautaire de la concurrence et le respect des principes du Traité. Pour autant une plus grande sécurité juridique doit être garantie et précisée au niveau de l'Union.

  Il est donc nécessaire de préciser dans le droit dérivé de l'Union, en codécision, quelques règles contribuant à la mise en place d'un cadre plus clair et plus sécurisant pour les PPP institutionnels, chaque Etat membre conservant la responsabilité de veiller à leur respect comme à leur mise en œuvre dans un droit interne respectueux de la libre administration comme des règles du marché intérieur.

- L'AMGVF et la Fédération des Sem proposent de fixer à toutes les collectivités locales européennes qui choisissent la Sem comme mode de gestion quatre règles communes :

  - une définition claire et pérenne du in house (voir réponse à la question 7)

  - l'affirmation de la liberté pour chaque Etat membre de décider pour les Sem à quel stade il est préférable d'organiser la concurrence (lors de l'attribution de la mission ou du choix de l'actionnaire), étant précisé que celle-ci ne saurait être à la fois en amont et en aval.

    Il est précisé au paragraphe 57 du Livre vert que les règles de concurrence doivent s'appliquer lors de la mise en place de l'entité mixte. Cette position semble contradictoire avec le paragraphe 58 qui considère par ailleurs que la décision de création d'une Sem ne résulte pas d'un contrat mais d'un acte unilatéral de l'administration, expression de son pouvoir discrétionnaire.

    Le deuxième niveau de concurrence concerne l'attribution des missions à la Sem et s'ajoute à un troisième niveau de concurrence concernant les contrats passés par la Sem elle-même lorsqu'elle a la qualité d'organisme adjudicateur, ce qui est pratiquement toujours le cas.

    Il convient d'ajouter un quatrième niveau lorsqu'un nouveau partenaire privé prend le contrôle de l'entité mixte, ce qui revient à mettre en concurrence les ouvertures de capital. Un dispositif faisant intervenir deux niveaux, voire plus, de concurrence en amont et en aval nous paraît excessif et discriminatoire.

  - la reconnaissance du PPP institutionnalisé, dans sa diversité, comme un mode de gestion à part entière des services publics locaux. Sur cette base, la constitution d'une entreprise mixte peut constituer le critère de l'exécution d'une mission par une entreprise. Dans ce cas, l'entreprise mixte est créée sans mise en concurrence mais avec un partenaire sélectionné au préalable par appel d'offre.

  - l'affirmation que le mode de représentation des collectivités locales dans les instances dirigeantes des Sem relève de la subsidiarité, et qu'il revient par conséquent à chaque Etat membre de décider si des élus locaux peuvent ou non être désignés à cet effet. Dans le cas de la France, la représentation obligatoire de l'actionnaire collectivité locale par des élus constitue une garantie de contrôle comme de légitimité dans l'exercice des missions de la société, surtout dans les situations relevant du in house.

(20) Quelles sont les mesures ou les pratiques que vous estimez constitutives d'entraves à la mise en place des PPP au sein de l'Union européenne ?

L'absence de statut européen des sociétés à capitaux mixtes et les contraintes administratives et juridiques différentes d'un Etat membre à l'autre rendent difficiles la constitution et le développement de partenariats public-privé transfrontaliers. L'adoption envisagée par la Commission d'un règlement instituant un instrument de coopération doté de la personnalité juridique au riveau communautaire serait un pas décisif dans la mise en œuvre de partenariats transfrontaliers opérationnels.

(21) Connaissez-vous d'autres formes de PPP développés dans les pays en dehors de l'Union ? Connaissez-vous des exemples de « bonnes pratiques » développées dans ce cadre, dont l'Union pourrait s'inspirer ? Si oui, lesquelles ?

L'AMGVF comme la Fédération des Sem sont de plus en plus fréquemment sollicités par des interlocuteurs étrangers désireux d'en savoir plus sur les modes de PPP existant en France.

Un vif intérêt est porté à la Société d'économie mixte, notamment car elle permet d'associer capitaux et expertise privés avec contrôle et impulsion publics. Cet outil fait en particulier l'objet d'interrogations croissantes de la part de représentants :

- des nouveaux ou futurs Etats membres (Pologne, Hongrie, Roumanie), où les élus semblent désireux de disposer de solutions permettant de moderniser les modes opératoires publics existants sans pour autant les privatiser afin d'en conserver la maîtrise directe (voire de la reprendre dans le cas de la Hongrie)

- de pays émergents d'Afrique australe et d'Asie du Sud-est. Le succès remporté par la formule Sem dans toutes les régions ultra périphériques françaises (80 sociétés jouant un rôle d'entraînement sur toute la vie économique locale comme sur la cohésion) atteste en effet du bien fondé du recours à ce type d'outil à ce stade de développement économique et social, en particulier pour le logement, l'aménagement public, l'eau, les transports publics et les déchets. De nombreuses Sem constituées avant la décolonisation dans des Etats africains et du Maghreb continuent d'ailleurs à jouer un rôle économique majeur dans ces pays notamment pour le logement.

- des villes des Etats-Unis d'Amérique et du Japon qui considèrent le PPP institutionnel comme une solution innovante évitant un transfert total de la collectivité au partenaire. Le maintien d'une expertise municipale aux côtés d'entreprises privées dans une entité ad hoc est un gage de contrôle du service rendu.

Loin d'être une exception française, la formule Sem est un type de PPP qui a fait ses preuves dans de nombreux pays et semble vouée à se développer davantage au cours des années à venir.

Des règles juridiques communautaires appropriées semblent donc particulièrement opportunes pour contribuer à cet essor.

L'AMGVF et la Fédération des Sem se tiennent à la disposition de la Commission pour participer à l'élaboration de recueils de bonnes pratiques en matière de PPP au sein de l'Union comme en dehors.

L'intérêt croissant porté au PPP dans le reste du monde justifierait sans doute l'organisation, avec le soutien de la Commission, voire en son sein, de missions d'expertise, d'appui comme de conseil. Les signataires du présent document font part de leur forte motivation pour s'y associer.

(22) De façon plus générale, et compte tenu des besoins importants d'investissements nécessaires dans certains Etats membres, afin de poursuivre un développement économique social et durable, estimez-vous utile une réflexion collective sur ces questions qui se poursuivrait à des intervalles réguliers entre les acteurs concernés, et qui permettrait un échange des meilleures pratiques ? Est-ce que vous considérez que la Commission devrait animer un tel réseau ?

Comme cela a été démontré lors des réponses précédentes, les attentes à l'égard du PPP ne sont pas exclusivement financières et limitées à « des besoins importants d'investissements ». Le PPP, en particulier institutionnel, constitue une composante du modèle socio-économique européen de développement et de cohésion territoriale, et pas seulement une solution «par défaut » relevant de considérations uniquement financières.

L'AMGVF et la Fédération des Sem n'en sont que plus motivées pour participer activement à des réseaux d'échange qui seraient animés par la Commission.

La Commission pourrait également opportunément apporter son appui aux réseaux de ce type qui ont déjà pu se constituer par exemple au sein du CEEP (Centre européen des entreprises à participation publique) sous la forme de groupes déchets, eau, funéraire, tourisme, et bientôt habitat et renouvellement urbain.

Un observatoire européen du partenariat public-privé, indépendant et pluraliste, pourrait également être constitué. Il permettrait de promouvoir les bonnes pratiques, de développer les échanges. Il contribuerait également à ce que toutes les parties prenantes à des PPP puissent disposer du même degré d'information, et donc de négocier ces PPP à « armes égales ».

LIVRE VERT SUR LES PARTENARIATS PUBLIC-PRIVE ET LE DROIT

COMMUNAUTAIRE DES MARCHES PUBLICS ET DES CONCESSIONS

REPONSE COMMUNE DE :

- L'Association des maires des grandes villes de France (AMGVF)
- La Fédération nationale des sociétés d'économie mixte (Fédération des Sem)

ANNEXE 1

29 juillet 2004

Grandes Villes et Groupements

Maires de grandes villes

DEXIA
Crédit Local

Les services publics locaux

mars 2004

AVANT-PROPOS

Le présent fascicule est la synthèse de l'enquête sur la gestion des services publics locaux lancée par l'Association des Maires de Grandes Villes de France début 2004.

Cette initiative, mise en œuvre avec le soutien de la Direction des Etudes de Dexia - Crédit Local, a pour objectif de dresser un panorama de la gestion des services publics des grandes villes de France et de leurs groupements. Par souci de concision, deux axes ont été privilégiés.

Le contexte actuel est celui d'une couverture presque optimale des aires urbaines par le phénomène intercommunal ; il était donc nécessaire de mener un état des lieux des rôles respectifs des villes et de leurs groupements dans la mise en œuvre des services publics locaux.

Les modalités de gestion de ces services locaux sont présentées synthétiquement puis analysées selon un axe financier. L'objectif est d'expliquer, en termes budgétaires, les conséquences, très différentes, de ces choix sur les masses financières des membres de l'association.

L'enquête complète en ce sens les différents annuaires financiers mis à votre disposition en affinant la validité des comparaisons par ratios.

Cette année, seuls les principaux services publics locaux que sont l'eau, l'assainissement, la collecte et le traitement des ordures ménagères, les transports en commun urbains et les cantines scolaires ont été traités.

L'actualité de l'ouverture des marchés à la concurrence nous a poussé à aborder également les services plus atypiques de l'électricité et du gaz.

Dans un paysage décentralisé mouvant, la pérennisation de cette étude permettrait de suivre, d'année en année, l'évolution des compétences des collectivités et leurs conséquences sur les budgets locaux.

Introduction

La note qui suit analyse les résultats de l'enquête menée par l'Association des Maires des Grandes Villes de France et Dexia Crédit Local sur la gestion des services publics locaux.

Le questionnaire envoyé aux 88 membres de l'association (47 villes et 41 groupements) concerne les 5 principaux services publics locaux que sont : l'eau (production et distribution), l'assainissement (collecte et traitement des eaux usées), les déchets (collecte et traitement), les transports en commun urbains et les cantines scolaires. Il répond, pour chacun d'entre eux, à deux questions :

- qui détient la compétence ?
- comment est géré le service ?

69 questionnaires ont été reçus et traités : 37 villes et 32 groupements. 21 villes sont traités en même temps que leurs groupements, membres de l'association.

VILLES	GROUPEMENTS
AMIENS	
ANGERS	CA d'ANGERS
ARGENTEUIL	
AVIGNON	
BESANCON	CA de BESANCON
BORDEAUX	CU de BORDEAUX
BOULOGNE BILLANCOURT	
BREST	CU de BREST
CAEN	
CLERMOND-FERRAND	CLERMONT COMMUNAUTE
DIJON	CA de DIJON
DUNKERQUE	CU de DUNKERQUE
LE HAVRE	CA du HAVRE
LE MANS	CU du MANS
LILLE	CU de LILLE
LIMOGES	CA de LIMOGES
MARSEILLE	
METZ	CA de METZ
MONTPELLIER	CA de MONTPELLIER
MULHOUSE	CA de MULHOUSE
NANCY	CU de NANCY
NANTES	CU de NANTES
NÎMES	
ORLEANS	CA d'ORLEANS
PERPIGNAN	CA de PERPIGNAN

VILLES	GROUPEMENTS
REIMS	CC de REIMS
RENNES	CA de RENNES
ROUBAIX	CU de LILLE
ROUEN	
SAINT - ETIENNE	
ST DENIS	
STRASBOURG	CU de STRASBOURG
TOULON	
TOULOUSE	
TOURCOING	CU de LILLE
TOURS	
VERSAILLES	
	CA du PAYS D'AIX
	CA de BAYONE-ANGLET
	CA de CALAIS
	CU de CHERBOURG
	CA d'EVRY
	GRENOBLE METRO
	CA du HAUT VAL DE MARNE
	CA de LORIENT
	CA de PAU
	CA de POITIERS
	SAN de SENART
	SAN VAL MAUBUEE

La présente analyse s'attache principalement à l'année 2002, afin de permettre une mise en parallèle avec les résultats de l'*annuaire 2002 des comptes consolidés des grandes villes et des groupements* réalisé par Dexia – Crédit Local et l'Association Des Maires De Grandes Villes De France.

L'évolution entre 2002 et 2003 est abordée en complément.

1 – Présentation synthétique des résultats

Le présent questionnaire part d'un constat : les modes de gestion choisis par les collectivités pour leurs services publics locaux ont des conséquences budgétaires diverses qui atténuent la pertinence des comparaisons financières.
Du fait des choix différents opérés par les villes et leurs groupements, la notion de comptes consolidés «budget principal – budgets annexes », introduite par l'*annuaire 2002 des comptes consolidés des grandes villes et des groupements* ne recouvre pas les mêmes champs d'une collectivité à l'autre.
L'objectif de la première partie de cette note, avant de s'attarder sur l'analyse détaillée du questionnaire, est de donner une vision synthétique de la manière dont chaque service public « pèse » sur les comptes de la collectivité.

Le tableau qui suit retrace les résultats individuels de chacune des collectivités et permet de mieux apprécier les différences observées entre les données financières des collectivités membres de l'Association des Maires de Grandes Villes de France.
Il présente en colonne les services publics étudiés :

- eau (E)
- assainissement (A)
- collecte des déchets (CD)
- traitement des déchets (TD)
- transports (T)
- cantines scolaires (C)

Différents cas ont été distingués pour chacun d'entre eux et pour chaque membre de l'association. Ils sont classés selon le poids financier que le service fait supporter à la collectivité, via un budget annexe ou le budget principal :

- la collectivité n'a pas la compétence : ***aucun impact budgétaire*** ;
- le service public est géré en DSP ou par un établissement public et aucune recette relative au service délégué (TEOM, VT) n'a pu être détectée au sein du budget principal ou du budget annexe : ***aucun impact budgétaire visible*** ;
- le service public est géré en DSP, par un établissement public ou en marché public et un budget annexe retrace certains des flux relatifs au service (TEOM, REOM, versement transport, subventions d'équilibre, prix du marché, dépenses d'équipements …etc…) : ***impact partiel sur les finances de la collectivité via un budget annexe*** ;
- le service public est géré en gestion directe et l'intégralité des dépenses et des recettes sont retracées au sein d'un budget annexe : ***impact sur les finances de la collectivité via un budget annexe*** ;
- le service public est géré en DSP, par un établissement public ou en marché public et le budget principal retrace certains des flux relatifs au service (TEOM, REOM, versement transport…etc…) : ***impact partiel sur le budget principal de la collectivité*** ;
- le service public est géré en régie directe : l'intégralité des dépenses et des recettes sont retracées au sein du budget principal : ***impact sur le budget principal de la collectivité.***

Le niveau de coloration de chaque ligne est, de par cette méthode, un indicateur du poids des services publics locaux dans les budgets (budget principal – budgets annexes) de chaque collectivité.

L'impact budgétaire du choix des modes de gestion des collectivités

Année 2002	E	A	CD	TD	T	C
AMIENS						░
ANGERS						░
ARGENTEUIL		▒	■		░	■
AVIGNON			■			░
BESANCON	▒	▒	▒	▒		■
BORDEAUX						■
BOULOGNE			■			■
BREST						░
CAEN	▒		▩			■
CLERMOND-FERRAND	▒	▒				■
DIJON						■
DUNKERQUE						░
HAVRE			■			░
LILLE						■
LE MANS						■
LIMOGES	▒	▒	▒	▒		░
MARSEILLE						░
METZ	▒					■
MONTPELLIER	▒		▩			■
MULHOUSE	▒					■
NANCY						░
NANTES						■
NÎMES		░	▩			░
ORLEANS	░					░
PERPIGNAN			■	░		■
REIMS			░			░
RENNES	▒	▒				▒
ROUBAIX						░
ROUEN	▒					░
SAINT - ETIENNE	▒	▒	■			░
SAINT DENIS		▒				■
STRASBOURG						░
TOULON	▒		▩			■
TOULOUSE	░		■	░		■
TOURCOING						■
TOURS	▒		■			■
VERSAILLES		▒	▩		░	░

Année 2002	E	A	CD	TD	T	C
CA d'ANGERS	▒	▒	▒	░	░	
CA de BAYONNE-ANGLET		▒	■	░		
CA de BESANCON					░	
CA de CALAIS				░		■
CA de CLERMONT FERRAND			▒	░		
CA de DIJON		░	▩	■	░	
CA de GRENOBLE		▒		░		
CA de LIMOGES						
CA de LORIENT	▒		▩	▩	░	
CA de METZ			■		░	
CA de MONTPELLIER		▒		░	▩	
CA de MULHOUSE			■			
CA de PERPIGNAN	▒	▒			▩	
CA de POITIERS	▒	▒	▩	▒	░	
CA de RENNES			░	░	░	
CA d'EVRY	░	░			░	
CA d'ORLEANS		▒	▩	░	░	
CA du HAUT VAL de MARNE		▒	░		░	
CA du HAVRE	▒	▒		▒	░	
CA du PAYS D'AIX				▩	▩	
CC de REIMS	▒	▒		░	▩	
CU de BORDEAUX	▒	▒	■	░	░	
CU de BREST	▒	▒	■	■	▩	
CU de CHERBOURG	▒	▒	■	▩	▩	
CU de DUNKERQUE		▒	▒	▒	░	
CU de LILLE	▒	▒	▩	░		
CU de NANCY	▒	▒	▩	░	▩	
CU de NANTES	▒	▒	▩	░	▩	
CU de PAU			■		░	
CU de STRASBOURG	▒	▒	■	░	▩	
CU du MANS	▒	▒	■	░	░	
SAN de SENART	▒	▒			░	
SAN VAL MAUBUEE	▒					

E : eau
A : assainissement
CD : collecte des déchets
TD : traitement des déchets
T : transports
C : cantines scolaires

■ impact sur le budget principal
▩ impact partiel sur le budget principal
▒ impact sur le budget annexe
▒ impact partiel sur le budget annexe
░ pas d'impact visible
n'a pas la compétence

2- Analyse détaillée du questionnaire

➢ Présentation du questionnaire et des services étudiés

La première partie du questionnaire étudie les compétences, liées aux 5 services publics étudiés (eau, assainissement, déchets, transports, cantines), détenues par chacune des collectivités membres de l'association en distinguant 3 cas : la compétence est détenue par une ville, par un groupement à fiscalité propre (CC, CA, CU ou SAN) ou par un syndicat dédié.

On distingue deux types de services publics locaux : les services publics industriels et commerciaux (SPIC) et les services publics administratifs (SPA). A l'inverse de ceux des SPA, les comptes des SPIC ont l'obligation d'être équilibrés en dépenses et en recettes et leur comptabilité doit être retracée au sein d'un budget annexe, autonome financièrement du budget principal.
La distinction SPIC / SPA est, de fait, nécessaire pour expliquer les modes de gestion choisis par les collectivités.
Les services étudiés sont, à l'exception des cantines scolaires et de la collecte des déchets ménagers, des services publics industriels et commerciaux.
Le service de la collecte des déchets est un cas particulier : il a une double qualification (SPIC ou SPA) selon son mode de financement. La collecte et le traitement des ordures ménagères ont été traités séparément dans le questionnaire.

Quatre modes de gestion ont été différenciés : la gestion directe (avec ou sans budget annexe), l'établissement public (administratif ou industriel et commercial), le marché public et la délégation de service public.
Le mode de gestion du service n'est étudié que si la compétence est détenue par la collectivité membre de l'association.
De même dans le cas où la collectivité ne gère qu'une partie du service[1] seule la manière dont cette dernière est gérée par la collectivité est analysée.

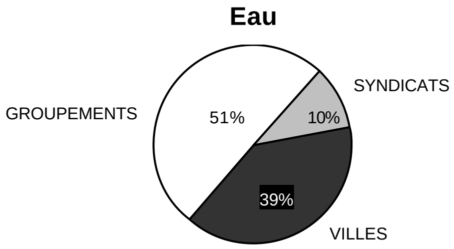
Les modes de gestion

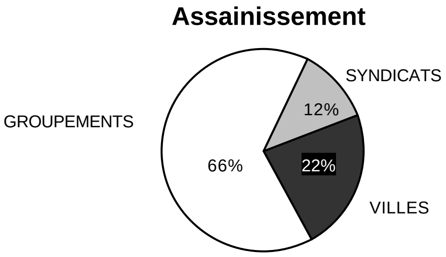
- **la gestion directe** : la collectivité gère le service à l'aide de ses services ou par le biais d'un établissement public.
  Au sein de la gestion directe, on distingue, selon leur niveau d'autonomie par rapport à la collectivité :
  - la **régie simple** : elle n'a aucune autonomie (financière ou administrative) par rapport à la collectivité ; ce mode de gestion est, en principe réservé aux seuls SPA. Il ne donne pas lieu à la création d'un budget annexe.
  - La **régie dotée d'une autonomie financière** : elle possède des organes de gestion distincts de la collectivité, cette dernière conservant le pouvoir de décision. Le coût de fonctionnement du service est obligatoirement retracé dans un budget annexe distinct de celui de la collectivité.
  - La **régie dotée de l'autonomie financière et de la personnalité morale** : c'est un établissement public autonome (juridiquement et financièrement) de la collectivité, administré par un Conseil d'Administration (désigné par le Conseil Municipal). Son budget est autonome, non annexé à celui de la collectivité et soumis aux règles de la comptabilité publique.
- **La gestion indirecte** dont on distingue deux principaux modes de gestion :
  - Le **marché public** : c'est un contrat de prestation (travaux, fournitures, services) passé entre la collectivité et une entreprise qui porte sur tout ou partie du service public (administratif ou industriel et commercial). L'entreprise est rémunérée par un prix.
  - La **délégation de service public** : c'est un contrat par lequel la collectivité confie à un tiers l'exploitation du service, sous son contrôle. Le délégataire est rémunéré pour l'exploitation directement par l'usager.

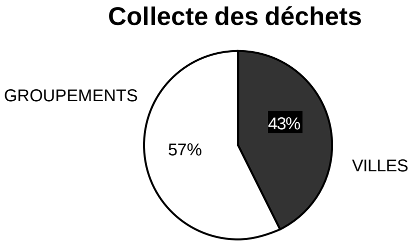
[1] La collectivité peut, par exemple, gérer la distribution d'eau et avoir transféré à un syndicat la production.

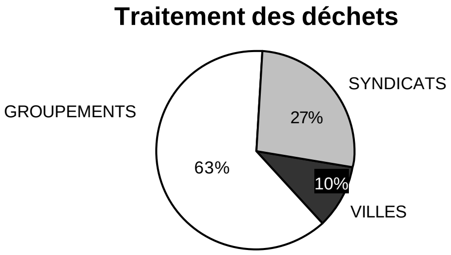
➢ Exercice de la compétence :

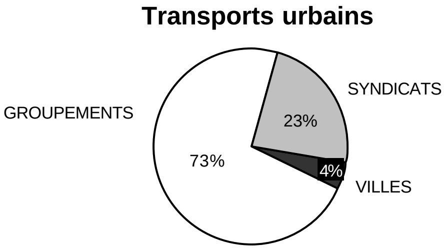
Les graphiques ci-dessous donnent une vision synthétique, pour chaque service public étudié, de la répartition des compétences entre chaque type de structure.

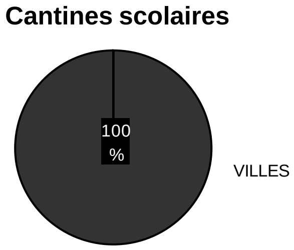












Les principaux services publics locaux sont, en 2002, majoritairement gérés par les groupements intercommunaux, à l'exception des cantines scolaires, qui sont restées de la compétence des communes.

Les services publics dont la compétence est la plus largement transférée aux **structures intercommunales** sont les transports (gérés à 73% par des groupements), le traitement des déchets (63%) et l'assainissement (66%).

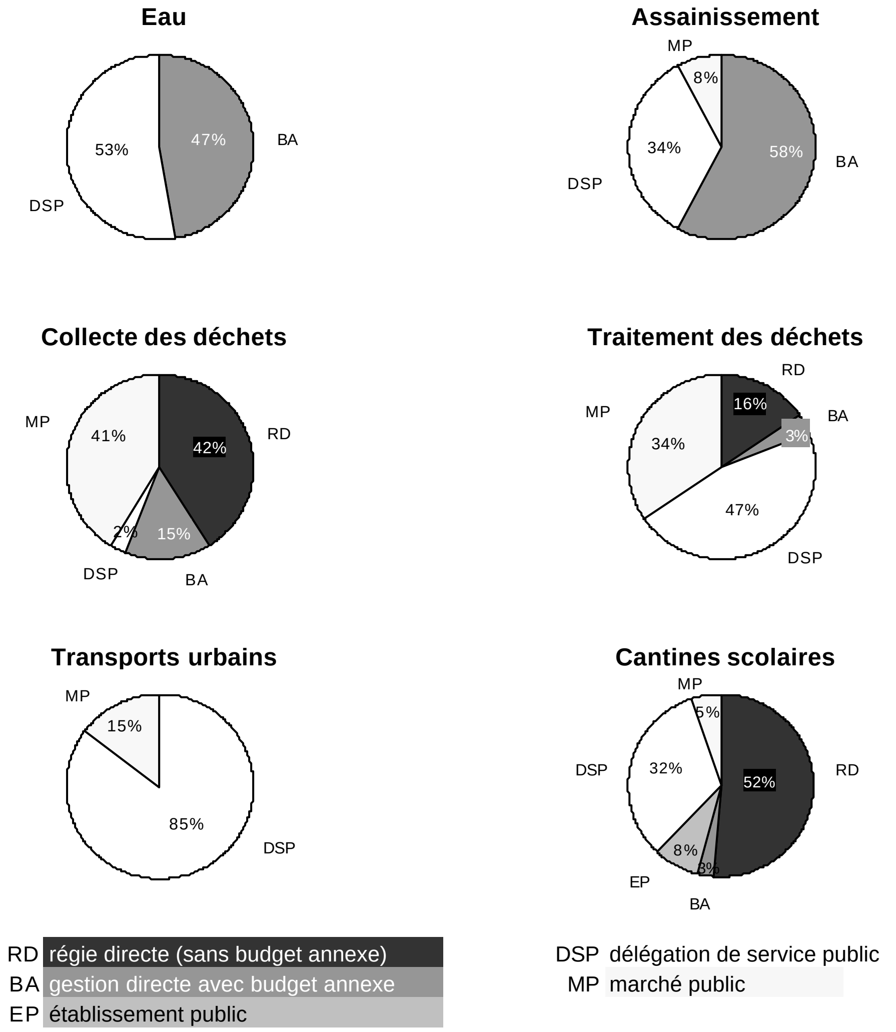
Le transfert de ces deux derniers services peut s'expliquer par les coûts importants des usines de traitement des déchets et des stations d'épuration et la nécessité qui en découle d'atteindre une taille critique et de parvenir à des économies d'échelle, ce que permet l'échelon intercommunal. La gestion des services de transports par l'intercommunalité naît souvent de la nécessité de gérer les déplacements sur l'aire urbaine et non uniquement sur le territoire de la commune.

Les **communes** restent plus souvent compétentes pour l'eau (39%) et la collecte des déchets (43%).

Les transports en commun urbains et le traitement des déchets sont, dans un quart des cas, gérés par des **syndicats intercommunaux**. Leurs interventions dans les autres domaines sont plus limitées.

➢ Mode de gestion des services

Les graphiques ci-dessous présentent les choix des collectivités compétentes en terme de mode de gestion. Les résultats des villes et des groupements ont été traités ensemble.



Le service public de l'**eau** est géré en gestion directe (47% des cas) ou en délégation de service public (53%). Sa qualification en SPIC donne obligation à la collectivité, lorsqu'il est géré en régie, de créer un budget annexe dédié.
Sur les 17 structures intercommunales compétentes, 5 gèrent ce service par deux modes de gestion différents. Cette situation est due, dans 4 cas sur 5, au fait que la production et la distribution d'eau ne sont pas gérées de manière identique. Le dernier cas est une communauté d'agglomération qui n'a pas encore homogénéisé, sur son territoire, les différents modes de gestion antérieurs de chacune des communes.

Le service public de l'**assainissement** a un schéma relativement similaire à celui du service public de l'eau. Il est géré en gestion directe, avec autonomie financière (58% des cas), en délégation (34%) et en marché public (8%).

Là encore, 7 structures intercommunales ont un double mode de gestion :

- 2 ont conservé le mode de gestion antérieur sur le territoire de chacune des communes,
- 3 gèrent le service de collecte en régie et leur station d'épuration en délégation ou en marché public[2].

Le mode de gestion des services de l'eau et de l'assainissement explique l'importance des budgets annexes eau et assainissement relevés dans l'*annuaire 2002 des comptes consolidés des grandes villes et des groupements*. Ils représentent, pour les villes, respectivement, 21 et 35%, des dépenses totales de leurs budgets annexes. Ces pourcentages sont de 16 et 39% pour les groupements.

Le service public de la **collecte des déchets** est plus complexe à appréhender du fait de sa double qualification possible en SPIC ou en SPA. Il est géré par les collectivités principalement en gestion directe (42% sans autonomie financière et 15% par le biais d'un budget annexe), en marché public (41%) ou en délégation (2%).
La qualification de la collecte des déchets dépend de son mode de financement : si la collectivité se finance par la TEOM ou le budget principal, le service est un SPA ; si la collectivité se finance par la REOM, le service est un SPIC. La TEOM est le mode de financement prépondérant des collectivités, ce qui explique l'importance des régies directes et des marchés publics.
Les cas de délégation ou de régie avec autonomie financière concernent plus particulièrement les centres de tri qui, dégageant des recettes commerciales, ont une structure de financement différente de la collecte proprement dite.
Cinq collectivités ont deux modes de gestion[3].

Le **traitement des déchets** est géré, par les collectivités compétentes, à 47% en DSP, à 34% en marché public, à 19% en régie directe (dont 16% sans budget annexe). 6 collectivités ont un double mode de gestion. Dans deux cas[4], il est lié à une gestion différente du centre de compostage, de la déchetterie et de l'usine d'incinération.

Les **transports en commun urbains** sont gérés par les collectivités à 85% en délégation de service public et à 15% en marché public. Une collectivité a un double mode de gestion pour son service des transports (délégation de service public et marché public).
En cas de délégation ou de marché public, les collectivités retracent, au sein d'un budget annexe, en dépense, la subvention d'équilibre (ou le prix) versée à leurs délégataires (ou au prestataire) et, en recette, le versement transport perçu des entreprises. Ceci explique le poids très important des budgets annexes transports relevés dans l'annuaire financier consolidé des collectivités membres de l'association, malgré l'importance de la gestion indirecte.
Les transports représentent 37% des dépenses des budgets annexes des groupements intercommunaux en 2002.

La gestion des **cantines scolaires**, qui concernent uniquement les communes, sont gérés dans une majorité des cas (55%) en régie directe (dont 52% sans budget

[2] 2 collectivités ne nous ont pas communiqué de détail sur ce double mode de gestion.
[3] Aucune information supplémentaire ne nous a été communiquée sur ces situations.
[4] Les autres cas ne sont pas renseignés.

annexe). 32% ont délégués le service, 5% ont recours au marché public et 8% à un établissement public.

➢ Evolution 2002 / 2003

De 2002 à 2003, on note une accélération du mouvement de transfert des compétences des villes vers leurs groupements.

C'est pour le service de collecte des déchets, géré dans 43% des cas par des communes en 2002, que ce mouvement est le plus fort, 8 communes transférant ce service à leur groupement. Aucun de ces 8 transferts n'est la conséquence de la création d'une nouvelle structure intercommunale.

Il est à noter qu'une communauté d'agglomération gère, depuis 2003, les cantines scolaires.

Transfert du service ….	… d'une commune à un EPCI	… d'un syndicat à un EPCI
eau	0	0
assainissement	1	1
collecte des déchets	8	0
traitement des déchets	2	0
transports	0	2
cantines scolaires	1	0

Enfin, très peu de modifications sont à observer dans les choix opérés par les collectivités pour leur mode de gestion, y compris en cas de transfert.

3- Les services publics de l'électricité et du gaz

➢ Législation et organisation des services

Les directives européennes du 19 décembre 1996 (électricité) et du 22 juin 1998 (gaz) transposées en droit français ont organisé l'ouverture progressive et partielle de la fourniture d'énergie à la concurrence en Europe.

Dans un premier temps, seuls étaient concernés les consommateurs d'énergie les plus importants. La directive européenne du 26 juin 2003 impose de généraliser l'éligibilité en deux étapes :

- intégralité du marché des clients professionnels au 1er juillet 2004
- marché des ménages au 1er juillet 2007.

Ce passage au marché d'une activité exercée jusque là en monopole dans le cadre d'un service public modifiera le contenu des missions d'intérêt général dévolues aux communes et à leurs groupements, collectivités organisatrices de la distribution publique d'énergie.

Pour évaluer concrètement les conséquences futures de ces directives, il a paru intéressant de photographier, avant l'ouverture des marchés, les modes de gestions de des grandes villes et de leurs groupements.

En France, la composante «distribution » des services publics de l'électricité et du gaz est locale. Certes la distribution est assurée – dans la plupart des communes – par une entreprise nationale (EDF et GDF), mais l'autorité organisatrice est une collectivité locale.

5% des communes de France sont approvisionnées par des régies, des sociétés d'économie mixte, des sociétés d'intérêt collectif ou par des entreprises analogues. Ces entreprises locales de distribution n'ont pas été nationalisées en 1946, comme le furent EDF et GDF.

La distribution d'électricité et de gaz reste un véritable service public, garant de l'égalité de traitement des usagers, d'un aménagement équilibré du territoire et de la qualité de l'environnement.

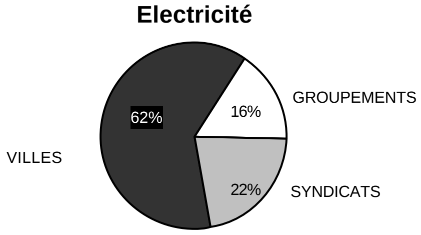
Les acteurs du système de distribution d'énergie en France

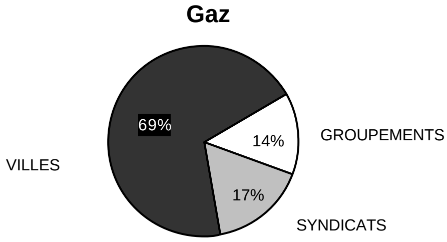
	Activité de production et de fourniture	**Activité de réseau (acheminement)**	
		Transport	**Distribution**
Propriété des équipements	- Opérateurs actuels (EDF et GDF) - Nouveaux opérateurs à l'ouverture des marchés	EDF GDF	Collectivités locales
Gestion des équipements		EDF GDF	- Distributeurs actuels (EDF GDF) - Entreprises locales de distribution

➢ Analyse du questionnaire

Sur les 70 questionnaires qui ont été retournés par les membres de l’association, 46 collectivités (20 groupements et 26 villes) ont répondu à la partie concernant les services publics du gaz et de l’électricité.

Il ressort des réponses envoyées que les villes restent majoritairement compétentes pour la gestion de ces services (62% pour l’électricité et 69% pour le gaz). Par ailleurs, près d’un service sur cinq est géré par un syndicat.

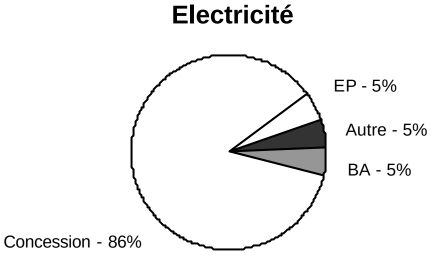


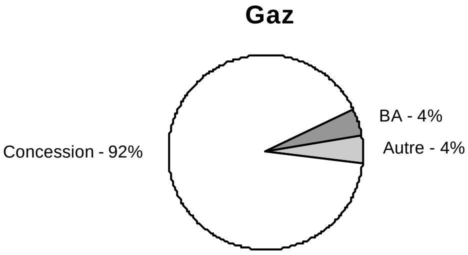


Une très large majorité des collectivités compétentes (86% pour l’électricité et 92% pour le gaz) ont passé des conventions avec EDF ou GDF pour la gestion de ces deux services.

Seules 3 ont adopté un mode de gestion différent :

- mise en place d’une régie autonome pour le service public d’électricité,
- gestion directe avec budget annexe pour les services de l’électricité et du gaz,
- autre mode de gestion[5].





[5] Pas de renseignement complémentaire

FÉDÉRATION DES Sem

Maires de grandes villes

LIVRE VERT SUR LES PARTENARIATS PUBLIC-PRIVE ET LE DROIT COMMUNAUTAIRE DES MARCHES PUBLICS ET DES CONCESSIONS

REPONSE COMMUNE DE :

- L'Association des maires des grandes villes de France (AMGVF)
- La Fédération nationale des sociétés d'économie mixte (Fédération des Sem)

ANNEXE 2

29 juillet 2004

5ème conférence européenne des entreprises publiques locales organisée par la Commission entreprises locales du CEEP

***Bruxelles - 29 octobre 2002
Comité économique et social européen***

****

LE PARTENARIAT PUBLIC-PRIVE DANS LES ENTREPRISES PUBLIQUES LOCALES EN EUROPE

Rapport introductif par Axelle Verdier

Chargée d'études - secteur public local Europe
Département des Etudes de Dexia Crédit Local

La synthèse présentée ici de l'enquête succincte sur les entreprises publiques locales sous l'angle des partenariats publics / privés a été conduite par la Fédération des sem et Dexia Crédit local, et à l'initiative de la Fédération des sem.

L'implication de Dexia aux côtés de la Fédération des sem sur cette thématique s'inscrit pleinement dans le champ d'intervention du groupe Dexia, présent à l'échelle européenne : groupe bancaire franco-belge spécialisé dans le financement des équipements collectifs et des services financiers aux collectivités locales dans le monde, Dexia est aussi partenaire des acteurs du développement local. Le groupe, qui opère dans la quasi totalité des pays de l'Union européenne, a acquis par le biais de ses filiales et implantations une connaissance approfondie du fonctionnement des collectivités locales en Europe. C'est à ce titre, et en tant que partenaire de longue date de la Fédération des sem, que cette dernière nous a associés pour travailler à approfondir la connaissance des entreprises publiques locales à l'échelle européenne.

La petite enquête lancée à la fin du mois de juin dernier se fait l'écho du livre réalisé par Dexia en partenariat avec la Fédération des sem, et présenté en cette même place voilà déjà trois années de cela, à l'occasion de la 1ère convention européenne des entreprises publiques locales qui se réunissait alors.

Il ne s'agissait pas, en 3 mois, de réactualiser le livre – aussi le champ de l'enquête est largement plus restreint que le champ de l'ouvrage, tant en ce qui concerne les thématiques abordées que les pays ciblés :
- l'axe d'actualisation choisi a été celui de la composition du capital des entreprises publiques locales, afin d'apprécier la réalité de ces entités sous l'angle des acteurs qui les composent aujourd'hui ;
- les pays visés : pour des questions d'accès à l'information et de délais, 8 pays de l'Union européenne (Allemagne, Autriche, Belgique, France, Grèce, Italie, Portugal, Suède) + la Norvège, correspondant aux pays membres actifs de la commission entreprises locales du CEEP– presque tous ont répondu.

A propos de l'accès à l'information: la collecte statistique et le recueil d'informations globales à l'échelle d'un pays ne sont toujours pas aisés :
- dans la plupart des pays, il n'existe pas d'organe représentatif de l'ensemble des entreprises publiques locales, ou bien, s'il en existe, ce sont par exemple des fédérations de métier, une entreprise publique locale gérant plusieurs activités pouvant être adhérente de plusieurs organismes fédérateurs, ce qui rend le recensement statistique difficile ;
- il n'existe pas non plus encore à notre connaissance de recensement systématique de ces entités à l'échelle nationale via les offices statistiques, ni à l'échelle européenne via eurostat - A la différence des collectivités locales par exemple, qui commencent à bénéficier d'une harmonisation européenne au niveau de la comptabilité nationale et qu'il est donc aujourd'hui possible d'appréhender dans une approche européenne globale.

Aussi les informations présentées ici proviennent principalement d'entretiens et de témoignages recoupés. Ces limites rendent d'autant plus difficile la synthèse transversale.

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En préambule, la définition de l'entreprise publique locale

Définition retenue de l'entreprise publique locale :
Toute entreprise à forme sociétaire exerçant une mission d'intérêt général et dont plus de la moitié du capital est détenue par une ou plusieurs collectivités locales, par exception moins de 50 % si ces collectivités disposent d'un contrôle réel sur l'activité de l'entreprise.

Il convient également de préciser que le champ de l'étude est focalisé sur les entreprises des collectivités locales décentralisées – en sont donc exclues les entreprises relevant directement des Etats fédérés (Allemagne, Autriche, Belgique).

Rappel état des lieux 1999

En 1999, le panorama des entreprises publiques locales européen était caractérisé par :
- près de 13 000 entreprises,
- pour la plupart détenues à 100 % par des collectivités locales
- avec pourtant des règles souples et sans contraintes particulières de composition du capital : généralement, le législateur n'a pas encadré la participation des collectivités locales par des seuils, sauf dans deux pays (France, Italie) où les seuils de participation concernent :

/ la participation des collectivités locales :
- minima en Italie (20 %), en France (50 %)
- maxima en France (85 %)

/ la participation des partenaires privés :
- mixité obligatoire en France (seul pays où la mixité est obligatoire compte tenu du plafonnement des participations publiques).
- mixité possible Italie, Portugal pas de seuils de participation, seulement des déclinaisons de types d'entreprises prévues par le législateur.

Etat des lieux 2002

Aujourd'hui, le tour d'horizon européen (, non exhaustif), fait apparaître un nombre d'entreprises publiques locales stable, autour de 13 000. L'analyse aurait pu s'arrêter là si l'on ne s'était penché sur les mouvements constatés au sein des entreprises locales elles-mêmes, et plus particulièrement sur les acteurs parties-prenantes au capital de ces entités : en effet, on constate que les grands équilibres entre les collectivités locales et les investisseurs privés se sont modifiés au sein du capital social des entreprises publiques locales. Estimée à 10 % environ en 1999, la proportion d'entreprises publiques locales européennes ayant ouvert leur capital à d'autres partenaires est aujourd'hui de l'ordre de 20%.

Cette évolution se traduit, dans la plupart des pays, par un accroissement plus ou moins marqué de la présence de partenaires privés – quelques grandes tendances se dessinent, parmi lesquelles on relève :
- un développement des entreprises à capital mixte en plein essor en Allemagne et en Italie ;
- une mixité en progression régulière en Autriche, Grèce, Portugal, Suède ainsi qu’en France ;
- une mixité en repli en Belgique.

1 – La tendance à l’ouverture du capital à d’autres actionnaires que les collectivités locales est à replacer dans les contextes juridique et économique dans lesquels les entreprises publiques locales évoluent
2 - Cette tendance est à nuancer en fonction des métiers exercés par les entreprises publiques locales
3 - Cette tendance ne remet cependant pas en cause pour l’instant le poids des collectivités locales au sein du partenariat public / privé

I – L’évolution du capital vers plus de partenariat semble plutôt contrainte que volontaire

1 – Contrainte, parce que les entreprises publiques locales sont perméables aux contextes juridique et économique dans lesquels elles évoluent

1-1 Un contexte juridique européen tout d’abord, influent sur les entreprises publiques locales

L’accroissement de la participation privée au capital des entreprises publiques locales s’inscrit dans un contexte de :
- libéralisation des marchés engagée au niveau communautaire depuis une dizaine d’années environ et progressivement intégrée dans les droits internes par les législateurs nationaux (par exemple en Belgique, avec les dispositions sur l’énergie prises par les Régions et Communautés, en Italie avec la loi de décembre 2001 actuellement en attente d’application).
Si l’ouverture des marchés jusqu’alors protégés touche plus particulièrement les entreprises publiques locales et leur capital, c’est que, dans certains pays :
/ les collectivités locales leur avaient confié l’exercice de secteurs d’activité aujourd’hui libéralisés. C’est notamment le cas de l’énergie, et plus particulièrement de l’électricité (notamment en Suède, en Belgique, en Allemagne).
/ le droit interne prévoit de réorganiser les modalités de gestion de ces secteurs d’activité en faveur d’entreprises locales à forme sociétaire (cf. infra, en Italie, pour le pôle services publics locaux industriel eau, énergie, transport avec la loi de décembre 2001 en suspens).

- normalisation communautaire en matière de déchets, d'assainissement pour l'amélioration des équipements (sécurité, respect de l'environnement). Le traitement des déchets peut être pris en charge par des entreprises publiques locales en Belgique par exemple.

1-2 Le contexte juridique interne régissant les entreprises publiques locales

D'abord, c'est l'évolution de l'environnement juridique des collectivités locales qu'il faut considérer, car il pourrait avoir des répercussions sur les entreprises publiques locales :

- en Belgique, le contexte juridique des entreprises publiques locales pourrait être davantage influencé par les Régions, qui, déjà compétentes pour réglementer l'organisation des intercommunales, sont, depuis la loi de juillet 2001, désormais responsables de l'organisation et des compétences des communes et des provinces. Ainsi la Communauté flamande a-t-elle pris le décret-loi du 6 juillet 2001 portant réglementation de la coopération intercommunale venant réglementer les ABSL intercommunales.

- au Portugal, la loi de 1999, qui accroît les transferts de compétences aux communes et aux paroisses, pourrait également influer sur la réalité des entreprises publiques locales en élargissant leurs champs d'activité (métiers).

Concernant les lois applicables aux entreprises publiques locales, c'est surtout l'Italie qui fait montre de changements : les *aziende speciali* (entités dépendantes des collectivités locales) qui, depuis 1997, pouvaient être transformées en sociétés par action, feront très prochainement l'objet d'une procédure de privatisation juridique obligatoire aux termes de la loi du 28 décembre 2001 dès lors que les derniers obstacles juridiques encore en suspens auront été levés.
En France également, le statut des sem a été clarifié par la loi de janvier 2002, notamment le statut du mandataire des élus administrateurs des Sem, et les relations financières avec les collectivités locales.

Concernant plus précisément les règles de composition du capital, les règles juridiques ne semblent pas avoir beaucoup évolué depuis notre première enquête.
Sauf en Belgique, où la libéralisation du secteur de l'énergie (gaz et électricité), qu'ont accompagnée de récentes dispositions législatives dans le droit interne (lois de 2001), aura des conséquences directes sur les intercommunales d'énergie et plus particulièrement sur leurs actionnaires : les activités de distribution (gestion et exploitation du réseau) et de fourniture d'énergie (achat et vente d'électricité) étaient traditionnellement confiées à des intercommunales mixtes, dont le capital, dans la pratique, étaient en effet généralement majoritairement détenu par un actionnaire privé (Electrabel). Cependant, quelque soit leur participation au capital, les collectivités locales y disposaient toujours de la majorité des voix.
Avec l'entrée en vigueur des nouvelles dispositions, et de la mise en œuvre de la scission entre les activités de gestion du réseau de distribution (activité monopolistique) et de fourniture de l'énergie, le capital des intercommunales qui

exerceraient ces deux activités doit désormais être détenu majoritairement par les collectivités locales. Celles-ci doivent donc renforcer leur positionnement financier dans le capital des intercommunales mixtes d'énergie et l'actionnaire privé renoncer à son droit de veto. Ainsi en Flandre par exemple, 70 % du capital des intercommunales devra être détenu par les collectivités locales d'ici à septembre 2006. Cette scission des activités ne sera pas sans conséquences sur les finances locales.

Voilà pour le contexte juridique interne, somme toute plutôt stable si l'on considère l'ensemble des pays de l'Union européenne.

1-3 le contexte macro-économique local

Les entreprises publiques locales, alors même qu'elles sont constituées en structures juridique de forme sociétaire, évoluent, en raison de la présence des collectivités locales actionnaires, dans le contexte macro-économique du secteur public local. Et ce contexte, on va le voir, n'est pas sans répercussions sur les entreprises publiques locales et sur la composition de leur capital.

La bonne santé du secteur public local entre 1996 et 2000 connaît une inflexion en 2001, en raison du ralentissement économique général qui s'est répercuté sur les ressources fiscales des collectivités locales. D'après nos estimations (Note de conjoncture sur les finances locales en Europe en 2002 publiée par Dexia, à paraître fin octobre), les recettes locales n'ont que très légèrement progressé en 2001 : +1 % pour l'ensemble des recettes fiscales locales européennes entre 2000 et 2001 contre 4,8 % en moyenne annuelle en volume entre 1996 et 2001. Particulièrement en Allemagne (recettes fiscales locales en diminution de 6,9 %), les recettes de taxe professionnelle ont chuté du fait de l'augmentation de la part de la taxe reversée par les communes au Bund et aux Länder et de la forte sensibilité au contexte économique de l'assiette de la taxe.
Les difficultés financières rencontrées par les collectivités locales allemandes par exemple, permettent d'expliquer en partie la recherche de partenaires privés au sein des entreprises publiques locales.

En outre, dans la plupart des pays, les collectivités locales sont parties prenantes dans les politiques de régulation des finances publiques liées à la mise en œuvre du traité de Maastricht. L'objectif de retour des finances publiques à l'équilibre prévu dans le Pacte de Stabilité et de Croissance de l'Union européenne dernièrement reporté à 2006 et la détérioration des soldes budgétaires en 2001 ont conduit la plupart des Etats à étendre aux collectivités locales les mécanismes de maîtrise du déficit et de la dette ou à renforcer les dispositifs existants. Au Portugal par exemple, la loi de stabilité budgétaire de juillet 2002 impose désormais des limites à l'endettement des collectivités locales et aux entreprises publiques locales, assorties de sanctions. En Italie, le décret-loi de septembre 2002 sur le gel des dépenses publiques pourrait avoir également des conséquences sur les entreprises publiques locales et leurs investissements.

Ainsi les contraintes liées à l'environnement économique et juridique actuel conduisent-elles les collectivités locales à s'associer à des partenaires privés pour :
- améliorer leur situation financière
- s'adapter au contexte juridique (libéralisation des marchés)

2- L'essor du recours aux partenaires privés dans les entreprises publiques locales tient aussi au libre choix des collectivités locales

Les motivations d'ouverture du capital à d'autres actionnaires répondent aussi à de multiples autres contingences (d'opportunité par exemple), qui s'inscrivent davantage dans une démarche volontaire des collectivités locales :

Parmi les motivations du recours à des investisseurs privés :
- Financer l'activité de l'entreprise publique locale ou des projets portant sur de lourdes infrastructures, pour permettre son développement et sa modernisation dans un contexte concurrentiel ;
- Bénéficier du savoir-faire et de l'expertise technique du partenaire ;
- Doter l'entreprise publique locale d'alliés dans un contexte concurrentiel, comme l'énergie et les réseaux (Italie, Allemagne) ;
- Améliorer et moderniser le management de l'entreprise (en terme de méthodes, de personnel).

Les partenaires privés sont variés :
- des PME spécialisées dans la gestion des services publics ;
- des grands groupes ;
- des banques ;
- le personnel des entreprises publiques locales.

Enfin, il faut noter que la recherche de nouveaux partenaires pour l'ouverture du capital n'est pas seulement orientée vers les actionnaires privés :
- l'association d'autres partenaires publics (Etat, organismes para-publiques) - c'est le cas en France, au Portugal en Allemagne ou en Autriche ;
- ou d'autres entreprises publiques locales – en Autriche, Allemagne, Italie

est également recherchée pour mettre en place des stratégies d'alliances économiques ou de partenariats institutionnels.

II - Le constat de l'essor du recours au partenariat public / privé est à moduler en fonction des métiers exercés par les entreprises publiques locales

L'essor est particulièrement sensible dans les secteurs très concurrentiels (ou rendus concurrentiels au niveau communautaire on l'a vu tout à l'heure), en général lucratifs, où interviennent des grands groupes nationaux ou internationaux, publics ou privés : il s'agit principalement des secteurs de l'eau, l'énergie, les déchets – c'est le cas en France, Allemagne, Suède, Autriche.

Dans les autres secteurs, l'orientation vers davantage de partenariat public-privé est moins perceptible : la tendance est certes à son développement, mais à un rythme beaucoup moins soutenu : il s'agit notamment des transports, du tourisme, du développement économique – c'est le cas en Allemagne, Grèce, France, Suède, Italie. Les partenaires privés sont en général des PME, des banques, des organismes de développement local qui entendent participer au développement de leur territoire d'intervention.

III – Au final, la présence accrue des partenaires privés est à mettre en balance avec le poids des collectivités locales toujours fort dans l'équilibre du partenariat public/privé

Même dans certains pays comme l'Allemagne, l'Autriche, l'Italie, où l'ouverture du capital a pu dans certains cas être présentée comme une étape vers une privatisation complète, celle-ci a, jusqu'à présent, rarement été conduite à son terme :
- dans certains pays, l'un des freins à la réalisation de certaines privatisations annoncées, totales ou partielles, d'entreprises publiques locales, a été notamment le risque de prise de participations étrangères, avec la volonté exprimée de refuser de faire sortir du patrimoine local ou national la propriété ou la gestion d'une activité exercée à l'échelle locale, en la confiant à des investisseurs étrangers, éloignés des réalités territoriales
- dans certains pays également, la cession des parts détenues par les collectivités locales, a pu être reportée du fait des mauvaises conditions du marché, sous-évaluant la valeur de l'entreprise.

Même si une grande souplesse dans la composition du capital est laissée aux acteurs locaux, rien ne s'opposant à ce que l'ouverture au privé porte sur la majorité du capital (sauf en France on l'a vu tout à l'heure), le plus souvent les collectivités locales choisissent d'en conserver la majorité (Allemagne, Italie, Grèce, Suède).

Et, lorsque la majorité du capital est cédée,
- la participation financière des collectivités locales ne descend en général pas au dessous de la minorité de blocage (Allemagne, Autriche, Italie),
- des dispositifs de protection existent en faveur des collectivités locales – par exemple en Belgique, où elles conservent la majorité des voix quelque soit leur participation financière au capital.

Les collectivités locales montrent ainsi qu'elles souhaitent conserver la maîtrise des entreprises au sein desquelles elles sont engagées et rester garantes de l'utilisation de l'argent public et du service offert à la population.

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Juillet 2004

LIVRE VERT SUR LES PARTENARIATS PUBLICS-PRIVES ET LE DROIT COMMUNAUTAIRE DES MARCHES PUBLICS ET DES CONCESSIONS

CONTRIBUTION DE L'ASSOCIATION DES MAIRES DE FRANCE

I. Observations préliminaires

1. La consultation publique organisée par la Commission européenne est utile dans la mesure où elle devrait permettre d'identifier si en ce domaine la réglementation européenne, ou dans certains cas l'absence de réglementation, est source d'instabilité juridique pour les contrats conclus entre les pouvoirs publics et les personnes privées dans les différents pays de l'Union
2. En outre, au-delà des questions précises posées par la Commission, le livre vert a le mérite de rappeler les règles communautaires régissant les différentes formules de PPP mises en œuvre dans les Etats de l'Union européenne.
3. S'agissant de la réglementation française en matière de PPP, le cadre juridique nationale, qu'il s'agisse des formules contractuelles (contrats de partenariat crées par l'ordonnance de juin 2004, marchés publics, concessions) ou des formules institutionnelles (sociétés d'économie mixte), répond aux exigences soit des directives en vigueur, soit des principes de transparence et d'équité fixés par les Traités.
4. Aussi, au regard de ce rappel et des éclaircissements apportés par le livre vert sur le cadre juridique en vigueur, l'Association des Maires de France ne considère pas qu'un nouvel instrument juridique et un surcroît de réglementation européenne apporteraient une plus value communautaire en ce domaine

II. Observations sur l'attribution des concessions de service.

5. Les concessions sont définies par le livre vert en parfaite cohérence avec la définition française.
6. La concession est une forme de délégation de service public déjà très ancienne en France et qui a contribué à la constitution de services publics performants. Depuis la loi dite Sapin, la procédure d'attribution d'une concession de service, et plus généralement de toute forme de délégation d'un service public, est soumise aux règles de concurrence et respectent les obligations imposées par le Traité (voir en ce sens l'arrêt Telaustria de la Cour de Justice de l'Union européenne).
7. De même, et conformément aux observations de la Commission dans sa communication interprétative sur les concessions d'avril 2000, la durée d'un contrat de concession ne peut excéder selon la loi celle nécessaire à l'amortissement des investissements.
8. La concession est ainsi strictement distinguée du marché public tant en droit communautaire qu'en droit national. C'est pourquoi, l'Association des Maires de France n'est pas favorable à un régime communautaire unique applicable à la fois aux procédures de passation des concessions et des marchés publics.
9. L'Association des Maires de France juge de plus qu'un cadre juridique européen existe déjà au travers des Traités, des arrêts de la Cour de Justice et de la communication interprétative de la Commission. Elle estime que ce cadre est suffisamment adapté aux différentes situations qui se caractérisent dans chaque Etat membre par leur diversité et leur souplesse.
10. Il en résulte qu'un texte communautaire sur l'attribution de concession de service serait sans réelle valeur ajoutée.
11. Enfin, dans l'hypothèse où la Commission estimerait pertinent de définir un cadre européen en matière de concession, l'Association des Maires de France considère que ce cadre devrait offrir la souplesse nécessaire à l'adaptation du service dans le temps et qu'en conséquence il n'encadre pas de façon contraignante les possibilités d'insertion de clauses d'évolution du service ou de clauses de révision.

III Observations sur les sociétés d'économie mixte (PPP de type institutionnel).

12. L'Association des Maires de France tient à rappeler son attachement au principe de libre administration des collectivités locales, et donc en l'espèce au libre choix du mode de gestion de leurs services publics : auto-production (régie), marchés publics, délégation de service public (notamment concession), création d'une société d'économie mixte.
13. Ce principe de libre administration vaut particulièrement quant au choix de créer ou non une société d'économie mixte dès lors qu'il s'agit de gérer un service public ou d'assurer une mission d'intérêt général. La

société d’économie mixte en effet n’est qu’un mode de gestion d’un service public parmi d’autres.

14. Compte-tenu de ces observations, et parce que la création d’une SEM ne résulte pas d’un contrat mais d’un acte unilatéral des pouvoirs publics, l’Association des Maires de France estime que la décision de créer une société d’économie mixte ne relève pas du droit de la concurrence mais de la libre administration des collectivités locales. C’est pourquoi, il est tout à fait justifié que soient confondues la phase de constitution de la SEM et celle d’attribution des tâches à cette même SEM. En effet une SEM est toujours créée en vue d’accomplir une ou plusieurs missions.
15. Si un texte européen devait encadrer les modalités de création d’une SEM, l’Association des Maires de France considère qu’il ne saurait y avoir deux niveaux de mise en concurrence cumulatifs, l’un pour le choix des actionnaires, l’autre pour l’attribution des missions, ainsi que le suggère la Commission européenne.
16. Enfin, et conformément au droit français, la société d’économie mixte doit mettre en œuvre la concurrence pour la sélection de ses propres co-contractants.

IV Observations sur les organismes de coopération intercommunale.

17. Bien que le livre vert n’aborde pas ce sujet, l’Association des Maires de France souhaite appeler l’attention de la Commission sur les relations conventionnelles entre les organismes de coopération intercommunale et leurs communes membres.
18. En effet, récemment la Commission européenne s’est interrogée sur les dispositifs belge et allemand présidant aux relations conventionnelles entre un organisme de coopération intercommunale et ses communes membres.
19. Le dispositif français en la matière a pour but de favoriser une meilleure organisation administrative.
20. Ainsi les Communautés urbaines, d’agglomération ou de communes sont constituées uniquement de communes, ce qui les distingue d’autres formules de coopération en vigueur dans nombre de pays de l’Union. Les communes délèguent leurs compétences à la Communauté selon des dispositions prévues par la loi. Par ailleurs, la loi oblige à une délégation obligatoire de compétences dans un certain nombre de domaines.
21. Il est à noter également que pour l’exercice des ses compétences, la Communauté peut faire appel à un opérateur privé au travers d’une procédure de délégation de service public, telle que la concession par exemple.
22. En conséquence et compte-tenu de ces éléments, le droit des marchés publics ne saurait s’appliquer aux relations conventionnelles entre les Communautés et leurs communes membres, telle que par exemple la mise à disposition des services de la Communauté en faveur des communes

membres. Ces mises à disposition n'ont d'ailleurs d'autre objet que de faciliter la bonne organisation des services. Enfin, il est à noter qu'une Communauté ne peut agir que dans un champ territorial limité, celui constitué par les communes membres, ce territoire devant être d'un seul tenant et sans enclave.

V. Réponses à certaines questions posées dans le livre vert.

Question 1 : Tous les types de PPP contractuels (concession de service, délégation de service public, contrat de partenariat institué récemment par ordonnance) font l'objet en France d'un encadrement législatif.

Question 2 : la procédure de dialogue compétitif a été transposée en droit français dans le code des marchés publics. S'agissant de l'attribution des concessions, un tel dialogue n'est pas imposé par la loi..

Question 5 : Dans l'Union européenne la participation de sociétés non-nationales aux procédures de passation de concessions de services est garantie, sinon par un texte communautaire spécifique, du moins par les principes découlant du Traité et en conséquence par la Cour de Justice de l'Union européenne. S'agissant de la France la loi dite SAPIN garantit bien évidemment ce droit pour les non-nationaux

Question 16 : l'ordonnance française sur les contrats de partenariat fixe des règles précises quant à la prise en compte des sous-traitants et des PME dans l'exécution du contrat Par ailleurs, une loi oblige au paiEment direct des sous traitants.

Question 22 : Ainsi que le propose la Commission, dans un premier temps et de préférence à un nouvel instrument juridique communautaire, l'Association des Maires de France est favorable à la poursuite d'une réflexion collective et organisée sur les questions soulevées par le livre vert, associant notamment les autorités publiques locales. Il s'agirait à la fois de faire le point sur les dysfonctionnements éventuellement constatés en l'absence d'un texte communautaire spécifique et de favoriser l'échange de bonnes pratiques.

LES PARTENARIATS PUBLIC-PRIVE

REACTIONS DE LA CCIP AU LIVRE VERT DE LA COMMISSION EUROPEENNE

Rapport de M. Gilbert DIÉPOIS
au nom de la Commission du commerce intérieur

adopté par le Bureau du 16 septembre 2004, selon la procédure d'urgence

- SYNTHESE DES PROPOSITIONS -

Sur la base d'un Livre vert, la Commission européenne a ouvert un débat sur l'opportunité de faire évoluer les règles communautaires en matière de marchés publics et de concessions, pour accompagner le développement des partenariats public-privé (PPP). La Chambre de commerce et d’industrie de Paris, dans la continuité de ses précédents travaux sur la commande publique, souhaite aujourd’hui réagir à ce document.

I/ DEFINIR LES PRINCIPES DIRECTEURS D’UN EVENTUEL NOUVEAU CONTRAT

- ***Position de la CCIP en faveur de la rédaction par la Commission de Bruxelles d’une simple communication interprétative, pour permettre un meilleur développement des PPP. Un outil rigide, comme la directive, pourrait nuire à ce développement ;***

- ***Faire bénéficier une définition européenne des PPP de l’apport des enseignements théoriques et des bonnes pratiques des deux grands ensembles juridiques (latin et common law)*** qui existent au sein de l’Union ;

- ***Proposer une définition multicritère*** comprenant comme principes directeurs l’utilisation d’un vocabulaire fonctionnel pour désigner les missions confiées au cocontractant ; la mention du long terme (celui-ci variant en fonction des contraintes liées à l’investissement) ; la liste des acheteurs publics autorisés à conclure de tels contrats, c’est-à-dire l’État, les collectivités territoriales et leurs établissements publics ; la précision des principes que ces contrats devront respecter (transparence, égal accès des candidats…) ; le fait que le partenaire privé assume une partie des risques de l’opération envisagée.

II/ PRESERVER L’INTERET PUBLIC

- ***Tenir compte des recommandations d’Eurostat soulignant que les PPP devraient répondre à des règles très précises pour ne pas être intégrés dans le calcul de la dette publique. En tout état de cause, la personne publique doit faire preuve d’une***

transparence financière sur la part des fonds qu'elle engage dans l'opération de PPP ;

- ***S'inspirer de l'article 8 de l'ordonnance française qui pose, parmi les critères d'attribution, « la part d'exécution du contrat que le candidat s'engage à confier à des PME et à des artisans »*** ;

- ***Inciter les personnes publiques à choisir leur cocontractant en fonction de critères précis et fixés préalablement*** Outre le renforcement de la transparence de la commande publique et la sécurité juridique des acteurs concernés, cela serait également source d'information pour les usagers-clients (avec le relais des associations professionnelles, par exemple) et de possibilité pour les entreprises de défendre au mieux leurs intérêts en présentant des offres parfaitement adaptées aux attentes des personnes publiques ;

- Procéder à une ***évaluation approfondie des opportunités de chaque modalité de contrat d'achat public qui devra, de plus, être réalisée en toute transparence*** (cela signifie, par exemple, que dans le cadre d'une commune, le conseil municipal en soit informé).

III/ FOURNIR DES REGLES ADAPTEES A L'OBJET DES CONTRATS DE PPP

- ***Écarter le dialogue compétitif comme unique mode de passation des PPP***. Hormis le risque de confusion avec les marchés publics, cette procédure peut manquer de souplesse, face à certaines situations économiques et risque de restreindre le concept même de partenariat. Le choix ou non d'une phase de dialogue dans l'attribution des contrats devra varier selon leur objet ;

- ***Instaurer un dialogue permanent entre les deux parties contractantes tout au long de la relation contractuelle ; une collaboration étroite se mettant ainsi en place avec pour bénéficiaire principal l'utilisateur du service*** ;

- ***Faire figurer dans un rapport technique et financier certains éléments propres à permettre un suivi satisfaisant des opérations de PPP et, également, à favoriser la mission de contrôle***. Il s'agit d'indicateurs permettant d'évaluer la qualité du service et le choix des tarifications, de démontrer la continuité du service (justification des pannes éventuelles ou des interruptions), et d'attester des modalités d'adaptabilité et de mutabilité du service ;

- ***Conférer à l'autorité publique à l'origine du contrat de PPP un rôle d'interface*** l'amenant à recueillir les attentes de la population en matière d'information, d'une part, et à transmettre les éléments fournis par le délégataire quant aux modalités de prestation du service, les explications concernant la qualité, les tarifs…, d'autre part.

En conclusion, notre Compagnie considère que les PPP doivent bénéficier à des contractants, entreprises privées ; les entités mixtes n'ayant pas vocation à y prendre part.

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Dans un contexte de contractualisation croissante de l'action publique, de nécessité renforcée pour l'administration à être plus accessible et plus performante et face à l'interaction entre les différents ordres juridiques qui existent au sein de l'Union européenne, la Commission de Bruxelles a présenté, le 30 avril dernier, un « Livre vert sur les partenariats public-privé et le droit communautaire des marchés publics et des concessions »[1].

Ce document se veut l'instigateur d'un débat auprès des différents acteurs économiques concernés, afin d'examiner la pertinence d'une intervention communautaire en matière de réglementation relative aux partenariats public-privé (PPP). Pour ce faire, il expose les règles et principes du droit communautaire des marchés publics et des concessions en matière de sélection du cocontractant et d'exécution du contrat. Il soulève également différentes questions visant à obtenir davantage d'informations sur l'applicabilité de ces règles et principes, pour déterminer si ceux-ci sont suffisamment clairs.

Les PPP correspondent à des contrats globaux permettant aux personnes publiques de confier à des entreprises privées, moyennant rémunération, la conception, la réalisation, le financement, la gestion et la maintenance de certains équipements et infrastructures publics. Ces dernières années, de nombreux États membres ont multiplié les recours à ces contrats. C'est la Grande-Bretagne qui la première a développé cette nouvelle forme de coopération au travers de la PFI (Private Finance Initiative). Créée à l'origine par le gouvernement thatcherien[2], son but était alors à la fois financier (remédier au retard d'équipement dans un contexte de réduction drastique des dépenses budgétaires) et politique (promouvoir la gestion privée des services publics). Ce programme a perduré au-delà des alternances politiques, lui conférant ainsi continuité et ancrage[3]. Et cela, d'autant plus, que la PFI a été relayée

[1] *Ce Livre vert s'inscrit parmi les priorités établies par la Commission européenne dans sa Stratégie pour le marché intérieur 2003-2006 et constitue une contribution aux actions prévues dans le cadre de l'Initiative pour la Croissance en Europe (adoptée le 7 mai 2003). http://europa.eu.int/comm/internal_market/publicprocurement/ppp_fr.htm*

[2] *Le programme des PFI a été lancé dans le discours du Chancelier de l'Échiquier, Norman Lamont, le 12 novembre 1992.*

[3] *Alors qu'en Grande-Bretagne, les services publics étaient traditionnellement gérés en régie directe par les collectivités publiques, la PFI a permis de confier la construction et la gestion d'infrastructures publiques au secteur privé, moyennant un tarif payé par l'usager ou, le plus souvent, un prix versé régulièrement par l'administration ; la dimension financière du projet étant ici prééminente.*

dans plusieurs États européens : l'Espagne, le Portugal, l'Italie et les Pays-Bas, principalement, recourent désormais à ce système de contrats, en particulier dans les secteurs de l'enseignement et hospitalier. C'est la volonté des autorités étatiques d'obtenir des investissements sûrs au travers de meilleurs achats qui a, avant tout, contribué au développement des PPP.

Il convient, par ailleurs, de noter que ces conventions se développent en dehors de toute référence au service public (notion française plus restrictive que celles d'activité ou de partenariat visées dans les PFI[4]). Aussi, et bien qu'à l'origine de la conception moderne des délégations de service public dans lesquelles les PPP prennent source, notre pays a-t-il longtemps paru en retrait. La Chambre de commerce et d'industrie de Paris avait ici à plusieurs reprises alerté les pouvoirs publics nationaux sur les risques pour la compétitivité de nos entreprises[5]. Elle salue donc l'adoption par le gouvernement français de l'ordonnance « sur les contrats de partenariats »[6].

Dans la continuité de ses différents travaux, notre Compagnie souhaite aujourd'hui contribuer au débat communautaire. A cette fin, elle propose différentes recommandations tendant à définir les principes directeurs d'un éventuel nouveau contrat, préserver l'intérêt public et fournir des règles adaptées à l'objet des PPP[7].

[4] *La communication interprétative de la Commission européenne sur les concessions en droit communautaire (JOCE n°C121 du 29 avril 2000) ne mentionne d'ailleurs que le terme d'« activité », celui de « service public » n'y figurant pas.*

[5] *Voir, notamment, les rapports de Gilbert Diépois, « Délégations de service public - Pour un renouveau » du 19 septembre 2002 (www.etudes.ccip.fr/archrap/rap02/die0209.htm) et de Andrée Hallauer, « Les entreprises face à la modernisation de la commande publique » du 5 juin 2003 (www.etudes.ccip.fr/archrap/rap03/hal0306.htm).*

[6] *Prise sur le fondement de la loi d'habilitation datant de près d'un an auparavant, elle est le fruit d'une vaste consultation et de quelques arbitrages. Ordonnance n°2004-566 du 17 juin 2004 (JORF du 19 juin 2004).*

[7] *Le présent rapport ne constitue pas une réponse exhaustive à l'ensemble des questions soulevées par la Commission européenne, certaines de celle-ci n'ayant pas vocation à être traitées par notre Compagnie.*

PARTIE PRELIMINAIRE : DEFINIR LES PRINCIPES DIRECTEURS D'UN EVENTUEL NOUVEAU CONTRAT

La création en France du « contrat de partenariat » était fort attendue, car ce nouvel engagement contractuel entre les personnes publiques et le secteur privé devrait permettre de réaliser des travaux d'infrastructures et d'équipements jusque là « au point mort », notamment faute de financements publics suffisants ou en raison de la complexité des projets.

En pratique, il s'agit d'une opportunité pour relancer l'aménagement de nos territoires en grandes infrastructures et équipements d'intérêt général qui viendront encourager et soutenir le développement économique et territorial, tout en apportant des services de qualité aux usagers-clients.

En effet, ces chantiers de longue durée devraient être synonyme de gains sur plusieurs plans : le professionnalisme et l'expérience des entreprises retenues devraient assurer une meilleure programmation des opérations, une analyse complète de la répartition des risques de construction et d'exploitation, et une exécution plus rapide des travaux. Les conditions d'un fonctionnement optimal des équipements et infrastructures créés devraient également être garanties.

Le recours aux PPP n'est cependant pas pertinent pour tous types de projets. L'appel au secteur privé est justifié prioritairement dans le cadre de services publics capitalistiques, complexes, tarifables et locaux. Mais le recours à des contrats de partenariat est également envisageable afin d'obtenir des gains de productivité par une gestion innovante d'un service, ou bien encore lorsqu'une technologie de pointe est requise. Ils sont également adaptés à des biens ou des services publics pour lesquels la rémunération de l'exploitant ne peut venir directement de l'usager, par exemple, dans le cas d'une infrastructure routière où une barrière de péage serait impossible (« péage virtuel ») ou pour un service d'éclairage public.

C'est ainsi que de nombreux projets sont déjà à l'étude en France dans divers domaines, comme la construction ou l'extension d'hôpitaux, de prisons, de commissariats de police, d'incinérateurs de déchets, de musées (Musée de l'air et de l'espace du Bourget, futur centre d'exposition du Grand Palais à Paris). Dans le domaine des transports, plusieurs opérations sont étudiées, tels le TGV Angoulême - Bordeaux, le tramway Lyon - aéroport Saint Exupéry et, en Ile-de-France, la liaison

Paris – aéroport Roissy CDG (projet CDG Express), ainsi que le doublement du tronc commun des autoroutes A4 et A86 à l'Est de Paris.

Sur le plan juridique, aux termes de l'article 1er de l'ordonnance française, « *les contrats de partenariats sont des contrats administratifs par lesquels l'État ou un établissement public de l'État confie à un tiers, pour une période déterminée en fonction de la durée d'amortissement des investissements ou des modalités de financement retenues, une mission globale relative au financement d'investissements immatériels, d'ouvrages ou d'équipements nécessaires au service public, à la construction ou transformation des ouvrages ou équipements, ainsi qu'à leur entretien, leur maintenance, leur exploitation ou leur gestion, et, le cas échéant, à d'autres prestations de services concourant à l'exercice, par la personne publique, de la mission de service publique dont elle est chargée.* ».

Il n'existe pas, en revanche, ainsi que le souligne la Commission européenne dans son Livre vert, de définition communautaire des PPP. Néanmoins, ils présentent d'un État à l'autre des caractéristiques communes :

- une durée relativement longue de la relation entre les contractants ;
- un mode de financement assuré pour partie par le secteur privé ;
- un rôle important de l'opérateur économique qui participe à différents stades du projet (conception, réalisation, mise en œuvre, financement) ;
- une répartition des risques entre le partenaire public et celui privé, sur lequel sont transférés des aléas habituellement supportés par le secteur public. Les PPP n'impliquent cependant pas nécessairement que le partenaire privé assume tous les risques.

Autre constat préalable de la Commission, celui de la création par certains États membres d'outils de coordination et de promotion. Il s'agit là d'échanges de bonnes pratiques qu'il est, selon notre Compagnie, fortement souhaitable de généraliser. Car, si le renouveau des réflexions sur le partenariat public-privé émane des États anglo-saxons et s'est ensuite diffusé aux pays méditerranéens, il est nécessaire *d'associer, en une démarche commune, les savoir-faire originels de notre pays[8] et ceux, plus récents, de nos voisins. Les PPP représentent un instrument qui a vocation à être partagé.*

Si une définition européenne des PPP devait être formulée, elle devrait bénéficier de l'apport des enseignements théoriques et des bonnes pratiques des deux grands ensembles juridiques (latin et common law) qui existent au sein de l'Union.

Des différents travaux de la CCIP[9] sur les éléments indispensables à une telle définition, il ressort, en premier lieu, la nécessité de l'emploi d'un vocabulaire fonctionnel permettant la désignation des PPP via des terminologies opérationnelles et non purement théoriques : construction, exploitation, maintenance…

En deuxième lieu, le long terme doit fondamentalement caractériser ces nouveaux contrats, cela compte tenu des investissements induits et des amortissements afférents. En outre, l'investissement devra être pour une grande partie assuré par le secteur privé.

En troisième lieu, il conviendra de préciser les acheteurs susceptibles de passer des PPP, à savoir l'État, les collectivités territoriales et leurs établissements publics. Une liste exhaustive des entités adjudicatrices est, par conséquent, nécessaire.

En quatrième lieu, il est fondamental que les candidats soient choisis dans des conditions d'objectivité et de mise en concurrence effective. Cela signifie que les PPP doivent être soumis aux principes de transparence et d'égalité devant la commande publique.

[8] *Sur l'évolution de ces contrats et les origines modernes de la délégation de service public, cf. Xavier Bezançon, « 2000 ans d'histoire du partenariat public-privé pour la réalisation des équipements et services collectifs », Presses de l'École nationale des Ponts et Chaussées, 2004.*

[9] *Cf. les rapports de Gilbert Diépois et Andrée Hallauer, précités.*

Enfin, la notion de transfert de risque - même s'il n'est pas entièrement assumé par le partenaire privé - est, pour notre Compagnie, un élément indispensable de définition, car il est inhérent à l'ensemble des activités économiques[10]

Dès lors, une définition multicritère des PPP devra comprendre les principes directeurs suivants :

- ***utiliser un vocabulaire fonctionnel pour désigner les missions confiées au cocontractant (construction, exploitation, maintenance) ;***
- ***être caractérisée par le long terme (celui-ci variant en fonction des contraintes liées à l'investissement) ;***
- ***mentionner précisément les acheteurs publics autorisés à conclure de tels contrats, c'est-à-dire l'État, les collectivités territoriales et leurs établissements publics ;***
- ***souligner les principes que ces contrats devront respecter (transparence, égal accès des candidats…) ;***
- ***préciser que le partenaire privé assume tout ou partie des risques de l'opération envisagée.***

Il s'agit là de principes directeurs indispensables et devant être partagés par l'ensemble des États du marché unique. Toutefois, relativement à l'opportunité d'une telle définition et sur son récipiendaire, ***la Chambre de commerce et d'industrie de Paris se prononce en faveur de la rédaction par la Commission européenne d'une simple communication interprétative, pour permettre un meilleur développement des PPP. Un outil rigide comme la directive pourrait nuire à ce développement.***

[10] *Rappelons que la délégation de service public, quant à elle, trouve sa justification première dans le transfert de risque de la personne publique vers le délégataire. Cf., notamment, l'arrêt « Teleaustria » dans lequel la Cour de Justice des Communautés Européennes estime que les concessions comportent pour le concessionnaire lui-même, l'obligation de supporter le risque économique principal, ou du moins substantiel, associé à la prestation du service concerné (CJCE, 7 décembre 2000).*

PREMIERE PARTIE : PRESERVER L'INTERET PUBLIC

Qu'il s'agisse du débat suscité lors de la création de la PFI en Grande-Bretagne ou de celui qui a prévalu à l'adoption de l'ordonnance française, les partisans et adversaires de cette forme de contrats ont permis, par les discussions ainsi engendrées, d'en relever les principaux avantages et inconvénients.

Notre Compagnie a, quant à elle, eu l'occasion de souligner que les PPP sont susceptibles de conférer une véritable souplesse dans la gestion et le financement, de garantir une plus grande rapidité de réponse aux attentes de la population et des entreprises, de permettre d'associer le secteur privé avec son expertise et ses savoir-faire… En parallèle, elle dénonçait les obstacles (juridiques, financiers…) existants et susceptibles d'en freiner l'essor : rigidité de certains cadres juridiques, absence de véritable protection du secteur public…

I / L'OPTIMISATION DES MISSIONS ET INFRASTRUCTURES PUBLIQUES

Le PPP comporte, avant tout, une dimension culturelle. En effet, leur esprit correspond à une externalisation des missions par l'appropriation des méthodes privées au bénéfice des clients et citoyens.

Dès lors, l'une des finalités premières réside-t-elle dans la nécessité de bonne gestion des deniers publics. Or, le recours au financement privé permet une diminution notable du coût des projets envisagés, puisqu'ils ne sont plus directement assumés par la personne publique. Cela peut, en outre, constituer une réponse au risque d'impécuniosité de certaines collectivités.

De plus, la souplesse pour les personnes publiques est renforcée par la possibilité de paiement différé qu'ils comportent. Les ressources publiques ne sont ainsi engagées que de façon étalée et évitent un endettement trop important[11]. Au delà, c'est la gestion elle-même des équipements et infrastructures qui serait performée grâce, en particulier, à la vision d'ensemble des projets et aux principes la

[11] *Rappelons que le Code français des marchés publics prohibe les paiements différés. Il était donc impossible, avant l'adoption de l'ordonnance sur les PPP, de procéder à certains types d'achats, en particulier les besoins en services publics non marchands (c'est-à-dire ceux pour lesquels il n'y a pas de paiement par l'usager). C'est, notamment, ce vide juridique que les PPP permettent de palier.*

gouvernant (émanant des entreprises). La recherche de rentabilité et de rationalité serait ainsi alliée à une souplesse accrue due à l'émancipation des cadres de la comptabilité publique.

D'un point de vue technique, les PPP sont censés apporter aux équipements et infrastructures publics les connaissances et outils de la sphère privée. Les solutions performantes et innovations technologiques de cette dernière profiteraient à l'ensemble des utilisateurs et renforceraient la qualité des services proposés.

Enfin, les délais seraient considérablement réduits : le caractère global des contrats entraînant des économies d'échelle temporelle en matière de construction.

II / LA SAUVEGARDE DES PRINCIPES D'EGAL ACCES A LA COMMANDE PUBLIQUE ET DE TRANSPARENCE DES CONTRATS

S'il est incontestable que l'ordonnance française sur les PPP a permis de remédier au vide juridique qui existait dans notre pays en la matière, cette nouvelle forme de contrat n'est pas sans susciter différentes inquiétudes et interrogations.

La problématique est, en premier lieu, financière. Certes, les PPP engendrent a priori une diminution du coût des infrastructures, préservant ainsi les deniers publics. Toutefois, il existe un coût indirect pour les administrés et les contribuables. Alors que les personnes publiques empruntent au taux d'intérêt le plus bas du marché, les entreprises privées sont soumises à des taux plus élevés. Ce différentiel sera répercuté par les cocontractants sur les loyers payés par les administrations, surcoût auquel il convient d'ajouter la marge qu'établiront naturellement les entreprises.

Or, ce supplément financier ne pourra pas véritablement être porté à connaissance du citoyen. En effet, lorsqu'une administration finance elle-même ses travaux, elle inscrit à son budget les sommes nécessaires et acquitte les factures et avances qui y sont afférentes. C'est le principe de transparence qui serait ici remis en cause. De plus, dès lors que le partenaire public s'engage pour plusieurs années à verser un loyer à son cocontractant, il grève d'autant ses ressources. Il s'agit donc d'un endettement indirect affecté au remboursement futur de l'entrepreneur.

C’est pour palier d’éventuelles dérives que l’Office statistique européen, Eurostat, a établi des recommandations relativement au traitement comptable dans les comptes nationaux des contrats ainsi souscrits par les autorités publiques en précisant l'impact sur le déficit / excédent public et la dette publique.

Eurostat conseille que les actifs liés à un partenariat public-privé soient classés comme actifs non publics et ne soient donc pas enregistrés dans le bilan des administrations, si deux conditions cumulatives sont réunies :

- le partenaire privé supporte le risque de construction ;
- il supporte aussi au moins l'un des deux risques suivants : celui de disponibilité[12] ou celui lié à la demande[13].

En outre, si le risque de construction[14] est assumé par l'État, ou si le partenaire privé endosse seulement le risque de construction et aucun autre risque, les actifs sont classés comme actifs publics.

Aussi, convient-il de tenir compte des recommandations d’Eurostat soulignant que les PPP devraient répondre à des règles très précises pour ne pas être intégrés dans le calcul de la dette publique. En tout état de cause, la personne publique doit faire preuve d’une transparence financière sur la part des fonds qu’elle engage dans l’opération de PPP.

Toujours en matière financière, on peut se poser la question de la faillite de l’entrepreneur. Ce dernier ne risque-t-il pas de demander la vente de l’hôpital, de l’école… qu’il aura construit ? Les banques elles-mêmes ne solliciteront-elles pas une telle démarche ?

[12] *Le risque de disponibilité correspond, notamment, au cas où le partenaire privé ne peut livrer le volume contractuellement convenu ou répondre, comme spécifié dans le contrat, aux normes de sécurité ou de certification publiques liées à la prestation de services aux utilisateurs finals.*

[13] *Ce risque couvre la variabilité de la demande (plus élevée ou plus faible qu'escomptée lors de la signature du contrat) lorsque celle-ci n'est pas imputable à la gestion du partenaire privé.*

[14] *Le risque de construction implique, en particulier, la livraison tardive, le non-respect de normes spécifiées, les surcoûts, la déficience technique…*

Face à ce risque pour la continuité des services publics, notre Compagnie souhaite que les ouvrages et infrastructures construits ne soient pas considérés comme des biens privés.

Autre grand principe susceptible d'être écarté par les PPP, celui d'égal accès des entreprises à la commande publique. La mise en concurrence serait illusoire dès lors que seules les grandes entreprises (ayant à la fois la capacité financière et la crédibilité auprès des banques) semblent aptes à assurer le financement et la réalisation d'importants projets. Aussi, certaines PME, notamment du BTP, redoutent-elles d'êtres exclues de ces contrats ou soumises aux firmes plus importantes en qualité de sous-traitant[15].

Or, toutes les structures doivent avoir leur place dans les PPP. Si les opérations de moyenne importance seront plus naturellement ouvertes aux PME, celles d'une plus forte envergure peuvent privilégier les grandes entreprises.

Dans ce contexte, notre Compagnie recommande de s'inspirer de l'article 8 de l'ordonnance française qui pose, parmi les critères d'attribution, « la part d'exécution du contrat que le candidat s'engage à confier à des PME et à des artisans ».

En matière de marchés publics, le principe d'égal accès est un des éléments fondamental. Le Code français[16] impose la hiérarchisation et le porter à connaissance, dès la publicité, des critères de choix. Ces derniers se rapportent, notamment, à la valeur technique, la rentabilité, le service après-vente, le prix des prestations… Tous ces éléments doivent concourir au choix de l'offre qualifiée d'« économiquement la plus avantageuse ». La volonté des auteurs de ce texte était de faire évoluer l'achat public dans le sens d'une meilleure efficacité des services et dans celui du choix des prestations les plus en adéquation avec leurs besoins. Le prix a d'ailleurs été placé en dernier dans la liste des critères de sélection des

[15] *Les concepteurs et architectes ont, eux aussi, fortement alerté les pouvoirs publics quant à leur place et leur rôle dans les PPP, craignant d'être écartés de la commande publique au profit des bureaux d'étude intégrés.*

[16] *Article 53 du Code des marchés publics français.*

entreprises, afin de souligner que des éléments non exclusivement économiques devaient être pris en compte.

Une telle démarche pourrait utilement être transposée dans le cadre des PPP, avec l'énonciation de critères de sélection permettant de déterminer la ou les entreprises susceptibles d'offrir les prestations les plus satisfaisantes aux citoyens. En parallèle, cela optimiserait les réponses des personnes privées qui soumettraient des offres parfaitement en adéquation avec les besoins du public.

Il serait souhaitable d'inciter les personnes publiques à choisir leur cocontractant en fonction de critères précis et fixés préalablement.

Outre le renforcement de la transparence de la commande publique et la sécurité juridique des acteurs concernés, cela serait également source d'information pour les usagers-clients (avec le relais des associations professionnelles, par exemple) et de possibilité pour les entreprises de défendre au mieux leurs intérêts en présentant des offres parfaitement adaptées aux attentes des personnes publiques.

Enfin, il convient de rappeler que le PPP ouvre une « troisième voie » dans la commande publique, à côté des concessions et des marchés publics. Le choix de la personne publique pour ce type de contrat doit être encadré. Selon le droit français, avant de conclure un PPP, une évaluation préalable (économique, financière, d'intérêt) du projet est obligatoire[17]. Elle permet de décider de la solution la plus à même de répondre aux besoins des administrations. Ces contrats ne peuvent alors être passés que lorsqu'il a été démontré que la personne publique n'est pas en mesure objectivement de définir seule et à l'avance les moyens techniques pouvant répondre à ses besoins ou d'établir le montage financier et juridique du projet, ou que celui-ci a un caractère d'urgence.

[17] *Sollicité le Conseil Constitutionnel français avait déclaré, dans un avis du 26 juin 2003, que les PPP devaient être considérés comme une « dérogation » au droit commun de la commande publique et ne pouvaient s'appliquer qu'à « des situations répondant à des motifs d'intérêt général, tels que l'urgence ».*

Non seulement, une évaluation approfondie des opportunités de chaque modalité de contrat d'achat public est nécessaire, mais encore devra-t-elle être réalisée en toute transparence.

Cela signifie, par exemple, que dans le cadre d'une commune, le conseil municipal en soit informé.

SECONDE PARTIE : FOURNIR DES REGLES ADAPTEES A L'OBJET DES CONTRATS DE PPP

I / LA QUESTION DE LA PERTINENCE DE L'APPLICATION DE LA PROCEDURE DE DIALOGUE COMPETITIF

Dans son Livre vert, la Commission européenne soulève la question de la procédure de passation des contrats de PPP et décrit les différentes modalités applicables aux autres achats publics.

C'est ainsi qu'elle rappelle que les marchés publics peuvent être contractés, notamment, à la suite d'un « dialogue compétitif ». Il s'agit d'une procédure ouverte dans les cas où l'organisme adjudicateur n'est pas objectivement en mesure de définir les moyens techniques pouvant répondre à ses besoins et à ses objectifs, ainsi que dans les cas où l'organisme adjudicateur n'est pas objectivement en mesure d'établir le montage juridique et / ou financier d'un projet[18]. Le dialogue compétitif permet l'instauration d'échanges avec les candidats, les discussions ayant pour objet de développer des solutions aptes à répondre aux besoins des administrations. Au terme du dialogue, les candidats sont invités à remettre leur offre définitive.

Par ailleurs, la Commission décrit les procédures d'attribution relative, en particulier, aux concessions. Il s'agit de déterminer les modalités de choix les plus à même de correspondre aux PPP. De l'avis de la Commission, « la transposition en droit national de la procédure de dialogue compétitif permettra aux parties concernées de disposer d'une procédure particulièrement adaptée à la passation des contrats qualifiés de marchés publics lors de la mise en place d'un PPP de type purement contractuel, tout en préservant les droits fondamentaux des opérateurs économiques ».

[18] *En droit français, le dialogue compétitif a été introduit par le Code des marchés publics de 2004. Proche de l'ancien appel d'offres sur performance, ses cas d'ouverture diffèrent selon le type de marché :*

- *s'il s'agit d'un marché de fournitures ou de services, le dialogue compétitif est possible quand l'administration n'est pas en mesure soit de définir les moyens permettant de répondre à ses besoins, soit d'établir le montage juridique et financier d'un projet ;*
- *s'il s'agit d'un marché de travaux, ces conditions ne s'appliquent qu'à partir de 5 900 000 € HT annuels.*

La CCIP estime, quant à elle, que la procédure de dialogue compétitif est parfaitement adaptée aux marchés publics, mais elle émet quelques réserves quant à sa généralisation aux PPP.

Certes, les cas d'ouverture des PPP en France ne sont pas sans rappeler ceux du dialogue compétitif des marchés publics. En effet, l'art. 2 de l'ordonnance dispose que les contrats de partenariat ne peuvent être conclus que pour la réalisation de projets pour lesquels une évaluation préalable :

- *montre ou bien que, compte tenu de la complexité du projet, la personne publique n'est pas objectivement en mesure de définir seule et à l'avance les moyens techniques pouvant répondre à ses besoins ou d'établir le montage financier ou juridique du projet, ou bien que le projet présente un caractère d'urgence ;*
- expose avec précision les motifs de caractère économique, financier, juridique et administratif, qui l'ont conduite, après une analyse comparative, à retenir le projet envisagé et à décider de lancer une procédure de passation d'un contrat de partenariat. En cas d'urgence, cet exposé peut être succinct.

Notre Compagnie estime que le dialogue compétitif comme unique mode de passation des PPP doit être écarté. Outre que cela risquerait d'entraîner une confusion avec les marchés publics, il s'agit d'une procédure qui peut manquer de souplesse, face à certaines situations économiques et qui risque de restreindre le concept même de partenariat. Le choix ou non d'une phase de dialogue dans l'attribution des contrats devra varier selon leur objet.

Par ailleurs, la CCIP rappelle que les PPP devront respecter strictement les principes de transparence et d'égal accès des candidats.

II / L'INSTAURATION D'UN SUIVI DES MODALITES D'EXECUTION

La Commission européenne souligne que le droit dérivé des marchés publics et des concessions vise principalement la phase d'adjudication d'un contrat. La phase postérieure à la sélection du partenaire privé, n'est, en revanche, pas visée. « Cependant, les principes d'égalité de traitement et de transparence qui découlent du Traité s'opposent, de manière générale, à toute intervention du partenaire public postérieurement à la sélection d'un partenaire privé, dans la mesure où une telle intervention serait de nature à remettre en cause l'égalité de traitement entre opérateurs économiques ».

Dans ce contexte, il semble important de prévoir différentes modalités permettant d'adapter les contrats aux évolutions économiques. Cela passe avant tout par le dialogue entre les partenaires, l'entreprise privée bénéficiant naturellement d'une certaine autonomie lui octroyant liberté d'appréciation et souplesse dans les modalités de gestion[19]*.*

Il est indispensable d'instaurer un dialogue permanent entre les deux parties contractantes ; une collaboration étroite se mettrait ainsi en place avec pour bénéficiaire principal l'utilisateur du service.

Par ailleurs, si l'on se rapporte aux délégations de service public telles qu'elles existent en France, les délégataires sont légalement tenus[20] de produire, chaque année, un rapport financier et technique retraçant la totalité des opérations afférentes à l'exécution de la délégation et une analyse de la qualité du service. Ce rapport est assorti d'une annexe permettant à l'autorité délégante d'apprécier ces conditions d'exécution.

Ce rapport pourrait utilement inspirer les PPP, à condition que certaines mentions obligatoires d'aide au contrôle y figurent.

Pour permettre un suivi satisfaisant des opérations de PPP et, également, favoriser la mission de contrôle, certains éléments devraient figurer dans le rapport technique et financier ; il s'agirait notamment :

- ***d'indicateurs permettant d'évaluer la qualité du service et le choix des tarifications ;***
- ***d'indicateurs démontrant la continuité du service (justification des pannes éventuelles ou des interruption) ;***

[19] *Il est d'ailleurs à noter que le dialogue est un des aspects à l'origine du succès des contrats de PFI.*

[20] *Art. 40-1 de la « loi Sapin » (loi n°93-122 du 29 janvier 1993 relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques).*

- ***d'indicateurs attestant des modalités d'adaptabilité et de mutabilité du service.***

Enfin, le choix du cocontractant et les actions de celui-ci doivent pouvoir être présentés au public, usagers-clients. Ce dernier est, en effet, le destinataire premier des prestations offertes dans le cadre des PPP. Il est, à ce titre, habilité à bénéficier d'un droit de regard sur les modalités de réalisation du contrat. En outre, les remarques (celles positives aussi bien que celles négatives) peuvent conférer réactivité et adaptation au service. Dès lors, l'information se doit d'être la plus complète et la plus transparente possible.

L'autorité publique à l'origine du contrat de PPP devrait avoir un rôle d'interface consistant à :

- ***recueillir les attentes de la population en matière d'information, d'une part ;***
- ***transmettre les éléments fournis par son contractant quant aux modalités de prestation du service, les explications concernant la qualité, les tarifs…, d'autre part.***

Par ailleurs, cette autorité devrait également être le relais entre les éventuelles réflexions et remarques des usagers-clients, d'un côté, et les réponses qui y sont apportées par l'entreprise privée, de l'autre.

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En conclusion, notre Compagnie considère que le PPP doit bénéficier à des contractants, entreprises privées ; les entités mixtes n'ayant pas vocation à y prendre part.

Juillet 2004

REPONSE DE LA FG3E AU LIVRE VERT DE LA COMMISSION EUROPEENNE SUR LES PARTENARIATS PUBLIC-PRIVE ET LE DROIT COMMUNAUTAIRE DES MARCHES PUBLICS ET DES CONCESSIONS

La Fédération Française des Entreprises Gestionnaires de Services aux Equipements, à l'Energie et à l'Environnement (FG3E) groupe, au sein de six syndicats nationaux, les entreprises françaises qui assurent la gestion des équipements de production et de distribution de chaleur et de froid de toutes tailles, ainsi que d'autres équipements techniques ; certaines d'entre elles gèrent aussi des services non techniques.

Les équipements concernés relèvent aussi bien du chauffage urbain, que de l'installation collective de chauffage ou de climatisation, ou encore de l'équipement individuel de chauffage, sans oublier la production d'énergie thermique ou électrique à partir de l'incinération des déchets ménagers.

Ces activités représentent un chiffre d'affaires de 6 milliards d'Euros en France (et l'équivalent hors France) et elles emploient environ 35 000 salariés en France.

* * *

La FG3E a pris connaissance du Livre Vert sur les PPP soumis à consultation par la Commission. Elle a manifesté un grand intérêt pour les questions soulevées

Les entreprises de la profession ont développé une activité importante depuis des décennies, en France et dans de nombreux autres pays européens ou hors de l'Europe, tant en matière de réseaux de chauffage urbain ou de froid, que dans celui de l'exploitation d'équipements collectifs thermiques, que dans le secteur du traitement des déchets ménagers par incinération avec valorisation énergétique.

Ces prestations sont fournies au secteur public (Etat et collectivités territoriales ainsi que leurs établissements) via des relations partenariales organisées différemment selon le droit national qui s'applique.

La FG3E note que les questions liées au développement des PPP sont complexes dans la mesure où chaque Etat membre a déjà mis en place ses propres concepts nationaux ; pour autant elles revêtent une importance primordiale dans la perspective d'une réflexion globale sur le phénomène des PPP.

La FG3E tient donc à apporter ses réponses afin que la Commission, dans sa grande sagesse, soit en mesure de prendre les dispositions qui conviennent après avoir entendu tous les points de vue.

N'étant pas concernée par toutes les questions, elle s'attachera à répondre à celles qui sont plus directement en rapport avec les activités des entreprises de la profession

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Question n°1 : Quels types de montages de PPP purement contractuel connaissez-vous ? Ces montages font-ils l'objet d'un encadrement spécifique (législatif ou autre) dans votre pays ?

La France connaît plusieurs formes de relations contractuelles entre un opérateur public et un prestataire :

- Les marchés publics sont des contrats conclus entre une autorité publique et une entité - généralement privée - dont l'objet porte sur des travaux, des services ou des fournitures, et dont le **paiement immédiat** est effectué par la personne publique.
  Ces contrats relèvent du décret n°2004-15 du 7 janvier 2004 portant Code des marchés publics ;

- Les délégations de service public sont des contrats **de longue durée** par lesquels une personne morale de droit public confie la gestion d'un service public, dont elle a la responsabilité, à un délégataire public ou privé, **dont la rémunération est substantiellement liée au résultat de l'exploitation du service.**
  Les investissements peuvent être financés, soit par la collectivité (affermage), soit par le prestataire (concession au sens français du terme).
  Ces contrats sont régis par la loi n°93-122 du 29 janvier 1993, dite loi Sapin et par la loi n°2001-1168 du 11 décembre 2001 portant Mesures urgentes de réformes à caractère économique et financier.

- Les contrats de partenariat, introduits récemment en droit français ; sont des **contrats de longue durée** conclus entre une autorité publique et un prestataire privé portant sur une mission globale de financement, construction, entretien, maintenance, exploitation et gestion, qui concourent à l'exercice par la personne publique de la mission de service public dont elle a la charge.
  La rémunération du prestataire privé se fait pendant toute la durée du contrat et **peut être liée à des objectifs de performance**.
  Ces contrats relèvent de l'ordonnance n°2004-559 du 17 juin 2004.

Question n°2 : De l'avis de la Commission, la transposition en droit national de la procédure de dialogue compétitif permettra aux parties concernées de disposer d'une procédure particulièrement adaptée à la passation des contrats qualifiés de marchés publics lors de la mise en place d'un PPP de type purement contractuel, tout en préservant les droits fondamentaux des opérateurs économiques. Partagez-vous ce point de vue ? Si non pourquoi ?

La procédure de dialogue compétitif nous paraît adaptée à la passation de **contrats qualifiés de marchés particulièrement complexes,** dès lors qu'elle permet à l'autorité adjudicatrice de définir ses besoins avec les opérateurs qui ont ainsi l'opportunité de proposer des solutions innovantes.

Toutefois, cette opinion ne vaut qu'à la condition qu'il soit fait une application rigoureuse de la procédure telle qu'est est organisée par la directive 2004/18/CE du 31 mars 2004, afin de respecter l'égalité de traitement des candidats, et de préserver leur savoir faire et leur propriété intellectuelle.

L'autorité adjudicatrice doit donc :

- S'interdire de révéler aux autres candidats les solutions proposées par l'un d'entre eux ;

- S'obliger à communiquer à tous les candidats les mêmes informations.

L'autorité adjudicatrice, une fois le dialogue clos, invite les candidats à remettre leur offre finale sur la base de la ou des solutions spécifiée(s) au cours du dialogue.

Il s'avère qu'en France, la procédure de dialogue compétitif instituée par les dispositions réglementaires du décret du 7 janvier 2004, ne nous paraît pas, sur ce point, être en conformité avec la directive, dans la mesure où elle prévoit la communication d'un **cahier des charges unique** aux candidats, une fois le dialogue clos.

Question n°3 : En ce qui concerne ces contrats, existe-t-il selon vous des points autres que ceux relatifs au choix de la procédure d'adjudication, susceptibles de poser problème au regard du droit communautaire des marchés publics ? Si oui, lesquels et pour quelles raisons ?

On peut regretter les situations dans lesquelles les pouvoirs adjudicateurs commencent une consultation en s'orientant vers un PPP de type contractuel, pour passer à un montage de PPP institutionnel, voire à une gestion en régie, après avoir bénéficié des solutions innovantes proposées par les candidats, et une fois la procédure déclarée infructueuse.

Ces observations valent pour tous les types de PPP contractuels (marchés publics ou concessions).

Par ailleurs, la FG3E considère que certaines situations pourraient bénéficier plus facilement de propositions de variantes de la part des opérateurs privés.

L'article 24 de la directive 2004/18/CE du 31 mars 2004 limite en effet trop restrictivement le recours aux variantes, en prévoyant notamment que sauf dispositions contraires dans l'avis de marché, les variantes ne sont pas autorisées.

Question n°4 : Avez-vous déjà organisé, participé, ou souhaité organiser ou participer à une procédure d'attribution de concession au sein de l'Union ? Quelle expérience en avez-vous ?

Sans objet pour la FG3E

Question n°5 : Estimez-vous que le cadre juridique communautaire actuel est suffisamment précis pour assurer la participation concrète et effective de sociétés ou groupements non-nationaux aux procédures de passation de concessions ? Une concurrence réelle est-elle, selon vous, habituellement assurée dans ce cadre ?

Pour certains aspects de la procédure, le cadre juridique actuel peut s'avérer insuffisamment protecteur des droits et intérêts des sociétés ou groupements non nationaux, notamment en matière de publicité.

La communication interprétative sur les concessions du 29 avril 2000 pourrait utilement être complétée sur ce point.

Question n°6 : Pensez-vous qu'une initiative législative communautaire, visant à encadrer les procédures de passation de concessions est souhaitable ?

Sous réserve de la réponse à la question 5, la FG3E estime qu'à l'heure actuelle les règles de passation des concessions sont suffisamment définies par:

- la communication interprétative de la Commission sur les concessions en droit communautaire du 29 avril 2000 ;

- la jurisprudence de la Cour de Justice des Communautés Européennes (et notamment l'arrêt Telaustria du 30 mai 2002) faisant obligation de respecter les principes des **articles 43 et 49 du Traité de Rome** pour la passation des contrats de concession (transparence, égalité de traitement, proportionnalité et reconnaissance mutuelle).

Il n'est donc pas juridiquement nécessaire de se doter d'un nouvel outil législatif communautaire, dès lors que les principes qui doivent présider à la passation des concessions sont déjà posés.

En revanche, il serait particulièrement opportun d'adopter une communication interprétative sur les différentes formes de PPP, y compris les PPP institutionnels (notamment les « in-house »), afin de rappeler les principes qui les régissent.

Question n°7 : D'une manière plus générale, si vous estimez qu'il est nécessaire que la Commission propose une nouvelle action législative, existerait-il à votre avis des raisons objectives de viser dans cet acte tous les PPP de type contractuels, qu'ils soient qualifiés de marchés publics ou de concessions, pour les soumettre à des régimes de passation identique ?

Considérant qu'il n'y pas lieu à une initiative législative communautaire concernant la passation des concessions, la FG3E ne peut que s'opposer à la perspective d'une directive soumettant à un régime de passation identique tous les PPP contractuels.

Comme cela a été précisé en réponse à la question n°2, la procédure de dialogue compétitif trouve son utilité pour ceux des contrats particulièrement complexes qui relèvent de la directive marchés publics, mais elle ne doit pas être généralisée à d'autres PPP contractuels, en raison notamment du fait que la lourdeur de cette procédure ne se justifie que pour des « *particulièrement complexes* », ce qui n'est pas le cas de l'ensemble des PPP contractuels.

Pour ce qui concerne les concessions, les dispositions retenues dans la communication interprétative du 29 avril 2000 sont plus adaptées à la grande diversité des situations rencontrées et apportent une meilleure réponse à la nécessaire souplesse dans la définition de ce type de contrat, tout en respectant les principes du Traité.

Question n°8 : Selon votre expérience, l'accès à des opérateurs non-nationaux aux formules de PPP d'initiative privée est-il assuré ? En particulier, lorsqu'il existe une invitation des pouvoirs adjudicateurs à présenter une initiative, cette invitation fait-elle généralement l'objet d'une publicité adéquate permettant l'information de tous les opérateurs intéressés ? Une procédure de sélection véritablement concurrentielle est-elle organisée pour assurer la mise en œuvre du projet retenu ?

Question n°9 : Quelle serait selon vous la meilleure formule pour assurer le développement des PPP d'initiative privée dans l'Union Européenne tout en assurant le respect des principes de transparence, de non discrimination et d'égalité de traitement ?

La FG3E fera une réponse unique à ces deux questions :

La FG3E approuve, dans son principe, le recours à un PPP d'initiative privée, qui permet à une entreprise de faire valoir ses capacités d'innovation.

Toutefois, une telle pratique doit faire l'objet d'un strict encadrement juridique pour assurer le respect des principes de transparence, de non discrimination et d'égalité de traitement des candidats.

Il s’agit en effet :

- d’une part, d’assurer une juste indemnisation pour l’initiateur d’un projet qui n’aurait pas été retenu *in fine* ;

- d’autre part, d’organiser les règles de publicité adaptées permettant d’informer les éventuelles entreprises intéressées, une fois la décision prise par les autorités publiques d’examiner le projet.

La FG3E considère donc que le recours au PPP d’initiative privée ne doit être encouragé qu’à la condition de l’encadrer de règles protectrices des intérêts des initiateurs et garantissant les respect des principes de transparence, de non discrimination et d’égalité de traitement.

Question n°10 : Quelle expérience avez-vous de la phase postérieure à la sélection du partenaire privé dans les opérations de PPP contractuels ?

Sans objet pour la FG3E

Question n°11 : Avez-vous connaissance de cas dans lesquels les conditions d’exécution – y compris les clauses d’adaptation dans le temps – ont pu avoir une incidence discriminatoire ou ont pu constituer une entrave injustifiée à la libre prestation de services ou à la liberté d’établissement ? Si oui , pouvez-vous décrire le type de problèmes rencontrés ?

La FG3E n’a pas connaissance de tels cas.

Question n°12 : Avez-vous connaissances de pratiques ou de mécanismes d’évaluation d’offres ayant des incidences discriminatoires ?

La FG3E regrette de devoir constater que les mécanismes d’évaluation de l’offre d’une prestation selon qu’elle est envisagée en *in-house* ou en marchés publics ou concessions conduit à des différences de traitement, notamment sur le plan fiscal (Taxe Professionnelle, T.V.A., Impôt sur les sociétés, redevance d’occupation du domaine public...).

Question n°13 : Partagez-vous le constat de la Commission selon lequel certains montages de type « step-in » peuvent poser problème en termes de transparence et d’égalité de traitement ? Connaissez-vous d’autres « clauses types » dont la mise en œuvre est susceptible de poser des problèmes similaires ?

La FG3E ne partage pas le point de vue de la Commission et considère que le step-in participe à la confiance des prêteurs, assurés d’obtenir le remboursement des emprunts, y compris lorsque le titulaire du contrat défaillant est substitué par un autre attributaire.

Plus généralement, la FG3E est favorable à la cession de contrat dans les PPP, dès lors naturellement qu'il n'en résulte pas de modification dans l'exécution du contrat.

Il doit en effet être rappelé, qu'outre la personne du candidat, la mise en concurrence préalable a porté essentiellement sur l'offre proposée : un changement de contractant n'est donc pas constitutif d'obstacle lorsque les termes du contrat initial sont préservés.

La cession de contrat peut par ailleurs faire l'objet de clauses contractuelles qui en définissent les conditions dans l'éventualité où elle se présenterait, de sorte que l'autorité publique puisse en appréhender par avance les conséquences.

Question 14 : Estimez-vous qu'il est nécessaire de clarifier au niveau communautaire certains aspects relevant du cadre contractuel des PPP ? Si oui, sur quel(s) aspect(s) devrait porter cette clarification ?

La Commission semble considérer que les modifications qui peuvent intervenir en cours d'exécution d'un PPP ne sont pas, en principe, admissibles car elles remettent en cause le principe d'égalité de traitement.

La Commission envisage ainsi une application particulièrement extensive de ce principe ; cette vision maximaliste peut avoir des conséquences préjudiciables pour la vie des contrats qui, notamment lorsqu'ils sont de longue durée, nécessitent parfois certaines adaptations pour répondre aux besoins à satisfaire.

Des modifications peuvent en effet être rendues nécessaires :

- par des considérations macro et micro-économiques qui apparaissent en cours d'exécution du contrat ;
- par les nécessités du service confié au partenaire privé, afin notamment de satisfaire au mieux les besoins qui ont pu évoluer.

Ces impératifs exigent donc de concilier le nécessaire respect du principe d'égalité de traitement avec la prise en compte de la nécessité de préserver l'intérêt général, l'équilibre économique du contrat, et de s'adapter à l'évolution des besoins.

Pour toutes ces raisons, la FG3E n'est pas favorable à des dispositions législatives qui encadreraient l'exécution des PPP contractuels.

Question 15 : Dans le contexte des opérations de PPP, avez-vous connaissance de problèmes particuliers rencontrés en matière de sous-traitance ? Lesquels ?

Sans objet pour la FG3E.

Question 16 : Le phénomène des PPP de type contractuel, impliquant le transfert d'un ensemble de tâches à un unique partenaire privé, justifie-t-il selon vous que des règles plus détaillées et/ou d'un champ d'application plus large soient mise en place en ce qui concerne le phénomène de sous-traitance ?

Dès lors que le PPP a pour objet de confier à un partenaire privé un ensemble de tâches constituées en une mission globale, il appartient au titulaire du contrat de choisir librement ses sous-traitants.

L'attribution des contrats de sous-traitance n'a pas à être soumis à une procédure de passation avec mise en concurrence.

Cette position ne fait toutefois pas obstacle à la possibilité pour l'autorité adjudicatrice d'imposer une part minimale de sous-traitance, comme le précise l'article 25 de la directive 2004/CE 18

Question 17 : De manière plus générale, estimez-vous qu'une initiative complémentaire devrait être prise au niveau communautaire en vue de clarifier, ou d'aménager, les règles relatives à la sous-traitance ?

Pour les raisons exposées ci-dessus, il n'apparaît pas opportun de modifier les règles en matière de sous-traitance.

Question n°18 : Quelle expérience avez-vous de la mise en place d'opération de PPP de type institutionnalisé ? En particulier, votre expérience vous conduit-elle à penser que le droit communautaire des marchés publics et des concessions est respecté dans le cas de montages de PPP institutionnalisé ? Si non, Pourquoi ?

En France, les Sociétés d'Economie Mixte (SEM) relèvent des PPP de type institutionnalisé.

Les SEM sont créées par des autorités publiques : le capital est majoritairement composé de capitaux publics, l'autre partie du capital étant détenue par un ou des opérateurs privés.

Si la constitution d'une SEM ne nécessite pas une mise en concurrence préalable du ou des opérateurs privés qui la composeront, elles doivent en revanche être soumises aux mêmes règles que les autres opérateurs, lors de l'attribution d'une activité économique par l'autorité publique.

Les principes du Traité doivent en effet trouver la même application selon que le PPP est de type contractuel ou institutionnel.

Question n°19 : Estimez-vous qu'une initiative doit être prise au niveau communautaire en vu de clarifier ou de préciser les obligations des organismes adjudicateurs quant aux conditions dans lesquelles doivent être mis en concurrence les opérateurs potentiellement intéressés par un projet de type institutionnalisé ? Si oui, sur quels points particuliers et sous quelle forme ? Si non, pourquoi ?

Comme la FG3E l'a fait valoir dans sa réponse à la question 6, il serait particulièrement opportun que la Commission adopte une communication interprétative définissant les différents PPP de type institutionnel et contractuel et rappelant les principes du Traité qui doivent recevoir application.

Question n°20 : Quelles sont les mesures ou les pratiques que vous estimez constitutives d'entraves à la mise en place des PPP au sein de l'Union Européenne ?

Sans objet pour la FG3E.

Question n°21 : Connaissez-vous d'autres formes de PPP développées dans les pays en dehors de l'Union ? Connaissez-vous des exemples de « bonnes pratiques » développées dans ce cadre, dont l'Union pourrait s'inspirer ? Si oui, lesquelles ?

La FG3E n'a pas connaissance de tels exemples.

Question n°22 : De façon plus générale, et compte tenu des besoins importants d'investissements nécessaires dans certains Etats membres, afin de poursuivre un développement économique et social durable, estimez-vous utile une réflexion collective sur ces questions qui se poursuivrait à des intervalles réguliers entre les acteurs concernés, et qui permettrait un échange des meilleures pratiques ? Est-ce que vous considérez que la Commission devrait animer un tel réseau ?

Une réflexion collective permettrait la mise en place d'un contexte juridique adapté, susceptible d'autoriser les prestataires privés à répondre aux besoins des Etats membres qui nécessitent un investissement important.

Cette réflexion collective permettrait, en outre, de mieux définir les critères des conditions d'utilisation des crédits communautaires, afin de les rendre les plus efficaces possibles.

* * *

Livre vert sur le partenariat public-privé
Avis de la FNCCR

1. La distinction de trois familles de procédures impose la mise en œuvre simultanée d'au moins deux critères de définition non équivoques (i.e. prenant chacun des valeurs binaires oui/non).

Les montages contractuels de partenariat public-privé –au sens large - relèvent actuellement, en France, de trois régimes juridiques distincts et alternatifs :

- code des marchés publics, issu du décret n° 2004-15 du 7 janvier 2004 ;
- délégations de service public, relevant des dispositions législatives issues de la loi n° 93- 122 du 29 janvier 1993 (pour les collectivités territoriales : articles L 1411-1 à L 1411-8 du code général des collectivités territoriales) ;
- contrats de partenariat (au sens strict), relevant des dispositions issues de l'ordonnance n° 2004-559 du 17 juin 2004 (pour les collectivités territoriales : articles L 1414-1 à L 1414-16 du code général des collectivités territoriales).

La création récente d'une troisième catégorie (contrats de partenariat) de contrats publics, faisant l'objet de règles, notamment procédurales, spécifiques (même si elles sont « voisines » de certaines procédures préexistantes), en sus des catégories préexistantes des marchés publics et des délégations de service public, augmente sensiblement les risques juridiques inhérents à une mauvaise qualification du contrat.

La distinction entre marché public et convention de délégation de service public s'est en effet avérée, au cours des dernières années, encore trop souvent malaisée à établir de manière claire et incontestable, en raison de l'existence d'un continuum de formes contractuelles d'une catégorie à l'autre. Il en est résulté un nombre élevé de contentieux, nuisant à la continuité et à la qualité des services publics, freinant l'initiative publique, et conduisant finalement à ce que ces obligations de procédure constituent trop souvent des obstacles à la fluidité des remises en concurrence et à l'ouverture des marchés.

Il est donc à craindre que la création d'une troisième voie contractuelle, participant à certains égards de principes afférents aux marchés publics, et à d'autres d'une logique proche de celle des délégations de service public, augmente encore cette instabilité juridique, et présente ainsi davantage d'inconvénients que d'avantages. En particulier, les contrats de partenariat et ceux de délégation de service public ayant en commun la caractéristique d'être des contrats à caractère global, et celle de transférer des risques d'exploitation au cocontractant de la personne publique, la pertinence de l'arbitrage entre l'une ou l'autre de ces procédures de passation pourrait s'avérer fréquemment difficile à démontrer. La mise en œuvre d'un seul critère de discrimination (celui du risque d'exploitation) conduit en effet à un classement binaire (critère rempli ou pas), et se prête donc particulièrement mal à la mise en œuvre d'une tripartition.

Deux types de solutions semblent envisageables pour remédier à ces difficultés :

- le premier consisterait à rétablir la distinction de seulement deux familles de procédures, la discrimination entre l'une et l'autre reposant, comme c'est actuellement le cas pour la différenciation entre les marchés et les délégations, sur le critère du risque d'exploitation ;
- le second permettrait de conserver trois familles distinctes de procédure, en combinant le critère du risque d'exploitation avec un autre critère, qui pourrait être celui de l'habilitation donnée au cocontractant à faire des actes juridiques (et pas seulement matériels) afférents aux usagers du service public au nom et/ou pour le compte du service public. Un cocontractant habilité sera alors celui qui peut ainsi passer lui-même les contrats avec les usagers du service public, et fera écran entre ceux-ci et la personne publique organisatrice du service ; en revanche, un cocontractant non habilité ne passera contrat qu'avec la personne publique, celle-ci conservant la responsabilité juridique des relations avec les usagers du service.

La combinaison de ces deux critères permettrait de discriminer plus sûrement les trois catégories de contrats, ainsi que cela apparaît dans le tableau ci-dessous.

	Transfert d'un risque d'exploitation sur le cocontractant ?	Habilitation du cocontractant à effectuer des actes juridiques concernant les usagers du service public ?
Marchés publics	non	non
Délégations de service public	oui	oui
Autres contrats de partenariat	oui	non

2. La création de nouvelles formes de partenariat public-privé ne doit pas avoir pour conséquence l'attribution en toute propriété, au patrimoine privé des entreprises cocontractantes, d'ouvrages affectés au service public

Alors que la délégation de service public est traditionnellement caractérisée par le régime juridique des biens de retour, reconnaissant à la collectivité publique la propriété « ab initio » des biens affectés au service public délégué, y compris lorsque ces biens sont construits sous la maîtrise d'ouvrage du délégataire, certaines formes nouvelles de partenariat pourraient conduire en revanche à ce que la propriété des ouvrages soit reconnue au titulaire du contrat de partenariat, bien que la rémunération de ce cocontractant lui soit versée par la personne publique et s'avère donc adossée à la fiscalité.

Une telle évolution ferait peser un risque évident sur la fluidité des remises en concurrence de l'activité d'exploitation des ouvrages, ainsi que sur le pouvoir de contrôle de la personne publique sur la qualité des ouvrages et services publics ainsi externalisés.

En effet, si les ouvrages affectés au service public appartiennent à l'entreprise gestionnaire du service public, celle-ci disposera d'un avantage évident au moment de la remise en concurrence de cette gestion, puisqu'il sera nécessaire de lui verser une indemnité de rachat avant que la gestion de l'ouvrage ne puisse être, le cas échéant, attribuée à l'un de ses concurrents : cette contrainte financière fonctionnera pour la collectivité publique comme un frein puissant au changement d'attributaire, ou conduira ladite collectivité publique à demander aux concurrents des propositions sur un droit d'entrée couvrant l'indemnité de rachat due au sortant. Rappelons qu'un tel droit d'entrée, facteur important de corruption, a été expressément interdit par la loi française.

Plus généralement, la reconnaissance, au titulaire d'un contrat de partenariat, de la propriété d'ouvrages affectés à un service public est motivée par la volonté de faciliter le recours, par ce titulaire, à un financement bancaire, objectif de pertinence discutable. Il ne suffira pas, en effet, à garantir que les conditions de financement obtenues par de tels opérateurs privés soient compétitives par rapport à celles auxquelles ont accès les collectivités publiques, toujours beaucoup plus intéressantes du fait de l'écart de solvabilité entre le secteur public et le secteur privé.

Par ailleurs, une collectivité publique aura beaucoup plus de difficultés à assurer le contrôle de la bonne exécution de missions de service public ou d'intérêt général afférentes à un ouvrage dont le cocontractant (et non la collectivité) serait reconnu propriétaire, les droits de propriété étant un facteur essentiel de légitimité pour une telle action de contrôle.

Enfin, le développement de formes de partenariat attribuant à l'entreprise privée titulaire la propriété d'ouvrages dont le financement serait adossé aux recettes fiscales acquittées par les contribuables peut conduire à assujettir les services d'intérêt général à des intérêts privés.

Pour l'ensemble de ces raisons, il semble très souhaitable que les formes de partenariat public-privé autres que les marchés publics ou les délégations de service public préservent l'attribution à la collectivité publique de la propriété d'ouvrages affectés au service public, ou qu'elles soient, à défaut strictement limitées à des cas exceptionnels.

GART
GROUPEMENT DES AUTORITES RESPONSABLES DE TRANSPORT

Position du GART sur le Livre vert de la Commission européenne sur les partenariats publics/privés et le droit communautaire des marchés publics et des concessions

Les élus du GART, réunis en Bureau élargi le 16 juin 2004, se sont accordés sur un certain nombre de grands principes à respecter par la Commission européenne dans l'élaboration de normes communautaires ayant pour objet de réglementer les partenariats publics / privés (PPP) contractuels et institutionnels (ces 2 types de partenariats étant intégrés dans la réflexion lancée par la Commission dans son Livre vert du 30 avril).

Ainsi, plutôt que de répondre à chacune des 22 questions posées dans le Livre vert, le GART propose une contribution assise sur le rappel de ces grands principes, qui sont au nombre de trois.

1). La nécessité d'une définition communautaire des concessions souple et adaptée

Le GART souhaite en premier lieu exprimer son accord en faveur d'une intervention communautaire en matière de concessions et autres dispositifs contractuels (PPP) qui ne sont pas des marchés publics (matière qui, à ce jour, n'est régie par aucune règle de droit dérivé, seuls les grands principes du traité trouvant à s'appliquer, à la différence des marchés qui, eux, sont régis par des directives).

Néanmoins, **nous souhaitons que cette intervention se fasse dans le respect de la distinction qui existe, et qui doit continuer d'exister, entre marchés publics et délégations de service public (DSP)** [1]. Il s'agit en effet de 2 outils distincts, qui ne poursuivent pas les mêmes finalités (même si, en France, le marché public est de plus en plus utilisé pour la gestion de services publics et que les 2 corpus de règles – marchés et DSP – tendent à se rejoindre) et qui, donc, ne doivent pas obéir aux mêmes contraintes.

De ce fait :

- **Nous ne soutenons pas l'idée d'un régime unique applicable aux 2 dispositifs contractuels** comme le suggère la Commission en page 13 du Livre vert (question n°7, dans laquelle la Commission évoque la possibilité de « régimes de passation identiques »). Il convient en effet de préserver aux DSP leur spécificité et leur souplesse.

- **Nous souhaitons l'élaboration d'une définition communautaire adaptée aux caractéristiques des DSP**. Celle qui est donnée par la Commission dans son Livre vert (page 6), et qui reprend celle déjà proposée dans sa commission interprétative sur les concessions en droit communautaire du 8 février 2000, nous convient : « contrat présentant les mêmes caractéristiques qu'un marché public à l'exception du fait que la contrepartie des travaux ou des services effectués consiste, soit uniquement dans le droit d'exploiter l'ouvrage ou le service, soit dans ce droit assorti d'un prix ».

[1] Les DSP (délégations de service public) en droit français correspondent à l'appellation communautaire de « concessions ».

Il s'agit d'une définition large, qui s'appuie sur la notion de risque d'exploitation et qui, ce faisant, rejoint la définition française des DSP.

Cette définition se différencie de celle qui a été proposée dans le projet de règlement communautaire relatif aux exigences de service public dans le domaine des transports de voyageurs (« ROSP »), dont l'article 3 i donne des concessions de transport la définition suivante : **contrats dont la majeure partie de la rémunération de l'opérateur provient des voyageurs**, notamment par la perception de redevances.
Dans ses différentes prises de position sur le « ROSP », le GART a critiqué cette définition trop restrictive des concessions, non adaptée au secteur des transports, dans lequel la part voyageurs ne couvre qu'une faible part des recettes, et susceptible de contentieux sur un sujet déjà sensible (on sait en effet que de nombreux contrats qualifiés de DSP ont été requalifiés par le juge au motif que le risque d'exploitation n'était pas suffisamment établi).

- **Nous tenons à rappeler que les dispositifs contractuels de type concessif sont le plus souvent utilisés pour la gestion ou l'exploitation de services publics ; de ce fait, ils doivent offrir la souplesse nécessaire à l'adaptation du service dans le temps**. Aussi, même si nous reconnaissons que les modalités d'exécution des projets de PPP doivent être définies de manière claire, transparente et non discriminatoire dans les cahiers des charges et qu'il ne doit pas y avoir de bouleversement substantiel des termes du contrat en cours d'exécution, **nous souhaitons que le cadre communautaire à venir n'encadre pas de façon trop contraignante les possibilités d'insertion de clauses d'évolution du service** ou de clauses de révision ou de réajustement, qui porteront notamment sur le régime financier du contrat.

Dans cet esprit, il convient de conserver un minimum de souplesse quant à la possibilité de prolonger, selon des modalités bien définies (motif et durée de la prolongation), les contrats de type concession (à l'image de ce qui a été reconnu en droit français avec la loi Sapin[2]).

2). Un encadrement des PPP institutionnalisés respectueux de la libre administration des collectivités territoriales

En parlant « d'entités détenues conjointement par le partenaire public et le partenaire privé », la Commission vise directement les SEM. Les régies, généralement créées et détenues par la seule puissance publique, ne sont donc pas directement concernées, étant entendu qu'elles pourront l'être indirectement par les solutions qui seront retenues.

Si nous ne sommes pas hostiles à une intervention communautaire visant à légiférer sur les PPP institutionnalisés, les termes du débat posés par la Commission dans son Livre vert nous laissent néanmoins circonspects, et ce à plusieurs niveaux[3].

Il ressort en effet des propos de la Commission (pp 19 et 20) que les règles de concurrence trouveront à s'appliquer au moment même de la mise en place de l'entité mixte si celle-ci a pour objet de se voir attribuer une ou plusieurs missions. Comment ne pas trouver cette formulation fallacieuse lorsque l'on sait qu'une SEM est toujours créée en vue d'accomplir une ou plusieurs missions (gestion d'un équipement, exploitation d'un service, etc) ?

[2] Tout en imposant que les contrats de délégation de service public soient limités dans leur durée, la loi Sapin a reconnu la possibilité de prolonger ces contrats de une année pour des motifs d'intérêt général ou lorsque des investissements nouveaux s'imposent.
[3] Même si le Livre vert a pour objet d'ouvrir le débat et qu'aucune « option prédéterminée d'intervention communautaire n'a été décidée » (Livre vert p 8), certaines solutions transparaissent néanmoins de la manière même de la Commission d'ouvrir le dialogue.

La formulation nous semble d'autant plus fallacieuse que les propos de la Commission sèment le doute : d'un côté elle estime que « l'option consistant à créer une entité au capital mixte n'est pas en elle-même visée par le droit des marchés publics et des concessions » ; de l'autre elle estime que « le choix d'un partenaire privé appelé à effectuer de telles missions dans le cadre … d'une entité mixte ne saurait être fondé exclusivement sur la qualité de son apport en capital ou de son expérience, mais devrait prendre en compte les caractéristiques de son offre. ... faute de disposer de critères clairs et objectifs permettant au pouvoir adjudicateur de retenir l'offre économiquement la plus avantageuse, l'opération en capital pourrait constituer une violation du droit des marchés publics et des concessions ».
Ne doit-on pas en déduire que c'est le choix, en tant que tel, du ou des partenaires de la personne publique qui devra être soumis à concurrence, alors même que la Commission dit ne pas avoir à se prononcer sur le choix et alors même que la décision de création d'une SEM ne résultera pas d'un contrat mais d'un acte unilatéral de l'administration, expression de son pouvoir discrétionnaire ?

A ce premier niveau de concurrence, qui touche à l'acte de création lui-même, intervient un 2ème niveau de mise en concurrence, qui touche à l'attribution des missions à l'entité mixte. Cela signifie qu'une fois la SEM créée après mise en concurrence, il sera impossible, pour la collectivité publique, de confier à cette SEM quelque mission que ce soit sans l'avoir préalablement mise en concurrence.
A ces 2 niveaux de mise en concurrence s'ajoute une 3ème niveau, qui concerne les contrats passés par la SEM elle-même. En effet, lorsque la SEM a le statut d'organisme adjudicateur (ce qui sera pratiquement toujours le cas), cette qualité lui impose le respect des règles de concurrence lorsqu'elle souhaite confier une ou plusieurs missions à un tiers (ce tiers pouvant être indépendant de la SEM ou, au contraire, être son actionnaire privé : dans ce dernier cas, la mise en concurrence des missions qui seront confiées audit partenaire s'imposera lorsque la création de la SEM n'aura pas, elle-même, fait l'objet d'une procédure de mise en concurrence.

Intervient, enfin, un 4ème niveau auquel la concurrence doit jouer d'après la Commission : lorsqu'il y a un changement de partenaire partie prenante à l'entité mixte (la Commission vise le cas précis d'une prise de contrôle d'une entité publique par un opérateur privé). Cela revient, en d'autres termes, et quoi qu'en dise la Commission, à mettre en concurrence les ouvertures de capital (alors même que, d'après le Livre vert, « le droit communautaire des marchés publics n'a pas en soi vocation à s'appliquer aux opérations représentant de simples apports de fonds par un bailleur à une entreprise »).

Ainsi, pour résumer : les contrats passés par les SEM (3ème niveau), de même que les contrats confiés à des SEM (2ème niveau), de même également que la création même de la SEM (1er niveau), de même, enfin, que les changements de partenaires de la SEM (4ème niveau), sont soumis à concurrence.

Un tel dispositif, faisant intervenir 4 niveaux de mise en concurrence, nous paraît excessif.

Si nous sommes d'accord avec une mise en concurrence des actionnaires de la SEM, procédure qui interviendrait donc au moment même de la création de la structure (niveau 1), ou en cas de changement d'actionnaire (niveau 4), nous ne voyons pas, par contre, l'intérêt d'une mise en concurrence de l'attribution des missions à ladite SEM (niveau 2) dans la mesure où, comme on l'a dit, lorsqu'une SEM est créée, elle l'est toujours dans l'objectif de se voir confier une ou plusieurs missions déterminées.

De ce point de vue, la SEM doit être vue comme une modalité de gestion d'un service ou, pour reprendre les termes de la Fédération Nationale des SEM (FNSEM), comme « critère de la mission d'exécution d'un service public par une entreprise privée »[4].

Dans un tel cas (absence de mise en concurrence des relations entre la SEM et le pouvoir adjudicateur actionnaire), nous ne sommes pas opposés à ce que la SEM applique les règles de concurrence pour la sélection de ses propres co-contractants (niveau 3).
Cette prohibition de la double mise en concurrence (niveaux 2 et 3) est une application pure et simple du droit français des marchés publics, qui n'impose pas la mise en concurrence pour les missions confiés à des entités « sur lesquelles l'administration exerce un contrôle comparable à celui qu'elle exerce sur ses propres services et qui réalise l'essentiel de ses activités pour elle » (2ème niveau) à partir du moment où cette entité soumettra à concurrence la passation de ses propres contrats (3ème niveau). Il s'agit donc d'un dispositif alternatif et non cumulatif.

3). L'impérieuse nécessité de définir les relations in house et de préciser leur régime juridique

Pour terminer, **le GART souhaite insister sur la nécessité d'une pleine reconnaissance par le droit communautaire de la notion de relation inter-organique (ou relation « in house ») qui n'a, à ce jour, fait l'objet d'aucune disposition spécifique**, n'ayant été reconnue que par le seul juge communautaire d'une part, et dans le seule contexte des marchés publics d'autre part.

En effet, dans l'arrêt Teckal du 18 novembre 1999, la Cour de Justice européenne a jugé que les seules exceptions permises au principes de concurrence énoncés dans les directives relatives aux marchés publics (il s'agissait en l'espèce de la directive fournitures) visent les contrats conclus par écrit par un pouvoir adjudicateur avec une entité qui est certes distincte de lui au plan formel mais sans autonomie par rapport à lui au plan décisionnel d'une part (première condition) et qui réalise l'essentiel de son activité avec le pouvoir adjudicateur d'autre part (deuxième condition).

C'est donc sur ces 2 critères (organique – absence d'autonomie par rapport au pouvoir adjudicateur – et matériel – prestations essentiellement réalisées pour le compte du pouvoir adjudicateur) que repose la notion de prestation in house. En principe, la régie, même dotée d'une personnalité morale distincte de la collectivité qui l'a créée, répond pleinement à ce double critère. Les SEM peuvent également, dans certains cas, exercer leurs missions dans un cadre « in house ». **Il semble néanmoins que les critères de définition d'une prestation in house soient loin d'être clairs, si l'on en juge par le nombre d'affaires pendantes devant la Cour européenne, qui visent à obtenir une clarification de la portée des critères dégagés dans l'arrêt Teckal. Aussi l'intervention d'un texte en la matière nous semble plus que jamais nécessaire**.

En outre, il convient de redonner à l'arrêt Teckal sa juste valeur en précisant qu'il est de portée limitée : les critères dégagés par la Cour dans cet arrêt visent à qualifier les contrats uniquement au regard des directives relatives aux marchés publics. Cet arrêt ne règle donc pas la question des autres contrats qui ne relèvent pas du champ d'application des directives (à savoir les concessions et autres PPP).

[4] La FNSEM estime que « dans ce cas, la SEM est créée sans mise en concurrence avec le partenaire privé retenu au préalable par appel d'offres. La SEM serait ainsi pleinement reconnue comme un mode de gestion à part entière des services publics locaux ».

En effet, dans la communication interprétative précitée, la Commission est restée prudente en considérant « qu'un problème particulier se pose lorsqu'il existe, entre le concessionnaire et le concédant, une forme de délégation interorganique qui ne sort pas de la sphère administrative du pouvoir adjudicateur ». En fait, la Commission s'en est remise jusqu'à aujourd'hui à l'interprétation de la Cour en rappelant que les avocats généraux se sont déjà penchés sur la question à plusieurs reprises.

Il nous semble que **ce contexte d'incertitude juridique place les régies et les SEM dans une situation délicate.**
Aussi le texte à venir devrait-il préciser que les relations in house échappent à toute mise en concurrence quelle qu'elle soit (qu'il s'agisse des règles applicables aux marchés publics ou celles applicables aux concessions et autres PPP). Ce texte, de portée transversale, devrait s'appliquer à tous les secteurs d'activité (rappelons que le « ROSP », tel qu'il est aujourd'hui proposé par la Commission, impose une mise en concurrence systématique des contrats de transports, y compris des « contrats » - la notion de contrat étant entendue largement par la Commission, qui y intègre également les actes unilatéraux - confiés à des régies).

En résumé, le GART souhaite :

1 Une définition communautaire des concessions souple et adaptée ;

2 La prohibition d'un double niveau de mise en concurrence pour les PPP institutionnalisés (SEM), la concurrence ne devant intervenir qu'en aval pour les propres contrats de la SEM et non en amont, dans les relations entre la SEM avec la collectivité actionnaire, les actionnaires privés de la SEM ayant, eux, préalablement fait l'objet d'une mise en concurrence ;

3 Une définition communautaire claire et précise des relations « in house ».

Fondation d'Entreprise

INSTITUT DE LA GESTION DÉLÉGUÉE

Livre vert de la Commission Européenne
Sur les Partenariats public-privé

Réponse de l'Institut de la Gestion Déléguée à la consultation

Préambule :

Les membres de l'Institut de la Gestion Déléguée (I.G.D.) dans leur ensemble, administrateurs, entreprises fondatrices et ensemble des organismes représentés, accueillent très favorablement l'initiative de la Commission de publier un *Livre vert sur les Partenariats public-privé et le droit communautaire des marchés publics et des concessions*.

Ils expriment à la Commission leur reconnaissance de voir enfin abordée, de manière spécifique et autonome des marchés publics, la question des partenariats public-privé tout en émettant le vœu que cette question soit traitée dans l'avenir avec un surcroît de vision économique.

La présente réponse de l'Institut de la Gestion Déléguée au Livre vert sur les partenariats public-privé du 30 avril 2004 s'explique par le statut particulier de l'Institut, fondation fédérant la plupart des acteurs et partenaires des SIG/SIEG en France (voir Annexe 1). Cette réponse n'est pas la juxtaposition de positions reflétant des intérêts politiques, sociaux ou professionnels mais se trouve être le fruit d'une concertation mettant au centre du débat **l'efficacité et la performance des services publics** (c'est-à-dire les SIG/SIEG) pour bâtir des solutions d'intérêt général. Cette démarche est illustrée dans la Charte des Services Publics Locaux signée en janvier 2002 à l'initiative de l'IGD (voir Annexe 2).

Elle fait suite à la première contribution de l'Institut adressée à la Commission le 7 avril 2004 (voir Annexe 3). Elle a été élaborée au sein d'un groupe d'experts présidé par M. Yves-Thibault de Silguy, Directeur Général de Suez, ancien Commissaire européen et administrateur de l'Institut, et a fait l'objet d'une large consultation auprès des membres de l'Institut, notamment associations d'élus locaux, associations de consommateurs, organisations professionnelles…

Le rapport comprend deux parties :

- la première, sous forme d'un rapport structuré permettant d'argumenter les propositions de l'Institut sur l'appréhension du phénomène PPP par le droit communautaire ;
- la seconde, qui répond aux questions posées dans le Livre vert.

En toute hypothèse, et compte tenu de l'importance et de la complexité de ce sujet, nous souhaiterions pouvoir être auditionnés par les membres de la Commission, et leurs cabinets, dans le cadre de la suite qu'ils jugeront utiles de donner au présent Livre vert.

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Première partie : Position et propositions de l'IGD en réponse au Livre vert

La présente partie réitère la position globale de l'IGD prenant en considération, à la fois la dimension économique fondamentale des PPP pour le développement économique de l'Union et l'insuffisance d'encadrement juridique du phénomène, préjudiciable au respect des Traités.

La diversité des « phénomènes PPP » nécessite toutefois, pour une appréhension complète du sujet, qu'ils soient préalablement et précisément identifiés et définis.

1 Ce que recouvrent les partenariats public-privé : notions et définitions

1.1. Les « PPP » dans le Livre vert

La Commission, précisant que ce terme « *n'est pas défini au niveau communautaire* », vise l'ensemble des « *formes de coopération entre les autorités publiques et le monde des entreprises qui visent à assurer le financement, la construction, la rénovation, la gestion ou l'entretien d'une infrastructure ou la fourniture d'un service* », [1] caractérisés par les éléments suivants :

- une durée relativement longue ;
- un mode de financement pour partie assuré par le secteur privé ;
- le rôle important de l'opérateur économique ;
- la répartition des risques et le transfert de certains d'entre eux vers le partenaire privé.

Une telle description, plutôt large et vaste, induit nécessairement une grande variété de mécanismes et d'outils, non décrits dans le Livre vert.

1.2. Les expériences de PPP dans l'Union européenne

Les partenariats public-privé expérimentés dans différents pays de l'Union Européenne recouvrent notamment les mécanismes suivants :

- l'expérience française[2] des délégations de service public, contrats par lesquelles l'autorité publique confie la gestion du service public, éventuellement après réalisation de travaux, à l'opérateur, dont « *la rémunération est substantiellement liée aux résultats de l'exploitation du service* », que ce soit par paiement de l'usager final et/ou par l'administration publique : concessions, affermages et régie intéressée.

[1] § 1.1.1.

[2] On citera également, pour mémoire à ce stade, compte tenu du caractère récent de sa création et l'absence, à ce jour, d'expériences concrètes, le Contrat de partenariat, créé par l'ordonnance du 17 juin 2004, « *contrats par lesquels* [la Personne publique] *confie à un tiers* […] *une mission globale relative au financement d'investissements immatériels, d'ouvrages ou d'équipements nécessaires au service public, à la construction ou transformation des ouvrages ou équipements, ainsi qu'à leur entretien, leur maintenance, leur exploitation ou leur gestion, et le cas échéant, à d'autres prestations de services concourant à l'exercice, par la personne publique, de la mission de service public dont elle est chargée* ».

On y ajoute également l'ensemble des montages complexes associant conventions d'exploitation et Baux emphytéotiques administratifs ou Autorisations d'occupation temporaires du domaine public consentis par les personnes publiques, avec mécanismes de financement (location, crédit-bail…) associés, mettant en œuvre une forme de coopération entre le public et le privé pour l'exercice d'une activité d'intérêt général.

- le modèle anglais de la Private Finance Initiative (PFI) et l'ensemble des contrats appartenant à la famille des BOT (build opérate transfer),[3] contrats de travaux et de services à paiement public, portant sur le financement, la conception, la réalisation et la gestion d'une infrastructure et du service dont elle est le support ;[4]

- certains marchés publics de longue durée, comme il en existe en France.

Les principaux critères communs à l'ensemble de ces contrats sont :

- **La délégation** à un partenaire privé tiers de la responsabilité **de la gestion d'une activité d'intérêt général**, la plupart du temps de caractère économique ;

- **La globalité du contrat**, déclinée sous la forme de :

    - la substitution à la personne publique pour exercer des « missions d'exploitation » dont la globalité repose sur plusieurs facteurs se combinant en privilégiant, soit le transfert de responsabilités, soit la complexité à assumer dans la durée, soit les deux, le tout conduisant à un transfert tangible de risques dans la durée ;
    - plusieurs missions élémentaires à exécuter comprenant *a minima* l'exploitation et la *possibilité* d'une participation au financement ;
    - la prise en charge d'une partie des risques, d'une part, sur la construction/reconstruction/remise en état finale et/ou, d'autre part, sur l'exploitation ;
    - des engagements de résultats et une relative liberté de choix pour les moyens.

- **La longue durée du contrat** fixée selon :

    - les objectifs d'organisation et d'exploitation ;
    - les caractéristiques du montage financier ;
    - la durée d'amortissement des investissements ;
    - l'ampleur des adaptations autorisées et la possibilité de révisions périodiques ou conditionnelles.

[3] BOOT (Build-own-operate-transfer); BTO (Build-Transfer-Operate) ; BOST(Build-Operate-Subsidize-Transfer), DBFO (Design-Build-Finance-Operate), BOO (Build-Own-Operate), Lease Contract…..

[4] Selon la typologie financière, les « services sold to the public sector », contrats par lesquels un entrepreneur réalise une prestation contre une rémunération versée par l'administration et les « financially freestanding », contrats dans lesquels un entrepreneur réalise une prestation contre une rémunération versée par l'administration, auxquels on peut ajouter les joint-ventures.

- **Le mécanisme d'équilibrage du contrat** fondé sur :

  - le contrôle des opérations et l'évaluation des résultats contractuels ;
  - l'information sur les résultats financiers ;
  - le droit au rééquilibrage du contrat en cas d'évènement justifiant leur révision (force majeure, imprévision, fait du prince…).

Concernant les actifs et l'exploitation, ces contrats ont en commun le partage des risques suivants :

- **Immobilisation** : risque de « construction », soit au titre du premier établissement, soit au titre du renouvellement/remise en état de fin de contrat,[5]
- **Exploitation** : risque de disponibilité, de performances, de qualité et de continuité, ou risque de fréquentation, d'utilisation ou de demande.[6]

2 L'impact économique des PPP et leur nécessaire développement au niveau communautaire

L'objectif principal recherché par les entités publiques faisant appel à ces formules est d'améliorer le rapport qualité/performance/prix des prestations obtenues par rapport au recours à la méthode classique des marchés publics (« value for money »). Tous les retours d'expérience indiquent, qu'en assignant aux partenaires privés des objectifs de résultats et non d'engagements de moyens et en les rémunérant en fonction, non pas de leurs engagements de dépenses mais de leur réalisation de la performance dans le temps, les entités publiques recourant à des PPP accroissent la « value for money » pour les raisons suivantes :

- ils laissent aux partenaires privés la possibilité de s'organiser de la manière la plus efficace ;
- ils peuvent optimiser l'allocation des tâches et des risques de la façon la plus efficace ;
- en organisant une relation de long terme en forme de jeu « gagnant-gagnant », le PPP créé une relation durable dans laquelle le co-contractant est engagé au plan technique, financier et « réputationnel », empêchant les comportements de prédateur ;
- ils assurent un emploi efficace et non spéculatif des investissements privés et, en permettant de mobiliser l'épargne mondiale, apportent à la part du financement d'origine publique un effet de levier maximal sur les capitaux propres et une diminution sensible des coûts de financement ;

[5] Les principes applicables au risque « construction » doivent également s'appliquer aux investissements immatériels.

[6] Le risque de « demande » s'applique également aux péages virtuels liés à la fréquentation ; ce risque ne couvre qu'une partie des risques de recettes. Par ailleurs, le paiement par l'usager final est fréquemment plus sûr que celui par l'Administration dans lequel les composantes facturation, délai, recouvrement, contestabilité sont souvent plus fortes que dans le cas de paiement par le client final. Dans le cas où l'opérateur gère en tout ou partie des ouvrages existants, le risque « premier établissement » se transforme en risque renouvellement/reconstruction/remise en état finale.

- ils permettent de répondre à des besoins d'investissement de long terme sûrs (retraites, assurances…).

Ainsi, comme l'a justement reconnu le Conseil dans le cadre de l'Initiative pour la Croissance pour les infrastructures du réseau transeuropéen, les PPP représentent un outil essentiel de développement économique pour l'ensemble de l'Union, et particulièrement des pays nouveaux entrants en fort besoin d'investissements matériels et immatériels.

3 L'absence d'encadrement communautaire des PPP porte atteinte au respect des principes du Traité

3.1. Droit communautaire et PPP « contractuels »

3.1.1. Un dispositif réglementaire manifestement incomplet

Le droit communautaire prend en compte deux familles de contrats permettant de faire appel à un tiers pour l'exercice d'une activité économique d'intérêt général :

- les Marchés publics, régis par les directives 2004-17 et 2004-18 et définis comme « *des contrats à titre onéreux conclus par écrit entre un ou plusieurs opérateurs économiques et un ou plusieurs pouvoirs adjudicateurs et ayant pour objet l'exécution de travaux, la fourniture de produits ou la prestation de services au sens de la précédente directive* » ;

- les « *Concessions* », qui, de fait, ont été reconnues comme seconde famille de contrats répondant à des besoins spécifiques et de nature distincte des marchés publics dès la directive n° 93/37 portant coordination des procédures de passation des marchés publics de travaux, définissant la « *concession de travaux publics* » comme « *un contrat présentant les mêmes caractères que ceux [des marchés publics de travaux], à l'exception du fait que la contrepartie des travaux consiste soit uniquement dans le droit d'exploiter l'ouvrage, soit dans ce droit assorti d'un prix* ».[7]

  Par la suite, la communication interprétative du 29 avril 2000 a défini les concessions comme « *les actes* […] *par lesquels une autorité publique confie à un tiers la gestion totale ou partielle de services qui relèvent normalement de sa responsabilité et pour lesquels ce tiers assume les risques d'exploitation* ».[8]

  Enfin, les récentes directives relatives aux marchés publics ont défini les contrats de concession – de service et de travaux – par référence auxdits marchés publics, comme les contrats « p*résentant les mêmes caractéristiques qu'un marché public,*

[7] Article 1er, d) de la directive n° 93/37.
[8] § 2.4. de la communication interprétative.

> *à l'exception du fait que la contrepartie [des travaux ou de la prestation de services] consiste soit uniquement dans le droit d'exploiter [l'ouvrage ou le service], soit dans ce droit assorti d'un prix* ».[9]

Alors que les marchés publics bénéficient d'un régime clair et détaillé, l'ensemble des concessions n'est soumis qu'à un encadrement juridique minimal, seuls les principes rappelés par la communication interprétative et la jurisprudence *Telaustria* donnant des indications de principe aux acteurs concernés quant au respect des principes du Traité.

Or, la plupart des partenariats public-privé contractuels répondent aux éléments de définition des concessions, à condition de revenir sur l'interprétation restrictive faite par la communication interprétative du « *droit d'exploiter l'ouvrage ou le service* », lorsqu'elle invoque la rémunération par l'usager comme élément caractéristique indispensable.

Le risque d'exploitation trouve son origine, en effet, dans de nombreux éléments, de fréquentation, de disponibilité des ouvrages, de risques techniques, de financement, d'évolutions des conditions règlementaires et environnementales…..qui ne se réduisent pas au paiement par l'usager.

Il apparaît donc clairement qu'à ce jour, le droit communautaire est **insuffisant** pour définir précisément ces phénomènes, au préjudice du respect des principes du Traité :

- **persistance de discriminations, au détriment notamment des pays ayant développé des législations pour mettre en œuvre les concessions sur des principes de transparence et d'égalité d'accès ;**

- **absence de sécurité juridique, notamment dans les nouveaux pays entrants, créant des risques d'entraves à la liberté d'établissement et à la libre prestation de services dans ces nouveaux pays.**

  Il est également important de souligner que l'insécurité juridique constitue un frein non négligeable à l'afflux de capitaux privés dans ces zones, ce qui en limite la capacité de développement et de rattrapage de l'acquis communautaire.

3.1.2. Les PPP contractuels ne se confondent pas avec les Marchés publics

Comme l'a reconnu elle-même la Commission en éprouvant le besoin de rédiger une communication spécifique aux concessions, et en suscitant la consultation autour du Livre vert aujourd'hui, les PPP contractuels, de nature concessive, ne peuvent s'assimiler aux marchés publics et comportent des caractéristiques substantiellement différentes.

Il s'agit de **contrats de long terme**, **par nature évolutifs**, qui, au-delà de la simple fourniture d'un bien ou d'un service, confient à l'opérateur une mission d'exploitation du service sur la

[9] Directive 2004-18, articles 1-3 et 1-4. La définition de la concession de travaux est inchangée par rapport à celle figurant dans la directive 93/37 précitée.

durée dans un **environnement changeant**. Fondés sur un partage des risques, des critères de performance et d'équilibre économique dans la durée, de tels contrats, par nature adaptables, doivent être, en particulier, **négociés de façon approfondie**, voire **renégociés** dans la durée. Ils mettent donc en place un partenariat durable qui ne peut se résumer à une relation acheteur/fournisseur.

Cette distinction de nature justifie également une distinction sur le plan procédural. Ainsi, si l'introduction de la procédure de « dialogue compétitif » représente une avancée notable pour une meilleure définition des besoins des autorités publiques, s'agissant des « marchés particulièrement complexes », son extension aux PPP contractuels de type concessif apparaît restrictive et peu adaptée aux exigences de tels contrats. Cette procédure ne laisse, en effet, pas de place aux discussions, dans un cadre transparent et équitable, tant pour construire le projet sur l'apport et les suggestions du partenaire, sa réputation et sa capacité à réagir dans la durée, dans une logique de satisfaction durable de l'intérêt général que pour répondre aux évolutions des besoins de l'autorité publique au fur et à mesure de la procédure. Ainsi, la procédure de dialogue compétitif apparaît plus à même de définir le projet que le contrat.

Un tel « dialogue négocié » permet également de procéder aux adaptations du contrat que l'évolution de l'environnement rendra indispensables.

A titre d'exemple, la procédure de passation des délégations de service public en France régies par la loi dite Sapin du 29 janvier 1993[10] fait, après une mise en concurrence organisée selon des règles précises, une large place à la libre négociation et autorise le libre choix des candidats pour l'approfondissement et la mise au point d'une offre finale, dans le respect des principes d'égalité d'accès et de concurrence –sanctionnés, qui plus est, par le droit pénal – au bénéfice de la qualité et de la performance des Services d'intérêt économique général ainsi considérés, et de l'usager final.

Sans être nécessairement la référence en la matière, une telle expérience pourrait légitimement offrir une source d'inspiration au législateur communautaire, dans la prise en compte de la phase de négociation, fondamentalement liée à la complexité et la durée des montages contractuels envisagés et conditionnant leur viabilité économique et sociale.

3.2. Les PPP « institutionnels »

L'Institut se félicite de l'intérêt porté par la Commission aux PPP dits institutionnels, impliquant une coopération entre le secteur public et le secteur privé au sein d'une entité distincte.

Les règles à définir doivent concerner aussi bien l'attribution de l'activité à des organismes mixtes que le choix des partenaires privés ou publics au sein des organismes mixtes ou encore celui des entreprises opératrices par les organismes mixtes, même si cette attribution ne prend pas de forme contractuelle. La clarification des règles doit conduire à un encadrement aussi rigoureux

[10] Loi n°93-122 du 29 janvier 1993 relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques, Titre Ier, Dispositions relatives à la transparence des activités économiques, chapitre IV, les délégations de service public.

que pour les partenariats contractuels. Il convient d'ajouter à cet encadrement, le rappel des règles définissant les « tiers » et de celles relatives à l'égalité d'accès aux subventions publiques.

Une réflexion semble devoir ainsi être menée au niveau communautaire pour déterminer les conditions d'attribution à ce type de sociétés, lorsqu'elles apparaissent comme des tiers à la personne publique, de l'exercice d'une activité d'intérêt économique général.

A titre d'exemple, en France, les société d'économie mixte locales sont soumises aux dispositions de la loi Sapin et mises en concurrence lorsqu'elles se portent candidates pour les contrats de délégation de service public des collectivités locales qui sont leurs actionnaires majoritaires, suivant une décision du Conseil constitutionnel.[11]

En outre, lorsque l'organisme mixte n'est pas « tiers » et sauf dans les cas où les missions sont le prolongement direct de prérogatives régaliennes, les règles de bonne gouvernance (séparation des fonctions d'actionnaire, de direction, de contrôle, d'autorité organisatrice, voire d'autorité politique) doivent s'imposer pour gérer un service en respectant des obligations qui dans la plupart des cas se trouvent intégrées dans le cahier des charges du contrat de service public lorsque l'opérateur est un « tiers ». Il convient également, dans ces hypothèses, que la durée de l'habilitation de l'organisme non tiers soit limitée dans le temps, par exemple en fonction de la durée des engagements, et que les partenaires privés de l'entité publique soient *a minima* mis en concurrence.

Par ailleurs, l'entrée dans le capital des organismes tiers, à majorité publique ou non, devrait être organisée avec d'autant plus de soins pour les partenaires privés que leur pouvoir effectif d'administration sera élevé et qu'ils apporteront des prestations pour l'organisme tiers. Il en est de même pour l'entrée dans le capital des personnes publiques non autorités organisatrices du service, lorsqu'elles seront chargées de l'exécution de tout ou partie des activités de l'organisme mixte tiers.

Les différentes dimensions du Partenariat institutionnel –quasi-mode de gestion, opérateur de service public, entreprise de droit commun- doivent être analysées en profondeur pour en formuler les fondamentaux et se donner les moyens d'un bon usage de ces montages. Le dossier est ouvert par l'Institut plus sous la forme d'interrogations que de propositions, afin que soit menée cette analyse associant l'ensemble des partenaires et notamment les Sociétés d'Economie Mixte ou plus généralement les « entreprises publiques locales ».

4- Les propositions de l'IGD en réponse globale au Livre vert

4.1. La publication d'une directive pour les PPP contractuels en concession

Les développements qui précèdent justifient une nécessaire intervention du droit communautaire pour mettre en place un régime communautaire des partenariats public-privé, reprenant également l'ensemble des concessions, qui soit clairement distinct du régime des marchés publics

[11] CC, 20 janvier 1993, n° 92-316 DC.

et garantisse, sur le territoire de l'Union, sécurité juridique, reconnaissance mutuelle et effectivité du marché intérieur, ainsi que les conditions économiques de développement des investissements.

L'Institut de la Gestion déléguée estime que seule une directive, donnant aux PPP contractuels qualifiés de "concessions" un régime législatif à l'échelle communautaire, serait à même d'assurer stabilité juridique et cohérence économique. Une communication interprétative, même allant au-delà de celle de 2000, maintiendrait une incertitude sur le régime de tels contrats, de nature à pénaliser le développement du marché intérieur et n'écartant pas la menace de leur absorption progressive par la régime des marchés publics, dont nous avons cherché à démontrer qu'il n'était pas adapté, sur un plan économique, à la particularité de ces contrats complexes de longue durée.

Une telle directive devrait notamment aborder les points suivants :

- **un approfondissement de la définition actuelle des concessions** permettant d'y ranger les PPP contractuels répondant à des critères minima d'objet et de risques : il apparaît en effet nécessaire, au préalable, d'aborder la question de la définition de la notion de "concessions" dans le sens d'une meilleure prise en compte de sa réalité économique, autour de la notion de risque (risque de construction, de reconstruction ou de remise en état, risques de demande ou de disponibilité, transfert de risque, longue durée) ;

- **l'obligation de soumettre la passation de ces contrats à une procédure préalable de mise à concurrence**, suivie d’une phase de "dialogue librement négocié" indispensable à la complexité des montages contractuels considérés, et rigoureuse en terme de non-discrimination et de transparence, donc de traçabilité.

4.2. La fixation de règles pour les PPP institutionnels

Il apparaît que toute attribution par la personne publique du droit d'exercer une activité économique au profit **d'un tiers**, doit respecter les principes de transparence et de concurrence.

Pour garantir le libre choix et la réversibilité des choix des modes de gestion, nous proposons d’encadrer les partenariats institutionnels par des règles de fonctionnement cohérentes et exhaustives s’étendant également aux relations organiques avec les partenaires publics.

Par ailleurs, la complexité de l’analyse économique appliquée à ces montages conduit à s’interroger sur la pertinence d’une triple mise en concurrence : celle de l’organisme pour l’obtention du droit d’exploiter, celle du choix du partenaire privé au sein de l’organisme, enfin celle des prestataires. L’interdépendance économique entre ces différents niveaux de compétition doit être étudiée pour aider à la définition d’options sur les modalités d’organisation faisant une juste place à la concurrence ; la mise en concurrence à tous les niveaux limite sensiblement les responsabilités : il convient également d’identifier les arrangements efficaces.

Cet encadrement doit *a minima* comprendre les quatre éléments suivants :

- rappel des règles de saine concurrence entre les opérateurs publics, mixtes ou privés, sans oublier le cas des régies ou des établissements publics ;

- définition de la notion de tiers –fondement de la pratique contractuelle ;
- organisation de l'égal accès aux subventions publiques et harmonisation des conditions de compétition ;
- organisation de la concurrence applicable aux organismes mixtes selon qu'ils sont tiers ou pas, à adapter et répartir entre les trois niveaux : attribution des missions, participation au capital et activités de l'organisme.

En complément de l'élaboration d'une Directive relative aux PPP contractuels, donc en concession, une réflexion pourrait donc être utilement menée au niveau communautaire sur les quatre éléments ci-dessus. L'IGD ne peut que souhaiter sur cette question, l'intervention à terme d'une législation de droit dérivée, qui pourrait être précédée, à l'instar de ce que la Commission a déjà engagé pour les concessions, d'une communication interprétative sur le sujet.

* * *

Telles sont les positions de l'Institut de la Gestion Déléguée, qui souhaite que l'Union se dote de mesures d'ordre législatif pour encadrer, sécuriser et garantir le développement des partenariats public-privé dans l'Union.

Nous sommes, par ailleurs, à l'entière disposition des membres de la Commission européenne, et de leurs cabinets, pour présenter ces propositions et développer notre argumentation. Nous ne manquerons pas, à cet effet, de prendre plusieurs contacts utiles dès septembre 2004, et espérons que l'expérience de nos membres sur le sujet, tant en France qu'en Europe et dans le monde entier, sera positivement accueillie, dans le souci du développement global et durable des services d'intérêt économique général en Europe.

Deuxième partie : les réponses aux questions du Livre vert

Question 1. Quels types de montages de PPP purement contractuel connaissez-vous ? Ces montages font-ils l'objet d'un encadrement spécifique (législatif ou autre) dans votre pays ?

Les membres de l'Institut de la Gestion Déléguée ont eu à connaître de la quasi-totalité des montages pratiqués en France et, pour certains de ses membres, la connaissance des montages dépasse le cadre européen.

L'encadrement des montages PPP en France est ancien et développé, au travers des concessions mais aussi des contrats à risques répartis,[12] des partenariats statutaires ou capitalistiques,[13] des entreprises à vocation mixte public-privé.[14]

Les principaux textes législatifs français[15] couvrant le champ des responsabilités locales en matière de PPP sont complétés par un nombre important de textes plus spécialisés[16] ou de décisions jurisprudentielles parachevant un édifice juridique relativement complet.

Question 2. De l'avis de la Commission, la transposition en droit national de la procédure de dialogue compétitif permettra aux parties concernées de disposer d'une procédure particulièrement adaptée à la passation des contrats qualifiés de marchés publics lors de la mise en place d'un PPP de type purement contractuel, tout en préservant les droits fondamentaux des opérateurs économiques. Partagez-vous ce point de vue ? Si non, pourquoi ?

Avant de présenter une procédure comme susceptible de devenir la procédure universelle pour les PPP, il nous semble qu'il conviendrait, au préalable, d'analyser les procédures déjà utilisées et qui ont fait leurs preuves. Il nous semble prématuré, à ce stade, d'affirmer que la procédure de dialogue compétitif serait la seule procédure de sélection appropriée, tant pour les marchés publics que pour l'ensemble des PPP.

[12] Les contrats de gérance annoncent les BOT et les PFI ; les garanties d'achat ou souscriptions publiques ont permis de réduire les risques d'entreprises que l'Etat ne voulait ou ne pouvait plus financer.

[13] Les sociétés à capitaux mixtes ont pris plusieurs formes (sociétés mixtes, SICAE, …).

[14] L'entreprise à vocation publique-privée a connu un grand essor avec l'aménagement urbain ou commercial dans la deuxième partie du XIX^{ème} siècle.

[15] 1982-décentralisation, 1983-SEML, 1988-intercommunalité, 1992-ATR, 1993-Délégation de service public Sapin, 1999-Chevènement, 2004-contrat de partenariat.

[16] Textes sectoriels (transport, eau, assainissement, déchets, énergies, …), textes relatifs à la gestion des propriétés publiques.

S’agissant de la France, la loi Sapin du 29 janvier 1993 qui traite notamment des procédures de dévolution des délégations de service public,[17] fait une large place à la libre négociation et autorise le libre choix du nombre de candidats retenus pour l’approfondissement et la mise au point d’une offre finale. Dans cette procédure, la personne publique considère bien sûr ce que le partenaire propose, comme dans le dialogue compétitif, mais peut davantage prendre en compte, d’un point de vue prospectif, la capacité du partenaire à réagir, à s’adapter et à intégrer des objectifs non financiers dans une logique plus durable de satisfaction de l’intérêt général.

Or, à ce jour, les services publics concernés en France sont plutôt plus compétitifs que la moyenne,[18] les opérateurs sont considérés comme performants et leurs marges financières nettes restent plutôt contenues.

Il apparaît donc, au vu de cette expérience reconnue et confirmée, qu’en complément de l’appel d’offre traditionnel et du dialogue compétitif, une troisième procédure de passation comportant une part de négociation finale reste nécessaire, car plus adaptée à la nature des concessions : longue durée, adaptation future du contrat, transfert de risques, …

En effet, tout contrat dit « complet » ne s’accommode pas facilement de la longue durée car l’évolution de l’environnement fait perdre progressivement la visibilité technique et financière à l’offre initiale. Ce ne sont plus des marchés publics à 3 ans qu’il faut conclure mais des contrats à 20, 30 ans ou plus. La compétition initiale exacerbée et détaillée dans le cadre d’une procédure du type dialogue compétitif ne dévoilera jamais la capacité de l’opérateur à contribuer à l’intérêt général à moyen et à long terme. Seul le libre choix éclairé aidera à bâtir les bonnes concessions du futur.

Question 3. En ce qui concerne ces contrats, existe-t-il selon vous des points autres que ceux relatifs au choix de la procédure d'adjudication, susceptibles de poser problème au regard du droit communautaire des marchés publics? Si oui, lesquels et pour quelles raisons ?

Aujourd’hui les différences de traitement résultant des règles et usages nationaux aboutissent, dans certains Etats, à surexposer les opérateurs de certains secteurs sans leur offrir de contrepartie au titre de la réciprocité alors que dans d’autres secteurs, les droits exclusifs sont cantonnés dans des modes de gestion imposés au sein desquels les opérateurs ne peuvent être vraiment stimulés.

[17] Loi n°93-122 du 29 janvier 1993 relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques, Titre Ier, Dispositions relatives à la transparence des activités économiques, chapitre IV, Les délégations de service public.

[18] Annexe : étude NUS sur les prix de l’eau reprise dans AQUAE.

Question 4. Avez-vous déjà organisé, participé, ou souhaité organiser ou participer à une procédure d'attribution de concession au sein de l'Union ?
Quelle expérience en avez-vous ?

Les membres de l'Institut participent à de telles procédures dans différentes fonctions (opérateurs, autorités concédantes), sachant que la définition de la concession n'est pas stabilisée, concernant le droit d'exploiter l'ouvrage (qui ne s'identifie pas à notre sens obligatoirement à la rémunération par l'usager du service).

Question 5. Estimez-vous que le cadre juridique communautaire actuel est suffisamment précis pour assurer la participation concrète et effective de sociétés ou groupements non nationaux aux procédures de passation de concessions ? Une concurrence réelle est-elle, selon vous, habituellement assurée dans ce cadre ?

La grande majorité des concessions de travaux en France font l'objet d'une publicité par la Commission du fait des seuils financiers en vigueur.

Il s'avère que cette publicité a des effets inégaux selon les secteurs quant à l'augmentation du nombre de candidats souhaitant soumissionner et quant à l'origine géographique de ces candidats ; **l'intérêt à harmoniser les règles de procédures est très grand** et se révèle tout spécialement dans le cas des **opérations transfrontalières** qui mettent en évidence la disparité des règles nationales existantes.

La publicité communautaire est l'instrument minimal de l'harmonisation ; celle-ci doit être complétée par une appréhension claire et non restrictive des concessions dans une approche mettant en évidence les caractéristiques essentielles de ces contrats, des procédures d'attribution disponibles (appel d'offres restreint, négociation après appel à propositions) et de leurs domaines de pertinence respectifs.

Question 6. Pensez-vous qu'une initiative législative communautaire, visant à encadrer la procédure de passation de concessions, est souhaitable ?

Nous répondons favorablement à cette question sur la pertinence d'une initiative législative communautaire visant, au-delà de sa définition, à encadrer la procédure de passation de concessions. Cette harmonisation doit également s'appliquer pour limiter les disparités entre opérateurs et entre modes de gestion.

Cette initiative serait une réponse pertinente pour les pays européens souhaitant se doter d'une législation nationale, qui pourraient utilement transposer une telle directive. L'Institut reçoit régulièrement des demandes allant dans ce sens, regrettant de ne pouvoir y répondre favorablement à ce jour.

Question 7. De manière plus générale, si vous estimez qu'il est nécessaire que la Commission propose une nouvelle action législative, existerait-il à votre avis des raisons objectives de viser dans cet acte tous les PPP de type contractuel, qu'ils soient qualifiés de marchés publics ou de concessions, pour les soumettre à des régimes de passation identique ?

Les procédures de passation doivent être celles répondant le mieux aux objectifs visés par les contrats concernés. Notre position est d'affirmer à nouveau que la diversité de nature des contrats et l'expérience des procédures existantes, efficaces et éprouvées, doivent être prises en considération. L'unicité de procédure ne peut être une fin en soi et les procédures d'attribution des marchés publics ne conviennent généralement pas aux PPP contractuels (cf. réponse à la question n°2).

Question 8. Selon votre expérience, l'accès des opérateurs non nationaux aux formules de PPP d'initiative privée est-il assuré ? En particulier, lorsqu'il existe une invitation des pouvoirs adjudicateurs à présenter une initiative, cette invitation fait-elle généralement l'objet d'une publicité adéquate permettant l'information de tous les opérateurs intéressés ? Une procédure de sélection véritablement concurrentielle est-elle organisée pour assurer la mise en œuvre du projet retenu ?

Cette question soulève le degré inégal d'ouverture des pays et la difficulté à organiser la réciprocité des mesures en faveur d'une meilleure application des principes du Traité. Le sujet des PPP est d'autant plus délicat à traiter que les principes du Traité ne peuvent y recevoir une déclinaison mécanique.

Les adaptations à apporter à ces principes dans les cahiers des charges et les procédures de mise en œuvre sont directement liées au contexte institutionnel et culturel de chaque pays. La France, en ouvrant les concessions locales, a pris les risques consécutifs à un défaut de réciprocité. Le réalisme économique a prévalu en provoquant la stimulation des opérateurs français sur le territoire national et en leur donnant des capacités et une compétitivité nouvelles à intervenir en dehors de leurs champs habituels.

Question 9. Quelle serait selon vous la meilleure formule pour assurer le développement des PPP d'initiative privée dans l'Union européenne tout en assurant le respect des principes de transparence, de non discrimination et d'égalité de traitement ?

La question est de trancher si cette initiative doit conduire à traiter avec l'inventeur du projet ou au contraire si le projet doit faire l'objet d'une mise en compétition.

La seconde solution apparaît dans la plupart des cas plus conforme aux principes du Traité. Plusieurs options doivent être prises pour la rémunération de l'inventeur, selon qu'il est le candidat retenu ou pas. Dans le cas où l'idée est mise en œuvre par un autre candidat, il convient également de distinguer les circonstances où le rachat de l'idée est possible de celles où elle génère des droits d'usage consécutifs à sa protection. En aucun cas, il ne faudrait admettre que l'idée ne puisse être valorisée car son inventeur en a admis l'utilisation dès lors qu'il en a proposé la mise en œuvre. Ce dernier ne peut subordonner son utilisation à son exclusivité de mise en œuvre. Il faut admettre, en contrepartie, que l'auteur soit justement récompensé.

D'une façon générale, les opérateurs et professionnels du secteur sont très attentifs aux conditions du respect de la propriété intellectuelle et industrielle par les autorités organisatrices, en l'absence duquel il serait illusoire d'espérer recueillir des propositions novatrices spontanées.

Question 10. Quelle expérience avez-vous de la phase postérieure à la sélection du partenaire privé dans les opérations de PPP contractuels ?

Les membres de l'IGD ont une grande expérience de la mise en œuvre et du suivi dans les PPP contractuels.

La spécificité des contrats de long terme réside principalement dans la capacité à tenir les engagements dans un environnement évolutif. Le suivi du contrat doit être organisé et garantir la transparence requise afin de pouvoir juger dans le temps de sa bonne exécution, de la performance de l'opérateur, des gains de productivité et de leur répartition.

Question 11. Avez-vous connaissance de cas dans lesquels les conditions d'exécution – y compris les clauses d'adaptation dans le temps - ont pu avoir une incidence discriminatoire ou ont pu constituer une entrave injustifiée à la libre prestation de services ou à la liberté d'établissement ? Si oui, pouvez-vous décrire le type de problèmes rencontrés ?

L'IGD n'a pas connaissance de tels cas.

Question 12. Avez-vous connaissance de pratiques ou de mécanismes d'évaluation d'offres ayant des incidences discriminatoires ?

L'IGD n'a pas connaissance de tels cas.

Question 13. Partagez-vous le constat de la Commission selon lequel certains montages du type "step-in" peuvent poser problème en termes de transparence et d'égalité de traitement ? Connaissez vous d'autres "clauses types" dont la mise en œuvre est susceptible de poser des problèmes similaires ?

Les clauses de « step-in » relèvent de la volonté des banquiers de limiter leurs risques et apparaissent aujourd'hui indispensables à la mise en œuvre de beaucoup de PPP, en réduisant, de fait, le coût du financement. Par ailleurs, à ce jour, aucune clause de ce type n'a jamais donné lieu à exécution.

Elles ne semblent pas poser, par elles-mêmes, de problèmes en terme de transparence et d'égalité de traitement. S'agissant des cessions, il convient de s'écarter de l'arbitraire consistant à prévoir l'accord systématique de la personne publique, qui devra, lorsqu'il sera prévu, être fondé sur des motifs objectifs liés à la bonne exécution du contrat.

Ces clauses, de même que le champ des adaptations prévisibles à l'origine du contrat, doivent être clairement décrites dans les contrats.

Question 14. Estimez-vous qu'il est nécessaire de clarifier au niveau communautaire certains aspects relevant du cadre contractuel des PPP ? Si oui, sur quel(s) aspect(s) devrait porter cette clarification ?

Nous rappelons que **l'Institut de la Gestion Déléguée souhaite que l'Union Européenne se dote d'une directive « concessions** distincte de celles relatives aux marchés publics avec pour thèmes principaux :

- la définition des concessions ;
- la clarification des critères (ampleur des missions et degré de délégation, durée et adaptation des conditions, allocation des risques et modalités de rémunération, contrôle et transparence, traitement comptable, fiscal et statistique) ;
- la définition et le champ des procédures d'attribution.

Question 15. Dans le contexte des opérations de PPP, avez-vous connaissance de problèmes particuliers rencontrés en matière de sous-traitance ? Lesquels ?

Question 16. Le phénomène des PPP de type contractuel, impliquant le transfert d'un ensemble de tâches à un unique partenaire privé, justifie-t-il selon vous que des règles plus détaillées et/ou d'un champ d'application plus large soient mise en place en ce qui concerne le phénomène de sous-traitance ?

Question 17. De manière plus générale, estimez-vous qu'une initiative complémentaire devrait être prise au niveau communautaire en vue de clarifier, ou d'aménager, les règles relatives à la sous-traitance ?

L'Institut ne s'est pas directement intéressé aux questions de sous-traitance. Plusieurs aspects de cette question reviennent cependant de manière récurrente :

- difficultés dans la phase d'exécution des contrats lorsque les garanties appelées dépassent la surface des sous-traitants et de leurs garants ;
- règles d'hygiène, de sécurité et protection sociale disparates favorisant les déplacements de main d'œuvre et pénalisant les entreprises socialement responsables ;
- incapacité de nombreux sous-traitants à garantir leur intervention en couvrant l'ensemble des risques liés (disponibilité, délais, pertes des utilisateurs…).

Question 18. Quelle expérience avez-vous de la mise en place d'opérations de PPP de type institutionnalisé ? En particulier, votre expérience vous conduit-elle à penser que le droit communautaire des marchés publics et des concessions est respecté dans le cas de montages de PPP institutionnalisés ? Si non, pourquoi ?

Les questions de gouvernance du PPP institutionnalisé sont inséparables de celles liées au choix des partenaires au sein des organismes mixtes et de la question de la mise en concurrence des missions qui lui sont confiées.

Les contraintes d'organisation qui pèsent sur le tour de table et le contrôle des PPP institutionnalisés sont grandes si l'on veut organiser une véritable séparation des pouvoirs entre les instances dirigeantes et celles chargées du contrôle, notamment lorsqu'elles émanent d'une autorité publique unique. En fonction des mesures prises pour prendre en compte ces contraintes, il convient d'adapter le dispositif de sélection des partenaires.

L'attribution de missions statutaires aux organismes mixtes doit rester possible lorsqu'ils ne sont pas tiers, au regard des critères dégagés par la jurisprudence *Teckal* caractérisant les phénomènes « in house ». La mise en compétition des organismes mixtes pour pouvoir exercer cette mission doit être la règle au moins lorsque les critères de la jurisprudence *Teckal* ne sont pas ou plus remplis Dans ce cas, même si d'autres personnes publiques participent au tour de table, il y a bien attribution d'une mission économique à un tiers (quel que soit son statut et celui de l'acte attributif) et les principes du Traité doivent s'appliquer.

Il en est de même lorsqu'une collectivité publique propose ses services à une autre collectivité pour une compétence que cette dernière ne lui a pas transférée[19]. Dans ce cas, la collectivité prestataire doit être mise en concurrence et répercuter les coûts réels dans son offre. Elle doit également s'interdire de rendre son offre anormalement basse dans l'intention de proposer de remplacer la prestation par un transfert de la compétence correspondante à son profit. En effet, ce transfert aurait pour effet de mutualiser les coûts dans un ensemble plus large, permettant de ne pas faire apparaître la sous-évaluation des prestations et diluant le manque à gagner dans l'ensemble des charges de la collectivité prestataire devenue attributaire de la compétence.

Question 19. Estimez-vous qu'une initiative doit être prise au niveau communautaire en vue de clarifier ou de préciser les obligations des organismes adjudicateurs quant aux conditions dans lesquelles doivent être mis en concurrence les opérateurs potentiellement intéressés par un projet de type institutionnalisé ? Si oui, sur quels points particuliers et sous quelle forme ? Si non, pourquoi ? De façon générale et indépendamment des questions soulevées dans ce document :

L'IGD souhaite ainsi que l'Union engage une réflexion sur l'utilité d'un cadrage législatif du partenariat institutionnalisé, éclairant les notions suivantes :

- Définition
- Règles de gouvernance et harmonisation des conditions de compétition et de gestion
- Sélection des partenaires
- Notion de « tiers » et procédures d'attribution
- Limitation de la durée d'exercice de l'activité par l'entité mixte
- Egalité d'accès aux subventions publiques

Compte tenu de la complexité du sujet et des différences d'appréhension culturelle selon les pays de l'Union, **une démarche progressive, commençant par l'adoption d'une communication interprétative** de la Commission, pourrait être opportune à ce stade.

Question 20. Quelles sont les mesures ou les pratiques que vous estimez constitutives d'entraves à la mise en place des PPP au sein de l'Union européenne ?

Certaines mesures ou pratiques apparaissent effectivement de nature à entraver la mise en place de PPP au sein de l'Union européenne, non pas forcément par elle-même, mais par manque d'encadrement juridique ou de position à leur égard. Il s'agit notamment :

- de l'imprécision de la notion de « in-house », qui mériterait d'être définie et encadrée ;

[19] Cf. en France, arrêt du Conseil d'Etat, 20 mai 1988, *Communauté de communes du Piémont de Barr.*

- d’une meilleure connexion entre développement des PPP et utilisation des fonds strucurels dans les pays nouveaux entrants ;

Question 21. Connaissez-vous d’autres formes de PPP développées dans les pays en dehors de l'Union ? Connaissez-vous des exemples de 'bonnes pratiques' développées dans ce cadre, dont l’Union pourrait s'inspirer ? Si oui, lesquelles ?

L’IGD n’a pas de réponse utile à cette question.

Question 22. De façon plus générale, et compte tenu des besoins importants d’investissements nécessaires dans certains Etats membres, afin de poursuivre un développement économique social et durable, estimez-vous utile une réflexion collective sur ces questions qui se poursuivrait à des intervalles réguliers entre les acteurs concernés, et qui permettrait un échange des meilleures pratiques ? Est-ce que vous considérez que la Commission devrait animer un tel réseau ?

L’Institut de la Gestion Déléguée note que le Livre vert sur les PPP n’aborde le sujet des PPP que d’un point de vue procédural, sans les situer comme un outil majeur du développement durable de l’Europe. Une réflexion plus générale sur les financements, leur objet, leurs caractéristiques principales, et les formes de concurrence qu’ils requièrent mériterait d’être menée au niveau communautaire. L’IGD se tient à la disposition de la Commission dans le cadre de travaux qui pourraient être utilement menés sur ce sujet.

La question de l’animation par la Commission d’une réflexion et d’un réseau sur le PPP est très intéressante notamment pour les organismes existants comme l’Institut de la Gestion Déléguée.

REPONSE DU MEDEF AU LIVRE VERT DE LA COMMISSION EUROPEENNE SUR LES PARTENARIATS PUBLIC/PRIVE ET LE DROIT COMMUNAUTAIRE DES MARCHES PUBLICS ET DES CONCESSIONS

Le MEDEF, organisation professionnelle représentant plus de 750 000 entreprises françaises de toutes tailles et de tous secteurs, a été consulté sur le Livre vert de la Commission européenne concernant les partenariat public/privé (PPP) et le droit communautaire des marchés publics et des concessions.

Avant de répondre aux questions posées par la Commission, il propose une synthèse introductive de sa position.

Synthèse introductive

Le MEDEF accueille très favorablement la décision de la Commission européenne, après sa Communication interprétative du 29 avril 2000, d'approfondir sa réflexion sur l'ensemble des modes de coopération entre les autorités publiques et les entreprises pour la mise en œuvre des activités d'intérêt général, à juste titre qualifiés de phénomène « *partenariat public/privé* ». Il est résolument convaincu de l'intérêt social, politique et économique de ces contrats pour la cohésion de l'Union, le développement de chacun de ses membres, particulièrement les nouveaux entrants, mais aussi pour chacun de ses habitants. Il se réjouit donc de la reconnaissance du rôle que l'entreprise, en sa qualité d'opérateur d'activités économiques, peut jouer aux côtés des autorités publiques, pour y contribuer.

Le MEDEF approuve l'approche pragmatique de la Commission européenne qui s'efforce de cerner le phénomène du PPP qui, sous des formes juridiques diverses, recouvre des réalités profondément semblables justifiant une démarche commune.

Pour clarifier ses propos, le MEDEF estime utile de préciser le sens qu'il entend donner dans sa réponse aux termes de « PPP » et de « concession ».

Il utilisera le vocable de « *PPP* » pour évoquer toutes les formes de relations entre une autorité publique et un tiers emportant attribution du droit d'exercer une activité économique d'intérêt général (dans les conditions rappelées aux paragraphes suivants). Sont exclues les relations relevant de la définition des marchés publics au sens des Directives 2004/17 et 2004/18, que cette relation soit contractuelle ou non. Il réservera le terme de « *concession* » à tous les contrats ayant un tel objet, dès lors qu'ils ne constituent pas un marché public au sens desdites directives. Cette notion de concession inclut les concessions de travaux publics régies par des règles particulières insérées dans la Directive 2004/18. Enfin, le vocable de « *PPP institutionnels* » sera retenu pour tous les PPP qui ne se présentent pas sous la forme de contrats de concession.

Tous les PPP - qu'ils prennent ou non la forme d'un contrat - ont un objet commun qui les caractérise mais surtout qui justifie pour eux un régime particulier. Le MEDEF entend insister dans ses propos introductifs sur cette question de l'objet qui lui paraît primordiale :

Dans un PPP, l'autorité publique, par son initiative, ses actes et ses décisions, confère à un tiers - qui peut être une entreprise à capitaux publics ou privés mais aussi une autre entité publique - le droit d'exercer une activité économique relevant de ses prérogatives ou de sa compétence (qu'elle aurait pu ou dû exercer elle-même si elle ne l'avait pas confiée à un tiers). Il s'agit, le plus souvent, d'un service d'intérêt économique général (SIEG).

Le transfert de responsabilité ainsi effectué est partiel car ce mode de gestion d'un SIEG se caractérise par la dissociation de deux fonctions, celle d'organisation du service rendu (sa définition, son périmètre, ses tarifs…) qui reste la prérogative de l'entité publique (l'Autorité Organisatrice) et celle de la production ou de la prestation du service rendu qui, seule, constitue une activité économique et peut être confiée à l'entreprise qualifiée alors d'« *opérateur* ». Ce dernier exerce donc l'activité sur les initiatives et sous le contrôle de l'autorité publique qui se comporte en entité ayant des obligations vis-à-vis des habitants en termes d'activité économique mais qui les exerce en définissant les contenus, les besoins, les attentes et en confiant à un tiers la responsabilité de leur exécution. Autorité Organisatrice et opérateur sont donc co-acteurs d'une même mission d'intérêt général, et coresponsables de la bonne exécution d'un SIEG.

Un second trait commun caractérise les PPP : ils se distinguent des marchés publics par le rôle attendu de l'entreprise et le mode d'exécution de la mission confiée qui implique durée, initiative, adaptation, autonomie et engagements de la part de l'entreprise ce qui implique plus de contrôle, sanction et droit d'intervention par l'Autorité Organisatrice. Les accords initiaux sont moins conclus dans l'intérêt des parties que dans celui des habitants bénéficiaires du service confié qui doivent rester la référence des deux acteurs et, de ce fait, céder devant les nécessités de l'intérêt général et l'évolution des besoins.

Cette dévolution du droit d'exercer une activité économique, caractéristique première du PPP, ne passe pas nécessairement par un contrat, en tous cas pas par un contrat formalisé en tant que tel. Elle peut se concrétiser par un acte juridique unilatéral (par exemple dans des statuts d'une entité créée spécifiquement) mais aussi, par l'attribution d'un droit économique, tels que le droit à une contribution publique, le droit d'utiliser une facilité essentielle, des droits exclusifs ou spéciaux permettant *de facto* d'exercer une activité qui, sans ces aides, ne serait pas économiquement rentable. Il y a donc toujours, en réalité, dans un PPP un acte de dévolution à un tiers, qu'il soit explicite (un contrat de concession) ou implicite (le PPP institutionnel). En ce sens, le PPP s'oppose à l'autre seul mode possible de gestion des SIEG, celui selon lequel l'Autorité Organisatrice décide d'exploiter elle-même ou par ses propres services ou assimilés (entités « *in house* ») avec, le cas échéant, l'intervention ponctuelle d'entreprises dans le cadre de marchés publics.

Or, pour tous les cas d'attribution du droit d'exercer une activité économique, le Traité de l'Union européenne exige le respect des principes découlant des articles 43 et 49 (transparence, égalité de traitement, proportionnalité et reconnaissance mutuelle). La Commission européenne l'a très justement relevé et le MEDEF est très favorable à cette analyse.

Toutefois, le texte du Livre vert pourrait laisser penser que la Commission européenne envisage d'aller au plus simple et à la préparation d'un instrument législatif communautaire complémentaire nouveau et spécifique aux seules concessions (PPP contractuels autres que les marchés publics). Ce serait méconnaître le fait qu'en réalité, les PPP institutionnels dissimulent très souvent un contrat, ou au moins l'attribution d'une activité économique à un tiers, et qu'ils doivent par conséquent également respecter les règles du Traité. Succomber à la tentation de cette facilité serait tout à fait regrettable et ne répondrait pas aux véritables enjeux d'ouverture de ce type d'activité économique aux règles de la concurrence ni aux attentes des entreprises françaises. L'effet d'éviction qui s'ensuivrait à l'encontre des formes soumises à réglementation au profit de celles qui ne le seraient pas serait inadmissible. Le MEDEF est en outre convaincu que l'excès de réglementation de certaines formes de PPP aurait paradoxalement un effet anticoncurrentiel, en favorisant la fermeture de marchés par le renforcement de PPP institutionnels qui, trop souvent, ne prévoient pas de remise en concurrence périodique.

En définitive, les entreprises françaises sont moins préoccupées par les conditions de passation des concessions que par les conditions dans lesquelles se mettent en place nombre de PPP institutionnels et les fermetures de marchés qui en découlent.

Le MEDEF partage l'avis de la Commission européenne selon lequel il serait souhaitable d'harmoniser, entre les différents Etats membres, les règles de passation des contrats de concession. Mais il est avant tout convaincu qu'il ne faut pas, par le biais de procédures trop contraignantes, tarir le courant encore timide mais prometteur d'ouvertures au PPP de la gestion de SIEG actuellement en autoproduction par l'autorité publique. Il craint également que la mise en place de règles inadaptées ou trop rigides sous le processus de compétition fasse obstacle à l'enrichissement qu'autorise la mise au point des droits et obligations des partenaires à un PPP, au cours d'un processus de discussions itératives.

⇨ Le MEDEF attend beaucoup d'une intervention communautaire qu'il appelle de ses vœux. Il est toutefois d'avis qu'en l'état, il serait prématuré d'élaborer un droit nouveau pour toutes les formes de PPP. Il serait plus rapide, plus efficace et surtout plus réaliste de se contenter de rappeler fermement les principes du Traité qui doivent s'appliquer à toutes les formes de PPP, quelle qu'en soit la nature juridique. Il ne paraît pas opportun de faire figurer ces rappels du droit existant dans une directive ; ils pourraient faire l'objet d'une communication interprétative plus ambitieuse que celle du 29 avril 2000, notamment en ce qu'elle y inclurait les PPP institutionnels. Cette étape permettra de préparer une directive ultérieure pour tous les PPP.

Le MEDEF développera ces différents points dans ses réponses aux différentes questions de la Commission européenne.

Question 1 : Quels types de montages de PPP purement contractuel connaissez-vous ?
Ces montages font-ils l'objet d'un encadrement spécifique (législatif ou autre) dans votre pays ?

1. TYPES DE CONTRATS DE CONCESSION

Pour clarifier sa réponse sur le PPP contractuel (qu'il appelle concession – à distinguer de marchés publics), le MEDEF rappelle ses propos introductifs selon lesquels dans tout PPP apparemment institutionnel, il y a en réalité contrat implicite d'attribution à un tiers du droit d'exercer une activité économique.

Les montages constatés sont très variés et c'est heureux. En effet, l'important est d'assurer la liberté contractuelle. Par ailleurs, il doit toujours être possible aux autorités publiques et aux entreprises de construire des relations contractuelles adaptées aux décisions publiques, aux besoins des habitants mais aussi au contexte juridique qu'il convient de respecter.

De ce fait, toute tentative de classification a un caractère artificiel sur le plan opérationnel. Ces classifications ne se recouvrent pas selon les systèmes juridiques, dans la mesure où il existe un continuum de « types » contractuels selon la nature des missions confiées et les conditions dans lesquelles elles sont confiées, l'étendue des engagements et responsabilités demandées à l'entreprises, des risque transférés… Par suite, les classifications vont dépendre des critères privilégiés de caractérisation. D'où l'importance d'identifier l'essentiel et notamment les éléments justifiant un régime juridique spécifique.

Les contrats peuvent être classés :

- selon le régime des biens, selon qu'ils sont mis à disposition ou qu'ils sont réalisés (et éventuellement) financés par l'entreprise (avec ou sans retour obligatoire à la personne publique),
- selon l'objet de la mission : service directement rendu aux habitants au lieu et place de la personne publique, ou service rendu à la personne publique pour contribuer à des missions qu'elle se réserve,
- selon la nature des risques assumés par l'entreprise par rapport à la performance promise,

- selon la nature et l'importance des risques économiques inhérents à l'activité assumée par l'entreprise (risque de fréquentation, risques du niveau des recettes commerciales, risque de la demande…).

A partir de ces différents critères, le MEDEF s'est efforcé d'établir une typologie des contrats qu'il connaît (voir en annexe).

2. PRATIQUE ET DROIT ADMINISTRATIFS FRANÇAIS

Le droit administratif français a été essentiellement construit par le juge à partir de la notion de service public. Traditionnellement, il a distingué deux grands types de relations dans les relations entre les autorités publiques et les entreprises : les relations qui relèvent des marchés publics au sens français du Code des marchés et toutes les autres formes de relations contractuelles. Jusqu'en 1993, seul le code des marchés publics était applicable. Pour tous les autres types de relations contractuelles, la tradition administrative française était très sensible au caractère très spécifique et polymorphe des liens pouvant se nouer entre l'autorité publique responsable et l'entreprise chargée de l'exécution d'un service public.

Il a progressivement été reconnu que le service public et l'intérêt général primaient sur la force du contrat et le juge administratif français a progressivement élaboré des principes du droit de ces contrats, consubstantiels à leur réalité même : l'obligation de continuité du service public et d'adaptation constante à ses nécessités et à leurs pendants, la mutabilité des contrats, le droit de modification unilatérale par l'autorité publique dans l'intérêt général ainsi que l'imprévision (qui oblige au rétablissement de l'équilibre financier initial voulu par les parties).

Il a également été considéré que cette relation singulière ne pourrait s'établir correctement si la concurrence devait se déployer dans le cadre d'une procédure rigide d'appel d'offres à partir d'un cahier des charges détaillé prédéfinissant les tâches de l'entreprise. La France en a tenu compte lorsqu'elle a décidé, avant la plupart des autres Etats membres, de légiférer[1] sur les conditions de passation des délégations de service public - qui correspondent sensiblement aux concessions de travaux publics et de service du droit communautaire. Elles ont pour objet commun principal la prestation de SIEG à destination des habitants. La France a ainsi par exemple affirmé la nécessité de mettre au point les conventions, tout au long d'un processus itératif d'échanges et de discussions entre l'entité publique et chacun des candidats retenus pour ce faire (processus dit de « *libre négociation* »). Ce processus permet de confronter les offres de l'entreprise à la réalité et aux contraintes qui n'avaient pu être suffisamment exprimées dans le dossier de consultation et doit aboutir à optimiser globalement l'ensemble en choisissant en définitive, sur chaque point, la meilleure solution en la circonstance, tout en respectant les principes d'égalité de traitement et de transparence.

La législation française en revanche n'avait pas prévu de règle particulière pour la passation des contrats confiant aux entreprises des missions complexes à destination des administrations mais, au contraire, les avaient progressivement supprimées dans le Code des marchés publics. En définitive, à trop vouloir

[1] Elle l'a fait par une loi du 29 janvier 1993 dite *loi Sapin* qui ne tentait même pas une définition de la délégation de service public, terminologie nouvelle dont il a été admis qu'elle recouvrait les contrats traditionnels de concession, d'affermage et de régie intéressée. Ces contrats sont regroupés dans une catégorie juridique commune puisque, tous, ont pour objet de confier tout ou partie des tâches nécessaires pour que soit rendu aux habitants un SIEG. Cet objet de service est central en droit français, les missions susceptibles d'être confiées concernant les biens étant considérées comme accessoires ; on distingue donc la concession qui confie au concessionnaire des travaux de premier établissement et l'affermage qui prévoit la mise à disposition au fermier des biens existants à charge pour lui de les entretenir, la régie intéressée étant une variante de d'affermage. Il y a bien entendu en pratique des contrats qui empruntent à ces différents types.
Ce n'est que par une loi du 11 décembre 2000 que la délégation de service public a été définie : « *Une délégation de service public est un contrat par lequel une personne morale de droit public confie la gestion d'un service public dont elle a la responsabilité à un délégataire public ou privé, dont la rémunération est substantiellement liée aux résultats de l'exploitation du service. Le délégataire peut être chargé de construire des ouvrages ou d'acquérir les biens nécessaires au service* ».

restreindre et réglementer les marchés, le législateur français a paradoxalement non pas interdit les contrats pour des missions complexes (intégrant construction/financement/exploitation)[2], mais les avait seulement dispensés de toute réglementation explicite.

Dans le cadre de la toute récente ordonnance du 17 juin 2004, le législateur français s'est employé à définir le régime de ces autres contrats qu'il a qualifié de contrats de partenariat. Il l'a fait en s'efforçant de respecter le nécessaire besoin de souplesse, de flexibilité de la procédure de passation et des conditions d'exécution de ce contrat. Pour la plupart, dans la mesure où les paiements sont publics, ils pourraient rentrer dans la catégorie des marchés publics au sens communautaire : c'est pourquoi la procédure de passation retenue est à titre principal celle du dialogue compétitif, celle de l'appel d'offres étant réservée aux cas d'urgence.

Enfin, il n'existe en France aucun texte spécifique pour les PPP institutionnels. Les sociétés d'économie mixte locales (SEML) font l'objet d'une réglementation particulière (article L 1521-1 et suivants du Code général des collectivités territoriales, issus d'une loi de 1983) mais elles ne bénéficient pas du droit de se voir attribuer des contrats de marchés publics, de délégation de service public ou de partenariat sans être mises en concurrence comme n'importe quelle autre société[3].

Question 2 : De l'avis de la Commission, la transposition au droit national de la procédure de dialogue compétitif permettra aux parties concernées de disposer d'une procédure particulièrement adaptée à la passation du contrat qualifié de marché public lors de la mise en place d'un PPP de type purement contractuel, tout en préservant les droits fondamentaux des opérateurs économiques. Partagez-vous ce point de vue ? Si non, Pourquoi ?

La position du MEDEF sur la pertinence de la procédure du dialogue compétitif diffère selon la nature de l'activité confiée et la forme juridique du contrat.

1. DIALOGUE COMPETITIF POUR LES MARCHES PUBLICS

Lors de la mise au point des dispositions actuelles des directives 2004/18 et 2004/17, nombre d'entreprises, dont les entreprises françaises, ont fait valoir à la Commission européenne que, si la procédure d'appel d'offres est adaptée pour un marché simple dont l'objet peut être clairement défini dans un cahier des charges, cette procédure était paralysante pour certains marchés qui justifient une discussion entre l'autorité adjudicatrice et les candidats. Le MEDEF juge positivement que la directive 2004/18 ait prévu, en son article 29, une procédure de dialogue compétitif pour la passation des marchés publics.

[2] Comme le besoin était certain, la pratique a en effet imaginé d'autres formes de relations contractuelles, à partir de contrats de droit commun (vente, location, crédit-bail…) et de contrats d'occupation du domaine public (bail emphytéotique administratif de la loi du 5 janvier 1988, autorisation d'occupation temporaire du domaine public), pour offrir à l'Administration les solutions et services intégrés que le secteur privé pourrait leur fournir. Ont ainsi été mis au point des montages contractuels complexes conduisant à la réalisation d'investissements, à leur financement et leur exploitation, leur maintenance et, le cas échéant, à l'exploitation des services dont ils sont le support.

[3] Décision du Conseil constitutionnel du 20 janvier 1993 : « *Considérant en revanche que la loi exclut de l'application de ces dispositions… toutes les sociétés dont le capital est directement ou indirectement majoritairement détenu par la collectivité délégante à la seule condition que l'activité déléguée figure expressément dans leurs statuts ; que ces dispositions qui portent sur la publicité préalable aux négociations, sur les formalités d'examen des offres et sur l'exigence d'un contrôle préalable de l'assemblée délibérante sur l'attribution des délégations méconnaissent le principe d'égalité; qu'en effet elles ne peuvent se justifier ni par les caractéristiques spécifiques du statut des sociétés en cause, ni par la nature de leurs activités, ni par les difficultés éventuelles dans l'application de la loi propres à contrarier les buts d'intérêt général que le législateur a entendu poursuivre* ».
Toutefois, jusqu'à l'adoption de l'ordonnance du 17 juin 2004, elles bénéficiaient du droit exclusif de se voir confier des contrats de mandat ou de conduite d'opération. Elles bénéficient toujours du droit exclusif de conclure des concessions d'aménagement.

Cette approbation n'est pas cependant sans quelques réserves ou craintes. En effet, cette procédure ne paraît pas adaptée en l'état pour les concessions. Le MEDEF déplore d'abord les conditions, selon lui excessivement restrictives, d'autorisation de ce dialogue et estime que la question n'est pas de savoir si on peut ou non attribuer un marché par une procédure d'appel d'offres ; mais de savoir si le dialogue compétitif ne permettrait pas un meilleur contrat pour l'entité publique que celui conclu après appel d'offres classique.

Le MEDEF souhaiterait en outre qu'il soit clairement dit que le dialogue doit se poursuivre avec chacun des candidats *sur la base des solutions de ce candidat.* L'idée, quelquefois exprimée, d'une remise en concurrence de l'ensemble des candidats sur des solutions identifiées comme bonnes par l'Administration, est inadmissible au regard du droit des entreprises sur leurs solutions. Elle est par ailleurs inefficace et anti-productive puisque les entreprises se garderont bien de se mettre en compétition sur leurs solutions techniques et innovations si ces solutions doivent bénéficier à leurs concurrents. Le MEDEF est d'avis que ce dialogue n'a pas pour objet de définir les bonnes solutions, mais de choisir la bonne offre qui sera celle qui aura prévu la (ou les) bonne(s) solution(s).

Le dispositif prévoit la remise d'une offre finale au moment où le pouvoir adjudicateur décide de mettre fin au dialogue. On ne saurait contester la nécessité d'arrêter la discussion à un moment donné et de demander à chacun de s'engager sur leur proposition. Mais, c'est mal connaître la difficulté de la mise au point de certains dossiers complexes que d'empêcher d'affiner les dispositions contractuelles jusqu'à la signature. Ainsi, le MEDEF est d'avis qu'il y a une place à faire à la discussion pour la mise au point de l'offre retenue, jusqu'au terme de la procédure.

2. DIALOGUE COMPETITIF POUR LES AUTRES PPP

Le MEDEF n'est pas favorable à une procédure de dialogue compétitif du type de celle applicable aux marchés publics pour les concessions et autres PPP.

Les réserves précitées seraient *a fortiori* valables pour les PPP. Mais son opposition tient plutôt à ses convictions :

- le MEDEF est fermement opposé à ce que la Commission édicte des règles différentes pour les PPP contractuels et pour les PPP institutionnels ; or il est évident que la procédure de dialogue compétitif est beaucoup trop rigide et fermée pour les PPP institutionnels ;
- il est également fermement opposé à ce que les PPP soient assimilés à des marchés publics et soumis au même régime de passation.

Sur ce second point, il estime que c'est la nature même du PPP que de ne pouvoir être attribué au vu seulement d'une offre écrite sans aucune discussion. La raison n'est qu'en partie liée à la complexité. En réalité, le contrat doit traduire le résultat du travail effectué au cours d'un dialogue pour interfacer les exigences de l'entité publique (qui évoluent en fonction des observations des entreprises) avec la capacité de l'entreprise à imaginer et mettre en place une organisation performante, à proposer des optimisations et des améliorations de service, à rechercher des économies et des gains de productivité, en vue d'arrêter ensemble les solutions économiquement et qualitativement les plus satisfaisantes.

Le MEDEF ne partage pas les réserves exprimées par la Commission européenne sur la négociation, estimant qu'il y a de bonnes négociations. Sous la terminologie de « *libre négociation* » qui a été posée par la *loi Sapin*, le législateur français n'a pas prévu autre chose qu'une discussion constructive permettant d'arrêter point par point, en connaissance de cause, les inévitables options puis la mise au point itérative des droits et obligations respectifs jusqu'à la signature du contrat.

Question 3 : En ce qui concerne ces contrats, existe-t-il, selon vous, des points autres que ceux relatifs au choix de la procédure d'adjudication, susceptibles de poser problème au regard du droit communautaire des marchés publics ? Si oui, lesquels et pour quelles raisons ?

Certaines pratiques parallèles à la procédure d'adjudication méritent d'être relevées car elles posent problèmes eu égard aux principes fondamentaux du Traité. Il s'agit des cas où la consultation d'origine qui devait aboutir à un PPP contractuel s'est transformée en une institutionnalisation du partenariat avec d'autres acteurs, sous prétexte d'infructuosité, permettant la réutilisation des solutions techniques identifiées en amont à partir des offres des entreprises.

Dans cette hypothèse, et conformément aux règles et principes fondamentaux découlant du Traité, il convient de prévoir une nouvelle mise en concurrence de compétiteurs qui présenteraient des offres dans des conditions d'égalité de traitement, notamment quant à leur structure de coûts qui doivent être établies selon les principes communs d'une économie de marché.

Question 4 : Avez-vous déjà organisé, participé, ou souhaité organiser ou participer à une procédure d'attribution de concession au sein de l'Union ? Quelle expérience en avez-vous ?

Sans objet pour le MEDEF.

Question 5 : Estimez-vous que le cadre juridique communautaire actuel est suffisamment précis pour assurer la participation concrète et effective de sociétés ou groupements non nationaux aux procédures de passation de concession ? Une concurrence réelle est-elle, selon vous, habituellement assurée dans ce cadre ?

Question 6 : Pensez-vous qu'une initiative législative communautaire, visant à encadrer les procédures de passation de concessions, est souhaitable ?

En matière de concessions, le cadre juridique communautaire actuel diffère selon qu'il s'agit d'une concession de travaux publics ou d'une concession de services.

Pour les concessions de travaux, les règles actuelles donnent toute satisfaction car elles permettent la mise au point de contrats complexes avec négociation jusqu'à leur finalisation. Les précisions de la directive 2004-18 sur la publicité et le délai minimal pour le dépôt des offres sont opportunes. On peut seulement déplorer que les concessions de travaux publics ne soient pas plus clairement distinguées des marchés publics, le critère du « *droit d'exploitation* »[4] ne traduisant qu'imparfaitement les spécificités de ce PPP contractuel.

[4] Directive n° 2004/18, article 1er.3 : « *La concession de travaux publics est un contrat présentant les mêmes caractéristiques qu'un marché public de travaux à l'exception du fait que la contrepartie des travaux consiste soit uniquement dans le droit d'exploiter, soit dans ce droit assorti d'un prix* ».

Pour les concessions de service, le besoin d'un instrument communautaire à caractère législatif n'est plus aussi prégnant qu'il l'était en 2000[5] en raison de la reconnaissance des exigences du Traité rappelées par l'arrêt *Telaustria*[6].

Il est vrai que l'application effective de ces principes et surtout la sanction de leur non application restent parfois théoriques et qu'il serait donc sans doute utile d'en préciser les modalités pratiques en termes de publicité et de délai (comme pour les concessions de travaux publics). Il n'est en revanche nul besoin de dispositions supplémentaires puisque il paraît préférable que les procédures utilisées demeurent suffisamment souples pour demeurer compatibles avec la nature particulière des PPP et que l'harmonisation des règles édictées par les différents Etats membres ne paraît pas vraiment utile.

La spécificité des concessions implique en effet que soit reconnue et préservée la singularité de la nature du choix que fait une collectivité publique quand elle décide de ne pas assurer elle-même un service d'intérêt général à destination des habitants et de se substituer une entreprise. Ce choix doit prendre en compte des données qui ne sauraient apparaître ou se traduire dans la seule production d'une offre écrite au vu d'un cahier des charges de consultation, même si la procédure admet un certain dialogue pour la mise au point progressive du contrat. Ce choix implique une relation de confiance et ce serait totalement méconnaître sa réalité que de nier le droit de prendre en considération la conviction que le candidat présente des garanties suffisantes en termes de références et de compétences pour honorer son offre.

Par suite, d'éventuelles indications complémentaires sur la procédure de publicité (qui pourraient prendre la forme de simples recommandations) ne relèveraient pas de la préoccupation essentielle du MEDEF relative au non respect des principes du Traité pour les PPP institutionnels.

Le MEDEF considère avant tout qu'il serait gravement contre-productif de faire un sort particulier aux contrats de concession parmi tous les autres PPP. Un instrument communautaire à valeur législative qui ne traiterait que de la question des conditions de passation des concessions pourrait être interprété comme l'indicateur selon lequel il n'est pas nécessaire de mettre de l'ordre dans tous les mécanismes relationnels entre les entités publiques et les entreprises qui n'ont pas la forme de concessions. Il serait par ailleurs prématuré aujourd'hui d'imaginer une procédure adaptée à toutes les formes de PPP (concession et PPP institutionnels) et respectueuse de leurs singularités.

Par conséquent, le MEDEF est d'avis que les règles actuelles, celles de la directive 2004-18 pour les concessions de travaux publics et celles qui ont été, très opportunément, rappelées par la CJCE pour tous les autres PPP, suffisent à assurer une concurrence réelle pour les concessions de service et ne réclame pas une initiative législative communautaire à valeur législative en matière de concessions.

[5] Au moment de la concertation sur la communication interprétative sur les concessions et autres formes de partenariats du 29 avril 2000, le MEDEF avait insisté sur l'impérieuse nécessité que l'ensemble des Etats membres ouvrent à la concurrence toutes les attributions d'activité économique à des tiers et prennent les mesures nécessaires, y compris par une directive.

[6] Décision qui a rappelé qu'il fallait mettre en oeuvre des procédures garantissant la transparence, l'égalité de traitement, la proportionnalité et la reconnaissance mutuelle.

Question 7 : De manière plus générale, si vous estimez qu'il est nécessaire que la Commission propose une nouvelle action législative, existerait-il à votre avis des raisons objectives de viser dans cet acte tous les PPP de type contractuel, qu'ils soient qualifiés de marché public ou de concession, pour les soumettre à des régimes de passation identiques ?

Le MEDEF croit comprendre la question de la Commission européenne comme évoquant certains PPP contractuels qui ne seraient pas des concessions et qui, par conséquent, seraient actuellement soumis à la directive Marchés publics (étant entendu que les concessions de travaux publics sont distinguées des marchés publics, même si un régime particulier est inscrit dans cette directive). Il ne pense pas utile de remettre en cause la distinction entre marchés et concessions qu'il convient au contraire de réaffirmer.

Question 8 : Selon votre expérience, l'accès des opérateurs non-nationaux aux formules de PPP d'initiative privée est-il assuré ? En particulier, lorsqu'il existe une invitation des pouvoirs adjudicateurs à présenter une initiative, cette invitation fait-elle généralement l'objet d'une publicité adéquate permettant l'information de tous les opérateurs intéressés ? Une procédure de sélection véritablement concurrentielle est-elle organisée pour assurer la mise en œuvre du projet retenu ?

La France (contrairement à l'Italie et à l'Espagne) n'a pas de législation encadrant les PPP d'initiative privée. Le MEDEF a donc une expérience limitée de ce type de formules mais ne peut que se faire l'écho de l'intérêt que les entreprises portent à de telles formules.

L'initiative privée permet de faire bénéficier les autorités publiques du travail argumenté d'une entreprise qui a eu une bonne idée et en a assuré une pré-étude, à ses risques et périls, avant de la présenter. Ainsi ces formules permettent aux entreprises de faire valoir leur capacité d'innovation. Le MEDEF accueille très favorablement la mesure prise par la Commission européenne sur ce point.

Question 9 : Quelle serait selon vous la meilleure formule pour assurer le développement des PPP d'initiative privée dans l'Union européenne tout en assurant le respect des principes de transparence, de non discrimination et d'égalité de traitement ?

Pour assurer le développement des PPP d'initiative privée dans l'Union européenne, il faut encourager ces initiatives mais également garantir leur viabilité juridique (en particulier leur compatibilité avec les règles de la concurrence).

L'obtention d'un avantage compétitif par l'entreprise est sans doute plus motivante pour elle qu'une indemnité car elle prend l'initiative dans le but de pouvoir participer à un projet et non pas pour de simples raisons pécuniaires. Si, en définitive, le marché n'est pas obtenu, l'attribution d'une prime apparaît alors comme une compensation justifiée. Cette prime ne doit toutefois pas couvrir la totalité des frais engagés afin de ne pas susciter un marché des offres spontanées. Toutefois, l'attribution de ces avantages devra être sécurisée juridiquement afin qu'il n'y ait pas de distorsion de concurrence. A défaut, il n'y aura pas d'études approfondies sur des idées complexes.

Pour assurer une bonne transparence, le MEDEF suggère que soit posée une obligation de publicité pour avertir les différentes entreprises susceptibles d'être intéressées, lorsque la personne publique accepte d'étudier une proposition d'initiative privée.

Question 10 : Quelle expérience avez-vous de la phase postérieure à la sélection du partenaire privé dans les opérations de PPP contractuels ?

Cette question est très importante. L'expérience des entreprises françaises les autorise à insister sur la nécessité impérative de laisser vivre ces contrats qui ont besoin de flexibilité, de durée et de mutabilité. A cet égard, le MEDEF est d'accord avec les analyses pertinentes de la Commission (voir notamment paragraphes 45 & 46) qui a exactement identifié les éléments essentiels de la vie d'un contrat de concession.

La durée est indispensable et elle ne l'est pas seulement en raison de la durée des investissements. Ce besoin de durée, assez généralement identifié si l'entreprise prend en charge les financements, est trop souvent méconnu quand la mission est simplement de service, alors qu'on attend d'elle qu'elle apporte du surplus et qu'elle fasse bénéficier la collectivité de sa capacité à améliorer l'équation économique grâce, notamment, à ses capacités d'organisation. Or certaines actions ne génèreront de gains de productivité qu'après de longs délais (par exemple : mise en œuvre d'une politique d'achats rigoureuse). D'autres impliquent, dans un premier temps, des dépenses ou des risques supplémentaires (par exemple : réorganisation du travail qui peut nécessiter des mesures de restructuration coûteuses et des tensions sociales). Enfin, les améliorations les plus importantes impliquent généralement des investissements qui doivent s'amortir.

Il faut en second lieu pouvoir adapter le contrat. Cette adaptation est d'autant plus nécessaire que la durée est longue mais elle l'est avant tout en raison de l'objet même de ce type de contrat : confier à un partenaire privé la mission de satisfaire des besoins d'intérêt général. Adapter le contrat à l'évolution des besoins n'est donc pas une faculté, c'est une obligation pour les deux parties car c'est la condition nécessaire au respect de l'objet du contrat, de satisfaire les besoins, non pas seulement ceux identifiés initialement, mais ceux qui seront constatés tout au long du contrat. Ceci est particulièrement vrai quand il s'agit de concessions de service public et que ces besoins sont ceux des habitants bénéficiant du service délégué.

Le contrat doit également pouvoir évoluer en fonction des circonstances, l'accord initial ne pouvant pas prévoir tous les évènements de nature à porter atteinte à l'équilibre financier envisagé à l'origine. Il faut donc admettre des révisions de bonne foi (le défaut d'accord pouvant conduire à la résiliation pour intérêt général avec indemnité, éventuellement sous le contrôle du juge) pour pouvoir, le cas échéant, rétablir les conditions de l'équilibre financier initial voulu par les parties. De telles modifications, dès lors qu'elles seront objectivement justifiées, ne doivent pas être considérées comme des atteintes aux conditions de la mise en concurrence initiale. Il serait désastreux que des contraintes excessives sur la vie des contrats au prétexte de concurrence conduisent les acteurs à privilégier des montages tels les PPP institutionnels échappant de fait à de tels handicaps.

Il faudrait aussi prendre en considération les situations inextricables créées par le refus d'une modification contractuelle nécessaire, au prétexte qu'elle apporterait au contrat initial des modifications trop substantielles pour ne pas nécessiter une remise en concurrence. Si l'objet de la modification n'est pas dissociable de la mission initiale, la résiliation du contrat initial devient inévitable et porte atteinte aux droits légitimes du contractant et, au surplus, risque de coûter cher en indemnisation à l'autorité publique.

Cette insécurité de la situation contractuelle des contractants des entités publiques est un très sérieux problème des PPP et handicape d'ailleurs très fortement la mise en place de financements adaptés dès lors que l'opération est légèrement complexe. Le MEDEF admet qu'il est normal que, quand l'intérêt général l'exige, l'autorité publique puisse imposer à ses contractants les modifications nécessaires, voire puisse mettre fin de façon anticipée à un contrat moyennant indemnité. Mais il considère que ces prérogatives doivent rester exceptionnelles.

Question 11 : Avez-vous connaissance de cas dans lesquels les conditions d'exécution – y compris les clauses d'adaptation dans le temps – ont pu avoir une incidence discriminatoire ou ont pu constituer une entrave injustifiée à la libre prestation de services ou à la liberté d'établissement ? Si oui, pouvez-vous décrire le type de problèmes rencontrés ?

Le MEDEF n'a pas connaissance de tels cas.

Question 12 : Avez-vous connaissance de pratiques ou de mécanismes d'évaluation d'offres ayant des incidences discriminatoires ?

Le MEDEF n'a pas d'exemples de telles pratiques discriminatoires. Il rappelle toutefois q'une vigilance accrue est indispensable envers les candidats qui, en raison de leur nature juridique, de moindres charges ou d'avantages reçus au titre d'une autre activité (aides, droits exclusifs et spéciaux), bénéficieraient d'avantages concurrentiels discriminatoires.

Question 13 : Partagez-vous le constat de la Commission selon lequel certains montages de type « *step-in* » peuvent poser problème en termes de transparence et d'égalité de traitement ? Connaissez-vous d'autres « *clauses types* » dont la mise en œuvre est susceptible de poser des problèmes similaires ?

Le MEDEF ne partage pas les inquiétudes de la Commission européenne sur les clauses de *step-in*. Ces clauses (qui permettent, avant résiliation du contrat pour faute du titulaire, de proposer aux prêteurs de substituer un autre organisme qui prendra le relais du titulaire défaillant) donnent une chance à la poursuite du contrat avant la résiliation effective. Ces clauses participent donc à la confiance des prêteurs qui est essentielle dans une opération de PPP. A sa connaissance, aucune clause de *step-in* n'a encore été appelée à jouer en France.

Plus largement, cette question permet de s'interroger sur la cessibilité des contrats. Dans ce domaine, il faut prendre en compte deux aspects : d'une part la légitime préoccupation de l'autorité publique que le contrat cédé continuera à être correctement exécuté par le cessionnaire et, d'autre part, le caractère patrimonial d'un contrat pour son titulaire à combiner avec les exigences du droit de la concurrence.

Sur le premier aspect, il est incontestable que la substitution d'un titulaire à un autre dans ses droits et obligations n'est pas, pour l'autorité adjudicatrice, un évènement négligeable qui puisse lui être imposé sans qu'elle puisse s'exprimer. Le MEDEF trouve normal que la collectivité publique puisse refuser un transfert mais elle ne doit pouvoir le faire que pour un motif légitime.

Sur le second aspect, le MEDEF s'oppose à toute interdiction par principe de la cessibilité du contrat. De tels contrats concrétisent le droit obtenu par l'entreprise d'exercer une activité économique et constituent un de leurs principaux actifs. Il serait gravement préjudiciable à l'équilibre macro-économique des Etats membres que des dispositions excessives sur la non cessibilité des contrats entravent des opérations de cession de branches d'activité, voire des opérations d'évolution du contrôle du capital des sociétés.

D'ailleurs, les exigences de la concurrence, souvent invoquées, ne justifient pas l'interdiction *a priori* de telles cessions. En effet, ce qui est mis en concurrence, ce ne sont pas les personnes des candidats mais la nature des offres, en vue de sélectionner l'offre économiquement la plus avantageuse. Certes, le choix fait par une autorité publique peut légitimement prendre en considération l'appréciation sur la capacité de la personne du candidat et son aptitude présumée à exécuter le contrat mais, pour autant, ce n'est pas la personne qui est mise en concurrence mais l'offre. Par suite, l'autorité publique a le droit de refuser un cessionnaire qui ne présenterait pas toutes les garanties nécessaires mais ne peut refuser *a priori* le principe d'une cession.

En outre, il convient d'observer que dans la quasi-totalité des cas de cession, l'ensemble de l'organisation en hommes, matériels… mis en place par le titulaire initial pour exécuter le contrat est transféré au cessionnaire. Cela est même obligatoire pour les personnels, notamment en vertu de la directive 2001/23/CE[7].

Question 14 : Estimez-vous qu'il est nécessaire de clarifier au niveau communautaire certains aspects relevant du cadre contractuel des PPP ? Si oui, sur quel(s) aspect(s) devrait porter cette clarification ?

Le MEDEF a déjà souligné que les acteurs de l'entreprise partenaire ont besoin de se développer dans la durée et ne peuvent être figés dans un contrat initial inchangé mais la durée du contrat et ses conditions d'adaptation relèvent de l'accord des parties. Ils ne justifient pas une réglementation communautaire en matière d'exécution du PPP, dont les fondements légaux seraient en outre douteux.

En revanche, il appartient à la Commission de rappeler que les exigences de mise en concurrence impliquent des procédures périodiques mais ne sauraient justifier l'interdiction de faire vivre les contrats entre deux appels d'offres. Cela relève toutefois d'un guide de bonne pratique et non d'une directive.

A cet égard, les remarques du Livre vert (point 49) sont beaucoup trop restrictives[8] et méconnaissent la réalité de la vie de ces contrats (voir développements sur la durée sous la question 10).

[7] Directive « *concernant le rapprochement des législations des Etats membres relatives au maintien des droits des travailleurs en cas de transfert d'entreprises, d'établissements ou de parties d'entreprises ou d'établissements* ».

[8] Point 49 du Livre vert : Les seules modifications pouvant faire l'objet d'avenants seraient celles qui « *sont rendues nécessaires par un événement imprévisible, ou lorsqu'elles sont justifiées par des raisons d'ordre public, de sécurité publique, ou de santé publique* ».

Question 15 : Dans le contexte des opérations de PPP, avez-vous connaissance de problèmes particuliers rencontrés en matière de sous-traitance ? Lesquels ?

Question 16 : Le phénomène des PPP de type contractuel, impliquant le transfert d'un ensemble de tâches à un unique partenaire privé, justifie-t-il selon vous que des règles plus détaillées et/ou d'un champ d'application plus large soient mise en place en ce qui concerne le phénomène de sous-traitance ?

Question 17 : De manière plus générale, estimez-vous qu'une initiative complémentaire devrait être prise au niveau communautaire en vue de clarifier, ou d'aménager, les règles relatives à la sous-traitance ?

Il existe déjà un certain encadrement pour les concessions de travaux publics[9] qui oblige le concessionnaire qui souhaite confier des marchés à des tiers à une obligation de publicité au dessus de certains seuils mais prend grand soin de préserver les exigences du montage de ces opérations (autorisation de recourir aux entreprises liées et à celles qui se sont groupées pour obtenir la concession, et dérogation quand sont réunies les conditions de recours à une procédure négociée).

Sur le plan général, le titulaire doit pouvoir librement choisir ses sous-traitants comme le font les titulaires de marchés publics classiques, sauf encadrement en vertu d'une loi nationale ou par voie contractuelle. A partir du moment où le contrat principal a été mis en concurrence (« *contrat amont* »), il n'y a pas lieu de soumettre à une procédure de passation l'attribution des contrats de sous-traitance (« *contrat aval* »). *A fortiori*, si lors de la mise en concurrence initiale, les sous-traitants du titulaire ont été déclarés, il n'y a pas lieu d'exiger que le titulaire organise une nouvelle procédure en aval ; d'ailleurs, aucun consortium ne pourrait se constituer pour la réalisation de grands projets si les « *sponsors* » (entreprises groupées pour répondre à l'offre et constituer l'entité *ad hoc*) ne peuvent assurer l'activité dans le cadre de contrats consentis par la société *ad hoc* titulaire du contrat.

En réalité, il n'est légitime de soumettre à concurrence les contrats de sous-traitance que si le titulaire a la qualité d'autorité ou d'entité adjudicatrice titulaire d'un contrat au sens de la directive 2004/17[10] ou bien si l'entité a le caractère d'une entité « *in house* ».

Toutefois, l'autorité publique est également en droit, dans certaines circonstances, de considérer comme souhaitable d'encadrer ou de contrôler le recours à la sous-traitance (selon le cas en le limitant ou au contraire en l'imposant ou en exigeant de la transparence) mais cela relève de contrats et non d'une législation communautaire. Par ailleurs, la transparence, voire la mise en concurrence obligatoire de certains marchés avals, sera légitimement imposée pour la réalisation de certains travaux ou services sous-traités (par exemple les marchés de travaux conclus avec un tiers par un concessionnaire de service public, s'il y a subventions d'investissement ou attribution de fonds de cohésion ou de fonds structurels communautaires). Mais il s'agit de cas particuliers qui relèvent des règles d'attribution de l'aide publique en cause.

[9] Article 63 de la directive 2004/18

[10] Directive du parlement européen et du conseil 2004/17 du 31 mars 2004 portant coordination des procédures de passation des marchés dans les secteurs de l'eau, de l'énergie, des transports et des services postaux.

Question 18 : Quelle expérience avez-vous de la mise en place d'opérations de PPP de type institutionnalisé ? En particulier, votre expérience vous conduit-elle à penser que le droit communautaire des marchés publics et des concessions est respecté dans le cas de montages de PPP institutionnalisés ? Si non, pourquoi ?

Question 19 : Estimez-vous qu'une initiative doit être prise au niveau communautaire en vue de clarifier ou de préciser les obligations des organismes adjudicateurs quant aux conditions dans lesquelles doivent être mis en concurrence les opérateurs potentiellement intéressés par un projet de type institutionnalisé ? Si oui, sur quels points particuliers et sous quelle forme ? Si non, pourquoi ?

La Commission européenne n'a pas éludé la question des PPP institutionnels et le MEDEF s'en réjouit. Le développement de formules d'associations entre entités publiques et entreprises à capitaux privés au sein d'entités communes est un fait incontestable, dont la portée économique ne peut être négligée, même si aborder cette question est politiquement sensible et techniquement délicat.

C'est politiquement sensible parce qu'en abordant cette question, on peut facilement se voir opposer le principe de subsidiarité et celui de la liberté d'organisation administrative des autorités publiques qui sont en droit de choisir le mode de gestion des services d'intérêt économique général. C'est techniquement délicat parce que, en abordant cette question, on peut se voir opposer les règles sur le libre droit de créer des sociétés et sur la libre circulation des capitaux.

Pour pouvoir légitimement aller plus loin, il faut se donner la peine et discerner derrière les apparences la réalité de l'opération qui résulte des objectifs assignés à cette association, par l'un et l'autre partenaire : faire assurer l'activité économique par cette entité nouvelle.

Il convient alors d'abord de s'interroger sur l'existence réelle de cette entité nouvelle et de se demander si elle est ou non un tiers par rapport à l'autorité publique qui l'a créée, au regard des critères de la décision *Teckal*. Si la réponse est positive, on doit considérer que l'opération a pour effet l'attribution d'une activité économique à un tiers à l'initiative et sur la décision d'une entité publique et que les règles du Traité s'appliquent.

Ces règles doivent s'appliquer avec pragmatisme car il serait regrettable que trop de rigidité entrave ce phénomène encore trop timide d'ouvertures d'entités publiques « *in house* » à des partenaires extérieurs qui peut constituer une première étape prometteuse avant l'appel au marché.

En pratique le plus souvent, le PPP institutionnel n'est pas constitué autour d'une société poursuivant un but lucratif et susceptible d'intéresser des actionnaires motivés par des considérations financières et les dividendes. Généralement, la société est largement conçue comme un service administratif (sans toutefois être sous contrôle au sens de la décision *Teckal*). De surcroît, l'intérêt du partenaire privé est d'être en situation pour apporter de l'extérieur à la société sa compétence et son savoir-faire (par exemple par la mise à disposition de dirigeants ou techniciens, par un contrat de management ou d'assistance technique, plus opérationnellement par des contrats de sous-traitance). Dans le cas d'une telle participation à vocation exclusivement financière, le principal actif de la société est constitué par un droit d'exécuter l'activité économique et l'opération financière est nécessairement - même si implicitement sous-tendue par un contrat lui confiant l'activité - un contrat qui aurait dû être conclu dans le respect des règles du Traité.

Dans le deuxième cas, il y a également nécessairement ce contrat d'attribution de l'activité. Mais il y a des contrats (contrat de management, pacte d'actionnaires…) par lesquels la société commune confie des missions à son actionnaire privé. En théorie, c'est bien le premier contrat qui devrait être conclu dans le respect des règles du Traité mais, à défaut, il faut au minimum que les contrats avals conclus avec le partenaire privé, le soient. Et ce, bien que, du point de vue de l'ouverture des marchés, l'attribution de missions limitées et ponctuelles par ces contrats avals ne puisse être mise sur le même plan que l'attribution de la mission amont du droit d'exercer l'activité économique globale.

Dans tous les cas, ce n'est pas l'entrée au capital des partenaires privés qui est visée mais ce que représente économiquement cette participation au capital en termes d'activité économique.

Pour ce qui concerne les applications concrètes, le MEDEF n'a pas qualité pour s'exprimer sur le développement des PPP institutionnels dans les différents Etats membres. Il observe qu'en France, la décision du Conseil constitutionnel de 1993 a mis un sérieux frein aux velléités des sociétés d'économie mixte d'obtenir des contrats de marchés ou de délégation de service public sans mise en concurrence. Dès lors, il n'est pas anormal que l'entrée au capital de partenaires privés ne donne lieu à aucune procédure. D'ailleurs, le plus souvent, la loi de 1983 sur les SEM locales n'autorise aux partenaires à capitaux privés qu'une participation minoritaire (article 1521-1 et suivants du Code général des collectivités territoriales).

Question 20 : Quelles sont les mesures ou les pratiques que vous estimez constitutives d'entrave à la mise ne place des PPP au sein de l'Union européenne ?

Ainsi qu'évoqué ci-dessus, le MEDEF est très préoccupé par la multiplication d'entités plus ou moins proches des autorités publiques responsables des SIEG qui se qualifient d'« *in house* » et sont prétexte à la sortie de pans entiers d'activités économiques d'intérêt général du champ de la concurrence et donc interdits aux entreprises de l'Etat ou d'autres Etats membres.

Le MEDEF insiste sur l'impérieuse nécessité de limiter le concept d'entités « *in house* » ; la mise en concurrence des marchés avals conclus par les organismes « *in house* » alors considérés comme autorités adjudicatrices, est une solution dégradée en termes d'ouverture du marché de ce type d'activités par rapport à la mise en concurrence de l'activité économique globale attribuée à l'entité de premier rang qui prétend à la qualité de « *in house* ».

Il est, par ailleurs, essentiel de veiller par la voie du contrôle communautaire des aides d'Etat à ce que l'octroi de subventions soit non discriminatoire entre les opérateurs, quels que soient leurs statuts[11].

Enfin, la politique communautaire en matière d'attribution de fonds communautaires n'est pas en faveur du développement des PPP et, par son manque de clarté, freine le développement de ces projets, notamment dans les nouveaux Etats membres[12].

[11] Le Conseil d'Etat français a validé en décembre 2003 la décision du Conseil général des Landes d'accorder aux communes exploitant leurs services en régie, un taux de subvention supérieur à celui accordé aux communes ayant délégué leurs services d'eau potable et d'assainissement.

[12] Voir notre réponse sous la question 22.

Question 21 : Connaissez vous d'autres formes de PPP développées dans les pays en dehors de l'Union ? Connaissez-vous des exemples de « bonnes pratiques » développées dans ce cadre, dont l'Union pourrait s'inspirer ? Si oui, lesquels ?

Le MEDEF n'a pas qualité pour répondre à cette question.

Question 22 : De façon plus générale, et compte tenu des besoins importants d'investissements nécessaires dans certains Etats membres, afin de poursuivre un développement économique social et durable, estimez-vous utile une réflexion collective sur ces questions qui se poursuivrait à des intervalles réguliers entre les acteurs concernés, et qui permettrait un échange de meilleures pratiques ? Est-ce que vous considérez que la Commission devrait animer un tel réseau ?

Le MEDEF souhaiterait une réflexion et la mise au point de règles de bonne pratique pour que les fonds de cohésion communautaires puissent bénéficier à des activités attribuées à des entreprises dans le cadre de PPP.

L'intervention d'entreprises engagées sur la globalité de la mission (réalisation de l'investissement et exploitation) est la meilleure garantie qui soit que les parties retenues en termes d'investissements sont adaptées aux besoins en termes d'exploitation. Les PPP autorisent également l'apport de financements privés qui permettraient de démultiplier les effets des fonds de cohésion en leur conférant un effet de levier.

Or, bien au contraire, on constate aujourd'hui, avec les fonds communautaires, une très grande réticence en pratique, alors qu'il n'y a pas de raison de principe, à attribuer des aides lorsqu'une entreprise se voit confier l'exploitation, au prétexte que l'aide à l'investissement bénéficierait à cette entreprise et/ou qu'il pourrait y avoir conflit d'intérêt.

Il devrait être remédié rapidement à cette anomalie. Une réflexion approfondie doit être engagée pour décrire les mécanismes de procédure qui éviteront les dérives craintes. Ces préoccupations ne doivent toutefois pas conduire à *de facto* interdire les PPP dans les secteurs prioritaires de développement de l'Union, susceptibles de bénéficier des fonds européens. Ce serait catastrophique et paradoxal. Les aides sont attribuées aux SIEG et, en définitive, à l'habitant et pas à l'entreprise titulaire du contrat.

Les dérives craintes sont parfaitement évitables et des mécanismes pour éviter ces dérives existent. Il suffit d'y réfléchir pour les définir et les mettre en œuvre et d'édicter des règles adaptées dans les textes qui régissent les conditions d'attribution des fonds. Il y a urgence et le MEDEF est prêt à participer à tous travaux sur ce point.

D'une façon générale, le MEDEF souhaiterait que soit mieux intégré l'ensemble des composantes du PPP au travers de ses aspects économiques, financiers, de transfert de risques…

ANNEXE 1

TYPOLOGIE DES CONTRATS SELON LEUR NATURE JURIDIQUE OU LEUR NATURE OPERATIONNNELLE

Contrat Caractères	Affermage	Concession (*au sens français*)[13]	Opération et maintenance[14]	BOT (*build, operate, transfer*)	DBFO (*design, build, finance, operate*)	BOO (*build, own, operate*)
Ouvrages **:**						
- conception		X		X	X	X
- réalisation		X		X	X	X
- financement		X		X	X	X
Exploitation :						
- entretien & maintenance	X	X	X	X	X	X
- renouvellement	[X]	X		X	X	X
- service associé à l'ouvrage[15]		X	[X]	[X]	[X]	[X]
- service global[16]	X	X				
- relation avec l'usager	X	X	[X]	[X][17]	[X][18]	[X][19]
Risques **:**						
- de performance	X	X	X	X	X	X
- commercial[20]	X	X				

[13] Voir note de bas de page sous la réponse à la question 1

[14] « *Service contract* » au sens des « *Guidelines for successful Public – Private Partnerships* », page 20 (DG REGIO, mars 2003)

[15] Par exemple, chaleur produite par un réseau de chauffage

[16] Service global dont l'ouvrage éventuel n'est qu'un élément. Ce peut être, par exemple, un service de distribution d'eau.

[17] Cf note de bas de page 4

[18] Cf note de bas de page 4

[19] Cf note de bas de page 4

[20] Risque de recettes tirées des bénéficiaires du service ou liées à la fréquentation : transfert du risque de la demande

PARTENARIAT PUBLIC-PRIVE

POSITION DE SYNTEC INFORMATIQUE

I. Cadre juridique

1.1. Présentation du Partenariat Public-Privé (PPP) :

Le Partenariat Public-Privé (PPP) est un concept de gestion publique permettant à des personnes publiques de confier à une entreprise privée la conception, la réalisation, le financement, la maintenance et la gestion de certains équipements publics ou investissements immatériels pour une période déterminée en fonction de la durée d'amortissement des investissements ou des modalités de financement retenues.
La mise en place du Partenariat Public-Privé en France passe par la création d'un nouveau type de contrat, distinct des Marchés Publics et des Délégations de Services Publics, régi par l'Ordonnance n° 2004-559 du 17 juin 2004 publiée au Journal Officiel du 19 juin 2004. La procédure de passation des PPP telle que définie par l'Ordonnance du 17 juin **inclut la procédure de dialogue compétitif** instituée par le nouveau Code des Marchés Publics. Le projet de guide de bonnes pratiques du Minefi, en cours d'élaboration, détaille les modalités de ce dialogue compétitif. Cette Ordonnance contribue à la mise en place d'instruments juridiques indispensables à une remise à niveau du droit français dans le domaine des Partenariats Public-Privé.

Tous les projets ne sont pas éligibles à la forme PPP. Le recours au PPP, et non à un autre type de contrat administratif, **doit être préalablement justifié** par des avantages objectifs et financiers établis par un **audit approprié** qui prendra la forme d'une « évaluation comparative » suivant les termes du décret 2004-1119 du 19 octobre 2004 portant création de la **Mission d'appui à la réalisation des contrats de partenariat** (on pourra trouver en Annexe II le décret paru au Journal Officiel portant création de l'organisme expert et permettant la mise en œuvre de projets au titre de l'ordonnance sur les contrats de partenariat).
Entrent clairement dans cette catégorie les projets réputés **complexes** ou revêtant un caractère **d'urgence**, par exemple, un projet nécessitant un investissement lourd ou un important degré de technicité auquel l'Administration ne peut répondre seule.
Le projet peut bénéficier de ventes de services supplémentaires destinés à d'autres clients que la puissance publique.

Le PPP doit permettre une optimisation des performances respectives du privé et du public, il doit contribuer à la modernisation de l'Administration, par le recours aux capitaux privés et par la mise en place d'une répartition des risques auprès de l'entité la mieux à même de les porter.

La Commission européenne, consciente de la nécessité de réglementer ce domaine au niveau communautaire, a publié un « Livre vert sur les Partenariats Public-Privé et le droit communautaire des Marchés Publics et des Concessions ». Ce Livre vert, accompagné d'une procédure de consultation publique à laquelle Syntec informatique a pris part, constitue la première étape vers la possible élaboration d'une proposition de directive appelée à réglementer à la fois le secteur des Concessions de Service Public et celui des PPP[1].

1.2. Distinction entre PPP et Outsourcing :

S'il se greffe la plupart du temps sur un montage d'externalisation, le PPP se distingue de l'Outsourcing en ce qu'il permet des projets beaucoup plus globaux (conception, réalisation, exploitation), plus longs (10-15 ans voire 15-20 ans) et souvent plus importants en terme de volume financier.
En outre, le PPP peut répondre à des besoins de financement exceptionnels de l'Etat aujourd'hui aux prises avec des contraintes budgétaires fortes. Le risque financier supporté par l'entreprise privée est beaucoup plus lourd dans le cadre du PPP puisque cette dernière investit et amortit son investissement par une phase d'exploitation longue.
Le PPP implique une véritable mutualisation des compétences, il suit tout autant une logique de partenariat qu'une logique d'infogérance pure. Grâce au PPP, des projets d'envergure peuvent ainsi voir le jour. Ils seraient inconcevables en dehors d'une telle procédure.

La proximité entre PPP et infogérance assure de fait une prime aux infogérants qui ont l'habitude des concepts de type variabilité, intéressement, réversibilité… Mais le développement de projets en PPP aura valeur pédagogique pour toutes les SSII.

1.3. Distinction entre PPP, Concessions de Service Public et Marchés Publics:

Le PPP se distingue de la Concession de Service Public par sa durée généralement plus courte, par le mode de rémunération (le concessionnaire est rémunéré par l'usager alors que les coûts d'une opération en PPP sont portés par l'entreprise privée) et par la répartition des responsabilités entre l'Administration et l'entreprise privée.

En matière de PPP, l'Administration conserve le pouvoir de contrôle qu'elle perd largement dans le cadre d'une Concession de Service Public. Dans un PPP, la rémunération du service est payée ou gérée par la puissance publique. Si l'entreprise perçoit des fonds, c'est pour compte de la puissance publique. Elle lui reverse ces sommes collectées, comme dans le cas du métro londonien, suivant les clauses contractuelles convenues. Le prestataire privé est rémunéré quant à lui au travers d'une facturation faite à la puissance publique. Dans ce type de montage, les banques, qui financent les projets de PPP, en amont trouvent ainsi une garantie physique inégalable.

Le PPP se distingue également des Marchés Publics puisque, dès le démarrage du projet, on s'intéresse à une qualité de service rendu, aux niveaux de performance à atteindre avec intéressement sur le résultat, et non aux seules techniques qui permettent d'y aboutir.

[1] Avis du Parlement européen en première lecture sur la proposition de la Commission COM (2000) 275 du 10 mai 2002.

En somme, le PPP constitue un outil intermédiaire qui se situe entre les deux grandes catégories de contrats administratifs que sont les Marchés Publics et les Concessions de Services Publics.

II. Avantages du système PPP

2.1. Avantages pour l'Administration :

Le PPP permettrait de favoriser la mise en place de nouveaux systèmes informatiques destinés à la modernisation des services de l'Etat et des collectivités. Il constitue un véritable levier permettant **l'accélération du processus de modernisation** de l'Etat par la mise en place de projets, qui n'auraient pas pu voir le jour sans un recours à des capitaux privés, et par l'augmentation de la qualité de service.

En outre, le PPP n'a pas pour conséquence l'abandon de ses prérogatives par l'Administration puisque ce type de contrat suit une logique de partenariat et non une logique de transfert au privé d'un Service Public. Le PPP permet à l'Administration **de bénéficier de l'expertise du secteur privé** dans un domaine particulier (**avec des clauses de réversibilité en fin de contrat**). Les formules de partenariat permettront d'assurer une meilleure exécution des missions régaliennes de l'Etat, notamment en établissant un lien entre la qualité de service et la rémunération effective du partenaire.
Le PPP suscite une meilleure coordination entre les différents concédants dans la mise au point et le suivi des contrats. Dans la concession, on assiste à une perte de contrôle de l'Etat alors que dans le PPP l'Etat conserve le contrôle du dispositif de bout en bout et le suivi du projet. Le PPP va permettre à l'Etat de mieux piloter sa transformation en se concentrant sur le processus de transformation : l'Etat trouve ici une excellente occasion d'apprendre à « faire faire » et non plus à « faire ». L'Etat pourra dès lors se recentrer sur sa fonction de pilotage, en développant sa capacité de maîtrise d'ouvrage, et laisser aux partenaires privés l'opportunité de la réalisation et la maîtrise d'œuvre.
Le PPP permet de replacer l'Etat dans son domaine réservé, les services régaliens, et de relancer une dynamique industrielle au travers de grands projets publics.

Le PPP est un moyen **de remédier à une vision trop annuelle des crédits** ; il s'inscrit parfaitement dans le plan de modernisation de l'Etat et, tout particulièrement, dans le mouvement de la LOLF en contribuant à la fongibilité entre les dépenses d'investissement et les dépenses de fonctionnement puisqu'il évite à l'Administration de devoir supporter le poids du financement en début de projet : le partenaire privé se substitue à la puissance publique en supportant l'investissement. Il permet de rentabiliser les investissements et de rechercher les gains de productivité pour les services offerts par le biais du partenaire privé. Il est plus souple que les Marchés Publics en ce sens qu'il n'est pas encadré par autant de lignes directrices et qu'il permet une adaptation, en cours de contrat, aux évolutions technologiques. En effet, dans le cadre du PPP, les partenaires cherchent à tout moment l'optimum entre la qualité ou le niveau de service offert et les prix. Ils s'attacheront davantage à la qualité de service à atteindre plutôt qu'aux techniques qui devront être employées pour l'exécution du contrat.

In fine, si le PPP semble coûter plus cher à l'Etat du fait des coûts inhérents à la nature du montage juridique et financier, il contribue néanmoins à la rationalisation des processus et permet le transfert de tâches (MOE d'ensemble) vers le secteur privé, structurellement mieux à même que l'Etat de tirer parti de phénomènes industriels. De ce point de vue, des synergies avec d'autres activités peuvent être envisagées, dégageant des possibilités de mutualisation, ce que les acteurs publics peuvent difficilement obtenir du fait de la règle de la verticalisation budgétaire en silo. De la même manière, le partenaire privé est spontanément à la recherche d'innovations qu'il peut déployer sans délais. Un acteur public aurait, par contre, à convaincre nombre d'interlocuteurs internes à envisager un processus d'achat par le Code des Marchés Publics, voire à casser des contrats existants, d'où des délais considérables, par définition improductifs et démotivants.

En outre, doit être mis au crédit du PPP, une qualité de service accrue liée à la possibilité d'intéresser fortement aux résultats le personnel à statut privé, y compris du personnel éventuellement détaché. Enfin, selon Eurostat, les actifs liés à un PPP étant classés comme actifs non publics, ils ne sont pas enregistrés dans le bilan des Administrations publiques si les deux conditions suivantes sont réunies :

- le partenaire privé supporte le risque de construction,

- le partenaire privé supporte l'un des deux risques suivants, à savoir celui de la disponibilité ou celui lié à la demande.

On notera que dans le cas des opérations informatiques, ces deux conditions sont le plus souvent réunies. Quand le système n'est utilisé que par le client public, le prestataire supporte automatiquement le risque lié à la demande.

On soulignera enfin que la notion de « programme » avec ses différentes phases d'évaluation, de négociation, d'exécution et de bilan est tout à fait cohérente avec les mécanismes de PPP. L'Administration pourrait ainsi assimiler un projet de PPP à un programme LOLF, voire à une action LOLF. Lisibilité, visibilité, traçabilité des niveaux de service seraient ainsi assurées dans une perspective pluri-annuelle.

2.2. Avantages pour les partenaires privés :

Les PPP apporteront aux SSII un volant d'affaires non négligeable susceptible, par les nouvelles méthodes utilisées, de les aider à se positionner sur des marchés internationaux et à **exporter le savoir-faire français.**
Ils permettront un partage de la culture de service du secteur privé avec le partenaire public. Les industriels, plus impliqués dans les objectifs de qualité de service, pourront mieux comprendre les préoccupations du service public. Ce faisant, ils sont conduits à intégrer une capacité de maîtrise d'œuvre globale et deviennent capables de soutenir un dialogue sur un pied de plus en plus grande égalité avec les responsables concernés du secteur public.

2.3. Avantages communs aux deux parties :

Le PPP doit permettre de favoriser l'initiative privée et de développer la collaboration, en amont, entre les différentes parties au projet tant sur les caractéristiques techniques, financières que juridiques des projets. L'évaluation en amont du projet permettra de partager une vision sur les coûts réels d'une opération et de connaître toutes les métriques qui restent inconnues à ce jour.

Le PPP doit également permettre d'assurer un partage des risques, transparent et équilibré, entre les différents partenaires.

Il s'agit d'une véritable mutualisation des compétences de l'Administration et du secteur privé.

III. Freins et risques du système PPP

3.1. Freins et risques pour l'Administration :

L'Administration devra opérer un changement dans les modalités de conduite du projet, laisser plus d'autonomie au partenaire privé que dans les Marchés Publics, évoluer **d'une position de maîtrise d'œuvre vers une véritable maîtrise d'ouvrage**, autant d'éléments qui constituent des freins culturels à la mise en place de ce dispositif. Le rôle de l'Administration est ainsi clarifié. La visibilité de ses actions vis-à-vis des partenaires privés est quant à elle améliorée.

Il existe également un risque de renchérissement du coût financier des projets sur le long terme pour l'Administration.

Le sénateur Jean Arthuis, dans un rapport du Sénat intitulé « Pour un Etat en ligne avec tous les citoyens » (Annexe III), précise que « si les PPP peuvent permettre un lissage des dépenses…la facilité de trésorerie peut libérer des moyens pour l'engagement d'autres opérations et donc constituer une incitation à la dépense ». Selon lui, il convient de ne pas faire du PPP un substitut à la **« nécessaire rigueur budgétaire ».**

La mise en place de textes particulièrement adaptés aux technologies de l'information permettrait une meilleure prise en compte de leurs spécificités.

Enfin, il pourrait exister **un risque social** aux yeux des syndicats de la Fonction Publique qui pourraient y voir une remise en cause potentielle de la notion de « Service Public ».

3.2. Freins et risques pour les partenaires privés :

Les partenaires privés devront prendre garde à ne pas s'engager dans des projets inadaptés ou dont la convention de service a été mal évaluée. L'évaluation prévue en amont du projet devrait permettre de pallier ce risque. Le parti-pris de réalisme et l'engagement de transparence des coûts permettent en effet de partager la même vision des coûts réels d'une opération et d'appréhender les facteurs inconnus à ce jour.

3.3. Freins et risques communs aux deux parties:

On assimile trop souvent le PPP à un dispositif destiné uniquement au secteur du BTP alors qu'il existe d'autres secteurs, en premier lieu celui des TICs, éligibles au mécanisme du PPP. Mais le PPP appliqué aux services informatiques souffre d'un manque d'intérêt spontané de la part des Administrations.

La mise en place du PPP est complexe car les intervenants sont nombreux. Le nombre des intervenants dans un PPP est en lui-même un facteur de complexité. Il faut s'attendre à ce que les délais de contractualisation soient plus longs que ceux constatés actuellement dans la passation des Marchés Publics.

Il conviendra de trouver un équilibre dans la définition de la durée du contrat de partenariat puisque les intérêts de l'Administration et du secteur privé peuvent diverger en la matière. La personne publique pourra souhaiter un engagement de courte durée alors que le partenaire privé souhaitera un délai plus long pour pouvoir amortir sur la durée des projets globaux.

Il existe également un risque de mauvaise appréciation et allocation des risques. En effet, il conviendra d'allouer à chacun les risques qu'il sait le mieux gérer.

IV. Recommandations

4.1. Recommandations à destination des Ministères et du Gouvernement :

4.1.1. Favoriser l'émergence de PPP :

Il existe de nombreux projets dans le domaine des TICs susceptibles de faire l'objet de PPP et pour lesquels, s'ils ne sont pas traités suivant ce mécanisme, le risque est fort qu'ils ne soient jamais réalisés, ou au mieux réalisés avec un retard important.

Il convient à notre sens d'établir une graduation dans le choix des projets. En effet, **le mécanisme PPP devrait pouvoir être expérimenté dans le cadre de projets de taille raisonnable** pour permettre aux entreprises du secteur privé (y compris les entreprises de taille moyenne) et à l'Administration de se familiariser avec ce nouveau type de contrat.

Les projets en question pourraient être choisis parmi les suivants, cette liste n'étant pas exhaustive :

● Modernisation du système d'information des CHU qui se caractérise par un réel besoin de financement (Caen, Lens, Amiens, Le Havre),

- Gestion de la production de soins,
- Dématérialisation des achats…

● Externalisation de la fonction encaissement des amendes (centre de recouvrement de Nantes),

● Chaîne de production informatique pour les tribunaux,

● Externalisation de la fonction approvisionnement des Armées (Centrales d'achats, logistique, etc.),

● Le Dossier Médical Personnalisé (DMP), pourrait également être traité sous la forme d'un PPP. Il est strictement conforme aux critères d'éligibilité : complexité –tout projet informatique l'est par nature- urgence, défaut de financement public…

D'ailleurs, des retours d'expérience existent déjà. Quelques exemples de PPP réalisés à l'étranger figurent en Annexe IV du présent document (on pourra trouver notamment un cas de PPP relatif à la logistique d'équipement des personnels de l'armée allemande démontrant une forte économie pour le budget de l'Etat, à service au moins égal et un partage des gains de productivité). Les premiers PPP menés sur le territoire français pourront tirer parti avec avantage de ces expériences européennes.

4.1.2. Démontrer la viabilité du modèle :

S'il existe de nombreux projets de PPP potentiels, plusieurs difficultés peuvent constituer des obstacles.

En premier lieu, un montage de PPP fait intervenir trois catégories d'acteurs. En effet, la contractualisation permise par le cadre réglementaire devra comprendre un volet financier, ce qui conduit naturellement le client public à voir intervenir aux côtés d'un prestataire technique, un Etablissement financier qualifié, Banque, Caisse des Dépôts, etc.

En second lieu, on notera qu'à l'heure actuelle, les sociétés de services informatiques ne connaissent en général pas les coûts de fonctionnement des services de l'Etat (exemple: le recouvrement des amendes). Ces sociétés sont donc à ce stade dans l'impossibilité d'établir avec certitude l'intérêt économique d'une opération de PPP. Ce qui réduit la possibilité pour ces sociétés de se positionner en force de proposition pour l'Etat.
Pour surmonter cet obstacle, seule une transparence des coûts des différents services de l'Etat permettra aux sociétés de services de faire montre d'initiative grâce à des métriques qui leurs sont nécessaires pour établir l'intérêt des projets de PPP, ce qui va dans le sens des recommandations du groupe de travail du Medef consacré à la « transparence des coûts ».

En troisième lieu, on ne sent pas de la part des acteurs informatiques des Administrations une motivation spontanée pour monter des projets en PPP comme dans d'autres secteurs d'activité. De ce fait, pour amorcer le mouvement, la personne publique doit adopter une démarche pro-active pour susciter les premiers **projets pilotes** permettant d'expérimenter des PPP « à la française » dans le secteur des TICs. Elle pourrait faire reconnaître des dossiers de différente envergure, comme pilotes en la matière, et notamment quelques projets phares comme le DMP.

4.1.3. La procédure d'évaluation préalable :

Nous proposons d'aller plus avant dans la transposition en droit français du **dispositif du PSC** (Public Sector Comparator) anglais. Le décret du 19 octobre 2004, dont Syntec informatique prend acte de la publication avec satisfaction, crée une **Mission d'évaluation** au sein du ministère des Finances. Cette Mission d'évaluation prend la forme d'un organisme central appelé à proposer des projets de PPP en évaluant les différences pour l'acheteur public entre des achats classiques (Code de Marchés Publics) et le recours au PPP. Dans cette logique, Syntec informatique estime souhaitable que tous les efforts soient faits pour parvenir sinon à une totale transparence des coûts, du moins garantir le caractère objectif de l'estimation des performances comparées (coût/qualité), notamment en faisant intervenir divers organismes de l'Etat (la Cour des Comptes ou tout autre organisme de contrôle), et ceci sous le contrôle du Parlement (par exemple la Commission Economique et celle des Finances).

4.2. Recommandations à destination des entreprises privées :

Il convient de prendre conscience du fait que le PPP vient en complément des autres types de contrats administratifs, et notamment des Marchés Publics, mais qu'il ne constitue pas une réponse à tous les types de marchés ou de contrats.

Les partenaires privés devront réfléchir et mettre au point les solutions techniques et financières permettant de répondre aux besoins définis au moment de l'appel d'offres. Ils devront être partie prenante en tant que profession dans la définition des SLAs adaptés à leur métier en introduisant des **métriques propres au secteur** des TICs, par exemple avec l'aide de l'AFNOR.

Les entreprises devront s'engager, dans les PPP à venir, à atteindre, sur la base d'indicateurs et de critères précis, le niveau de qualité du service qui aura été défini.
Elles devront garantir une structure de PPP « à la française » en proposant, notamment, de trouver des critères adéquats pour déterminer la durée optimale du contrat.

4.3. Recommandations communes :

De façon à faire droit aux TICs aux côtés notamment des entreprises du secteur du BTP et de services traditionnels aux collectivités comme la restauration, Syntec informatique propose que soit créé, au sein de la mission d'évaluation, un **Observatoire des performances du PPP**, impliquant l'Administration et les partenaires privés, par secteur d'application. Cet observatoire où l'on retrouverait des représentants des organismes professionnels et du Ministère des Finances, aurait vocation à remonter les informations concernant les projets de PPP en cours (retours d'expérience), ce qui permettrait de faire évoluer le Code de bonnes pratiques auquel travaille Bercy pour précisément « encadrer » les premiers PPP. Cet observatoire serait l'interlocuteur privilégié de la Mission créée par le décret du 19 octobre 2004.

Un séminaire pratique dédié à la mise en place du PPP « à la française » regroupant les industriels et l'Administration pourrait être mis en place. Il s'attacherait à promouvoir la culture du partenariat et à faire évoluer les mentalités en donnant la possibilité aux acteurs du PPP d'intégrer les subtilités de ce nouveau mode de contractualisation, de s'expliquer sur les enjeux respectifs et de mieux se comprendre.

Pendant les premières années de mise en pratique du PPP, les partenaires devront s'assurer que les organismes professionnels concernés soient bien consultés en cas de contestations juridiques et puissent donner un **avis consultatif** lors des éventuels litiges portés devant les tribunaux administratifs.

En outre, les parties concernées par le PPP devront se donner comme objectifs la rédaction de **guides contractuels**. Ces guides seront rédigés en partenariat avec les Administrations concernées. Ils visent à (i) alléger les coûts pour les partenaires publics et privés, (ii) optimiser la répartition des risques et (iii) assurer la plus grande transparence. Ces contrats pourraient, par exemple faire appel à la notion de Joint Venture de façon à permettre à l'Etat de contrôler et de suivre l'exécution ultérieure du PPP.

Enfin, les partenaires devront mettre en place une allocation des risques équilibrée et adaptée au projet.

V. Participation de Syntec informatique :

5.1. Mise en place d'un séminaire pratique dédié aux PPP :

Syntec informatique se propose de participer activement à la mise en place d'un séminaire pratique (cf infra. 4.3.) dédié aux PPP à la Française qui permettrait aux différents acteurs d'échanger sur ce nouveau mode de contractualisation et sur ses spécificités par grand secteur d'activité.

5.2. Déroulement des appels d'offres :

Sur le plan du déroulement des procédures d'appel d'offres en vue d'un PPP, des discussions pourraient être menées sur les modalités du « dialogue compétitif » dans le cadre d'une consultation en PPP pour la réalisation d'un projet informatique. Il serait souhaitable que la formalisation des étapes à l'intérieur de ce dialogue soit précisée **avec la collaboration de Syntec informatique.**

5.3. La reconnaissance de l'initiative privée pour générer des projets :

Il conviendra également d'assurer une plus grande implication des partenaires privés en les incitant à se positionner en force de proposition en vue de la réalisation de projets sous forme de PPP. C'est surtout vrai pour l'identification de ces projets. Du fait de l'existence d'un a priori peu favorable au PPP au sein des ministères, **Syntec informatique devrait avoir un accès direct et permanent auprès de la Mission d'évaluation** pour proposer des projets. Au-delà, la notion d'« initiative privée », telle que décrite dans le Livre vert de la Commission Européenne, devra sans doute être précisée. Il faudra en particulier définir dans quelle mesure et à quelles conditions la personne publique est habilitée à rémunérer « une initiative privée ».

5.4. Des formes de contractualisation basées sur le principe du « gagnant-gagnant » :

Le terme « partenariat » sous-entend la fixation d'objectifs communs clairement définis et acceptés, la transparence des coûts et des stratégies adoptées par les partenaires, la définition d'une structure de gouvernance (permettant une réévaluation du projet initial en fonction de l'évolution des objectifs, des besoins…) et de pilotage des processus à haut niveau, et enfin la détermination du partage des risques (boni et pénalités) et des gains de productivité.

Dans le cadre du processus de transformation qu'elle a initié en son sein en faveur de la performance et de la « culture du résultat », la puissance publique devra prévoir des formes de rémunération innovantes qui incitent à l'amélioration constante des services fournis. A cette fin, il est souhaitable qu'elle favorise, d'une part, l'établissement d'un mode de rémunération du partenaire privé qui reflète sa prise de risque et, d'autre part, les conditions de répartition entre la personne publique et le partenaire privé des gains liés aux résultats obtenus (par exemple, les gains de productivité). **Syntec informatique se propose de suggérer à la Mission (ou à l'Observatoire des performances, cf infra) des règles en la matière dérivées de l'expérience de ses membres et applicables au secteur des TICs**, à charge pour la Mission de les répercuter auprès des acheteurs publics concernés. En effet, Syntec informatique pourrait par exemple transmettre à la mission ou à l'observatoire des performances une information régulière concernant les projets traités à l'étranger sous forme de PPP. Ainsi, cet organisme pourrait bénéficier de l'expérience étrangère, mieux cerner les avantages de l'adoption de telle ou telle forme de contractualisation et identifier les pièges à éviter.

Par ailleurs, Syntec informatique pourrait entretenir des contacts avec d'autres organismes équivalents en Europe pour faire préciser par l'Union Européenne certains aspects juridiques du PPP appliqués à l'informatique et liés aux aspects de Joint Venture à mettre en place lors de la contractualisation en fin de consultation. Il est rappelé à cet égard qu'une interprétation étroite au plan juridique des textes européens sur les PPP pourrait interdire tout changement pendant la période de consultation dans l'identité d'un groupement en compétition. Ceci est peut-être admissible pour une affaire de BTP (secteur dont la maturité est extrêmement avancée, et où les acteurs sont stables), mais tout à fait inadéquat pour le secteur des TICs qui est soumis à des changements permanents tant du point de vue des technologies que du point de vue des acteurs.

Syntec informatique se propose de rédiger un guide contractuel en matière de PPP relatifs aux prestations informatiques. Ce guide mettrait en exergue les spécificités du contrat de partenariat par rapport aux autres types de contrats administratifs et permettrait de dégager des lignes directrices concernant la rédaction des contrats de partenariat.

5.5. Contribuer à la disparition des freins principaux :

Il est rappelé que les montages de PPP quand ils sont appliqués au secteur des TICs viennent se greffer sur des mécanismes d'infogérance. En outre, du fait de l'existence d'équipes informatiques nombreuses au sein des Administrations, il se peut que de tels montages rendent nécessaires le recours à des transferts de personnel (exemple de la logistique de l'équipement des personnels de l'armée Allemande déjà évoqué plus haut). Il est donc nécessaire que soit traité convenablement le problème du détachement dans le cadre d'opérations en PPP pour le secteur des TICs. **Syntec informatique suggère que s'ouvre une discussion à ce sujet avec le Ministre en charge de la fonction publique**. A cet égard, la Commission Sociale de Syntec informatique va rédiger un premier document de travail afin d'amorcer ladite discussion. Naturellement, un tel document sera orienté dans le sens des spécificités propres au personnel informaticien du secteur public.

VI. Conclusion :

Le PPP est la solution permettant à l'Etat de réussir ses projets en contrôlant :

- ses objectifs,
- ses budgets,
- les évolutions technologiques et les aléas.

Les Marchés Publics sont trop structurés et ne permettent pas un contrôle des évolutions technologiques en cours de contrat puisque la technique permettant d'obtenir le résultat recherché au moment de l'appel d'offres est figée. Le PPP s'intéresse à la rentabilité du projet, à la qualité du service rendu et à l'efficacité de ce dernier. Dans ce cadre, le choix de la technique permettant d'atteindre les objectifs fixés est laissé à la discrétion du partenaire privé.

La Concession de Service Public permet au partenaire privé d'adapter la technique employée aux évolutions technologiques mais présente un inconvénient considérable pour l'Etat qui perd le contrôle sur les objectifs et sur leur modification.

Le PPP regroupe les avantages du Marché Public et de la Concession de Service Public et minimise les inconvénients que ces derniers présentent pour l'Etat. Ce n'est pas un transfert d'activités relevant du service public vers un partenaire privé.

Soucieuse de la qualité et de la continuité des services informatiques, notre Chambre patronale a rédigé, en collaboration avec le CIGREF (Club Informatique des Grandes Entreprises Françaises), une Charte édictant des principes de gouvernance des projets informatiques ayant vocation à s'appliquer dans les relations maître d'ouvrage/ Maître d'œuvre (Annexe III). **Cette Charte pourrait trouver à s'appliquer dans le cadre des contrats de partenariat.**

Les projets informatiques que l'Etat peut lancer ont cette vertu particulière d'accélérer le changement. En ce sens, les TICS participent de manière éminente au processus même de transformation de l'Etat appelé de ses vœux par le Premier Ministre.

ANNEXE I : SITES INTERNET

- Institut de Gestion Déléguée **: www.fondation-igd.org**

- Ministère de l’économie et des finances : **www.ppp.minefi.gouv.fr**

- Legifrance, le Service Public de l’accès au droit : **www.legifrance.org**

- Commission européenne :
http://europa.eu.int/comm/internal_market/publicprocurement/ppp_fr.htm#contributions

-Eurostat :

• Méthode Eurostat de calcul des déficits :
http://epp.eurostat.cec.eu.int/cache/ITY_OFFPUB/KS-42-02-585/EN/KS-42-02-585-EN.PDF

▪ Contrats de longues durées, Etat / entités privées :
http://epp.eurostat.cec.eu.int/cache/ITY_OFFPUB/KS-BE-04-004/EN/KS-BE-04-004-EN.PDF

ANNEXE II : ORDONNANCE ET DECRETS :

- Ordonnance n° 2004-559 du 17 juin 2004 sur les contrats de partenariat publiée au JO n°141 du 19 juin 2004 consultable sur : www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=ECOX0400035R

- Décret n° 2004-1119 du 19 octobre 2004 portant création de la mission d'appui à la réalisation des contrats de partenariat consultable sur : www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=ECOM0400477D

- Décret n° 2004-1145 du 27 octobre 2004 pris en application des Articles 3, 4, 7 et 13 de l'Ordonnance du 17 juin 2004 consultable sur : www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=ECOM0400470D

ANNEXE III : BIBLIOGRAPHIE

- **Travaux du Medef :**
Direction des affaires économiques, financières et fiscales,
Comité Economie Electronique,
Groupe de travail « Réforme de l'Etat par l'utilisation des TICs », sous groupe « Transparence ».

- « Pour un Etat en ligne avec tous les citoyens » :
Jean Arthuis, Rapport du Sénat n° 422 (2003/2004), Commission des Finances.

- Charte Cigref/ Syntec :
La Charte est consultable sur le site de Syntec informatique :
http://www.syntec
informatique.fr/information/Page.asp?page_id=989&Theme_ID=37&Titre_theme=Professionnalisme&Article_id=270.

- Guide contractuel syntec informatique relatif à l'infogérance.

ANNEXE IV : EXEMPLES DE PPP ETRANGERS

- PPP relatif à l'habillement de l'armée allemande consultable sur le site de Syntec informatique : www.syntec-informatique.fr

- PPP pour une ville e-citoyenne ; NORWICH (UK) (Partenariat entre une entreprise privée et une collectivité locale) :www.syntec-informatique.fr

LIVRE VERT SUR LES PARTENARIATS PUBLIC-PRIVÉ ET LE DROIT COMMUNAUTAIRE DES MARCHÉS PUBLICS ET DES CONCESSIONS

RÉPONSE DE L'UNSPIC

L'Union Nationale des Services Publics (UNSPIC) regroupe, via leurs organisations professionnelles ou directement, les entreprises mettant au service de l'Etat, des collectivités territoriales et de leurs groupements ainsi qu'au service des entreprises leur expérience – parfois plus que centenaire – et leur savoir-faire dans les domaines de la propreté, des réseaux d'énergie, de l'eau et de l'assainissement, des transports, des autoroutes et du stationnement, des équipements sportifs, de la restauration collective ainsi que de l'ingénierie financière.

Elle s'attache à valoriser les atouts et les performances de la gestion déléguée et à en promouvoir le développement à l'international.

Les S.I.E.G. gérés par les entreprises gestionnaires de services publics adhérentes ont le plus souvent un cadre géographique régional, départemental voire local et sont mis en œuvre en application de contrats à durée déterminée conclus avec des autorités publiques locales après mise en concurrence.

Les entreprises représentées par l'UNSPIC représentent plus de 250.000 Salariés et environ 30 milliards d'euros de chiffre d'affaires en France et 400.000 Salariés pour un chiffre d'affaires de près de 70 Milliards d'euros au niveau de l'Europe des 25 ; certaines d'entre elles ont d'ores et déjà une longue expérience de la gestion déléguée dans ce cadre géographique élargi.

L'UNSPIC sait gré à la Commission d'avoir élaboré un livre vert sur les P.P.P. et ouvert une vaste consultation sur ce thème qui vient fort opportunément compléter les livre vert et livre blanc sur les SIEG.

L'UNSPIC partage totalement la préoccupation de la Commission de doter les autorités publiques et les entreprises des outils les plus adaptés pour contribuer dans les conditions les plus efficaces à mettre à la disposition des populations de l'Union Européenne et notamment celle de ses dix nouveaux membres, des équipements et services d'intérêt économique général de qualité.

Forte de l'expérience de ses membres dans le domaine des concessions, notamment des concessions de service, l'UNSPIC attache la plus grande importance à toute démarche européenne visant à améliorer la qualité de service, réduire les coûts et assurer des financements pérennes .

L'UNSPIC :

- **Tient à marquer son attachement aux principes de transparence, d'égalité de traitement, de proportionnalité et de reconnaissance mutuelle découlant du traité et à leur application à toute activité économique, qu'elle revête ou non un caractère de service public**

- **Partage l'objectif de la Commission que les diverses formes de partenariats puissent s'exercer et se développer « dans un contexte de concurrence efficace et de clarté juridique » (paragraphes 16 et 40)**

- **Relève que le débat ouvert par la Commission « se situe en aval du choix économique et organisationnel » d'externaliser ou non la gestion des services publics (paragraphe 17)**

- **Salue le rappel que, dès lors que la gestion d'un service public est confiée à un tiers, l'autorité publique compétente « est tenue de respecter le droit des marchés publics et des concessions même si ce service est considéré comme relevant de l'intérêt général » (paragraphe 7)**

- **Apprécie que la Commission ait fait entrer dans le champ de sa réflexion les attributions de missions réalisées par la voie d'un acte unilatéral et la notion de P.P.P. de type institutionnalisé. Il s'agit bien là en effet de situations s'analysant comme des contrats de fait entre une entité publique et un organisme tiers : l'UNSPIC souhaiterait que celles-ci fassent l'objet d'une analyse plus complète.**

- **Enfin et surtout, tient à souligner le caractère spécifique des concessions, tant au plan économique qu'au plan juridique ainsi que l'avait relevé la Commission dans sa communication interprétative sur les concessions de 2000 ; cette spécificité doit orienter l'énoncé des règles applicables tant pour l'attribution des concessions que pour l'adaptation des contrats pendant leur durée.**

Les réponses de l'UNSPIC aux questions précises du livre vert sont présentées ci après. Consciente que la présente contribution n'épuise pas un sujet aussi important et complexe, l'UNSPIC souhaite poursuivre le dialogue avec la Commission par tout moyen que celle ci jugera utile, notamment lors d'une audition devant les responsables de la Commission Européenne.

1. *Quels types de montages de PPP purement contractuel connaissez-vous? Ces montages font-ils l'objet d'un encadrement spécifique (législatif ou autre) dans votre pays?*

1. En retenant l'acception la plus large de la notion de « PPP purement contractuel » les contrats dont nos adhérents ont la pratique sont, selon les cas, du type « concession » ou du type « marché public » au sens du droit communautaire.

   Dans l'un et l'autre cas, ils présentent une très grande variété, traduisant l'accord des parties sur un objet ou une mission, la nature et la répartition des risques, le partage des responsabilités, le type de relation entretenu avec le client final, l'origine et les modalités du financement du service.

   C'est dans le domaine des concessions que les contrats s'avèrent les plus variés à raison de leurs caractères communs spécifiques :

   - le service opéré correspond au transfert d'une mission de service public que l'autorité publique délégante entend toutefois strictement encadrer
   - les bénéficiaires finaux sont constitués par la population au profit de laquelle l'autorité choisit de faire rendre un service par un autre qu'elle même
   - la relation contractuelle est par nécessité de longue durée et adaptable
   - le prix du service est généralement acquitté directement et de manière significative par les habitants bénéficiaires

   Sur ce dernier point, deux remarques doivent être faites :

   - le cas où les contrats comportent le versement d'une subvention par la collectivité publique n'est pas le plus fréquent
   - lorsqu'une rémunération complémentaire existe, comme cela a été bien analysé par l'Arrêt ALTMARK, cette rémunération ne saurait être considérée comme une aide d'Etat ; son montant varie d'ailleurs selon divers paramètres tels que la qualité du service rendu, son volume ou l'atteinte d'objectifs contractuellement définis.

2. En France, les montages relevant des PPP contractuels font l'objet d'encadrements distincts selon qu'il s'agit de marchés publics – au sens du droit interne français- ou de délégations de service public.

   Le Code des Marchés Publics, qui a été réformé en 2003, traite notamment des marchés conclus par l'Etat ainsi que de ceux conclus par les collectivités locales et leurs groupements, qu'il s'agisse de marchés de travaux ou de services.

Après une longue période d'élaboration progressive d'un droit jurisprudentiel, la loi du 29 janvier 1993 – dite loi SAPIN- a donné un cadre légal spécifique aux missions de gestion déléguée des services économiques d'intérêt général ; ce texte a été complété par la loi du 8 février 1995 faisant obligation au délégataire de produire chaque année à l'autorité délégante un rapport financier et relatif à la qualité de service, assorti d'une annexe sur les conditions d'exécution du service public. Enfin la loi du 11 décembre 2000 a donné une définition de la « délégation de service public » que ne comportait pas le texte de 1993.

Dans de tels cas, il ne s'agit pas de privatisation de services publics mais d'un partage de responsabilités dans lequel la personne morale de droit public fixe les objectifs, les tarifs et assure le contrôle de la bonne gestion du délégataire. La complexité de la mission confiée au délégataire implique toujours que ces contrats aient une durée longue, indépendamment de l'importance des seuls investissements mis à sa charge.

A ces deux types de montage contractuels, il convient d'ajouter celui des « contrats de partenariat » institué par la récente ordonnance du 17 juin 2004 dont les textes d'application ne sont pas parus à ce jour : ce nouveau cadre a pour origine la volonté des pouvoirs publics de proposer un cadre approprié à des montages complexes qui ne pouvaient être réalisés dans aucun des deux dispositifs législatifs et réglementaires rappelés ci-dessus.

2. De l'avis de la Commission, la transposition en droit national de la procédure de dialogue compétitif permettra aux parties concernées de disposer d'une procédure particulièrement adaptée à la passation des contrats qualifiés de marchés publics lors de la mise en place d'un PPP de type purement contractuel, tout en préservant les droits fondamentaux des opérateurs économiques. Partagez-vous ce point de vue? Si non, pourquoi?

Le champ d'application de la nouvelle procédure de dialogue compétitif instaurée par les Directives 2004/17 et 2004/18 est circonscrit aux actes attributifs qualifiés de marchés publics et vise les seuls cas où l'organisme adjudicateur n'est pas en mesure de définir, soit les moyens techniques, soit le montage juridique et / ou financier d'un projet.

Dans ces situations, les candidats sont appelés à participer à co-définir le projet conjointement avec l'organisme adjudicateur ce qui constitue une différence fondamentale avec les concessions, pour lesquelles l'organisme adjudicateur définit seul le projet et reçoit des candidats une offre unique.

Il nous paraît de la plus haute importance que dans la phase initiale de dialogue, chaque candidat puisse être assuré de la manière la plus absolue que les échanges avec l'organisme d'adjudicateur conservent un caractère strictement bilatéral et confidentiel afin que soient respectés les droits fondamentaux des acteurs économiques.

Dans la mesure où cette procédure de dialogue compétitif – qui peut s'avérer d'un grand intérêt pour des projets innovants et présentant une grande complexité - devrait être interprétée comme incluse dans le « régime de passation » évoqué au paragraphe 36, il nous paraîtrait totalement inopportun qu'elle soit étendue à tous les PPP contractuels qualifiés de marchés publics car elle risquerait de générer, tant pour les organismes adjudicateurs que pour les entreprises candidates des surcoûts et des allongements de procédure pour des projets clairement pré-définis pour lesquels les diverses parties ont une pratique éprouvée et dont l'efficacité technique et économique est avérée.

A fortiori la procédure du dialogue compétitif ne nous semble pas adaptée aux PPP contractuels qualifiés de concessions : voir notre réponse à la question 7.

3. En ce qui concerne ces contrats, existe-t-il selon vous des points autres que ceux relatifs au choix de la procédure d'adjudication, susceptibles de poser problème au regard du droit communautaire des marchés publics? Si oui, lesquels et pour quelles raisons?

La situation particulière, mais non exceptionnelle, dans laquelle une entité adjudicatrice déclare une procédure infructueuse, notamment lorsqu'elle a reçu plusieurs offres, nous paraîtrait mériter une attention particulière de la part de la Commission.

Sans nullement remettre en cause le droit des entités adjudicatrices de prendre une telle décision, cette situation, préjudiciable aux entreprises candidates devrait conduire à une application particulièrement rigoureuse des obligations de transparence, d'impartialité des procédures et le cas échéant de pertinence des éléments de preuve, selon les principes issus de l'arrêt TELAUSTRIA.

Par ailleurs, pour les P.P.P. qualifiés de marchés publics de longue durée, car comportant investissement et exploitation ou maintenance, il est impératif de prévoir la possibilité d'adaptation du contrat au cours de sa durée.

4. Avez-vous déjà organisé, participé, ou souhaité organiser ou participer à une procédure d'attribution de concession au sein de l'Union? Quelle expérience en avez-vous?

En sa qualité d'association professionnelle, l'UNSPIC n'a pas d'expérience directe en la matière mais ses adhérents ont éprouvé certaines difficultés à bénéficier des Fonds ISPA et sont préoccupés, s'agissant notamment des dix nouveaux Etats membres de l'Union, que l'attribution des fonds communautaires ne donne pas lieu à distorsion selon les modes de gestion, directs ou concessifs.

5. ***Estimez-vous que le cadre juridique communautaire actuel est suffisamment précis pour assurer la participation concrète et effective de sociétés ou groupements non-nationaux aux procédures de passation de concessions? Une concurrence réelle est-elle, selon vous, habituellement assurée dans ce cadre?***

Nous n'avons pas connaissance de cas dans lesquels des sociétés ou groupements n'auraient pu participer à des procédures de passation de concessions à raison de leur nationalité et, à cet égard, le cadre juridique communautaire actuel nous paraît suffisant.

On peut observer d'ailleurs que, le plus souvent, les entreprises européennes étrangères à un pays membre créent dans ce pays une filiale locale nationale, moins pour échapper à un obstacle juridique que pour disposer d'équipes susceptibles par leur culture locale, d'exercer au mieux les missions de service public..

6. ***Pensez-vous qu'une initiative législative communautaire, visant à encadrer la procédure de passation de concessions, est souhaitable?***

Les concessions de travaux relèvent d'un cadre juridique communautaire très récemment actualisé par la Directive 2004/18 qui donne satisfaction et n'appelle pas, de notre point de vue, de nouvelle initiative législative communautaire.

Si en matière de concessions de services il n'existe pas de cadre juridique similaire, la Cour de Justice européenne a énoncé dans l'arrêt TELAUSTRIA du 7 décembre 2000, des règles claires tirées du principe de non-discrimination du Traité, en matière de transparence : tout soumissionnaire potentiel doit bénéficier de la double garantie d'un « degré de publicité adéquat » et d'un « contrôle de l'impartialité des procédures d'adjudication »

Nous ne verrions pas d'inconvénient à ce que soit mise en chantier une directive sur les concessions à la condition que les P.P.P. institutionnels y soient inclus ; cependant, conscients que la récente adhésion de dix nouveaux Etats rend cette perspective peu probable dans un avenir proche, le plus réaliste nous parait être de devoir s'en tenir aux principes fixés par le Traité en matière de concurrence et de neutralité à l'égard du statut des opérateurs.

Enfin nous tenons à préciser qu'une action législative qui n'inclurait pas les P.P.P. institutionnels ferait courir le grave risque de jeter le discrédit ou la suspicion sur les P.P.P. de type contractuel qui seuls apparaîtraient comme nécessitant d'être encadrés, alors qu'au contraire on peut attendre des effets positifs de l'ouverture à la concurrence des P.P.P. institutionnels.

7. ***De manière plus générale, si vous estimez qu'il est nécessaire que la Commission propose une nouvelle action législative, existerait-il à votre avis des raisons objectives de viser dans cet acte tous les PPP de type contractuel, qu'ils soient qualifiés de marchés publics ou de concessions, pour les soumettre à des régimes de passation identiques?***

L'UNSPIC tient à rappeler qu'elle avait porté le plus grand intérêt à l'initiative prise par la Commission en 2000 en adoptant une communication interprétative sur les concessions en droit communautaire.

Plus particulièrement, elle avait relevé les éléments distinctifs des concessions de services énoncés par la Commission que constituent :

- ➢ Le critère de l'exploitation
- ➢ La prise de risques liés au service par l'opérateur et le mode de rémunération par l'usager qui y est associé.
- ➢ Le transfert de la responsabilité d'exploitation lequel ne peut être assimilé à une simple fourniture de services
- ➢ Leur domaine normal de mise en œuvre : « des activités qui, de par leur nature, leur objet et les règles auxquelles elle sont soumises, sont susceptibles de relever de la responsabilité de l'Etat »

Ces critères nous étaient apparus tout à fait adéquats pour distinguer les notions communautaires de « marchés publics » et de « concessions ».

Dans le prolongement de cette première approche et au vu de l'extension du « phénomène partenariat – public - privé » selon la juste expression du Livre Vert, il nous paraîtrait opportun que la notion de concession puisse être complétée et précisée sous quelques aspects.

Ainsi, en matière de concessions de services, la prise de risque n'est pas circonscrite aux seuls risques d'exploitation ou financiers : elle porte également sur les diverses aspects que comporte une prestation continue rendue à une population dont les attentes sont diverses et les exigences de qualité croissantes et évolutives. Les choix opérés par l'autorité publique au cours de l'exécution du contrat concourent également à conférer à la prise de risque un caractère global et multiforme exercé dans le cadre contractuel défini.

En effet le concessionnaire se voit confier une mission – et non un ensemble de tâches à exécuter – assortie d'un transfert d'aléas lié à celui de la responsabilité d'un service rendu au public dans le cadre d'un partenariat.

Ce dernier se traduit notamment par une collaboration active et durable dans des domaines tels que : la définition précise du service offert, la suite donnée aux propositions du concessionnaire pour faire évoluer le service et en optimiser la gestion**,** les choix à opérer en matière d'évolution technique ou technologique, les réponses à apporter aux exigences croissantes des bénéficiaires du service en termes de qualité ou de protection environnementale, aux suites à donner aux suggestions des représentants des consommateurs….

L'UNSPIC souligne également que, de manière générale, le concessionnaire se voit explicitement confier une mission globale de conseil pour le développement et la meilleure organisation du service.

Ces observations correspondent au constat fait tant par la Commission au paragraphe 2 du Livre Vert selon lequel « le partenaire public se concentre essentiellement sur la définition des objectifs à atteindre en termes d'intérêt public, de qualité de services offerts, de politique des prix, et assure le contrôle du respect de ces objectifs » que par nos entreprises adhérentes.

La différence de nature, en droit communautaire, entre les concessions et les marchés publics nous paraît appeler un corollaire indispensable : l'existence de deux procédures distinctes de mise en concurrence.

On ne voit pas comment de tels critères peuvent s'intégrer dans une procédure de type « dialogue compétitif ». Au contraire, la procédure française de la loi SAPIN qui prévoit, encadrée par la concurrence, la possibilité pour l'autorité publique de disposer, en phase finale, d'une libre négociation, répond bien à ces nécessités.

S'agissant des marchés, des textes existent. S'agissant des concessions, aucune des procédures existantes – y compris celle du dialogue compétitif - ne nous parait adaptée ; en effet :

- le dialogue compétitif a été conçu pour la fourniture d'ouvrages ou d'équipements complexes pour lesquels l'entité publique ne dispose pas à elle seule de la compétence technique pour choisir les meilleures technologies.
- Dans le cas des concessions de service, la préoccupation première n'est généralement pas d'ordre technologique ou technique mais réside dans la capacité de l'opérateur à exercer de manière satisfaisante et durable la mission de service public ; cette capacité se traduit par exemple, par la qualité du climat social, la pertinence de la politique de formation ou l'aptitude à répondre de manière réactive et appropriée aux attentes des clients.

La procédure propre aux concessions devrait contribuer à faire assurer le respect des principes de transparence et d'égalité de traitement découlant du Traité tout en laissant aux entités adjudicatrices et aux entreprises candidates l'espace de négociation indispensable à la clarification des offres, en particulier aux plans techniques et de partage des responsabilités pour la mise en œuvre de la mission confiée dans la perspective du partenariat à conclure.

8. ***Selon votre expérience, l'accès des opérateurs non-nationaux aux formules de PPP d'initiative privé est-il assuré? En particulier, lorsqu'il existe une invitation des pouvoirs adjudicateurs à présenter une initiative, cette invitation fait-elle généralement l'objet d'une publicité adéquate permettant l'information de tous les opérateurs intéressés? Une procédure de sélection véritablement concurrentielle est-elle organisée pour assurer la mise en œuvre du projet retenu?***

La France ne dispose pas d'une législation propre aux PPP d'initiative privée, contrairement à ce qui existe en Italie et en Espagne.

Toutefois, en élargissent le champ d'observation, il sera intéressant, le moment venu et avec le recul et l'expérience suffisants, de faire un bilan des premières applications du « contrat de partenariat » institué très récemment en France.

9. ***Quelle serait selon vous la meilleure formule pour assurer le développement des PPP d'initiative privée dans l'Union européenne tout en assurant le respect des principes de transparence, de non discrimination et d'égalité de traitement?***

L'UNSPIC émet la suggestion que la Commission invite les autorités publiques à rendre publics – préalablement à la décision politique de faire ou de faire faire et en respectant ce choix – les projets de création de services ou d'équipements collectifs, afin de contribuer à la transparence, éclairer la décision politique, contribuer au meilleur choix sous les aspects technique, qualitatif et de coût.

10. ***Quelle expérience avez-vous de la phase postérieure à la sélection du partenaire privé dans les opérations de PPP contractuels?***

1. Ainsi que le Livre Vert le constate avec raison le laps de temps qui s'écoule entre la sélection du partenaire et la signature est parfois long. Ceci peut être particulièrement vrai en matière de concessions pour lesquelles ce temps est celui de la négociation, phase du processus qui aurait mérité d'être approfondie.

En effet, comme indiqué plus haut, la négociation est capitale puisque, sur la base d'une offre remise, elle permet aux deux futurs partenaires d'obtenir les précisions nécessaires à la bonne compréhension des engagements réciproques et de préparer dans les meilleures conditions la vie du contrat à conclure qui sera inévitablement soumis aux aléas extérieurs ; c'est lors de cette étape que sont notamment précisées les procédures d'examen en commun du suivi de l'exécution du contrat ainsi que de l'analyse des évènements pouvant en affecter les modalités et de la recherche des solutions correspondantes.

2. L'expérience et la pratique des relations contractuelles entre entités publiques et entreprises montrent que les contrats conclus à l'issue d'une procédure concurrentielle doivent pouvoir être ultérieurement modifiés par accord des parties.

   En effet, quel que soit le soin apporté à la rédaction d'un contrat, l'entité publique et l'entreprise co-contractante ne peuvent d'autant moins tout prévoir que le contrat est long et que, par ailleurs, des évènements ou situations échappant totalement à leur emprise peuvent survenir. A cet égard on peut citer des modifications sensibles de la répartition géographique de la population desservie au sein d'une zone donnée, l'intervention de nouvelles normes environnementales, l'extension de l'aire de responsabilité de l'entité publique – en France le cas est fréquent dans le cadre du développement de l'intercommunauté - la nécessité de renforcer les mesures de sécurité pour la protection de personnes et des biens, la prise en compte de l'évolution des modes de vie des consommateurs, etc.

   Ce point nous parait devoir être souligné car il est au cœur de toute activité de service et constitue une préoccupation commune très forte dans la gestion des SIEG locaux tant de la part des représentants des autorités publiques que des entreprises qui en sont en charge.

   Aussi, l'UNSPIC souhaite-t-elle très vivement voir évoluer l'approche très rigide que traduit notamment le paragraphe 49 vers une vision plus empirique de la réalité qui n'a d'autre but que d'adapter et d'optimiser les SIEG en permettant d'apporter aux contrats qui les régissent la nécessaire souplesse qui en constitue le corollaire.

11. Avez--vous connaissance de cas dans lesquels les conditions d'exécution –y compris les clauses d'adaptation dans le temps- ont pu avoir une incidence discriminatoire ou ont pu constituer une entrave injustifiée à la libre prestation de services ou à la liberté d'établissement? Si oui, pouvez-vous décrire le type de problèmes rencontrés?

Nous n'avons pas connaissance de conditions d'exécution des contrats qui ait été de nature à fausser la concurrence.

12. ***Avez-vous connaissance de pratiques ou de mécanismes d'évaluation d'offres ayant des incidences discriminatoires?***

Nous n'avons pas connaissance de pratiques ou de mécanismes d'évaluation d'offres déposées par des entreprises privées ayant eu des incidences discriminatoires.

En revanche nous avons souvent relevé des pratiques discriminatoires constitutives de distorsions de concurrence en cas de gestion directe de type « in house » ou de PPP institutionnels ainsi que nous le mentionnons en réponse à la question 20.

13. ***Partagez-vous le constat selon lequel certains montages du type « step-in » peuvent poser problème en termes de transparence et d'égalité de traitement? Connaissez-vous d'autres « clauses types » dont la mise en œuvre est susceptible de poser des problèmes similaires?***

Le Livre Vert relève (paragraphe 48) que la mise en œuvre des clauses de « step-in » peut aboutir au changement du partenaire privé de l'adjudicateur sans mise en concurrence et soulève la question de la compatibilité de cette éventualité avec le droit communautaire des marchés publics et des concessions.

Bien qu'aucune indication ne soit fournie quant à la fréquence ou l'étendue du type de situation évoquée, elle appelle de notre part les observations suivantes :

- L'UNSPIC, si elle comprend les interrogations que peut susciter de la part de l'organisme adjudicateur une modification dans l'actionnariat de l'entreprise avec laquelle elle a contracté, tient à rappeler son attachement au principe de liberté de circulation de capitaux, issu du Traité, lequel a un caractère général et ne comporte pas d'exception fondée sur la nature des entités avec lesquelles les entreprises contractent

- Le seul critère à retenir par l'autorité délégante nous parait devoir être celui de l'exécution par l'entreprise des engagements contractuels qu'elle a pris et sur lesquels une éventuelle modification de l'actionnariat ne doit pas avoir d'incidence ; dans le cas particulier où la tenue de ces engagements est pour partie liée à l'appartenance de l'entreprise délégataire – constituée à l'effet d'avoir pour client unique telle autorité délégante - à un groupe qui lui apporte le concours de ses moyens humains et techniques, il nous parait légitime que la poursuite de ce concours ne soit pas affectée par la modification d'actionnariat.

14. ***Estimez-vous qu'il est nécessaire de clarifier au niveau communautaire certains aspects relevant du cadre contractuel des PPP? Si oui, sur quel(s) aspect(s) devrait porter cette clarification?***

D'une manière générale, la matière est trop diversifiée pour pouvoir relever d'un cadre global et unique.

Plus précisément, sur la durée, l'UNSPIC estime inappropriée voire dangereuse la limitation au seul amortissement du critère de durée des contrats : elle semble inspirée par les seuls contrats de construction et de gestion d'infrastructure et méconnaître les spécificités des services lesquels ne comprennent pas nécessairement d'investissements financiers mais peuvent comporter des engagements de productivité ; à cet égard l'UNSPIC rappelle que dans les professions de services qu'elle représente, les engagements contractuels en matière de qualité de service sont très largement répandus, de plus en plus nombreux et complexes et peuvent inclure des objectifs progressant au fur et à mesure du déroulement des contrats.

Il convient également de souligner que la connaissance approfondie d'un service par un nouvel exploitant nécessite du temps : il en est ainsi – à titre d'exemple – de la connaissance détaillée des pratiques de déplacements des habitants d'une agglomération pour un exploitant de réseau de transport ou de celle de l'état d'un réseau de canalisations de distribution d'eau potable.

L'UNSPIC partage totalement l'observation faite (paragraphe 47) que les relations de PPP « doivent pouvoir évoluer afin de s'adapter » tant aux changements de l'environnement macro-économique ou technologique qu'aux besoins de l'intérêt général : ceci justifie que puissent s'opérer des ajustements de la relation contractuelle et milite en faveur d'une approche multicritères de l'appréciation de la durée adéquate des contrats.

En matière de durée, l'UNSPIC propose qu'en cas de gestion directe, « in house » ou partenariat institutionnel, les entités adjudicatrices assortissent leur décision d'une fixation de durée, (déterminée, maximale ou en cohérence avec la pratique en cas de gestion déléguée) : en effet la situation actuelle entrave de manière injustifiée la libre prestation de services et la liberté d'établissement car elle ferme définitivement un marché alors que l'environnement technique, économique, social …. évolue et qu'il serait inéquitable que la notion de « durée excessive » s'applique à la seule gestion déléguée.

Une autre suggestion pourrait être soumise à la Commission en matière de gestion institutionnelle : l'évaluation, à intervalles réguliers, de la qualité et du coût du service.

15. ***Dans le contexte des opérations de PPP, avez-vous connaissance de problèmes particuliers rencontrés en matière de sous-traitance? Lesquels?***

16. ***Le phénomène des PPP de type contractuel, impliquant le transfert d'un ensemble de tâches à un unique partenaire privé, justifie-t-il selon vous que des règles plus détaillées et/ou d'un champ d'application plus large soient mise en place en ce qui concerne le phénomène de sous-traitance?***

17. ***De manière plus générale, estimez-vous qu'une initiative complémentaire devrait être prise au niveau communautaire en vue de clarifier, ou d'aménager, les règles relatives à la sous-traitance?***

La décision d'une collectivité publique de confier à un tiers la mise en œuvre d'une activité économique de service n'est pas réductible au transfert « d'un ensemble de tâches » mais correspond au transfert d'une mission : ceci nous parait constituer une différence de nature d'avec les concessions des travaux et marchés publics évoqués au paragraphe 52.

Aussi**,** l'UNSPIC considère qu'en matière de concession de services – lesquelles présentent la spécificité d'emporter un transfert, contrôlé, de la responsabilité de mise en œuvre d'un service public – les entreprises qui en sont contractuellement chargées dans une enveloppe de coût préalablement définie doivent se voir reconnaître la plus large autonomie de gestion dont celle du choix de leurs sous-traitants et des exigences correspondantes en matière de prestations confiées à ces derniers ***:*** le transfert de la mission emporte en effet une responsabilité globale, vis à vis de l'autorité concédante et il lui appartient donc d'assumer seule le choix des entreprises auxquelles elle estime devoir recourir au regard notamment des exigences de qualités sur lesquelles elle a pris des engagements.

En outre, l'évolution de l'environnement économique de l'entreprise peut la conduire pendant la durée du contrat à opérer, pour des raisons de meilleure gestion ou de nature technique, des choix entre gestion interne et gestion sous-traitée des divers éléments qui concourent à la mise en œuvre du service rendu.

Cette large autonomie doit également être respectée dans le cas, évoqué au paragraphe 64, où une entité mixte a la qualité d'organisme adjudicateur, dans le strict respect du droit communautaire actuellement applicable.

18. ***Quelle expérience avez-vous de la mise en place d'opérations de PPP de type institutionnalisé? En particulier, votre expérience vous conduit-elle à penser que le droit communautaire des marchés publics et des concessions est respecté dans le cas de montages de PPP institutionnalisés? Si non, pourquoi?***

19. ***Estimez-vous qu'une initiative doit être prise au niveau communautaire en vu de clarifier ou de préciser les obligations des organismes adjudicateurs quant aux conditions dans lesquelles doivent être mis en concurrence les opérateurs potentiellement intéressés par un projet de type institutionnalisé ? Si oui, sur quels points particuliers et sous quelle forme ? Si non, pourquoi ?***

En France, les seules entités distinctes au sein desquelles coopèrent le secteur public local et le secteur privé sont les sociétés d'économie mixtes (S.E.M.)

Sociétés de droit privé à capitaux majoritairement publics, elles ne se distinguent pas, au regard du « phénomène P.P.P. », des sociétés à capitaux privés et se trouvent dans la même situation que ces dernières par rapport aux entités adjudicatrices pour l'obtention d'une tâche ou d'une mission de service public.

La question soulevée par la Commission relative à la prise de contrôle d'une entité publique par un opérateur privé correspond à la situation de passage d'un PPP institutionnel dans lequel une entité publique exerce une influence dominante à un PPP de type contractuel.

A cet égard, il convient d'observer et de souligner que ce passage ne peut s'opérer que parce que le PPP institutionnel se caractérise - et il se distingue en cela de la situation d'in house- par l'existence d'un lien, de nature contractuelle mais non formalisé, entre l'entité publique qui est à l'origine de sa constitution et lui-même.

L'UNSPIC est d'avis que, dès lors que l'opération en capital conduit à céder à un tiers une participation lui permettant d'exercer une influence certaine, elle soit assortie de la formalisation d'un contrat et de la détermination de la durée certaine de celui-ci.

L'UNSPIC souscrit à la critique formulée par la Commission de la pratique tendant à confondre la phase de constitution de l'entité et celle d'attribution des taches : la première doit en effet être distincte de la seconde et antérieure à celle-ci ; elle souhaite que la Commission adopte des dispositions appropriées pour y remédier et s'assurer que cette pratique ne perdure pas en invitant les Etats membres à y veiller.

20. *Quelles sont les mesures ou les pratiques que vous estimez constitutives d'entraves à la mise en place des PPP au sein de l'Union européenne?*

L'expérience qu'ont nos adhérents sur leurs marchés respectifs montre que les situations critiquables rencontrées tiennent moins à des obstacles ou entraves objectifs qu'à des différences entre acteurs économiques à raison de leur statut juridique ou de leur régime de propriété, selon que celle-ci est privée ou publique, ce qui, au regard du droit communautaire devrait être neutre.

Les discriminations peuvent porter – outre le coût d'accès au marché des capitaux du fait de garanties d'Etat- sur la fiscalité et les charges assises sur les salaires : ainsi en France, les régies d'eau, d'assainissement, de gestion des déchets et de transport ne sont pas assujetties à la taxe professionnelle non plus qu'à la taxe foncière ni à l'impôt sur les sociétés ; de même le droit d'entrée acquitté par les usagers d'une piscine supporte ou non la TVA selon que sa gestion est déléguée ou assurée en régie.

Très récemment, par un arrêt rendu le 12 décembre 2003 la décision prise par un Conseil Général d'accorder aux communes gérant en régie leur service des eaux un taux de subvention supérieur à celui octroyé aux communes ayant délégué ce service à des entreprises a été validée par le Conseil d'Etat.

21. *Connaissez-vous d'autres formes de PPP développées dans les pays en dehors de l'Union? Connaissez-vous des exemples de « bonnes pratiques » développées dans le ce cadre, dont l'Union pourrait s'inspirer? Si oui, lesquelles?*

Nous n'avons pas connaissance de formes de PPP développées en dehors de l'Union et dont elle pourrait s'inspirer.

22. *De façon plus générale, et compte tenu des besoins importants d'investissements nécessaires dans certains Etats membres, afin de poursuivre un développement économique social et durable, estimez-vous utile une réflexion collective sur ces questions qui se poursuivrait à des intervalles réguliers entre les acteurs concernés, et qui permettrait un échange des meilleures pratiques? Est-ce que vous considérez que la Commission devrait animer un tel réseau?*

Les adhérents de l'UNSPIC partagent totalement le constat fait par la commission des importants besoins d'investissements, notamment mais non exclusivement, dans les pays qui viennent de rejoindre l'Union Européenne.

Aussi, l'UNSPIC appelle t-elle de ses vœux une réflexion, la plus proche possible, qui serait consacrée à la recherche de la meilleure mise en œuvre possible des fonds communautaires au profit des services d'intérêt économique général opérés par des entreprises dans le cadre de concessions et d'autres formes de PPP au service des populations.

Une initiative d'envergure, assortie d'une communication appropriée sur les aires géographiques des SIEG ainsi pris en considération, permettrait d'illustrer auprès des habitants bénéficiaires la coopération fructueuse entre l'Union Européenne, les collectivités publiques responsables et les entreprises en vue du meilleur développement économique et social durable.

POSITION DE L'UTP

LIVRE VERT

SUR LES PARTENARIATS PUBLIC PRIVE
ET LE DROIT COMMUNAUTAIRE
DES MARCHES PUBLICS ET DES CONCESSIONS

21 JUILLET 2004

L'Union des Transports Publics représente l'ensemble des entreprises françaises de transport public urbain. Ces entreprises sont des opérateurs privés, des opérateurs publics ou des sociétés à capitaux publics.

L'UTP salue le lancement d'un important débat au niveau européen par la Commission Européenne sur le phénomène des Partenariats Public Privé (PPP), après sa communication d'avril 2000, consacrée aux concessions. Ce débat ne manque pas de soulever des questions fondamentales, comme celles de la mise en concurrence des concessions de service, la vie des contrats … questions qui sont susceptibles d'affecter profondément le droit des contrats. Elle regrette cependant que les questions relatives au phénomène des PPP et les solutions qui y sont proposées, soient présentées uniquement sous l'angle du droit existant des marchés publics et des concessions, et que la Commission n'ait pas adopté une vision plus prospective des solutions à apporter.

Toutefois, l'UTP tient à attirer l'attention de la Commission sur le traitement de certaines questions actuellement vecteurs d'insécurité juridique et qui jusqu'ici concernent plus particulièrement le secteur des transports publics de proximité.
En effet, comme l'UTP le développe ci-après[1], le secteur est actuellement fragilisé par les incertitudes qui entourent la question des modalités d'attribution des compensations pour la réalisation des obligations de service public et de celle des droits exclusifs.

Ces questions n'étant pour l'instant pas encore réglées, notre secteur connaît une situation d'insécurité juridique, qui handicape fortement la prise d'initiatives des autorités compétentes et des entrepreneurs publics et privés.
L'UTP est donc favorable à tout débat ou à toute démarche juridique qui pourrait permettre de préciser et de clarifier ces questions, et in fine d'adopter un instrument législatif sectoriel, en amont même des discussions relatives à l'adoption éventuelle d'un encadrement des PPP.

La position de l'Union des Transports Publics est centrée sur le type de PPP qui concerne le plus couramment ses membres pour l'exploitation de services de transport public, à savoir ce qu'on appelle en France la "délégation de service public". Les propositions présentées ne représentent donc pas nécessairement un cadre unique, identique pour toutes les formes de PPP .

Question 1 :
Quels types de montages de PPP purement contractuel connaissez-vous ? Ces montages font-ils l'objet d'un encadrement spécifique (législatif ou autre) dans votre pays ?

Les contrats de délégation de service public qui sont passés en France pour l'exploitation des transports publics urbains peuvent entrer dans la notion de PPP, telle que présentée dans le livre vert ; ce qui n'est pas le cas des marchés publics.
En effet, dans les délégations de service public, le délégataire est en charge de l'exploitation du service et peut se voir confier le financement de certains biens, tels que le matériel roulant, les dépôts de véhicules, les systèmes d'aides aux voyageurs … Sa rémunération est assurée en tout ou partie par les voyageurs, le délégataire supportant un risque sur la

[1] Confere réponse à la question 6

fréquentation. Ces contrats se caractérisent en outre par une durée assez longue, en raison même des obligations prises en charge par le délégataire.

Les PPP contractuels sont très présents dans notre secteur. En effet, en dehors de la région parisienne, 94 % des réseaux de transport public sont gérés en France sous la forme de délégation de service public.

Seuls quelques réseaux épars ont donné lieu à la passation de marchés publics, le reste des réseaux étant géré en autoproduction sous la forme de « régies » (structures publiques dotées généralement de la personnalité juridique et de l'autonomie financière) sans mise en concurrence.
Outre le respect des principes fondamentaux du traité, la passation des délégations de service public est encadrée par la loi Sapin (loi du 29 janvier 1993). Cette loi prévoit une mise en concurrence des contrats après publicité et la possibilité pour l'autorité compétente de négocier avec les différents candidats après remise de leur offre.

Question 2 :
De l'avis de la Commission, la transposition en droit national de la procédure de dialogue compétitif permettra aux parties concernées de disposer d'une procédure particulièrement adaptée à la passation des contrats qualifiés de marchés publics lors de la mise en place d'un PPP de type purement contractuel, tout en préservant les droits fondamentaux des opérateurs économiques. Partagez-vous ce point de vue ? Si non, pourquoi ?

En France, le cadre des marchés publics n'a pas vocation à donner naissance à un PPP.
De plus, comme il vient d'être précisé, très peu de contrats sont passés sous la forme de marchés publics pour l'exploitation de réseaux de transports publics …
La France vient toutefois de se doter d'un nouveau type de contrat, différent des marchés publics et des délégations de service public, par ordonnance du 17 juin 2004, qui pourrait s'apparenter dans certains cas au marché public-PPP présenté dans le livre vert.

Question 6 :
Pensez-vous qu'une initiative législative communautaire, visant à encadrer la procédure de passation de concessions, est souhaitable?

Avant d'encadrer la procédure de passation des concessions, l'UTP [2] considère qu'il est essentiel que la Commission s'intéresse en amont au traitement de certaines questions actuellement vecteurs d'insécurité juridique et qui jusqu'ici concernent plus particulièrement le secteur des transports publics de proximité.

Les transports publics de proximité sont actuellement organisés de trois manières à travers l'Union européenne : les marchés fermés ; les situations de concurrence régulée (passation de concessions) ; et la déréglementation.

[2] A l'exception de son adhérent AGIR, qui est une association qui regroupe des opérateurs indépendants et des autorités compétentes.

L'organisation du secteur est principalement marquée[3], en France comme dans le reste de l'Union européenne, par deux facteurs :
- La nécessité de recourir à des financements publics pour assurer l'équilibre financier de l'opérateur. En particulier, les autorités publiques compétentes attribuent des compensations pour la réalisation des exigences de service public qu'elles déterminent ;
- L'attribution de droits exclusifs pour exploiter les services de transport sur une ligne ou sur l'ensemble d'un réseau.

La question de savoir selon quelles modalités les compensations financières et les droits exclusifs d'exploitation peuvent être attribués par l'autorité publique compétente est source d'insécurité juridique dans notre secteur depuis maintenant plusieurs années, alors même que ce secteur a été reconnu comme étant un marché européen, notamment par la Cour de Justice des Communautés européennes[4].

Aussi afin de remédier à cette situation d'insécurité juridique et éviter que ces questions ne soient résolues au cas par cas par les tribunaux, la Commission a proposé en juillet 2000 un règlement sur les « Exigences de Service Public » dans les transports publics, modifié en février 2002. La Commission propose dans ce règlement de soumettre à la concurrence toute passation de contrat de service public. Sont définis comme « contrat de service public », tout contrat (en dehors des marchés publics), et tout acte unilatéral attribuant des droits exclusifs ou des compensations pour exigences de service public pour l'exploitation d'un service de transport public[5].
Ce texte n'a pour l'instant abouti à aucun accord politique sur ces questions, pourtant génératrices d'un contentieux croissant[6]. Par ailleurs, le projet de communication de la Commission[7] portant sur l'attribution de compensations pour exigences de service public n'a pas fait avancer le traitement de cette question dans notre secteur, ce dernier étant exclu de son champ d'application, en raison notamment de ses spécificités.
Notre secteur connaît donc aujourd'hui une situation d'insécurité juridique, qui handicape fortement la prise d'initiatives des autorités compétentes et des entrepreneurs publics et privés, alors que le développement des transports publics est indispensable à la réussite des politiques de développement durable.
L'UTP considère donc comme prioritaire tout débat ou toute démarche juridique qui pourrait permettre de préciser et de clarifier ces questions, et in fine d'adopter un instrument législatif sectoriel, en amont même des discussions relatives à l'adoption éventuelle d'un encadrement des PPP.
Elle estime de plus, qu'en raison même de la multiplicité des formes de PPP, il paraît plus approprié dans un premier temps que la Commission européenne adopte une communication interprétative sur ce sujet.
Elle tient néanmoins à saisir l'opportunité de la consultation lancée par la Commission européenne pour donner son opinion sur une éventuelle initiative législative communautaire en la matière.

L'UTP estime tout d'abord que toute éventuelle initiative législative communautaire visant à encadrer la procédure de passation des concessions devrait nécessairement tenir compte de la nature spécifique des concessions par rapport notamment aux

[3] En dehors des expériences de déréglementation intervenues au Royaume Uni (à l'exception du cas de Londres),

[4] Confere décision Altmark Trans GmbH (C-280/00, arrêt du 24 juillet 2003).
[5] Le principe adopté était celui de la concurrence régulée, modéré néanmoins par des exceptions.
[6] Confere décision précitée Altmark Trans GmbH de la Cour de Justice des Communautés Européennes et la décision du tribunal de 1ère instance, (T157/01- 16 mars 2004), société Combus.

[7] Paquet proposé en février 2004 et comprenant une décision pour les aides de faible montant, un encadrement et une proposition de modification de la directive « transparence »

marchés publics. Cette procédure devrait concerner non seulement les concessions, mais également tous les contrats qui pourraient y être assimilés.

Avant d'aller plus avant dans la discussion sur la nécessité d'adopter une procédure particulière pour la passation des concessions, **il paraît essentiel à l'UTP de réagir sur le risque de requalification des contrats** qui est présenté au paragraphe 34 du présent livre vert. Les autorités publiques françaises disposent depuis de nombreuses années du choix entre la passation d'un marché public ou d'une concession. La passation de l'un ou de l'autre de ces contrats ne fait pas peser les mêmes obligations, ni les mêmes contraintes sur l'autorité compétente et sur l'opérateur. Le choix de l'un de ces deux contrats résulte donc d'une véritable réflexion menée en amont par l'autorité compétente sur la politique qu'elle entend mettre en œuvre sur son territoire. Ainsi, même lorsque l'autorité compétente ne sait pas exactement quelles solutions précises elle envisage de mettre en place pour la réalisation d'une infrastructure ou l'exploitation d'un service, elle sait dans la plupart des cas, le budget qu'elle compte y affecter, les risques qu'elle est prête à assumer ou ceux qu'elle souhaite transférer, l'organisation qu'elle veut mettre en place pour suivre et contrôler l'exécution du contrat. Avant même de lancer la procédure, l'autorité compétente prépare au moins un cahier des charges et le cas échéant un cadre de négociation conformes à la politique qu'elle a définie en amont et au type de contrat choisi. **Aussi, les craintes exprimées au paragraphe 34 sur un risque de requalification du contrat ne se concrétisent-elles que très rarement en réalité.**
Il ne paraîtrait dès lors pas utile de soumettre les concessions aux mêmes règles que les marchés publics-PPP.

Mais surtout, **les nombreuses spécificités des concessions par rapport aux marchés publics nécessiteraient, si une initiative législative en la matière était confirmée, l'adoption d'une procédure particulière pour leur passation et un régime adapté pour leur exécution.**
En effet, comme la communication de la Commission sur les concessions du 29 avril 2000 l'a rappelé à juste titre, les concessions se caractérisent tout d'abord par une prise en charge de risques par le concessionnaire, que le titulaire d'un marché public n'assume pas, notamment en matière de risques commerciaux et de financements. De plus, tout ou partie de la rémunération du concessionnaire provient généralement directement des clients ; le concessionnaire est donc particulièrement attentif à leurs besoins et entretient des relations étroites avec ces derniers. Ces contrats sont en outre généralement passés pour une durée assez longue en raison même des obligations pesant sur les concessionnaires.
La concession confie donc à son titulaire la réalisation d'une mission de service public, qu'il doit accomplir sous sa responsabilité tout en bénéficiant d'une certaine autonomie.
En contrepartie de ces importantes responsabilités, le concessionnaire peut être tenu comme c'est le cas en France, de rendre compte annuellement à l'autorité compétente de l'exploitation du service public ou de l'ouvrage qui lui a été confié dans un rapport détaillé. L'autorité compétente est par ailleurs à même de contrôler à n'importe quel moment l'exploitation effectuée par le concessionnaire ainsi que les investissements réalisés.

En ce qui concerne les caractéristiques de la procédure de passation des concessions, ces dernières étant des contrats distincts des marchés publics, **il paraîtrait essentiel que cette procédure de mise en concurrence soit prévue dans un texte différent de celui des directives marchés publics,** comme cela est d'ailleurs proposé au paragraphe 35 du présent livre vert. Cette procédure devrait être la même pour les concessions de services et celles de travaux, notamment pour éviter toute difficulté d'interprétation relative à la part respective des travaux et des services dans un même contrat, au vu de son régime de passation.

Tenant compte des particularités des concessions, cette procédure devrait permettre d'assurer à la fois une réelle ouverture à la concurrence, le respect des principes communautaires de concurrence ainsi qu'une viabilité économique de ces contrats. Un équilibre devrait ainsi être trouvé entre une application rigide de certains principes et la souplesse nécessaire à la réussite de ces contrats. Cette procédure devrait de plus assurer une réelle sécurité juridique, indispensable au bon développement des PPP, tout en étant relativement simple et modérément coûteuse pour les autorités compétentes.

L'adoption d'une procédure permettant une négociation encadrée, garante du respect de la transparence et d'un traitement égal des candidats, paraîtrait être la meilleure solution pour tenir compte de l'ensemble de ces préoccupations.
En effet, seule la négociation permet aux candidats de commenter et d'apporter des explications sur les solutions proposées contenues dans leur offre, ce qui est essentiel pour des contrats complexes, susceptibles de comporter des enjeux importants. La négociation s'avère de plus un instrument indispensable à la constitution de bases solides d'un partenariat réellement satisfaisant pour l'ensemble des parties. La possibilité offerte à l'autorité compétente d'organiser une négociation serait en outre d'autant plus nécessaire, si des règles communautaires devaient dorénavant régir certains aspects de l'exécution des contrats. Cette procédure devrait être encadrée afin d'assurer l'indispensable traçabilité des échanges et éviter que des abus puissent être commis.
Cette négociation devrait pouvoir porter sur l'ensemble des aspects du contrat.

La procédure de passation des concessions devrait par ailleurs veiller à garantir une protection efficace des savoirs-faire et des secrets commerciaux des entreprises. Par exemple, les autorités compétentes ne devraient en aucun cas pouvoir conditionner la remise des offres par l'acceptation préalable des candidats d'autoriser la transmission de leurs solutions aux autres candidats concurrents.

Question 7 :
De manière plus générale, si vous estimez qu'il est nécessaire que la Commission propose une nouvelle action législative, existerait-il à votre avis des raisons objectives de viser dans cet acte tous les PPP de type contractuel, qu'ils soient qualifiés de marchés publics ou de concessions, pour les soumettre à des régimes de passation identique ?

Comme l'UTP l'a déjà indiqué dans sa réponse à la question précédente, elle n'est pas favorable à ce que la Commission européenne lance prochainement une nouvelle action législative. **Il lui paraît néanmoins fondamental de donner dès à présent son opinion sur la procédure du dialogue compétitif, procédure que la Commission pourrait envisager de proposer pour la passation de l'ensemble des PPP contractuels**.
Cette procédure est pour l'instant réservée aux marchés publics particulièrement complexes, lorsque la collectivité publique ne peut déterminer que des besoins ou des exigences. Telle que prévue dans la directive secteurs classiques nouvellement adoptée, cette procédure permet à l'autorité compétente de consulter des candidats qui vont l'aider à choisir une ou plusieurs solutions[8] à partir desquelles ils pourront présenter une offre complète. Sur la base des offres remises, l'autorité compétente choisira ensuite l'offre économiquement la plus avantageuse.
L'effort de transparence et d'encadrement qui caractérise la procédure du dialogue compétitif doit être salué.

[8] voir ci-après

Cependant, cette procédure, peut s'avérer longue, coûteuse et adaptée aux seules hypothèses pour lesquelles elle a été prévue, à savoir les cas où l'autorité compétente ne peut définir en amont que des besoins ou des exigences fonctionnelles.
En effet, cette procédure implique en premier lieu d'organiser de nombreux échanges et auditions avec les candidats sélectionnés pour l'élaboration progressive d'un ou de plusieurs cahiers des charges définitifs. Cette première phase peut s'avérer très longue et nécessiter plusieurs mois de discussions. Elle requiert en second lieu la consultation des candidats sur la base d'un cahier des charges définitif, en vue de la remise d'une offre finale à laquelle ils ne pourront apporter que des précisions, clarifications ou compléments.

Cette procédure exige donc la mise en œuvre d'une organisation structurée, complexe et onéreuse, aussi bien pour les autorités compétentes que pour les candidats, afin de permettre la rédaction d'un cahier des charges qui donnera lieu ensuite à la remise d'offres.
L'ensemble des étapes de la procédure de dialogue compétitif ne paraît néanmoins pas nécessaire pour la passation des PPP contractuels. En effet, si les PPP sont toujours des contrats complexes, (confere leurs caractéristiques, 1.1 du présent livre vert et réponse de l'UTP à la question 6) les autorités compétentes peuvent dans la plupart des cas, déterminer préalablement des obligations qui vont bien au-delà de la fixation de besoins ou d'exigences fonctionnelles.

Ainsi, lorsqu'une ville moyenne envisage de concéder son réseau de transports urbains, elle peut souhaiter mettre en place de nouvelles solutions pour l'exploitation de son réseau et faire appel à la créativité des candidats, sans que cela nécessite toutefois la conduction d'une procédure aussi lourde que celle prévue dans le dialogue compétitif. En effet, l'autorité compétente transmet un cahier des charges aux candidats (surtout lorsque le réseau de transports publics est déjà existant) dans lequel elle a généralement déjà défini la consistance des services par référence à sa politique de transports (réseau de base hors variantes).
A l'appui de ce cahier des charges, l'autorité compétente peut solliciter plus particulièrement les candidats sur une démarche qualité originale, sur nouvelles technologies à mettre en place ou sur des solutions innovantes pour desservir, par exemple, des quartiers plus excentrés.

La procédure du dialogue compétitif prévue dans la directive secteurs classiques comporte par ailleurs des ambiguïtés sur les modalités de rédaction des cahiers des charges. Il existe en effet une incertitude sur le fait de savoir si la procédure du dialogue compétitif, permet aux autorités compétentes de consulter les candidats sur la base d'un unique cahier des charges élaboré à partir de diverses solutions proposées par les candidats ; ou si les autorités compétentes doivent consulter les candidats à partir d'un cahier des charges dédié, qui reprend pour chacun des candidats les solutions qu'il avait proposées.

La première hypothèse, soulève des difficultés quant au respect d'une parfaite confidentialité des solutions proposées par les candidats lors des discussions. En effet, il ne faudrait pas notamment que la procédure du dialogue compétitif puisse permettre à des autorités compétentes de conditionner la remise des offres par l'acceptation préalable des candidats d'autoriser la transmission de leurs solutions aux autres candidats concurrents. De plus, il devrait être clairement précisé que les autorités compétentes ne sont pas autorisées à mélanger les solutions présentées par les différents candidats et encore moins à les communiquer. Cette procédure pourrait en effet se révéler contre-productive à termes, les entreprises devenant extrêmement réticentes à communiquer leur savoir-faire s'il est susceptible d'être transmis à leurs concurrents.

Dans l’hypothèse où chaque candidat serait consulté sur la base d’un cahier des charges rédigé en fonction des solutions proposées par lui, le respect du principe de non discrimination entre les candidats et la possibilité de comparer des offres remises en fonction de cahiers des charges différents ne paraissent pas garantis.

Aussi, en raison notamment de sa lourdeur intrinsèque et des importantes incertitudes sur son déroulement, la procédure du dialogue compétitif ne paraît pas devoir être généralisée à tous les PPP contractuels. Une telle généralisation ne manquerait d’ailleurs pas de décourager de nombreuses autorités compétentes et par là-même de compromettre le développement futur des PPP.

Questions 8 et 9 :
Selon votre expérience, l'accès des opérateurs non-nationaux aux formules de PPP d'initiative privée est-il assuré? En particulier, lorsqu'il existe une invitation des pouvoirs adjudicateurs à présenter une initiative, cette invitation fait-elle généralement l'objet d'une publicité adéquate permettant l'information de tous les opérateurs intéressés ? Une procédure de sélection véritablement concurrentielle est-elle organisée pour assurer la mise en oeuvre du projet retenu?

Quelle serait selon vous la meilleure formule pour assurer le développement des PPP d'initiative privée dans l'Union européenne tout en assurant le respect des principes de transparence, de non discrimination et d'égalité de traitement ?

La formule des PPP d’initiative privée ne paraît pas conciliable avec les principes mêmes de transparence, de non discrimination et d’égalité de traitement des candidats.
En effet, par définition, le contrat de PPP d’initiative privée, a initialement été proposé et rédigé par un opérateur économique, qui souhaite se voir attribuer ce contrat. Cet opérateur économique maîtrise parfaitement les solutions qu’il a proposées à l’autorité compétente, ce qui n’est pas forcément le cas des autres candidats, surtout si ces solutions sont innovantes.
Aussi, **l’initiateur du PPP garde-t-il un indéniable avantage sur ses concurrents,** quelles que soient les modalités prises ultérieurement pour assurer une meilleure égalité lors de la mise en concurrence. La rétribution de l’initiateur du PPP ne corrige pas les inégalités entre les candidats, elle permet seulement à l’opérateur économique qui a pris une telle initiative d’être au moins partiellement indemnisé pour le travail en amont qu’il a effectué dans l’hypothèse où le contrat ne lui serait finalement pas attribué.
La publicité d’un PPP d’initiative privée ne permet pas non plus d’assurer une totale égalité entre les candidats, mais juste de permettre à d’autres opérateurs économiques de se porter candidats à l’obtention d’un tel contrat.
Dans ces conditions, il paraît impossible d’assurer une réelle égalité et une absence de discrimination entre les candidats.
Par ailleurs, les PPP d’initiative privée soulèvent de sérieuses inquiétudes concernant la protection de la propriété industrielle et intellectuelle des solutions innovantes qui pourraient être proposées à d’autres candidats et sur lesquelles l’opérateur économique pourrait perdre ses prérogatives en la matière.
Pour toutes ces raisons, l’UTP n’est pas favorable à ce que le droit communautaire permette la passation de PPP d’initiative privée.

Question 13 :
Partagez-vous le constat de la Commission selon lequel certains montages du type « step in » peuvent poser problème en termes de transparence et d'égalité de traitement ? Connaissez-vous d'autres « clauses types » dont la mise en œuvre est susceptible de poser des problèmes similaires ?

L'UTP comprend parfaitement les inquiétudes que les autorités compétentes peuvent nourrir lors de la mise en œuvre de clauses de step-in ou lors de cessions de capital aboutissant à un changement de l'actionnaire majoritaire du concessionnaire.
Cependant, elle entend rappeler que les mises en concurrence portent sur l'attribution des contrats. Aussi, l'offre qui a été choisie par l'autorité compétente devra être réalisée, même si le concessionnaire connaît des modifications de son capital. L'autorité compétente dispose d'ailleurs de moyens pour faire exécuter cette offre.
Par ailleurs, le pragmatisme et le fonctionnement d'un système basé sur l'économie de marché, doivent devoir être pris en compte dans le traitement de cette question.
En effet, il n'est pas du tout souhaitable que la mise en œuvre de clauses de step-in ou les cessions de capital puissent être soumises à une éventuelle approbation de la part des autorités compétentes. Cela aurait pour conséquence d'entraîner une immixtion dans la vie des entreprises, alors même qu'il est vital que ces dernières conservent leur indépendance de gestion.

Question 14 :
Estimez-vous qu'il est nécessaire de clarifier au niveau communautaire certains aspects relevant du cadre contractuel des PPP ? Si oui, sur quel(s) aspect(s) devrait porter cette clarification?

Le livre vert semble se fonder principalement sur le respect des principes de transparence et d'égalité de traitement des candidats pour proposer l'adoption de règles visant à encadrer l'exécution des PPP contractuels.
Il est certes essentiel que ces principes soient respectés, notamment afin d'éviter des détournements de procédure, cependant une application trop stricte de ces principes pourrait aboutir à un véritable déni de la réalité économique des concessions et mettre en péril leur bonne exécution.
En effet, les concessions peuvent porter directement sur la gestion de services qui sont des SIEG. Or, comme l'ont souligné le livre vert [9] et le livre blanc sur les SIG[10], il est essentiel d'assurer une certaine adaptabilité de ces services aux besoins des clients. Cette adaptabilité peut même s'avérer indispensable pour la survie de certains services, d'autant plus que les concessions sont généralement passées pour une durée assez longue. Ainsi, les transports publics urbains sont en concurrence permanente avec la voiture individuelle et doivent sans cesse s'adapter pour maintenir leur clientèle.
Il serait en conséquence souhaitable que la Commission fasse preuve de beaucoup de pragmatisme dans la définition d'un cadre contractuel des PPP et trouve un compromis entre les principes de transparence et d'égalité de traitement des

[9] Paragraphes 50 à 54
[10] Paragraphes 3.3

candidats et les principes fondamentaux nécessaires aux SIEG comme l'adaptabilité des services rendus aux clients.

Sur la durée des PPP :

L'UTP partage la position du livre vert qui préconise que la durée soit fixée au cas par cas en fonction de la « nécessité de garantir l'équilibre économique et financier d'un projet » et son lien avec l'amortissement des investissements et une rémunération raisonnable des capitaux investis. Elle estime en conséquence que la durée des contrats doit être clairement indiquée dans le contrat, mais qu'elle ne doit pas être plafonnée par type de contrat au sein d'un encadrement législatif.

Elle considère en revanche que la durée excessive d'un contrat ne peut être assimilée à une aide d'Etat, plus particulièrement dans le domaine des SIG (paragraphe 46).
Une distinction doit être effectuée entre la durée d'un contrat d'une part et les compensations pour obligations de service public qui peuvent être imposées à un opérateur, d'autre part. En effet, la durée des contrats est dans la plupart des cas liée aux investissements et aux risques pris en charge par l'opérateur, alors que le montant des compensations doit être déterminé au regard des obligations de service public imposées par l'autorité compétente.
La jurisprudence Altmark de la Cour de Justice des Communautés européennes (précédemment citée sous question 6), fixe d'ailleurs les règles en ce qui concerne l'attribution de compensations pour réalisation d'obligations de service public. Cette jurisprudence définit déjà les conditions dans lesquelles le versement de compensations pour obligations de service public ne correspond pas à des aides d'Etat. La Cour exige notamment que les obligations de service public soient préalablement déterminées et que les modes de calcul des compensations soient fixés de façon transparente. Elle demande en outre que le montant des compensations soit proportionnel aux obligations fixées.
Par ailleurs, les contrats portant sur les SIG, que ce soient des marchés publics ou des concessions sont mis en concurrence et tout candidat intéressé peut y répondre.

Sur la passation d'avenants aux contrats :

Afin d'éviter que des missions supplémentaires ne soient confiées postérieurement à la passation du contrat, le livre vert prévoit notamment que les modifications qui ne sont pas prévues au contrat, ne sont acceptables que si « elles sont rendues nécessaires par un événement imprévisible ou justifiées pour des raisons d'ordre public, de sécurité publique ou de santé publique ». (paragraphe 49) Le livre vert prévoit des conditions très strictes pour que les contrats puissent être modifiés.
Or, force est de constater qu'il n'est pas toujours possible de prévoir précisément les modifications nécessaires à la vie du contrat, surtout pour les contrats d'une certaine durée. Les modifications ultérieures du contrat, notamment par voie d'avenant, répondent ainsi à la nécessaire adaptabilité du service public, du fait de l'évolution des besoins de la collectivité et des clients du réseau de transport. Il est notamment fréquent que le périmètre territorial de l'autorité compétente en matière de transports urbains soit amené à être modifié pendant l'exécution même du contrat. Dans la plupart des réseaux français, l'autorité compétente est maintenant un groupement de communes auquel de nouvelles communes peuvent adhérer pour lui confier l'organisation des transports urbains. Cette modification est rarement complètement prévisible lors de la passation des contrats ; il est en même temps très difficile de déterminer à l'avance les communes qui adhéreront finalement à ce groupement et les nouvelles zones urbanisées qui devront donner lieu à des dessertes en transport en commun.

Par ailleurs, les entreprises de transports urbains, ainsi que les autorités compétentes sont de plus en plus sensibilisées à l'avis des consommateurs et des voyageurs, qui se manifestent de plus en plus, et dont la prise en compte peut aboutir à des modifications au service initialement défini. (demandes de nouveaux services, nouvelles exigences de qualité …).

Une politique trop stricte en matière de passation d'avenants paraît inopportune et pourrait aboutir à des situations inextricables. Elle pourrait de plus fragiliser les contrats et augmenter l'insécurité juridique. Une éventuelle initiative législative venant encadrer les concessions devrait donc permettre une souplesse de l'évolution des contrats.

L'UTP tient par ailleurs à souligner que si des règles d'exécution des concessions devaient finalement être adoptées, il semble alors que les directives marchés publics devraient elles-mêmes être modifiées pour intégrer des contraintes comparables, ces contrats étant également soumis à des principes de transparence et d'égalité de traitement entre les candidats.

Question 15.
Dans le contexte des opérations de PPP, avez-vous connaissance de problèmes particuliers rencontrés en matière de sous-traitance ? Lesquels?

Question 16 :
Le phénomène des PPP de type contractuel, impliquant le transfert d'un ensemble de tâches à un unique partenaire privé, justifie-t-il selon vous que des règles plus détaillées et/ou d'un champ d'application plus large soient mis en place en ce qui concerne le phénomène de sous-traitance?

Question 17 :
De manière plus générale, estimez-vous qu'une initiative complémentaire devrait être prise au niveau communautaire en vue de clarifier, ou d'aménager, les règles relatives à la sous-traitance?

L'UTP tient à attirer l'attention de la Commission sur la confusion qui pourrait s'établir sur les sociétés de projet. En effet, il semble à la lecture des paragraphes 51 et 52 que la Commission souhaite que les sociétés de projet lorsqu'elles sont pouvoirs adjudicateurs, organisent des appels d'offres pour la réalisation des prestations qui leur ont été confiées. (Paragraphes 50 à 51).
Cette proposition paraît toutefois surprenante. En effet, les sociétés de projet sont des sociétés ad hoc constituées d'entreprises ayant des compétences différentes pour répondre à des appels d'offres déterminés. Ces entreprises s'associent donc en amont à leur réponse à l'appel d'offres pour pouvoir travailler ensemble. **Mais surtout, ces entreprises ont déjà été mises en concurrence et ont été choisies par l'autorité compétente qui avait connaissance de leur composition.**

Question 18 :
Quelle expérience avez-vous de la mise en place d'opérations de PPP de type institutionnalisé ? En particulier, votre expérience vous conduit-elle à penser que le droit communautaire des marchés publics et des concessions est respecté dans le cas de montages de PPP institutionnalisé? Si non, pourquoi ?

De nombreuses sociétés d'économie mixte locale (SEM) interviennent dans le secteur des transports publics urbains. Ces entreprises sont librement mises en place par les autorités compétentes qui sont en France, des autorités locales. Le capital de ces sociétés est composé majoritairement de capitaux publics et doit être constitué au minimum de 15 % de capitaux privés.
En vertu de la loi Sapin et de l'interprétation qui en a été donnée par le Conseil Constitutionnel français, **les SEM doivent répondre aux mises en concurrence au même titre que les autres candidats pour l'attribution de concessions.**

Question 19 :
Estimez-vous qu'une initiative doit être prise au niveau communautaire en vu de clarifier ou de préciser les obligations des organismes adjudicateurs quant aux conditions dans lesquelles doivent être mis en concurrence les opérateurs potentiellement intéressés par un projet de type institutionnalisé? Si oui, sur quels points particuliers et sous quelle forme? Si non, pourquoi?

Pour répondre à cette question, il convient avant tout de distinguer les règles de constitution de ces sociétés, les conditions de création de ces entités, les conditions d'entrée dans leur capital et les attributions de missions ou de contrats.

Il paraît nécessaire que les PPP institutionnalisés soient soumis aux mêmes règles de concurrence que les autres opérateurs pour l'attribution de missions ou de contrats déterminés. Les règles de plus qui pourraient être fixées concernant le régime des concessions (durée, passation d'avenants …) devraient également leur être appliquées.
Ces règles devraient s'appliquer aussi aux entreprises en cours de constitution ou venant d'être constituées.

En revanche, il ne paraît pas nécessaire de prévoir que l'entrée du capital privé soit soumise à la concurrence, sauf si cette entrée au capital est liée à l'attribution de contrats ou de missions. En effet, la mise en concurrence du capital ne peut pas avoir la même portée que celle effectuée pour l'attribution de missions ou de contrats, l'entrée dans le capital d'une société étant notamment effectuée pour une durée non limitée.

L'UTP souhaiterait apporter des précisions sur la mesure des performances :

Par ailleurs, le livre vert recommande de fixer « des spécifications techniques en termes de performances ou d'exigences fonctionnelles » (paragraphe 27) et conseille d'effectuer régulièrement des contrôles de la performance du titulaire du PPP (paragraphe 45).
L'UTP est tout à fait favorable à ce qu'un contrôle de la performance des opérateurs puisse être effectué. Elle estime cependant que les indicateurs de qualité de service doivent être préalablement déterminés dans le contrat et qu'ils doivent assurer une mesure objective de la qualité réalisée**. En outre, la définition de ces indicateurs de qualité de services ou de ces performances ne doit pas répondre à l'application d'un référentiel standard mais doit pouvoir être adaptée selon la taille, la complexité des réseaux de transport et la volonté de l'autorité compétente.**

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Stellungnahme zu ausgewählten Aspekten des PPP Grünbuchs

Einleitung

Die Aussage im Grünbuch, den Mitgliedsstaaten kämen Public Private Partnerships angesichts der haushaltspolitischen Sachzwänge entgegen, da dem öffentlichen Sektor Finanzmittel aus der Privatwirtschaft zuflössen, ist zumindest missverständlich.

Zwar wendet der private Bieter zur Erfüllung einer der öffentlichen Hand obliegenden Aufgabe (z.B. Bau und Betrieb einer Schule, Krankenhauses, Gefängnisses) zunächst erhebliche Investitionskosten auf, die in den öffentlichen Haushalten nicht der erforderlichen Höhe zur Verfügung stehen. Gleichzeitig übernimmt die öffentliche Hand aber in der Regel die Verpflichtung, regelmäßig Miet- oder Leasingraten über den gesamten Zeitraum der Partnerschaft an den Bieter zu zahlen, welche in der Regel über den entstandenen Beschaffungs-, Investitions- und Betriebskosten liegen. Es findet daher mit Hilfe des privaten Bieters lediglich eine haushaltsverträgliche Streckung öffentlicher Finanzmittel statt, jedoch ohne dass damit Mehreinnahmen für die öffentliche Hand verbunden sind.

Anders verhält es sich nur in den (Ausnahme-) Fällen, in denen die öffentliche Hand etwa bei Infrastrukturprojekten gänzlich auf eine wirtschaftliche/finanzielle Einbindung verzichtet („reines Betreibermodell") und deshalb keine Lasten und Risiken in die Zukunft verlagert werden.

Aus Sicht der Architekten bietet das Public Private Partnership gleichwohl interessante Möglichkeiten, planerische Eigeninitiativen in Bereichen zu entfalten, aus denen sich die öffentliche Hand zurückgezogen hat.

Antworten

Frage 1.
Welche Formen von ÖPP auf Vertragsbasis sind Ihnen bekannt? Gibt es in Ihrem Land spezifische (gesetzliche oder andere) Rahmenbedingungen für derartige Konstruktionen?

Die gesetzlichen Rahmenbedingungen für ÖPP-Projekte ergeben sich insbesondere aus den haushaltrechtlichen Vorschriften. Demnach ist genau zu prüfen, ob eine Eigenfinanzierung von Projekten nicht wirtschaftlich günstiger ist als die Durchführung im Rahmen eines ÖPP. Ausführliche Informationen zu diesem Thema – auch zu den vergabe- und vertragsrechtlichen Fragen – sind im Gutachten „ÖPP im öffentlichen Hochbau“ enthalten, welches vom Bundesministerium für Verkehr, Bau- und Wohnungswesen in Auftrag gegeben wurde[1].

Frage 2
Nach Auffassung der Kommission wird die Umsetzung des wettbewerblichen Dialogs in einzelstaatliche Rechtsvorschriften den betroffenen Parteien ein Verfahren an die Hand geben, das sich ganz besonders für die Vergabe öffentlicher Aufträge in Zusammenhang mit der Einrichtung einer ÖPP auf Vertragsbasis eignet und gleichzeitig die Grundrechte der Wirtschaftsteilnehmer wahrt. Stimmen Sie dem zu? Falls nein, warum nicht?

Antwort:
Soweit sich ein auf Vertragsbasis eingerichtetes ÖPP auch auf die Planung und Ausführung von Bauwerken bezieht, dürfte auch hier der allgemeine, von den Rechnungshöfen aufgestellte Grundsatz richtig sein, dass eine Trennung von Planung und Ausführung zu den wirtschaftlich günstigsten Resultaten führt. Insofern ist die Nutzung des wettbewerblichen Dialogs schon deshalb wenig sinnvoll, als der vor ein Verfahren zur Vergabe anderer Auftragskomponenten geschalteter Planungswettbewerb ein größeres Potential zur Auffindung des qualitativ (gestalterisch und wirtschaftlich) hochwertigsten Angebots bietet als der wettbewerbliche Dialog. Anders als der wettbewerbliche Dialog folgt die Auswahl des Leistungsträgers im Architektenwettbewerb auf ausschließlich sachlichen Erwägungen, da aufgrund der Anonymität der Teilnehmer zunächst nur das „Angebot“ selbst als Bewertungsgrundlage zur Verfügung steht. Darüber hinaus ergeht die Entscheidung über die Preisträger durch eine qualifizierte, unabhängige Jury, was eine weitere wesentliche Voraussetzung für eine rein qualitätsorientierte Auswahl ist.

Auch aus Teilnehmersicht ist der wettbewerbliche Dialog letztlich kein akzeptables Verfahren: weder die Regelung zum Vertrauensschutz noch die Separierung der Verhandlungen mit den Einzelbietern in sukzessiven Schritten bietet hinreichende Gewähr, dass der Auftraggeber keine konzeptuellen Überlegungen von Teilnehmern an Konkurrenten weitergibt. Die Vorstellung, dass die im Kompromissweg erzielte vorliegende Verfahrensgestaltung dem entgegenwirken könnte, ist lebensfremd.

Frage 3
Sehen Sie in Bezug auf diese Aufträge neben der Wahl des Vergabeverfahrens andere Punkte, die mit dem Gemeinschaftsrecht über öffentliche Aufträge in Konflikt stehen könnten? Wenn ja, nennen Sie diese und begründen Sie!

ÖPP’s können auf Grundlage des jetzigen Gemeinschaftsrechts rechtskonform durchgeführt werden. Da eine Reihe von ÖPP’s vergaberechtlich jedoch als Dienstleistungskonzession zu qualifizieren sein wird, ist fraglich, ob der gemeinschaftliche Rechtsrahmen hier ausgewogen ist. Es ist schwer nachvollziehbar, aus welchem Grund Baukonzessionen im neuen europäischen Vergaberecht ausführlich geregelt werden, Dienstleistungskonzessionen hingegen jedoch nur den primärrechtlichen Vorschriften unterfallen. Die bestehende Rechtslage könnte von öffentlichen Auftraggebern zu einer „Flucht ins primäre Gemeinschaftsrecht“ genutzt werden.

[1] Auf Wunsch senden wir Ihnen dieses gerne zu.

Frage 4.
Haben Sie bereits einmal ein Verfahren zur Vergabe einer Konzession in der Europäischen Union organisiert, daran teilgenommen bzw. ein solches organisieren oder daran teilnehmen wollen? Welche Erfahrungen haben Sie gemacht?

Nein.

Frage 5.
Halten Sie das derzeitige Gemeinschaftsrecht für präzise genug, um die konkrete und effektive Teilnahme von Gesellschaften oder Gruppierungen aus anderen Staaten an den Konzessionsvergabeverfahren sicherzustellen? Sind Sie der Ansicht, dass in dieser Hinsicht normalerweise ein tatsächlicher Wettbewerb herrscht?

Mit der Möglichkeit zur Einrichtung von Präqualifikationssystemen liefert das neue europäische Vergaberecht bedauerlicherweise die Grundlage für mögliche Diskriminierungen von Bietergemeinschaften. Da zumindest in einem konkreten Vergabeverfahren eine nicht vorliegende Präqualifikation zu einem faktischen Ausschluss des Teilnehmers führt, haben Bietergemeinschaften eigentlich keine wirkliche Teilnahmechance mehr. Bietergemeinschaften bilden sich in aller Regel ad hoc für bestimmte Projekte. Damit wird möglicherweise ein sehr flexibles – und auch mittelstandsfreundliches – Instrument ins Abseits gedrängt. Gerade im Planungsbereich spielen Bietergemeinschaften eine wichtige Rolle. Die Leistungsträger können auf diese Weise flexibel auf die wechselnden Marktanforderungen reagieren. Besonders für kleinere Unternehmen aus dem Ausland ist deshalb mit einer erheblichen Verschlechterung der Marktzugangschancen zu rechnen.

Frage 6.
Halten Sie einen Vorschlag für einen gemeinschaftlichen Rechtsakt zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe für wünschenswert?

Ja, da der Charakter des öffentlichen Auftrags auch bei Konzessionen und daraus folgender Vergabeverfahren klargestellt werden sollte (siehe auch Antwort zu Frage 4).

Frage 7.
Allgemeiner gefragt: Wenn Sie ein neues Gesetzgebungsvorhaben der Kommission für erforderlich halten, gibt es dann objektive Gründe dafür, in diesem Rechtsakt sämtliche ÖPP auf Vertragsbasis zu behandeln und sie ein und demselben Regelwerk für die Vergabe zu unterwerfen, ganz gleich ob die Vorhaben als öffentliche Aufträge oder als Konzessionen einzustufen sind?

Da bei ÖPP sowohl als öffentliche Aufträge oder als Konzessionen Vergaberecht anzuwenden ist, sollten die Vergabeverfahren auch in einem einheitlichen Gesetzgebungsvorhaben geregelt werden.

Frage 8.
Ist Ihrer Erfahrung nach der Zugang der ausländischen Akteure zu privat initiierten ÖPP gewährleistet? Für den Fall, dass die Vergabestellen zur Initiative aufrufen, wird dieser Aufruf dann angemessen bekannt gemacht, so dass alle interessierten Akteure Kenntnis davon haben können? Wird für die Ausführung des ausgewählten Projekts ein Auswahlverfahren auf Basis eines effektiven Wettbewerbs organisiert?

Hierüber liegen keine ausreichenden Erkenntnisse vor. Selbstverständlich haben ausländische Akteure genau wie national ansässige Wirtschaftsteilnehmer die Möglichkeit, ÖPP's zu initiierten. Insbesondere bei der Vergabe von Dienstleistungskonzessionen ist es aufgrund des unzureichenden rechtlichen Regelungsrahmens zweifelhaft, ob Auswahlverfahren auf der Basis eines effektiven Wettbewerbs stattfinden.

Frage 9.
Wie könnte Ihrer Auffassung nach die Entwicklung privat initiierter ÖPP in der Europäischen Union unter Wahrung der Grundsätze der Transparenz und der Gleichbehandlung und ohne Verstoß gegen das Diskriminierungsverbot gewährleistet werden?

Die Auswahl des Vertragspartners in einem privat initiierten ÖPP muss unter Wahrung der Grundsätze der Transparenz und der Gleichbehandlung und ohne Verstoß gegen das Diskriminierungsverbot erfolgen. Auch bei privat initiierten ÖPP handelt es sich um öffentliche Aufträge. Soweit die Durchführung des Projektes Bauplanungsleistungen einschließt, ist der Wettbewerb (Art. 1 g Richtlinie 92/50/EWG des Rates vom 18. Juni 1992 über die Koordinierung der Verfahren zur Vergabe öffentlicher Dienstleistungsaufträge bzw. Titel VI der Richtlinie 2004/18/EG des EUROPÄISCHEN PARLAMENTS UND DES RATES vom 31. März 2004 über die Koordinierung der Verfahren zur Vergabe öffentlicher Bauaufträge, Lieferaufträge und Dienstleistungsaufträge) vorzusehen.

In den Fällen, in denen Wirtschaftsteilnehmer ausführliche Projektvorschläge ausarbeiten, ohne hierzu von der Verwaltung aufgefordert worden zu sein, wirft eine Anwendung der vergaberechtlichen Vorschriften jedoch erhebliche Probleme auf. Derartige Vorschläge können qualitativ hochwertige technisch-innovative und wirtschaftlich günstige Lösungen für bestehende Probleme bieten. Eine Verwendung durch die öffentliche Hand, auch im Rahmen eines ÖPP, ist aber schon aus urheberrechtlichen Gründen in der Regel nicht möglich. Der Ankauf der Nutzungsrechte würde sich wiederum selbst als öffentlicher Auftrag darstellen. Eine Ausschreibung des Projektes kann jedoch dazu führen, dass Teilelemente des im Rahmen der Initiative entwickelten Vorschlags von Konkurrenten aufgegriffen und in eigene Lösungskonzepte eingebaut werden, ohne dass dies urheberrechtlich zu fassen wäre. In diesen Fällen ist es naturgemäß auch ungesichert, ob der Initiator den Auftrag erhält. Hier muss das Vergaberecht Kompensationsmöglichkeiten für Initiatoren von ÖPP vorsehen.

Frage 10.
Welche Erfahrungen haben sie in der Phase im Anschluss an die Auswahl des privaten Partners im Rahmen von ÖPP auf Vertragsbasis gemacht?

Keine.

Frage 11.
Sind Ihnen Fälle bekannt, in denen die Ausführungsbedingungen, einschließlich der Klauseln zur Anpassung im Zeitverlauf, eine diskriminierende Wirkung entfalten konnten oder eine ungerechtfertigte Behinderung der Dienstleistungs- oder Niederlassungsfreiheit darstellten? Falls ja, bitte beschreiben Sie die Art der aufgetretenen Probleme!

Nein.

Frage 12.
Sind Ihnen Praktiken oder Mechanismen zur Bewertung von Angeboten bekannt, die eine diskriminierende Wirkung haben?

Uns sind keine solchen Praktiken oder Mechanismen bekannt, die aufgrund des materiellen Vergaberechts zulässig wären und die nicht durch die Inanspruchnahme von Vergaberechtsschutzmitteln angegriffen werden könnten.

Frage 13.
Sind Sie wie die Kommission der Auffassung, dass bestimmte Interventionsklauseln in Bezug auf die Grundsätze der Transparenz und der Gleichbehandlung problematisch sein können? Sind Ihnen andere Typen von Klauseln bekannt, deren Anwendung zu ähnlichen Problemen führen kann?

In die Interventionsklauseln könnte ein Zusatz aufgenommen werden, nach dem beim Austausch von Projektpartnern für bestimmte Leistungsbereiche jeweils eine neue Ausschreibung durchzuführen ist.

Frage 14.
Halten Sie es für erforderlich, dass bestimmte Aspekte der vertraglichen Rahmenbedingungen für ÖPP auf Gemeinschaftsebene geklärt werden? Falls ja, was sollte geklärt werden?

Aufgrund des breiten Spektrums an möglichen ÖPP ist die Einführung vertraglicher Rahmenbedingungen – erst recht auf Gemeinschaftsebene – kaum praktikabel.

Frage 15.
Sind Ihnen bei ÖPP-Konstruktionen besondere Probleme mit der Vergabe von Unteraufträgen bekannt? Welche?

Die Anwendung der Vorschriften für die Vergabe öffentlicher Aufträge auf Unteraufträge ist umstritten. Aus diesem Grund sollte der öffentliche Auftraggeber gehalten sein, den privaten Bieter im Rahmen der Vertragsfreiheit zu verpflichten, hinsichtlich der Vergabe von Unteraufträgen ebenfalls öffentliches Vergaberecht anzuwenden. Dieses gilt naturgemäß nicht für die erstmalige Zusammenstellung des Bieterkonsortiums, welches sich um den ÖPP-Auftrag bemüht.

Frage 16.
Rechtfertigt die Existenz von ÖPP auf Vertragsbasis, die die Übertragung eines Aufgabenpakets an einen einzigen privaten Partner impliziert, ihrer Auffassung nach, dass ausführlichere Regeln für die Vergabe von Unteraufträgen eingeführt werden und/oder dass der Anwendungsbereich erweitert wird?

Ja, vergleichbar den Grundsätzen der „Scheinprivatisierung“, wonach die öffentliche Hand zwar Leistungen an Private zur Aufgabenerfüllung übergibt – der private Auftraggeber jedoch in Erfüllung dieser öffentlichen Aufgaben selbst wiederum vergaberechtlich wie ein öffentlicher Auftraggeber zu handeln hat.

Frage 17.
Halten Sie, allgemeiner gesprochen, eine ergänzende Initiative auf Gemeinschaftsebene zur Klärung oder Umgestaltung der Regeln für die Vergabe von Unteraufträgen für erforderlich?

Ja, denn die regelmäßige Laufzeit einer ÖPP (ca. 20 – 30 Jahre) darf nicht dazu führen, dass während der gesamten Laufzeit öffentliches Vergaberecht nicht eingehalten wird, obwohl die gesamte Maßnahme entweder direkt (Miete, Leasing) oder indirekt (Konzessionen) von der öffentlichen Hand finanziert wird. Die Grundsätze zur Vergabe öffentlicher Aufträge müssen auch hier auf Unteraufträge Anwendung finden.

Frage 18.
Welche Erfahrungen haben Sie mit der Einrichtung institutionalisierter ÖPP gemacht? Lassen Ihre Erfahrungen Sie zu der Schlussfolgerung gelangen, dass die gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen bei institutionalisierten ÖPP-Konstruktionen eingehalten werden? Falls nein, warum nicht?

Noch keine Erfahrungen.

Frage 19.
Halten Sie eine Initiative auf Gemeinschaftsebene für erforderlich, um die Verpflichtungen zu klären oder zu vertiefen, die die öffentlichen Auftraggeber in Bezug auf den Wettbewerb zwischen potenziell an einem institutionalisierten ÖPP-Projekt interessierten Wirtschaftsteilnehmern haben? Falls ja, welche Aspekte halten Sie für besonders wichtig und welche Form sollte eine solche Initiative haben? Falls nein, warum nicht?

Ja, denn auch hier müssen die allgemeinen Grundsätze des Vergaberechts zum Tragen kommen. Besonders wichtig wäre die Klärung der Frage, inwieweit bei einer institutionellen ÖPP der private Bieter selbst als öffentlicher Auftraggeber auftritt.

Allgemein und unabhängig von den in diesem Grünbuch aufgeworfenen Fragen:
(Siehe auch Antwort zu Frage 4.)

Frage 20.
Welche Maßnahmen oder Verfahren behindern in der Europäischen Union die Einrichtung von ÖPP?

ÖPP kann nur in bestimmten Einzelfällen die öffentliche Aufgabeerfüllung durch Private verbessern. Dafür sind kompetente Ansprechpartner auf Auftraggeberseite ebenso erforderlich wie eine gewisse Größenordnung des Vorhabens. Effizienzgewinne durch die Berücksichtung von Lebenszykluskosten sind nicht spezifische Vorteile von ÖPP, da diese Gesichtspunkte generell der Bauplanung zu Grunde liegen. Von einer Behinderung von ÖPP aufgrund gemeinschaftsrechtlicher Vorschriften kann also nicht gesprochen werden; vielmehr hängt die Entscheidung zur erfolgreichen Durchführung einer ÖPP von zahlreichen Faktoren ab, die insbesondere auch die Qualität der Planungsleistung zu berücksichtigen haben. Wenn jedoch die Voraussetzungen für die Durchführung einer ÖPP vorliegen, müssen die o .g. vergaberechtlichen Grundsätze berücksichtigt werden.

Frage 21.
Kennen Sie andere ÖPP-Formen aus Drittländern? Kennen Sie aus Ihren Erfahrungen in solchen Ländern bewährte Verfahrensweisen, die auch für die EU beispielgebend sein könnten? Falls ja, welche?

Nein.

Frage 22.
Denken Sie dass es nützlich wäre, im Hinblick auf den großen Investitionsbedarf einzelner Mitgliedstaaten zum Erreichen einer sozialen und dauerhaften Entwicklung gemeinsam und in regelmäßigen Abständen über diese Fragen unter den betroffenen Akteuren nachzudenken und bewährte Verfahrensweisen auszutauschen? Sollte die Kommission nach Ihrer Auffassung ein derartiges Netzwerk aufbauen?

Der Aufbau eines solchen Netzwerks wird als ausgesprochen sinnvoll angesehen.

Berlin, 12.07.2004
Bundesarchitektenkammer e.V.
Hauptgeschäftsstelle Berlin

Dr. Tillman Prinz
Bundesgeschäftsführer

Zur Beibehaltung kommunaler Dienstleistungen in der Europäischen Union

Stellungnahme des Wissenschaftlichen Beirats
der Gesellschaft für öffentliche Wirtschaft

Thesen

(1) In Deutschland erbringen die Städte und Gemeinden zahlreiche Dienstleistungen von allgemeinem und von allgemeinem wirtschaftlichen Interesse für ihre Bürger traditionell in eigener Regie. Dass dabei die Bedürfnisse der Bürger im Vordergrund stehen, macht den besonderen Wert der kommunalen Selbstverwaltung in Deutschland aus.

(2) Die von der EU betriebene Liberalisierung bringt dieses System der kommunalen Leistungserbringung in Gefahr. Nachdem in Art. I/5 Abs. 1 des EU-Verfassungsentwurfs festgelegt wurde, dass die EU die nationale Identität der Mitgliedstaaten einschließlich der Selbstverwaltung zu achten hat, ist an die EU die Forderung zu richten, die Erbringung der Dienstleistungen von allgemeinem wirtschaftlichen (und nichtwirtschaftlichen) Interesse durch Städte und Gemeinden weiter zu ermöglichen und zu fördern, auch wenn dies – im Interesse anderer Prinzipien des EG-Vertrages – Abstriche am reinen Wettbewerbsprinzip erforderlich macht. Das Inhouse-Prinzip sollte nicht eingeschränkt, sondern im Gegenteil ausgeweitet werden.

(3) Der deutsche Gesetzgeber in Bund und Ländern sollte die sich nach Art. 86 Abs. 2 EGV bietenden Möglichkeiten zur Betrauung von Unternehmen mit bestimmten Dienstleistungen von allgemeinem wirtschaftlichen Interesse mehr als bisher ausschöpfen und im Gemeindewirtschaftsrecht die Chancen der kommunalen Unternehmen im Wettbewerb verbessern.

(4) Die Verantwortlichen in den Städten und Gemeinden sowie in den kommunalen Unternehmen sollten sich des Wertes der örtlichen Selbstverwaltung für die Bürger bewusst bleiben und wichtige Dienste nicht leichtfertig an Dritte abgeben. Neben ordnungspolitischen Überlegungen muss bei der Entscheidung die Absicherung der Wirtschaftlichkeit eine Rolle spielen.

Dazu im Einzelnen:

I. Die derzeitigen kommunalen Dienstleistungen in Deutschland – Wert und Bedeutung

In Deutschland besitzt die kommunale Selbstverwaltung der Städte, Gemeinden und Kreise eine lange Tradition – in politischer, aber auch in wirtschaftlicher Hinsicht. Die Kommunen verfügen über eigene Einnahmen, eigene Haushalte und eigene Vermögen und stärken damit ihre wirtschaftliche und zugleich politische Selbständigkeit.

Von jeher gehört es zur politischen Kultur in Deutschland, dass Kommunen ihre Position im föderalen System auch auf diese Weise sichern. Sie festigen damit zugleich ein Stück bürgernaher Demokratie. In diesem Sinne ist die kommunale Selbstverwaltung in Art. 28 Abs. 2 GG verfassungsrechtlich verankert.

Auf dieser Grundlage erbringen und sichern die deutschen Gemeinden, namentlich die Städte, seit langem in eigener Regie zahlreiche Dienstleistungen für ihre Einwohner, indem sie entsprechende Unternehmen und Einrichtungen vorhalten und betreiben.

Es handelt sich dabei teils um Dienstleistungen von allgemeinem wirtschaftlichen Interesse (insbesondere Energie- und Wasserversorgung, Entsorgung, öffentlicher Personennahverkehr, Sparkassen), teils um „nichtwirtschaftliche“ Dienstleistungen von allgemeinem Interesse, insbesondere solche des Kultur- und Bildungswesens (z.B. Museen, Theater, Bibliotheken, Schulen, Kindergärten), Sportstätten und Freizeiteinrichtungen, Einrichtungen des Sozial- und Gesundheitswesens (Jugend- und Altenheime, Beratungsstellen, Krankenhäuser u.ä.) und sonstige Einrichtungen (z.B. Feuerwehr, Friedhöfe, zoologische und botanische Gärten). Je nach den örtlichen Gegebenheiten betreiben Städte und Gemeinden zahlreiche weitere Unternehmen und Einrichtungen wie Häfen, Flughäfen, Messehallen und Kureinrichtungen.

Mit diesen Dienstleistungen von allgemeinem wirtschaftlichen und nichtwirtschaftlichen Interesse tragen die Kommunen eine besondere Verantwortung für die Sicherung der intergenerationellen Daseinsvorsorge ihrer Bürger, für die Gestaltung des kommunalen Lebensraums und für die Stabilität der infrastrukturellen Grundlage wirtschaftlicher Aktivitäten.

Wichtig ist, dass diese Dienstleistungen von den kommunalen Unternehmen und Einrichtungen *örtlich erbracht* und *örtlich verantwortet* werden. Über grundsätzliche Fragen bezüglich der Leistungserbringung, insbesondere über größere Investitionen, und darüber, welche Leistungen in welcher Qualität zu welchem Preis erbracht werden sollen, entscheidet die gemeindliche Volksvertretung; sie ist berufen, die Interessen der Bürger zu wahren. Dies lässt sich am Beispiel des städtischen Nahverkehrsangebots verdeutlichen: Die städtische Volksvertretung bestimmt, wie viel Investitionsmittel sie für das Liniennetz bereitstellen will, welche Verkehrsdichte es geben soll. In diesem Sinne bestimmt z.B. § 3 Abs. 1 S. 1 ÖPNVG NRW, dass die Planung, Organisation und Ausgestaltung des ÖPNV Aufgabe der Kreise und kreisfreien Städte ist. In diesem Rahmen behalten die Leiter der örtlichen Nahverkehrsunternehmen unternehmerischen Gestaltungsspielraum, den sie zu möglichst wirtschaftlicher Leistungserbringung zu nutzen haben. Die Grundsätze der Unternehmensführung im kommunalen Interesse legt jedoch die Stadt als Inhaberin des Unternehmens fest. Die kommunale Selbstverwaltung trägt dabei auch den Erwartungen der Bürger an eine preisgünstige Versorgung mit Dienstleistungen von allgemeinem Interesse Rechnung.

Das Prinzip örtlicher Leistungserbringung und Leistungsverantwortung hat niemals ausgeschlossen und schließt nicht aus, dass die Gemeinde ein privates (örtliches, regionales Groß- oder sogar internationales) Unternehmen mit der Erbringung einer Leistung beauftragt, ein gemischtwirtschaftliches Unternehmen gründet oder eine Public Private Partnership eingeht. Dieser Weg bietet sich z.B. dann an, wenn Kooperationen oder Partnerschaften Synergieeffekte entstehen lassen, welche die Erbringung der Dienstleistungen zum Nutzen der Bürger fördern, z.B. auch ermöglichen, dass Kostendegressionen über die Preise an die Verbraucher weitergegeben werden (Vorteile, die allerdings bei der Kooperation mit auswärtigen Unternehmen nicht immer eintreten). *Die Gemeinden können in solchen Fällen das kommunale Interesse durch Verträge sichern, die z.B. festlegen, wie das Leistungsangebot aussehen soll. Bei Unzuträglichkeiten können sie den Vertrag kündigen oder nicht verlängern und so im Prinzip zur Eigenregie zurückkehren. Um den Weg der Rückverlagerung (Insourcing) offen zu halten, darf den Gemeinden aber nicht die Fähigkeit abhanden kommen, öffentliche Aufgaben in eigener Regie zu erfüllen, zumindest die fremde Aufgabenerfüllung zu kontrollieren.*

Vielfach wird heute gefordert, die Gemeinden sollten weitestgehend auf die eigene Leistungserbringung verzichten und sie privaten Unternehmen überlassen. Die Gemeinden sollten danach ihre Interessen grundsätzlich durch Verträge sichern und sich so auf die Sicherstellung (Gewährleistung) des gewünschten Leistungsangebots beschränken (Stichwort: Gewährleistungsstaat). Eine solche Lösung kann sich durchaus anbieten, ihre Effizienz wäre aber von Fall zu Fall nachzuweisen. Dabei ist zu berücksichtigen, dass eine flächendeckende Privatisierung öffentlicher Dienstleistungen die Selbstverwaltung gefährden kann. Eine Privatisierung „um jeden Preis" bedeutet einen Verlust an gesellschaftlicher Gestaltungsfähigkeit und demokratischer Legitimation. So würde den Gemeinden – möglicherweise irreversibel – der Kontakt zur Leistungserstellung verloren gehen. Deshalb sollte weiterhin ein Schwergewicht der Leistungserbringung bei der Gemeinde selbst liegen.

Die deutsche Tradition der gemeindlichen Leistungserbringung verdient eine Fortsetzung auch in der durch den gemeinsamen Binnenmarkt bestimmten Zukunft. Zum einen ist Föderalismus prinzipiell zu befürworten. Denn dezentrale politische Entscheidungen können grundsätzlich den Präferenzen der Kunden besser Rechnung tragen als zentralisierte; sie ermöglichen ein effizientes raumbezogenes Angebot an öffentlichen Leistungen. Zum anderen wird durch sie weit mehr als das ökonomische Umfeld erschlossen: Es lassen sich außer den Interessen des Investors auch die der Bürger insgesamt in die Entscheidungen einbeziehen. Dies kann die Bürgerverantwortung stärken und somit einer demokratischen Entwicklung förderlich sein.

Das System des Binnenmarkts begünstigt Großunternehmen, bei denen die Gefahr besteht, dass sie von einer ortsfernen Konzernzentrale aus das Geschehen bestimmen. Dieser Umstand erschwert es auf Dauer den Gemeinden, die Belange ihrer Bürgerschaft nachhaltig zu wahren. Über die Gestaltung beispielsweise des ÖPNV in einer Stadt sollte auch künftig am Ort nach den Bedürfnissen der Bürger und den verfügbaren Ressourcen entschieden werden, nicht aber ausschließlich nach den kaufmännischen Interessen eines privaten Großunternehmens oder gar eines internationalen Konzerns. *Es kommt darauf an, dass die Gemeinde über die Gestaltung des Leistungsangebots (Eigenregie oder Beauftragung) entscheiden kann und nicht von außen zu einer bestimmten Lösung gezwungen wird. Kommunalpolitischer Gestaltungsspielraum muss erhalten bleiben.* Zu verlangen ist jedoch, dass der Gestaltungsspielraum verantwortungsbewusst ausgefüllt wird.

II. Forderungen an die EU

An die EU ist die Forderung zu richten, im Rahmen der Möglichkeiten, die der EG-Vertrag bietet, mehr als bisher den Gestaltungsspielraum der Gemeinden zu achten und zu wahren, den der jeweilige nationale Gesetzgeber ihnen bietet, wie zum Beispiel in Deutschland. Bezüglich der sogenannten nichtwirtschaftlichen Einrichtungen ist zu begrüßen, wenn die EU-Kommission in dem „Grünbuch zu Dienstleistungen von allgemeinem Interesse“[1] die Bereitschaft erkennen lässt, sich auf diesem Gebiet zurückzuhalten, weil ihr der EG-Vertrag und ebenso die geplante Verfassung insoweit keine Regelungskompetenz verleihen.

In den letzten Jahren hat die EU nahezu ausschließlich den Gedanken der Förderung des europaweiten Wettbewerbs verfolgt und in diesem Sinne die Liberalisierung betrieben. Es kam ihr, und dies im Ausgangspunkt mit Recht, darauf an, für alle Unternehmen in Europa gleiche Chancen zu eröffnen, Aufträge von den öffentlichen Verwaltungen zu erhalten. Dem dient in Umsetzung der entsprechenden EG-Richtlinien die inzwischen im deutschen GWB und in der Vergabeverordnung näher ausgestaltete Pflicht, größere Aufträge öffentlich, und zwar europaweit, auszuschreiben. Diese Ausschreibungspflicht soll nun schrittweise auch für öffentliche Dienstleistungen, die wegen der Netzbedingungen sinnvollerweise nur *ein* Unternehmen erbringen kann (z.B. ÖPNV oder Wasserversorgung in einer Stadt), eingeführt werden.

Gemäß der EuGH-Rechtsprechung gibt es eine Ausnahme von der Ausschreibungspflicht, nämlich wenn die Stadt ein von ihr wie eine Verwaltungsabteilung beherrschtes Unternehmen beauftragen will (sog. *Inhouse-Prinzip*).[2] Aber damit ist für die deutsche kommunale Wirtschaft wenig gewonnen, weil man so geknebelte, das heißt der unternehmerischen Entscheidungsfreiheit beraubte kommunale Unternehmen hierzulande gerade nicht einsetzen möchte. Dies würde gegenüber den Eigenbetriebsgesetzen zum Teil einen gravierenden Rückschritt darstellen, wurden die Eigenbetriebe doch gerade geschaffen, um eine Unternehmensplanung zu gestatten, die von den starren Regeln der Haushaltsplanung befreit ist und allfälligen Bedarfsveränderungen flexibel zu folgen vermag. Im Übrigen möchte die EU-Kommission das Inhouse-Prinzip ganz abgeschafft sehen. Würde sie sich damit durchsetzen, wären die Gemeinden gezwungen, z.B. die Wasserversorgung oder den

[1] KOM(2003)270 endg., Brüssel, 21. Mai 2003, Rn.43.

[2] EuGH-Urteil vom 18. November 1999 in der Rechtssache C-107/98, Teckal Srl. gegen Gemeinde Viano und AGAC Reggio Emilia.

ÖPNV (oder Teile hiervon) für ihr Gebiet in einem starren Verfahren auszuschreiben, mit der Folge, dass sich alle einschlägig tätigen Unternehmen aus den europäischen Ländern, große wie kleinere, öffentliche wie private, mit Angeboten bewerben können, ohne dass sie am Wohl der entsprechenden Gemeinde und ihrer Bürger interessiert sein müssen. Dass Ausschreibungswettbewerb nicht nur zu Kostendegressionen im Interesse der Bürger führt, sondern die Konzentration und Oligopolisierung der Märkte verstärken kann, zeigt die Entwicklung auf dem skandinavischen ÖPNV-Markt, der inzwischen durch Kostensteigerungen mitgeprägt wird.

Eine Ausschreibungspflicht dürfte für den größten Teil der Kommunalwirtschaft in Deutschland, vor allem für die kleineren und mittleren kommunalen Unternehmen, in vielerlei Hinsicht Probleme aufwerfen: Zwar kann sich das bisher in der Gemeinde tätige Unternehmen auch bewerben und im Fall des Zuschlags weiterarbeiten, aber wenn ein anderes Unternehmen obsiegt, müsste das gemeindeeigene Unternehmen, weil nun ohne Aufgabe, im ungünstigsten Fall liquidiert werden; denn wegen des Örtlichkeitsprinzips könnte das Unternehmen als ganzes nicht anderenorts Kompensation erlangen. Dies ist vor allem deshalb bedenklich, weil die Gemeindebürger das Unternehmen über lange Jahre im Wege der Selbstfinanzierung über den Preis aufgebaut und so den inneren Wert des Unternehmens gesteigert haben. An der nächsten Ausschreibung könnte es sich, weil nicht mehr existent, nicht wieder beteiligen. Will die Gemeinde dann die Aufgabe wieder in Eigenregie übernehmen, muss sie ein neues eigenes Unternehmen dafür gründen, und dieses zunächst virtuelle Unternehmen müsste sich an der Ausschreibung beteiligen und den Zuschlag erhalten – ein nahezu unrealistischer Fall. *Bei realistischer Betrachtung muss man davon ausgehen, dass die einmal an einen Dritten abgegebene Dienstleistung in dem von der EU favorisierten System nicht rückholbar ist: Die Gemeinde kann, unter völligem Verlust ihrer organisatorischen Gestaltungsfreiheit, nur noch ausschreiben und den Gewinner der Ausschreibung beauftragen. Im Ergebnis würden die kommunalen Unternehmen in dem System, das mehr Wettbewerb schaffen soll, vom Wettbewerb ausgeschlossen.*

Gegenüber diesen für die Selbstverwaltung äußerst misslichen Konsequenzen der EU-Wettbewerbskonzeption ist zu betonen, dass der EG-Vertrag wie die nunmehr vorgesehene EU-Verfassung zu diesem Ergebnis keineswegs zwingen. Zunächst verdient Beachtung, dass nach Art. 295 EGV (bei dem es bleiben soll) die Eigentumsordnung in den Mitgliedstaaten aufrechterhalten bleibt, so dass es weiterhin Staats- und Kommunalunternehmen geben darf, die sich gleichberechtigt am gewerblichen Leben und am Wettbewerb beteiligen können. Im Wettbewerb darf es irgendeine Form der Diskriminierung öffentlicher Unternehmen ebenso wenig geben wie eine Privilegierung. Allerdings ist für die deutschen kommunalen Unternehmen damit noch nicht viel gewonnen.

Als wichtigste einschlägige Vorschriften werden gemeinhin Art. 86 Abs. 2 und Art. 16 EGV (im Verfassungsentwurf Art. III/55-2 und Art. III/6) betrachtet, wonach Unternehmen, die mit „Dienstleistungen von allgemeinem wirtschaftlichen Interesse“ betraut sind, von den Wettbewerbsvorschriften des Vertrags im erforderlichen Umfang befreit werden *können* und die EU sowie die Mitgliedstaaten für das gute Funktionieren dieser Dienste Sorge tragen. Die EU-Bürger haben nach Art. 36 der EU-Grundrechtscharta ein Recht auf Zugang zu diesen Dienstleistungen. Offen gelassen ist in diesen Vorschriften aber, welcher Art die betrauten Unternehmen sind: öffentliche oder private, große oder kleine, fremde oder eigene. Einen irgendwie gearteten Anspruch kommunaler Unternehmen, vorzugsweise mit solchen Diensten betraut zu werden, gibt es nicht. Art. 86 Abs. 2 EGV regelt auch nicht, ob es Ausschreibungen geben soll oder nicht, lässt also keine Präferenz für das Ausschreibungsverfahren erkennen. Festzuhalten ist immerhin, dass die oben unter I. genannten kommunalen Dienste auch nach Auffassung der EU-Kommission zu den Dienstleistungen von allgemeinem wirtschaftlichen Interesse gehören (über die „Definitionsmacht" im Einzelnen wird noch gestritten), *so dass eine Beauftragung oder Betrauung unter Befreiung von Wettbewerbsvorschriften in Betracht kommt*.

Erforderlich wäre allerdings ein ausdrücklicher Betrauungsakt, woran es bisher in Deutschland noch weitgehend fehlt. Geben müsste es die Betrauung eines Unternehmens mit klar definiertem Inhalt, die einem oder mehreren konkret benannten Unternehmen die Ausübung der Dienstleistung von allgemeinem wirtschaftlichen Interesse als besondere Aufgabe überträgt. Übertriebenen Formalismus erfordert der Betrauungsakt allerdings nicht, wie der EuGH in dem Urteil in Sachen Altmark Trans[3] erneut bestätigt hat. Diesen Standpunkt sollte sich die Kommission zu eigen machen. Es kommen nicht nur Gesetzgebungsakte, sondern auch Verwaltungsakte, Konzessionsverträge und andere Rechtsakte als Mittel der Betrauung in Betracht. Verkehrsunternehmen können beispielsweise in Form einer Genehmigung nach dem PBefG betraut werden. Zu begrüßen ist, dass der EuGH im gleichen Urteil auch festgestellt hat, dass es sich bei Ausgleichszahlungen zur Finanzierung des ÖPNV nicht um Beihilfen im Sinne von Art. 87 EGV handelt, wenn sich diese an einem objektiven Kostenmaßstab („Kosten eines durchschnittlichen, gut geführten Unternehmens") orientieren, somit eine Begünstigung des Unternehmens ausgeschlossen wird.

Ein Vorzug kommunaler Unternehmen gegenüber anderen Institutionen ergibt sich daraus nicht. Ein besseres Ergebnis lässt sich auch nicht aus der Subsidiaritätsklausel (Art. 5 EGV) und der Pflicht zur Beachtung der gemeinsamen Verfassungsüberlieferungen an Mitgliedstaaten durch die EU (Art. 6 Abs. 2 EU-Vertrag) herleiten. Zu den „gemeinsamen" Überlieferungen gehört die besonders ausgeprägte deutsche Selbstverwaltung sicherlich nicht. Bisher gibt es deshalb keinen formalen Anspruch darauf, dass die EU bei der Gesetzgebung, der Rechtsprechung oder dem Vorschriftenvollzug auf die besondere deutsche Selbstverwaltung in dem Sinne Rücksicht nehmen müsse, dass den Gemeinden ihre angestammten Betätigungsfelder unter Ausschluss des Wettbewerbs per Ausschreibung belassen werden müssten.

[3] Rechtssache C-280/00, Altmark Trans GmbH und Regierungspräsidium Magdeburg gegen Nahverkehrsgesellschaft Altmark GmbH.

Allerdings lag es von Anfang an im Sinne der europäischen Verträge, auf die Eigenheiten der Mitgliedstaaten gebührend Rücksicht zu nehmen; lange Zeit wurde auch so verfahren. Inzwischen sieht der noch nicht rechtlich verbindliche, aber doch den Willen der Mitgliedstaaten zum Ausdruck bringende Verfassungsentwurf für die EU in Art. I/5 Abs. 1 ausdrücklich vor: „Die Union achtet die nationale Identität ihrer Mitgliedstaaten, die in deren grundlegender politischer und verfassungsrechtlicher Struktur einschließlich der regionalen und kommunalen Selbstverwaltung zum Ausdruck kommt." Damit ist unmissverständlich klargestellt, und zwar auch wenn der Entwurf als ganzer nicht rechtsverbindlich werden sollte, dass die EU – als Gesetzgeber und als vollziehende Gewalt – die zur nationalen Identität gehörenden Besonderheiten der Mitgliedstaaten zu achten hat, insbesondere die jeweilige regionale und kommunale Selbstverwaltung („autonomy"/„autonomie" im Urtext). *Die EU muss also nicht eine Art europäischen Durchschnitt von kommunaler Selbstverwaltung in Rechnung stellen, sondern sie muss in Bezug auf Deutschland die hier bestehende, stark ausgeprägte gemeindliche Selbstverwaltung achten und sicherstellen, dass diese Selbstverwaltung durch europäisches Handeln nicht angetastet wird.*

Damit muss – und das ist entscheidend – unter Umständen auch das Wettbewerbsprinzip zurücktreten, wenn anders die deutsche kommunale Selbstverwaltung nicht gewahrt werden kann. Wie Art. I der geplanten EU-Verfassung deutlich macht, basiert die Union nunmehr auf einer Reihe gemeinsamer Grundprinzipien, darunter z.B. auch dem Subsidiaritätsprinzip. Der freie Waren- und Dienstleistungsverkehr ist nicht übergeordneter Grundsatz, sondern steht neben den anderen Prinzipien, muss sich also gegebenenfalls Einschränkungen gefallen lassen.

Die konkreten Forderungen an die EU lauten:

Die EU muss die gewachsene deutsche Selbstverwaltung der Städte und Gemeinden respektieren und den Kommunen bei wichtigen örtlichen Dienstleistungen wie z.B. Wasserversorgung, ÖPNV, Entsorgung und ähnlichen Diensten die freie Wahl belassen, ob sie die Dienstleistung mit eigenen Unternehmen selbst erbringen oder ein drittes Unternehmen in Anspruch nehmen wollen. Nur im zweiten Fall kommt eine Ausschreibungspflicht infrage, doch sollte der Gemeinde ermöglicht werden, einen bewährten Partner weiter zu beauftragen. Sucht eine Gemeinde allerdings einen neuen, z.B. möglichst kostengünstigen Partner, dann darf es die Suche eines solchen Partners per Ausschreibung geben.

Das Inhouse-Prinzip darf keinesfalls eingeschränkt, sondern sollte im Gegenteil ausgeweitet werden auf mehrheitlich von der Kommune beherrschte Unternehmen, die überwiegend Dienstleistungen für die Bürger dieser Kommune erbringen. Nur mit einem großzügig interpretierten Inhouse-Prinzip haben die Städte und Gemeinden eine wirkliche Wahl, ob sie die Dienstleistungen selbst erbringen wollen oder nicht.

III. Forderungen an den deutschen Gesetzgeber

Der deutsche Gesetzgeber sollte in erster Linie dafür sorgen, dass die kommunalen Unternehmen ihrer Aufgabe gerecht werden und mit gleichen Chancen und Risiken wie andere Unternehmen am Wettbewerb teilnehmen können. Der Gesetzgeber, insbesondere der Bundesgesetzgeber, sollte die Möglichkeiten prüfen, von Art. 86 Abs. 2 EGV in Bezug auf kommunale Unternehmen künftig mehr Gebrauch zu machen. Besonders sollte der deutsche Gesetzgeber darauf achten, dass er den vom EuGH für eine wirksame Betrauung genannten Kriterien gerecht wird.

Vom Landesgesetzgeber ist in erster Linie zu fordern, das Gemeindewirtschaftsrecht im Sinne größerer Flexibilität der Gemeinden und ihrer Unternehmen zu modernisieren. Was im Einzelnen geschehen sollte, hat der Wissenschaftliche Beirat in einer Stellungnahme vom April/Mai 2001 verdeutlicht.[4] An diesen Forderungen wird festgehalten, und deren wichtigste seien noch einmal in Kurzfassung hervorgehoben:

- Den kommunalen Unternehmen soll eine bewegliche und effiziente Wirtschaftsführung ermöglicht werden.
- Die Gemeinden sollten im Wesentlichen selbst über ihr wirtschaftliches Engagement entscheiden.
- Die bisher in den Gemeindeordnungen enthaltenen Subsidiaritätsklauseln sollten für den Kernbereich der gemeindlichen Tätigkeit (Daseinsvorsorge) entfallen.
- Bei der Bindung der gemeindlichen Wirtschaftsbetätigung an den öffentlichen Zweck sollte es bleiben; dieser soll aber im Kernbereich der gemeindlichen Wirtschaftsbetätigung als gegeben angesehen werden.
- In liberalisierten Märkten darf kommunalen Unternehmen eine Beschränkung ihrer Tätigkeit auf das Gemeindegebiet nicht auferlegt werden.
- Den Gemeinden sollte die Wahl zwischen einer öffentlich-rechtlichen und einer privatrechtlichen Rechtsform offen stehen.

IV. Forderungen an die kommunalen Akteure

An die kommunalen Akteure selbst, also Bürgermeister, zuständige Beigeordnete, Kämmerer und nicht zuletzt die Vorstände der kommunalen Unternehmen, richtet sich die Forderung, alles nur irgend Mögliche für die Beibehaltung kommunaler Dienstleistungen in örtlicher Regie zu tun. Oben unter I. wurden die Gefahren aufgezeigt, die entstehen, wenn Gemeinden auf eigene Leistungserbringung verzichten und das Feld privaten, insbesondere privaten Großunternehmen überlassen. Es ist davor zu warnen, um kurzfristiger Einnahmeerzielung willen beispielsweise Stadt-

[4] Stellungnahme des Wissenschaftlichen Beirats der Gesellschaft für öffentliche Wirtschaft zur Weiterentwicklung des Gemeindewirtschaftsrechts, Berlin, April/Mai 2001, veröffentlicht in: Zeitschrift für öffentliche und gemeinwirtschaftliche Unternehmen, Heft 2, 2001, S. 190-193; sowie in: Günter Püttner (Hrsg.), Zur Reform des Gemeindewirtschaftsrechts, Schriftenreihe der Gesellschaft für öffentliche Wirtschaft, Heft 49, Baden-Baden 2002, S. 250-253. Die Stellungnahme ist auch als Sonderdruck bei der Gesellschaft für öffentliche Wirtschaft kostenlos erhältlich oder unter www.goew.de („Publikationen“) abrufbar.

werke zu veräußern, weil damit jeder wirtschaftliche Einfluss auf die Art der Leistungserbringung schwindet und insbesondere durch vertragliche Abreden nicht immer wirksam gesichert werden kann. Die örtliche Erbringung kommunaler Dienstleistungen ist von unschätzbarem Wert für die Bürger und sollte deshalb aufrecht erhalten bleiben.

Berlin, April 2004

Der Wissenschaftliche Beirat der Gesellschaft für öffentliche Wirtschaft e.V.

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Zu dieser Stellungnahme sind zwölf Kommentare zu Einzelaspekten der hier vorgetragenen Thematik, im Wesentlichen von Mitgliedern des Wissenschaftlichen Beirats, vorgelegt worden. Diese Kommentare werden zusammen mit der Stellungnahme in der bei der Nomos Verlagsgesellschaft erscheinenden „Zeitschrift für öffentliche und gemeinwirtschaftliche Unternehmen", Band 27, Heft 2/2004 veröffentlicht. Die Kommentare finden sich auch auf der Website der Gesellschaft für öffentliche Wirtschaft: www.goew.de („Publikationen").

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Positionspapier
des Wissenschaftlichen Beirats der Gesellschaft für öffentliche Wirtschaft
zu Public Private Partnership

Adressaten und Zielsetzung

Mit dem vorliegenden Positionspapier sollen die Akteure und Entscheidungsträger in Politik und Verwaltungen der Gebietskörperschaften, aber auch Berater und Finanzierungsträger für die Chancen, Risiken, Anwendungsfelder und Handlungsbedarfe von Public Private Partnership (PPP) sensibilisiert werden. Es geht darum, einerseits PPP und die hiermit verbundenen Potenziale sinnvoll für Innovationen und zur Förderung der Wettbewerbsfähigkeit der deutschen Gebietskörperschaften und Regionen zu nutzen, andererseits aber auch die Grenzen und Probleme von PPP nicht zu verkennen.

1. Ausgangssituation

(1) Die aktuelle – teilweise euphorische – Diskussion um Public Private Partnership vollzieht sich vor dem Hintergrund einer wachsenden Marktorientierung und Hinwendung zum Gewährleistungsstaat für bisher öffentlich wahrgenommene Aufgaben. Die Diskussion ist durch unterschiedliche Interessen und Einflussgrößen geprägt. Dominanter Einfluss für die wachsende Bedeutung von PPP ist die Finanzkrise der Gebietskörperschaften. Offen dabei ist die Frage, inwieweit es sich hierbei um eine dauerhafte neue Form öffentlicher Aufgabenwahrnehmung handelt oder nur um ein Übergangsstadium zur vollständigen Privatisierung. Unabhängig von den unterschiedlichen Einflussgrößen ist unverkennbar, dass PPP für die Erhaltung und Erneuerung der öffentlichen Infrastruktur zunehmend an Bedeutung gewinnt. Die klassischen Formen der Organisation und Finanzierung öffentlicher Aufgaben werden immer weniger realisierbar.

(2) Vor dem Hintergrund der Finanzkrise ist es ein weit verbreitetes Missverständnis, PPP sei ein neues Finanzierungsinstrument, mit dessen Hilfe auf Dauer die öffentlichen Haushalte entlastet werden können. Die von privaten Partnern häufig über komplizierte Vertragsstrukturen eingebrachten Finanzmittel haben in der Regel den Charakter einer Vor- oder Zwischenfinanzierung. PPP ist weder ein Instrument zur Lösung der Finanzprobleme der Gebietskörperschaften, noch kann PPP dazu dienen, die Politik in Deutschland vor einer notwendigen Umorientierung zu entlasten.

2. Inhaltliche Kennzeichnung

(3) PPP ist nicht klar definiert. Es handelt sich um einen unstrukturierten Sammelbegriff für unterschiedliche Formen der Zusammenarbeit von öffentlichen Einheiten mit privaten Wirtschaftssubjekten. Wesentliche Merkmale sind eine längerfristige Zusammenarbeit sowie ein aus der Art der Aufgabenwahrnehmung resultierender Abstimmungsbedarf im Zeitablauf. Von daher umfasst PPP sowohl die

klassische gemischtwirtschaftliche Unternehmung (Organisations-PPP/ Institutionelle PPP) als auch die Einbeziehung privater Unternehmen in zeitlich befristete Projekte und Aufgabenfelder (Projekt-PPP/Vertrags-PPP). Unter PPP können nur solche Kooperationsformen subsumiert werden, bei denen die Leistungen und Gegenleistungen der privaten und öffentlichen Partner nicht bereits mit Einrichtung der PPP klar definiert und festgelegt sind. Klassische Verträge zwischen öffentlichen und privaten Vertragspartnern stellen keine PPP dar. Allerdings ist auch hier eine Abgrenzung nicht immer trennscharf möglich. Soweit erreichbar, sollten die Leistungen und Gegenleistungen der Partner bei Vertragsabschluss klar vorgegeben werden.

(4) Bei der Organisations-PPP/Institutionellen PPP handelt es sich in der Regel um ein unbefristet angelegtes gemeinsames Betreiben eines Unternehmens zwecks einer dauerhaften Wahrnehmung einer bestimmten Aufgabe. Der Kooperations- und Koordinationsbedarf zwischen den Anteilseignern resultiert aus Anpassungsmaßnahmen an geänderte Umweltbedingungen im Zeitablauf, wie sie sich in jedem Unternehmen stellen. Es existiert eine – z.B. durch das GmbH-Gesetz und den Gesellschaftervertrag festgelegte – Kooperationsverfassung. Erfolgspotenziale müssen im Zeitablauf gemeinsam entwickelt und erarbeitet werden. Der Einsatz des öffentlichen Kapitals muss legitimiert und kontrolliert werden.

(5) Bei der Projekt-PPP/Vertrags-PPP geht es um eine Einbeziehung von Privaten in ein abgegrenztes öffentliches Projekt, das sich durchaus über einen längeren Zeitraum (z.B. 30 Jahre) erstrecken kann. Dabei besteht das Problem darin, dass bei Vertragsbeginn nicht sämtliche Leistungen und Kosten sowie Risiken eindeutig geregelt werden können (relationale Verträge). Bereits bei Vertragsabschluss besteht ein für beide Vertragspartner erkennbarer Koordinations- und Kooperationsbedarf während der Vertragslaufzeit. Von daher ist eine Festlegung der Kooperations- und Konfliktlösungsmechanismen bereits bei Vertragsabschluss notwendig.

3. Chancen und Risiken

(6) Die Chancen von PPP liegen darin, dass sich durch die Einbeziehung von Privaten eine bisher öffentlich erstellte Leistung effizienter erstellen lässt. Dies dürfte in der Regel dann der Fall sein, wenn bei einer Vertrags-PPP über den gesamten Lebenszyklus das Projekt geplant, finanziert, betrieben und erfolgsabhängig gesteuert wird. Ein besonderer Vorteil des Lebenszykluskonzepts resultiert daraus, dass sämtliche Kosten für eine bestimmte Leistung über die gesamte Projektlaufzeit erfasst und transparent gemacht werden.

(7) Die Effizienzvorteile Privater bei der Projektplanung und Projektrealisation erfordern nicht zwingend PPP-Konstruktionen. Sie lassen sich generell auch durch das Konzept des Generalunternehmers realisieren. Synergien und die Nutzung privater Kreativität durch PPP können aber besonders dann erreicht werden, wenn auch der Output und damit die Ressourcennutzung als variable Größe einbezogen wird. Dies kann etwa durch funktionale Ausschreibungen und/oder einen wettbewerblichen Dialog zwischen privaten Anbietern und öffentlichen Auftraggebern erreicht werden. Es ist zu vermuten, dass durch PPP leistungsfähigere Nutzungskonzepte etwa für Hochschulen, für Schulen oder für öffentliche

Freizeitanlagen erschlossen werden, die zu einer besseren kapazitätsmäßigen Auslastung und Verwendung der verfügbaren Gebäude und Anlagen führen.

(8) Mit PPP kann ein nicht zu unterschätzendes Innovations- und Managementpotenzial in die öffentlichen Verwaltungen transferiert werden. Zugleich führen PPP zu einer Art Wettbewerbsdruck gegenüber den weiterhin rein öffentlich erstellten Leistungen. PPP erfordert eine Risikoverteilung zwischen den beteiligten Partnern. Allerdings sollte nicht die Diskussion um die Risikoteilung im Vordergrund stehen, sondern die Vermeidung von Risiken. Geboten ist die Implementierung von Risikomanagementinformationssystemen einschließlich von Frühwarnsystemen zur Identifikation, Vermeidung und Handhabung unterschiedlicher Risiken. Die aktuelle Entwicklung ist auf diesem Gebiet noch ausgesprochen defizitär.

(9) Ein gravierendes Problem für erfolgreiche PPP besteht darin, dass die öffentliche Seite ihre Aufmerksamkeit auf die rechtliche Absicherung von PPP konzentrieren muss und weniger die Festlegung und die Kontrolle quantifizierbarer Ziele verfolgen kann. Demgegenüber kann sich der private Partner auf die Erreichung von Gewinn- bzw. Rentabilitätszielen konzentrieren.

(10) Die mit PPP möglicherweise verbundenen langfristig wirksamen Verpflichtungen und Folgewirkungen für die öffentliche Hand sind bei dem derzeitigen Rechnungswesen nicht erkennbar. So kann es sich bei PPP um eine verdeckte Erweiterung der Verschuldung der öffentlichen Gebietskörperschaften handeln. PPP kann den Intentionen der Maastricht-Kriterien zuwider laufen.

(11) Aufgrund der nicht für die gesamte Vertragslaufzeit eindeutig definierten Leistungen, Kosten und Risiken sowie der Komplexität von Vertragswerken ist bereits bei Vertragsabschluss ein systematisches Vertragsmanagement festzulegen. Es muss vermieden werden, dass PPP als komplexe und intransparente Konstrukte in Form vielschichtiger und interdependenter nicht mehr zu handhabender Vertragsverbünde entstehen.

4. Anwendungsfelder

(12) PPP können weitgehend bei allen öffentlichen Aufgabenfeldern zur Anwendung kommen. Die derzeitige Konzentration der Diskussion und praktischen Ausgestaltung von PPP auf öffentliche Bauprojekte (z.B. Autobahn, Schulgebäude, Tunnel, Justizvollzugsanstalten) ist zu eng, einseitig und interessenorientiert ausgerichtet. Potenziale von PPP liegen in gleichem Maße im Gesundheits-, Bildungs-, Sozial- und Kulturbereich. Vor allem sollten PPP-Lösungen für den Hochschulbereich, auf dem Gebiet von Forschung und Entwicklung sowie für E-Government im weitesten Sinne zur Anwendung kommen – Gebiete, die für die zukünftige Wettbewerbs- und Leistungsfähigkeit von entscheidender Bedeutung sind.

(13) Der Grundgedanke von PPP, Kooperationen zur Nutzung der Potenziale in einer Region unabhängig von den jeweiligen Eigentumsverhältnissen zu schaffen, sollte nicht nur auf Unternehmen und öffentliche Einheiten beschränkt werden. Vielmehr ist dieser Ansatz auch auf das bürgerliche Engagement auszudehnen, etwa auf eine Kooperation zwischen Vereinen und öffentlichen Einrichtungen. Erstes anschauliches Beispiel hierfür ist das Betreiben von Schwimmbädern.

5. Handlungsempfehlungen

(14) PPP erfordert unabdingbar vor Vertragsabschluss Transparenz und Festlegung der Zielsetzungen des öffentlichen und privaten Partners. Dabei ist zu beachten, dass der Private ein vergleichsweise operables Zielsystem verfolgt. Die öffentliche Hand sollte möglichst quantitativ und qualitativ die mit der PPP angestrebten Ziele fixieren.

(15) Für komplexe PPP-Konstruktionen sind ein systematisches Vertragscontrolling, ein Risikomanagementsystem und ein Frühwarnsystem einzurichten.

(16) Komplexe PPP-Konstruktionen erfordern mit Vertragsabschluss die Festlegung eines verbindlichen und leistungsfähigen Verfahrens zur Lösung von Konflikten während der Projektlaufzeit.

(17) Haushaltsrecht, Vergaberecht, Steuerrecht, Planungsrecht und Zuwendungsrecht sind an die Funktionsweisen und Erfordernisse von PPP anzupassen.

(18) Die durch das Grünbuch der EU-Kommission zu öffentlich-privaten Partnerschaften (ÖPP) angestoßene Diskussion um die Potenziale von PPP und die Frage eines EU-weiten Regelungsbedarfs sind zu unterstützen und zu fördern. Hierbei ist einerseits der Regelungsbedarf zu klären, andererseits die Institutionalisierung neuer bürokratischer Hemmnisse und Inflexibilitäten durch EU-Regelungen zu verhindern.

(19) Über bisherige Pilotprojekte und das Potenzial von PPP-Lösungen sollten möglichst bald empirische Daten ermittelt werden. Dies gilt insbesondere auch für Wirtschaftlichkeits- und Wirkungsvergleiche unterschiedlicher Formen und Regelungen. Insofern erfordert die PPP-Diskussion und Entwicklung eine fundierte wissenschaftliche Aufarbeitung. Hierfür müssen sowohl auf EU-Ebene als auch auf nationaler Ebene entsprechende Mittel bereit gestellt werden.

Berlin, 29. Juli 2004

Stellungnahme

des Wissenschaftlichen Beirats der Gesellschaft für öffentliche Wirtschaft zum Grünbuch der EU-Kommission zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen vom 30. April 2004 (KOM [2004] 327)

Vorbemerkung

In Deutschland praktizieren die Gebietskörperschaften sowohl auf staatlicher als auch auf kommunaler Ebene eine Vielzahl sehr unterschiedlicher Formen von ÖPP. Dabei steht die Entwicklung auf diesem Gebiet häufig erst ganz am Anfang. Die Potenziale von ÖPP liegen nicht nur im die aktuelle Diskussion in Deutschland prägenden Bauwesen, sondern in fast allen gesellschaftlichen Bereichen. Hierzu gehören insbesondere Verkehr, Ver- und Entsorgung aber auch Kultur, Bildung, Gesundheit, Sicherheit, Freizeit u.a.m. Vor diesem Hintergrund begrüßt der Wissenschaftliche Beirat die mit dem Grünbuch von der EU-Kommission initiierte Intensivierung der Diskussion zu ÖPP auf nationaler und internationaler Ebene.

Allerdings wird das von der Kommission gewählte Verfahren und hier vor allem der sehr knappe Zeitrahmen (Stellungnahmen bis Ende Juli 2004) weder der von der EU angestrebten Förderung von ÖPP, noch dem Bedarf an fundierter Diskussion und Analyse dieses für die Zukunft ausgesprochen wichtigen Gestaltungsbereichs gerecht. Dieser Aspekt ist deshalb problematisch, weil in der bisherigen Diskussion wesentliche mit ÖPP verbundene ordnungspolitische und allokative Aspekte ausgeklammert worden sind. Der Wissenschaftliche Beirat nimmt nicht im Einzelnen zu den überwiegend auf die praktische Erfahrung ausgerichteten Fragen Stellung, sondern konzentriert sich in einer ersten Reaktion auf einige grundlegende mit dem Grünbuch angesprochene Problemfelder. Die Diskussion wird im Wissenschaftlichen Beirat über den im Grünbuch gesetzten Termin hinaus fortgesetzt; die Kommission wird über die Ergebnisse unterrichtet werden.

1. Differenzierung zwischen vertraglicher ÖPP (klassische öffentliche Auftragsvergabe) und institutioneller ÖPP (klassische gemischtwirtschaftliche Unternehmung)

Bei den öffentlich-privaten Partnerschaften ist, wie dies auch in dem Grünbuch geschieht, zu unterscheiden zwischen vertraglicher ÖPP und institutioneller ÖPP.

Die beiden Kategorien von ÖPP weisen unterschiedliche Merkmale und Problemfelder auf. Die **vertragliche ÖPP** ist ein über den Markt organisiertes Tauschmodell. Der Kooperationsbedarf ergibt sich daraus, dass bei den jeweils zugrunde gelegten Projekten mit dem Vertragsabschluss in der Regel nicht vollständig die Kosten, Leistungen und Risiken der Vertragspartner definiert werden können. Im Zeitablauf bedarf es einer kontinuierlichen Abstimmung, um dieses Problem zu lösen. Dabei spielt bei Großprojekten auch die Komplexität von Vertragsverbünden eine Rolle. Vertragliche ÖPP im Sinne dieses Tauschmodells finden Anwendung bei Beschaffungsvorgängen der öffentlichen Hand. Entsprechend den EU-Vergaberichtlinien handelt es sich hierbei durchweg um die Vergabe ausschreibungspflichtiger öffentlicher Aufträge. Dritte werden mit der Erstellung einzelner Leistungen beauftragt und erhalten hierfür ein entsprechendes Entgelt.

Bei der **institutionellen ÖPP** handelt es sich nicht um ein Tauschmodell, sondern um ein Poolmodell. Der private und der öffentliche Partner bringen in der Regel gemeinsame Ressourcen in eine gemeinsame Kapitalgesellschaft ein. Der Kooperationsbedarf resultiert aus der Steuerung der gepoolten Ressourcen und aus der Verwendung der damit erzielten Ergebnisse. Anders als die vertragliche ÖPP – als Tauschmodell – stellt die institutionelle ÖPP nicht einen Beschaffungsakt dar, sondern eine Gestaltungsmaßnahme zur organisatorischen und ressourcenmäßigen Einbindung eines privaten Partners.

Die Kooperations-, Steuerungs- und Kontrollprobleme sind in beiden Kategorien sehr unterschiedlich.

Berücksichtigt man die Entstehungs- und Funktionszusammenhänge von ÖPP, hauptsächlich auf kommunaler Ebene, so stellt sich in der Tat die in dem Grünbuch aufgeworfene Frage, ob und wann zweckmäßigerweise die Einbindung eines privaten Partners mit seinen Ressourcen öffentlich ausgeschrieben werden soll. Hierbei ist insbesondere zu berücksichtigen, dass institutionelle ÖPP sich gerade nicht nur etwa auf große netzgebundene Industriezweige als private Partner der öffentlichen Hand darstellen. Vielmehr entstehen vor allem auf kommunaler Ebene auch durch spezifische Problemsituationen und informelle Kontakte sukzessive formale institutionelle ÖPP, deren Initiativen nicht selten bei dem privaten Partner liegen. Eine generelle Ausschreibung der Einrichtung institutioneller ÖPP könnte in derartigen Fällen dazu führen, dass entsprechende Initiativen beeinträchtigt werden, d.h. der angestrebten Förderung von institutionellen ÖPP gerade entgegen wirken.

Für die zukünftige Diskussion und Entwicklung ist es notwendig, wesentlich stärker zwischen den einzelnen Kategorien von ÖPP zu unterscheiden und die Entstehungs- und Funktionsbedingungen einzelner ÖPP innerhalb der genannten Kategorien einzubeziehen und zu klären.

2. Wettbewerbsordnung

Die Kommission legt in dem Grünbuch ihren Überlegungen ein punktuelles und statisches Wettbewerbsverständnis zugrunde. Im Wesentlichen geht es dabei um die Beseitigung von Markteintrittsbarrieren. Die Entwicklung des Marktes im Zeitablauf, etwa nach Einrichtung einer institutionellen ÖPP, findet hingegen kaum Beachtung. So weisen die Märkte in den Sektoren der Dienstleistungen von allgemeinem wirtschaftlichen Interesse überwiegend starke Tendenzen zur Oligopolisierung auf. Für die Tätigkeit dieser Oligopole gilt unter Kriterien des Wettbewerbs grundsätzlich das Konzept des funktionsfähigen Wettbewerbs. Allerdings tendieren überregionale Oligopole im Zeitablauf zu regionalen Monopolen, d.h. der Preis ist nach Markteintritt kein Wettbewerbsparameter mehr. Hier stellt sich dann das Problem, dass es innerhalb der Region/Gebietskörperschaft für die öffentliche Hand keinen Regelungsmechanismus zur Vermeidung der mit regionalen Monopolen verbundenen allokativen Ineffizienzen gibt.

Vernachlässigt wird in der Diskussion bisher auch, dass Wettbewerb und Kooperationen zwei Seiten ein und derselben Medaille sind. Dies ist für den privatwirtschaftlichen Bereich hinreichend bekannt und schlägt sich in den so genannten strategischen Allianzen als Kooperationsstrategien nieder, die zunehmend an Bedeutung gewinnen. Der private Akteur sucht sich ganz gezielt für seine strategische Allianz einen Partner, der für die zukünftige Unternehmensentwicklung am geeignetsten erscheint. Häufig handelt es sich hierbei um gewachsene strategische Allianzen. Für den öffentlichen Sektor bedeutet dies, dass ihm eine durchaus gleichartige Vorgehensweise wie dem privatwirtschaftlichen Sektor ermöglicht werden muss.

Zudem ist im Zusammenhang mit der Wettbewerbsordnung und der Bildung großer überregionaler Oligopole zu fragen, inwieweit die Wettbewerbsordnung mit der im Konventsentwurf der europäischen Verfassung explizit enthaltenen Stärkung des Subsidiaritätsprinzips und der Gewährleistung der kommunalen Selbstverwaltung in Einklang steht.

3. ÖPP und generelle Reformstrategien des öffentlichen Sektors

Die Entwicklung und Förderung von ÖPP – hier speziell die institutionelle ÖPP – muss im Gesamtkontext mit den Strategien zur Modernisierung des öffentlichen Sektors gesehen werden. Die derzeitigen, insgesamt positiven Reformprozesse dürfen nicht durch EU-weite Regulierungen unterlaufen werden. Von Bedeutung ist in diesem Zusammenhang insbesondere die Dezentralisierung öffentlicher Aufgaben zwecks Schaffung rechtlich selbstständiger Aufgabenträger, denen die Kosten und Leistungen der Aufgabenwahrnehmung klar zugerechnet werden können. Die Verlagerung von Aufgaben auf dezentrale öffentliche Einheiten sowie die Kooperationen und Zusammenschlüsse auf überwiegend öffentliche Einheiten sollte nicht einer generellen Ausschreibungspflicht unterworfen werden.

4. ÖPP und Maastricht-Kriterien

Vor dem Hintergrund der Finanzkrise ist es ein weit verbreitetes Missverständnis, mit Hilfe von PPP ließen sich die öffentlichen Haushalte auf Dauer entlasten oder möglicherweise sanieren. Die von privaten Partnern häufig in ÖPP eingebrachten Finanzmittel haben in der Regel den Charakter einer Vor- oder Zwischenfinanzierung. Von daher muss in der Diskussion stärker deutlich gemacht werden, dass ÖPP weder ein Instrument zur Lösung der Finanzprobleme und Verschuldung der Gebietskörperschaften in der EU ist, noch ÖPP dazu dienen können, in der EU im allgemeinen und in Deutschland im besonderen die Maastricht-Kriterien zu unterlaufen oder weiter auszudünnen. Im Falle kreditähnlicher Geschäfte von ÖPP ist diesem Sachverhalt im Haushalts- und Rechnungswesen hinreichend transparent Rechnung zu tragen.

5. ÖPP – Zentralisierung und Bürokratisierung

Die bisherige Flexiblität und Vielfalt, mit denen die Gebietskörperschaften ÖPP zur Anwendung bringen können, sollte erhalten und ausgebaut werden. Aus diesem Grund sind anfängliche Bestrebungen auf nationaler Ebene in Deutschland, ein einheitliches Kooperationsrecht zu schaffen, nicht weiter verfolgt worden. Der Wissenschaftliche Beirat sieht von daher in einer einheitlichen EU-weiten ÖPP-Regulierung die Tendenz einer Überregulierung und Bürokratisierung auf diesem Gebiet. Bei dem derzeitigen Erfahrungs- und Diskussionsstand besteht die Gefahr, dass die bisherigen Förderungen und erweiterten Anwendungen von ÖPP, speziell der institutionellen ÖPP, durch ein entsprechendes einheitliches Regulierungswerk eher beeinträchtigt denn ausgeweitet würden.

6. Empirische Datenbasis über Potenziale und Reglungsbedarfe

Über bisherige Erfahrungen und über das Potenzial von ÖPP-Lösungen liegen bisher nur geringe und ausgesprochen zufallsbezogene Informationen vor. Von daher bedarf die ÖPP-Diskussion und Entwicklung einer fundierten wissenschaftlichen Aufarbeitung. Hierfür sollten sowohl auf EU-Ebene als auch auf nationaler Ebene entsprechende Mittel ab sofort bereitgestellt werden.

Berlin, den 29. Juli 2004

Prof. Dr. Peter Eichhorn
als Vorsitzender des Wissenschaftlichen Beirats
der Gesellschaft für öffentliche Wirtschaft

Aktionsgemeinschaft Wirtschaftlicher Mittelstand

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Stellungnahme der Aktionsgemeinschaft Wirtschaftlicher Mittelstand (AWM) zum Grünbuch der Europäischen Kommission zu Öffentlich-Privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen

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Allgemein

Die AWM vertritt als Bundesverband der Dienstleistungswirtschaft die Interessen von 100.000 deutschen mittelständischen Unternehmen, die in 24 Bundesverbänden und 73 Regionalverbänden organisiert sind.

Aus der Sicht des deutschen Mittelstandes müssen bei der Thematik Öffentlich-Private Partnerschaften zwei Teilaspekte betrachtet werden. Einerseits ist es wünschenswert, daß die öffentliche Hand verstärkt auf die Privatwirtschaft setzt, um ihre Aufgaben zu erfüllen. Auf der anderen Seite engagieren sich vielfach kommunale Unternehmen oder Unternehmen, an denen die Kommunen beteiligt sind, auf dem Terrain der Privatwirtschaft und das weit über die Daseinsvorsorge hinaus. Diese Unternehmen sind unter anderem durch bessere Refinanzierungsmöglichkeiten im Vorteil gegenüber der Privatwirtschaft. Zudem haben diese Unternehmen kein Insolvenzrisiko. Die Befürchtung ist, daß sie ihre privatwirtschaftliche Geschäftstätigkeiten noch stärker ausweiten. Dabei besteht in Deutschland grundsätzlich eine Nachrangigkeit von privatwirtschaftlich tätigen Unternehmen der öffentlichen Hand, wohingegen im europäischen Vertrag eine Gleichberechtigung von öffentlichen und privaten Unternehmen festgelegt wurde.

Ein Beispiel für die privatwirtschaftliche Betätigung der öffentlichen Hand in Deutschland ist die Gesellschaft für Entwicklung, Beschaffung und Betrieb mbH (gebb), eine Öffentlich-Privates Partnerschaftsprojekt der Bundeswehr. Die gebb beabsichtigt, daß die von ihr gegründeten Unternehmen ihre Dienstleistungen nicht nur der Bundeswehr sondern auch verstärkt privaten Marktteilnehmern anbieten.

In Deutschland fehlt weitgehend die Möglichkeit für die Privatwirtschaft, um gegen umstrittene kommunalwirtschaftliche Aktivitäten vorzugehen. Über das Wettbewerbsrecht ist dieses nur unter ganz besonderen Vorraussetzungen möglich. Der Bundesgerichtshof hat jedoch eine diesbezügliche Klage gegen die Privatwirtschaft entschieden. Der Weg über das öffentliche Recht war bei gleich gelagerten

Fällen auch nicht erfolgreich. Das hat zur Folge, daß die Kommunen die Vorgaben ihrer Gemeindeordnungen ignorieren können. Vor diesem Hintergrund ist der Mittelstand bei institutionalisierten ÖPP´s sehr skeptisch.

Zu den Fragen

Es wird eine Auswahl aus den von der Kommission gestellten Fragen beantwortet.

1. Welche Formen von ÖPP auf Vertragsbasis sind Ihnen bekannt? Gibt es in Ihrem Land spezifische (gesetzliche oder andere) Rahmenbedingungen für derartige Konstruktionen?

In Deutschland läßt die Wahlfreiheit der Verwaltung zahlreiche Gestaltungsmöglichkeiten zu. Spezifische Rahmenbedingungen gibt es nicht.

3. Sehen sie in bezug auf diese Aufträge (ÖPP auf Vertragsbasis) neben der Wahl des Vergabeverfahrens andere Punkte, die mit dem Gemeinschaftsrecht über öffentliche Aufträge in Konflikt stehen könnten? Wenn ja, nennen Sie diese und begründen Sie.

Es gibt Bereiche in denen eine reine Preis- und Wirtschaftlichkeitsbetrachtung wenig Sinn macht, zum Beispiel wenn verfassungsrechtliche Vorgaben zu berücksichtigen sind. Ein Beispiel ist die Einbeziehung privater Sicherheitsdienste für die Leistungserbringung im Bereich der Sicherheitsgewährleistung.

Ein weiterer Aspekt beim Vergabeverfahren, der aus Sicht des deutschen Mittelstandes problematisch erscheint, ist die Gewährleistung der Chancengleichheit von privatwirtschaftlichen Unternehmen und Unternehmen, an denen die öffentliche Hand beteiligt ist. Es läßt sich nicht unterbinden, daß zwischen der Vergabestelle und dem Unternehmen der Kommune ein Informationsaustausch stattfindet. Zudem ist es auch im Interesse der Kommune, daß ihr eigenes Unternehmen, den Auftrag erhält, weil damit Einnahmen erzielt werden, von denen die Kommune profitiert. Da für diese Unternehmen die Möglichkeit einer Insolvenz nicht berücksichtigt werden muß, können sich die Kommunen wirtschaftlich betätigen, ohne das unternehmerische Risiko zu berücksichtigen. In diesem Zusammenhang spielt auch die sehr schlechte finanzielle Verfassung vieler Kommunen in Deutschland eine wichtige Rolle.

6. Halten Sie einen Vorschlag für einen gemeinschaftlichen Rechtsakt zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe für wünschenswert?

Die Konzessionsvergabe ist ein neues gemeinschaftsrechtliches Institut, das nur rudimentär – etwa bei Baukonzessionen – angesprochen wird. Es ist dringend erforderlich, das Vergaberecht der Konzessionen nicht nur aus Gründen der Rechtsklarheit zu normieren. Denn voraussichtlich wird diese Handlungsform bei einem weiteren Rückzug des Staates von staatlichen Aufgaben eine größere Bedeutung gewinnen. Deshalb sollten die Verfahrensstandards abstrakt gemeinschaftsweit festgelegt werden, zumal auch Beleihungskonzessionen denkbar sind.

7. Allgemeiner gefragt: Wenn Sie ein neues Gesetzgebungsverfahren der Kommission für erforderlich halten, gibt es dann objektive Gründe dafür, in diesem Rechtsakt sämtliche ÖPP auf Vertragsbasis zu behandeln und sie ein und demselben Regelwerk für die Vergabe zu unterwerfen, ganz gleich ob die Verfahren als öffentliche Aufträge oder als Konzessionen einzustufen sind?

Ein einheitliches Regelwerk senkt die Transaktionskosten für Unternehmen, die sich um ÖPP-Projekte in anderen europäischen Ländern bewerben. Hinzu kommt ein Transparenzgewinn. Dadurch steigt die Anzahl der mittelständischen Unternehmen für die es in Frage kommt, sich außerhalb ihres Herkunftslandes wirtschaftlich zu betätigen.

Ein weiterer Vorteil eines einheitlichen Regelwerks ist, das es leichter fällt, Benchmarks in Bezug auf erfolgreiche Projekte zu erarbeiten.

9. Wie könnte Ihrer Auffassung nach die Entwicklung privat initiierter ÖPP in der Europäischen Union unter Wahrung der Grundsätze der Transparenz und der Gleichbehandlung und ohne Vorstoß gegen das Diskriminierungsverbot gewährleistet werden?

Jede ÖPP muß den selben Rechtsregeln unterliegen. Es ist kein Sachgesichtspunkt ersichtlich, weshalb privat initiierte ÖPP unterschiedlich behandelt werden sollen, weil nicht die Initiative für das Rechtsregime maßgeblich sein kann.

16. Rechtfertigt die Existenz von ÖPP auf Vertragsbasis, die die Übertragung eines Aufgabenpakets an einen einzigen privaten Partner impliziert, ihrer Auffassung nach, daß ausführlichere Regeln für die Vergabe von Unteraufträgen eingeführt werden und/oder daß der Anwendungsbereich erweitert wird?

Die Vergabe von Unteraufträgen ist ein typisches Instrument zur Abarbeitung öffentlicher Aufträge. Da hiermit besondere Risiken für alle Beteiligten verbunden sind, ist eine ausdrückliche Normierung der damit verbundenen Rechtsverhältnisse wünschenswert. Dies ist auch deshalb angebracht, weil Unteraufträge häufig an mittelständische Unternehmen weitergeleitet werden, die gemeinschaftsrechtlich besonders förderungswürdig sind.

Jedoch ist mit einer gemeinschaftsrechtlichen Regelung das Risiko verbunden, daß darüber zusätzliche Bürokratie nach Deutschland hereingetragen wird. Dies muß aus Sicht der kleinen und mittleren Unternehmen abgelehnt werden, weil für diese Unternehmen auf Grund der Größenverhältnisse bürokratische Anforderungen einen sehr viel höheren Aufwand verursachen als bei Großunternehmen.

17. Halten Sie, allgemeiner gesprochen, eine ergänzende Initiative auf Gemeinschaftsebene zur Klärung oder Umgestaltung der Regeln für die Vergabe von Unteraufträgen für erforderlich?

Ja, wobei es auch möglich ist, daß die Vergabe von Unteraufträgen in einem allgemeinen Regelwerk zu ÖPP Berücksichtigung finden.

19. Halten sie eine Initiative auf Gemeinschaftsebene für erforderlich, um die Verpflichtungen zu klären oder zu vertiefen, die die öffentlichen Auftraggeber in bezug auf den Wettbewerb zwischen potentiell an einem institutionalisierten ÖPP-Projekt interessierten Wirtschaftsteilnehmern haben? Falls ja, welche Aspekte halten Sie für besonders wichtig und welche Form sollte eine solche Initiative haben? Falls nicht, warum nicht?

Grundsätzlich lehnt die AWM eine Ausweitung der institutionellen Verflechtung der öffentliche Hand mit der Privatwirtschaft aus Wettbewerbserwägungen ab. Insbesondere für mittelständische Unternehmen hat die wirtschaftliche Betätigung der öffentlichen Hand häufig zur Folge, daß diese aus den betroffenen Märkten herausgedrängt werden.

Da in Deutschland die privatwirtschaftliche Betätigung Vorrang vor der Tätigkeit der öffentlichen Hand hat, im Gegensatz zum Europäischen Vertrag, in dem die Gleichberechtigung von öffentlichen und privaten Unternehmen festgelegt ist, lehnt die AWM eine Initiative auf Gemeinschaftsebene ab.

20. Welche Maßnahmen oder Verfahren behindern in der Europäischen Union die Einrichtung von ÖPP?

Es wäre sinnvoll, daß sich die EU auch außerhalb des Vergaberechts verstärkt für ÖPP´s einsetzen und eine Rahmenrichtlinie zu dieser Thematik verabschieden würde. Auf diese Weise könnten nationale, regionale und lokale Bedenken überwunden bzw. gemildert werden. Denn das Rechtsinstitut ÖPP ist noch nicht allgemein bekannt und die Vorteile einer Zusammenarbeit sind noch nicht überzeugend vermittelt worden. Insoweit besteht eine legislative Verantwortung der EU, die ÖPP als Binnenmarktkonzept zu etablieren und besser zu positionieren.

22. Denken Sie daß es nützlich wäre, im Hinblick auf den großen Investitionsbedarf einzelner Mitgliedsstaaten zum Erreichen einer sozialen und dauerhaften Entwicklung gemeinsam und in regelmäßigen Abständen über diese Fragen unter den betroffenen Akteuren nachzudenken und bewährte Verfahrensweisen auszutauschen? Sollte die Kommission nach Ihrer Auffassung ein derartiges Netzwerk aufbauen?

Angesichts der Neuartigkeit von ÖPP, der rechtlichen Unsicherheit und der fehlenden praktischen Erfahrungen ist es sehr hilfreich, wenn ein Netzwerk aufgebaut wird und ein Gedankenaustausch stattfindet.

Berlin, 30. Juli 2004

DIE DEUTSCHE
BAUINDUSTRIE

Stellungnahme

des Hauptverbandes der Deutschen Bauindustrie

zum Fragenkatalog im Grünbuch

der Kommission der Europäischen Gemeinschaften

zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen

(Fertigstellung 29. Juli 2004)

Frage 1:
Welche Formen von ÖPP auf Vertragsbasis sind Ihnen bekannt? Gibt es in Ihrem Land spezifische (gesetzliche oder andere) Rahmenbedingungen für derartige Konstruktionen?

Der Hauptverband sieht im Baubereich vor allem drei **Anwendungsfelder** für ÖPP-Modelle:

- im **Verkehrswegebau**,
- im **öffentlichen Hochbau**,
- beim Bau von **Ver- und Entsorgungseinrichtungen**.

Konzessionsmodelle in dem im ÖPP-Grünbuch verwendeten Sinne gibt es derzeit

- im **Verkehrswegebau** auf der Grundlage des Fernstraßenbauprivatfinanzierungsgesetzes (F-Modell),
- im **öffentlichen Hochbau** im Bereich der Realisierung kommunaler Parkhäuser.

PFI- oder **Betreiber-Modelle** im Sinne des ÖPP-Grünbuchs finden sich

- im **Verkehrswegebau** als Betreibermodelle nach dem privatwirtschaftlichen Ausbauprogramm der Bundesregierung (A-Modell) und als Funktionsbauverträge,

- im **öffentlichen Hochbau** in verschiedenen Vertragsmodellen wie

  - PPP-Erwerbermodell (Mietkaufvertrag)
  - PPP-FMLeasing-Modell (Leasingvertrag),
  - PPP-Vermietungsmodell (Mietvertrag),
  - PPP-Inhabermodell (Nutzungsüberlassungsvertrag),
  - PPP-Contractingmodell.

- im **Umweltschutzbau** (Niedersächsisches Betreibermodell)

Spezifische gesetzliche Regelungen für ÖPP allgemein existieren in Deutschland bisher nicht. Es gelten aber selbstverständlich die allgemeinen Regelungen des Vergaberechts, Zivilrechts, öffentlichen Rechts etc.. Die Vergabe von **Baukonzessionen** ist z.B. in der VOB/A geregelt.

Für das **F-Modell** sind spezifische gesetzliche Rahmenbedingungen im **Fernstraßenbauprivatfinanzierungsgesetz** geschaffen worden. Für das **F-Modell** wie auch für das **A-Modell** gibt es darüber hinaus **Musterkonzessionsverträge** und **Mustervergabebedingungen**.

Eine Analyse des Rechtsrahmens und praxisorientierte Leitlinien für ÖPP-Vergaben im Hochbau gibt auch das Gutachten „PPP im öffentlichen Hochbau“, das von einem Beraterkonsortium um Freshfields Bruckhaus Deringer und PriceWaterhouseCoopers im Auftrag des Bundes, der Bundesländer und der kommunalen Spitzenverbände sowie der Spitzenverbände der Bau- und Kreditwirtschaft erstellt und im September 2003 vorgelegt wurde.

Frage 2:
Nach Auffassung der Kommission wird die Umsetzung des wettbewerblichen Dialogs in einzelstaatliche Rechtsvorschriften den betroffenen Parteien ein Verfahren an die Hand geben, das sich ganz besonders für die Vergabe öffentlicher Aufträge im Zusammenhang mit der Einrichtung einer ÖPP auf Vertragsbasis eignet und gleich-

zeitig die Grundrechte der Wirtschaftsteilnehmer wahrt. Stimmen Sie dem zu? Falls nein, warum nicht?

Die deutsche Bauindustrie ist mit Blick auf die hohe Komplexität und die hohen Angebotskosten in hohem Maße an einem rechtssicheren Verfahren für die Ausschreibung und Vergabe von ÖPP-Projekten interessiert.

Die Erfahrungen mit ersten ÖPP-Projekten in der Bundesrepublik Deutschland haben gezeigt, dass mit dem Verhandlungsverfahren schon jetzt ein Vergabeverfahren existiert, mit dessen Hilfe Ausschreibung und Vergabe von ÖPP-Projekten rechtssicher und flexibel strukturiert werden können.

Mit dem wettbewerblichen Dialog wird den öffentlichen Auftraggebern nunmehr ein Verfahren an die Hand gegeben, das sich hinsichtlich seiner Verfahrensvoraussetzungen – vorbehaltlich der Klärung der weiter unten aufgeworfenen Fragen – ganz besonders für ÖPP-Projekte eignen könnte, insbesondere wenn es die Gefahr der unzulässigen Auswahl des Vergabeverfahrens und damit die Angreifbarkeit des Vergabeverfahrens vermindert.

Durch ein solches Verfahren könnte das Ziel von ÖPP gefördert werden, innovative und kreative Lösungen unter Beachtung des Bedarfs des Auftraggebers und unter gleichzeitiger Nutzung des Innovationspotentials der beteiligten Unternehmen zu finden.

Zur abschließenden Bewertung des neuen Vergabeverfahrens ergibt sich aus Sicht der Bauindustrie jedoch noch ein erheblicher Aufklärungs- bzw. Präzisierungsbedarf:

1. Anwendungsbereich des wettbewerblichen Dialogs

Für uns ist es nach wie vor fraglich, ob die in Deutschland üblichen ÖPP-Projekte im Verkehrswegebau, öffentlichen Hochbau und Umweltschutzbau die in Präambel 31 der Erwägungsgründe zu der Richtlinie 2004/18/EG niedergelegten Voraussetzungen für die Einleitung eines wettbewerblichen Dialogs erfüllen:

- Was ist unter der **besonderen Komplexität** eines Vorhabens zu verstehen?
- Was ist unter der **objektiven Unmöglichkeit** des öffentlichen Auftraggebers**, die Mittel zu bestimmen**, die seinen Bedürfnissen gerecht werden können, zu verstehen?

- Was ist unter der **objektiven Unmöglichkeit** eines öffentlichen Auftraggebers, zu beurteilen, was der Markt an **technischen bzw. finanziellen/rechtlichen Lösungen** bieten kann, zu verstehen?

Sind die Anforderungen sehr streng i.S. eines „letzten Mittels" auszulegen, reduziert sich damit der Anwendungsbereich des wettbewerblichen Dialogs auf nur ganz wenige ÖPP-Projekte mit außergewöhnlichem Innovationsbedarf. Das wäre angesichts des auch bei ÖPP-Projekten allgemein bestehenden Bedürfnisses nach Flexibilität und Innovationsoffenheit im Vergabeverfahren für die Entwicklung von ÖPP hinderlich.

Der Hauptverband der Deutschen Bauindustrie begrüßt deshalb vor diesem Hintergrund die von der Kommission angekündigte Absicht, den Anwendungsbereich des wettbewerblichen Dialogs durch eine Mitteilung zu präzisieren. Der Hauptverband mahnt dringend an, den Anwendungsbereich des wettbewerblichen Dialogs dabei so weit wie möglich zu fassen, um dieses Verfahren für die Vergabe von ÖPP-Vorhaben offen zu halten.

2. Beschreibung des Verfahrens in Art. 29

Für den Hauptverband ist es von größtem Interesse, dass die EU-Richtlinie mit der Einführung des wettbewerblichen Dialogs ein neues Verfahren für öffentliche Aufträge schafft, die im Wege eines offenen oder nicht offenen Verfahrens nicht vergeben werden können. Dies ist in der Regel bei ÖPP-Projekten der Fall.

Die deutsche Bauindustrie geht davon aus, dass das in Art. 29 implizit enthaltene dreistufige Verfahren

- **Teilnahmewettbewerb** (Abs. 2),
- **Dialogphase** (Abs. 3 bis 5),
- **Angebotsphase** (Abs. 6)

eine geeignete Strukturierung des Vergabeprozesses darstellt.

Voraussetzung dafür ist jedoch, dass die **Dialogphase**

- bereits auf der Grundlage von **Lösungskonzepten im Sinne von indikativen Angeboten** geführt wird,

- in der **bilateralen Erörterung dieser Lösungskonzepte** zwischen dem öffentlichen Auftraggeber und einzelnen Bieter (und nicht der gemeinsamen Diskussion i.S. von Bieterkonferenzen) besteht.

Nach Art. 29 Abs. 6 soll der Auftraggeber nach Abschluss des Dialoges die Teilnehmer auffordern, "auf der Grundlage der eingereichten und in der Dialogphase näher ausgeführten Lösungen ihr endgültiges Angebot einzureichen". Dieser Wortlaut könnte entweder bedeuten, dass

- jeder Bieter sein endgültiges Angebot auf der Basis seines (ggf. während des Dialogs modifizierten) Lösungsansatzes abgeben soll oder aber
- alle Bieter auf der Grundlage der Lösung eines Bieters, die sich als die beste herausgestellt hat, anbieten.

Sollte für die endgültigen Angebote aller Teilnehmer eine Lösung zur Grundlage gemacht werden, ergeben sich u.E. erhebliche Probleme mit dem Geheimnisschutz für den Bieter, der diese Lösung ursprünglich vorgeschlagen hat. U.E. muss sichergestellt werden, dass

- die **Weitergabe von Lösungskonzepten** eines Bieters an konkurrierende Bieter durch den öffentlichen Auftraggeber unterbleibt,
- die **Zustimmung zur Weitergabe von Lösungsvorschlägen** oder vertraulichen Informationen nicht durch generelle Klauseln in den Vergabeunterlagen erzwungen wird.

Der **Schutz geistigen Eigentums** muss über die Dialogphase hinaus auch **für die Angebotsphase** gemäß Abs. 6 gelten. Der Hauptverband ist davon überzeugt, dass der wettbewerbliche Dialog nur dann zu einem erfolgreichen Verfahren entwickelt werden kann, wenn der Schutz geistigen Eigentums sichergestellt ist. Unseres Erachtens liegt das sowohl im Interesse der Bieter, die erhebliche Kosten in die Entwicklung innovativer Konzepte stecken müssen, als auch im Interesse der öffentlichen Auftraggeber, die solche innovativen Lösungskonzepte nur dann erwarten können, wenn der Schutz der Konzepte und Ideen des einzelnen Bieters sichergestellt ist.

Soll aber jeder Bieter auf der Basis seines eigenen Lösungskonzeptes ein endgültiges Angebot erstellen, kann u.U. die Vergleichbarkeit der einzelnen Angebote Probleme bereiten. Von entscheidender Bedeutung ist insofern, dass der Auftraggeber alle Teilnehmer in der gleichen Weise über das Projekt und die politischen, rechtlichen, technischen sowie wirtschaftlichen Rahmenbedingungen informiert und seine **Eckpunkte und Mindest-**

anforderungen („KO-Kriterien“) diskriminierungsfrei festlegt. Mindestanforderungen („KO-Kriterien“) sollten jedoch nur in dem unbedingt erforderlichen Maß gesetzt werden, um dem Innovationspotential der Teilnehmer keine unnötigen Schranken zu setzen. Ein fairer Verfahrensablauf scheint zudem nur denkbar, wenn die Teilnehmer rechtzeitig umfassend und ausführlich über die **Zuschlagskriterien und ihre Gewichtung informiert** werden.

Nach Art. 29 Abs. 8 sollen die Bieter nur optional (nach Wahl des Auftraggebers) eine **Entschädigungszahlung** erhalten. Nach unseren Erfahrungen dürfte das Fehlen einer Entschädigungszahlung jedoch die Motivation der Bieter dämpfen, tatsächlich mit großem Aufwand eine innovative Lösung für ein komplexes Projekt zu entwickeln. Wenn die Bieter zudem fürchten müssen, dass ihr aufwendig erstelltes Lösungskonzept auch den anderen Teilnehmern offengelegt wird, dürfte sich der Kreis der interessierten Unternehmen sehr verengen.

Nach Einreichung der endgültigen Angebote sollen nach Art. 29 Abs. 7 nur noch in engem Rahmen **Änderungen der Angebote** zulässig sein, um eine Verfälschung des Wettbewerbs und die Diskriminierung einzelner Bieter zu verhindern. Allerdings muss nach unserer praktischen Erfahrung auch eine gewisse Flexibilität gewahrt bleiben, um möglicherweise erst in diesem (verbindlicheren) Stadium zu klärende Inhalte (insbes. im Hinblick auf die Finanzierungskonditionen der finanzierenden Banken) einbeziehen zu können. Nach bisheriger Erfahrung sind die Kreditinstitute regelmäßig zu vertretbaren Bedingungen erst in der letzten Phase des Verfahrens bereit, feste Finanzierungskonditionen anzubieten und die für die Fremdkapitalgewinnung notwendigen Prüfungen vorzunehmen. Die Kommission sollte insofern eine möglichst weite Auslegung der noch zulässigen „Feinabstimmungen“ vorziehen, um die Finanzierbarkeit der ÖPP-Vorhaben („Bankability“) nicht in Frage zu stellen und die Transaktionskosten für die Bieter nicht unnötig in die Höhe zu treiben.

Wenn diese Voraussetzungen erfüllt werden, kann sich der Hauptverband der Deutschen Bauindustrie den wettbewerblichen Dialog für ÖPP-Projekte als geeignetes Verfahren vorstellen.

Frage 3:
Sehen Sie in Bezug auf diese Aufträge neben der Wahl des Vergabeverfahrens andere Punkte, die mit dem Gemeinschaftsrecht über öffentliche Aufträge in Konflikt stehen könnten? Wenn ja, nennen Sie diese und begründen Sie!

Bei ÖPP-Projekten handelt es sich in der Regel um Aufträge, die Bau-, Liefer- und Dienstleistungskomponenten enthalten. Da insbesondere Baukonzessionen dem Vergaberechtsregime unterliegen, Dienstleistungskonzessionen hingegen nicht, hat die Ermittlung der im konkreten Fall anwendbaren Vorschriften entscheidende Bedeutung.

Präzisierungsbedarf sieht der Hauptverband hier vor allem bezüglich der Kriterien für die **Bestimmung des Schwerpunkts**, da die vom Europäischen Gerichtshof entwickelte Schwerpunkttheorie nicht in allen Fällen zu eindeutigen Lösungen führt.

Der Hauptverband betont jedoch, dass diese Unschärfe bislang in der Praxis nicht zu einer ernsten Behinderung von ÖPP-Projekten geführt hat.

Frage 4:
Haben Sie bereits einmal ein Verfahren zur Vergabe einer Konzession in der Europäischen Union organisiert, daran teilgenommen bzw. ein solches organisieren oder daran teilnehmen wollen? Welche Erfahrungen haben Sie gemacht?

Die Unternehmen der deutschen Bauindustrie haben in den letzten Jahren Erfahrungen mit der Ausschreibung von vier Betreibermodellen nach dem Fernstraßenbauprivatfinanzierungsgesetz sammeln können (s. Anlage).

Die Auswertung der im Rahmen dieser Verfahren gemachten Erfahrungen hat aus Sicht des Hauptverbandes den folgenden Fortschreibungsbedarf für Ausschreibungs- und Vergabebedingungen bei der Vergabe von Konzessionsmodellen ergeben:

1. Die **Qualität der vorgeschalteten Machbarkeitsstudien** sollte verbessert werden, um in den Vergabeunterlagen marktgerechte Projektbedingungen festlegen zu können.

2. Die **beschränkte Ausschreibung/das nicht offene Verfahren** erscheint für Konzessionsmodelle im Fernstraßenbereich (z.B. die sog. F-Modelle) **ungeeignet**, da häufig Verhandlungsbedarf bzgl. der Risikoverteilung besteht (siehe Vergabeverfahren zur Vergabe einer Baukonzession für eine neue Straßenanbindung der Insel Rügen - „Strelasundquerung“). Speziell wenn ein förmliches Verfahren mit Verhandlungsverbot in Kombination mit nicht marktgerechten Anforderungen in der Leistungsbeschreibung (bzgl. der prognostizierten tatsächlichen Nutzung des Bauwerks) auftritt, ist ein Scheitern des Verfahrens sehr wahrscheinlich. Nach unserer Erfahrung wird dann das (vorher-

sehbare) Scheitern von ÖPP-Konzessionsvergaben, die ohne ordnungsgemäße Vorbereitung in Verfahren ohne Verhandlungsmöglichkeiten ausgeschrieben werden, z.T. als Argument gegen die Effizienz und Realisierbarkeit einer ÖPP-Struktur für das betreffende Projekt missbraucht.

3. Auftraggeber sollten **mehr Ideenwettbewerb** zulassen, um das Innovationspotential der freien Wirtschaft effizient nutzen zu können.

4. Die **steuerlichen Rahmenbedingungen** müssen geklärt werden; Doppelbesteuerung sollte vermieden werden.

5. **Planfeststellungsbeschlüsse** sollten, insbesondere mit Blick auf die Einhaltung von Umweltschutzrichtlinien sorgfältiger vorbereitet werden (Beispiel: Bauvorhaben Straßenbrücke „Hochmoselquerung“).

Darüber hinaus neigen einige öffentlichen Auftraggeber im öffentlichen Hochbau dazu, im Interesse einer besseren Vergleichbarkeit der Angebote, die **Abgabe von Nebenangeboten** zu begrenzen oder ganz auszuschließen. Das führt zu einer Einschränkung des Innovationspotentials und der Flexibilität, die für die Erzielung von Effizienzvorteilen durch ÖPP entscheidend sind.

Frage 5:
Halten Sie das derzeitige Gemeinschaftsrecht für präzise genug, um die konkrete und effektive Teilnahme von Gesellschaften oder Gruppierungen aus anderen Staaten an den Konzessionsvergabeverfahren sicherzustellen? Sind Sie der Ansicht, dass in dieser Hinsicht normalerweise ein tatsächlicher Wettbewerb herrscht?

Hinweise auf eine Diskriminierung deutscher Unternehmen im europäischen Binnenmarkt liegen uns bislang nicht vor.

Frage 6:
Halten Sie einen Vorschlag für einen gemeinschaftlichen Rechtsakt zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe für wünschenswert?

Siehe Antwort auf Frage 7.

Frage 7:

Allgemeiner gefragt: Wenn Sie ein neues Gesetzgebungsvorhaben der Kommission für erforderlich halten, gibt es dann objektive Gründe dafür, in diesem Rechtsakt sämtliche ÖPP auf Vertragsbasis zu behandeln und sie ein und demselben Regelwerk für die Vergabe zu unterwerfen, ganz gleich ob die Vorhaben als öffentliche Aufträge oder als Konzessionen einzustufen sind?

Eine eigenständige ÖPP-Vergaberichtlinie ist aus unserer Sicht zum gegenwärtigen Zeitpunkt nicht notwendig.

Frage 8:

Ist Ihrer Erfahrung nach der Zugang der ausländischen Akteure zu privat initiierten ÖPP gewährleistet? Für den Fall, dass die Vergabestellen zur Initiative aufrufen, wird dieser Aufruf dann angemessen bekannt gemacht, so dass alle interessierten Akteure Kenntnis davon haben können? Wird für die Ausführung des ausgewählten Projekts ein Auswahlverfahren auf Basis eines effektiven Wettbewerbs organisiert?

vgl. unter Frage 9.

Frage 9:

Wie könnte Ihrer Auffassung nach die Entwicklung privat initiierter ÖPP in der Europäischen Union unter Wahrung der Grundsätze der Transparenz und der Gleichbehandlung ohne Verstoß gegen das Diskriminierungsverbot gewährleistet werden.

Nach den uns vorliegenden Informationen

- gibt es in Deutschland im Anwendungsbereich der europäischen Vergaberichtlinien keine privat initiierten ÖPP-Projekte,
- haben deutsche Unternehmen an privat initiierten ÖPP-Projekten im EU-Ausland nicht teilgenommen.

Die Mehrzahl der Unternehmen spricht sich eher dafür aus, privat initiierte ÖPP-Projekte genau denselben Vergaberegeln zu unterwerfen wie öffentlich initiierte, d.h. eine ordnungsgemäße Ausschreibung der Leistung durchzuführen. Sie sehen darin einen wirksamen Schutz gegenüber der Manipulation von Vergabeprozessen.

Sollte es dennoch zu privat initiierten ÖPP-Projekten kommen, wie in Spanien und Italien, sprechen wir uns dafür aus, den Initiator im Vergabeverfahren nicht zu bevorteilen, sondern gesondert zu vergüten. Denn durch eine sonstige Bevorzugung des Initiators im Vergabeverfahren würde der Wettbewerb verzerrt. Die übrigen Bieter hätten angesichts des Informationsvorsprungs des Initiators kaum eine echte Chance auf den Zuschlag.

Frage 10:
Welche Erfahrung haben Sie in der Phase im Anschluss an die Auswahl des privaten Partners im Rahmen von ÖPP auf Vertragsbasis gemacht?

Nach unserer Erfahrung ist gerade bei langjährigen ÖPP i.d.R. eine gewisse **Flexibilität im Hinblick auf nachträgliche Vertragsänderungen** notwendig, da sich während der Vertragslaufzeit nahezu zwingend auch die technischen, wirtschaftlichen und politischen Umstände ändern werden. Um den im Verlauf einer 20-30 jährigen Vertragslaufzeit beinahe zwangsläufig entstehenden Anpassungsbedarf möglichst unproblematisch und in Beachtung der Grundsätze der Transparenz und Gleichbehandlung zu ermöglichen, sollten u.E. bei ÖPP-Projekten regelmäßig Klauseln für Vertragsanpassungen (etwa zur Preisindexierung oder Neufestlegung der erhobenen Gebühren etc.) bereits in den Vergabeunterlagen klar umrissen werden.

In der deutschen Rechtsprechung ist bisher nicht abschließend geklärt, wann Änderungen des Vertragsinhalts während der Vertragslaufzeit ohne Vorliegen einer Anpassungsoption zulässig sind. Zumindest **bei „wesentlichen Änderungen“**, die einem Neuabschluss des Vertrages gleichkommen, soll eine **vergaberechtliche Neuausschreibungspflicht** entstehen. Was “wesentlich“ in diesem Sinne bedeutet, sollte u.E. im Interesse einer höheren Rechtssicherheit gemeinschaftsweit klargestellt werden.

In der Praxis ist damit zu rechnen, dass

- Unternehmen während der Vertragslaufzeit aus dem Vertrag aussteigen bzw. diesen auf ein anderes Unternehmen übertragen werden,
- Unternehmen während der Vertragslaufzeit ihre Struktur bzw. die Aufgabenzuweisung an bestimmte Unternehmensteile ändern und deshalb einen Austausch des ursprünglichen Vertragspartners anstreben,

- sich während der Betriebszeit Umstände, aufgrund der der ursprüngliche Vertragspartner die Qualität des Betriebs nicht mehr sicherstellen kann, ergeben.

Eine **Anpassung des Vertrages** an solche Änderungen der Umstände **durch Austausch des Vertragspartners** sollte u.E. (und auch nach Auffassung der deutschen Rechtsprechung) **ohne eine Pflicht zur Neuausschreibung** zulässig sein, wenn dabei der Vertragsinhalt nicht geändert wird und das neue Unternehmen nachweislich mindestens ebenso geeignet ist wie das ausscheidende. Denn der Auftrag wurde bereits im Rahmen der ursprünglichen Ausschreibung in den Wettbewerb gegeben.

Frage 11:

Sind Ihnen Fälle bekannt, in denen die Ausführungsbedingungen einschließlich der Klauseln zur Anpassung im Zeitverlauf, eine diskriminierende Wirkung entfalten konnten oder eine ungerechtfertigte Behinderung der Dienstleistungs- oder Niederlassungsfreiheit darstellten? Falls ja, bitte beschreiben Sie die Art der aufgetretenen Probleme!

Derartige Fälle sind uns aus dem Bereich unserer Mitglieder nicht bekannt.

Frage 12:

Sind Ihnen Praktiken oder Mechanismen zur Bewertung von Angeboten bekannt, die eine diskriminierende Wirkung haben?

U.E. ist für die Rechtssicherheit der Vergabe von ÖPP-Projekten ganz entscheidend, dass von Anfang an eindeutig klargestellt wird, nach welchen **Zuschlagskriterien** das zu bezuschlagende Angebot ausgewählt wird – und diese (und nur diese) dann auch bei der Wertung verwendet werden. Teilweise ziehen Auftraggeber nach unserer Erfahrung in der Praxis jedoch Kriterien heran, die zuvor nicht bekannt gemacht wurden oder wenden bekannt gemachte Kriterien nicht oder mit einer willkürlichen (Unter- oder Über-)Gewichtung an. U.E. besteht bei fehlender Angabe aussagekräftiger, eindeutiger Zuschlagskriterien sowie deren Gewichtung immer die Gefahr diskriminierender Entscheidungen, da z.B. durch die nachträgliche Gestaltung der Gewichtung die Wertung manipuliert und der Zuschlag an einen bestimmten Bieter erreicht werden kann.

Wir haben die Erfahrung gemacht, dass nach Bekanntgabe des für den Zuschlag vorgesehenen Bieters viele Nachprüfungsverfahren wegen Verdachts auf Nichteinhaltung von Vergabebestimmungen eingeleitet werden. Dem könnte u.U. durch eine **erhöhte Transparenz der Verfahren und der Gründe für die Zuschlagsentscheidung** begegnet werden. Unsere Erfahrung ist: Je transparenter ein Verfahren gestaltet wird, desto eher sind die Bieter bereit, u.U. auf einen Nachprüfungsantrag zu verzichten, da ihnen die Entscheidung nachvollziehbar ist und verständlich dargelegt wurde.

Frage 13:
Sind Sie wie die Kommission der Auffassung, dass bestimmte Interventionsklauseln in Bezug auf die Grundsätze der Transparenz und der Gleichbehandlung problematisch sein können? Sind Ihnen andere Typen von Klauseln bekannt, deren Anwendung zu ähnlichen Problemen führen kann?

„Step-in-rights“ werden von den Banken oft zur Voraussetzung der Finanzierung eines ÖPP-Projekts gemacht. Ohne die Einräumung von **Interventionsklauseln** wäre die „Bankability“ vieler Projekte gefährdet.

Wir sind anders als die Kommission nicht der Meinung, dass Interventionsklauseln per se vergaberechtlich problematisch sind. Wie bereits unter Frage 10 dargelegt, halten wir (und die deutsche Rechtsprechung) den Austausch eines Vertragspartners während der Vertragslaufzeit für zulässig – und zwar ohne erneute Ausschreibungspflicht, solange der Inhalt des Vertrages nicht geändert wird und der neu eintretende Partner mindestens ebenso geeignet ist wie der ausscheidende.

Frage 14:
Halten Sie es für erforderlich, dass bestimmte Aspekte der vertraglichen Rahmenbedingungen für ÖPP auf Gemeinschaftsebene geklärt werden? Falls ja, was sollte geklärt werden?

Die Regelung des nationalen Vertragsrechts für die Durchführung von ÖPP halten wir für vollkommen ausreichend.

Frage 15:
Sind Ihnen bei ÖPP-Konstruktionen besondere Probleme mit der Vergabe von Unteraufträgen bekannt? Welche?

Allgemein wird darüber diskutiert, ob Subunternehmerverträge auf der zweiten Ebene dem Vergaberecht unterliegen. Eine gesetzliche Ausschreibungspflicht für Weiterbeauftragungen trifft nur Auftragnehmer, die selbst öffentliche Auftraggeber sind. Wir meinen jedoch, dass diese Pflicht enden muss, wo die untervergebenen Leistungen bereits Bestandteil der ursprünglichen Ausschreibung waren.

Nach wie vor nicht vollständig geklärt erscheint uns, **welchen Regeln ein Unternehmen bei der Untervergabe unterliegt, das selbst eine Baukonzession erhalten hat (Baukonzessionär) und gleichzeitig in einem Sektorenbereich tätig ist (Sektorenauftraggeber)**. Untervergaben eines Baukonzessionärs an die Mitglieder der Bietergemeinschaft sowie an mit deren Mitgliedern verbundene Unternehmen fallen nach Art. 11 Abs. 4 i.V. 3 Abs. 4 RL 93/37/EWG, 63 Abs. 2 RL 2004/18/EG nicht in den Anwendungsbereich des Vergaberechts, da es sich dabei nicht um Vergaben an „Dritte“ handelt. Sektorenauftraggeber hingegen sind nur dann von der Pflicht zur Ausschreibung von Unteraufträgen befreit, wenn die Voraussetzungen des Art. 13 RL 93/38/EWG, Art. 23 RL 2004/17/EG vorliegen (d.h. Mindestumsatz von 80% mit Leistungen für konzernverbundene Unternehmen). Vor dem Hintergrund der Erwägungen der Kommission in dem Grünbuch zum öffentlichen Auftragswesen von 1996 ist eine Klarstellung bzw. ausdrückliche Regelung wünschenswert, welche der Regelungen nach Auffassung der Kommission vorrangig ist.

Im Zusammenhang mit der Vergabe von Unteraufträgen durch Konzessionäre möchten wir zudem darauf hinweisen, dass uns die benachteiligende Verpflichtung von privaten Baukonzessionären zur Anwendung bestimmter Vergaberechtsvorschriften - im Gegensatz zu privaten Auftragnehmern – nicht nachvollziehbar erscheint. Für ÖPP-Projekte hinderlich erscheint uns insbesondere die in Art. 3 Abs. 2 RL 92/37/EWG, Art. 60 RL 2004/18/EG vorgesehene **Möglichkeit für den Auftraggeber, vom Konzessionär die Ausschreibung von mindestens 30% des Gesamtvolumens der Konzession an Dritte zu fordern**. Dadurch wird u.E. die Finanzierbarkeit und Realisierbarkeit von ÖPP-Konzessionsmodellen erheblich beschränkt. Denn derartige Ausschreibungspflichten erhöhen die Risiken des Konzessionärs, sie erschweren und verteuern die Abwicklung des Projekts und sie belasten den Konzessionär mit z.T. unkalkulierbaren zusätzlichen Insolvenzrisiken Dritter.

Frage 16:

Rechtfertigt die Existenz von ÖPP auf Vertragsbasis, die die Übertragung eines Aufgabenpakets an einen einzigen privaten Partner impliziert, Ihrer Auffassung nach, dass ausführlichere Regelung für die Vergabe von Unteraufträgen eingeführt werden und/oder, dass der Anwendungsbereich erweitert wird?

Der Bereich der Untervergabe sollte nicht zu stark reglementiert werden. Eine Ausdehnung des Anwendungsbereiches des Vergaberechts auf Untervergaben privater ÖPP-Partner wäre u.E. der Entwicklung von ÖPP in Deutschland eher hinderlich als förderlich. Auch die praktische Umsetzbarkeit von Ausschreibungspflichten für private ÖPP-Auftragnehmer erscheint uns überaus zweifelhaft: In der Regel muss sich der Bieter im Rahmen von ÖPP-Ausschreibungen in Deutschland bereits vor Abgabe seines Angebotes auf bestimmte Nachunternehmer festlegen. Eine Ausschreibung der Unteraufträge ist vor Erhalt des Auftrags mangels Verbindlichkeit nicht möglich und nach Erhalt des Auftrages sinnlos, da der Auftragnehmer bereits bestimmte Nachunternehmer mit anbieten musste und angeboten hat. Auch nach der Rechtsprechung des EuGH in Sachen Holst Italia (Urteil vom 2.12.1999, EuZW 2000, 110) kann sich ein Bieter bereits zum Beleg seiner Eignung im Rahmen eines Vergabeverfahrens auf andere Unternehmen (seine Nachunternehmer) berufen, wenn er den Nachweis seines Zugriffs auf diese Nachunternehmer erbringt - eine spätere Ausschreibungspflicht für die Unteraufträge konterkarierte dieses Recht.

Frage 17:

Halten Sie, allgemeiner gesprochen, eine ergänzende Initiative auf Gemeinschaftsebene zur Klärung oder Umgestaltung der Regeln für die Vergabe von Unteraufträgen für erforderlich?

Der Hauptverband lehnt, wie bereits dargestellt, eine Überregulierung der Untervergabe ab.

Wir haben uns stattdessen gegenüber dem deutschen Bundesministerium für Verkehr, Bau- und Wohnungswesen (BMVBW) während des Prozesses der Entwicklung von Mustervergabeunterlagen für ÖPP-Vergaben im Verkehrswegebau als Betreibermodelle nach dem privatwirtschaftlichen Ausbauprogramm der Bundesregierung („A-Modelle“) für eine Regelung eingesetzt, nach der Unterauftragnehmer generell keine schlechteren Konditionen erhalten sollten, als die, die im Verhältnis zwischen Auftraggeber und Hauptauftragnehmer vereinbart worden sind. Weitere Reglementierungen der Nachunternehmervergabe in ÖPP-Projekten erscheinen uns nicht notwendig und nicht sinnvoll.

Frage 18:
Welche Erfahrungen haben Sie mit der Einrichtung institutionalisierter ÖPP gemacht? Lassen Ihre Erfahrungen Sie zu der Schlussfolgerung gelangen, dass die gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen bei institutionalisierten ÖPP-Konstruktionen eingehalten werden? Falls nein, warum nicht?

Nach Auffassung des Hauptverbandes sind ÖPP-Projekte auf Vertragsbasis institutionalisierten ÖPP grundsätzlich vorzuziehen.

Den Vorteil sieht die deutschen Bauindustrie vor allem in der klaren Trennung zwischen privaten Auftragnehmern und öffentlichen Auftraggebern. Insbesondere ist u.E. bei ÖPP auf Vertragsbasis eine klare Zuordnung von Verantwortlichkeiten leichter möglich.

Institutionalisierte ÖPP zur Umgehung des Vergaberechts lehnen wir ab. Auch die Errichtung institutionalisierter ÖPP umfasst in der Regel eine Auftragsvergabe; nach der deutschen Rechtsprechung ist zumindest bei Bestehen eines Zusammenhangs zwischen Gesellschaftsgründung und Auftragserteilung der Gesamtvorgang aufgrund einer „wirtschaftlichen Gesamtbetrachtung“ ausschreibungspflichtig.

Frage 19:
Halten Sie eine Initiative auf Gemeinschaftsebene für erforderlich, um die Verpflichtungen zu klären oder zu vertiefen, die die öffentlichen Auftraggeber in Bezug auf den Wettbewerb zwischen potenziell an einem institutionalisierten ÖPP-Projekt interessierten Wirtschaftsteilnehmern haben? Falls ja, welche Aspekte halten Sie für besonders wichtig und welche Formen sollte eine solche Initiative haben? Falls nein, warum nicht?

Vor dem Hintergrund der dargestellten relativ strikten deutschen Rechtsprechung zu Ausschreibungspflichten für institutionalisierte ÖPP aufgrund einer wirtschaftlichen Gesamtbetrachtung stellen öffentliche Auftraggeber in Deutschland nach unserer Erfahrung (inzwischen) auch bei solchen Projekten sicher, dass eine Vergabe im Wettbewerb erfolgt. Eine weitergehende Regulierung erscheint daher nicht notwendig.

Frage 20:
Welche Maßnahmen oder Verfahren behindern in der Europäischen Union die Einrichtung von ÖPP?

ÖPP-Projekte stoßen in Deutschland nach wie vor auf erhebliche Skepsis, v.a. bei

- kleineren Unternehmen, die sich die Übernahme von ÖPP-Projekten nicht vorstellen können,
- Architekten, die am herkömmlichen Architektenwettbewerb festhalten wollen,
- Gewerkschaften, die eine Gefährdung von Arbeitnehmerrechten vermuten,
- Verwaltungen, die einen Bedeutungsverlust befürchten.

Mit starken Widerständen hat in Deutschland insbesondere die privatwirtschaftliche Realisierung von Verkehrsprojekten zu kämpfen, sofern diese ÖPP-Projekte mit Nutzungsgebühren – insbesondere Pkw-Maut – verbunden sind.

ÖPP-Projekten stehen darüber hinaus in Deutschland

- **gebührenrechlichte** Hemmnisse (z.B. Maut als staatliche Gebühr im Fernstraßenbauprivatfinanzierungsgesetz)
- **steuerrechtliche** Hemmnisse (z.B. umsatzsteuerliche Diskriminierung privater gegenüber staatlichen Realisierungsformen),
- **zuwendungsrechtliche** Hemmnisse,
- **kommunalrechtliche** Hemmnisse (z.B. Veräußerungsverbot für Vermögensgegenstände, die der Staat zur Erfüllung seiner Aufgaben braucht, damit Behinderung wirtschaftlich sinnvoller Sale-and-Leaseback-Lösungen)

entgegen.

Aus Sicht der deutschen Bauindustrie wirken sich vor allem die steuerlichen Hemmnisse dämpfend auf die Verbreitung von ÖPP-Projekten aus. Zur Beseitigung der umsatzsteuerlichen Diskriminierung setzt sich deshalb der Hauptverband für eine vorbehaltslose Prüfung von **Refundsystemen** nach niederländischem oder britischem Muster ein.

Frage 21:

Kennen Sie andere ÖPP-Formen aus Drittländern? Kennen Sie aus Ihren Erfahrungen in solchen Ländern bewährte Verfahrensweisen, die auch für die EU beispielgebend sein könnten? Falls ja, welche?

Nach unserem Wissen ist es auf den europäischen ÖPP-Märkten im Bereich der Verkehrswege noch nicht zur **Versteigerung von Konzessionen** nach chilenischem Vorbild gekommen. Möglicherweise sollte mit Blick auf die angespannten öffentlichen Finanzen dieser Ansatz auch in Europa erprobt werden.

Frage 22:

Denken Sie, dass es nützlich wäre, im Hinblick auf den großen Investitionsbedarf einzelner Mitgliedsstaaten zum Erreichen einer sozialen und dauerhaften Entwicklung gemeinsam und in regelmäßigen Abständen über diese Fragen unter den betroffenen Akteuren nachzudenken und bewährte Verfahrensweisen auszutauschen? Sollte die Kommission nach Ihrer Auffassung ein derartiges Netzwerk aufbauen?

Deutschland ist ein „Spätstarter" im ÖPP-Prozess. Es war deshalb in der Lage, von den ÖPP-Erfahrungen seiner Nachbarstaaten, insbesondere Großbritannien, zu profitieren.

Der Hauptverband spricht sich schon deshalb dafür aus, den Erfahrungsaustausch über ÖPP-Verfahrensweisen zwischen den Mitgliedsstaaten zu intensivieren.

Den Aufbau eines **Netzwerkes**, das die in verschiedenen Mitgliedstaaten existierenden ÖPP-Task Forces und ÖPP-Komptenzzentren in engeren Kontakt bringen und dadurch den Informationsaustausch beleben könnte, halten wir für sinnvoll. Deutschland könnte sich über die seit dem 1. Juli 2004 beim Bundesministerium für Verkehr, Bau- und Wohnungswesen bestehende PPP Task Force des Bundes an diesem Netzwerk beteiligen.

Berlin, 29.07.2004.
HA 4/Dr. Heiko Stiepelmann

BDE · TEMPELHOFER UFER 37 · 10963 BERLIN

27 July 2004

POSITION PAPER

Green Paper of the Commission on public-private partnerships and community law on public contracts and concessions

COM (2004) 327 final

1. General assessment of the Green Paper

Assessing the Green Paper, the BDE assumes that the European Commission does not aim at extending the range of public economy but to set up a framework within which a public-private partnership (PPP) shall be possible in core fields of public administration. The economic fields represented by the BDE are:

- waste management,
- water supply and
- waste water disposal.

They already have a long tradition of the most various shapes of PPPs. Thus in these fields the objective has to be to improve the existing opportunities and to ensure the legal framework. In this respect the field of waste water disposal shows until now the highest number of obstacles.

Under point 17 of the Green Paper the Commission states explicitly not to intend to answer in general the question whether the provision of services by the public authorities should be externalised or not. Accordingly, in Germany the municipal provision for elementary requirements belongs to the essence of the municipal self-administration (Art. 20 German Constitution) and its services are protected by the EC Treaty.

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Logistiksysteme
Abfallbeseitigungssysteme
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Sonderabfallwirtschaft

Kreislaufwirtschaft
Wasserwirtschaft
Kleine Tarifkommission

BDE – already on grounds of its statute - stands up for market liberalisation within the above mentioned economic fields. In spite of certain successes over the last few years in this regard, the economic fields represented by us still lag behind the development in other sectors (e. g. telecommunication, energy and gas supply, postal services).

BDE is convinced that important steps regarding market development have been or will soon be taken. First the European Court of Justice (ECJ) has circumscribed the scope for the so called in-house awards. The conclusions resulting from the "Teckal Judgement" must consequently be implemented (see below, under Question 18/19). Hence arises inevitably a broad range of activity for PPPs, too. Secondly equal conditions for all market participants have to be established. We have already set out our opinion on this subject in our position paper on the Green Paper of the European Commission on Services of General Interest of 21 May 2003 (COM (2003) 270).

The question whether such an equal treatment of all market participants requires a revision of national law governing economic activities of local government entities may be left open here. At any rate it is absolutely not acceptable that some companies secure themselves market shares by using aggressively the position they have attained in protected markets in other areas. The compliance with local economic principles (public objective, principle of locality, subsidiarity) has to be absolutely ensured.

Compliance with these principles is particularly important in the interest of the European market. A company shall not be granted an exclusive or special right for the sake of a service of general interest if this service could also be provided without any limitations on the market (Art. 86 (2) EC Treaty). In Germany reality moves progressively away from this common objective and it can be presumed that this happens to the detriment of companies from other Member States, too.

With regard to waste management industry, third party contracts (in terms of the Green Paper: purely contractual PPPs) have been concluded despite the above mentioned reservations, but they do still contain potential for development. The assignment according to § 16 (1) Closed Substance Cycle and Waste Management Act (KrW-/AbfG) is mainly common at district level whereas in the cities - especially in the large ones - third party contracts are still of lesser importance. It can be assumed that public authorities have involved private companies in waste management in approximately 50 % of the cases. However, the waste management market is heavily distorted to the detriment of private companies because they suffer from unequal tax treatment with the effect that these national barriers hinder the set-up of PPPs. The harmonization of turnover tax law would be an important step towards the removal of those barriers.

The creation of mixed entities (in terms of the Green Paper: creation of an ad hoc entity held jointly by the public sector and the private sector) has not progressed that far in the field of waste management. But this field is clearly expanding, take e. g. the creation of mixed entities over the last few weeks in the cities of Berlin and Dresden.

In the water supply and waste water disposal sectors the number of privatisation measures falls far behind the one in the field of waste management where these have taken place to a considerable extent. In our opinion this does have to do with regulation deficits in the water sector. Contrary to the federal KrW-/AbfG there are hardly any provisions in the state water acts mentioning third party contracts, let alone regulating them. By introducing § 18 lit. a (2) lit. a Water Management/Resources Act (WHG) the Federal Government has created the explicit possibility for the federal states to regulate "under which conditions local authorities may revocably entrust a third party with its obligation of water disposal entirely or partially limited in time". According to further provisions these conditions encompass that the third party has to be skilled and reliable in order to ensure the fulfilment of the assigned duties and that there is no predominant public interest standing in the way of assignment.

Except for three federal states (Saxony, Baden-Wuerttemberg, Saxony-Anhalt) state legislators have simply ignored this provision. But even in those federal states that have decided differently there is hardly any disposition of the municipal waste water disposal obligors to develop initiatives.

As private water suppliers and waste water disposal companies are barely involved in the fulfilment of the obligations concerning water management, the corresponding German industry only plays a minor role at international level. Contrary to large foreign company groups, German enterprises cannot refer to domestic reference projects. But these are indispensable in order to tap foreign markets and to enter into competition with other European companies. In the same way European companies from the other 24 Member States do not have veritable chances to provide their services on the German market, because due to the legal situation the German market is fenced off in favour of municipal suppliers.

The forthcoming revision of the state water act in North Rhine-Westphalia (NRW) is a good example for the discriminating legal situation in Germany and its development.

If the revision privileges – as can already been foreseen - the public North Rhine-Westphalian water associations with regard to the assumption of water supply and waste water disposal networks, municipalities will no longer have the chance to opt for private economic solutions to fulfil their commitments. Thus the municipalities will be definitely denied the possibility of choice and the sovereignty to decide upon the form of the municipal water supply and waste water disposal and purification.

In the case of such a privilege the citizen will lose the possibility through the channels of municipal decision-making to decide freely upon his water services. No municipality should be forced to resort to privatisation but should on the other hand have the uncircumcised liberty to choose on its own its partners for the performance of the municipal tasks. The draft by the North Rhine-Westphalian state government restrains this liberty and deprives municipalities of the chance to search on the European market for a company which can render high-quality, ecologically sustainable and economically viable services towards the citizen.

Even more discriminating is the planned § 54 (concretising § 18a WHG) "Obligation of waste water disposal in the regions of waste water disposal associations after assumption" which provides that the assigned tasks have to be carried out by an association undertaking. The explanatory statement of the draft for a "law amending the provisions concerning the rules for water and water association regulation" of 14 May 2004 discriminates all companies that have been charged so far by municipalities and cities with e. g. sewerage cleaning, inspection and rehabilitation by declaring: "This precludes the performance of tasks by third parties".

We would like to question the consistency of the statement that the decision to externalise is solely in the discretion of the authority. In our opinion there are definitely opportunities and necessities at European level to give fresh impetus for a liberalisation in the fields of waste management, waste water disposal and water supply. The issue of the competitiveness of Europe's services industry on the world market requires appropriate decisions.

Having regard to the described specialisation we would like to concentrate on specific questions to clarify our concerns. Our key request will be dealt with under question 20.

2. Particular questions of the Green Paper

Question 2

In our opinion the well-tried structured negotiated procedure suffices to achieve a legally certain and – from a practical perspective - sound award. Thinkable but theoretical approaches like the "competitive dialogue" are not target-orientated for their lack of practical relevance. Restrictive procedures hinder a target-orientated solution in favour of the client, especially regarding complex services, that are very common e. g. in the water and waste management sectors.

In Germany, the fundamental rights of economic operators mentioned in question 2 must firstly be created. These are in particular:

- the principle of subsidiarity und therefore the activities of private households and companies on their own responsibility on the basis of private property (remember: A company shall not be granted an exclusive or special right for the sake of a service of general interest if this service could also be provided without any limitations on the market (Art. 86 (2) EC Treaty).

- the principle of freedom of choice to find among the tenderers for a service of general interest the one, who is capable of performing the service on a long term basis appropriately, effectively, efficiently and geared to the common welfare.

- the equal legal treatment of all market participants in general and particularly with regard to tax and business law

From the perspective of European law, competition is also distorted and the equality of opportunity infringed when a company not bearing the risk of insolvency competes with companies that do have to assume this risk. The ECJ rightly says that the dominant position of municipalities within their domestic scope and their activities beyond this scope violate EC competition law.

Questions 5, 6 and 7

It would be sensible to specify the existing community law regarding public contracts and concessions in so far as we would prefer both means to be submitted to a uniform awarding regime. The demarcation between the two is firstly often doubtful and secondly not necessary.

The conclusion under point 45 is definitely correct, according to which it is crucial for the success of a PPP that the terms of contract for the project are as comprehensive as possible and that the elements applying to the performance are defined optimally. Experience shows that the awarding authorities use more and more professional planning and project developing companies in order to determine precisely the terms of contract. However, there is a certain risk for an undistorted competition resulting from the fact that large and powerful consultancies which are consistently used by various awarding authorities cause a certain standardisation and thus hinder the competition for innovation. We would take for granted that consulting services in the preliminary stages of an award of public service contracts have to be put out for tender too.

If the Commission opted for a new legislative initiative it would be necessary to solve the issue of the legal consequences resulting from so called “de facto awards”. In this regard we take the view that “de facto awards” – i. e. legal acts that have in fact to be put out for tender but where such a procedure has not been abided by - cannot be justified by the principle of *pacta sunt servanda*. Allowing this would “reward” illegal behaviour. The argument that the contracting parties had not known the obligation to invite tenders should not be admissible since authorities have to examine every legal act whether public procurement law applies, possibly by seeking external legal advice.

We think that European rules are also necessary because there is no reason that Member States determine by themselves the legal consequences of “de facto awards”. The question whether time limits for reversed transactions should be established is worth considering. A viable solution is from our point of view to demand reversed transactions only for contracts that do not exist for more than one year.

Questions 15 and 16

In fact it can sometimes be observed that between the contractor and the one who carries out the contract effectively emerge disparities arising from sub-contracting. We do not want to go as far as to call this phenomenon a “particular problem”. Sub-contracting can be regulated sufficiently by the awarding authority in the terms of contract so that grievances can be prevented. Hence we do not see the necessity to introduce elaborate rules for the award of sub-contracts and/or to broaden the scope of the existing legislation.

Questions 18 and 19

We discern a need for action in regard to the creation of partnerships by setting up a joint ad hoc entity of the public and the private sector.

Under point 63 the Green Paper refers rightly to the decision of the ECJ in the Teckal case. In this case the ECJ stated that a contract between legally distinct entities has to be put out to tender in the case “where a contracting authority, such as a local authority, plans to conclude in writing, with an entity which is formally distinct from it and independent of it in regard to decision-making, a contract for pecuniary interest for the supply of products, whether or not that entity is itself a contracting authority”.

The situation is only different “in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities”. One has to state though that the conditions for this case – a control that is similar to that which the authority exercises over its own departments and a performance of the essential activities with the controlling authority or authorities – are not sufficiently precise. Particularly in the Federal Republic of Germany the interpretation of the aforementioned rules of the ECJ has given rise to a considerable number of (national) litigations. These lawsuits have so far only partially been decided. From our point of view it is desirable to lay down clear legal provisions.

Question 20

In our opinion the establishment of PPPs is significantly hindered by the fact that the public institutions have to face competition only to a limited extent. From our point of view it is necessary to assess any kind of externalisation project from the angle of public procurement law. This also refers especially to cases where the public authority transforms a publicly owned company (ancillary municipal enterprise, owner-operated municipal enterprise) into a private company with a 100 % share of the public institution. The creation of such new public companies changes in any case the efficient provision of services and affects the financing obligation of the inhabitants or users by the means of charges, fees, etc. The change has to prove its worth in a competitive environment. It usually helps not only to improve organisation and manageability of the undertaking but also to make possible its free market behaviour. Thus the public organisation loses its character of a mere provider for elementary requirements that can so far only address customers in its domestic region. Stipulating the application of the public procurement law also on such cases will help improve transparency.

The requirement that PPP-projects have to be put on the market must not be neutralised by the municipal partner excluding de facto competition by inappropriate requirements und stipulations concerning the potential co-shareholder in the framework of the obligatory tender call. Pursuant to the motto: ”...I have tried to but nobody wanted to, so now I’ll take another road…”.

Furthermore it does no longer seem appropriate in view of today's importance of transparency and competition, to conceive it as a pure "act of organisation" when different forms of public companies merge in order to constitute a larger unit (special purpose associations, or similar), even if they remain finally governed by public law. It is unmistakable that such activities do not incite competition but on the contrary restrict it. This problem must be encountered by the general obligation to face the market in the framework of a procurement procedure.

The same thought applies to the re-transformation of PPPs into entities governed purely by public law (particularly re-municipalisation). Consequently there should also be a procurement procedure in order to examine if the contracting parties pursue objectives beyond the most efficient provision of services. As for the rest it is easily possible to regulate social objectives in the framework of PPP-projects if this is intended.

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Statement

on the Green Paper
on Public-Private Partnerships and Community Law
on Public Contracts and Concessions
(COM(2004)327) final

presented by
the Commission of the European Communities

"so-called Green Paper on PPP"

prepared by the

Federal Association of the German
Gas and Water Industries (BGW),
Berlin and Brussels

Berlin, 30 July 2004

The water and waste water disposal utilities organised in the Federal Association of the German Gas and Water Industries (BGW) welcome the presentation of the Green Paper on "Public-Private Partnerships and Community Law on Public Contracts and Concessions" (the so-called "Green Paper on PPP") submitted by the European Commission.

BGW would welcome if the representatives of the European Commission and of the European Parliament as well as the representatives of the Federal and Laender Governments were to take account of the following remarks during their upcoming consultations:

Underlying assumptions of the European Commission:

The European Commission stated that cooperative forms of public-private partnerships (PPP) are increasingly used in all European Member States. However, it holds the opinion that there is no sufficient Community legal framework. From BGW's point of view, this does not apply to the areas of water supply and waste water disposal. In Germany, public-private partnerships develop dynamically on the basis of existing EU law. A structural change towards more public-private cooperation, inter-municipal cooperations and the internationalisation of the supply industry with the participation of enterprises from many countries is taking place. Therefore, BGW considers the existing regulations on tendering and competition law as absolutely sufficient. BGW asks the Commission to review what factors prevent similar processes of competition from occurring in other Member States despite the same community legislation.

The Commission also refers to the court rulings of the European Court of Justice on so-called in-house dealings (Teckal decision). Being an integral part of municipal self-government, the activity of public special-purpose associations (Zweckverbände) is excluded from competition. Public procurement law and the court ruling on in-house dealings are therefore not applicable to the establishment and joining of such special-purpose associations (Zweckverbände). Otherwise, the initiative of many municipalities in Germany to render a contribution, by an increased cooperation in associations, for optimising the supply structure, would be made more difficult. As the

European Commission has stated in the case of the Municipality of Hinte (C (2004(1202), public procurement law does not apply to cases where an obligation to carry out a service is transferred from a municipality to a public special-purpose association (Zweckverband) by way of a purely administrative act.

Objectives of the Green Paper:

The European Commission proposes in its Green Paper on PPP that **concession contracts, licence contracts or other exclusive contracts** between municipalities and service providers (so-called service concessions) should be **subject to the law of public contracts.**

It furthermore suggests to make the selection of the **participating private partner** in newly established **mixed-capital entities** subject to the law on public contracts.

Also, the **contracting public authority** which **participates** in a newly established **mixed-capital entity itself**, is to be required to **invite tenders for the award of contracts to this entity**.

Furthermore, the so-called **"competitive dialogue**" is to be developed further as a new variant in the award of contracts, intended to enable, in technically and economically particularly complex infrastructural projects, that the contracting authority develops and outlines, in a joint dialogue with various potential contractors on the part of the enterprises, the conditions and terms for performance of the contract.

The Situation in Germany:

Publicly and privately organised entities are no contrast in Germany. Cooperations under public law as well as public-private partnerships have a decade-long, well-proven tradition in Germany. The vast majority of municipal utilities, for example, operates under private law. The shareholders are the municipalities and to an increasing extent also private enterprises.

In Germany, public construction and service contracts involving a transfer to third parties have been subject to public procurement law for a long time, with the result that in Germany, some 90% of the construction and planning services in the waste water sector are carried out by private third parties.

Service concessions are no public contracts and are therefore not subject to a compulsory public procurement procedure. Such an obligation would be conflicting with property rights regarding the distribution networks and waterworks. The ownership in the networks is regulated in different ways in the individual Member States. In Germany and England, the networks and other facilities are owned by the water supply utilities. In France the networks are normally owned by the municipality to be supplied and are rented by the supply utility. If as a result of public tendering a municipality charges a new service provider with the duty to carry out water services, this company is not allowed to use the networks of the original provider without interfering into the property rights of the latter. The change of a concession holder in the water supply would be linked with the transfer of ownership in the supply networks to the new contracting partner, or at least with the transfer of usufruct. It has to be pointed out that an obligation to tender for concessions would require regulations for the use of facilities – keyword unbundling – as they were necessary for the liberalisation of the energy markets. From BGW's point of view, an obligation to tender for concessions in fact leads to a liberalisation of the water sector, which, however, was rejected both by the European Parliament and by the German Bundestag in their most recent resolutions. BGW supports the positions taken by both Parliaments.

In many places, privately organised water utilities have the permanent right to use the real estate on which the water abstraction facilities (wells) are located. An obligation to tender could mean a separation from the local water resource, since a foreign concession holder would possibly tend to purchase water outside the supply area. This would be incompatible with the principle of local supply stipulated in the federal water act of Germany and would in the long run pave the way for a trade with water which is currently neither supported in Brussels nor in Berlin.

Demands of BGW against this background:

1. Regarding water supply services, **BGW rejects** a compulsory **obligation to tender for service concessions**. As stated above, an opening of the market by a tendering competition would be incompatible with the principles of a countrywide water protection. An obligation to tender could also undermine the local supply

established in the federal water act. The required regulations on third-party access to the networks would mean a liberalisation through the backdoor. Article I-5 of the new European Constitution provides that: "The Union shall respect the national identities of the Member States, inherent in their […] regional and local self-government.“ This means that the municipalities continue to be free to decide whether or not they wish to award a concession to third parties.

2. **BGW rejects an obligation to making the selection** of a **private partner** in mixed entities subject to the **laws of public procurement (tendering)**. If a municipality decides to involve a private partner, it must be free to select such private partner without being obliged to invite tenders for the contribution of private equity. Only if the creation of a mixed-capital entity is linked to the transfer of a task to this entity, the relevant law on public procurement should apply.

3. Regarding newly created mixed-capital entities where the public partner also awards the contract in its capacity as competent public authority, national law already requires a public tendering procedure. The **BGW** supports this position and **opposes any rule that would extend the scope of the national law on public procurement beyond the present level.**

4. **BGW requests that the municipalities' structural options are preserved.** The activity of special-purpose associations (Zweckverbände) is one out of several possibilities of how a municipality can come up to its obligation regarding services of general interest. The foundation and joining of special-purpose associations is an administrative act of inter-municipal cooperation which is not subject to the procurement provisions under European law..

5. **BGW supports** that an **obligation to tender for public contracts** and services (not concessions) is effectively enforced by the transfer of the water supply and waste water disposal task to third parties all over **Europe**.

Further to the underlying assumptions of the European Commission:

European Commission:
There is no sufficient legal framework in the EU for public-private partnerships

BGW:
From BGW's point of view, this does not apply to the areas of water supply and waste water disposal. First of all, it has to be pointed out that the Green Paper on PPP does not only apply to water supply and waste water disposal, but to all infrastructural projects where the public and private sector cooperate. As the European Commission outlined in its recently submitted "White Paper on Services of general economic Interest", a structured debate in view of the water sector is first of all necessary. In BGW's opinion, this also applies to the present Green Paper on PPP.

The questions raised by the Commission for discussion are focussed on whether e.g. concession contracts between municipalities and supply utilities, so-called service concessions, are to be treated like other public contracts. This would mean an obligation to tender for concessions starting at specific threshold values, since other construction and service contracts are subject to the public procurement law and therefore to the obligation to tender.

The European procurement law has so far made a distinction on the one hand between public contracts which are subject to an invitation to tender, and on the other hand service concessions which are not subject to an invitation to tender. This was explained by the fact that in the case of the concession, only the right to an economic activity by a private enterprise is transferred, whereas a public contract, including a remuneration for the private entity, is not present. In the case of a concession, the enterprise also acts at its own economic risk. BGW considers this distinction as adequate and suggests to maintain it. Accordingly, service concessions should not be made subject to the laws of public procurement (tendering).

An obligation to tender for concessions is conflicting with the ownership question regarding the distribution networks and waterworks. The ownership question is regulated in very different ways in the individual Member States. In Germany, the networks and other facilities of the water supply utilities supplying under concession contracts, are normally owned by the enterprises. In France e.g. the networks are normally owned by the municipality to be supplied. If a municipality entrusts another enterprise in an invitation to tender, this other enterprise is not allowed to use the networks of the original provider without interfering into its property rights. The change of a concession holder in the water supply would inevitably be linked with the transfer of ownership in the supply networks to the new contracting partner, or at least with the transfer of usufruct. To determine an adequate fee for the use, the value of the network would have to be calculated, which is a matter of profitability of the supply networks. This depends on the amount of water being supplied to customers. Since common carriage is not possible as far as water supply is concerned a substantial decrease of the amount of water supplied within one supply area lead to the situation that user fees are not covered by the profit of the networks. It has to be pointed out that an obligation to tender for concessions would require regulations for the use of facilities – keyword unbundling – as they were necessary for the liberalisation of the energy markets. From BGW's point of view, an obligation to tender for concessions in fact leads towards a liberalisation of the water sector, which, however, was rejected both by the European Parliament and by the German Bundestag in their most recent resolutions. BGW supports the positions of the two Parliaments.

In many places, the water utilities are the owners of the real estate on which the water abstraction facilities are located. An obligation to tender could in the last consequence also mean a separation from the local water resource, since a foreign concession holder would possibly tend to purchase water outside the supply area and thus fulfil its supply task. This would be incompatible with the principle of local supply stipulated in the federal water act of Germany and would in the long run pave the way for a trade with water which is currently neither supported in Brussels nor in Berlin. Experience also shows that water resources which are no longer used are less protected.

BGW asks the European Commission to review in how far the proposals presented for discussion would only unilaterally lead to changes in some few Member States, whereas the situation in other states, however, would remain unchanged. The objective of any new EU wide provisions should in BGW's opinion be oriented at the objective of ensuring the compliance with the EU Directives for the drinking water quality and the quality of waste water disposal and of guaranteeing an economically and ecologically sustainable supply in the Member States at reasonable prices in the long run. All this has been in principle implemented in Germany. Especially the adherence to the principle of full cost recovery including the costs for the construction and the refinancing of facilities by the water price ensures the sustainable compliance with the standards reached. With a monthly burden of 0.5% of the average income for drinking water and 0.6% for waste water, the burden for the individual consumers is far below the 4% target value of the World Bank despite full cost recovery.

European Commission:

The judgement of ECJ on the so-called in-house dealing (Teckal decision) applies to all public contracts and concessions within the transfer to an independent legal person.

BGW:

The Green Paper reasons with the reference to the court ruling of the European Court of Justice on the so-called in-house dealing (Teckal decision) according to which in the opinion of the European Commission the provisions on public contracts and concessions apply as soon as a contracting public authority decides to transfer a task to a third party (enterprise), i.e. to an independent legal person. It is irrelevant, pursuant to the Green Paper, whether the partner of the contracting public authority (municipality) has public, private or mixed status. For lack of a dominating influence of the municipalities involved, this could mean that the respective shareholders (municipalities) would have to invite tenders, either individually or jointly, for the economic activity of the special-purpose association (Zweckverband) This would counteract the initiative of many municipalities in Germany to render a contribution, by an increased cooperation in associations, for optimising the supply structure. BGW considers this premise as a loss of the municipal executive power as well as of the municipal self-determination safeguarded in the German Constitution as well as in the new EU Constitution.

BGW expressly pleads for a definition of the outline conditions, under which municipalities render services of economic interest, exclusively at national level and not at European level. The long and successful German tradition of inter-municipal cooperation is to be preserved pursuant to Article I-5 of the new EU Constitution and may not be threatened by framework conditions which are placed at European level. The formation of special-purpose associations has proven worthwhile. It is a form of service-rendering by the municipality itself. These account for approx. 20 % of all supply utilities in the water and waste water sector in Germany. In the opinion of the German Bundestag, the support of cooperations is a central element of the modernisation strategy for the water industry in Germany. The above-outlined development would restrict the development of such (inter-municipal) cooperations.

Further to the questions of the Green Paper relevant for the water supply and waste water disposal industry in detail:

Green Paper

1. **What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?**

BGW:

The operator model. The private partner (enterprise) concludes a works contract for pecuniary interest with the municipality. The private partner plans, constructs, finances and operates the facility and becomes the owner of it. The private partner operates the facility on its own account by order of the municipality and in turn is paid an operator consideration from the municipality The municipality remains obliged to the citizens/enterprises to render the distribution service and levies charges. The operating company is in no direct relation to the charge payers. The operator consideration is exclusively paid as a service remuneration by the municipality.

The utility management model. The private partner (enterprise) concludes a business management contract for pecuniary interest with the municipality and performs technical and commercial services for the municipality according to its instructions, in its name and on its account. The private partner is paid a consideration for this service by the municipality. The municipality remains the owner of the facilities and levies charges from the users. The private partner (managing enterprise) is in no direct relation to the users of the supply service.

The concession. The municipality grants the private partner (enterprise) an exclusive right to use public roads for the municipal area. The private partner commits itself to supply the municipality and its residents with the public service at its own risk. The private partner itself concludes contracts with the customers/users and yields capital gains. The private partner pays concession taxes to the municipality from these gains. The amount of these concession taxes is limited by an ordinance. There are direct legal relations between the private partner (enterprise) and the users. The private law is applicable.

The compulsory transfer. Another form to be differentiated from the concession is the compulsory transfer where a complete, even if possibly conditional and limited transfer of the waste disposal obligation to the enterprise takes place which again enters into a performance relation to the citizens.

The cooperation model. In the cooperation model, the municipal task (water supply, amongst other things) is performed by a mixed holding company established jointly by the municipality and private partners where the above-stated models can be implemented. This company, normally having a dominating municipal capital interest, then entrusts a specialised third party with the actual management, taking account of the relevant public procurement law. The third party can also be the private partner which has an interest in the mixed holding company at capital level.

Award of construction and planning contracts to private third parties.

2. **In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at**

the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not??

BGW:

The competitive dialogue as a new form of the tendering procedure cannot be used by water supply utilities. These are sectoral contracting authorities, and the competitive dialogue is not provided in the Sectoral Directive. Even though not all individual questions have been clarified so far, BGW pleads for enabling the competitive dialogue also for water supply utilities as sectoral contracting authorities.

3. **In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.**

BGW:

No.

4. **Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?**

BGW:

BGW sees material deficits in Europe in the application of the existing European legislation. This refers both to the award of concessions and of service contracts; especially the markets in the old EU Member States are hardly or not at all accessible. Concession or service contracts are normally awarded to the respective national enterprises. German supply utilities have made the experience in other Member States that the decision-making processes of municipalities in other Member States are not transparent despite invitations to tender. The information required for an effective participation in a tendering procedure can only be obtained with difficulty and incompletely. For this reason, BGW supports the consistent application of the existing public procurement law in Europe.

5. **Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?**

BGW:
BGW considers that the applicable EU procurement law is sufficiently detailed. It is possible for foreign enterprises to obtain concessions in Germany. The practical experience, however, shows that the difficulties regarding the implementation of the Single Market for the water supply cannot be solved by issuing new rules, but by their practical and concrete implementation in Europe. This especially applies to the presently existing public procurement law.

Regarding the question whether a sufficient actual competition exists, it must first of all be pointed out that in Germany, public entities transfer the execution of a commercial activity both by way of concessions and by contracts on the operation and management to third parties. It turns out that an actual competition takes place and also companies from other Member States are active on the German market. German municipalities have most recently concluded management, operator as well as concession contracts with international enterprises or with enterprises with international interest. Thus, companies from the Netherlands, Belgium, France, Italy and the USA have meanwhile been operating in water supply and waste water disposal.

It is pointed out that in Germany, other forms of competition than in the other EU Member States dominate. On the one hand, industry and trade are entitled to abstract water themselves and thus to satisfy the demand by means of self-supply. This right is used in a considerable scope, with the consequence that the supply of industry accounts for only 5% of the distribution service by water supply utilities. Industry supplies itself by 95%. Furthermore, the competitive environment is marked by the competition for private equity, price control under cartel-law resp. the supervision of local authorities as well as competition for water consuming companies to locate their premises in the area of a given municipality and hence its supply area.

6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

BGW:

BGW rejects a Community legislative initiative, designed to regulate the procedure for the award of concessions. The general principles of equality of treatment, transparency, proportionality and mutual recognition are binding already today, a further Community legislative initiative would not bring any practical advantages. As outlined above under questions 4 and 5, such a legislative initiative would not be a suitable instrument to increase the functionality of the European Single Market since there is no lack of adequate legal provisions, but of their compliance.

Furthermore, additional Community regulations for the award of service concessions would restrict further the municipalities' freedom to decide which is guaranteed in the German Constitution. Also the subsidiarity principle is a reason against an obligation to tender.

Moreover, the Commission correctly stated in the past that concessions stand out by the fact that in contrast to the public contract, the essential economic risk is borne by the respective enterprise. This means a high risk for the citizens particularly regarding the rendering of services of general interest by an enterprise. Taking such a risk is therefore only possible for the responsible municipality on the basis of particular mutual trust between the municipality and the enterprise. The already existing rules guarantee the required neutrality by the municipality; further regulations are not necessary.

7. **More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPP's, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?**

BGW:

New legislative action is not necessary. The above-mentioned factual difference between public contracts and concessions has to be reflected in a different legal treatment. The present legal situation is adequate.

8. **In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?**

BGW:

Due to the municipal responsibility for water supply and waste water disposal, the initiative for investments normally comes from the municipalities. Private-initiative PPP's are a rare exception. The non-discriminating participation of foreign enterprises in projects is guaranteed in Germany which is proven by many examples.

10. **In contractual PPP's, what is your experience of the phase which follows the selection of the private partner?**

BGW:

This depends on the respective concrete situation.

14. Do you think there is a need to clarify certain aspects of the contractual framework of PPP's at Community level? If so, which aspects should be clarified?

BGW:

BGW does not consider it necessary to govern the contractual framework of PPP's at Community level..

15. In the context of PPP's, are you aware of specific problems encountered in relation to subcontracting? Please explain.

BGW:

At times, a construction contract is awarded along with the award of operator contracts (for a definition, see the answer to question 1). The European procurement law should be designed in such a way that these contracts are separately invited for tender and are separately awarded.

16. In your opinion does the phenomenon of contractual PPP's, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field of application in the case of the phenomenon of subcontracting?

BGW:

See answer to question 15.

17. In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

BGW:

The existing Community law should be reviewed within the meaning of the answer to question 15.

18. What experience do you have of arranging institutionalised PPP's and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not?

BGW:

The cooperation model outlined under question 1 has proven worthwhile in the practice. The cooperation between the public sector and private partners at capital level creates a joint loyalty regarding the supply task. Already existing Community regulations are adhered to.

Bundesverband Public Private Partnership
Rentzelstraße 7, 20146 Hamburg

An die
Kommission der Europäischen Gemeinschaften

B-1049 Brüssel

Konsultation „Grünbuch zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen“
C 100 2/005

Sehr geehrte Damen und Herren,
mit großem Interesse haben wir Ihr Grünbuch zur Kenntnis genommen. Die einzelnen aufgeworfenen Fragen bildeten den Gegenstand lebhafter Diskussionen unserer Mitglieder. Gerne möchten wir Ihnen hiermit die vom Bundesverband Public Private Partnership e. V. (BPPP) erarbeiteten Antworten zu den von Ihnen aufgeworfenen Fragen übermitteln. Einer Veröffentlichung unserer Stellungnahme auf der Homepage der Europäischen Kommission stimmen wir zu.
Wir haben uns erlaubt, zunächst den Bundesverband kurz vorzustellen (dazu unter I.). An diese Vorstellung schließt sich eine kurze allgemeine Stellungnahme zum Grünbuch an (dazu unter II.). Die Positionen des BPPP e. V. zu den einzelnen Fragen fügen sich an (dazu unter III.).

Der Vorstand

BPPP
Bundesverband
Public Private Partnership

Stellungnahme des Bundesverbandes
Public Private Partnership e. V.

zum

„Grünbuch zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen“

-C 100 2/005-

I. Der Bundesverband Public Private Partnership

Der BPPP wurde am 4. Nov. 2003 in Hamburg gegründet. Er versteht sich vor dem Hintergrund einer wachsenden aber zugleich sehr heterogenen Landschaft von Kooperationsprojekten zwischen Staat und privatem Sektor als umfassende privat-öffentliche Diskussions- und Gestaltungsplattform. Der Verband konkurriert weder mit den staatlichen PPP-Kompetenzzentren noch mit den privaten Branchenverbänden. Er ist keine klassische Interessenvertretung für eine bestimmte Klientel, sondern versteht sich als multidisziplinäres Forum, in das sich die verschiedenen Interessen einbringen. Es geht vielmehr darum, inwieweit PPP einen Beitrag zum Abbau der derzeitigen Innovations- und Reformdefizite in Deutschland leisten kann. Dabei bedarf es der Entwicklung allseitig akzeptierter Standards für die einzelnen PPP-Anwendungsbereiche. Nur wenn sich privater und öffentlicher Sektor auf Standards für die Vertragsgestaltung und Erfolgsmessung privat-öffentlicher Kooperationen einigen, können PPP-Gestaltungen auch in Deutschland sinnvoll dazu beitragen, die anstehenden Infrastrukturaufgaben zu lösen. Hierzu bedarf es einer fundierten Analyse und Klärung, inwieweit, unter welchen Bedingungen und auf welchen Gebieten PPP eine konstruktive und zukunftsträchtige Problemlösung für dringend gebotene Investitionen in die öffentliche Infrastruktur und für innovative Organisations- und Finanzierungsmodelle zur Überwindung der derzeitigen schwierigen Situation des Gemeinwesens sein kann. Der Verband entfaltet seine Tätigkeit durch Arbeitskreise. Folgende Arbeitskreise wurden eingesetzt und haben ihre Arbeit aufgenommen.

- Potenziale von PPP
- PPP Personalübergänge
- PPP in Forschung und Entwicklung
- PPP im Management von Immobilien
- Verteidigung und Sicherheit
- Infrastruktur

Die wesentlichen Zielsetzungen des Verbandes sind:

- Organisation und Diskussion der Weiterentwicklung von PPP auf nationaler und internationaler Ebene;

- Analyse von Anwendungs- und Effizienzpotenzialen von PPP in Deutschland;
- Auswertung internationaler Erfahrungen und "best practice" von PPP;
- Empfehlungen und Förderung von PPP dort, wo eine öffentlich-private Kooperation einzel und/oder gesamtwirtschaftlich von Vorteil ist;
- Nutzung von Synergieeffekten privater und öffentlicher Kooperation zur Stärkung der Wettbewerbssituation von Regionen;
- Erarbeitung von Standards für die Ausgestaltung von PPP;
- Analyse der Risiken und langfristigen Wirkungen von PPP bezogen auf Haushalte,
- Organisationsstrukturen und Wettbewerb von Gebietskörperschaften;
- Bündelung vorhandener Kompetenzen in Wissenschaft und Praxis auf dem Gebiet von PPP;
- Förderung und Weiterentwicklung des Wissens über PPP verbunden mit einem entsprechenden Transfer in die Praxis.

II. Allgemeine Anmerkungen zum Grünbuch

Die BPPP begrüßt die von der Kommission angestoßene Diskussion zu ÖPP auf nationaler und internationaler Ebene. Die dabei zugrunde gelegte Unterscheidung zwischen vertraglicher und institutioneller ÖPP (letztere sind in Deutschland vor allem die klassischen-gemischtwirtschaftlichen Unternehmen) wird nicht nur für zweckmäßig, sondern auch als geboten erachtet, da beide Formen ganz unterschiedliche Fragestellungen aufwerfen.

In Deutschland praktizieren die Gebietskörperschaften eine Vielzahl unterschiedlicher Formen von ÖPP, die sowohl der vertraglichen Kategorie als auch der institutionellen ÖPP zugeordnet werden können. Dabei zeigt sich, dass die denkbaren Möglichkeiten zur Organisation der Aufgabenwahrnehmung in Gebietskörperschaften in der Regel situationsabhängig sind und damit für jedes einzelne Projekt bewertet werden müssen. Dabei sieht der Bundesverband nicht zwingend als einzige Alternative zu den ÖPP die Vergabe der Durchführung öffentlicher Aufgaben an private Dritte. Vielmehr können auch eigene Einrichtungen und öffentliche Unternehmen diese Aufgabe wahrnehmen. Insbesondere bedarf es der Zulässigkeit ohne Vergabeverfahren von Kooperationsmodellen zwischen öffentlichen Einrichtungen wie etwa Zweckverbänden, die bei der Wahrnehmung öffentlicher Aufgaben in Deutschland eine ganz wesentliche Rolle spielen. Die Einbindung des privaten Sektors muss jedoch in allen Bereichen erwogen und auf ihre Machbarkeit geprüft werden, vgl. § 7 Abs. 1 Satz 2 Bundeshaushaltsordnung.

Nicht selten wird der Eindruck erweckt, mit Hilfe von PPP ließen sich auf Dauer die öffentlichen Haushalte entlasten oder möglicherweise sogar sanieren. Es ist deutlich zu machen, dass die von privaten Partnern häufig in ÖPP eingebrachten Beteiligungen (Finanzmittel) nicht selten den Charakter einer Zwischenfinanzierung haben und damit letztlich die Verschuldung erhöhen. Dieser Sachverhalt und ihre Wirkungen auf die Maastricht-Kriterien sind in die Diskussion um die Funktion und Leistungsfähigkeit von ÖPP mit einzubeziehen

Die bisherige Flexibilität, mit denen die Gebietskörperschaften das Instrument der ÖPP zur Anwendung bringen können, sollte erhalten und möglicherweise erweitert werden. Der BPPP sieht in einer EU-weiten Regulierung, insbesondere mit Vorschriften des Vergaberechts, die Gefahr einer Überregulierung und Bürokratisierung auf diesem Gebiet. Mit einer derartigen Vorgehensweise wird möglicherweise die Tendenz institutionalisiert, anstelle der bisher bestehenden Gestaltungsfreiheiten nur zwischen einer reinen Eigenerstellung oder einer völligen Privatisierung wählen zu können. Bei der Diskussion sind die Regelungen des vorgelegten Entwurfs für eine EU-Verfassung stärker zu berücksichtigen, insbesondere das Subsidiaritätsprinzip und das Prinzip der kommunalen Selbstverwaltung. Hinsichtlich der interkommunalen Zusammenarbeit sollte nicht generell eine Ausschreibungspflicht gefordert werden. Es macht in einer Reihe von Feldern keinen Sinn, Private in derartige Kooperationsprozesse zwingend einzubeziehen

III. Antworten zu den Fragen der Kommission im Grünbuch zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen vom 30. April 2004

1. Welche Formen von ÖPP auf Vertragsbasis sind Ihnen bekannt? Gibt es in Ihrem Land spezifische (gesetzliche oder andere) Rahmenbedingungen für derartige Konstruktionen?

In der Bundesrepublik Deutschland existieren in der Praxis und in der theoretischen Diskussion eine Vielzahl von ÖPP-Modellen, etwa das

- Inhabermodell
- Konzessionsmodell
- Erwerbermodell

- FMLeasingmodell
- Vermietungsmodell
- Contractingmodell
- PFI (Private Finance Initiative)

Die spezifischen nationalen, gesetzlichen Rahmenbedingungen ergeben sich aus Band II Teilband 1 des Gutachtens „PPP im öffentlichen Hochbau“, das auf der Website des Bundesministeriums für Verkehr, Bau- und Wohnungswesen verfügbar ist (www.bmvbw.de). Darüber hinaus haben sich im Abwassersektor zahlreiche Kooperationsmodelle bewährt. Zur Anschauung sei auf die Studie „Der Wassersektor in Deutschland (Ziffer 4.3) verwiesen, die unter www.umweltbundesamt.org/wsektor/wasserdoku/german/start.html verfügbar ist.

In der Bundesrepublik gibt es keine übergreifende ÖPP-Kodifikation. Allerdings existieren in einzelnen Bereichen gesetzliche Regelungen. Zu nennen sind in diesem Kontext z. B. das Fernstraßenbauprivatfinanzierungsgesetz (Bundesgesetzblatt 2003 Teil I, S. 99 ff.) mit Regelungen zu Bau, Erhaltung, Betrieb und Finanzierung von Straßeninfrastrukturprojekten einschließlich der Erhebung einer echten Maut (F-Modell) und das Gesetz über die Verkehrsinfrastrukturgesellschaft (VIFG), der Aufgaben im Zusammenhang mit ÖPP im Verkehrsinfrastrukturbereich zugewiesen sind. Von übergreifendem Interesse ist zudem § 7 der Bundeshaushaltsordnung (BHO), der folgenden Wortlaut hat:

(1) Bei Aufstellung und Ausführung des Haushaltsplans sind die Grundsätze der Wirtschaftlichkeit und Sparsamkeit zu beachten. Diese Grundsätze verpflichten zur Prüfung, inwieweit staatliche Aufgaben oder öffentlichen Zwecken dienende wirtschaftliche Tätigkeiten durch Ausgliederung und Entstaatlichung oder Privatisierung erfüllt werden können.

(2) Für geeignete Maßnahmen von erheblicher finanzieller Bedeutung sind Nutzen-Kosten-Untersuchungen anzustellen. In geeigneten Fällen ist im Rahmen eines Interessenbekundungsverfahrens festzustellen, inwieweit und unter welchen Bedingungen private Lösungen möglich sind.

Derzeit arbeitet die Bundesregierung an einer Änderung dieser Bestimmung, die dem Ziel dient, die Verpflichtung zur Einbeziehung des privaten Sektors verbindlicher festzulegen. Dies wird vom BPPP unterstützt. Nur wenn ernsthaft über alternative Wege nachgedacht wird, besteht die Möglichkeit, die in vielen Bereichen erreichbaren Effizienzvorteile zu nutzen und privates Kapital zur Finanzierung öffentlicher Aufgaben zu mobilisieren. Die in § 7 Abs. 2 BHO und entsprechenden Haushaltsvorschriften auf Landes- oder Kommunalebene angeordnete Prüfpflicht hat sich in Deutschland als hemmend erwiesen. Bevor erste Pilotprojekte angegangen wurden, wurden unzählige und langwierige Studien und Prüfungen durchgeführt. Dabei erwies sich die steuerliche Behandlung als besonders problematisch, da sie Nachteile für eine Aufgabenprivatisierung nach sich zog, obwohl die Steuern der öffentlichen Hand zufließen. Weitere sektorspezifische Regelungen über die Übertragung öffentlicher Aufgaben an Private finden sich beispielsweise in § 16 Abs. 2 Kreislaufwirtschafts- und Abfallgesetz, § 18 a Abs. 2 a Wasserhaushaltsgesetz und §§ 11, 12 Baugesetzbuch.

Der BPPP e. V. ist der Auffassung, dass umfassende spezialgesetzliche Rahmenbedingungen für ÖPPs im Lichte der Vielzahl der betroffenen Rechtsgebiete weder realisierbar noch wünschenswert sind. Sie würden lediglich eine unerwünschte Einschränkung der notwendigen Gestaltungsfreiheit bewirken.

2. Nach Auffassung der Kommission wird die Umsetzung des wettbewerblichen Dialogs in einzelstaatliche Rechtsvorschriften den betroffenen Parteien ein Verfahren an die Hand geben, das sich ganz besonders für die Vergabe öffentlicher Aufträge in Zusammenhang mit der Einrichtung einer ÖPP auf Vertragsbasis eignet und gleichzeitig die Grundrechte der Wirtschaftsteilnehmer wahrt. Stimmen Sie dem zu? Falls nein, warum nicht?

Nachdem in dem Verfahren nunmehr die Vertraulichkeit des Dialogs gegenüber den Mitbewerbern festgelegt wurde und Angebote nur auf der Basis der im Dialog selbst vorgelegten Vorschläge unterbreitet werden dürfen, konnten die insbesondere von Seiten der Bauwirtschaft erhobenen urheberrechtlichen Bedenken zurückgestellt werden. Es wird insbesondere die Gefahr eines Cherry-Picking gesehen und daher die Notwendigkeit, die Gespräche mit den Mitbewerbern strikt unabhängig voneinander zu führen.

In der Diskussion insbesondere im Rahmen des Arbeitskreises Infrastruktur wurde einhellig die Bürokratisierung des Vergabeprozesses bemängelt. Dies erschwere es auch KMUs, sich an solchen Verfahren zu beteiligen. Wegen der Vielschichtigkeit der im Rahmen von ÖPP-Projekten zu beachtenden Fragen und der äußerst langen Bindungen ist ein flexibles Verfahren erforderlich, das Vertragsverhandlungen mit dem/den Bietern zulässt. Als problematisch wurde mehrfach bemängelt, dass die Richtlinie keine Regelung über die Erstattung von Ausgaben für die Bewerbung enthält. Die Erstellung von Angeboten für ÖPP-Projekte sind sehr zeitraubend und kostspielig.

Darüber hinaus enthält die Regelung eine Reihe von Ungenauigkeiten und unklare Bestimmungen. Insgesamt befürwortet der BPPP, das sich die EU-Kommission dem Thema ÖPP angenommen hat und mit ihrer Initiative einen Beitrag dazu leistet, dieses Instrumentatrium voran zu bringen. Dem in der Vergabekoordinierungsrichtlinie geregelten konkreten Verfahren stehen sie jedoch kritisch gegenüber und sehen in dem flexibleren Verhandlungsverfahren das geeignetere Verfahren für ÖPP-Projekte

3. Sehen Sie in Bezug auf diese Aufträge neben der Wahl des Vergabeverfahrens andere Punkte, die mit dem Gemeinschaftsrecht über öffentliche Aufträge in Konflikt stehen könnten? Wenn ja, nennen Sie diese und begründen Sie!

In diesem Zusammenhang stellt sich die Problematik der interkommunalen Zusammenarbeit. Es gibt im Gemeinschaftsrecht den Ansatz aus wettbewerbsrechtlichen Gründen die Ausschreibungspflicht für die Vergabe von Aufträgen innerhalb der öffentlichen Hand vorzusehen. Diese Frage wird im Rahmen des BPPP unterschiedlich beurteilt. Teilweise wird vorgebracht, dass öffentlich-öffentliche Zusammenarbeit vielfach eine Vorstufe für ÖPP-Modelle darstellt und daher nicht bereits erschwert werden sollte. Zum anderen zeigen interessierte Kreise ein großes Interesse, bereits frühzeitig die Möglichkeit zur Kooperation zu erhalten. Letztlich stellt sich die Frage, wie insoweit sachgerecht differenziert werden kann.

4. Haben Sie bereits einmal ein Verfahren zur Vergabe einer Konzession in der Europäischen Union organisiert, daran teilgenommen bzw. ein solches organisieren oder daran teilnehmen wollen? Welche Erfahrungen haben Sie gemacht?

Der BPPP hat an keinem Verfahren teilgenommen. Es ist weder Aufgabe noch Ziel des Verbandes sich an einem o. g. Verfahren zu beteiligen.
Zahlreiche Mitglieder insbesondere aus dem Arbeitskreis Infrastruktur waren an Ausschreibungen beteiligt, so z.B. für die Projekte Herrentunnel, Warnow-Querung und Strelasundquerung. Die Erfahrungen aus diesen Verfahren lassen sich kaum verallgemeinern, da es sich um Pilotprojekte handelte. Soweit möglich, wurden sie bei der Erarbeitung von Musterunterlagen berücksichtigt. Es wird insbesondere die Notwendigkeit gesehen, die Verfahren zu beschleunigen und weniger aufwendig zu gestalten. In den Verfahren hat sich zum einen gezeigt, dass bei der Auswahl der Projekte die wirtschaftlichen Aspekte stärker zu berücksichtigen sind, und zum anderen, dass vertragliche Verhandlungen unerlässlich sind, um ein wirtschaftlich tragbares und finanzierbares Projekt verwirklichen zu können.
In dem Verfahren des wettbewerblichen Dialogs wird die Gefahr der zunehmenden Bürokratisierung gesehen.

5. Halten Sie das derzeitige Gemeinschaftsrecht für präzise genug, um die konkrete und effektive Teilnahme von Gesellschaften oder Gruppierungen aus anderen Staaten an den Konzessionsvergabeverfahren sicherzustellen? Sind Sie der Ansicht, dass in dieser Hinsicht normalerweise ein tatsächlicher Wettbewerb herrscht?

Der Bundesverband hält das derzeitige Gemeinschaftsrecht für ausreichend, um eine Teilnahme von Gesellschaften aus anderen Staaten zu gewährleisten. Dies belegt die Praxis, wobei bei den einzelnen Projekten oftmals eine Zusammenarbeit zwischen internationalen und lokalen Unternehmen festzustellen ist.
Es macht für einen ausländischen Bieter durchaus Sinn, sich mit einem Partner vor Ort zusammen zu tun, der die nationalen Verhältnisse besser kennt. Mit der Warnow-Querung wurde eines der beiden ersten Mautstraßenprojekte an ein französisches Bauunternehmen vergeben. Auch im Abwasserbereich wurde die Beobachtung gemacht, dass ausländische Sponsoren zum Zuge kommen.

6. Halten Sie einen Vorschlag für einen gemeinschaftlichen Rechtsakt zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe für wünschenswert?

ÖPP und deren differenzierte Ausprägung lassen nicht immer eine zuverlässige Abgrenzung nach Bereichen, die heute von Richtlinien erfasst sind (z.B. Sektorenrichtlinien) und nicht reglementierten Bereichen zu (Teilbereiche von Konzessionen). Zur Verbesserung der Rechtssicherheit für vergebende Stellen wäre ein einheitliches Verfahren für die Auswahl privater Partner in ÖPP begrüßenswert. Dabei muss sich ein solcher Rechtsrahmen aber auf die technische Durchführung des Verfahrens beschränken, um nicht mögliche Formen und Ausprägungen von ÖPP (sowohl im Bereich kooperativer, als auch im Bereich korporativer ÖPP) zu beschränken.

7. Allgemeiner gefragt: Wenn Sie ein neues Gesetzgebungsvorhaben der Kommission für erforderlich halten, gibt es dann objektive Gründe dafür, in diesem Rechtsakt sämtliche ÖPP auf Vertragsbasis zu behandeln und sie ein und demselben Regelwerk für die Vergabe zu unterwerfen, ganz gleich ob die Vorhaben als öffentliche Aufträge oder als Konzessionen einzustufen sind?

Siehe Antwort zu Frage 6

8. Ist Ihrer Erfahrung nach der Zugang der ausländischen Akteure zu privat initiierten ÖPP gewährleistet? Für den Fall, dass die Vergabestellen zur Initiative aufrufen, wird dieser

Aufruf dann angemessen bekannt gemacht, so dass alle interessierten Akteure Kenntnis davon haben können? Wird für die Ausführung des ausgewählten Projekts ein Auswahlverfahren auf Basis eines effektiven Wettbewerbs organisiert?

> Im wesentlichen laufen derartige Verfahren transparent und diskriminierungsfrei ab, vgl. auch die Antwort zu Frage 5).

9. Wie könnte Ihrer Auffassung nach die Entwicklung privat initiierter ÖPP in der Europäischen Union unter Wahrung der Grundsätze der Transparenz und der Gleichbehandlung und ohne Verstoß gegen das Diskriminierungsverbot gewährleistet werden?

> Die Entwicklung privat initiierter ÖPP in der Europäischen Union unter Wahrung der Grundsätze der Transparenz und der Gleichbehandlung und ohne Verstoß gegen das Diskriminierungsverbot könnte dadurch gewährleistet werden, dass der Leistungsteil des privaten Initiators bepreist wird, allen Bietern eines solchen Verfahrens in diskriminierungsfreier Weise zur Verfügung gestellt wird. Im Rahmen des ÖPP wird der vorstehende Leistungsteil vergütet.
>
> Ein Anreiz- oder Entschädigungssystems müsste so beschaffen sein, dass es letztlich nicht zur Entstehung einer Initiatorenbranche kommt.

10. Welche Erfahrungen haben sie in der Phase im Anschluss an die Auswahl des privaten Partners im Rahmen von ÖPP auf Vertragsbasis gemacht?

11. Sind Ihnen Fälle bekannt, in denen die Ausführungsbedingungen, einschließlich der Klauseln zur Anpassung im Zeitverlauf, eine diskriminierende Wirkung entfalten konnten oder eine ungerechtfertigte Behinderung der Dienstleistungs- oder Niederlassungsfreiheit darstellten? Falls ja, bitte beschreiben Sie die Art der aufgetretenen Probleme!

> Generell besteht häufig das Problem nicht ausreichender Beschreibungen der geforderten Qualität von Betrieb und Instandhaltung eines Objektes. Fehlt z.B. die Beschreibung des Zustandes, in dem ein Objekt nach dem Betrieb durch den Privaten an die öffentliche Hand zurückgegeben werden soll, so kann der Instandhaltungsaufwand durch unterschiedliche

Bieter sehr unterschiedlich kalkuliert werden, was unmittelbar zu einer Verzerrung der Angebotspreise führt.
Sonstige Fälle, in denen die Ausführungsbedingungen im Zeitverlauf eine diskriminierende Wirkung entfalteten, sind uns nicht bekannt.

Häufig bekommen Nebenangebote den Zuschlag, die in Art und Umfang der Leistung wesentlich von der Ausschreibung abweichen. Das führt dazu, dass die Bieter zunehmend abschätzen müssen, welche Lösung den knappen Finanzmitteln der ausschreibenden Gebietskörperschaft o.ä. vielleicht mehr entgegen kommt, als deren eigenes ursprüngliches Konzept. Sofern von vornherein funktional ausgeschrieben wurde, ist das nicht zu beanstanden, ansonsten führt es aber zu einer Diskriminierung derjenigen, die sich an die Vorgaben der Ausschreibung halten.

13. Sind Sie wie die Kommission der Auffassung, dass bestimmte Interventionsklauseln in Bezug auf die Grundsätze der Transparenz und der Gleichbehandlung problematisch sein können? Sind Ihnen andere Typen von Klauseln bekannt, deren Anwendung zu ähnlichen Problemen führen kann?

Nein. Der BPPP legt jedoch wert auf die Feststellung, dass die Ausübung von Interventionsrechten wie Step-In-Right zwingend notwendig sind, um ein ÖPP-Projekt durch zu führen. Ansonsten erhält das Projekt keine Finanzierung. Die Durchführung von Vergabeverfahren ist in diesen Situationen nicht praktikabel und widerspricht dem Charakter der Aufgabenprivatisierung.

14. Halten Sie es für erforderlich, dass bestimmte Aspekte der vertraglichen Rahmenbedingungen für ÖPP auf Gemeinschaftsebene geklärt werden? Falls ja, was sollte geklärt werden?

Nein. Dennoch wird die Einführung und Evaluierung vertraglicher Standards für ÖPPs für dringend geboten gehalten. Allerdings sollten die vertraglichen Standards weder von der Europäischen Kommission noch von den nationalen Gesetzgebern verabschiedet werden. Vielmehr sind sie von den Beteiligten im Dialog zu erarbeiten. Sie müssen weiterhin flexibel einsetzbar sein.
Der BPPP versteht sich als neutrale Plattform für die Beteiligten bei der gemeinsamen Evaluierung der o.g. vertraglichen Standards.

15. Sind Ihnen bei ÖPP-Konstruktionen besondere Probleme mit der Vergabe von Unteraufträgen bekannt? Welche?

Die Unteraufträge sollten ohne neues Vergabeverfahren vergeben werden können. Nur dies entspricht dem Charakter der Aufgabenprivatisierung. In diesem Kontext bereitet die Entscheidung des OLG Düsseldorf vom 30. April 2003, Az. Verg 67/02, Probleme.

Wünschenswert ist eine klare und unmissverständliche Definition des öffentlichen Auftraggeberbegriffs nach § 98 Nr. 2 GWB, die keinerlei Auslegung bedarf, ob und in welchem Umfang ein Auftraggeber als ein „öffentlicher“ im Sinne des GWB anzusehen ist. So empfiehlt sich einer konkretere und substantiellere Umschreibung, wann zu vermuten ist, dass ein öffentlicher Auftraggeber i.S.v. § 98 Nr. 2 GWB vorliegt.

Denkbar wäre etwa eine Formulierung, aus der eindeutig hervorgeht, dass bzw. ob sich das Merkmal der „Nicht-Gewerblichkeit“ auf die juristische Person bzw. die im Allgemeininteresse liegende Aufgabe bezieht.

Des weiteren lassen auch die Tatbestandsmerkmale der „Beteiligung“, der „überwiegenden Finanzierung“ sowie „Aufsicht“ über die Leitung der juristischen Person im Wortlaut des § 98 Nr. 2 GWB weiten Raum zur Auslegung. Denkbar wären hier möglicherweise Formulierungen wie „Von einer überwiegenden Finanzierung ist auszugehen, wenn Stellen, die unter Nummer 1 oder 3 fallen, mindestens x % des Gesellschaftskapitals stellen oder aber einen geldwerten Beitrag zur Unternehmenstätigkeit der Gesellschaft in Höhe von x % beisteuern.“ bzw. „Aufsicht über die Leitung der Gesellschaft wird in den Fällen unwiderleglich vermutet, in denen es den unter Nummer 1 und 3 genanten Stellen möglich ist, Entscheidungen der Gesellschaft auch im Bezug auf öffentliche Aufträge zu beeinflussen.“.

16. Rechtfertigt die Existenz von ÖPP auf Vertragsbasis, welche die Übertragung eines Aufgabenpakets an einen einzigen privaten Partner impliziert, ihrer Auffassung nach, dass ausführlichere Regeln für die Vergabe von Unteraufträgen eingeführt werden und/oder dass der Anwendungsbereich erweitert wird?

Nein, jedenfalls die auf deutscher bzw. nationaler Ebene bestehenden Regelungen werden für ausreichend erachtet. Ein Bedürfnis nach zusätzlichen Regelungen besteht nicht. Wenn bereits bei der Vergabe der Konzession ein aufwendiges Verfahren durchgeführt wurde, besteht kein Anlass noch ein weiteres Verfahren auf der 2. Ebene durchzuführen. Der Bereich der Untervergabe sollte nicht reglementiert werden, da sonst ein Effizienzvorteil bei ÖPP-Projekten gegenüber klassisch ausgeschriebenen Projekten kaum zu realisieren ist.

17. Halten Sie, allgemeiner gesprochen, eine ergänzende Initiative auf Gemeinschaftsebene zur Klärung oder Umgestaltung der Regeln für die Vergabe von Unteraufträgen für erforderlich?

Nein, bzw. allenfalls sollte im Wege einer Novellierung die europaweite Vergabe auf der 2. Ebene aus den oben genannten Gründen (vgl. die Antwort zu 16.) abgeschafft werden.

18. Welche Erfahrungen haben Sie mit der Einrichtung institutionalisierter ÖPP gemacht? Lassen Ihre Erfahrungen Sie zu der Schlussfolgerung gelangen, dass die gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen bei institutionalisierten ÖPP-Konstruktionen eingehalten werden? Falls nein, warum nicht?

Bei gemeinsamen Unternehmen ist darauf zu achten, dass der Private die Betriebs- und Geschäftsführung in der Hand hat. Der Entwicklung weiterer ÖPP in den Bereichen Wasser/Abwasser steht immer noch die Ungleichbehandlung bei der Umsatzsteuer entgegen.

Vor dem Hintergrund bestehender Rechtsprechung bergen Umgehungskonstruktionen der öffentlichen Hand ein derart großes Risiko, dass in der Praxis zu einer Minimierung der genannten Risiken führt.

19. Halten Sie eine Initiative auf Gemeinschaftsebene für erforderlich, um die Verpflichtungen zu klären oder zu vertiefen, welche die öffentlichen Auftraggeber in Bezug auf den Wettbewerb zwischen potenziell an einem institutionalisierten ÖPP-Projekt interessierten Wirtschaftsteilnehmern haben? Falls ja, welche Aspekte halten Sie für besonders wichtig und welche Form sollte eine solche Initiative haben? Falls nein, warum nicht?

Eine umfassende Initiative auf Gemeinschaftsebene, um die Verpflichtungen zu klären oder zu vertiefen, welche die öffentlichen Auftraggeber in Bezug auf den Wettbewerb zwischen potenziell an einem institutionalisierten ÖPP-Projekt interessierten Wirtschaftsteilnehmern haben, wird nicht für erforderlich gehalten, da nach bestehender Rechtslage die Verpflichtungen hinreichend bestimmt sind.

Allgemein und unabhängig von den in diesem Grünbuch aufgeworfenen Fragen:

20. Welche Maßnahmen oder Verfahren behindern in der Europäischen Union die Einrichtung von ÖPP?

> Die kameralistische Buchführung der öffentlichen Haushalte behindert die Einrichtung von ÖPP in Deutschland. Anzumerken ist, dass sofern die öffentliche Hand ihre Aufwendungen und Erträge richtig erfassen würde, auch der Wirtschaftlichkeitsvergleich anders ausfallen würde. Hinzu kommt, dass die mittel- und langfristige Wirkung von ÖPP als Zwischenfinanzierungsinstrumente auf die Verschuldung im öffentlichen Haushalts- und Rechnungswesen auszuweisen sind.

21. Kennen Sie andere ÖPP-Formen aus Drittländern? Kennen Sie aus Ihren Erfahrungen in solchen Ländern bewährte Verfahrensweisen, die auch für die EU beispielgebend sein könnten? Falls ja, welche?

22. Denken Sie dass es nützlich wäre, im Hinblick auf den großen Investitionsbedarf einzelner Mitgliedstaaten zum Erreichen einer sozialen und dauerhaften Entwicklung gemeinsam und in regelmäßigen Abständen über diese Fragen unter den betroffenen Akteuren nachzudenken und bewährte Verfahrensweisen auszutauschen? Sollte die Kommission nach Ihrer Auffassung ein derartiges Netzwerk aufbauen?

> Ja, dies ist dringend geboten. Bisher liegen zuwenig systematische Auswertungen und empirische Analysen zu der ÖPP-Thematik vor. Eine Unterstützung von wissenschaftlichen Studien durch die EU-Kommission ist sehr wünschenswert.

Deutscher Gewerkschaftsbund

Bundesvorstand

Abteilung
Struktur- und Umweltpolitik;
Handwerkssekretariat

07.07.2004
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Deutschen Gewerkschaftsbundes
Bundesvorstand

zum

Grünbuch zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen der Europäischen Kommission (KOM(2004)327 endg.)

Herausgeber:
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Das Grünbuch der Kommission zu den öffentlich-privaten Partnerschaften trägt einen irreführenden Namen. Es behandelt nicht die grundsätzlichen Fragen der Vor- und Nachteile der Durchführung öffentlich-privater Partnerschaften (ÖPP), sondern deren vergaberechtliche Behandlung. Dabei ist die Tendenz der Kommission unverkennbar, so viele Tatbestände im Zusammenhang mit den öffentlich-privaten Partnerschaften wie möglich als vergaberechtlich relevant zu definieren. Dieses Vorgehen ist voreilig, weil die angekündigte europäische Rahmenrichtlinie über die „Dienstleistungen im allgemeinen Interesse“ (DAI) weiter aussteht. Es müsste zunächst mit dieser Rahmenrichtlinie festgelegt werden, welches die öffentlichen Dienstleistungen sind, die uneingeschränkt staatlicher oder kommunaler Verfügungsgewalt unterliegen. Dann könnten sich auch keine Abgrenzungsschwierigkeiten hinsichtlich der Anwendbarkeit des Vergaberechtes ergeben. Jede Regelung, die vor einer Regelung über die DAI zur vergaberechtlichen Behandlung der öffentlich-privaten Partnerschaften getroffen wird, präjudiziert die weiterhin offene Debatte um die DAI. Um diese sollte sich die Kommission aber nicht weiter drücken.

Der DGB sieht keinen Handlungsbedarf, der über die bereits getroffene Regelung des Vergaberechtes hinaus eine neue grenzüberschreitende Regulierung notwendig machen würde. Die gegenwärtige Rechtslage führt nicht zu Beeinträchtigungen der Effizienz von Dienstleistungen oder der Wettbewerbsfähigkeit. Zudem gelten die allgemeinen Grundsätze des EU-Vertrages durchgängig; sie kommen damit in ausreichender Weise zur Geltung.

Laut eigener Aussage der Europäischen Kommission ist es nicht Aufgabe des Grünbuches, die jeweilige Rolle der öffentlichen und der privaten Partner im Zusammenhang mit ÖPP zu definieren – trotzdem trifft es aber präjudizierende Aussagen in dieser Richtung:

U.a. heisst es: „Der Staat nimmt Abstand von seiner Funktion als direkter Akteur und geht zu Organisation, Regulierung und Controlling über.“ (Nr.3, Seite 3): Wenn solche grundlegenden Aussagen über die Rolle des Staates getroffen werden, müssten sie zumindest von qualitativen Anforderungen an die privaten Akteure begleitet werden, die insbesondere Sozial- und Umweltstandards betreffen.

Die Kommission fordert, dass Bieter nur dann aufgefordert werden dürfen, bestimmte Aspekte ihres Angebotes zu erläutern oder die darin eingegangenen Verpflichtungen zu bestätigen, wenn die wesentlichen Elemente des Angebotes oder der Ausschreibung dadurch nicht verändert werden und der Wettbewerb nicht verfälscht wird oder Diskriminierungen entstehen (Nr. 7. S. 4-5). Auch eine solche Forderung darf nicht ohne die Beachtung ihrer sozialen Auswirkungen gestellt werden. Es kann für die staatliche Stelle gerade von zentraler Bedeutung sein, solche Erläuterungen anzufordern, denn oft verbergen sich hinter dem wirtschaftlich günstigsten Angebot Kalkulationsgrundlagen, bei denen insbesondere Entgelte, Arbeitssicherheit und sonstige Sozialleistungen nach unten gedrückt oder zumindest vernachlässigt werden.

Entsprechend verhält es sich mit dem Interesse der Vergabestelle, Funktionsanforderungen zu stellen (Nr. 25, S.11.): Dazu können auch soziale Anforderungen im weitesten Sinne gehören, die im Text der Kommission bezeichnenderweise nicht erwähnt werden.

Zu den vergaberechtlichen Fragen im engeren Sinne ist folgendes anzumerken:

Die Kommission legt den Anwendungsbereich des bestehenden „Verhandlungsverfahrens“ eindeutig zu eng aus. Mit diesem Verfahren lässt sich die Vergabepraxis gut handhaben, was mit dem von der Kommission offensichtlich favorisierten Verfahren des „wettbewerblichen Dialogs“ wiederum nicht oder nur unzureichend der Fall wäre.

Auch die Ausweitung der Anwendbarkeit des Vergaberechtes auf die Konzessionsvergabe ist aus Sicht des DGB nicht notwendig.

Die von der Kommission gewählte Definition der „inhouse“-Geschäfte präjudiziert bzw. verschiebt die bestehende Definition kommunaler Aufgaben und wird daher vom DGB abgelehnt. Das Subsidiaritätsprinzip ist zu beachten.

Eine mögliche Neuregelung des Vergaberechtes ist ein schlechter Weg, um eine Debatte um öffentlich-private Partnerschaften zu eröffnen. Sie präjudiziert den eigentlich notwendigen Regulierungsbedarf in der immer wieder aufgeschobenen europäischen Debatte um die öffentlichen Güter. Öffentlich-private Partnerschaften als solche können in der Tat eine effiziente Form der Dienstleistungserbringung sein. Wenn man die Durchführung öffentlich-privater Partnerschaften erleichtern will, sollte man die Debatte darüber jedoch mit den grundsätzlichen Fragen über die Aufgaben und Verpflichtungen der öffentlichen und privaten Partner beginnen und sie nicht durch die Frage der Anwendbarkeit des Vergaberechtes präjudizieren.

Deutscher Städtetag

Deutscher Landkreistag

Deutscher Städte- und Gemeindebund

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Stellungnahme zum Grünbuch der Kommission der Europäischen Gemeinschaften zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen vom 30. April 2004, KOM (2004) 327 endgültig

A. Allgemeine Anmerkungen

Die Städte, Gemeinden und Landkreise in Deutschland praktizieren öffentlich-private Partnerschaften (ÖPP) in vielfältiger Weise und Ausgestaltung. Dies bezieht sich sowohl auf die im Grünbuch angesprochenen vertraglichen ÖPP (z. B. Finanzierung und Betrieb von Hochbauten) als auch auf die institutionellen ÖPP (z. B. gemischt-wirtschaftliche Versorgungsunternehmen). ÖPP sind eine der denkbaren Möglichkeiten zur Organisation der Aufgabenerfüllung der Kommunen.

Flexibilität und Vielfalt der ÖPP erhalten

Als grundsätzlicher Vorteil erweist sich dabei bisher die Flexibilität, mit der die Kommunen das Instrument der ÖPP nutzen können. Diese muss erhalten bleiben. Eine Überregulierung, insbesondere mit Vorschriften des Vergaberechts, würde die Attraktivität dieser Organisationsform für die Erfüllung kommunaler Aufgaben stark vermindern. Die Folge wäre, dass sich Kommunen strikt entweder für eine reine Eigenerbringung oder für eine völlige Privatisierung entscheiden müssten. Dies bedeutete aber, dass die bisher bestehende Gestaltungsfreiheit der Städte, Gemeinden und Landkreise eingeschränkt und das in vielen Fällen auch sinnvolle Instrument der ÖPP aufgegeben würde.

Wir teilen die Einschätzung der EU-Kommission (Rd.-Nr. 5), dass im Rahmen von ÖPP stets für jedes einzelne Projekt bewertet werden muss, ob diese Art der Partnerschaft mit Privaten einen tatsächlichen Zusatznutzen gegenüber anderen Möglichkeiten kommunaler Aufgabenerfüllung bringt. Einer solchen Bewertung gehen äußerst komplexe Betrachtungen voraus. Ob eine ÖPP für die Kommune sinnvoll ist, hängt z.B. von der Risikoverteilung zwischen öffentlichem und privatem Partner oder den durch das Projekt verursachten Transaktionskosten ab. Ein generelles Urteil über die unterschiedlichen Formen von ÖPP ist zurzeit für den kommunalen Bereich in Deutschland noch schwierig abzugeben.

Im Bereich der vertraglichen ÖPP ist insbesondere auf die Beteiligung Privater an Hochbaumaßnahmen der Städte, Gemeinden und Landkreise hinzuweisen. So haben z.B. einzelne Kommunen die bauliche Erhaltung und den Betrieb ihrer Schulen im Wege der Ausschreibung auf Private übertragen. ÖPP bieten dabei als reine Finanzierungsmethode gegenüber herkömmlichen kommunalen Finanzierungsmethoden keinen Vorteil. Für eine Bewertung muss vielmehr auf die gesamte Nutzungsdauer des Projektes abgestellt werden, Diese umfasst neben der Bau- auch die Betriebsphase. Auf der Basis der Erfahrungen in anderen Mitgliedsstaaten der EU dürfte sich eine positive Bewertung der wirtschaftlichen Möglichkeiten solcher ÖPP ergeben.

Die institutionellen ÖPP haben bei den Kommunen in Deutschland insbesondere durch die Liberalisierung der Energiemärkte eine stärkere Verbreitung erlebt. Viele Kommunen haben Anteile an ihrem Energieversorgungsunternehmen an Private veräußert. Auch hier ist eine abschließende Bewertung dieses Prozesses nicht möglich. Es muss jedoch darauf hingewiesen werden, dass die Kartellbehörden in Deutschland bereits erhebliche Bedenken wegen der vertikalen Verflechtung großer überregionaler Versorgungsunternehmen mit kommunalen örtlichen Energieversorgern angemeldet haben. Es besteht die Gefahr, dass die großen überregionalen Versorger auch durch ihre Beteiligungen an örtlichen Versorgern eine Marktaufteilung verwirklichen, die dem Wettbewerbsgedanken nicht gerecht wird.

Beachtung der Freiheit der Kommunen zur eigenverantwortlichen Aufgabenwahrnehmung und Organisationsgestaltung

Von entscheidender Bedeutung für die weiteren Beurteilungen von ÖPP generell ist aber die Beachtung der mitgliedstaatlichen Organisationsfreiheit sowie hier insbesondere der national wie europarechtlich abgesicherten Selbstverwaltung der Kommunen. National folgt diese Gewährleistung aus der deutschen Verfassung in Art. 28 Abs. 2 GG. Europarechtlich sieht nunmehr der von der Regierungskonferenz einstimmig beschlossene Verfassungsvertrag in Art. I-5 die *Achtung* der nationalen Identität der Mitgliedstaaten, die in deren grundlegender politischer und *verfassungsrechtlicher Struktur einschließlich der regionalen und kommunalen Selbstverwaltung* zum Ausdruck kommt, vor. Zu dem Kernbereich dieser Selbstverwaltungsgarantie und damit zu den Grundlagen der nationalen verfassungsrechtlichen Struktur im Sinne von Art. I-5 Verfassungsvertrag gehört die Kooperations- und Organisationshoheit, die den Kommunen die eigenverantwortliche Entscheidung garantiert, Dienstleistungen und hoheitliche Tätigkeiten selbst zu erledigen, die Erledigung auf Dritte zu übertragen oder – wie hier – für die Aufgabenerfüllung mit Privaten und/oder anderen Trägern der öffentlichen Verwaltung zu kooperieren. Hierbei handelt es sich nicht um Konzessionserteilungen, sondern um die eigenverantwortliche Entscheidung über die Modalitäten der Aufgabenerfüllung.
Ganz überwiegend erfüllen die Städte, Gemeinden und Landkreise in Deutschland ihre Aufgaben selbst oder durch eigene Einrichtungen und Unternehmen. Deshalb trifft das in Rd.-Nr. 3 des Grünbuchs vermittelte Bild, dass die öffentliche Hand Abstand von ihrer Funktion als direkter Akteur nimmt und sich lediglich auf die Organisation, Regulierung und Controlling der Erfüllung ihrer Aufgaben beschränkt für die Kommunen in Deutschland nicht zu. Das dieser Betrachtung seitens der EU-Kommission zugrunde liegende Modell einer bloßen Gewährleistungskommune mag in einzelnen Bereichen diskussionswürdig sein, es ist aber weder Regelfall noch zwingendes Leitbild. Das, wie aufgezeigt, national wie europarechtlich verbürgte Selbstverwaltungsrecht, das den Kernbestand eigener Aufgabenerfüllung schützt, gewährleistet vielmehr, dass Städte, Gemeinden und Landkreise auch zukünftig unabhängig darüber entscheiden können müssen, ob sie eine Aufgabe selbst, durch eigene Unternehmen oder Einrichtungen oder durch private Dritte erfüllen. Die Festlegung auf eine Gewährleisterfunktion wäre eine Neuverteilung der Verantwortung bei öffentlichen Aufgaben der Städte, Gemeinden und Landkreise zwischen diesen und den beauftragten Dritten. Bei dem in Deutschland ganz überwiegend praktizierten Modell der kommunalen Eigenleistung liegt sowohl die Festsetzung der politischen Rahmenbedingungen einer Aufgabe als auch ihre Verwirklichung bei der Kommune. Bei der Gewährleistung würde dies auf die Verantwortung reduziert, politische Vorgaben für die Aufgabenerfüllung zu setzen und deren Umsetzung zu überwachen. Eine solche Neuverteilung kann aber, wenn überhaupt, nur das Ergebnis einer intensiven gesellschaftspolitischen Diskussion in den Mitgliedstaaten bzw. ihren Untergliederungen sein. Eine solche Diskussion betrifft wesentliche Fragen der innerstaatlichen Organisation, der historisch gewachsenen Strukturen und damit auch der Ausgestaltung der gesellschaftlichen Rahmenbedingungen. Die Festlegung, ob sich die öffentliche Hand eher als Gewährleister oder eher als Erbringer öffentlicher Aufgaben sieht oder zu sehen hat, kann daher nicht auf europäischer Ebene getroffen werden.

Vor dem Hintergrund dieser grundsätzlichen Betrachtungen ergeben sich notwendigerweise Auswirkungen zur Einschätzung eines Verfahrensrahmens für die Konzessionsvergabe, zu den Möglichkeiten interkommunaler Zusammenarbeit, auch zu Fragen von Inhouse-Geschäften sowie zu lokalen Dienstleitungen von allgemeinem wirtschaftlichem Interesse:

Kein Verfahrensrahmen für die Vergabe von Dienstleistungskonzessionen erforderlich

Auf Grund der erheblich von der Einschätzung der Kommission, die das Gewährleistungsmodell bereits als in der Praxis vorherrschend ansieht, abweichenden tatsächlichen Organisation der kommunalen Aufgabenerfüllung in Deutschland, die durch die Eigenerfüllung geprägt ist, haben die in dem Grünbuch getroffenen Aussagen und Fragestellungen für die Kommunen in Deutschland eine über den Bereich der ÖPP hinausgehende Bedeutung. Dies betrifft insbesondere die Erteilung von Dienstleistungskonzessionen. Soweit hier eine stärkere, an das bestehende Vergaberecht angelehnte europäische Regelung angedacht ist, hätte dies sowohl Auswirkungen auf die Beauftragung eigener Einrichtungen und Unternehmen durch die Kommunen als auch auf die interkommunale Zusammenarbeit. Die Kommunen wenden sich daher gegen einen gemeinschaftlichen Rechtsakt zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe. Dies entspricht sowohl der Haltung der Mehrheit des Rates als auch der des Europäischen Parlaments, die im Rahmen des kürzlich verabschiedeten Legislativpakets zum öffentlichen Auftragswesen gemeinschaftsrechtlicher Regelungen für Dienstleistungskonzessionen abgelehnt haben. Wesentliche Entwicklungen, die einen erneuten Anlauf der EU-Kommission rechtfertigen könnten, sind nicht ersichtlich.

Vertrauensschutz

Soweit die Kommission aber die im Grünbuch dargelegten Überlegungen, einen Verfahrensrahmen für die Konzessionsvergabe vorzuschlagen, weiter verfolgt, dürfen die dort getroffenen Regelungen jedenfalls keine Rückwirkung auf bereits bestehende ÖPP haben. Sollten diese nämlich nicht unter Beachtung der neuen Regeln eingegangen wurden, wäre es anderenfalls notwendig, sie rückabzuwickeln. Dies muss aber aufgrund des damit verbundenen erheblichen rechtlichen und tatsächlichen Aufwands und der finanziellen Risiken für die Beteiligten vermieden werden.

Konkretisierung der Inhouse-Kriterien

Die EU-Kommission sieht die öffentliche Hand als Gewährleister und nicht als Erbringer von öffentlichen Aufgaben an. Daraus ergibt sich für sie automatisch der Ansatz, Dienstleistungsaufträge und Dienstleistungskonzessionen, die sich von den Erstgenannten nur durch die Ausgestaltung der Entgeltregelungen unterscheiden, auf das Verhältnis der Kommunen zu ihren Unternehmen und die interkommunale Zusammenarbeit auszuweiten. Unabhängig von der Frage, inwieweit eine Beauftragung eines kommunalen Unternehmens oder einer kommunalen Einrichtung durch eine Trägerkommune in der jeweiligen Ausgestaltung überhaupt einen Dienstleistungsauftrag bzw. eine Dienstleistungskonzession darstellt, ist hier die Definition der sogenannten Inhouse-Geschäfte für uns von besonderer Bedeutung. Eine Festlegung der Kriterien in der Gestalt, dass ein Inhouse-Verhältnis lediglich bei 100 %igen Tochterunternehmen der Kommunen vorliegt, würde dazu führen, dass institutionelle ÖPP der Kommunen nicht weiter verfolgt werden. Es muss daher eine rechtliche Lösung gefunden werden, die die Beauftragung eines gemischtwirtschaftlichen Unternehmens durch die Kommune ohne Ausschreibung unter bestimmten Voraussetzungen als Inhouse-Geschäft zulässt.

Problematisch erscheint eine solche Absicht der Kommission auch vor dem Hintergrund, dass es in einigen Sektoren der Dienstleistungen von allgemeinem wirtschaftlichem Interesse - insbesondere in den investitionsintensiven Bereichen - außer kommunalen Anbietern, die in ihrer Leistungserbringung auf ihr Territorium begrenzt sind, nur noch einige wenige große, europaweit agierende Unternehmen gibt, die den Markt bestimmen. Bei europaweiten Ausschreibungen sind es insbesondere diese Unternehmen, die sowohl in Bezug auf die Dienstleistungskonzessionen, aber auch im Hinblick auf die Auswahl des privaten Partners die kostengünstigsten Angebote vorlegen können. Der von der Kommission angedachte Verfahrensrahmen für Dienstleistungskonzessionen wird in diesen Sektoren mittelfristig dazu führen, dass es kaum noch kommunale Unternehmen geben wird, sondern lediglich einige wenige private Anbieter. Insbesondere für kleine und mittlere Kommunen bedeutet dies automatisch, dass die Möglichkeit der Einflussnahme auf die Erbringung der Dienstleistung stark eingeschränkt werden wird. Sie stehen einer Marktmacht gegenüber, die ihnen sowohl die Art der Erbringung der Dienstleistungen als auch mittelfristig den Preis diktieren kann.

Keine Beeinträchtigung interkommunaler Zusammenarbeit

Noch drängender ist das Problem bei der interkommunalen Zusammenarbeit. Es muss sichergestellt werden, dass die Regelungen des Vergaberechts und zu Dienstleistungskonzessionen die kommunale Zusammenarbeit nicht beeinträchtigen. Bei den in den Gesetzen der deutschen Bundesländer geregelten Instrumenten dieser Zusammenarbeit handelt es sich entgegen der Auffassung der Europäischen Kommission (vgl. die mit Gründen versehene Stellungnahme vom 30. März 2004 (2000/4433 C(2004)1202)) lediglich um kommunale Organisationsfragen und nicht um die Erteilung einer Dienstleistungskonzession oder einen vergaberelevanten Dienstleistungsauftrag. Kommunale Zweckverbände sind Instrumente bzw. Organisationsformen, die helfen, den eigenen, kommunalen Handlungsspielraum zu sichern, handlungsfähig möglichst effektiv Leistungen zu erbringen, die in Einzelleistung ggf. kostenintensiver wären. Es wird dabei aber keine Leistung am Markt gegen Entgelt eingekauft oder beschafft. Vielmehr geht mit der Gründung eines Zweckverbandes die öffentlich-rechtliche Aufgabe der Kommune auf den Zweckverband kraft Gesetzes, nicht aber durch Rechtsgeschäft über. Es handelt sich um einen Fall unmittelbarer gemeinsamer Aufgabenerledigung durch eine seit jeher praktizierte Rechts- und Organisationsform kommunaler Eigenproduktion. Ein Markt wird nicht betreten.

Lokale Dienstleistungen von allgemeinem wirtschaftlichem Interesse

Insbesondere für die Erbringung der Dienstleistungen von allgemeinem wirtschaftlichen Interesse (DAWI) müssen neben den im Grünbuch angesprochenen Wettbewerbsgrundsätzen die Gemeinwohlverpflichtungen betrachtet werden. Es bedarf daher zum einen der Abwägung der Wettbewerbsgrundsätze mit dem Verfassungsbeschluss zur Beachtung der kommunalen Selbstverwaltung und Subsidiarität; zum anderen greifen auch die im EGV zu DAWI festgelegten Regelungen in Art. 16 und Art. 86,2. In diesem Zusammenhang könnte für die Beauftragung kommunaler Unternehmen und Einrichtungen der kommunalen Zusammenarbeit mit lokalen Dienstleistungen von allgemeinem wirtschaftlichem Interesse, durch die der Binnenmarkt nur unwesentlich beeinträchtigt wird, sollte eine Freistellungsregelung von den Vorschriften für die Vergabe von Dienstleistungsaufträgen und –konzessionen geschaffen werden. Dies entspräche der Lösung, die zurzeit durch den Vorschlag der EU-Kommission für eine Freistellungsentscheidung im Bereich des europäischen Beihilferechts angestrebt wird. Mögliche Kriterien für die Vermutung einer nur unwesentlichen Beeinträchtigung des Binnenmarktes wären in erster Linie der lediglich örtliche Bezug der Dienstleistung, aber auch die öffentliche Rechtsform des beauftragten Unternehmens oder auch Schwellenwerte.

B. zu den Fragen

1. **Welche Formen von ÖPP auf Vertragsbasis sind Ihnen bekannt?
Gibt es in Ihrem Land spezifische (gesetzliche oder andere) Rahmenbedingungen für derartige Konstruktionen?**

In der Bundesrepublik Deutschland sind vielfältige Modelle von ÖPP auf Vertragsbasis bekannt. Neben den klassischen Betreiber- und Betriebsführungsmodellen sowie dem Konzessionsmodell werden Kombinationen aus diesen Modellen gewählt. ÖPP umfasst eine Vielzahl von Formen und Ausgestaltungen. Gemeinsam ist allen, dass es sich um die gemeinschaftliche privat-öffentliche Wahrnehmung öffentlicher Aufgaben handelt. Dabei geht es nicht nur um Investitionen, die derzeit im Vordergrund stehen, sondern auch um die Erbringung von Dienstleistungen.

Hauptmotiv für die Kommunen zur Suche nach Möglichkeiten zur langfristigen Zusammenarbeit mit privaten Investoren ist der Wunsch, durch Effizienzsteigerungen die engen finanziellen Spielräume für Investitionen erweitern zu können. Hierdurch soll die Kluft zwischen wachsendem Erweiterungs-, Ersatz- und Modernisierungsbedarf in der kommunalen Infrastruktur einerseits und den geringer werdenden Ressourcen andererseits verkleinert werden.

Im Bereich der vertraglichen ÖPP hat die Bundesregierung unter Beteiligung interessierter Kreise das Projekt „PPP“ im öffentlichen Hochbau ins Leben gerufen; mit diesem Projekt soll der Gedanke der langfristig angelegten Zusammenarbeit der öffentlichen Hand mit privaten Investoren forciert werden. Nähere Angaben zu diesem Projekt und zu den rechtlichen Rahmenbedingungen für PPP in Deutschland sind unter der Internetadresse www.bmvbw.de/Bauwesen-.346.htm abrufbar. Zeitgleich haben einzelne Kommunen die bauliche Erhaltung und den Betrieb ihrer Schulen im Wege der Ausschreibung auf Private übertragen. Durch die Beurteilung der gesamten Nutzungsdauer eines Projektes, die neben der Bau- auch die Betriebsphase umfasst, dürfte sich auf der Basis der Erfahrungen in anderen Mitgliedsstaaten der EU eine positive Bewertung der wirtschaftlichen Möglichkeiten solcher ÖPP ergeben. Zur Begleitung der ÖPP-Projekte im Hochbau wurde im Rahmen des erwähnten Projekts beim Bundesministerium für Verkehr, Bau- und Wohnungswesen inzwischen eine Task force gegründet. Auch einzelne Länder sind derzeit dabei, entsprechende Task forces einzurichten.

Hinsichtlich der Bewertung der Erfahrungen mit vertraglichen ÖPP verweisen wir auf die Aussagen in Teil A.

Spezifische sondergesetzliche Rahmenbedingungen für derartige Konstruktionen sind in der Bundesrepublik Deutschland nicht vorhanden. Vielmehr können durch in anderen Rechtsgebieten erlassene Rechtsvorschriften, wie Gemeindeordnungen Haushalts- und Vergaberecht zufrieden stellende Lösungen und Regelungen zur Bildung derartiger Konstruktionen abgeleitet werden. Der Erlass spezifischer Rahmenbedingungen für derartige Konstruktionen ist daher nicht erforderlich. Einzelheiten zu den rechtlichen Rahmenbedingungen für vertragliche ÖPP in Deutschland finden sich auf der bereits erwähnten Internetseite www.bmvbw.de/Bauwesen-.346.htm der Bundesregierung.

2. Nach Auffassung der Kommission wird die Umsetzung des wettbewerblichen Dialogs in einzelstaatliche Rechtsvorschriften den betroffenen Parteien ein Verfahren an die Hand geben, das sich ganz besonders für die Vergabe öffentlicher Aufträge im Zusammenhang mit der Einrichtung einer ÖPP auf Vertragsbasis eignet und gleichzeitig die Grundrechte der Wirtschaftsteilnehmer wahrt. Stimmen Sie dem zu? Falls nein, warum nicht?

Für den Fall, dass eine Ausschreibungsverpflichtung im Zusammenhang mit der Einrichtung einer ÖPP auf Vertragsbasis besteht, könnte der wettbewerbliche Dialog als Unterfall des Verhandlungsverfahrens ein geeignetes Verfahren darstellen. Er bietet durchaus Vorteile, da mit seiner Hilfe die Kosten und Risiken eines ÖPP–Modelles ausgelotet werden können. Insofern ist die optionale Anwendung zu begrüßen. Allerdings wird sich im Falle der Einführung des wettbewerblichen Dialogs in Deutschland erst noch zeigen müssen, ob dieses Instrument praxistauglich ist. Hier sehen wir gewisse Probleme in Zusammenhang mit der Regelung des Art. 29 Abs. 8 der Richtlinie, wonach die öffentlichen Auftraggeber wegen des aufwendigen Verfahrens Prämien oder Zahlungen an die Teilnehmer am wettbewerblichen Dialog vorsehen können. Setzt sich in der Praxis durch, dass die öffentlichen Auftraggeber diese Zahlungen nicht vorsehen, dann wird der wettbewerbliche Dialog insbesondere für den Mittelstand (KMU) unattraktiv; setzt sich demgegenüber in der Praxis durch, dass die öffentlichen Auftraggeber solche Zahlungen faktisch ausloben müssen, dann dürfte das die Attraktivität des wettbewerblichen Dialogs insbesondere bei kleinen und mittleren öffentlichen Auftraggebern einschränken.

Keinesfalls darf aber eine Verbindung zwischen dem vergaberechtlichen Instrument des wettbewerblichen Dialogs und den Dienstleistungskonzessionen gezogen werden. Nach unserer Auffassung kann das Verhandlungsverfahren - anders als unter Randnummer 24 des Grünbuches dargestellt - sehr wohl angewandt werden, wenn Probleme aufgrund der Tatsache auftreten, dass die rechtliche und finanztechnische Konstruktion sehr komplex ist. Das Verhandlungsverfahren ist ja gerade darauf ausgelegt, mit einer möglichst geringen Anzahl von Bewerbern im Wege des Verhandelns zu einer eindeutigen Leistungsbeschreibung zu gelangen.

3. Sehen Sie in bezug auf diese Aufträge neben der Wahl des Vergabeverfahrens andere Punkte, die mit dem Gemeinschaftsrecht über öffentliche Aufträge in Konflikt stehen könnten? Wenn ja, nennen Sie diese und begründen sie!

Nein.

4. Haben Sie bereits einmal ein Verfahren zur Vergabe einer Konzession in der Europäischen Union organisiert, daran teilgenommen, bzw. ein solches organisieren oder daran teilnehmen wollen? Welche Erfahrungen haben Sie gemacht?

Nein.

5. Halten Sie das derzeitige Gemeinschaftsrecht für präzise genug, um die konkrete und effektive Teilnahme von Gesellschaften oder Gruppierungen aus anderen Staaten an den Konzessionsvergaben sicher zu stellen? Sind sie der Ansicht, dass in dieser Hinsicht normalerweise ein tatsächlicher Wettbewerb herrscht?

Das häufige Fehlen von Angeboten aus anderen Mitgliedsländern nicht nur bei ÖPP, sondern im gesamten Vergabebereich, liegt im Regelfall nicht an den Verfahrensweisen oder fehlendem Wettbewerb, sondern an dem mangelnden Interesse der Bieter. Dieses scheint insbesondere für die mittelständische Wirtschaft zu gelten.

In den Fällen der Dienstleistungskonzessionen besteht für Gruppierungen und Gesellschaften aus anderen Staaten effektiv die Möglichkeit, Konzessionär zu werden. Art. 43 ff. EGV sind insoweit hinreichend präzise.

6. Halten Sie einen Vorschlag für einen gemeinschaftlichen Rechtsakt zur Festlegung eines Verfahrenrahmens für die Konzessionsvergabe für wünschenswert?

Nein.
Siehe im Übrigen Teil A der Stellungnahme.

7. Allgemeiner gefragt: Wenn sie ein neues Gesetzgebungsvorhaben der Kommission für erforderlich halten, gibt es dann objektive Gründe dafür, in diesem Rechtsakt sämtliche ÖPP auf Vertragsbasis zu behandeln und sie ein und demselben Regelwerk für die Vergabe zu unterwerfen, ganz gleich ob die Vorhaben als öffentliche Aufträge oder als Konzessionen einzustufen sind?

Nein.
Siehe im Übrigen Teil A der Stellungnahme.

8. Ist Ihrer Erfahrung nach der Zugang der ausländischen Akteure zu privat initiierten ÖPP gewährleistet? Für den Fall, dass die Vergabestellen zur Initiative aufrufen, wird dieser Aufruf dann angemessen bekannt gemacht, so dass alle interessierten Akteure Kenntnis davon haben können? Wird für die Ausführung des ausgewählten Objektes ein Auswahlverfahren auf Basis eines effektiven Wettbewerbs organisiert?

Nach unserer Erfahrung ist dies im Rahmen der bestehenden Regelungen gewährleistet.
Siehe im Übrigen auch die Antwort zu Frage 5.

9. Wie könnte Ihrer Auffassung nach die Entwicklung privat initiierter ÖPP in der Europäischen Union unter Wahrung der Grundsätze der Transparenz und der Gleichbehandlung und ohne den Verstoß gegen das Diskriminierungsverbot gewährleistet werden?

Die Entwicklung privat initiierter ÖPP würde bei der Erstellung eines einheitlichen Rechtsrahmens und damit bei einer generellen Ausschreibungspflicht in zu starre rechtliche Grundlagen gezwängt. Damit wäre jede private Initiative im Keim erstickt und dieses Instrument wiederum zum Scheitern verurteilt. Im Einzelfall könnte jedoch ein Verhandlungsverfahren als Vergabeart gewählt werden. Zur Entwicklung und Förderung privat initiierter ÖPP bedarf es eines Anreizes der Privatwirtschaft, der ihre Kreativität fördert. Es bleibt deshalb zu überlegen, ob im Wege der Wertung der Angebote diese Kreativität angemessen berücksichtigt werden kann und sollte. Lediglich eine an die Vorstellungen des Urheberrechts angelehnte Entlohnung der Idee dürfte dafür nicht ausreichend sein.

10. Welche Erfahrung haben Sie in der Phase im Anschluss an die Auswahl des privaten Partners im Rahmen von ÖPP auf Vertragsbasis gemacht?

In dieser Phase wurden unterschiedliche Erfahrungen gemacht. Das Gelingen der ÖPP auf Vertragsbasis ist von der sorgfältigen Planung und Vorbereitung sowie der vertraglichen Gestaltung abhängig. Zudem ist großer Wert auf einen gerechten Risiko- und Lastenausgleich zu legen. Das Finanzierungs- und Vollzugsrisiko darf nicht einseitig zu Lasten eines Partners geregelt werden. Letztendlich ist immer der Einzelfall zu betrachten und ausschlaggebend. So ist es etwa in den bereits erwähnten Modellen der Schulsanierung im Rahmen vertraglicher ÖPP selbstverständlich, dass das Risiko zukünftig sinkender Schülerzahlen beim Schulträger und damit bei der Kommune anzusiedeln ist; in Anwendungsfällen der ÖPP im Verkehrsbereich, in denen der private Investor den Nutzern der Verkehrsinfrastruktur Entgelte abverlangen darf, ist es demgegenüber selbstverständlich, das Risiko einer mangelnden Inanspruchnahme dieser Infrastruktur dem privaten Investor aufzuerlegen.

Eine einheitliche europäische Regelung zur Risikoverteilung ist nicht erforderlich, wäre angesichts der Bandbreite von ÖPP-Anwendungsfällen auch ausgesprochen kontraproduktiv.

11. **Sind Ihnen Fälle bekannt, in denen die Ausführungsbedingungen einschließlich der Klausel zur Anpassung im Zeitverlauf, eine diskriminierende Wirkung entfalten konnten oder eine ungerechtfertigte Behinderung der Dienstleistungs- oder Niederlassungsfreiheit darstellten? Falls ja, beschreiben Sie bitte die Art der aufgetretenen Probleme.**

Nein.

12. **Sind Ihnen Praktiken oder Mechanismen zur Bewertung von Angeboten bekannt, die eine diskriminierende Wirkung haben?**

Nein.

13. **Sind Sie wie die Kommission der Auffassung, dass bestimmte Interventionsklauseln in bezug auf die Grundsätze der Transparenz und der Gleichbehandlung problematisch sein können? Sind Ihnen andere Typen von Klauseln bekannt, deren Anwendung zu ähnlichen Problemen führen kann?**

Interventionsklauseln sind in der Praxis unverzichtbar. Vertragliche ÖPP leben davon, dass sie bei allen Beteiligten eines Projektes auf breite Akzeptanz stoßen. Voraussetzung dafür ist u. a. das Vertrauen auf die wirtschaftliche Leistungsfähigkeit auch der beteiligten privaten Investoren. So wird von Gegnern vertraglicher ÖPP häufig das Risiko einer Insolvenz des privaten Investors in den Vordergrund gestellt. Dieses Risiko bleibt stets vorhanden, lässt sich aber bezogen auf das konkrete Projekt durch die von der EU-Kommission kritisch betrachteten Interventionsklauseln relativieren. Kann die beteiligte Kommune davon ausgehen, dass eine beteiligte Bank die wirtschaftliche Leistungsfähigkeit eines privaten Investors überwacht und im Falle des Unterschreitens eines gewissen Limits von einer Ersetzungsmöglichkeit Gebrauch machen kann, dann lässt sich dadurch das Funktionieren einer vertraglichen ÖPP über den vorgesehenen Zeitraum sicherstellen. Eine mögliche Insolvenz eines privaten Investors schlägt dann nicht mehr auf das konkrete Modell durch.

Die EU-Kommission wird sich daher überlegen müssen, ob es ihr darum geht, die möglichen Effizienzgewinne, die mit einer stärkeren Verbreitung vertraglicher ÖPP verbunden sein könnten, innerhalb des gemeinsamen Wirtschaftsraumes zu realisieren. Dann wird sie eine vertragliche ÖPP als ein Gesamtwerk betrachten müssen, dessen Entstehung den Grundsätzen der Transparenz und der Gleichbehandlung Rechnung trägt, deren weiteres Schicksal sich dann aber an den Interessenlagen der beteiligten Partner orientieren muss. Schwebt der EU-Kommission demgegenüber vor, eine vertragliche ÖPP im Laufe ihrer Geltungsdauer immer wieder neu den vergaberechtlichen Regelungen zu unterwerfen, wird sie diesen Interessenlagen nicht gerecht und eine Verbreitung der ÖPP eher behindern.

14. **Halten Sie es für erforderlich, dass bestimmte Aspekte der vertraglichen Rahmenbedingungen für ÖPP auf Gemeinschaftsebene geklärt werden? Falls ja, was sollte geklärt werden?**

Wir halten es nicht für erforderlich, bestimmte Aspekte der vertraglichen Rahmenbedingungen für ÖPP auf Gemeinschaftsebene zu regeln. Vielmehr sollte und muss es den Mitgliedstaaten und Vertragspartnern des ÖPP überlassen bleiben, die einzelnen Vertragsanpassungen zu regeln. Jeder Vertrag bedarf zu seiner erfolgreichen Abwicklung auch der Regelung im Einzelfall. Selbstverständlich lassen sich gewisse Vertragsanpassungen vorhersehen und in den Verdingungsunterlagen berücksichtigen. Dennoch brauchen alle Verträge gewisse Spielräume, um bestimmten Entwicklungen, die angesichts der langen Laufzeit solcher Verträge nicht vorhersehbar sind, Rechnung tragen zu können. Man sollte den beteiligten Parteien zutrauen, dass sie diesen Entwicklungen in Kenntnis der Rahmenbedingungen des Einzelfalles und in Wahrung ihrer aufeinander abgestimmten Interessenlagen am besten Rechnung tragen können. Ein schematisches

Verfahren zur Vertragsanpassung widerspricht den Bedürfnissen der Praxis und könnte dazu führen, dass im Ergebnis für eine oder sogar alle Vertragsparteien dass mit ÖPP verbundene Risiko deutlich zunimmt. Es können nicht alle Unwägbarkeiten eines über Jahre hinweg lebenden Projektes bei der Vergabe bereits überschaut werden.

15. Sind Ihnen bei ÖPP-Konstruktionen besondere Probleme mit der Vergabe von Unteraufträgen bekannt? Welche?

Nein.

16. Rechtfertigt die Existenz von ÖPP auf Vertragsbasis, die die Übertragung eines Aufgabenpaketes an einen einzigen privaten Partner impliziert, ihre Auffassung nach, dass ausführlichere Regeln für die Vergabe von Unteraufträgen eingeführt werden und / oder dass der Anwendungsbereich erweitert wird?

Nein.

17. Halten Sie, allgemeiner gesprochen, eine ergänzende Initiative auf Gemeinschaftsebene zur Klärung oder Umgestaltung der Regeln für die Vergabe von Unteraufträgen für erforderlich?

Eine ergänzende Initiative auf Gemeinschaftsebene wird nicht für erforderlich gehalten. Wettbewerb und Engagement leben davon, dass nicht alle Geschäftsvorgänge bei jedermann gleichförmig und für jedermann voraussehbar erfolgen.

18. Welche Erfahrungen haben Sie mit der Einrichtung institutionalisierter ÖPP gemacht? Lassen Ihre Erfahrungen Sie zu der Schlussfolgerung gelangen, dass die gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen bei institutionalisierten ÖPP-Konstruktionen eingehalten werden? Falls nein, warum nicht?

Die Einrichtung der institutionalisierten ÖPP bedarf ebenfalls guter und gründlicher Vorbereitung (s. Antwort zu Frage 10). Hier ist vor allem die sorgfältige Auswahl der Partner ein wichtiges Kriterium. Zudem muss der Vertrag sorgfältig ausgearbeitet werden und auf einen Interessenausgleich zwischen den Partnern Wert gelegt werden. Sind diese Kriterien erfüllt, kann die institutionalisierte ÖPP durchaus erfolgreich sein. Augenmerk ist insbesondere auf die Mehrheitsverhältnisse sowie auf die Möglichkeiten der Einflussnahme zu legen. Auch ohne nationale oder EU-rechtliche Vorgaben haben sich viele erfolgreiche ÖPP entwickelt. Das spricht gegen das Erfordernis eines besonderen gemeinschaftlichen Rechtsrahmens.

Dabei lassen unsere Erfahrungen die Schlussfolgerung zu, dass die bestehenden gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen eingehalten werden.

19. Halten Sie eine Initiative auf Gemeinschaftsebene für erforderlich, um die Verpflichtungen zu klären und zu vertiefen, die die öffentlichen Auftraggeber in Bezug auf den Wettbewerb zwischen potentiell an einem institutionalisierten ÖPP-Projekt interessierten Wirtschaftsteilnehmern haben? Falls ja, welchen Aspekt halten Sie für besonders wichtig und welche Form sollte eine solche Initiative haben? Falls nein, warum nicht?

Nein.

Aufgrund ihres Organisationsrechts steht es den Kommunen frei, sich zur Erfüllung ihrer Aufgaben der Gestaltungsform der institutionellen ÖPP zu bedienen. Ob die Auswahl der privaten Partner und die Beauftragungen gemischtwirtschaftlicher Unternehmen mit der Erbringung von öffentlichen Dienstleistungen ausschreibungspflichtig sind, hängt unter anderem davon ab, ob es sich um einen öffentlichen Auftrag im Sinne des Vergaberechts handelt. Die Vergaberichtlinien der EU definieren öffentliche Aufträge als entgeltliche Verträge zwischen öffentlichen Auftraggebern und Unternehmern, die Lieferungen sowie Bau- oder Dienstleistungen zum Gegenstand haben. Eine Ausschreibungspflicht besteht für den öffentlichen Auftraggeber, wenn ein Beschaffungsakt vorliegt. Dies ist der Fall, wenn ein Dritter mit der Durchführung einzelner Leistungen beauftragt wird und für diese Leistungen von der öffentlichen Behörde ein Entgelt erhält. Diese Regelungen sind eindeutig und bedürfen keiner weiteren Ergänzung.

Häufig sind es die Privaten, die bestimmte Maßnahmen initiieren. Muss trotz dieser Initiative einzelner privater Unternehmen die Auswahl des Partners ausgeschrieben werden, macht die private Initiative keinen Sinn mehr, so dass mit einem Rückzug der Privaten gerechnet werden kann. Dies dürfte umso eher zutreffen, wenn - wie von der EU-Kommission vorgeschlagen - auch die Vertragsgestaltung gemeinschaftsweiten Regelungen unterzogen werden soll.

20. Welche Maßnahmen oder Verfahren behindern in der Europäischen Union die Einrichtung von ÖPP?

Zum gegenwärtigen Zeitpunkt bestehen keine Hindernisse. Sollte allerdings ein gemeinschaftlicher Rechtsrahmen eingeführt werden, werden die Flexibilität der ÖPP – Modelle behindert und zusätzliche Bürokratie aufgebaut. Das könnte zum Rückgang derartiger Modelle führen.

21. Kennen Sie andere ÖPP – Formen aus Drittländern? Kennen Sie aus Ihren Erfahrungen in solchen Ländern bewährte Verfahrensweisen, die auch für die EU beispielgebend sein könnten? Falls ja, welche?

Nein.

22. Denken Sie, dass es nützlich wäre, im Hinblick auf den großen Investitionsbedarf einzelner Mitgliedstaaten zum Erreichen einer sozialen und dauerhaften Entwicklung gemeinsam und in regelmäßigen Abständen über diese Fragen unter den betroffenen Akteuren nachzudenken und bewährte Verfahrensweisen auszutauschen? Sollte die Kommission nach ihrer derzeitigen Auffassung ein derartiges Netzwerk aufbauen?

Ein Erfahrungsaustausch ist grundsätzlich immer sinnvoll. Wir sind daher gerne bereit, uns an einem solchen Austausch auch auf europäischer Ebene zu beteiligen.

Stellungnahme

des Verbandes der Elektrizitätswirtschaft
– VDEW – e. V.
zum Grünbuch ÖPP und Konzessionen

Frankfurt am Main, 29. Juli 2004

VDEW ist der Spitzenverband der Deutschen Elektrizitätswirtschaft. Er repräsentiert mit seinen 750 Mitgliedern knapp 95 Prozent des gesamten deutschen Strommarktes. Zu seinen Mitgliedern zählen Unternehmen der privaten Wirtschaft, sowie auch gemischtwirtschaftliche und öffentliche – zumeist kommunale – Unternehmen, deren Gemeinsamkeit es ist, die sichere, preiswerte sowie umweltverträgliche Stromversorgung der Verbraucher sicherzustellen.

Die nachfolgende Stellungnahme setzt sich mit der Konzeption des Grünbuchs und ihrer Anwendung auf den Strombereich auseinander. Wegen der im Grünbuch seitens der Kommission gestellten Fragen zu einzelnen Themenkomplexen verweist der VDEW auf das Papier "Antworten des VDEW zum Fragenkatalog des Grünbuchs zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen vom 30.04.2004".

1. Vorbemerkung

Am 30.04.2004 hat die EU-Kommission das Grünbuch zu öffentlich-privaten Partnerschaften (ÖPP) und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen vorgelegt. Die Grundintentionen des Grünbuchs lassen sich wie folgt zusammenfassen und bewerten:

- Entgegen den geltenden europarechtlichen Bestimmungen soll auch die Vergabe von Dienstleistungskonzessionen künftig einer wie auch immer gearteten Ausschreibungsverpflichtung unterliegen.

- Für institutionalisierte ÖPP soll ein gemeinschaftsweiter Rechtsrahmen gefunden werden, unter dem auch diesbezügliche Projekte ausgeschrieben werden können (müssen).

- Auch die letzten noch verbliebenen Freiräume kommunaler Selbstbestimmung sollen reglementiert und damit die noch bestehenden innovativen Kräfte in das Korsett starrer europarechtlicher Regelungen gepresst werden, um die überbordende Bürokratisierung nochmals qualitativ zu steigern.

- Die im Grünbuch angedachten innovativen Ideen sind fern ab jeder wirtschaftlichen Realität und verursachen außer Kosten keinen Fortschritt in der wirtschaftlichen Entwicklung und Produktivität.

- Es wird vollständig übersehen, dass die Institutionalisierung von ÖPP schon heute im harten Wettbewerb zwischen den Marktteilnehmern erfolgt und keiner „Liberalisierung“ bedarf.

- Die Grundlage vergaberechtlicher Bestimmungen, „Beschaffungen“ der öffentlichen Hand zu regeln, wird vollständig ignoriert und auf Marktsituationen ausgedehnt, in denen die öffentliche Hand als Anbieter und unter keinem Blickwinkel als Nachfrager auftritt.

Die erneute Initiative der EU-Kommission zur Ausweitung der vergaberechtlichen Regelungsbereiche und Regelungstiefen verkennt die tatsächlichen Marktverhältnisse.

Gerade in der Energiewirtschaft hat der Wettbewerb eine Intensität erreicht, dass eine Unterscheidung zwischen Marktteilnehmern, die privat dominiert werden und Marktteilnehmern mit öffentlicher Mehrheitsbeteiligung zwangsläufig zu einer Diskriminierung der mehrheitlich öffentlichen Unternehmen führt. Obwohl beide Marktteilnehmer im Wettbewerb zueinander stehen, sollen sie doch unterschiedlichen Regelungssystemen gehorchen - eine mit dem Liberalisierungs- und Wettbewerbsgedanken schlicht nicht zu vereinbarende Systematik.

2. Anwendungsbereich

Es fällt zunächst schwer, die vom Grünbuch behandelten ÖPP zu isolieren. Die sehr weite Formulierung „ÖPP sind Formen der Zusammenarbeit zwischen öffentlichen Stellen und Privatunternehmen zwecks Finanzierung, Bau, Betrieb oder Unterhalt einer Infrastruktur oder der Bereitstellung einer Dienstleistung“ ist mangels hinreichender Konturen nicht hilfreich für den angestrebten Diskussionsprozess, da sich jede Kommentierung zwangsläufig anhand eigener Auslegungen zum Begriff ÖPP orientieren muss.

3. Kosten-/ Nutzenverhältnis

Das vorgelegte Grünbuch lässt die Aussage vermissen, inwieweit die durch europaweite Ausschreibungen entstehenden Kosten sich zu den Vorteilen verhalten. Man kann wohl davon ausgehen, dass die durch EU-weite Verfahren ausgelösten Bürokratiekosten die generierten Vorteile neutralisieren. Die vor diesem Hintergrund unbedingt erforderliche Begründung der Regelungsnotwendigkeit wird an keiner Stelle erbracht.

4. Der liberalisierte Strommarkt braucht keine ÖPP-Vorschriften

Öffentliche Ausschreibungen können Wettbewerb in Märkte und Marktsegmente tragen, die dem Wettbewerb bislang verschlossen sind. Mit den Binnenmarktrichtlinien von 1996 und 2002 ist der Elektrizitätsmarkt jedoch bereits wirkungsvoll geöffnet worden.

Der Gemeinschaftsgesetzgeber hat sich zur Einführung eines wirkungsvollen Wettbewerbs im Strombereich für einen sektoralen Ansatz entschieden.

Dort, wo Mitgliedstaaten Elektrizitätsunternehmen im allgemeinen wirtschaftlichen Interesse Verpflichtungen auferlegen, stellt Art. 3 Abs. 2 – 4 der Richtlinie 2003/54/EG vom 26. Juni 2003 über gemeinsame Vorschriften für den Elektrizitätsbinnenmarkt und zur Aufhebung der Richtlinie 96/92/EG sicher, dass dies auf nicht-diskriminierende, transparente Weise geschieht. Erläuternd hat die Generaldirektion TREN ihre Sicht der korrekten Handhabung gemeinwirtschaftlicher Verpflichtungen in einem Vermerk vom 16. Januar 2004 niedergelegt.

Es ist daher zu fordern, dass der sektoral geregelte Elektrizitätsbinnenmarkt von einer sektorunspezifischen ÖPP-Regelung ausgenommen wird.

Öffentliche Ausschreibungen können ein wirksames Mittel zur Sicherung des Wettbewerbs sein, insbesondere dann, wenn es Anhaltspunkte hierfür gibt, dass der Wettbewerb bisher nicht funktioniert hat.

In einem Sektor mit funktionierendem Wettbewerb - wie dies in der Stromwirtschaft der Fall ist - und hoher Kundenzufriedenheit (siehe hierzu VDEW-Kundenfokus 2003) würde die Einführung von aufwendigen öffentlichen Ausschreibungen zusätzliche Kosten verursachen, die letztlich der Verbraucher zu tragen hätte.

Der deutsche Strommarkt ist mit dem in Kraft treten des modifizierten Energiewirtschaftsgesetzes am 29. April 1998 insgesamt liberalisiert worden. Neben der stromintensiven Industrie haben auch kleine Gewerbekunden, sowie Haushalte das Recht, ihren Stromversorger frei zu wählen. Von diesem Recht haben in Deutschland eine Vielzahl von Kunden Gebrauch gemacht (vgl. hierzu 3. Benchmarking-Bericht der Europäischen Kommission zur Vollendung des Energiebinnenmarktes vom 01.03.2004).

Die Einführung eines speziellen Vergaberegimes für ÖPP passt jedenfalls für den Stromsektor aus einem weiteren Grund nicht. Der Gemeinschaftsgesetzgeber hat gerade vor kurzem die Weichen dafür gestellt, andere Aktivitäten von Unternehmen der Elektrizitätswirtschaft von der Pflicht zu einer förmlichen Vergabe auszunehmen. Aufgrund des nunmehr bereits seit sechs Jahren fest etablierten Wettbewerbs im Stromsektor, sollen die Stromversorger nach dem Willen des europäischen Richtliniengebers nunmehr von der bestehenden Ausschreibungspflicht für Bau-, Liefer- sowie Dienstleistungsaufträge befreit werden (vgl. Richtlinie 2004/17/EG des Rates sowie des Europäischen Parlaments vom 31. März 2004 zur Koordinierung der Zuschlagserteilung durch Auftraggeber im Bereich der Wasser-, Energie- und Verkehrsversorgung sowie der Postdienste). Eine Gleichstellung mit öffentlichen Auftraggebern erscheint nicht mehr sachgerecht.

5. ÖPP sind kein Königsweg

Im Grünbuch ist eine eindeutige Tendenz festzustellen, die Aufgabenerfüllung durch ÖPP zu bevorzugen, wobei die ordnungspolitische Zielrichtung dieser Präferenz an keiner Stelle erläutert wird. Dabei sollen die Auswahl des privaten Partners bei der Bildung einer institutionalisierten ÖPP sowie die Erteilung von Dienstleistungskonzessionen (ÖPP auf Vertragsbasis) dem Vergaberecht unterworfen werden. Jedoch sind ÖPP kein Königsweg, sondern nur eine von vielen möglichen Organisationsformen.

Vorab muss die ordnungspolitische Grundsatzfrage diskutiert und geklärt werden, ob dieser Ansatz sinnvoll und mit nationalem Verfassungsrecht bzw. mit europäischem Primärrecht vereinbar ist. Das Europäische Parlament jedenfalls hat sich in dem Beschluss vom 14. Januar 2004 zum Grünbuch DAI ausdrücklich zum Selbstbestimmungsrecht der Gemeinden bekannt.

Jede Richtlinie ist unter dem Blickwinkel zu prüfen, ob durch den Regelungsgehalt die Eigentumsordnungen der Mitgliedsstaaten betroffen werden. Durch die Fokussierung auf den Bereich der ÖPP wird der Eindruck erweckt, allein ÖPP sind prädestiniert, Dienstleistungen von allgemeinem (wirtschaftlichen) Interesse adäquat leisten zu können. Eine derartige Zuspitzung missachtet jedoch das Recht öffentlicher Einrichtungen, Aufgaben, Organisation und Finanzierung frei zu wählen. Entsprechend muss eine Auslegung der Vorschläge ergeben, dass der Bereich der öffentlich-öffentlichen Partnerschaften aus dem Anwendungsbereich herausfällt. Die Bildung interkommunaler Zusammenschlüsse muss weiter ohne formalisiertes Ausschreibungsverfahren möglich sein.

6. Sog. "Konzessionsverträge" nach deutschem Recht sind keine Konzessionen

In der deutschen Strom- und Gaswirtschaft gibt es keine "Konzessionen" im Sinne des Grünbuchs.

Die im Grünbuch genannten Beispiele betreffen durchgängig die Einbeziehung Privater in die Erfüllung staatlicher Aufgaben. Welche Tätigkeiten dem jeweiligen Mitgliedstaat zugewiesen sind und welche jedermann für eine privatwirtschaftliche Betätigung offen stehen, bestimmt sich allein nach dem jeweiligen nationalen Recht. Der EG-Vertrag ist wirtschaftspolitisch neutral und überlässt den Mitgliedstaaten die Abgrenzung zwischen dem Bereich öffentlichen Wirtschaftens und privaten Wirtschaftens; die Eigentumsordnungen der Mitgliedstaaten sollen unberührt bleiben (Art. 295 EGV).

In Deutschland steht die Betätigung in der Strom- und Gasversorgung einschl. des Netzbetriebs jedermann im Rahmen der Berufs- und Gewerbefreiheit offen. Zwar ist dazu eine Betriebsaufnahmegenehmigung gem. § 3 EnWG erforderlich. Dadurch wird nicht etwa ein "Recht zur Energieversorgung" einem privaten Unternehmen quasi konstitutiv "verliehen". Denn der Staat hat sich in Deutschland eine energiewirtschaftliche Betätigung nicht zur eigenen Wahrnehmung gesetzlich vorbehalten (wie z. B. teilweise im Bereich der Abfallbeseitigung). Bei der Betriebsaufnahmegenehmigung gem. § 3 EnWG handelt es sich um eine schlichte gewerberechtliche Genehmigung zum Schutz des öffentlichen Interesses und schwächerer Marktpartner. Deshalb kann sich in Deutschland im Bereich der Strom- und Gasversorgung die Frage einer partiellen Privatisierung im Rahmen einer ÖPP nicht stellen.

Auch in den sog. "Konzessionsverträgen" wird kein Recht zur Energieversorgung quasi konstitutiv von der Kommune auf Private übertragen. Dies würde voraussetzen, dass die Tätigkeit als Energieversorger oder Netzbetreiber zuvor per Rechtsvorschrift ausdrücklich allein den Kommunen zugewiesen worden wäre. Eine solche Zuweisung im Sinne staatlicher Wahrnehmungsverantwortung gibt es in Deutschland nicht. In den sog. Konzessionsverträgen im Bereich der Strom- und Gasversorgung geht es in erster Linie um die Einräumung von Nutzungsrechten zur Verlegung von Verteilungsleitungen im öffentlichen Straßengrund, der i. d. R. im privatrechtlichen Eigentum der Kommunen (Gemeinden, u. U. auch Kreise) steht. Ohne solche Grundstücksnutzungsrechte können Letztverbraucher nicht in größerem Umfang an das Strom- und Gasnetz angeschlossen werden, da die öffentlichen Wege praktisch alle Verbrauchsorte im Gemeindegebiet umschließen.

Das Grünbuch verdeutlicht die Bemühungen der Europäischen Kommission, die Ausschreibungspflichten zu erweitern. Letztlich soll ein Ausschreibungszwang für alle, insbesondere kommunalen Infrastrukturbereiche implementiert werden.

Die ÖPP auf Vertragsbasis, die im Grünbuch einen breiten Raum einnehmen, erfassen bei unbefangener Betrachtung sämtliche öffentliche Aufträge, die schon heute dem Vergaberecht unterfallen. Unter letzterem Blickwinkel bleibt für die ÖPP auf Vertragsbasis nur noch ein Regelungsbereich: die Dienstleistungskonzessionen.

Der VDEW sieht gemeinsam mit dem Verband kommunaler Unternehmen – VKU - diesbezüglich aber weder einen konkreten legislatorischen Handlungsbedarf noch erkennt er entsprechende Zuständigkeiten auf europäischer Ebene. Selbst die Kommission erkennt im Übrigen an, dass die Dienstleistungskonzessionen, auch nach den gerade erst verabschiedeten Vergaberichtlinien, nicht ausschreibungspflichtig sind. Deren Einbeziehung war diskutiert und letztlich abgelehnt worden.

In den sog. Konzessionsverträgen im Strom- und Gasbereich wird, anders als in den vom Grünbuch genannten öffentlichen Konzessionierungen, kein Recht zur örtlichen Energieversorgung oder zum örtlichen Verteilungsnetzbetrieb auf einen Privaten übertragen. Diese Tätigkeiten stehen in Deutschland ohnehin privatwirtschaftlicher Betätigung offen, bedürfen keines zusätzlichen Privatisierungsakts.

Auch vergaberechtlich sind die im Grünbuch genannten öffentlichen Konzessionierungen nicht mit den sog. "Konzessionsverträgen" im Strom- und Gasbereich vergleichbar. Denn hier ist die Gemeinde nicht Nachfrager, sondern **Anbieter** (eines Nutzungsrechts an kommunalen Grundstücken). Das Vergaberecht ist aber schon vom Grundansatz her nur anwendbar auf eine **Nachfrage** öffentlicher Hände (nach Gütern, Bau- oder Dienstleistungen), d. h. auf eine öffentliche Bedarfdeckung, wie sie im Bereich der dem Staat gesetzlich zugewiesenen Aufgaben typischerweise entsteht.

Nachfrager ist bei den sog. "Konzessionsverträgen" im Strom- und Gasbereich das **EVU**, das sich die für den örtlichen Strom- oder Gasnetzbetrieb unverzichtbare "Ressource" Wegenutzung beschaffen will. Die Beschaffungstätigkeit der EVU soll aber auf Grund der neuen Sektorenrichtlinie gerade nicht mehr besonderen Ausschreibungsvorschriften unterliegen. Deshalb macht es keinen Sinn, die Wegerechtsbeschaffung der EVU unter diesem Blickwinkel einer besonderen Ausschreibungsregelung zu unterwerfen (zumal je Gemeinde nur ein einziger Wegerechtsanbieter in Betracht kommt, nämlich die Kommune selbst).

Auch deshalb macht die Einbeziehung der sog. Konzessionsverträge der deutschen Strom- und Gaswirtschaft in vergaberechtsähnliche Regelungen, wie sie das Grünbuch für die dort genannten öffentlichen Konzessionierungen intendiert, keinen Sinn.

Auch wenn Gemeinden sich im Rahmen der jeweiligen gemeindewirtschafts-rechtlichen Vorschriften selbst über ein eigenes Stadtwerk als Energieversorger oder auch als Netzbetreiber betätigen, nehmen sie damit keine staatliche Aufgabe wahr, sondern werden wirtschaftlich tätig. Gem. § 3 EnWG steht ihnen eine solche Betätigung in gleicher Weise offen wie Privaten; auch sie benötigen dazu eine Betriebsaufnahmegenehmigung (s. o.), die aber nur aus den in § 3 EnWG genannten Gründen verweigert werden darf (gebundene Erlaubnis).

Obgleich die o.g. Konzessionen im energiewirtschaftlichen Sinne keinen vergaberechtlich zu bewertenden Fall darstellen, werden auch die Leitungs- und Wegerechte in einem transparenten und für alle Marktteilnehmer offenen Verfahren eingeräumt. So regelt § 13 EnWG dass „Gemeinden spätestens zwei Jahre vor Ablauf von Konzessionsverträgen das Vertragsende in geeigneter Form bekannt machen.“ In gleicher Weise wird der Neuabschluss oder eine Verlängerung des gegenständlichen Vertrages gehandhabt. Mit diesem Verfahren, bei denen allen Marktteilnehmern - d.h. gerade auch ausländischen Wettbewerbern - die Möglichkeit der Beteiligung eingeräumt wird, ist eine Diskriminierung bereits systembedingt ausgeschlossen. Außerdem bietet das Verfahren den unabweisbaren Vorteil der Kostengünstigkeit. Vor diesem Hintergrund wird noch deutlicher, dass es keiner gesonderten Regelungen bedarf. Insbesondere mit Blick auf das Subsidiaritätsprinzip ist bereits die Regelungskompetenz zu verneinen.

7. Gesellschafts- und fusionsrechtliche Vorschriften zur Kontrolle institutioneller ÖPP ausreichend

Wenn Kommunen Anteile an einem solchen Stadtwerk veräußern, so unterliegt dies den ganz normalen gesellschafts- und fusionsrechtlichen Vorschriften. Auch hier wird die Gemeinde als **Anbieter** (eines Geschäftsanteils an ihrem Unternehmen) tätig; es geht also nicht um kommunale Bedarfsdeckung. Deshalb sind auch hier vergaberechtliche Grundsätze nicht übertragbar, und solche Veräußerungsfälle sind nicht vergleichbar mit den im Grünbuch genannten Beispielen für eine institutionelle ÖPP.

Es muss gewährleistet sein, dass auf staatlicher wie kommunaler Ebene die Gestaltungsfreiheit bei den ÖPP erhalten bleibt. Eine einheitliche europäische Definition oder eine Standardisierung der Gesellschaftsverträge ist weder erforderlich, noch wäre sie zweckmäßig.

Bei Verkäufen ganzer Unternehmen oder auch von Teilen gelten die einschlägigen gesellschafts- und fusionsrechtlichen Vorschriften, auch wenn der Verkäufer die öffentliche Hand ist. In einem solchen Fall beschafft die öffentliche Hand jedoch keine Leistung für den eigenen Bedarf / für die eigenen Aufgaben, sondern rückt selbst in die Position eines Anbieters. Entsprechend ist eine Subsumtion unter vergaberechtliche Grundsätze nicht möglich und damit auch nicht vergleichbar mit den im Grünbuch skizzierten Szenarien für institutionelle ÖPP. Überdies ist dieser Bereich von starkem europaweitem Wettbewerb geprägt, wie Beteiligungen der EdF bei EnBW, Vattenfall Europe bei HEW/BEWAG oder auch ESSENT bei swb deutlich zeigen.

8. Das Grünbuch lässt Grundprinzipien der Europäischen Union außer Betracht

Bei der mit dem Grünbuch eröffnete Debatte über ÖPP und Konzessionen sollen die Grundprinzipien des EG-Vertrages nicht außer Acht gelassen werden. Gemäß dem Subsidiaritätsprinzip darf die Gemeinschaft nur tätig werden, soweit die Ziele der in Betracht gezogenen Maßnahmen auf Ebene der Mitgliedstaaten nicht ausreichend erreicht werden können (Art. 5 EG-Vertrag). Das Grünbuch legt in nicht ausreichender Weise dar, dass ein Handeln der Gemeinschaft in Bezug auf ÖPP und Konzessionen erforderlich ist, um die Ziele der Gemeinschaft in dieser Hinsicht zu erreichen. Vielmehr müsste zunächst die Umsetzung der jüngsten Richtlinien der EU in Bezug auf die Auftragsvergabe abgewartet werden, deren Umsetzung und praktische Auswirkungen auf den Markt analysiert werden. Aufgrund dieser Feststellungen müsste dann entschieden werden, ob zur Erreichung der Ziele der Gemeinschaft weitere Maßnahmen im Auftragsvergabewesen erforderlich sind. Das auf dem Subsidiaritätsprinzip beruhende Recht der Mitgliedstaaten, über die Form der Erbringung öffentlicher Dienstleistungen zu entscheiden, darf nicht ausgehebelt oder eingeschränkt werden.

Aus dem Subsidiaritätsprinzip folgt auch für die ÖPP auf Vertragsbasis, dass die primärrechtlichen Zuständigkeiten der EU nur dann gegeben sind, wenn eine gemeinschaftsweite Regelung gerechtfertigt und sachlich geboten ist. Das ist dann der Fall, wenn in den Mitgliedsstaaten vorgenommene Maßnahmen zu keiner ausreichenden Entwicklung i.S. der Grundsätze des EG-Vertrages führen. Insbesondere lässt die Abfassung des Grünbuchs zum jetzigen Zeitpunkt den Schluss zu, nicht einmal an den Auswirkungen der Neu-Kodifikationen der Richtlinien 2004/17/EG[1] und 2004/18/EG[2] interessiert zu sein, deren Auswirkungen auf den Wettbewerb und die wirtschaftliche Entwicklung noch abzuwarten bleiben. Diese Vorgehensweise lässt ernsthafte Zweifel an der Konformität des Gründbuchs mit dem Subsidiaritätsprinzip aufkommen.

Diesen Grundsatz hat der Konvent zur Zukunft Europas in seinem Vorschlag für die künftige europäische Verfassung bekräftigt. Für die Regelung innerer Angelegenheiten der Mitgliedstaaten, wie innere Verfasstheit und Organisation, sowie für die Frage, welche Aufgaben die Mitgliedstaaten erfüllen und wie sie dies tun, besteht somit keine Kompetenz der Europäischen Union.

Als weiteres Grundsatz-Prinzip des EG-Vertrages ist die Neutralität der Europäischen Union in Bezug auf die Eigentumsordnung der Mitgliedstaaten zu beachten (Art. 295 EG-Vertrag). Die Europäische Union hat alles zu unterlassen, dass die Eigentumsstrukturen in den einzelnen Mitgliedstaaten in Frage stellen würde. Maßnahmen, die die freie Betätigung von Unternehmen wesentlich einschränken, können zugleich eine Einschränkung des nach dem deutschen Grundgesetz verbriefte Eigentumsgarantie bewirken.

Dies gilt entsprechend Artikel 295 EGV, nach dem die Eigentumsordnung in den verschiedenen Mitgliedstaaten vom EGV unberührt bleibt, insbesondere für die Frage, ob öffentliche Aufgaben in öffentlicher, privater oder gemischtwirtschaftlicher Trägerschaft erfüllt werden.

Wegen des Prinzips der Neutralität der Eigentumsordnungen darf es seitens der europäischen Institutionen keine Präferenz für bestimmte Formen der Trägerschaft geben.

Außerdem soll durch den neuen Verfassungsartikel I-5 auf europäischer Ebene die Wahlfreiheit der Kommunen, abgeleitet aus dem Recht auf Selbstorganisation, festgeschrieben werden. Damit werden die Garantien des Artikels 28 Abs. 2 Grundgesetz auf europäischer Ebene – an höchster Stelle – anerkannt. Vor diesem Hintergrund ist es nicht verständlich, dass die Kommission mit dem vorliegenden Grünbuch versucht, Kompetenzen auf die EU-Ebene hoch zu ziehen und lokale dezentrale Zuständigkeiten einer gemeinschaftsweiten Regelung zu unterwerfen.

[1] Richtlinie 2004/17/EG des Europäischen Parlaments und des Rates vom 31. März 2004 zur Koordinierung der Zuschlagserteilung durch Auftraggeber im Bereich der Wasser-, Energie- und Verkehrsversorgung sowie der Postdienste

[2] Richtlinie 2004/18/EG des Europäischen Parlaments und des Rates vom 31. März 2004 zur Koordinierung der Verfahren zur Vergabe öffentlicher Bauaufträge, Lieferaufträge und Dienstleistungsaufträge

Fazit

Weder aus wirtschaftlicher, aus wettbewerblicher noch aus rechtlicher Sicht ist das Ansinnen des „Gründbuchs zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen“ vertretbar und sinnvoll. Der Erlass einer neuen Richtlinie in einem von Wettbewerb geprägten Wirtschaftsbereich führt zu einer Überregelementierung und zu einer volkswirtschaftlich bedenklichen Zunahme an Bürokratisierung, die ein weiteres ernstes Hemmnis für Wachstum und Entwicklung darstellen würde. Die Ausweitung europäischer Regelungskompetenzen bedeutet einen ernsten Eingriff in die Eigentumsordnungen der Nationalstaaten und findet auch keine - ohnehin nicht zulässige - Rechtfertigung in den Ausnahmebestimmungen zum Subsidiaritätsprinzip. **Das vorgelegte Grünbuch darf auf keinen Fall in einer entsprechenden Richtlinie oder in die Modifizierung bestehender Richtlinien münden.** Jedenfalls ist zu fordern, dass der sektoral geregelte Elektrizitätsbinnenmarkt von einer sektorunspezifischen ÖPP-Regelung ausgenommen wird.

VDEW

Verband der
Elektrizitätswirtschaft e.V.

Antworten des VDEW

zum Fragenkatalog des Grünbuchs zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen
vom 30.04.2004

Frankfurt am Main, 29. Juli 2004

VDEW ist der Spitzenverband der Deutschen Elektrizitätswirtschaft. Er repräsentiert mit seinen 750 Mitgliedern knapp 95 Prozent des gesamten deutschen Strommarktes. Zu seinen Mitgliedern zählen Unternehmen der privaten Wirtschaft, sowie auch gemischtwirtschaftliche und öffentliche – zumeist kommunale – Unternehmen, deren Gemeinsamkeit es ist, die sichere, preiswerte sowie umweltverträgliche Stromversorgung der Verbraucher sicherzustellen.

Allgemein fällt auf, dass das Grünbuch nicht in der gebotenen Offenheit formuliert wird, die eine allgemeine und umfassende Diskussion zu ÖPP ermöglichen würde. Viele der im Grünbuch gestellten Fragen werden mit einer Tendenz gestellt, die ein Ergebnis bereits vorwegnehmen.

1. Welche Formen von ÖPP auf Vertragsbasis sind Ihnen bekannt? Gibt es in Ihrem Land spezifische (gesetzliche oder andere) Rahmenbedingungen für derartige Konstruktionen?

Die deutschen Stromversorger, ob privat, gemeinwirtschaftlich oder öffentlich gehen vielfach Partnerschaften ein, die rein privater Natur sein können aber auch mit Partnern aus der öffentlichen Wirtschaft bzw. mit staatlichen Stellen – zumeist Gemeinde oder Gemeindeverbände abgeschlossen werden können. Die hierfür erforderlichen Verträge werden nach geltendem Energie-, Umwelt- und Kartellrecht unter Wahrung der Verbraucherrechte abgeschlossen. Aufwendige Ausschreibungsverfahren erscheinen wegen hoher Kosten kontraproduktiv.

Das Grünbuch erklärt, dass es für den Begriff der ÖPP – und damit auch für den der ÖPP auf Vertragsbasis - keine gemeinschaftsweit geltende Definition gibt (Rn.1). Auch gäbe es für diese Rechtsfigur kein besonderes System im Gemeinschaftsrecht (Rn. 8). Soweit das Grünbuch selbst „ÖPP auf Vertragsbasis“ als ÖPP definiert, „bei denen die Partnerschaft zwischen öffentlichem und privaten Sektor nur auf vertraglichen Beziehungen basiert“ (Rn. 20), bleibt es sehr allgemein. Vor dem Hintergrund dieser Konturlosigkeit des Begriffs der ÖPP auf Vertragsbasis tut sich der VDEW genau wie VKU schwer, ÖPP auf Vertragsbasis im Sinne des Grünbuchs überhaupt – geschweige denn abschließend – zu benennen.

Das Vorhaben der Kommission, Dienstleistungskonzessionen den Vergaberegeln zu unterwerfen, ist u.a. deshalb verfehlt, weil das Vergaberecht nur auf Beschaffungsvorgänge anwendbar und seiner ratio nach auch nur diesbezüglich sinnvoll ist. Dies erklärt auch die geltende Rechtslage, nach der Dienstleistungskonzessionen nicht dem Vergaberecht unterliegen – übrigens auch nach den neuen EU-Richtlinien zum Vergaberecht (2004/17/EG und 2004/18/EG) nicht.

In Deutschland werden Dienstleistungskonzessionen durch Verträge „vergeben“, wobei die Auswahl des Vertragspartners im pflichtgemäßen Ermessen der jeweiligen öffentlich-rechtlichen Körperschaft steht.

Im Übrigen liegen den hier in Rede stehenden Dienstleistungskonzessionen regelmäßig privatrechtliche Verträge zugrunde, deren Inhalte sich an den einschlägigen Gesetzen messen lassen müssen und gerichtlich überprüfbar sind. Ein Beispiel für eine derartige gesetzliche Regelung stellt § 13 Abs. 2 EnWG dar, wonach die Gemeinden die Neuvergabe von Wegenutzungsverträgen zur Strom- und Gasversorgung 2 Jahre vor Ablauf des Altvertrags öffentlich bekannt machen müssen, § 13 Abs. 3 EnWG. Auf diese Weise wird Transparenz und Gleichbehandlung sichergestellt. Weitere Regelungen ergeben sich aus der Konzessionsabgabenverordung.

2. Nach Auffassung der Kommission wird die Umsetzung des wettbewerblichen Dialogs in einzelstaatliche Rechtsvorschriften den betroffenen Parteien ein Verfahren an die Hand geben, das sich ganz besonders für die Vergabe öffentlicher Aufträge in Zusammenhang mit der Einrichtung einer ÖPP auf Vertragsbasis eignet und gleichzeitig die Grundrechte der Wirtschaftsteilnehmer wahrt. Stimmen Sie dem zu? Falls nein, warum nicht?

Dieser Aussage ist nicht zuzustimmen. Denn der wettbewerbliche Dialog ist für die Vergabe öffentlicher Aufträge vorgesehen und damit ein Instrument des Vergaberechts. So heißt es in Art. 29 der Vergabe-Richtlinie 2004/18/EG, dass „der öffentliche Auftraggeber“ […] den wettbewerblichen Dialog „[b]ei besonders komplexen Aufträgen“ anwenden kann. Sinn und Zweck des wettbewerblichen Dialogs ist es also bei unübersichtlichen, schwer zu durchdringenden Sachverhalten das Vergabeverfahren zu vereinfachen bzw. überhaupt erst zu ermöglichen (vgl. Grünbuch Rn. 25). Für den Bereich der Dienstleistungskonzessionen gilt, wie bereits zu Frage 1 ausgeführt, dass das Vergaberecht zu Recht nicht anwendbar ist. Insoweit gibt es keine Verbindung zwischen dem vergaberechtlichen Instrument des wettbewerblichen Dialogs und den Dienstleistungskonzessionen.

Im Übrigen sind die Sachverhalte, die den Dienstleistungskonzessionen in den Bereichen, in denen die Unternehmen des VDEW tätig sind, zugrunde liegen, keineswegs derart komplex, wie sie es aber nach der ratio des Art. 29 für die Eröffnung des wettbewerblichen Dialogs sein müssten. Das heißt, die Tatbestandsvoraussetzungen des Art. 29 würden bei den hier in Rede stehenden Sachverhalten nicht erfüllt sein. Dies ist ein weiterer Anhaltspunkt dafür, dass der wettbewerbliche Dialog des Vergaberechts von der Frage der Erteilung von Dienstleistungskonzessionen streng zu trennen ist.

3. Sehen Sie in Bezug auf diese Aufträge neben der Wahl des Vergabeverfahrens andere Punkte, die mit dem Gemeinschaftsrecht über öffentliche Aufträge in Konflikt stehen könnten? Wenn ja, nennen Sie diese und begründen Sie!

Die Frage stellt sich in der Elektrizitätswirtschaft aus den unter Frage 2 geführten Gründen nicht.

4. Haben Sie bereits einmal ein Verfahren zur Vergabe einer Konzession in der Europäischen Union organisiert, daran teilgenommen bzw. ein solches organisieren oder daran teilnehmen wollen? Welche Erfahrungen haben Sie gemacht?

In der Stromwirtschaft bilden die Konzessionsverträge keine "Konzessionen" im herkömmliche Sinne, sondern es geht um privatrechtliche Wegenutzungsrechte. In den in Deutschland üblichen „Konzessionsverträgen“ wird kein Recht zur Energieversorgung vom Staat auf Private übertragen. Vielmehr haben sie die Nutzung öffentlicher Wegerechte zum Gegenstand, für die das Unternehmen nicht ein Entgelt erhält, sondern entrichtet.

5. Halten Sie das derzeitige Gemeinschaftsrecht für präzise genug, um die konkrete und effektive Teilnahme von Gesellschaften oder Gruppierungen aus anderen Staaten an den Konzessionsvergabeverfahren sicherzustellen? Sind Sie der Ansicht, dass in dieser Hinsicht normalerweise ein tatsächlicher Wettbewerb herrscht?

Art. 43 ff. EGV sind hinreichend präzise. Im besonderen Fall der Dienstleistungskonzessionen besteht für Gesellschaften bzw. Gruppierungen aus anderen Staaten effektiv die Möglichkeit, Konzessionär zu werden. Auch im Rahmen des Abschlusses der sog. Stromkonzessionen, bei denen keine klassische Vergabe stattfindet, hat die öffentlich-rechtliche Körperschaft vor Ort die Partner ihrer Konzessionsverträge beispielsweise nach § 13 EnWG in einem transparenten und diskriminierungsfreien Verfahren auszuwählen. Beteiligungen von ausländischen privaten Partnern an Dienstleistungskonzessionen existieren. Soweit unmittelbar keine Konzessionsverträge zwischen ausländischen Unternehmen und deutschen Gebietskörperschaften vorliegen, ist zu bedenken, dass ausländische Unternehmen oftmals mittelbar über institutionalisierte ÖPP an Dienstleistungskonzessionen beteiligt sind. Dies ist dann der Fall, wenn diese an deutschen Unternehmen gesellschaftsrechtlich beteiligt sind, die ihrerseits Dienstleistungskonzessionen - unmittelbar oder mittelbar - innehaben (z. B. EdF/EnBW/Stadtwerke Düsseldorf AG, Vattenfall Europe/HEW/ BEWAG).

Hinsichtlich des tatsächlichen Wettbewerbs gilt: Inwieweit faktisch Gruppierungen aus anderen Staaten Dienstleistungskonzessionen erhalten, ist kein Gradmesser für den tatsächlichen Wettbewerb. Insoweit sind also unternehmenspolitische Entscheidungen für das wettbewerbliche Verhalten der Unternehmen aus anderen Staaten verantwortlich. Der derzeit geltende Rechtsrahmen ermöglicht sowohl die Teilnahme am Wettbewerb als auch den Erhalt der Konzession.

6. Halten Sie einen Vorschlag für einen gemeinschaftlichen Rechtsakt zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe für wünschenswert?

Nein.
Es besteht vielmehr die Gefahr, dass bei der mit dem Grünbuch eröffneten Debatte über ÖPP und Konzessionen die Grundprinzipien des EG-Vertrages außer Acht gelassen werden. Gemäß dem Subsidiaritätsprinzip darf die Gemeinschaft nur tätig werden, soweit die Ziele der in Betracht gezogenen Maßnahmen auf Ebene der Mitgliedstaaten nicht ausreichend erreicht werden können (Art. 5 EG-Vertrag). Das Grünbuch legt in nicht ausreichender Weise dar, dass ein Handeln der Gemeinschaft in Bezug auf ÖPP und Konzessionen erforderlich ist, um die Ziele der Gemeinschaft in dieser Hinsicht zu erreichen. Vielmehr müsste zunächst die Umsetzung der jüngsten Richtlinie der EU in Bezug auf die Auftragsvergabe abgewartet werden. Aufgrund dieser Feststellungen müsste dann entschieden werden, ob zur Erreichung der Ziele der Gemeinschaft weitere Maßnahmen im Auftragsvergabewesen erforderlich sind.

Ein weiterer Grundsatz des EG-Vertrages ist die Neutralität der Europäischen Union in Bezug auf die Eigentumsordnung der Mitgliedstaaten (Art. 295 EG-Vertrag). Die Europäische Union hat alles zu unterlassen, das die Eigentumsstrukturen in den einzelnen Mitgliedstaaten in Frage stellen würde. Maßnahmen, die die freie Betätigung von Unternehmen wesentlich einschränken, können zugleich eine Einschränkung der nach dem deutschen Grundgesetz verbrieften Eigentumsgarantie bewirken.

Eine Ausschreibungsverpflichtung für Dienstleistungskonzessionen würde übrigens bedeuten, dass auch die Konzessionserteilung an institutionalisierte ÖPP auszuschreiben wäre. Auf das Zustandekommen und Weiterbestehen von institutionalisierten ÖPP hätte dies negative Auswirkungen. Es müsste nämlich damit gerechnet werden, dass das Interesse privater Akteure, solche Partnerschaften einzugehen oder aufrecht zu erhalten, wegen der dann fehlenden Investitionssicherheit der privaten Partner stark zurückgehen würde. Dies könnte dann die Fähigkeit der öffentlichen Hand einschränken, die Versorgung mit bisher im Rahmen von institutionalisierten ÖPP erbrachten Dienstleistungen sicherzustellen. Für die privaten Partner könnten sich bereits getätigte Investitionen als Fehlinvestitionen erweisen. In jedem Fall muss daher sichergestellt werden, dass die institutionalisierten ÖPP die Aufträge erhalten können und die Vertragslaufzeiten so bemessen werden, das die Investitionen sich über einen angemessenen Zeitraum amortisieren können.

7. Allgemeiner gefragt: Wenn Sie ein neues Gesetzgebungsvorhaben der Kommission für erforderlich halten, gibt es dann objektive Gründe dafür, in diesem Rechtsakt sämtliche ÖPP auf Vertragsbasis zu behandeln und sie ein und demselben Regelwerk für die Vergabe zu unterwerfen, ganz gleich ob die Vorhaben als öffentliche Aufträge oder als Konzessionen einzustufen sind?

Nein.
Objektive Gründe gibt es in dieser Hinsicht gerade nicht. Insbesondere dürfen nicht Dienstleistungskonzessionen – über den Weg der Einstufung als Unterfall der

Konzessionen – einem Vergaberegelwerk unterworfen werden. Die Einbeziehung der Dienstleistungskonzessionen in das Vergaberecht ist in den Gesetzgebungsverfahren zu den Vergaberichtlinien immer wieder diskutiert worden und letztlich mit den besseren und richtigen Gründen abgelehnt worden.

8. Ist Ihrer Erfahrung nach der Zugang der ausländischen Akteure zu privat initiierten ÖPP gewährleistet? Für den Fall, dass die Vergabestellen zur Initiative aufrufen, wird dieser Aufruf dann angemessen bekannt gemacht, so dass alle interessierten Akteure Kenntnis davon haben können? Wird für die Ausführung des ausgewählten Projekts ein Auswahlverfahren auf Basis eines effektiven Wettbewerbs organisiert?

In der deutschen Elektrizitätswirtschaft gibt es bereits eine Vielzahl von Partnerschaften mit ausländischen Unternehmen (siehe Grafik).

9. Wie könnte Ihrer Auffassung nach die Entwicklung privat initiierter ÖPP in der Europäischen Union unter Wahrung der Grundsätze der Transparenz und der Gleichbehandlung und ohne Verstoß gegen das Diskriminierungsverbot gewährleistet werden?

Wie in unserer Antwort zu Frage 5 dargelegt, besteht im Bereich der Dienstleistungskonzessionen Wettbewerb in der Form, dass jedes in- und ausländische Unternehmen sich um die Erteilung der lokalen Dienstleistungskonzessionen – wie näher erläutert auch erfolgreich – bemühen kann. Soweit Dienstleistungskonzessionen nur befristet erteilt werden oder werden können, ist – nach Ablauf der jeweiligen Vertragslaufzeit – auch für ausländische Akteure der Zugang zu privat initiierten ÖPP gewährleistet.

Im Übrigen hätte ein Ausschreibungszwang im Fall privat initiierter ÖPP wohl zur Folge, dass die schnellen, innovativen Akteure benachteiligt werden, weil sie in die Reihe der übrigen Bieter eingegliedert würden. Gerade deswegen wird ja auch in der Praxis nach "Belohnungen" gesucht, um das System für die Initiatoren attraktiv zu gestalten (vgl. Grünbuch Rn. 41). Innovationsfreudigkeit und Schnelligkeit sind typische Wettbewerbsmerkmale, die nicht durch eine formalisierte Gleichbehandlung zunichte gemacht werden dürfen. Die Belohnungs-Lösung legt wiederum eine nicht gerechtfertigte Ungleichbehandlung der Akteure nahe, die das System des obligatorischen Vergabeverfahrens im Fall privat initiierter ÖPP letztlich ad absurdum führen würde.

10. Welche Erfahrungen haben sie in der Phase im Anschluss an die Auswahl des privaten Partners im Rahmen von ÖPP auf Vertragsbasis gemacht?

Grundsätzlich besteht der Eindruck, dass ÖPP, wo sie abgeschlossen wurden, sich bewährt haben. Es ist nicht ersichtlich, dass eine Ausschreibung zu besseren Ergebnissen führen würde.

11. Sind Ihnen Fälle bekannt, in denen die Ausführungsbedingungen, einschließlich der Klauseln zur Anpassung im Zeitverlauf, eine diskriminierende Wirkung entfalten konnten oder eine ungerechtfertigte Behinderung der Dienstleistungs- oder Niederlassungsfreiheit darstellten? Falls ja, bitte beschreiben Sie die Art der aufgetretenen Probleme!

Nein. In den VDEW Mitgliedsunternehmen betreffenden Bereichen der Konzessionsverträge für Strom sind derartige Fälle nicht bekannt. Hier existieren gesetzliche Regelungen, die Rechtssicherheit für alle Beteiligten gewährleisten.

12. Sind Ihnen Praktiken oder Mechanismen zur Bewertung von Angeboten bekannt, die eine diskriminierende Wirkung haben?

Nein.

13. Sind Sie wie die Kommission der Auffassung, dass bestimmte Interventionsklauseln in Bezug auf die Grundsätze der Transparenz und der Gleichbehandlung problematisch sein können? Sind Ihnen andere Typen von Klauseln bekannt, deren Anwendung zu ähnlichen Problemen führen kann?

Nein.

14. Halten Sie es für erforderlich, dass bestimmte Aspekte der vertraglichen Rahmenbedingungen für ÖPP auf Gemeinschaftsebene geklärt werden? Falls ja, was sollte geklärt werden?

Der VDEW hält für den ihn betreffenden Bereich die bestehenden primärrechtlichen Regelungen für ausreichend. Insbesondere in Bezug auf die Dienstleistungskonzessionen besteht kein Handlungs- bzw. Klärungsbedarf. (Siehe hierzu die Antworten zu den Fragen 6 u. 7).

15. Sind Ihnen bei ÖPP-Konstruktionen besondere Probleme mit der Vergabe von Unteraufträgen bekannt? Welche?

Nein.

16. Rechtfertigt die Existenz von ÖPP auf Vertragsbasis, die die Übertragung eine Aufgabenpakets an einen einzigen privaten Partner impliziert, ihrer Auffassung nach, dass ausführlichere Regeln für die Vergabe von Unteraufträgen eingeführt werden und/oder dass der Anwendungsbereich erweitert wird?

Nein.
Erhält ein Privater den Zuschlag für einen öffentlichen Auftrag und kann er die

Leistungen nicht aus eigener Kraft erbringen, kann schon nach dem heutigen Recht der Auftraggeber die Vergabe von Unteraufträgen an bestimmte Bedingungen knüpfen. Jede zusätzliche Verpflichtung der Vergabestelle, dem privaten Partner Zusagen abzuverlangen, bringt unverhältnismäßigen Aufwand und erhebliche Zeitverzögerung mit sich. Wird eine Dienstleistungskonzession vergeben, ist schon der Hauptauftrag nicht ausschreibungspflichtig. Das gilt dann selbstverständlich auch für die Unteraufträge.

17. Halten Sie, allgemeiner gesprochen, eine ergänzende Initiative auf Gemeinschaftsebene zur Klärung oder Umgestaltung der Regeln für die Vergabe von Unteraufträgen für erforderlich?.

Nein.
Letztlich würden auf diese Weise – ohne dass dies erforderlich wäre – Märkte bis ins Kleinste durchreguliert. Eigeninitiative und besonderes Engagement würden verhindert.

18. Welche Erfahrungen haben Sie mit der Einrichtung institutionalisierter ÖPP gemacht?
Lassen Ihre Erfahrungen Sie zu der Schlussfolgerung gelangen, dass die gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen bei institutionalisierten ÖPP-Konstruktionen eingehalten werden? Falls nein, warum nicht?

Auch ohne eine gemeinschaftsrechtliche Initiative haben sich die vielfältigsten Formen institutionalisierter ÖPP entwickelt, von der einfachen Hereinnahme eines privaten Partners bis zur Bildung von Konsortien zur Verfolgung eines gemeinsamen Zwecks. Für diese Formen institutionalisierter ÖPP reichen die nationalen Vorschriften (Zivilrecht, Gesellschaftsrecht, Wettbewerbsrecht) völlig aus. Es ist im Gegenteil zu befürchten, dass eine gemeinschaftsweite Vereinheitlichung der Voraussetzungen für die Bildung institutionalisierter ÖPP diese Vielgestaltigkeit verhindert.
Dass bei der Einrichtung institutionalisierter ÖPP die gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge nicht beachtet wurden, konnte nicht beobachtet werden.

Dies gilt nach unseren Erfahrungen auch für die Einhaltung der gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen bei institutionalisierten ÖPP-Konstruktionen. Beides belegt die fehlende Erforderlichkeit einer gemeinschaftsrechtlichen Regelung. Vor dem Hintergrund der Vielgestaltigkeit der ÖPP muss befürchtet werden, dass der Versuch für alle denkbaren Konstellationen einheitliche Regelungen zu schaffen nicht gelingt, sondern im Gegenteil für die Bildung und die effiziente Betätigung der ÖPP behindernd wirkt.

19. Halten Sie eine Initiative auf Gemeinschaftsebene für erforderlich, um die Verpflichtungen zu klären oder zu vertiefen, die die öffentlichen Auftraggeber in Bezug auf den Wettbewerb zwischen potenziell an einem institutionalisierten ÖPP-Projekt interessierten Wirtschaftsteilnehmern haben? Falls ja, welche Aspekte halten Sie für besonders wichtig und welche Form sollte eine solche Initiative haben? Falls nein, warum nicht? Allgemein und unabhängig von den in diesem Grünbuch aufgeworfenen Fragen:

Das rasche Anwachsen der Anzahl institutionalisierter ÖPP – auch bei den Mitgliedern des VDEW – belegt, dass es einer Gesetzesinitiative auf EU-Ebene zur Förderung dieses Modells nicht bedarf.

Der VDEW sieht im Übrigen im europäischen Primärrecht auch keinerlei Ermächtigungsgrundlage für generelle europäische Regelungen für institutionalisierte ÖPP.

Auch die Anwendung der Binnenmarkt- und Wettbewerbsregeln darf nicht dazu führen, dass dadurch das auf dem Subsidiaritätsprinzip beruhende Recht der Mitgliedstaaten, über die Form der Erbringung öffentlicher Dienstleistungen zu entscheiden, ausgehebelt oder eingeschränkt wird. Sofern eine Kommune, basierend auf ihrer Organisationshoheit, eine institutionalisierte ÖPP eingeht, ist dies kein Beschaffungsakt. Somit untersteht die Auswahl des privaten Partners nicht dem Vergaberechtsregime. Es muss auch zukünftig gewährleistet sein, dass auf staatlicher wie kommunaler Ebene die Gestaltungsfreiheit bei den ÖPP erhalten bleibt. Eine einheitliche europäische Definition oder eine Standardisierung der Gesellschaftsverträge ist weder erforderlich, noch wäre sie zweckmäßig und handhabbar. Um die Möglichkeit der Aufgabenerledigung im Rahmen von institutionalisierten ÖPP – die sich bei geeigneter Ausgestaltung in vielen Fällen für die Erbringung öffentlicher Dienstleistungen als zweckmäßig und vorteilhaft erwiesen hat – nicht zu gefährden, wäre es hilfreich, wenn der Inhouse-Begriff weiter gefasst würde, z. B. indem institutionalisierte ÖPP darunter fallen, wenn der öffentliche Einfluss innerhalb der institutionalisierten ÖPP überwiegt (Kontrollkriterium) und die ausgeübte Dienstleistung im Wesentlichen zum Nutzen der Bürger in der entsprechenden Gebietskörperschaft erfolgt (Dienstleistungskriterium).

20. Welche Maßnahmen oder Verfahren behindern in der Europäischen Union die Einrichtung von ÖPP?

Wie in der Antwort zu Frage 6 ausgeführt, würde eine Ausschreibungsverpflichtung für Dienstleistungskonzessionen bedeuten, dass auch die Konzessionserteilung an institutionalisierte ÖPP auszuschreiben wäre. Auf das Zustandekommen und Weiterbestehen von institutionalisierten ÖPP hätte dies negative Auswirkungen, weil die Bildung institutionalisierter ÖPP an Sinnhaftigkeit verliert. Dieses Beispiel belegt, dass die Ausdehnung von vergaberechtlichen Vorgaben die Bildung von ÖPP verhindern könnte. Dies könnte sogar zur Konsequenz haben, dass bereits bestehende institutionalisierte ÖPP aufgelöst würden. Am Ende der Entwicklung stünde der reine (teure und ineffiziente) „Ämterstaat“. Auch wirkt die Formalisierung durch Vergabeverfahren eher abschreckend auf die Wirtschaftsteilnehmer. Mit ihr ist zudem regelmäßig eine längere Verfahrensdauer verbunden. Letztlich werden die Handlungsmöglichkeiten auf kommunaler Ebene unangemessen eingeschränkt. Dies alles erscheint wenig förderlich für die Bildung von ÖPP.

21. Kennen Sie andere ÖPP-Formen aus Drittländern? Kennen Sie aus Ihren Erfahrungen in solchen Ländern bewährte Verfahrensweisen, die auch für die EU beispielgebend sein könnten? Falls ja, welche?

Der VDEW kann hierzu keine Angaben machen.

22. Denken Sie, dass es nützlich wäre, im Hinblick auf den großen Investitionsbedarf einzelner Mitgliedstaaten zum Erreichen einer sozialen und dauerhaften Entwicklung gemeinsam und in regelmäßigen Abständen über diese Fragen unter den betroffenen Akteuren nachzudenken und bewährte Verfahrensweisen auszutauschen? Sollte die Kommission nach Ihrer Auffassung ein derartiges Netzwerk aufbauen?

Weder aus wirtschaftlicher, aus wettbewerblicher noch aus rechtlicher Sicht ist das Ansinnen des „Gründbuchs zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen“ vertretbar und sinnvoll. Der Erlass einer neuen Richtlinie in einem von Wettbewerb geprägten Wirtschaftsbereich führt zu einer Überregelementierung und zu einer volkswirtschaftlich bedenklichen Zunahme an Bürokratisierung, die ein weiteres ernstes Hemmnis für Wachstum und Entwicklung darstellen würde. Die Ausweitung europäischer Regelungskompetenzen bedeutet einen ernsten Eingriff in die Eigentumsordnungen der Nationalstaaten und findet auch keine - ohnehin nicht zulässige - Rechtfertigung in den Ausnahmebestimmungen zum Subsidiaritätsprinzip. **Das vorgelegte Grünbuch darf auf keinen Fall in einer entsprechenden Richtlinie oder in die Modifizierung bestehender Richtlinien münden.** Wegen der falschen Grundintention des Ansatzes ist auch ein alternierender künftiger Austausch nicht erforderlich und entsprechend abzulehnen.

Internationale Beteiligungen

(Stand: März 2004)

1. Wesentliche ausländische Beteiligungen an deutschen Stromversorgern

ausländisches Unternehmen		indirekt beteiligt über	deutsche Stromversorger	Beteiligungs-quote in %
Land	Unternehmen			
Belgien	Electrabel	Deutsche Electrabel AG	Energie SaarLorLux	51,0
Belgien	Electrabel	Deutsche Electrabel AG	EV Gera GmbH / Kraftwerke Gera GmbH	49,9
Frankreich	EDF		EnBW Energie Baden Württemberg AG	34,5
Frankreich	EDF	EnBW AG	ESAG Energieversorgung Sachsen Ost AG	17,4
Frankreich	EDF	EnBW AG	DREWAG Stadtwerke Dresden GmbH	12,1
Frankreich	Veolia Environnement		Stw. Görlitz AG	74,9
Frankreich	Veolia Environnement		Stw. Weißwasser GmbH	74,9
Niederlande	Essent	Deutsche Essent GmbH	swb AG, Bremen	51,0
Niederlande	Essent	Deutsche Essent GmbH / über swb AG, Bremen	Stw. Bielefeld GmbH	25,4
Niederlande	Essent	Deutsche Essent GmbH / über swb AG, Bremen	Stw. Soltau GmbH	24,8
Niederlande	Essent	Deutsche Essent GmbH / über swb AG, Bremen	Stromversorgung Greifswald GmbH	20,0
Niederlande	Essent	Deutsche Essent GmbH / swb AG & Stw. Bielefeld	Stw. Gütersloh GmbH	12,5
Niederlande	NUON	NUON Deutschland GmbH	NUON Heinsberg AG	100,0
Schweden	Vattenfall		Vattenfall Europe AG	ca. 93%
Schweden	Vattenfall	Vattenfall Europe AG / über Bewag	Energie Südwest AG, Landau	51,0
Schweden	Vattenfall	Vattenfall Europe AG / über HEW	Wemag AG, Schwerin	80,4
Schweden	Vattenfall	Vattenfall Europe AG / über HEW	Städtische Werke AG, Kassel	24,9
Schweden	Vattenfall	Vattenfall Europe AG / über WEMAG	Stw. Rostock AG	10,1
USA	TXU*	TXU Europe Ltd.	Braunschweiger Versorgungs AG	74,9
USA	TXU*	TXU Europe Ltd.	Stw. Kiel AG	51,0

* TXU-Anteil steht wegen Insolvenz momentan zum Verkauf

Quellen: Geschäftsberichte, Presse, VDEW

Internationale Beteiligungen

(Stand: März 2004)

1. Wesentliche deutsche Beteiligungen an ausländischen Stromversorgern

deutscher Stromversorger	ausländischer Stromversorger			Beteiligungs-	Bemerkung
	Land	Sitz	Unternehmen	quote in %	
E.ON	Finnland	Espoo	Espoon Sähkö Oyi	65,6	
E.ON	Großbritannien	London	Powergen UK plc	100,0	Erzeugung
E.ON	Großbritannien	London	Central Networks (East Midlands & Midlands Elec.)	100,0	Verteilung
RWE	Großbritannien	Swindon	Innogy Holdings plc	100,0	
E.ON	Litauen	Vilnius	Lietuvos Energija	10,0	
RWE	Luxemburg	Luxemburg	Luxempart-Energie s.a.	49,0	
RWE	Östereich	Klagenfurt	KELAG	49,0	
EnBW	Österreich	Wien	Österreichische Elektrizitätswirtschaft AG (Verbund)	6,3	+ 0,5 % über EVN
EnBW	Österreich	Maria Enzersdorf	Energie-Versorgung Niederösterreich AG (EVN)	5,0	
E.ON	Polen	Warschau	Polenergia	33,5	Stromhändler
RWE	Polen	Warschau	Stoen S.A.	85,0	
RWE	Portugal	Lissabon	Turbogas-Produtora Energetica	75,0	
E.ON	Schweden	Malmö	Sydkraft AB	55,2	
E.ON	Schweden	Kramfors	Graninge AB	97,5	über Sydkraft AB
E.ON	Schweden	Malmö	Baltic Cable AB	66,6	Betreiber Ostseekabel
E.ON	Schweiz	Bern	BKW FMB Energie AG	20,0	
EnBW	Schweiz	Zug	EnAlpin AG	100,0	
E.ON	Slowakei	Bratislava	ZSE Zapadoslovenska energetika a.s.	49,0	
RWE	Slowakei	Kosice	VSE Vychodoslovenska energetika a.s.	49,0	
EnBW	Spanien		Hidroelectrica del Cantabrico S.A.	33,0	Veräußerung geplant
E.ON	Tschechien	Ceske Budejovice	JCE Jihoceska energetika a.s.	84,7	
E.ON	Tschechien	Brno	JME Jihomoravská energetika, a. s.	85,7	
EnBW	Tschechien	Decin	SCE Severoceska Energetika a.s.	16,5	
EnBW	Tschechien	Prag	PRE Prazska energetika a.s.	34,0	
RWE	Tschechien	Decin	SCE Severoceska Energetika a.s.	16,0	
RWE	Tschechien	Prag	PRE Prazska energetika a.s.	15,0	
RWE	Tschechien	Prag	STE Stredoceska energeticka.	35,0	
E.ON	Ungarn	Debrecen	TITASZ Rt.	92,4	
E.ON	Ungarn	Györ	EDASZ Rt.	95,6	
E.ON	Ungarn	Pecs	DEDASZ Rt.	92,4	
EnBW	Ungarn	Budapest	ELMÜ	27,3	
EnBW	Ungarn	Miskolc	EMASZ	26,8	
RWE	Ungarn	Budapest	ELMÜ	55,0	
RWE	Ungarn	Miskolc	EMASZ	54,0	
E.ON	USA	Louisville	LG&E Energy Corp.	100,0	

Quellen: Geschäftsberichte, Presse, VDEW

VERBAND DEUTSCHER VERKEHRSUNTERNEHMEN

Verband Deutscher Verkehrsunternehmen (VDV) · Kamekestraße 37 – 39 · D-50672 Köln

Europäische Kommission
Konsultation „Grünbuch zu öffentlich-privaten
Partnerschaften und den gemeinschaftlichen
Rechtsvorschriften für öffentliche Aufträge und
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Grünbuch der EU-Kommission zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen vom 30. April 2004 (KOM [2004] 327)

Sehr geehrte Damen und Herren,

wir danken Ihnen für die Gelegenheit, zum Grünbuch der EU-Kommission zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen Stellung nehmen zu können.

Der Verband Deutscher Verkehrsunternehmen e.V. (VDV) vertritt die Interessen der Unternehmen des öffentlichen Personenverkehrs auf Straße und Schiene sowie des Güterverkehrs mit Schwerpunkt Eisenbahngüterverkehr in Deutschland. Dem VDV gehören zurzeit 540 Verkehrsunternehmen an.

431 Mitgliedsunternehmen betreiben öffentlichen Personenverkehr mit den Betriebszweigen U-Bahn, Stadtbahn, Straßenbahn, Eisenbahn, S-Bahn, Bahnen besonderer Bauart, Obus und Omnibus. Insgesamt wurden die Verkehrsmittel aller VDV-Unternehmen 2003 von rund 9,1 Milliarden Fahrgästen benutzt. Das entspricht einem Anteil von mehr als 90 Prozent am Gesamtmarkt des öffentlichen Personennahverkehrs auf Schiene und Straße in Deutschland.

Bei den Mitgliedsunternehmen mit Güterverkehr handelt es sich um 99 Unternehmen des öffentlichen Verkehrs, 61 Unternehmen betreiben nichtöffentlichen Verkehr (Werkseisenbahnen und Hafeneisenbahnen). Diese Unternehmen befördern rund 530 Millionen Tonnen Güter im Jahr, was einer Leistung von etwa 80 Milliarden Tonnenkilometern entspricht.

Erfreulicherweise hatte der öffentliche Personennahverkehr in den vergangenen Jahrzehnten ein kontinuierliches Fahrgastwachstum zu verzeichnen. Die Erfüllung der Mobilitätsansprüche der Bürgerinnen und Bürger erfordert unbestritten einen leistungsfähigen und attraktiven ÖPNV, um gleichwertige Lebensverhältnisse zu gewährleisten, die Straßen vom motorisierten Individualverkehr zu entlasten, eine lebenswerte Entwicklung des städtischen und ländlichen Raums zu fördern, Ressourcen zu schonen und die Umwelt zu entlasten. Diese öffentliche Daseinsvorsorgeaufgabe erfüllen die deutschen Verkehrsunternehmen mit modernen und innovativen Angeboten, indem sie insbesondere ihre Fahrzeugflotten umfassend modernisieren, Fahrpläne untereinander immer besser verknüpfen, Tarifsysteme vereinfachen und die Fahrgastinformation weiter ausbauen.

Der Genehmigungswettbewerb, aber auch die Verschärfung der dramatischen Situation insbesondere der öffentlichen Haushalte in Städten und Gemeinden, haben Bewegung in die Verkehrsbranche gebracht. Wirtschaftliches Arbeiten und der Wechsel zu individuellen, bedarfsgerechten Bedienungsangeboten sind unabdingbar geworden. Aus diesen Gründen haben Kooperationen und Partnerschaften jeglicher Art bei Verkehrsunternehmen im Personen- und Schienengüterverkehr stark an Bedeutung gewonnen

Der VDV begrüßt grundsätzlich das Ziel der Kommission, Hemmnisse gegenüber öffentlich-privaten Partnerschaften abzubauen. Wir fürchten aber, dass die von der Kommission in Aussicht genommenen Klarstellungen und Regulierungen bewährte und effiziente Gestaltungen im Rahmen der verfassungsrechtlich garantierten kommunalen Organisationshoheit in Deutschland in Frage stellen und unnötige bürokratische Hürden für unternehmerisch und aus Kundensicht sinnvolle Kooperationen im Verkehrsmarkt aufrichten werden.

Das Grünbuch unterstreicht die Bestrebungen der Kommission, Ausschreibungspflichten zu erweitern und insbesondere auf Dienstleistungskonzessionen auszudehnen. Die im Grünbuch vorgesehene tendenzielle Bevorzugung öffentlich-privater Partnerschaften gegenüber anderen Formen der Kooperation lehnen wir ab. Das Grünbuch unterscheidet grundsätzlich nur zwischen zwei Arten von öffentlich-privaten Partnerschaften: Partnerschaften auf Vertragsbasis, bei denen die Partnerschaft zwischen öffentlichem und privatem Sektor nur auf vertraglichen Beziehungen basiert, sowie institutionellen Partnerschaften, bei denen die Zusammenarbeit zwischen öffentlichem und privatem Sektor innerhalb eines eigenständigen Rechtssubjekts erfolgt. Nach dem deutschen Recht stehen jedoch horizontale Kooperationen, kommunale Zweckverbände und Anstalten des öffentlichen Rechts als weitere Alternativen gleichberechtigt neben öffentlich-privaten Partnerschaften. Dies darf nicht in Frage gestellt werden.

Öffentlich-private Partnerschaften und Kooperationen sind im Verkehrssektor – auch ohne eine eigenständige Regulierung auf der Ebene des europäischen Gemeinschaftsrechts – eine seit langer Zeit bewährte Form der Zusammenarbeit öffentlicher und/oder privater Unternehmen zum gegenseitigen Nutzen und damit auch zum Vorteil der Bürgerinnen und Bürger als Nutzer des ÖPNV und von Unternehmen als Nutzer des Schienengüterverkehrs. Gleichwohl sind öffentlich-private Partnerschaften, wie auch die Kommission im Grünbuch unter Ziffer 5 anerkennt, keine Patentlösung und kein Königsweg. Denn die Beteiligung Privater muss nicht zwangsläufig eine positive Auswirkung auf die Qualität der Dienstleistungserbringung haben.

Da das Gemeinschaftsrecht eigentümerneutral ausgestaltet ist, kann das Grünbuch nur so ausgelegt werden, dass auch die wirtschaftliche Betätigung der (kommunalen) Gebietskörperschaften mit einem eigenen Unternehmen unter den Begriff der „öffentlich-privaten Partnerschaften“ im Sinne des Grünbuchs zu subsumieren ist (Ziffer 7: Partnerschaft zur Bereitstellung öffentlicher Dienstleistungen durch Übertragung öffentlicher Dienstleistungen auf öffentliche, private oder gemischtwirtschaftliche Unternehmen). Damit würde auch die Dienstleistungserbringung durch ein eigenes Unternehmen der von der Kommission in Betracht gezogenen Koordinierung zur Einführung der Pflicht einer diskriminierungsfreien wettbewerblichen Vergabe unterliegen.

Die gemeinschaftsrechtlichen Vergaberichtlinien belassen die Entscheidung, eine Dienstleistung selbst zu erbringen oder sie (partnerschaftlich) einem Dritten zu übertragen, bisher den zuständigen Entscheidungsträgern vor Ort. Eine über die Vergaberichtlinien hinausgehende Regulierung von Konzessionen und öffentlich-privaten Partnerschaften ist nicht erforderlich, denn jeder öffentliche Auftraggeber, der die Bereitstellung einer Dienstleistung einem Dritten übertragen will, ist bereits an die Rechtsvorschriften für öffentliche Aufträge und Konzessionen sowie das primäre Gemeinschaftsrecht, insbesondere die Grundsätze der Gleichbehandlung und Transparenz, gebunden.

Deshalb ist es aus Sicht des VDV unabdingbar, dass es auch weiterhin in der Verantwortung der jeweiligen Gebietskörperschaft stehen muss, selbst zu entscheiden, wie und mit wem sie ihre Aufgaben erfüllen und Dienstleistungen für die Bürgerinnen und Bürger erbringen will. Der bestehende Rechtsrahmen für Partnerschaften zwischen öffentlichem und privatem Sektor ist nach unserer Auffassung ausreichend geregelt. Eine weitergehende Regulierung ist nicht erforderlich.

Zu den einzelnen im Grünbuch aufgeworfenen Fragen nehmen wir wie folgt Stellung:

1. *Welche Formen von ÖPP auf Vertragsbasis sind Ihnen bekannt? Gibt es in Ihrem Land spezifische (gesetzliche oder andere) Rahmenbedingungen für derartige Konstruktionen?*

Öffentlich-private Partnerschaften und Kooperationen sind auch auf dem Verkehrssektor – ohne eine besondere Regulierung auf der Ebene des europäischen Gemeinschaftsrechts – eine bewährte Möglichkeit der Zusammenarbeit öffentlicher und/oder privater Unternehmen zum gegenseitigen Nutzen und damit auch zum Vorteil der Bürgerinnen und Bürger als Nutzer des Öffentlichen Personennahverkehrs sowie der Unternehmen als Nutzer des Schienengüterverkehrs. Angesichts des zunehmenden Wettbewerbs auch im Öffentlichen Personennahverkehr (ÖPNV) und wegen der Verschärfung der dramatischen Situation insbesondere der öffentlichen Haushalte in Städten und Gemeinden, sind wirtschaftliches Arbeiten und die Orientierung auf marktgerechte Bedienungsangebote im Verkehrssektor unabdingbar geworden.

Aus diesen Gründen haben horizontale Kooperationen und öffentlich-private Partnerschaften jeglicher Art zwischen Verkehrsunternehmen stark an Bedeutung gewonnen und bringen die Chance mit sich, durch Rationalisierung und höhere Effektivität öffentliche Haushalte zu entlasten. Auch haben die deutschen Genehmigungsbehörden den gesetzlichen Auftrag nach § 8 Abs. 3 Satz 1 des Personenbeförderungsgesetzes (PBefG), im Interesse einer ausreichenden Bedienung der Bevölkerung mit ÖPNV-Leistungen sowie einer wirtschaftlichen Verkehrsgestaltung insbesondere für Verkehrskooperationen zu sorgen. Gleiches gilt für die Bildung von Kooperationen im Schienenpersonenverkehr nach § 12 Abs. 7 Satz 1 des Allgemeinen Eisenbahngesetzes (AEG).

Kooperationen sind die typische Organisationsform unternehmerischer Zusammenarbeit. Durch die Bündelung von Kräften und Kompetenzen der Kooperationspartner erweitern sich die Handlungsmöglichkeiten und führen zu einer „Win-Win-Situation" nicht nur der Partner, sondern insbesondere auch der Kunden und der öffentlichen Hand. Verkehrskooperationen i. S. d. § 8 Abs. 3 PBefG bzw. § 12 Abs. 7 AEG können dabei sowohl als vertragliche als auch als institutionalisierte ÖPP ausgestaltet sein.

Die Zusammenarbeit mehrerer Unternehmen umfasst zwangsläufig eine damit verbundene – auch vertraglich festgelegte – Teilung der Aufgabenbewältigung, die zu Synergieeffekten führen soll, aber nicht zwangsläufig einen öffentlichen Auftrag und damit einen Vergabevorgang darstellt. Kooperationen sind deshalb vorteilhaft, weil die eigene Aufgabenerledigung sinnvollerweise durch eine gemeinsame ersetzt wird. Im Vordergrund steht nicht die vergaberechtliche Beauftragung eines Kooperationspartners, sondern die gesetzlich geforderte und vorgesehene Zusammenarbeit zur wirtschaftlichen Verkehrsgestaltung, die sinnvollerweise mit einer Arbeitsteilung verbunden ist. Der Charakter der Aufgabenbewältigung der Versorgung der Bürgerinnen und Bürger und Unternehmen mit Verkehrsdienstleistungen im ÖPNV und Schienengüterverkehr durch die beteiligten Verkehrsunternehmen, auch wenn sie grundsätzlich öffentliche Auftraggeber sind, ändert sich durch die Kooperation nicht.

2. ***Nach Auffassung der Kommission wird die Umsetzung des wettbewerblichen Dialogs in einzelstaatliche Rechtsvorschriften den betroffenen Parteien ein Verfahren an die Hand geben, das sich ganz besonders für die Vergabe öffentlicher Aufträge in Zusammenhang mit der Einrichtung einer ÖPP auf Vertragsbasis eignet und gleichzeitig die Grundrechte der Wirtschaftsteilnehmer wahrt. Stimmen Sie dem zu? Falls nein, warum nicht?***

Das Modell des „wettbewerblichen Dialogs" wurde durch die am 30. April 2004 in Kraft getretenen novellierten gemeinschaftsrechtlichen Vergaberichtlinien eingeführt und bedarf noch seiner Umsetzung in das nationale Recht der EU-Mitgliedstaaten. Daher bestehen auch noch keine Erfahrungen mit dem „wettbewerblichen Dialog", die eine belastbare Aussage, ob sich dieses Modell auch für die Einrichtung einer ÖPP auf Vertragsbasis eignet, zulassen würden.

Soweit bei der Einrichtung einer ÖPP aufgrund der Vergabe öffentlicher Aufträge die vergaberechtlichen Bestimmungen zu beachten sind, kann der „wettbewerbliche Dialog" geeignet sein, gemeinsam Lösungskonzepte für die optimale Aufgabenerfüllung zu erarbeiten. Jedoch besteht die Gefahr, dass derjenige Unternehmer, der sein besonderes „Know how" – möglicherweise mit hohen Kosten verbunden – in den wettbewerblichen Dialog einbringt, nicht den Zuschlag erhält. Ein anderer Bieter würde von der hohen Kompetenz des Unternehmers profitieren, was diesen unter wettbewerblichen Gesichtspunkten von einer weiteren Teilnahme an „wettbewerblichen Dialogen" abhalten könnte.

Bestrebungen, die bestehenden Ausschreibungspflichten noch weiter im Bereich der kommunalen Daseinsvorsorge wie dem ÖPNV zu erweitern, lehnen wir ab. Unter Beachtung der bestehenden vergaberechtlichen Vorschriften muss es auch weiterhin in der Verantwortung einer Gebietskörperschaft stehen, selbst zu entscheiden, wie und mit wem sie ihre Aufgaben erfüllen und Dienstleistungen für die Bürgerinnen und Bürger erbringen will.

3. ***Sehen Sie in Bezug auf diese Aufträge neben der Wahl des Vergabeverfahrens andere Punkte, die mit dem Gemeinschaftsrecht über öffentliche Aufträge in Konflikt stehen könnten? Wenn ja, nennen Sie diese und begründen Sie!***

Nein. Denn soweit die Vergabe öffentlicher Aufträge in Zusammenhang mit der Einrichtung einer ÖPP auf Vertragsbasis die Anwendung der vergaberechtlichen Bestimmungen bedingt, kann sie auch nicht mit dem Gemeinschaftsrecht über öffentliche Aufträge in Konflikt stehen.

4. ***Haben Sie bereits einmal ein Verfahren zur Vergabe einer Konzession in der Europäischen Union organisiert, daran teilgenommen bzw. ein solches organisieren oder daran teilnehmen wollen? Welche Erfahrungen haben Sie gemacht?***

Nein, der VDV selbst hat bisher keine Erfahrungen mit einem Verfahren zur Vergabe einer Konzession gemacht.

5. ***Halten Sie das derzeitige Gemeinschaftsrecht für präzise genug, um die konkrete und effektive Teilnahme von Gesellschaften oder Gruppierungen aus anderen Staaten an den Konzessionsvergabeverfahren sicherzustellen? Sind Sie der Ansicht, dass in dieser Hinsicht normalerweise ein tatsächlicher Wettbewerb herrscht?***

Es ist unbestritten, dass auch bei vergaberechtsfreien ÖPP die primärrechtlichen Grundsätze der Nichtdiskriminierung und Transparenz zu beachten sind. Das geltende Gemeinschaftsrecht ist auch präzise genug, um die Teilnahme von Gesellschaften oder Gruppierungen aus anderen Staaten an der Bildung von ÖPP oder an der Vergabe von Konzessionen zu gewährleisten. Probleme hinsichtlich der Teilnahme ausländischer Unternehmen am Wettbewerb sind dem VDV nicht bekannt.

6. ***Halten Sie einen Vorschlag für einen gemeinschaftlichen Rechtsakt zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe für wünschenswert?***

Nein, einen solchen Vorschlag hält der VDV nicht für wünschenswert. Gegenstand von Dienstleistungskonzessionen sind vielfach Dienstleistungen von allgemeinem (wirtschaftlichen) Interesse. Daher muss die wettbewerbliche Vergabe im Ermessen der Gebietskörperschaft stehen, die die Aufgabenverantwortung trägt. Eine stärkere Reglementierung durch einen gemeinschaftlichen Rechtsakt, insbesondere durch eine zwangsweise Unterwerfung unter die vergaberechtlichen Vorschriften, lehnen wir ab.

Ein gemeinschaftlicher Rechtsakt würde Dienstleistungskonzessionen gegen das ausdrückliche Petitum der erst am 30. April 2004 in Kraft getretenen novellierten EU-Vergaberichtlinien (Richtlinie 2004/17/EG, ABl. L 134 vom 30. April 2004; Seite 1; Richtlinie 2004/18/EG, ABl. L 134 vom 30. April 2004, Seite 114), die in ihren Artikeln 18 bzw. 17 Dienstleistungskonzessionen ausdrücklich vom Anwendungsbereich ausnehmen, in den Ausschreibungswettbewerb bringen. Da die Kommission bereits eine umfangreiche und detaillierte „Mitteilung (...) zu Auslegungsfragen im Bereich Konzessionen im Gemeinschaftsrecht (2000/C 121/02)“ veröffentlicht hat (ABl. C 121 vom 29. April 2000, S. 2 ff.), die zu wesentlichen Teilaspekten des Themas klarstellende Interpretationen enthält, kann auch nicht von einer Rechtsunsicherheit gesprochen werden.

7. ***Allgemeiner gefragt: Wenn Sie ein neues Gesetzgebungsvorhaben der Kommission für erforderlich halten, gibt es dann objektive Gründe dafür, in diesem Rechtsakt sämtliche ÖPP auf Vertragsbasis zu behandeln und sie ein und demselben Regelwerk für die Vergabe zu unterwerfen, ganz gleich ob die Vorhaben als öffentliche Aufträge oder als Konzessionen einzustufen sind?***

Ein neues Gesetzgebungsvorhaben mit der im Grünbuch vorgesehenen tendenziellen Bevorzugung öffentlich-privater Partnerschaften gegenüber anderen Formen der Kooperation lehnen wir ab. Das Grünbuch unterscheidet grundsätzlich nur zwischen zwei Arten von öffentlich-privaten Partnerschaften: Partnerschaften auf Vertragsbasis, bei denen die Partnerschaft zwischen öffentlichem und privatem Sektor nur auf vertraglichen Beziehungen basiert, sowie institutionellen Partnerschaften, bei denen die Zusammenarbeit zwischen öffentlichem und privatem Sektor innerhalb eines eigenständigen Rechtssubjekts erfolgt. Nach dem deutschen Recht stehen jedoch horizontale Kooperationen, kommunale Zweckverbände und Anstalten des öffentlichen Rechts als weitere Alternativen gleichberechtigt neben öffentlich-privaten Partnerschaften. Dies darf nicht in Frage gestellt werden.

Da das Gemeinschaftsrecht eigentümerneutral ausgestaltet ist, kann das Grünbuch nur so ausgelegt werden, dass auch die wirtschaftliche Betätigung der Gebietskörperschaften mit einem eigenen Unternehmen unter den Begriff der „öffentlich-privaten Partnerschaften“ im Sinne des Grünbuchs zu subsumieren ist (Ziffer 7: Partnerschaft zur Bereitstellung öffentlicher Dienstleistungen durch Übertragung öffentlicher Dienstleistungen auf öffentliche, private oder gemischtwirtschaftliche Unternehmen). Damit würde auch die Dienstleistungserbringung durch ein eigenes Unternehmen einem Vergabe-Regelwerk unterliegen.

Die kommunalen Unternehmen unterliegen den überwiegend restriktiven Vorschriften über die wirtschaftliche Betätigung der Gemeinden in den Gemeindeordnungen (Kommunalverfassungen) der deutschen Bundesländer. Blieben diese Vorschriften im Fall der von der Kommission in Betracht gezogenen Koordinierung zur Einführung der Pflicht einer diskriminierungsfreien wettbewerblichen Vergabe unverändert, hätten kommunale Nahverkehrsunternehmen kaum die Chance, sich im Wettbewerb zu behaupten.

Dies folgt vor allem aus dem Örtlichkeitsprinzip, das vielen Gemeindeordnungen immanent ist: Müsste sich das kommunale Nahverkehrsunternehmen auf seinem angestammten Gebiet dem Ausschreibungswettbewerb stellen und verlöre es dabei Leistungen, dürfte es sich nicht wie jedes andere staatliche oder private Verkehrsunternehmen anderswo Kompensation verschaffen. Die Folge wäre eine vom europäischen Gesetzgeber indirekt erzwungene und von den Landesgesetzgebern nicht verhinderte Privatisierung oder Schließung kommunaler Verkehrsunternehmen. Ein solches Szenario hält der VDV für völlig inakzeptabel.

8. ***Ist Ihrer Erfahrung nach der Zugang der ausländischen Akteure zu privat initiierten ÖPP gewährleistet? Für den Fall, dass die Vergabestellen zur Initiative aufrufen, wird dieser Aufruf dann angemessen bekannt gemacht, so dass alle interessierten Akteure Kenntnis davon haben können? Wird für die Ausführung des ausgewählten Projekts ein Auswahlverfahren auf Basis eines effektiven Wettbewerbs organisiert?***

9. ***Wie könnte Ihrer Auffassung nach die Entwicklung privat initiierter ÖPP in der Europäischen Union unter Wahrung der Grundsätze der Transparenz und der Gleichbehandlung und ohne Verstoß gegen das Diskriminierungsverbot gewährleistet werden?***

Privat initiierte ÖPP entstehen, indem der Privatsektor selbst die Initiative zu einem ÖPP-Vorhaben ergreift. Dieses Initiativrecht steht nationalen wie ausländischen Akteuren gleichermaßen zur Verfügung, so dass ein diskriminierungsfreier Zugang zu privat initiierten ÖPP aus Sicht des VDV auch ohne einen regulatorischen Eingriff bereits gewährleistet ist.

10. ***Welche Erfahrungen haben sie in der Phase im Anschluss an die Auswahl des privaten Partners im Rahmen von ÖPP auf Vertragsbasis gemacht?***

Der VDV selbst hat bisher noch keine Erfahrungen hinsichtlich der Auswahl eines privaten Partners im Rahmen von ÖPP auf Vertragsbasis gemacht.

11. ***Sind Ihnen Fälle bekannt, in denen die Ausführungsbedingungen, einschließlich der Klauseln zur Anpassung im Zeitverlauf, eine diskriminierende Wirkung entfalten konnten oder eine ungerechtfertigte Behinderung der Dienstleistungs- oder Niederlassungsfreiheit darstellten? Falls ja, bitte beschreiben Sie die Art der aufgetretenen Probleme!***

Aus den VDV-Mitgliedsunternehmen sind uns derartige Fälle nicht bekannt. Nahverkehrskooperationen gemäß § 8 Absatz 3 PBefG, die im Interesse einer ausreichenden und leistungsfähigen Bedienung der Bürgerinnen und Bürger mit Nahverkehrsleistungen gebildet werden, unterliegen gemäß § 8 Absatz 3 Satz 9 PBefG gleichwohl der kartellrechtlichen Missbrauchsaufsicht nach dem Gesetz gegen Wettbewerbsbeschränkungen (GWB). Eine diskriminierende Wirkung von Nahverkehrskooperationen kann somit ausgeschlossen werden.

12. ***Sind Ihnen Praktiken oder Mechanismen zur Bewertung von Angeboten bekannt, die eine diskriminierende Wirkung haben?***

Aus den VDV-Mitgliedsunternehmen sind uns derartige Praktiken oder Mechanismen nicht bekannt.

13. Sind Sie wie die Kommission der Auffassung, dass bestimmte Interventionsklauseln in Bezug auf die Grundsätze der Transparenz und der Gleichbehandlung problematisch sein können? Sind Ihnen andere Typen von Klauseln bekannt, deren Anwendung zu ähnlichen Problemen führen kann?

Nein. In Bezug auf unsere Branche sehen wir keine Probleme.

14. Halten Sie es für erforderlich, dass bestimmte Aspekte der vertraglichen Rahmenbedingungen für ÖPP auf Gemeinschaftsebene geklärt werden? Falls ja, was sollte geklärt werden?

Die bestehenden gemeinschaftsrechtlichen Regelungen sind aus Sicht des VDV ausreichend. Eine weitergehende Regulierung öffentlich-privater Partnerschaften ist nicht erforderlich, denn jeder öffentliche Auftraggeber, der die Bereitstellung einer Dienstleistung einem Dritten übertragen will, ist bereits an die gemeinschaftsrechtlichen Vorschriften gebunden. Es muss auch weiterhin in der eigenen Verantwortung der Gebietskörperschaften stehen zu entscheiden, wie und mit wem sie ihre Aufgaben erfüllen und Dienstleistungen für die Bürgerinnen und Bürger erbringen wollen.

Die Einführung einer generellen Ausschreibungspflicht in Bezug auf die Bildung von ÖPP würde im Übrigen zu einer Bürokratisierung führen, denn Ausschreibungsverfahren sind mit einem administrativen und gegebenenfalls kostenintensiven Aufwand verbunden. Ein starres einheitliches Vergabeverfahren würde den örtlichen und strukturellen Unterschieden insbesondere bei der Erbringung von Dienstleistungen von allgemeinem (wirtschaftlichem) Interesse nicht mehr Rechnung tragen.

15. Sind Ihnen bei ÖPP-Konstruktionen besondere Probleme mit der Vergabe von Unteraufträgen bekannt? Welche?

Aus den VDV-Mitgliedsunternehmen sind uns derartige Probleme nicht bekannt.

16. Rechtfertigt die Existenz von ÖPP auf Vertragsbasis, die die Übertragung eine Aufgabenpakets an einen einzigen privaten Partner impliziert, ihrer Auffassung nach, dass ausführlichere Regeln für die Vergabe von Unteraufträgen eingeführt werden und/oder dass der Anwendungsbereich erweitert wird?

17. Halten Sie, allgemeiner gesprochen, eine ergänzende Initiative auf Gemeinschaftsebene zur Klärung oder Umgestaltung der Regeln für die Vergabe von Unteraufträgen für erforderlich?

Da die Auftraggeber bei der Vergabe öffentlicher Aufträge bereits nach dem zurzeit geltenden Vergaberecht die Vergabe von Unteraufträgen an Bedingungen knüpfen können, ist die weitergehende Einführung ausführlicherer Regeln für die Vergabe von Unteraufträgen nicht erforderlich. Ist der Auftragnehmer selbst Auftraggeber, unterliegen auch die von ihm zu vergebenden Unteraufträge ebenfalls den vergaberechtlichen Bestimmungen. Ist der Hauptauftrag selbst bereits ein vergaberechtsfreier Auftrag, so muss dies selbstverständlich auch für daraus resultierende Unteraufträge gelten.

18. Welche Erfahrungen haben Sie mit der Einrichtung institutionalisierter ÖPP gemacht? Lassen Ihre Erfahrungen Sie zu der Schlussfolgerung gelangen, dass die gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen bei institutionalisierten ÖPP-Konstruktionen eingehalten werden? Falls nein, warum nicht?

Der Auf- und Umbau eines verkehrlich und wirtschaftlich sinnvollen Bedienungsangebots macht Kooperationen notwendig, um die steigenden Mobilitätsansprüche der Bürgerinnen und Bürger an den ÖPNV und der Unternehmen an den Schienengüterverkehr erfüllen zu können. Angesichts der Rahmenbedingungen sind Kooperationen vielerorts der einzige bzw. verkehrlich oder politisch wünschenswerte Weg, um dem Ziel einer wirtschaftlichen Verkehrsbedienung – das auch die gemeinsame europäische Verkehrspolitik verfolgt – gerecht werden zu können.

Auch die Bildung institutionalisierter ÖPP hat im vergangenen Jahrzehnt im Verkehrssektor einen Aufschwung erfahren. Dabei handelt es sich um Partnerschaften sowohl zwischen Verkehrsunternehmen als auch mit Unternehmen aus anderen Dienstleistungsbranchen und der Industrie. Probleme bei der Einhaltung von Rechtsvorschriften sehen wir nicht.

19. Halten Sie eine Initiative auf Gemeinschaftsebene für erforderlich, um die Verpflichtungen zu klären oder zu vertiefen, die die öffentlichen Auftraggeber in Bezug auf den Wettbewerb zwischen potenziell an einem institutionalisierten ÖPP-Projekt interessierten Wirtschaftsteilnehmern haben? Falls ja, welche Aspekte halten Sie für besonders wichtig und welche Form sollte eine solche Initiative haben? Falls nein, warum nicht?

Die nach unserer Kenntnis positiven Erfahrungen mit ÖPP in den VDV-Mitgliedsunternehmen unterstreichen, dass der bestehende Rechtsrahmen für Partnerschaften zwischen öffentlichem und privatem Sektor ausreichend geregelt ist. Eine weitergehende Regulierung ist aus Sicht des VDV nicht erforderlich. Ein Rechtsrahmen auf Gemeinschaftsebene könnte sich aufgrund seiner regulatorischen Wirkungen als Hindernis erweisen, ÖPP überhaupt zu bilden.

Allgemein und unabhängig von den in diesem Grünbuch aufgeworfenen Fragen:

20. Welche Maßnahmen oder Verfahren behindern in der Europäischen Union die Einrichtung von ÖPP?

Die gemeinschaftsrechtlichen Vergaberichtlinien belassen bisher aus gutem Grund die Entscheidung, eine Dienstleistung selbst zu erbringen oder sie (partnerschaftlich) einem Dritten zu übertragen, den Entscheidungsträgern vor Ort. Eine über die Vergaberichtlinien hinausgehende Regulierung von Konzessionen und öffentlich-privaten Partnerschaften ist nicht erforderlich, denn jeder öffentliche Auftraggeber, der die Bereitstellung einer Dienstleistung einem Dritten übertragen will, ist bereits an die Rechtsvorschriften für öffentliche Aufträge und Konzessionen sowie das primäre Gemeinschaftsrecht, insbesondere die Grundsätze der Gleichbehandlung und Transparenz, gebunden.

Es muss auch weiterhin unter Berücksichtigung des Subsidiaritätsprinzips in der Verantwortung der zuständigen Gebietskörperschaft stehen, selbst zu entscheiden, wie und mit wem sie ihre Aufgaben erfüllen und Dienstleistungen für die Bürgerinnen und Bürger erbringen will. Der bestehende Rechtsrahmen für Partnerschaften zwischen öffentlichen und privatem Sektor ist nach unserer Auffassung ausreichend geregelt. Eine weitergehende Regulierung ist nicht erforderlich und könnte abschreckend auf die Wirtschaftsteilnehmer wirken. Eine weitergehende Formalisierung von ÖPP durch eine Änderung der Vergaberichtlinien wäre daher für die Bildung von ÖPP kontraproduktiv.

21. ***Kennen Sie andere ÖPP-Formen aus Drittländern? Kennen Sie aus Ihren Erfahrungen in solchen Ländern bewährte Verfahrensweisen, die auch für die EU beispielgebend sein könnten? Falls ja, welche?***

Dem VDV sind ÖPP-Formen aus Drittländern nicht bekannt.

22. ***Denken Sie dass es nützlich wäre, im Hinblick auf den großen Investitionsbedarf einzelner Mitgliedstaaten zum Erreichen einer sozialen und dauerhaften Entwicklung gemeinsam und in regelmäßigen Abständen über diese Fragen unter den betroffenen Akteuren nachzudenken und bewährte Verfahrensweisen auszutauschen? Sollte die Kommission nach Ihrer Auffassung ein derartiges Netzwerk aufbauen?***

Der VDV ist gern bereit, sich an einem Diskurs im Hinblick auf den Investitionsbedarf einzelner Mitgliedstaaten zum Erreichen einer sozialen und dauerhaften Entwicklung zu beteiligen. Um jedoch einen konstruktiven Gedanken- und Ideenaustausch zu ermöglichen, muss ein derartiges Netzwerk ergebnisoffen ausgestaltet sein und die unterschiedlichen staatsorganisationsrechtlichen Strukturen in den einzelnen EU-Mitgliedstaaten berücksichtigen. Darüber hinaus darf mit keinem Diskurs eine Präjudizwirkung verbunden sein.

Mit freundlichen Grüßen

Rechtsanwalt Reiner Metz
Geschäftsführer ÖPNV

Stellungnahme der deutschen Dienstleistungsgewerkschaft ver.di

zum

Grünbuch zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen – KOM (2004) 327 endgültig vom 30. April 2004

1. Grundsätzliche Bewertung von öffentlich-privaten Partnerschaften (ÖPP) und des Grünbuchs

In Deutschland haben Öffentlich-Rechtliche Partnerschaften (ÖPP), die Zusammenarbeit zwischen öffentlicher Hand und privaten Akteuren, in den vergangenen Jahren stark an Bedeutung gewonnen.

Kommunen wählen in Deutschland in vielen Fällen Öffentlich-private Partnerschaften (ÖPP), um Dienstleistungen im allgemeinen wirtschaftlichen Interesse zu finanzieren (DAWI) , z.B. in den Bereichen Energie, Wasser/Abwasser und Entsorgung und ÖPNV. Dieses geschieht in allen möglichen Vertragsformen. Neben weit verbreiteten Dienstleistungskonzessionen existieren öffentliche Aufträge, z.B. zur Stromversorgung, ebenso wie auch Institutionalisierte ÖPP in den Kommunen. Diese ÖPP sind ein Beitrag zur Sicherung von Arbeitsplätzen in der Region und zur regionalen Wirtschaft.

Eine Forcierung von Öffentlich-privaten Partnerschaften könnte einen neuen Zugang privater Unternehmen zur Erbringung öffentlicher Dienstleistungen bedeuten, was nachhaltige Auswirkungen auf die in diesen Branchen organisierten Beschäftigten hätte. Vor allem die Branchen der Sicherheitsdienste (wie Bewachung) aber auch die Bereiche der Anlagensicherheit, die im öffentlichen Interesse liegen, bis hin zum Bereich des sozialen Wohnungsbaus könnten durch ÖPP enorm profitieren. Allerdings müssten zum Zustandekommen dieser ÖPP Regeln und Maßnahmen ergriffen werden, die keinen Wettbewerb durch Lohn- und Sozialdumping auslösen, sondern vielmehr eine Chance zur Verbesserung der Arbeitsverhältnisse, Entlohnungen und Bedingungen eröffnen.

Das Grünbuch der Europäischen Kommission unterscheidet ÖPP auf Vertragsbasis und institutionalisierte ÖPP. Der Schwerpunkt der Ausgestaltung der Leistungs- und Finanzbeziehungen zwischen der öffentlichen Hand und dem privaten Sektor liegt im Grünbuch bei Vertrags- und Konzessionsmodellen. Eine Begrenzung des Begriffs Doch ÖPP (für die Auswahl der Partner, Vertragsgestaltung, Vergabeverfahren, Wirtschaftlichkeitsuntersuchungen, Beschäftigtenfragen) stelle eine Verkürzung der Thematik dar und ist damit abzulehnen.

Darüber hinaus behandelt das Grünbuch nicht die grundsätzlichen Fragen von Vor- und Nachteilen der Durchführung öffentlich-privater Partnerschaften, sondern lediglich deren vergaberechtliche Behandlung. Dabei wird versucht, so viele Tatbestände wie möglich unter vergaberechtlichen Gesichtspunkten zu erörtern, obwohl eine europäische Rahmenrichtlinie über die Dienstleistungen im allgemeinen Interesse (DAWI) nach wie vor nicht existiert. Statt dessen müsste zunächst europäisch mit einer stärkeren Rahmenrichtlinie festgelegt werden, welches die öffentlichen Dienstleistungen sind, die uneingeschränkt staatlicher oder kommunaler Verfügungsgewalt unterliegen. Dann könnten sich auch keine Abgrenzungsschwierigkeiten hinsichtlich der Anwendbarkeit des Vergaberechts ergeben.

In Deutschland basieren ÖPP bei den Kommunen auf der grundgesetzlich gesicherten Befugnis der kommunalen Selbstverwaltung, über Art und Organisation der Erbringung von DAWI in ihrem Gebiet im Rahmen von Konzessionen frei entscheiden zu können. Sie haben die Wahlfreiheit, eigene Unternehmen zu gründen, mit geeigneten Partner ÖPP durchzuführen oder die DAWI an Private zu vergeben.

Deshalb ist an die im Grünbuch gestellte Leitfrage, ob die Vereinbarung derartiger ÖPP zur Erfüllung einer DAWI im Rahmen von Dienstleistungskonzessionen einen rechtlichen Rahmen seitens der EU erfordere, zu hinterfragen. Dies ist vielmehr im Rahmen des Subsidiaritätsprinzips durch nationale gesetzliche Regelungen zu klären. Es muss im Hinblick auf ÖPP gewährleistet bleiben, dass die Gestaltungsfreiheit der ÖPP der Kommunen und der Einzelstaaten erhalten bleibt. Mit der Entscheidung des Europäischen Gerichtshofes vom 24. Juli 2003 (Rechtssache C-280/00) wurde ein Kostenausgleich für gemeinwirtschaftliche Verpflichtungen ohne vorherige wettbewerbliche Vergabe erlaubt. Wenn somit Kosten für die Erbringung von gemeinwirtschaftlichen Verpflichtungen ausgeglichen werden dürfen, dann ist natürlich auch die Erbringung als solche ohne Ausschreibung erlaubt. Ferner hat das EU-Parlament das „Recht auf Eigenproduktion" der DAWI durch die Kommunen in seiner Resolution von Anfang 2004 bestätigt. Dazu gehört auch, eigenverantwortlich zu entscheiden, ob und mit welchem Partner eine ÖPP eingegangen werden soll und welchen Umfang der Dienstleistungsauftrag haben soll.

Auch der vom EU-Ministerrat im Juni 2004 angenommene Entwurf der Europäischen Verfassung, der den Mitgliedsstaaten zur Ratifizierung vorgelegt wird, bestätigt ausdrücklich die kommunale Entscheidungshoheit im Rahmen des Subsidiaritätsprinzips.

Chancen und Risiken von ÖPP sind abzuwägen

Das zunehmende Interesse an öffentlich-rechtlichen Partnerschaften hat einerseits mit steigender Finanznotlage der öffentlichen Kassen zu tun, es resultiert andererseits aus der Tendenz, bürgerschaftliches Engagement zu mobilisieren und dadurch Infrastrukturleistungen bürgernäher und bedarfsgerechter zu gestalten.

Damit eine solche Partnerschaft zustande kommen kann, bedarf es Anreize in dem spezifischen Projekt, die eine solche Kooperation für beide Seiten vorteilhaft erscheinen lassen: Die zu erwartenden Ergebnisse müssen bei freiwilliger Zusammenarbeit besser sein, als es für jeden Beteiligten allein möglich wäre; damit aber müssen solche Kooperationen als win-win-Situation angelegt sein, sodass die Vorteile des einen nicht zu Lasten des anderen zustande kommen, sondern der beidseitige Effizienzgewinn den Anreiz zur Verfolgung einer gemeinsamen Aufgabe bildet.

Die Funktionslogik von ÖPP besteht also in der erfolgreichen Parallelschaltung der Interessen der beteiligten Akteure, von öffentlichem und privatem Interesse. Diese Zielkomplementarität muss nicht bedeuten, dass die Ziele identisch sind. Es ist ausreichend, wenn die Partner durch die gemeinsame Strategie ihre jeweiligen Zielvorstellungen verfolgen können. Eine weitere Voraussetzung ist die Möglichkeit, Synergieeffekte erzielen zu können. Gegenüber anderen organisatorischen Lösungen wie Privatisierungen oder Betreibermodelle sollen ÖPP den Vorteil haben, dass sie geringere Transaktionskosten mit sich bringen: Die gemeinsame Verantwortung und Interessen der Partner sollten eine gegenseitige Kontrolle der Leistungserbringung unnötig machen. Dafür ist allerdings ein vertrauensvolles Verhältnis zwischen den Partnern notwendig. Dies ist erforderlich, da der Entstehungsprozess eines solchen Projektes regelmäßig eine längere Zeit in Anspruch nimmt und sich auch die Rahmenbedingungen in Form anderer politischer Mehrheiten und einer veränderten Ertragslage der privaten Partner u.a. häufig verändern

Unternehmen haben Interesse an ÖPP wegen

- Renditeerwartungen
- einer Sicherung von Märkten im infrastrukturellen Grundbedarf
- einer Verbesserung der Wettbewerbssituation: Zugriff auf Fördermittel und –programme sowie öffentliche Vorleistungen (z.B. Infrastruktur)
- die Möglichkeit politischer Einflussnahme in den Projekten selbst

Die öffentliche Hand erwartet sich

- die Verbreiterung der finanziellen Basis durch Einbindung privaten Kapitals und der Entlastung der Verwaltung
- die Erschließung neuer Organisationskapazitäten und –potentiale durch die Einbeziehung privater Marktkenntnisse und unternehmerischer Kompetenz sowie
- eine Effizienzsteigerung der Verwaltung

Für beide Partner kann sich die Chance für ein Bündnis gegen Betriebsblindheit ergeben, weil das gemeinsame Interesse an der Durchführung des Projektes die einzelnen Partner zwingt, dem jeweils anderen das eigene Handeln zu erklären und damit die Qualität von Entscheidungen und Aktionen zu erhöhen.

Dies zeigen beispielhaft zwei Projekte in Deutschland:

- ÖPP, wie die Lokale Agenda 21 Berlin-Wedding oder
- der gemeinsame Betrieb von Freibädern durch BügerInnen und den kommunalen Bäderbetrieb in der Stadt Essen

- beide aus bürgerschaftlichem Engagement entstanden, belegen, dass beide Seiten Vorteile erzielen können. ÖPP sind keine erfolgreichen Projekte, wenn das Risiko einseitig auf einen Partner übertragen wird, etwa wenn Ausfallshaftungen des Staates für Risiken vereinbart werden, die im Grunde typisch unternehmerisch zu behandeln sind. Vor diesem Hintergrund ist – worauf das Grünbuch nur am Rande eingeht (vgl. Rn 45) – eine eindeutige und funktionale Aufteilung der Risiken zwischen öffentlichem und privatem Sektor eine Grundbedingung für ein erfolgreiches ÖPP-Modell. Private Partner müssen in der Lage sein, die typisch kommerziellen Risiken (Planungs- und Baukosten, Betriebsrisiko, Nachfragerisiko) zu tragen. Risikoübernahmen der öffentlichen Hand gehen nur zu Lasten der Allgemeinheit, ohne dass ein sichtbarer Effizienzgewinn (z.B. eine bessere Qualität der Dienstleistung) damit vorhanden wäre.

So gibt es auch eine ganze Reihe von ÖPP-Beispielen in Deutschland, wo die Kooperation zu Lasten der öffentlichen Hand gegangen ist: im Zusammenhang mit der Nutzung von Generalunternehmern und von Paketlösungen (z.B. Sanierung Schulgebäude Rostock), bei der Inanspruchnahme unterschiedlicher (öffentlicher!) Finanzierungsformen (zinsgünstige Kredite bei der Sanierung der Schwimmsporthalle Gera), unter Ausblendung einer angemessenen Risikoverteilung (Kreishaus Luckenwalde), durch Erzeugung eines hohen Abstimmungsbedarfs zwischen Verwaltungseinheiten (Neubau Gymnasium Salzhausen), auf Grundlage der Ausgestaltung des Insolvenzrisikos (Neubau einer Integrierten Gesamtschule Peine) oder wegen entstandener Mehrkosten aufgrund politischen Nachsteuerungsbedarfs zu Lasten der öffentlichen Hand.

Auch die Private-Finance-Initiative-Projekte in Großbritannien haben zu einer Reihe negativer Entwicklungen geführt (u.a. keine Innovationen, keine fristgerechte Baufertigstellung, hohes Insolvenzrisiko bei Privaten, überzogene Gewinnerwartungen, Sicherheits- und Gesundheitsmängel bei Schulen, hohe Finanzierungskosten, selten Einsparungen bei Bewirtschaftungskosten).

Dies zeigt, dass Verhandlungsverfahren gegenüber Ausschreibungsverfahren im Vorteil sind – erst recht bei komplexen und langfristigen Formen der Zusammenarbeit.

Um die Risiken zu begrenzen, kommt es sehr auf die Auswahl des geeigneten privaten Partners und auf die vertragliche Ausgestaltung der institutionalisierten PPP an. Es muss eine Vertrauensbasis entstehen können und das Insolvenzrisiko des Mitgesellschafters muss gering sein. Soll eine künftige Abhängigkeit der öffentlichen Hand vom privaten Partner vermieden werden, muss im Konsortialvertrag deren maßgebliche Einflussmöglichkeit sichergestellt werden. Es müssen eindeutige Regelungen getroffen werden, die bei Eintritt eines Risikos die weitere Sicherstellung der Dienstleistung ermöglichen und Gefahren abwenden. Dazu zählen die Unternehmensnachfolge des materiell privaten Partners, der Rückzug eines dritten Kapitalgebers und die damit verbundene Insolvenz des privaten Partners. Bei der Abwägung von Chancen und Risiken spielen neben den nationalen, regionalen und örtlichen Gegebenheiten auch die jeweiligen Sektoren sowie die Art und Höhe der privaten Beteiligung eine erhebliche Rolle.

Eine Zwangsausschreibung für Dienstleistungskonzessionen darf es nicht geben

Das Grünbuch zu öffentlich-privaten Partnerschaften (ÖPP) geht auf die Grundbedingungen für das Funktionieren von ÖPP-Modellen nicht ein, sondern stellt nur deren Möglichkeit in den Raum (vgl. Frage 22). Eine mögliche Neuregelung des Vergaberechts ist ein schlechter Weg, um eine Debatte um öffentlich-private Partnerschaften zu eröffnen. Sie präjudiziert den eigentlich notwendigen Regulierungsbedarf in der aufgeschobenen europäischen Debatte um die öffentlichen Güter. Öffentlich-private Partnerschaften können eine effiziente Form der

Dienstleistungserbringung darstellen, wenn grundsätzliche Fragen über Aufgaben und Verpflichtungen der öffentlichen und privaten Partner eindeutig definiert werden. Das Vergaberecht kann jedoch diese Unsicherheiten des Partnerschaftsverhältnisses und im Verhältnis der Partnerschaft zu weiteren privaten Anbietern nicht auflösen.

So führt die Europäische Kommission an, dass bei der Übertragung einer Dienstleistung an Dritte die Rechtsvorschriften für öffentliche Aufträge und Konzessionen zu beachten sind, auch wenn die betreffende Dienstleistung als Leistung von allgemeinem Interesse eingestuft wird. Es ist aber eine Differenzierung von Dienstleistungen im allgemeinem wirtschaftlichem (DAWI) und Dienstleistungen im allgemeinem nicht-wirtschaftlichem Interesse (DAI) notwendig, da erstere unter Gemeinschaftsregelungen fallen und letztere nicht. Was ist darüber hinaus mit nicht-wirtschaftlichen Tätigkeiten von Einrichtungen wie Gewerkschaften, politischen Parteien, Kirchen und religiösen Gemeinschaften, Verbraucherverbänden, wissenschaftlichen Gesellschaften, Wohlfahrtsverbänden sowie Schutz- und Hilfsorganisationen? Nach der Rechtsprechung des Gerichtshofs unterliegen hoheitliche Tätigkeiten des Staates oder auch Dienstleistungen im Zusammenhang mit nationalen Bildungssystemen oder sozialen Grundversorgungssystemen als nicht-wirtschaftliche Tätigkeit nicht dem gemeinschaftlichen Wettbewerbsrecht. Bei der Kategorisierung einer Tätigkeit als nicht-wirtschaftlich muss sowohl der Inhalt der Leistung als auch die Form der Leistungserbringung berücksichtigt werden.

Es drängt sich der Eindruck auf, dass das Grünbuch im Rahmen der Definition von Dienstleistungskonzessionen für DAWI als ÖPP (auf Vertragsbasis) die Einführung von Zwangsausschreibungen von Dienstleistungskonzessionen für DAWI wie Strom-, Gas-, Wasser/Abwasser- und Entsorgungsdienstleistungen sowie ÖPNV intendiert. Dies wäre ein Paradigmenwechsel „im Handstreich“. Damit könnte eine breite öffentliche Diskussion über diese Frage, wie sie gegebenenfalls im Rahmen der Erarbeitung eines Richtlinienentwurfs zur Regelung der DAWI erfolgen müsste, umgangen werden. Ein derartiges Verfahren ist schon aus Gründen mangelnder Transparenz des demokratischen Entscheidungsprozesses abzulehnen.

ver.di wendet sich generell gegen Ausschreibungsverpflichtungen für Dienstleistungskonzessionen für DAWI im Rahmen der EU. Derartige Verpflichtungen verstoßen gegen das Subsidiaritätsprinzip und die in Deutschland grundgesetzlich geschützte Wahlfreiheit der Kommunen, die Art der Erbringung von DAWI selbst zu bestimmen. ver.di wendet sich deshalb gegen alle Versuche, derartige Regelungen EU-weit zu treffen, sei es in einer ÖPP-Richtlinie, sei es in einer DAWI-Richtlinie, sei es in sektorspezifischen Richtlinien etwa zu Wasser/Abwasser, Entsorgung oder ÖPNV.

Es kann nicht angehen, dass Öffentliche Daseinsvorsorge zukünftig nur noch über ÖPP auf Vertragsbasis ausgeführt werden darf. Das hätte zur Folge, dass öffentliche Dienstleistungen rein betriebswirtschaftlichen Kriterien unterworfen und öffentliche (aber demokratischer Kontrolle unterliegende) Monopole durch private Monopole ersetzt werden. Die Einführung von Zwangsausschreibungen von Dienstleistungskonzessionen würde kommunale Unternehmen, die überwiegend zu den kleinen und mittleren Unternehmen (KMU) zählen, mittelfristig vom Markt verdrängen. Dies beeinträchtigt auch ÖPP, die mit dem kommunalen Unternehmen eingegangen wurden. Eine derartige Oligopolisierung im Bereich der DAWI kann wettbewerbspolitisch nicht gewollt sein. Dies widerspräche der Politik der Kommission, eigentumsneutral die Entwicklung von KMU zu fördern.

Die kommunale Gestaltungsfreiheit muss erhalten bleiben.

Es kann auch nicht sein, dass kommunale Zuständigkeiten für den Wettbewerb aufgebrochen und letzten Endes privatisiert werden und die Gemeinden in eine Gewährleistungsrolle zurückgedrängt werden. Die Regelungshoheit für Dienstleistungskonzessionen darf deshalb nicht auf die europäische Ebene transferiert werden.

Wenn eine Gemeinde, basierend auf ihrer Organisationshoheit, eine institutionalisierte ÖPP eingeht, ist dies kein Beschaffungsakt. Vielmehr existieren in den Kommunen neben reinen Kostengesichtspunkten weitere entscheidungsrelevante Kriterien, wie z.B. qualitative, regionalspezifische und strukturpolitische Aspekte. Die Auswahl des privaten Partners darf deshalb nicht dem EU-Wettbewerbsrecht unterworfen werden. Um die dauerhafte Aufgabenerledigung im Rahmen von ÖPP nicht zu gefährden, muss der Inhouse-Begriff angemessen geregelt werden. Auch hierzu wären im Grünbuch Ausführungen erforderlich gewesen, um zur Rechtssicherheit in den Mitgliedsstaaten beizutragen. Für den Inhouse-Begriff muss ausreichen, dass der öffentliche Einfluss innerhalb der ÖPP überwiegt (Kontrollkriterium) und die ausgeübte Dienstleistung im wesentlichen zum Nutzen der Bürger in der entsprechenden Gebietskörperschaft erfolgt (Dienstleistungskriterium).

Die im Grünbuch vorgetragene Behauptung, dass öffentliche Auftraggeber sich nur von wirtschaftlichen Überlegungen leiten lassen dürfen, relativiert die im EU-Vergaberecht vorgenommene Verankerung der Verfolgung sozialer und ökologischer Ziele im Rahmen der Auftragsvergabe (vgl. Erwägungsgründe 1, 5, 29, 33, 43, 44 und 46 sowie die Artikel 23, 26, 27, 50 und 53 der RL 2004/18/EG). Das gesellschaftliche Interesse an öffentlichen Dienstleistungen konkretisiert sich eben in Qualitäts-, Versorgungs-, sozialen und ökologischen Zielen.

Positiv wird von ver.di die Absicht beurteilt, eine EU-weite Bestandsaufnahme der ÖPP vorzubereiten. Die dadurch mögliche Transparenz des Umgangs mit ÖPP in allen Mitgliedsstaaten kann Hemmnisse für die Bildung von ÖPP aufdecken und damit einen Beitrag zur Angleichung der Wettbewerbsbedingungen in den Mitgliedsstaaten leisten, sowohl für Kommunen als auch für private Partner. Dies kann dazu beitragen, eine „gute Praxis“ für ÖPP europaweit zu definieren. Einer rechtlichen Rahmensetzung hierfür bedarf es allerdings nicht.

2. Zu den einzelnen Fragen des Grünbuchs

1. Welche Formen von ÖPP auf Vertragsbasis sind Ihnen bekannt? Gibt es in Ihrem Land spezifische (gesetzliche oder andere) Rahmenbedingungen für derartige Konstruktionen?

Die Europäische Kommission weist in Rn1 darauf hin, dass es keine gemeinschaftsweit geltende Definition für ÖPP-Modelle gibt. Auch gebe es für diese Rechtsfigur kein besonderes System im Gemeinschaftsrecht (Rn 8). Damit bleibt der Anwendungsbereich des Vergaberechtes unscharf. So ist z.B. fraglich, wie öffentlich geförderte Wohlfahrtsorganisationen, arbeitsmarktpolitische Einrichtungen oder ganz allgemein Subventionen und Förderungen zur Bereitstellung einer Dienstleistung als öffentlich-private Partnerschaft zu verstehen sind. Gleiches gilt für den Kostenausgleich für gemeinwirtschaftliche Verpflichtungen im Sinne der Entscheidung des Europäischen Gerichtshofes (Rechtssache C-280/00).

Das Vorhaben der Europäischen Kommission, Dienstleistungskonzessionen den Vergaberegeln zu unterwerfen, ist deshalb verfehlt, weil das Vergaberecht nur auf Beschaffungsvorgänge angewendet wird und dies bei Dienstleistungskonzessionen nicht der Vertragsgegenstand ist. In Deutschland werden Dienstleistungskonzessionen durch Verträge vergeben, wobei die Auswahl des Vertragspartners im Ermessen der jeweiligen öffentlich-rechtlichen Körperschaft steht. Die privatrechtlichen Verträge müssen sich an einschlägigen Gesetzen messen lassen und sind gerichtlich überprüfbar. Ein Beispiel für eine derartige gesetzliche Regelung stellt § 13 Abs. 2 EnWG dar, wonach die Gemeinden die Neuvergabe von Wegenutzungsverträgen zur Strom- und Gasversorgung 2 Jahre vor Ablauf des Altvertrags öffentlich bekannt machen müssen. Auf diese Weise wird Transparenz und Gleichbehandlung sichergestellt.

2. ***Nach Auffassung der Kommission wird die Umsetzung des wettbewerblichen Dialogs in einzelstaatliche Rechtsvorschriften den betroffenen Parteien ein Verfahren an die Hand geben, das sich ganz besonders für die Vergabe öffentlicher Aufträge in Zusammenhang mit der Einrichtung einer ÖPP auf Vertragsbasis eignet und gleichzeitig die Grundrechte der Wirtschaftsteilnehmer wahrt. Stimmen Sie dem zu? Falls nein, warum nicht?***

Der wettbewerbliche Dialog ist für die Vergabe öffentlicher Aufträge vorgesehen und damit ein Instrument des Vergaberechts. Für den Bereich der Dienstleistungskonzessionen gilt, dass das Vergaberecht nicht anwendbar ist. Also gibt es keine Verbindung zwischen dem vergaberechtlichen Instrument des wettbewerblichen Dialogs und den Dienstleistungskonzessionen.

Der im Grünbuch vorgeschlagene wettbewerbliche Dialog führt zu einer Defensivposition des öffentlichen Verhandlungspartners und ist keine Lösung für Probleme, wie unverbindliche Angebotseinholung, Nachverhandlungen oder

Parameterwechsel je nach Dienstleistung. Es gibt auch andere Möglichkeiten, wie z.B. best value bidding, bei dem der zentrale Parameter nicht der Preis, sondern die Qualität ist.

3. ***Sehen Sie in Bezug auf diese Aufträge neben der Wahl des Vergabeverfahrens andere Punkte, die mit dem Gemeinschaftsrecht über öffentliche Aufträge in Konflikt stehen könnten? Wenn ja, nennen Sie diese und begründen Sie!***

Bei Dienstleistungskonzessionen ist das Vergaberecht nicht anwendbar. Daher können Konflikte mit dem Gemeinschaftsrecht über öffentliche Aufträge nicht auftreten.

4. ***Haben Sie bereits einmal ein Verfahren zur Vergabe einer Konzession in der Europäischen Union organisiert, daran teilgenommen bzw. ein solches organisieren oder teilnehmen wollen? Welche Erfahrungen haben Sie gemacht?***

Zu dieser Frage nimmt ver.di keine Stellung.

5. ***Halten Sie das derzeitige Gemeinschaftsrecht für präzise genug, um die konkrete und effektive Teilnahme von Gesellschaften oder Gruppierungen aus anderen Staaten an den Konzessionsvergabeverfahren sicherzustellen? Sind Sie der Ansicht, dass in dieser Hinsicht normalerweise ein tatsächlicher Wettbewerb herrscht?***

Art. 43 ff. EGV sind präzise genug, vorausgesetzt, die Europäische Kommission nimmt davon Abstand das Binnenmarktprinzip zu überspannen. Beteiligungen von ausländischen privaten Partnern an Dienstleistungskonzessionen existieren. Ausländische Unternehmen können auch mittelbar an Dienstleistungskonzessionen beteiligt sein, z.B. über gesellschaftsrechtliche Beteiligungen an deutschen Unternehmen. Ebenso haben ausländische Unternehmen sich erfolgreich um öffentliche Aufträge, z.B. zur Stromversorgung kommunaler Einrichtungen beworben.

Bezüglich des tatsächlichen Wettbewerbs kann es unternehmenspolitische Gründe ausländischer Dienstleister geben, sich nicht an der Erbringung von Dienstleistungen im allgemeinen wirtschaftlichen Interesse zu beteiligen. Oder die Gebietskörperschaft entscheidet sich aus sachlichen Gründen (Effektivität, Kundennähe) für einen orts- und sachnäheren Bewerber.

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6. ***Halten Sie einen Vorschlag für einen gemeinschaftlichen Rechtsakt zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe für wünschenswert?***

Einer europaweiten Ausschreibungspflicht für Dienstleistungskonzessionen steht das Subsidiaritätsprinzip entgegen. Diesen Grundsatz hat der europäische Verfassungsentwurf aufgenommen und bekräftigt. Dienstleistungskonzessionen sollten also nicht stärker reglementiert werden, insbesondere durch vergaberechtliche Vorschriften.

Eine Ausschreibungsverpflichtung für Dienstleistungskonzessionen hätte negative Auswirkungen auf das Zustandekommen und das Weiterbestehen von institutionalisierten ÖPP. Denn auch die Konzessionserteilung an institutionalisierte ÖPP müsste ausgeschrieben werden, und dies bedeutet neue private Partner, deren Investitionssicherheit man nicht einschätzen kann. Die institutionalisierten ÖPP müssen Aufträge erhalten können und die Vertragslaufzeit muss so bemessen sein, dass die Investitionen sich über einen angemessenen Zeitraum amortisieren.

7. ***Allgemeiner gefragt: Wenn Sie ein neues Gesetzgebungsvorhaben der Kommission für erforderlich halten, gibt es dann objektive Gründe dafür, in diesem Rechtsakt sämtliche ÖPP auf Vertragsbasis zu behandeln und sie ein und demselben Regelwerk für die Vergabe zu unterwerfen, ganz gleich ob die Vorhaben als öffentliche Aufträge oder als Konzessionen einzustufen sind?***

Nein. Wie bereits ausreichend dargelegt, dürfen Dienstleistungskonzessionen und vergaberechtliche Tatbestände nicht vermischt werden.

Ein Ausschreibungszwang für Dienstleistungen im allgemeinen wirtschaftlichen Interesse hätte zur Folge, dass einerseits das Vergabeverfahren zu einem enormen bürokratischen Aufwand führen würde (Zusammenstellung einer ungeheuren Menge an Unterlagen; schwerfälliger, langwieriger Entscheidungsprozess) und andererseits die Organisation von Dienstleistungen im allgemeinen wirtschaftlichen Interesse einem starren, einheitlichen Verfahren unterworfen wird. Dienstleistungen im allgemeinen wirtschaftlichen Interesse sind sowohl örtlich als auch strukturell sehr unterschiedlich. Dienstleistungen im allgemeinen wirtschaftlichen Interesse sollen darüber hinaus nicht nur nach kommerziellen Gesichtspunkten erbracht werden, sondern sowohl Qualitäts- als auch sozialen und ökologischen Standards entsprechen. Eine flächendeckende Versorgung und ein universeller Zugang sind dabei Grundvoraussetzungen.

8. ***Ist Ihrer Erfahrung nach der Zugang der ausländischen Akteure zu privat initiierten ÖPP gewährleistet? Für den Fall, dass die Vergabestellen zur Initiative aufrufen, wird dieser Aufruf dann angemessen bekannt gemacht, so dass alle interessierten Akteure Kenntnis davon haben können? Wird für die Ausführung des ausgewählten Projekts ein Auswahlverfahren auf Basis eines effektiven Wettbewerbs organisiert?***

Siehe Antwort zu Frage 5.

9. ***Wie könnte Ihrer Auffassung nach die Entwicklung privat initiierter ÖPP in der Europäischen Union unter Wahrung der Grundsätze der Transparenz und der Gleichbehandlung und ohne Verstoß gegen das Diskriminierungsverbot gewährleistet werden?***

Jedes in- und ausländische Dienstleistungsunternehmen kann sich um die Erteilung einer lokalen Dienstleistungskonzession bemühen. Wenn Dienstleistungskonzessionen befristet erteilt werden, ist nach Ablauf der Vertragslaufzeit auch für ausländische Unternehmen der Zugang zu privat initiierten ÖPP möglich.

Ein Ausschreibungszwang bei privat initiierten ÖPP hätte zur Folge, dass schnelle, innovative Anbieter gleich wie die anderen Bieter behandelt werden.

Innovationsfreudigkeit und Schnelligkeit sind aber Wettbewerbsmerkmale, die gesondert behandelt werden müssen. Eine Belohnungs-Lösung hat aber auch mit Ungleichbehandlung der Wirtschaftsakteure zu tun, und dies ist bei einem obligatorischen Ausschreibungszwang nicht mehr möglich.

10. ***Welche Erfahrungen haben Sie in der Phase im Anschluss an die Auswahl des privaten Partners im Rahmen von ÖPP auf Vertragsbasis gemacht?***

Wie in der Einleitung erwähnt, waren negative Erfahrungen Insolvenz des privaten Partners, Preiserhöhungen bei den Dienstleistungen und Oligopolisierungsbestrebungen der Unternehmen.

11. ***Sind Ihnen Fälle bekannt, in denen die Ausführungsbedingungen, einschließlich der Klauseln zur Anpassung im Zeitverlauf, eine diskriminierende Wirkung entfalten konnten oder eine ungerechtfertigte Behinderung der Dienstleistungs- oder Niederlassungsfreiheit darstellten? Falls ja, bitte beschreiben Sie die Art der aufgetretenen Probleme.***

Im Wasser-, Strom-, Gas- und Fernwärmebereich existieren gesetzliche Regelungen, die Rechtssicherheit für alle Beteiligten gewährleisten.

12. ***Sind Ihnen Praktiken oder Mechanismen zur Bewertung von Angeboten bekannt, die eine diskriminierende Wirkung haben?***

Public Sector Comparator: weitere intelligente Verfahren der Wirtschaftlichkeitsbetrachtung sind in Deutschland noch im Anfangsstadium.

13. ***Sind Sie wie die Kommission der Auffassung, dass bestimmte Interventionsklauseln in Bezug auf die Grundsätze der Transparenz und der Gleichbehandlung problematisch sein können? Sind Ihnen andere Typen von Klauseln bekannt, deren Anwendung zu ähnlichen Problemen führen können?***

Die Grundsätze der Transparenz und Gleichbehandlung müssen auch den anderen Zielen des EGV entsprechen. Art. 16 EGV gibt den Dienstleistungen im allgemeinen wirtschaftlichen Interesse eine besondere Bedeutung, der über dem Grundsatz einer wettbewerbsorientierten Marktwirtschaft steht.

14. ***Halten Sie es für erforderlich, dass bestimmte Aspekte der vertraglichen Rahmenbedingungen für ÖPP auf Gemeinschaftsebene geklärt werden? Falls ja, was sollte geklärt werden?***

In Bezug auf Dienstleistungskonzessionen besteht kein Handlungs- und Klärungsbedarf.

15. ***Sind Ihnen bei ÖPP-Konstruktionen besondere Probleme mit der Vergabe von Unteraufträgen bekannt? Welche?***

Bei der Vergabe von Subaufträgen kann bei jeder weiteren Auftragsvergabe ein Kostendruck entstehen, der dazu führt, dass sich Subauftragnehmer über die Einhaltung rechtlicher Bestimmungen (insbesondere Lohn- und Arbeitsbedingungen) hinwegsetzen. Auch wenn das EU-Vergaberecht die Einhaltung ortsüblicher Lohn- und Arbeitsbedingungen vorschreibt, wie bewerten ausländische Unternehmen ortsübliche Tarife und Arbeitsbedingungen (nach dem Unternehmen in der Tarifgemeinschaft oder nach tarifungebundenen Unternehmen)? Je länger die Kette an Subaufträgen, desto intransparenter sind die Rechtskonstruktionen für die Behörden und desto schwieriger werden Kontrolle bzw. Rechtsverfolgung.

16. ***Rechtfertigt die Existenz von ÖPP auf Vertragsbasis, die die Übertragung eines Aufgabenpakets an einen einzigen privaten Partner impliziert, ihrer Auffassung nach, dass ausführlichere Regeln für die Vergabe von Unteraufträgen eingeführt werden und/oder dass der Anwendungsbereich erweitert wird?***

Wird eine Dienstleistungskonzession vergeben, ist schon der Hauptauftrag nicht ausschreibungspflichtig. Das gilt dann auch für die Subaufträge. Schon heute kann der Auftraggeber die Vergabe von Subaufträgen nach bestimmten Bedingungen genehmigen. Ausführlicher einheitlicher Regelungen bedarf es deshalb nicht.

17. ***Halten Sie, allgemeiner gesprochen, eine ergänzende Initiative auf Gemeinschaftsebene zur Klärung oder Umgestaltung der Regeln für die Vergabe von Unteraufträgen für erforderlich?***

Nein. Märkte würden dadurch bürokratisch überreguliert. Eigeninitiative und Engagement würden dadurch verhindert werden.

18. ***Welche Erfahrungen haben Sie mit der Einrichtung institutionalisierter ÖPP gemacht? Lassen Ihre Erfahrungen Sie zu der Schlussfolgerung gelangen, dass die gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen bei institutionalisierten ÖPP-Konstruktionen eingehalten werden? Falls nein, warum nicht?***

Es gibt verschiedene Formen des ÖPP, die nicht einheitlich geregelt werden können. Dies würde das Zustandekommen und das Funktionieren der ÖPP eher behindern. Für Handlungsformen von ÖPP kommen gemischt-wirtschaftliche (Kapital-)Gesellschaften ebenso in Betracht wie formlose Zusammenkünfte, Arbeitsgemeinschaften, Vereine, Stiftungen oder längerfristig angelegte Austauschverträge. Eine ÖPP kann durch das Betreiben der öffentlichen Hand, eines privaten Unternehmens oder durch ein bürgerschaftliches Engagement entstehen. Contracting Out sind Formen nicht korporativer Verbundenheit, Private-Finance-Modelle beruhen auf Kooperations- und Konzessionsmodellen mit korporativer Verbundenheit (z.B. Mitgesellschafter einer Besitzgesellschaft).

Die zu erwartenden Ergebnisse müssen bei freiwilliger wechselseitiger Zusammenarbeit besser sein, als es für jeden Beteiligten allein möglich wäre; damit aber müssen solche Kooperationen als win-win-Situation angelegt sein, also nicht die Vorteile eines Beteiligten nur zu Lasten des anderen realisierbar sein lassen, denn der jeweilige Effizienzgewinn bei der Verfolgung einer gemeinsamen Aufgabe bildet den Anreiz zum Interessenkompromiss bzw. der Suche nach Konsens-Lösungen.

Deshalb sind einheitliche Regelungen für ÖPP nicht sinnvoll – vielmehr eine Verbesserung des Rechtsrahmens. Hier sind verschiedene Initiativen von Bund und Ländern zur Schaffung verbesserter Implementierungsvoraussetzungen im Gange.

Auch diese führen zu einer Vereinfachung des rechtlichen Umfeldes im Sinne „Moderner Staat – Moderne Verwaltung“.

Wählen Kommunen Öffentlich-private Partnerschaften zur Erbringung von Dienstleistungen im allgemeinen wirtschaftlichen Interesse – sei es durch Dienstleistungskonzessionen, durch die Vergabe öffentlicher Aufträge oder durch die Einrichtung institutionalisierter ÖPP – werden die gemeinschaftlichen Rechtsvorschriften eingehalten.

19. Halten Sie eine Initiative auf Gemeinschaftsebene für erforderlich, um die Verpflichtungen zu klären oder zu vertiefen, die die öffentlichen Auftraggeber in Bezug auf den Wettbewerb zwischen potenziell an einem institutionalisierten ÖPP-Projekt interessierten Wirtschaftsteilnehmer haben? Falls ja, welche Aspekte halten Sie für besonders wichtig und welche Form sollte eine solche Initiative haben? Falls nein, warum nicht?

Das rasche Anwachsen der Anzahl institutionalisierter ÖPP belegt, dass es einer Gesetzesinitiative auf EU-Ebene zur Förderung dieses Modells nicht bedarf. Eine politische Entscheidung für eine europäische Investitionsinitiative, z.B. Transeuropäische Netze, auf ÖPP-Basis ist dagegen etwas anderes. Eine europäische Inititative, die zu Überregulierung führt, hindert dagegen die wachsende Zahl institutionalisierter ÖPP in Deutschland. Hinzu kommt, dass im EU-Recht auch keine Ermächtigungsgrundlage für derartige Regelungen vorhanden ist.

Es muss auch zukünftig gewährleistet sein, dass auf staatlicher wie kommunaler Ebene die Gestaltungsfreiheit bei den ÖPP erhalten bleibt. Wir verweisen an dieser Stelle nochmals auf die kommunale Entscheidungshoheit im Rahmen des Subsidiaritätsprinzips. Eine einheitliche europäische Definition oder eine Standardisierung der Gesellschaftsverträge ist weder erforderlich noch zweckmäßig.

20. Welche Maßnahmen oder Verfahren behindern in der Europäischen Union die Einrichtung von ÖPP?

Derzeit sind in Bezug auf Deutschland keine derartigen Maßnahmen und Verfahren erkennbar. Eine Zwangsausschreibung für Dienstleistungskonzessionen könnte allerdings die Einrichtung von ÖPP behindern, denn dann müssten sich auch institutionalisierte ÖPP an dieser Ausschreibung beteiligen. Damit wäre der Anreiz zur Bildung von ÖPP stark eingeschränkt.

Beide Partner (öffentlich Hand, Private) müssen durch eine ÖPP positive Ergebnisse für sich erzielen können. Die Rahmenbedingungen für diese positive Zielerreichung sind zu verbessern und nicht die Möglichkeit über Größe und Preis innovative und qualitätssichernde Mitbewerber aus dem Feld zu schießen. Europa benötigt eine sozial-ökologische Marktwirtschaft. Ein freier Wettbewerb mit Marktversagen kann nicht im Interesse der Allgemeinheit sein – dies müsste Grundlage der europäischen Wettbewerbsphilosophie werden.

21. Kennen Sie andere ÖPP-Formen aus Drittländern? Kennen Sie aus Ihren Erfahrungen in solchen Ländern bewährte Verfahrensweisen, die auch für die EU beispielgebend sein könnten? Falls ja, welche?

Ein positives in der EU, was beispielgebend sein kann, ist das Bürgerbeteiligungs- und Planungsverfahren zur Stadterneuerung „Rahmenplanung Yppenplatz Wien“. Der Yppenplatz in Wien entwickelte sich im Verlauf der 70er und 80er Jahre zum städtischen Problemgebiet. Der stärker werdende Problemdruck und eine Verunsicherung der Bevölkerung durch eine Vielzahl von Projektvorschlägen brachten bei den Bewohnern und Marktleuten vor Ort eine hohe Erwartungshaltung, aber auch Resignation hervor. In dieser Situation entstand das EU-Programm URBAN Wien-Gürtel Plus, das eine Aufwertung des Westgürtelbereiches beabsichtigte. Es sollte ein anderer Planungsansatz durchgeführt werden, von dem man sich eine größere Umsetzungsdynamik erhoffte: Im Rahmen eines kooperativen Planungsverfahrens, in das alle maßgebenden Betroffenen eingebunden waren, sollte ein tragfähiger Konsens in Form eines Rahmenplanes entwickelt werden. In dem Arbeitskreis, „quasi das Parlament des Verfahrens“, saßen neben der Projektleitung Fachleute aus Arbeiter- und Wirtschaftskammer, des URBAN-Büros, Mitglieder der Bürgerinitiative Yppenplatz sowie Anwohner und Geschäftsleute. Neben der Organisationsstruktur wurden folgende Arbeitsgrundsätze für das Verfahren entwickelt:

- Offen und kommunikationsorientiert: die betroffenen Bürger und Gewerbetreibende vor Ort wurden in das Verfahren integriert.
- Fachübergreifende Beratung
- Nutzerorientiert: Das breite Spektrum der Nutzer stand im Mittelpunkt.
- Umsetzungsorientiert: Es sollte Sofortmaßnahmen, längerfristige Projekte und weiterführende Konzepte geben.

Erfolgsfaktoren:

- Zeitdruck und gemeinsamer Wille erzwangen einen straffen Gesprächsstil.
- Es herrschte ein offenes Klima, in dem alle Beteiligten zu Wort kamen.
- Großes Engagement der Bürger und Gewerbetreibenden, die sich konstruktiv einbrachten.
- Die Einhaltung des Zeitplans und die penible Vorbereitung und das detaillierte Verfahrensdesign.

Als problematisch wurde bezeichnet, dass das Verfahren nur zur Entscheidungsvorbereitung diente. Es wurde lokales Expertenwissen mobilisiert, aber nicht zur Legitimation politischer Entscheidungen verwendet.

Diese Erfahrung machte im übrigen auch das von der deutschen Bundesregierung initiierte Projekt „Soziale Stadt“, welches Kooperationsbeziehungen mit dem EU-Projekt Urban hatte. Es gab bei diesem Projekt keine Regelung für eine politische Legitimation der Steuerungsgruppe.

Ver.di möchte in diesem Zusammenhang noch auf zwei positive ÖPP-Projekte in Deutschland hinweisen, die aus bürgerschaftlichem Engagement entstanden sind. Und zwar:

- Lokale Agenda 21 Berlin-Wedding
- Gemeinsamer Betrieb von Freibädern durch BügerInnen und den kommunalen Bäderbetrieb in der Stadt Essen

22. Denken Sie, dass es nützlich wäre, im Hinblick auf den großen Investitionsbedarf einzelner Mitgliedsstaaten zum Erreichen einer sozialen und dauerhaften Entwicklung gemeinsam und in regelmäßigen Abständen über diese Fragen unter den betroffenen Akteuren nachzudenken und bewährte Verfahrensweisen auszutauschen? Sollte die Kommission nach Ihrer Auffassung ein derartiges Netzwerk aufbauen?

Der Vorschlag ist sinnvoll, wenn die Vorgehensweise objektiv und vom Ergebnis her offen ist. Folgende Bedingungen sind dabei zu berücksichtigen:

- Gleichberechtigter Zugang und Austausch
- Schutz vor Missbrauchsmöglichkeiten finanzkräftiger Lobbies
- Transparenz.

Abschließende Bemerkung

Das Grünbuch reduziert seine Fragestellungen hauptsächlich auf das Vergaberecht. Wirtschafts- und finanzpolitische Grundsatzfragen mit gesellschaftspolitischen Auswirkungen wurden nicht gestellt. Die vergaberechtliche Analyse versuchte die kommunale, regionale und nationale Gestaltungsfreiheit in Frage zu stellen, obwohl im Europäischen Verfassungsvertrag eine Grundsatzentscheidung für die Subsidiarität gefällt wurde. Damit erfüllt das Grünbuch die Erwartungen für ein besseres Funktionieren von ÖPP in Europa nicht im geringsten. Bevor weitere europäische Rechtsgrundlagen für das Zustandekommen von ÖPP in Europa entstehen, sollte die europäische Rahmenregelung für Dienstleistungen im allgemeinen wirtschaftlichen Interesse umgesetzt sein. Erst dann können neue ordnungsrechtliche Fragestellungen in Angriff genommen werden.

Verband kommunaler Unternehmen e.V.

28. Juli 2004

STELLUNGNAHME

des Verbandes kommunaler Unternehmen e.V. (VKU)

zum Grünbuch der Europäischen Kommission zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen - KOM (2004) 327 endgültig - vom 30.04.2004

I. Vorbemerkung

Der Verband kommunaler Unternehmen e.V. (VKU) vertritt, gemeinsam mit dem VKS im VKU, die Interessen der kommunalen Wirtschaft in den Bereichen Energie- und Wasserversorgung sowie Abwasser- und Abfallwirtschaft. Nahezu 1.400 Mitgliedsunternehmen mit einem Gesamtumsatz von rund 50 Milliarden € und 164.000 Beschäftigten sind im VKU organisiert. Das Investitionsvolumen beträgt rund 5,4 Mrd. Euro.[1]

Die kommunalen Unternehmen nehmen Dienstleistungen von allgemeinem Interesse nicht wirtschaftlicher und wirtschaftlicher Art (DAI/DAWI) wahr und erfüllen sie gegenüber Bürgern, Gewerbe und Industrie. Mit Stand Oktober 2003 stellte sich die Struktur der Mitgliedsunternehmen nach Rechtsform folgendermaßen dar: 225 Eigenbetriebe, 48 Zweckverbände, 21 Anstalten öffentlichen Rechts und Körperschaften des öffentlichen Rechts, 49 Aktiengesellschaften, 592 Gesellschaften mit beschränkter Haftung und 36 Sonstige[2].

[1] Die Zahlen bzgl. Umsatz, Beschäftigten und Investitionsvolumen basieren auf den rund 1000 Unternehmen, die vor der Fusion mit den Entsorgungsverbänden im Jahr 2003 Mitglied im VKU waren.

[2] Siehe Fn. 1.

Seit 1998 ist bei den Verbandsmitgliedern der verstärkte Trend zu Kooperationen zu beobachten. Dies trifft insbesondere unter dem Aspekt der so genannten institutionalisierten ÖPP auf einen Großteil der Mitglieder des VKU zu. Freilich ist diese Entwicklung vor allem auf die teils katastrophale Haushalts- und Finanzsituation der Kommunen zurückzuführen. Sicherlich spielt auch die Liberalisierung der kommunalen Infrastrukturdienstleistungen eine Rolle.

II. Grundsätzliche Bewertung des Grünbuchs

1. Als betroffener Verband nimmt der VKU das Grünbuch mit großer Aufmerksamkeit zur Kenntnis. Dieses Grünbuch ist für die kommunale Wirtschaft von höchster Brisanz. Es verdeutlicht die Bestrebungen der EU-Kommission, die Ausschreibungspflichten zu erweitern. Letztlich soll ein Ausschreibungszwang für alle kommunalen Infrastrukturbereiche implementiert werden.

Die ÖPP auf Vertragsbasis, die im Grünbuch einen breiten Raum einnehmen, erfassen bei unbefangener Betrachtung sämtliche öffentliche Aufträge, die schon heute dem Vergaberecht unterfallen. Unter letzterem Blickwinkel bleibt für die ÖPP auf Vertragsbasis nur noch ein Regelungsbereich: die Dienstleistungskonzessionen.

Der VKU sieht diesbezüglich aber **weder einen konkreten legislatorischen Handlungsbedarf noch** erkennt er **entsprechende Zuständigkeiten auf europäischer E-bene**. Selbst die Kommission erkennt im Übrigen an, dass die Dienstleistungskonzessionen, auch nach den gerade erst verabschiedeten Vergaberichtlinien, nicht ausschreibungspflichtig sind. Deren Einbeziehung war diskutiert und letztlich abgelehnt worden.

2. Im Grünbuch ist eine eindeutige Tendenz festzustellen, die Aufgabenerfüllung durch ÖPP zu bevorzugen, wobei die ordnungspolitische Zielrichtung dieser Präferenz an keiner Stelle erläutert wird. Dabei sollen die Auswahl des privaten Partners bei der Bildung einer institutionalisierten ÖPP sowie die Erteilung von Dienstleistungskonzessionen (ÖPP auf Vertragsbasis) dem Vergaberecht unterworfen werden. Jedoch sind ÖPP kein Königsweg, sondern nur eine von vielen möglichen Organisationsformen. Die Beteiligung eines privaten Kapitalgebers etwa hat nicht zwangsläufig eine positive Auswirkung auf die Qualität der Dienstleistungen zur Folge. Alternativen zu den ÖPP sind beispielsweise horizontale Kooperationen, Zweckverbände oder Anstalten des öffentlichen Rechts. Im Rahmen der **kommunalen Selbstverwaltung** steht es in der Verantwortung der Gebietskörperschaft zu entscheiden, in welcher Organisationsform sie ihre Aufgaben wahrnimmt.

Der VKU sieht die Gefahr, dass **kommunale Zuständigkeiten für den Wettbewerb aufgebrochen und** letzten Endes **privatisiert** werden sollen und die **Gemeinden auf eine Gewährleistungsrolle zurückgedrängt** werden. In jedem Fall muss aber die ordnungspolitische Grundsatzfrage diskutiert und geklärt werden, ob dieser Ansatz sinnvoll und mit nationalem Verfassungsrecht bzw. mit europäischem Primärrecht vereinbar ist. Das Europäische Parlament jedenfalls hat sich in der Entschließung vom 14. Januar 2004 zum Grünbuch DAI ausdrücklich zum Selbstbestimmungsrecht der Gemeinden bekannt.

3. Entsprechend dem in Artikel 5 Abs. 2 EGV verankerten **Subsidiaritätsprinzip** wird die Gemeinschaft in den Bereichen, die nicht in ihre ausschließliche Zuständigkeit fallen, nur tätig, sofern und soweit die Ziele der in Betracht gezogenen Maßnahmen auf der Ebene der Mitgliedstaaten nicht ausreichend erreicht werden können. Dieser Grundsatz ist auch in dem Text des Vertrags über eine Verfassung für Europa verankert.[3] Für die Regelung innerer Angelegenheiten der Mitgliedstaaten, wie innere Verfasstheit und Organisation, sowie für die Frage, welche Aufgaben die Mitgliedstaaten erfüllen und wie sie dies tun, besteht somit keine Kompetenz der Europäischen Union. Dies gilt entsprechend Artikel 295 EGV, nach dem die **Eigentumsordnung in den verschiedenen Mitgliedstaaten vom EGV unberührt bleibt**, insbesondere für die Frage, ob öffentliche Aufgaben in öffentlicher, privater oder gemischtwirtschaftlicher Trägerschaft erfüllt werden.

Außerdem soll durch den neuen Verfassungsartikel I-5 auf europäischer Ebene die Wahlfreiheit der Kommunen, abgeleitet aus dem Recht auf Selbstorganisation, festgeschrieben werden. Damit werden die Garantien des Artikels 28 Abs. 2 des deutschen Grundgesetzes auf europäischer Ebene – an höchster Stelle – anerkannt. Vor diesem Hintergrund ist es nicht verständlich, dass die Kommission mit dem vorliegenden Grünbuch versucht, Kompetenzen auf die EU-Ebene hoch zu zonen und lokale Zuständigkeiten einer gemeinschaftsweiten Regelung zu unterwerfen.

[3] Vorläufige konsolidierte Fassung des Vertrags über eine Verfassung für Europa, Art. I-9: Grundprinzipien, Abs. 3, CIG 86/04.

4. Hingewiesen sei in diesem Zusammenhang nochmals auf die Entschließung des Europäischen Parlaments zum Grünbuch „Dienstleistungen von allgemeinem Interesse“ und die dort herausgestellte vorrangige Bedeutung des Subsidiaritätsgrundsatzes, „demzufolge die zuständigen Behörden der Mitgliedstaaten frei über die Wahl der Aufgaben, die Organisation und den Finanzierungsmodus der Dienstleistungen von allgemeinem Interesse und der Dienstleistungen von allgemeinem wirtschaftlichen Interesse entscheiden können“ (Ziffer 18).

Darüber hinaus wird in dieser EP-Entschließung zur Erfüllung des Subsidiaritätsprinzips für die lokalen und regionalen Körperschaften ausdrücklich ein **Recht auf Eigenproduktion** der Dienstleistungen von allgemeinem wirtschaftlichen Interesse anerkannt. Damit verträgt sich aber die Reduzierung auf den Gewährleistungsstaat nicht. Eigenproduktion in diesem Sinne bedeutet die eigene Wahrnehmung einer Aufgabe durch eine Kommune oder aber im Rahmen interkommunaler Zusammenarbeit gemeinsam z.B. durch die Bildung eines Zweckverbandes. Dies impliziert aber auch die Wahlfreiheit zu entscheiden, ob die Gebietskörperschaft dieses Recht auf Eigenproduktion auf eigene Unternehmen überträgt. Diese Wahlfreiheit muss auch weiterhin erhalten bleiben.

5. Unter diesen Aspekten ist auch die Bildung eines **Zweckverbandes** zu würdigen. Der Zweckverband ist als Körperschaft des öffentlichen Rechts organisatorisch und rechtlich verselbständigt. Er verwaltet seine Angelegenheiten im Rahmen der Gesetze unter eigener Verantwortung. Wenn der Zweckverband eine einzelne kommunale Aufgabe übernimmt, geht die kommunale Aufgabe qua Gesetz auf den Zweckverband selbst über. Es wird nicht lediglich die Ausführung der Aufgabe übertragen. Dem regelmäßig vollständigen Aufgabenübergang steht nicht entgegen, dass im Einzelfall Kontroll- oder Überwachungsrechte bei der übertragenden Kommune verbleiben. Derartige Pflichtigkeiten zu Lasten der Kommune können sich nämlich aus außerhalb der Übertragung der Infrastrukturaufgabe angesiedelten rechtlichen Grundlagen ergeben, wie z. B. bei der Wasserversorgung aus wasserrechtlichen Vorschriften und der von der Aufgabenerfüllung zu trennenden Funktion der Kommune als Wasserbehörde.

Diese Rechtsauffassung wird auch vom deutschen Bundesministerium für Wirtschaft und Arbeit geteilt, wie der Bundesminister in einem Brief an die kommunalen Spitzenverbände vom 15. Oktober 2003 verdeutlicht. Danach hat „der Zusammenschluss zu einem kommunalen Zweckverband mit einem öffentlichen Auftrag nichts zu tun“. Ganz ähnlich sieht es der deutsche Bundesrat in seiner Empfehlung zum Grünbuch ÖPP vom 28. Juni 2004.[4]

Das vorliegende Grünbuch behandelt die öffentlich-öffentlichen Partnerschaften (ÖÖP), zu denen auch die Zweckverbände zu zählen sind, nicht. Insofern geht der VKU davon aus, dass die Kommission diese bewusst von dem Adressatenkreis dieses Grünbuchs ausnimmt.

6. Vom Grünbuch wird unter dem Begriff der institutionalisierten ÖPP die gesamte Bandbreite der **gemischtwirtschaftlichen Unternehmen** erfasst. Institutionalisierte ÖPP kommen auf kommunaler Ebene entweder dadurch zu Stande, dass Gemeinden gemeinsam mit privaten Akteuren eine Gesellschaft in Privatrechtsform neu gründen oder dass Gesellschaftsanteile an bestehenden Unternehmen an private Akteure verkauft werden. Die privaten Partner bei institutionalisierten ÖPP variieren erheblich: Bezogen auf die deutschen kommunalen Versorgungsunternehmen ist festzustellen, dass die **privaten Partner selbst Wettbewerber sind, die mit der Beteiligung marktstrategische Ziele verfolgen**.

Für den Bereich der Abfallwirtschaft ist darauf hinzuweisen, dass es durch die Teilliberalisierung schon seit geraumer Zeit zu einer Oligopolisierung auf dem deutschen Markt kommt. Dieser Trend dürfte sich auch europaweit nach dem Verkauf von RWE Umwelt noch verstärken, da dann nur noch wenige Unternehmen der privaten Entsorgungswirtschaft, etwa Rethmann, Cleanaway und Sita, überhaupt noch als ÖPP-Partner in Frage kommen.

7. Das Grünbuch erläutert ausführlich die Chancen von ÖPP. Es gibt aber auch erhebliche **Risiken**. Zwischen den öffentlichen und den privaten Marktteilnehmern besteht ein grundsätzlicher Zieledissens. Die Gebietskörperschaft bzw. deren Unternehmen haben einen öffentlichen Zweck zu erfüllen und gegebenenfalls die Gewinnerwartungen zu reduzieren, falls dies dem öffentlichen Zweck zuwider läuft. Die Privaten sind ausschließlich an einer Gewinnmaximierung (shareholder value) interessiert. **Um die Risiken zu begrenzen, kommt es sehr auf die Auswahl des geeigneten privaten Partners und auf die vertragliche Ausgestaltung der institutionalisierten ÖPP an.** Letztere stellen eine **besondere Form einer auf langfristige partnerschaftliche Zusammenarbeit angelegten ÖPP** dar. Denn gesellschaftsrechtliche Regelungen sind auf

[4] BR-Drs. 408/1/04.

Dauer angelegt. Darüber hinaus muss jeder an einem Gemeinschaftsunternehmen Beteiligte die gemeinsamen Ziele im Auge haben und darf nicht allein die eigenen Interessen in den Vordergrund stellen. Damit eine institutionalisierte ÖPP Erfolg haben kann, muss bei der Auswahl des privaten Partners darauf geachtet werden, dass die **Zielvorstellungen beider Partner so weit wie möglich angenähert werden, dass eine Vertrauensbasis besteht** und dass das Insolvenzrisiko des Mitgesellschafters gering ist. Soll eine künftige Abhängigkeit der Gebietskörperschaft von dem privaten Partner vermieden werden, muss im Konsortialvertrag deren maßgebliche Einflussnahmemöglichkeit sichergestellt werden. Es müssen eindeutige Regelungen getroffen werden, die bei Eintritt eines Risikos die weitere Sicherstellung der Dienstleistung ermöglichen und Gefahren abwenden. Zu diesen Risiken und Gefahren gehört insbesondere die Unternehmensnachfolge des materiell privaten Partners, die im Einzelfall das gesamte ÖPP-Gefüge in Frage stellen kann. Auch der Rückzug eines dritten Kapitalgebers und die damit verbundene Insolvenz des privaten Partners zählen hierzu. Bei der Abwägung von Chancen und Risiken spielen neben den nationalen, regionalen und örtlichen Gegebenheiten auch die jeweiligen Sektoren sowie die Art und Höhe der privaten Beteiligung eine erhebliche Rolle. **Letztlich muss bereits bei der Auswahl des privaten Partners respektiert werden, dass der Schwerpunkt bei einer institutionalisierten ÖPP auf der auf Dauer angelegten partnerschaftlichen Zusammenarbeit mit der Kommune liegt.**

8. Der VKU sieht im europäischen Primärrecht keinerlei Ermächtigungsgrundlage, die institutionalisierten ÖPP einer generellen europäischen Vergaberegelung zu unterwerfen. Aus dem Subsidiaritätsprinzip folgt auch für die ÖPP auf Vertragsbasis, dass die primärrechtlichen Zuständigkeiten der EU nur dann gegeben sind, wenn eine gemeinschaftsweite Regelung sachlich geboten ist. Das hat für die Dienstleistungskonzessionen zur Folge, dass mangels Erforderlichkeit keine gemeinschaftsweite Regelung erlassen werden darf.

Soweit die Binnenmarkt- und Wettbewerbsvorschriften auf ÖPP anwendbar sind, sollten die folgenden Überlegungen und Vorschläge Berücksichtigung finden:

- Die Anwendung der Binnenmarkt- und Wettbewerbsregeln darf nicht dazu führen, dass das auf dem **Subsidiaritätsprinzip** beruhende Recht der Mitgliedstaaten, über die Form der Erbringung öffentlicher Dienstleistungen zu entscheiden, ausgehebelt oder eingeschränkt wird.

- Es muss gewährleistet sein, dass auf staatlicher wie kommunaler Ebene die **Gestaltungsfreiheit** bei den ÖPP erhalten bleibt. Eine einheitliche europäische Definition oder eine Standardisierung der Gesellschaftsverträge ist weder erforderlich, noch wäre sie zweckmäßig.

- Wegen des **Prinzips der Neutralität der Eigentumsordnungen** darf es seitens der europäischen Institutionen keine Präferenz für bestimmte Formen der Trägerschaft geben.

- Die Großzahl der örtlichen Dienstleistungen, die für die Bürger vor Ort angeboten werden, hat einen **minimalen Einfluss auf den Binnenmarkt**. Auch stünden die **Kosten und der Bürokratismus** bei der Anwendung von Vergabevorschriften **in keinem Verhältnis zu etwaigen Vorteilen**. Deshalb dürfen die örtlichen Dienstleistungen nicht unter den Anwendungsbereich europäischer Vergaberegelungen fallen.

- Wenn eine Gemeinde, basierend auf ihrer Organisationshoheit, eine institutionalisierte ÖPP eingeht, ist dies kein Beschaffungsakt. Die Auswahl des privaten Partners darf deshalb nicht einem Vergaberegime unterworfen werden. Um die dauerhafte Aufgabenerledigung im Rahmen von ÖPP nicht zu gefährden, muss der **Inhouse-Begriff angemessen geregelt werden**. Gerade hierzu hätte sich das Grünbuch äußern können und müssen, um zur Rechtssicherheit in den Mitgliedsstaaten für Organisationsakte der Kommunen beizutragen. Für den Inhouse-Begriff muss ausreichen, dass der öffentliche Einfluss innerhalb der ÖPP überwiegt (Kontrollkriterium) und die ausgeübte Dienstleistung im Wesentlichen zum Nutzen der Bürger in der entsprechenden Gebietskörperschaft erfolgt (Dienstleistungskriterium). Die Gemeinde und ihre Unternehmen sind als Konzern zu betrachten. Es kann folglich keinen Unterschied machen, ob die Aufgabe durch das „Rathaus“ oder durch eine verselbständigte Organisationseinheit erfüllt wird. Das gilt jedenfalls so lange, wie ein prägender kommunaler Einfluss festgestellt werden kann.

- Um den **Selbstverwaltungsrechten** Rechnung zu tragen, ist die Anerkennung der Wahlfreiheit erforderlich, öffentliche Dienstleistungen ohne Ausschreibung durch die Verwaltung oder mittels eigener Unternehmen selbst zu erbringen oder Dritte mit der Durchführung zu beauftragen. Die Einführung einer Zwangsausschreibung von Dienstleistungskonzessionen hätte im Übrigen zur Folge, dass die kommunalen Unternehmen, die überwiegend zu den KMU zählen, mittelfristig vom Markt verdrängt würden, da sie im Unterschied zu ihren großen Mitkonkurrenten im Falle des Unterliegens in einem Ausschreibungsverfahren abgewickelt werden müssten. Eine solche Entwicklung hin zur **Oligopolisierung im Bereich der DAWI** kann wettbewerbspolitisch nicht erwünscht sein. Dies widerspräche auch der Politik der Kommission, eigentumsneutral die Entwicklung von KMU zu fördern.

III. Zu den einzelnen Fragen des Grünbuchs

1. Welche Formen von ÖPP auf Vertragsbasis sind Ihnen bekannt? Gibt es in Ihrem Land spezifische (gesetzliche oder andere) Rahmenbedingungen für derartige Konstruktionen?

Das Grünbuch erklärt, dass es für den Begriff der ÖPP – und damit auch für den der ÖPP auf Vertragsbasis - keine gemeinschaftsweit geltende Definition gibt (Rn.1). Auch gebe es für diese Rechtsfigur kein besonderes System im Gemeinschaftsrecht (Rn. 8). Soweit das Grünbuch selbst „ÖPP auf Vertragsbasis“ als ÖPP definiert, „bei denen die Partnerschaft zwischen öffentlichem und privaten Sektor nur auf vertraglichen Beziehungen basiert“ (Rn. 20), bleibt es sehr allgemein. Vor dem Hintergrund dieser Konturlosigkeit des Begriffs der ÖPP auf Vertragsbasis tut sich der VKU schwer, ÖPP auf Vertragsbasis im Sinne des Grünbuchs überhaupt – geschweige denn abschließend – zu benennen.

Von den ÖPP auf Vertragsbasis werden Sachverhalte erfasst, die durch die Vergabe öffentlicher Aufträge (Liefer- und Dienstleistungsaufträge) entstehen und bereits durch die Vergaberichtlinien geregelt sind. Aus Sicht des VKU erscheint die Intention des Grünbuchs klar, Dienstleistungskonzessionen als ÖPP auf Vertragsbasis zu qualifizieren und über deren Einbeziehung in das Vergaberecht die Erteilung von Dienstleistungskonzessionen zu reglementieren, insbesondere zu einer europaweiten Ausschreibungsverpflichtung zu gelangen. Hier sind die Unternehmen des VKU betroffen, weil sie auf der Grundlage eben solcher Dienstleistungskonzessionen beispielsweise die Energieversorgung sicherstellen und damit Dienstleistungen von allgemeinem wirtschaftlichen Interesse (DAWI) erbringen.

Das Vorhaben der Kommission, Dienstleistungskonzessionen den Vergaberegeln zu unterwerfen, ist u.a. deshalb verfehlt, weil das Vergaberecht nur auf Beschaffungsvorgänge anwendbar und seiner Ratio nach auch nur diesbezüglich sinnvoll ist. Dies erklärt auch die geltende Rechtslage, nach der Dienstleistungskonzessionen nicht dem Vergaberecht unterliegen – übrigens auch nach den neuen EU-Richtlinien zum Vergaberecht (2004/17/EG und 2004/18/EG) nicht.

In Deutschland werden Dienstleistungskonzessionen durch Verträge „vergeben“, wobei die Auswahl des Vertragspartners im pflichtgemäßen Ermessen der jeweiligen öffentlich-rechtlichen Körperschaft steht. Diese Form der vertraglichen ÖPP ist bei den Mitgliedsunternehmen des VKU seit langem gebräuchlich. Ergebnis ist die Gewährleistung von DAWI auf technisch hohem, sicherem und preisgünstigem Niveau.

Im Übrigen liegen den hier in Rede stehenden Dienstleistungskonzessionen regelmäßig privatrechtliche Verträge zugrunde, deren Inhalte sich an den einschlägigen Gesetzen messen lassen müssen und gerichtlich überprüfbar sind. Ein Beispiel für eine derartige gesetzliche Regelung stellt § 13 Abs. 2 EnWG dar, wonach die Gemeinden die Neuvergabe von Wegenutzungsverträgen zur Strom- und Gasversorgung 2 Jahre vor Ablauf des Altvertrags öffentlich bekannt machen müssen, § 13 Abs. 3 EnWG. Auf diese Weise wird Transparenz und Gleichbehandlung sichergestellt. Weitere Regelungen ergeben sich aus der Konzessionsabgabenverordung.

2. Nach Auffassung der Kommission wird die Umsetzung des wettbewerblichen Dialogs in einzelstaatliche Rechtsvorschriften den betroffenen Parteien ein Verfahren an die Hand geben, das sich ganz besonders für die Vergabe öffentlicher Aufträge in Zusammenhang mit der Einrichtung einer ÖPP auf Vertragsbasis eignet und gleichzeitig die Grundrechte der Wirtschaftsteilnehmer wahrt. Stimmen Sie dem zu? Falls nein, warum nicht?

Dieser Aussage ist in Bezug auf die für die Mitgliedsunternehmen des VKU besonders relevanten Dienstleitungskonzessionen nicht zuzustimmen. Denn der wettbewerbliche Dialog ist für die Vergabe öffentlicher Aufträge vorgesehen und damit ein Instrument des Vergaberechts. So heißt es in Art. 29 der Vergabe-Richtlinie 2004/18/EG, dass „der öffentliche Auftraggeber“ […] den wettbewerblichen Dialog „[b]ei besonders komplexen Aufträgen“ anwenden kann. Sinn und Zweck des wettbewerblichen Dialogs ist es also bei unübersichtlichen, schwer zu durchdringenden Sachverhalten das Vergabeverfahren zu vereinfachen bzw. überhaupt erst zu ermöglichen (vgl. Grünbuch Rn. 25). Für den Bereich der Dienstleistungskonzessionen gilt, wie bereits zu Frage 1 ausgeführt, dass das Vergaberecht zu Recht nicht anwendbar ist. Insoweit gibt es keine Verbindung zwischen dem vergaberechtlichen Instrument des wettbewerblichen Dialogs und den Dienstleistungskonzessionen.

Im Übrigen sind die Sachverhalte, die den Dienstleistungskonzessionen in den Bereichen, in denen die Unternehmen des VKU tätig sind, zugrunde liegen, keineswegs derart komplex, wie sie es aber nach der Ratio des Art. 29 für die Eröffnung des wettbewerblichen Dialogs sein müssten. Das heißt, die Tatbestandsvoraussetzungen des Art. 29 würden bei den hier in Rede stehenden Sachverhalten nicht erfüllt sein. Dies ist ein weiterer Anhaltspunkt dafür, dass der wettbewerbliche Dialog des Vergaberechts von der Frage der Erteilung von Dienstleistungskonzessionen streng zu trennen ist.

Die Grundrechte der Wirtschaftsteilnehmer werden dann gewahrt, wenn Normierungen nur dort stattfinden, wo sie Ziel führend sind. Wo eine Übernormierung stattfindet, indem Regeln des Vergaberechts unnötig auf nicht vergaberechtsrelevante Sachverhalte angewendet werden und dadurch die Freiheit der Unternehmen eingeschränkt wird, werden Grundrechte nicht gewahrt, sondern verletzt.

3. Sehen Sie in Bezug auf diese Aufträge neben der Wahl des Vergabeverfahrens andere Punkte, die mit dem Gemeinschaftsrecht über öffentliche Aufträge in Konflikt stehen könnten? Wenn ja, nennen Sie diese und begründen Sie!

Nein. Soweit Dienstleistungskonzessionen in Rede stehen, ist das Vergaberecht nicht einschlägig. Daher können Konflikte mit dem Gemeinschaftsrecht über öffentliche Aufträge nicht auftreten.

4. Haben Sie bereits einmal ein Verfahren zur Vergabe einer Konzession in der Europäischen Union organisiert, daran teilgenommen bzw. ein solches organisieren oder daran teilnehmen wollen? Welche Erfahrungen haben Sie gemacht?

Zu dieser Frage nimmt der VKU keine Stellung.

5. Halten Sie das derzeitige Gemeinschaftsrecht für präzise genug, um die konkrete und effektive Teilnahme von Gesellschaften oder Gruppierungen aus anderen Staaten an den Konzessionsvergabeverfahren sicherzustellen? Sind Sie

der Ansicht, dass in dieser Hinsicht normalerweise ein tatsächlicher Wettbewerb herrscht?

Art. 43 ff. EGV sind hinreichend präzise. Im besonderen Fall der Dienstleistungskonzessionen besteht für Gesellschaften bzw. Gruppierungen aus anderen Staaten effektiv die Möglichkeit, Konzessionär zu werden. Auch wenn hier keine klassische Vergabe stattfindet, hat die öffentlich-rechtliche Körperschaft vor Ort die Partner ihrer Konzessionsverträge beispielsweise nach § 13 EnWG in einem transparenten und diskriminierungsfreien Verfahren auszuwählen. Beteiligungen von ausländischen privaten Partnern an Dienstleistungskonzessionen existieren. Soweit unmittelbar keine Konzessionsverträge zwischen ausländischen Unternehmen und deutschen Gebietskörperschaften vorliegen, ist zu bedenken, dass ausländische Unternehmen oftmals mittelbar über institutionalisierte ÖPP an Dienstleistungskonzessionen beteiligt sind. Dies ist dann der Fall, wenn diese an deutschen Unternehmen gesellschaftsrechtlich beteiligt sind, die ihrerseits Dienstleistungskonzessionen - unmittelbar oder mittelbar - innehaben (z. B. EdF/EnBW/Stadtwerke Düsseldorf AG, Vattenfall Europe/HEW/ BEWAG).

Hinsichtlich des tatsächlichen Wettbewerbs gilt: Inwieweit faktisch Gruppierungen aus anderen Staaten Dienstleistungskonzessionen erhalten, ist kein Gradmesser für den tatsächlichen Wettbewerb. Denn zum einen wird oftmals der orts- und sachnähere Bewerber - aus sachlichen Gründen (Effektivität, Kundennähe) – mit der Dienstleistungskonzession bedacht. Zum anderen handelt es sich bei den ausländischen Unternehmen oftmals um so genannte Global Player, die – bislang – noch kein Interesse an den oftmals nicht besonders lukrativen DAWI vor Ort haben. Insoweit sind also unternehmenspolitische Entscheidungen für das wettbewerbliche Verhalten der Unternehmen aus anderen Staaten verantwortlich. Der derzeit geltende Rechtsrahmen ermöglicht sowohl die Teilnahme am Wettbewerb als auch den Erhalt der Konzession.

6. Halten Sie einen Vorschlag für einen gemeinschaftlichen Rechtsakt zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe für wünschenswert?

Nein. Ein Vorschlag für einen gemeinschaftlichen Rechtsakt zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe, der auch die Dienstleistungskonzessionen erfasst, ist nicht wünschenswert. Soweit es die Dienstleistungskonzessionen anbelangt, gibt es überzeugende Gründe, diese nicht stärker zu reglementieren, also sie insbesondere vergaberechtlichen Vorschriften zu unterwerfen. Wenn die Kommission auf diesem Weg „gemeinschaftsweit tätige Akteure“ fördern möchte (Rn. 31 bis Rn. 35), erzielt sie nicht den erstrebten Wettbewerb, sondern erreicht eine irreversible Oligolpolisierung (siehe zu alledem die Antwort zu Frage 7).

Eine Ausschreibungsverpflichtung für Dienstleistungskonzessionen würde übrigens bedeuten, dass auch die Konzessionserteilung an institutionalisierte ÖPP auszuschreiben wäre. Auf das Zustandekommen und Weiterbestehen von institutionalisierten ÖPP hätte dies negative Auswirkungen. Es müsste nämlich damit gerechnet werden, dass das Interesse privater Akteure, solche Partnerschaften einzugehen oder aufrecht zu erhalten, wegen der dann fehlenden Investitionssicherheit der privaten Partner stark zurückgehen würde. Dies könnte dann die Fähigkeit der öffentlichen Hand einschränken, die Versorgung mit bisher im Rahmen von institutionalisierten ÖPP erbrachten Dienstleistungen sicherzustellen. Für die privaten Partner könnten sich bereits getätigte Investitionen als Fehlinvestitionen erweisen. In jedem Fall muss daher sichergestellt werden, dass die institutionalisierten ÖPP die Aufträge erhalten können und die Vertragslaufzeiten so bemessen werden, das die Investitionen sich über einen angemessenen Zeitraum amortisieren können.

Im Übrigen könnte sich ein Privater ja auch direkt um die Dienstleistungskonzession bemühen und seine finanziellen Möglichkeiten in Gänze auf den Erhalt dieser lokalen Konzession verwenden. Die (vorherige) Investition in eine institutionalisierte ÖPP brächte schließlich diesbezüglich keinen Vorteil. Die von der Kommission vorgeschlagenen Maßnahmen führten vorliegend also - entgegen ihrer Zielsetzung - zu einer Verminderung der Attraktivität von institutionalisierten ÖPP.

Einer europaweiten Ausschreibungspflicht für Dienstleistungskonzessionen dürfte das Subsidiaritätsprinzip entgegenstehen, eine Regelungskompetenz auf europäischer Ebene danach nicht bestehen. Denn entsprechend dem in Artikel 5 Abs. 2 EGV verankerten Subsidiaritätsprinzip wird die Gemeinschaft in den Bereichen, die nicht in ihre ausschließliche Zuständigkeit fallen, nur tätig, sofern und soweit die Ziele der in Betracht gezogenen Maßnahmen auf der Ebene der Mitgliedstaaten nicht ausreichend erreicht werden können. Dieser Grundsatz ist auch in dem Text des Vertrags über eine

Verfassung für Europa verankert.[5] Wie in den Antworten zu den Fragen 1 und 5 dargelegt, erfolgt die Erbringung der DAWI auf technisch hohem, sicherem und preisgünstigem Niveau, wobei auch hinreichender Wettbewerb um die den DAWI zugrunde liegenden Dienstleistungskonzessionen eröffnet ist. Aus Sicht des VKU besteht daher für einen gemeinschaftlichen Rechtsakt zur Festlegung eines Verfahrensrahmens für die Vergabe von Dienstleistungskonzessionen keinerlei Notwendigkeit.

7. Allgemeiner gefragt: Wenn Sie ein neues Gesetzgebungsvorhaben der Kommission für erforderlich halten, gibt es dann objektive Gründe dafür, in diesem Rechtsakt sämtliche ÖPP auf Vertragsbasis zu behandeln und sie ein und demselben Regelwerk für die Vergabe zu unterwerfen, ganz gleich ob die Vorhaben als öffentliche Aufträge oder als Konzessionen einzustufen sind?

Nein. Objektive Gründe gibt es in dieser Hinsicht gerade nicht. Insbesondere dürfen nicht Dienstleistungskonzessionen – über den Weg der Einstufung als Unterfall der Konzessionen – einem Vergaberegelwerk unterworfen werden. Die Einbeziehung der Dienstleistungskonzessionen in das Vergaberecht ist in den Gesetzgebungsverfahren zu den Vergaberichtlinien immer wieder diskutiert worden und letztlich mit den besseren und richtigen Gründen abgelehnt worden.

An dieser Stelle gilt es in Erinnerung zu rufen, dass Dienstleistungskonzessionen typischerweise dazu genutzt werden, DAWI zu erbringen. Denn schon praktische Aspekte sprechen gegen eine unbedingte Anwendung eines Ausschreibungsverfahrens bei der DAWI-Vergabe: Nicht nur, dass das Vergabeverfahren zu enormem bürokratischen Aufwand führen (Zusammenstellung einer ungeheuren Menge an Unterlagen, schwerfälliger, langwieriger Entscheidungsablauf) und die Organisation der DAWI einem starren, einheitlichen Verfahren unterworfen würde. Sondern auch, dass eine solche Vereinheitlichung angesichts der vielfältigen, sich sowohl örtlich als auch strukturell stark unterscheidenden Gegebenheiten bei der Durchführung von DAWI gerade nicht geeignet wäre. Denn es handelt sich hier eben nicht um einen bloßen Beschaffungsakt, sondern um die laufende Erbringung ganzer Leistungsbündel. Dies ist der besondere Unterschied zu Leistungen im Rahmen des öffentlichen Beschaffungswesens. Zwar

[5] Vorläufige konsolidierte Fassung des Vertrags über eine Verfassung für Europa, Art. I-9: Grundprinzipien, Abs. 3, CIG 86/04.

bestehen z. B. Bauleistungen auch aus einem komplexen Bündel von Leistungen; sie werden jedoch nur einmalig erbracht; mit der Fertigstellung des Baus sind regelmäßig alle Leistungen endgültig durchgeführt und beendet.

Die Bestrebungen der Kommission in ihrem Grünbuch ÖPP könnten für den vom VKU betreuten Bereich zum Ergebnis haben, dass Aufträge der Gemeinden an ihre Stadtwerke nach einer gewissen Zeit durch Ausschreibung neu vergeben werden müssen. Lokale Unternehmen wären in diesem Verfahren in einer Situation, die man als „win or die“ umschreiben kann. Verliert ein solches kommunales Unternehmen den Wettbewerb um die bislang innegehabte lokale Dienstleistungskonzession, etwa durch Zahlung von strategischen Markteintrittspreisen (Preisdumping) so müsste es liquidiert oder bei einem Mehrspartenunternehmen um die in Rede stehende Sparte verkleinert werden. Hier ist unserer Auffassung nach die durch Art. 295 EGV garantierte Neutralität der Eigentumsordnung beeinträchtigt.

Nach der Übertragung der örtlichen Dienstleistungskonzession an den Gewinner des Ausschreibungswettbewerbs – nach der Kommission insbesondere europaweit tätige Unternehmen – könnte das unterlegene kommunale Unternehmen auch nicht an einem Ausschreibungswettbewerb in einer anderen Stadt teilnehmen. Dem stehen zum einen häufig gemeindewirtschaftsrechtliche Hindernisse entgegen (Beschränkung der Tätigkeiten auf das Gemeindegebiet). Zum anderen fehlt solchen KMU häufig die Größe und die strategische Ausrichtung für ein Tätigwerden außerhalb der eigenen Stadt oder gar in einem anderen Mitgliedstaat der EU. Ein national oder international agierendes Großunternehmen kann dagegen die Niederlage in einem Ausschreibungsverfahren um eine lokale Konzession – regelmäßig auch mehrfach – verkraften. Bei Einführung eines obligatorischen Ausschreibungsverfahrens für lokale Dienstleistungskonzessionen führten diese Umstände mittel- und langfristig zu einer Oligopolisierung des Marktes. Dieses Ergebnis wäre weitgehend irreversibel und hätte mit dem von der Kommission intendierten Wettbewerb nichts mehr zu tun.

8. Ist Ihrer Erfahrung nach der Zugang der ausländischen Akteure zu privat initiierten ÖPP gewährleistet? Für den Fall, dass die Vergabestellen zur Initiative aufrufen, wird dieser Aufruf dann angemessen bekannt gemacht, so dass alle interessierten Akteure Kenntnis davon haben können? Wird für die Ausführung des

ausgewählten Projekts ein Auswahlverfahren auf Basis eines effektiven Wettbewerbs organisiert?

9. Wie könnte Ihrer Auffassung nach die Entwicklung privat initiierter ÖPP in der Europäischen Union unter Wahrung der Grundsätze der Transparenz und der Gleichbehandlung und ohne Verstoß gegen das Diskriminierungsverbot gewährleistet werden?

Wie in unserer Antwort zu Frage 5 dargelegt, besteht im Bereich der Dienstleistungskonzessionen Wettbewerb in der Form, dass jedes in- oder ausländische Unternehmen sich um die Erteilung der lokalen Dienstleistungskonzessionen – wie näher erläutert auch erfolgreich – bemühen kann. Soweit Dienstleistungskonzessionen nur befristet erteilt werden oder werden können, ist – nach Ablauf der jeweiligen Vertragslaufzeit – auch für ausländische Akteure der Zugang zu privat initiierten ÖPP gewährleistet.

Im Übrigen hätte ein Ausschreibungszwang im Fall privat initiierter ÖPP wohl zur Folge, dass die schnellen, innovativen Akteure benachteiligt werden, weil sie in die Reihe der übrigen Bieter eingegliedert würden. Gerade deswegen wird ja auch in der Praxis nach „Belohnungen“ gesucht, um das System für die Initiatoren attraktiv zu gestalten (vgl. Grünbuch Rn. 41). Innovationsfreudigkeit und Schnelligkeit sind typische Wettbewerbsmerkmale, die nicht durch eine formalisierte Gleichbehandlung zunichte gemacht werden dürfen. Die Belohnungs-Lösung legt wiederum eine nicht gerechtfertigte Ungleichbehandlung der Akteure nahe, die das System des obligatorischen Vergabeverfahrens im Fall privat initiierter ÖPP letztlich ad absurdum führen würde.

Außerdem zeigt die Praxis, dass die Innovationsfreudigkeit gerade kein typisches Merkmal der privaten Beteiligung darstellt. Die Innovationen innerhalb der ÖPP werden regelmäßig von dem kommunalen Partner geleistet.

10. Welche Erfahrungen haben Sie in der Phase im Anschluss an die Auswahl des privaten Partners im Rahmen von ÖPP auf Vertragsbasis gemacht?

Der VKU nimmt zu dieser Frage keine Stellung.

11. Sind Ihnen Fälle bekannt, in denen die Ausführungsbedingungen, einschließlich der Klauseln zur Anpassung im Zeitverlauf, eine diskriminierende Wirkung entfalten konnten oder eine ungerechtfertigte Behinderung der Dienstleistungs- oder Niederlassungsfreiheit darstellten? Falls ja, bitte beschreiben Sie die Art der aufgetretenen Probleme

In den die VKU-Mitgliedsunternehmen betreffenden Bereichen der Konzessionsverträge für Wasser, Strom, Gas, und Fernwärme sind derartige Fälle nicht bekannt. Hier existieren gesetzliche Regelungen, die Rechtssicherheit für alle Beteiligten gewährleisten.

12. Sind Ihnen Praktiken oder Mechanismen zur Bewertung von Angeboten bekannt, die eine diskriminierende Wirkung haben?

Derartige Praktiken oder Mechanismen sind dem VKU aus dem Bereich seiner Mitglieder nicht bekannt.

13. Sind Sie wie die Kommission der Auffassung, dass bestimmte Interventionsklauseln in Bezug auf die Grundsätze der Transparenz und der Gleichbehandlung problematisch sein können? Sind Ihnen andere Typen von Klauseln bekannt, deren Anwendung zu ähnlichen Problemen führen kann?

Diese Problematik ist dem VKU aus dem kommunalen Bereich nicht bekannt. Es ist indessen anzumerken, dass im Bereich der Dienstleistungskonzessionen DAWI erbracht werden, die mitunter einen starken privaten Partner erfordern. Die Grundsätze der Transparenz und der Gleichbehandlung sind auch mit den übrigen Zielen des EGV in Einklang zu bringen. Art. 16 EGV räumt den DAWI auf der Ebene des Primärrechts einen eigenständigen Wert ein, der gegenüber der Grundsatzentscheidung für eine wettbewerbsorientierte Marktwirtschaft zu behaupten ist.[6]

[6] *Geiger*, EUV/EGV, Art. 16 EGV Rn. 4.

14. Halten Sie es für erforderlich, dass bestimmte Aspekte der vertraglichen Rahmenbedingungen für ÖPP auf Gemeinschaftsebene geklärt werden? Falls ja, was sollte geklärt werden?

Der VKU hält für den ihn betreffenden Bereich die bestehenden primärrechtlichen Regelungen für ausreichend. Insbesondere in Bezug auf die Dienstleistungskonzessionen besteht kein Handlungs- bzw. Klärungsbedarf. (Siehe hierzu die Antworten zu den Fragen 6 u. 7).

15. Sind Ihnen bei ÖPP-Konstruktionen besondere Probleme mit der Vergabe von Unteraufträgen bekannt? Welche?

Dem VKU sind derartige Probleme nicht bekannt.

16. Rechtfertigt die Existenz von ÖPP auf Vertragsbasis, die die Übertragung eines Aufgabenpakets an einen einzigen privaten Partner impliziert, ihrer Auffassung nach, dass ausführlichere Regeln für die Vergabe von Unteraufträgen eingeführt werden und/oder dass der Anwendungsbereich erweitert wird?

Nein. Erhält ein Privater den Zuschlag für einen öffentlichen Auftrag und kann er die Leistungen nicht aus eigener Kraft erbringen, kann schon nach dem heutigen Recht der Auftraggeber die Vergabe von Unteraufträgen an bestimmte Bedingungen knüpfen. Jede zusätzliche Verpflichtung der Vergabestelle, dem privaten Partner Zusagen abzuverlangen, bringt unverhältnismäßigen Aufwand und erhebliche Zeitverzögerung mit sich.

Wird eine Dienstleistungskonzession vergeben, ist schon der Hauptauftrag nicht ausschreibungspflichtig. Das gilt dann selbstverständlich auch für die Unteraufträge.

17. Halten Sie, allgemeiner gesprochen, eine ergänzende Initiative auf Gemeinschaftsebene zur Klärung oder Umgestaltung der Regeln für die Vergabe von Unteraufträgen für erforderlich?

Nein. Letztlich würden auf diese Weise – ohne dass dies erforderlich wäre – Märkte bis ins Kleinste durchreguliert. Eigeninitiative und besonderes Engagement würden verhindert. Wettbewerb aber lebt gerade auch davon, dass nicht alle Geschäftsvorgänge bei jedermann – gesetzlich normiert – gleichförmig und für jedermann voraussehbar erfolgen.

18. Welche Erfahrungen haben Sie mit der Einrichtung institutionalisierter ÖPP gemacht? Lassen Ihre Erfahrungen Sie zu der Schlussfolgerung gelangen, dass die gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen bei institutionalisierten ÖPP-Konstruktionen eingehalten werden? Falls nein, warum nicht?

Seit den 90er Jahren haben sich im Mitgliederbereich des VKU rund 300 institutionalisierte ÖPP in unterschiedlichsten Formen im Sinne des vorliegenden Grünbuchs gebildet. Auch ohne einen nationalen oder europäischen detaillierten Rechtsrahmen haben sich also viele ÖPP entwickelt. Nach unseren Erfahrungen werden dabei die gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen bei institutionalisierten ÖPP-Konstruktionen eingehalten. Beides belegt die fehlende Erforderlichkeit einer gemeinschaftsrechtlichen Regelung. Vor dem Hintergrund der Vielgestaltigkeit der ÖPP muss befürchtet werden, dass der Versuch für alle denkbaren Konstellationen einheitliche Regelungen zu schaffen nicht gelingt, sondern im Gegenteil für die Bildung und die effiziente Betätigung der ÖPP behindernd wirkt.

19. Halten Sie eine Initiative auf Gemeinschaftsebene für erforderlich, um die Verpflichtungen zu klären oder zu vertiefen, die die öffentlichen Auftraggeber in Bezug auf den Wettbewerb zwischen potenziell an einem institutionalisierten ÖPP-Projekt interessierten Wirtschaftsteilnehmern haben? Falls ja, welche Aspekte halten Sie für besonders wichtig und welche Form sollte eine solche Initiative haben? Falls nein, warum nicht?

Das rasche Anwachsen der Anzahl institutionalisierter ÖPP – auch bei den Mitgliedern des VKU – belegt, dass es einer Gesetzesinitiative auf EU-Ebene zur Förderung dieses Modells nicht bedarf.

Der VKU sieht im Übrigen im europäischen Primärrecht auch keinerlei Ermächtigungsgrundlage für generelle europäische Regelungen für institutionalisierte ÖPP. Auch die Anwendung der Binnenmarkt- und Wettbewerbsregeln darf nicht dazu führen, dass dadurch das auf dem Subsidiaritätsprinzip beruhende Recht der Mitgliedstaaten, über die Form der Erbringung öffentlicher Dienstleistungen zu entscheiden, ausgehebelt oder eingeschränkt wird. Sofern eine Kommune, basierend auf ihrer Organisationshoheit, eine institutionalisierte ÖPP eingeht, ist dies kein Beschaffungsakt. Somit untersteht die Auswahl des privaten Partners nicht dem Vergaberechtsregime.

Es muss auch zukünftig gewährleistet sein, dass auf staatlicher wie kommunaler Ebene die Gestaltungsfreiheit bei den ÖPP erhalten bleibt. Eine einheitliche europäische Definition oder eine Standardisierung der Gesellschaftsverträge ist weder erforderlich, noch wäre sie zweckmäßig und handhabbar.

Um die Möglichkeit der Aufgabenerledigung im Rahmen von institutionalisierten ÖPP – die sich bei geeigneter Ausgestaltung in vielen Fällen für die Erbringung öffentlicher Dienstleistungen als zweckmäßig und vorteilhaft erwiesen hat – nicht zu gefährden, wäre es hilfreich, wenn der Inhouse-Begriff weiter gefasst würde, z.B. indem institutionalisierte ÖPP darunter fallen, wenn der öffentliche Einfluss innerhalb der institutionalisierten ÖPP überwiegt (Kontrollkriterium) und die ausgeübte Dienstleistung im Wesentlichen zum Nutzen der Bürger in der entsprechenden Gebietskörperschaft erfolgt (Dienstleistungskriterium).

Allgemein und unabhängig von den in diesem Grünbuchaufgeworfenen Fragen:

20. Welche Maßnahmen oder Verfahren behindern in der Europäischen Union die Einrichtung von ÖPP?

Wie in der Antwort zu Frage 6 ausgeführt, würde eine Ausschreibungsverpflichtung für Dienstleistungskonzessionen bedeuten, dass auch die Konzessionserteilung an institutionalisierte ÖPP auszuschreiben wäre. Auf das Zustandekommen und Weiterbestehen von institutionalisierten ÖPP hätte dies negative Auswirkungen, weil die Bildung institutionalisierter ÖPP an Sinnhaftigkeit verliert. Dieses Beispiel belegt, dass die Ausdehnung von vergaberechtlichen Vorgaben die Bildung von ÖPP verhindern könnte. Dies könnte sogar zur Konsequenz haben, dass bereits bestehende institutionalisierte

ÖPP aufgelöst würden. Am Ende der Entwicklung stünde der reine - teure und ineffiziente - „Ämterstaat“.

Auch wirkt die Formalisierung durch Vergabeverfahren eher abschreckend auf die Wirtschaftsteilnehmer. Mit ihr ist zudem regelmäßig eine längere Verfahrensdauer verbunden. Letztlich werden die Handlungsmöglichkeiten auf kommunaler Ebene unangemessen eingeschränkt. Dies alles erscheint wenig förderlich für die Bildung von ÖPP.

21. Kennen Sie andere ÖPP-Formen aus Drittländern? Kennen Sie aus Ihren Erfahrungen in solchen Ländern bewährte Verfahrensweisen, die auch für die EU beispielgebend sein könnten? Falls ja, welche?

Der VKU kann zu dieser Frage keine belastbaren Ausführungen machen.

22. Denken Sie dass es nützlich wäre, im Hinblick auf den großen Investitionsbedarf einzelner Mitgliedstaaten zum Erreichen einer sozialen und dauerhaften Entwicklung gemeinsam und in regelmäßigen Abständen über diese Fragen unter den betroffenen Akteuren nachzudenken und bewährte Verfahrensweisen auszutauschen? Sollte die Kommission nach Ihrer Auffassung ein derartiges Netzwerk aufbauen?

Hiergegen ist nichts einzuwenden. Indessen muss die Vorgehensweise objektiv und vom Ergebnis her offen sein. Die Resultate des Netzwerks dürfen nicht präjudiziert sein und müssen den unterschiedlichen Strukturen in den Mitgliedstaaten Rechnung tragen.

Grünbuch ÖPP - Beantwortung der Fragen der Kommission

Frage 1:

Nach dem u.a. vom Ministerium für Verkehr, Bau- und Wohnungswesen in Auftrag gegebenen Gutachten "PPP im öffentlichen Hochbau" kann davon ausgegangen werden, dass derzeit folgende Vertragsmodelle für ÖPP-Vorhaben in Deutschland existieren bzw. in Frage kommen:

- Erwerbermodell:

Das Erwerbermodell beschreibt eine Vertragsstruktur mit einer Laufzeit von üblicherweise 20 - 30 Jahren, während der ein Gebäude auf dem Grundstück des privaten Auftragnehmers durch diesen errichtet und anschließend dem öffentlichen Auftraggeber zur Nutzung überlassen werden soll. Am Ende der Vertragslaufzeit wird das Eigentum an dem Gebäude auf den öffentlichen Auftraggeber übertragen.

- Leasingmodell:

Das Leasingmodell beschreibt eine dem Erwerbermodell vergleichbare Vertragsstruktur, bei der allerdings im Gegensatz zum Erwerbermodell keine Verpflichtung zur
Übertragung des Gebäudeeigentums auf den Auftraggeber am Ende der Vertragslaufzeit besteht. Dem öffentlichen Auftraggeber wird vielmehr eine Erwerbsoption eingeräumt. Der Preis, zu dem der öffentliche Auftraggeber das Eigentum am Gebäude am Ende der Vertragslaufzeit erwerben kann, wird bereits mit Vertragschluss festgelegt.

- Vermietungsmodell:

Das Vermietungsmodell entspricht weitgehend dem Leasingmodell, einzige Abweichung besteht insofern darin, dass der Auftraggeber das Gebäude nur ausnahmsweise nach Ablauf der Vertragslaufzeit und nur zu einem dann zu ermittelnden Verkehrswert erwerben kann.

- Inhabermodell:

Das Inhabermodell beschreibt eine Vertragsstruktur mit einer Laufzeit von üblicherweise 15 - 20 Jahren, während der ein Gebäude auf dem Grundstück des öffentlichen Auftraggebers für diesen saniert bzw. neu errichtet und anschließend vom privaten Auftragnehmer betrieben werden soll.

- Conctractingmodell

Das Conctractingmodell betrifft Bauarbeiten bzw. betriebswirtschaftliche Optimierungsmaßnahmen an bestimmten technischen Anlagen sowie Anlagenteilen. Während der Laufzeit des Vertrages - regelmäßig 5 - 15 Jahre -

werden durch den privaten Auftragnehmer einzelne Anlagen oder Anlagenteile in einem Gebäude auf dem Grundstück des öffentlichen Auftraggebers eingebaut, gebaut oder optimiert und anschließend betrieben.

- Konzessionsmodell:

Im Rahmen eines Konzessionsvertrages verpflichtet sich der private Auftragnehmer gegenüber dem öffentlichen Auftraggeber, eine bestimmte Leistung entweder in Form der Gebäudeerrichtung (Baukonzession) oder in Form einer Dienstleistung (Dienstleistungskonzession) anstelle des Auftraggebers gegenüber Dritten zu erbringen. Als Spezialfall der vorher genannten Vertragsmodelle wird dem Auftragnehmer durch die Konzession regelmäßig das Recht eingeräumt, die Kosten des Projekts durch ein Entgelt, das von dem Drittnutzer zu entrichten ist, zu refinanzieren.

- Gesellschaftsmodell:

Im Rahmen des Gesellschaftsmodells können sämtliche der o.g. Vertragsmodelle verwirklicht werden. Dies geschieht durch eine Projektgesellschaft, an der sowohl der Auftragnehmer als auch der öffentliche Auftraggeber beteiligt sind. Als Gesellschaftsform kommen insofern sowohl Personen- als auch Kapitalgesellschaften in Betracht.

Frage 2:

Unseres Erachtens eignet sich das Verfahren des wettbewerblichen Dialogs grundsätzlich nicht für die Vergabe öffentlicher Bauaufträge im Zusammenhang mit der Einrichtung einer ÖPP auf Vertragsbasis. Da die Bieter in diesem Verfahren innovative Ansätze in eine offen geführte Diskussion einbringen sollen, besteht die naheliegende Gefahr, dass die Ideen von anderen Wettbewerbern übernommen werden und damit dem ursprünglichen Ideeninhaber Schaden entsteht. Es ist unklar, wie in diesem Verfahren Ideenschutz faktisch durchgesetzt werden soll. Gerade weil es um umfassende Projekte und "ganzheitliche" Lösungsansätze geht, können Mitbewerber ggf. besonders tiefe Einblicke in die jeweiligen Unternehmensstrukturen, Entwicklungspotentiale usw. erhalten. Nach alledem werden im Verfahren des wettbewerblichen Dialogs unseres Erachtens die Geheimhaltungsinteressen der Mitbewerber nicht hinreichend berücksichtigt.

Zudem stehen mit dem Verhandlungsverfahren und ggf. auch dem offenen und nichtoffenen Verfahren hinreichende und in der Praxis bewährte Vergabeverfahren zur Verfügung, mit denen auch ÖPP sachgerecht vergeben werden können.

Frage 3:

Wir sehen derzeit keine anderen Punkte, die bei der Einrichtung einer ÖPP auf Vertragsbasis mit dem Gemeinschaftsrecht über öffentliche Aufträge in Konflikt stehen könnten.

Frage 4:

Der Zentralverband des Deutschen Baugewerbes hat mehrere Verfahren zur Vergabe von Konzessionen initiiert und durch Unterstützung der beteiligten Unternehmen auch in der Abwicklungsphase begleitet. Die Erfahrungen der Unternehmen bzw. des Verbandes waren hierbei grundsätzlich positiv. Bezüglich der Erfahrungen mit einzelnen Projekten erlauben wir uns, auf die beiliegende, von Deutschem Städte- und Gemeindebund und Zentralverband des Deutschen Baugewerbes gemeinsam herausgegebene Dokumentation „Public Private Partnership – Neue Wege in Städten und Gemeinden“ zu verweisen.

Frage 5:

Wir halten das derzeitige Gemeinschaftsrecht für präzise genug, um die konkrete und effektive Teilnahme von Unternehmen aus anderen Staaten an den Konzessionsvergaben sicherzustellen. Tatsächlicher Wettbewerb herrscht in dieser Hinsicht u.E. in dem Umfang, in dem er auch im Rahmen sonstiger öffentlicher Ausschreibungen zu
beobachten ist.

Frage 6:

Derzeit ergibt sich aus unserer Sicht kein Bedarf für einen gemeinschaftlichen Rechtsakt zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe. Ggf. kristallisieren sich aber nach einiger Zeit der Erfahrungen mit Konzessionsverträgen im Bereich ÖPP Probleme heraus, die dann im Rahmen eines derartigen Rechtsaktes zu regeln wären. Vorauseilend sollte u.E. aber, schon im Interesse der Verhinderung der Überregulierung des Bereiches ÖPP, keine Neuregelung auf Gemeinschaftsebene eingeführt werden.

Frage 7:

Nach Verneinung von Frage 6 erübrigt sich die Antwort auf Frage 7.

Frage 8:

Unserer Erfahrung nach ist in Deutschland der Zugang ausländischer Akteure zu privat initiierten ÖPP gewährleistet. In einigen anderen europäischen Ländern bestehen partiell im Hinblick auf die Möglichkeit des Marktzuganges deutscher Unternehmer die selben Probleme wie in den sonstigen Verfahren der öffentlichen Auftragsvergabe.

Frage 9:

Bei privat initiierten ÖPP muss gewährleistet sein, dass der Initiator für die Entwicklung und Vorstellung seiner Idee, die ja im Erfolgsfalle der Vergabestelle als Grundlage für die Ausarbeitung des Konzeptes bzw. der Vergabeunterlagen dient, eine hinreichende Vergütung erhält. Eine solche Sondervergütung ist immer dann notwendig, wenn der Initiator der ÖPP den Zuschlag für das Projekt im späteren Vergabeverfahren letztlich nicht erhält. Um tatsächlich einen Anreiz für die Initiierung von ÖPP zu bieten, darf sich diese Vergütung nicht auf einen reinen Kosten- und Auslagenersatz beschränken. Vielmehr ist zu berücksichtigen, dass die Vergabestelle durch die Initiative des Unternehmens u.U. ein Planungsergebnis erhält, das sie sich anderenfalls gegen Vergütung hätte erstellen lassen müssen. Eine marktgerechte Vergütung ist daher anzustreben. Dahingegen erscheint derzeit nicht ersichtlich, wie der Ansatz umgesetzt werden könnte, dem Initiator im Rahmen des Wettbewerbs um das ausgewählte Projekt bestimmte Vorteile einzuräumen. Solche Vorteile würden letztlich immer in einer Benachteiligung der anderen Wettbewerber resultieren.

Im Übrigen ist zu gewährleisten, dass Verträge im Rahmen von ÖPP, unabhängig davon wer das Vorhaben initiiert hat, stets öffentlich ausgeschrieben werden. In den entsprechenden Verfahren können dann die Grundsätze der Transparenz und der Gleichbehandlung sowie das Diskriminierungsverbot durchgesetzt werden. Insbesondere ist auf mittelstandsfreundliche Ausschreibungen zu achten. Hier ist zu berücksichtigen, dass Innovationen zu einem Großteil aus dem Mittelstand kommen, entsprechende Aktivitäten aber im Zweifel erlahmen würden, sollten die Ideen des Mittelstandes sodann ausschließlich in Großlosvergaben münden.

Frage 10:

Aus Sicht der privaten Partner waren die Erfahrungen in der Phase nach Auftragserteilung durchweg positiv. Wegen näherer Einzelheiten verweisen wir auf die bereits zitierte Dokumentation „Public Private Partnership – Neue Wege in Städten und Gemeinden“.

Frage 11:

Fälle, in denen die Ausführungsbedingungen einschließlich der Klauseln zur Anpassung im Zeitverlauf eine diskriminierende Wirkung entfalten konnten oder eine ungerechtfertigte Behinderung der Dienstleitungs- oder Niederlassungsfreiheit darstellten, sind uns nicht bekannt.

Frage 12:

Praktiken oder Mechanismen zur Bewertung von Angeboten, die eine diskriminierende Wirkung im Hinblick auf grenzüberschreitende Sachverhalte haben, sind uns nicht bekannt. In sonstigen Bereichen, d.h. bei Inlandssachverhalten, treten diskriminierende Wirkungen zuweilen durch mittelstandsfeindliche Großlosausschreibungen zustande (zu unrühmlicher Bekanntheit gelangte hier z.B. das Projekt der „100 Schulen“ in Offenbach bei Frankfurt am Main).

Frage 13:

Interventionsklauseln führen unseres Erachtens nicht zu einer Verletzung der Grundsätze der Transparenz und der Gleichbehandlung. Zu einem Austausch des Vertragspartners in rechtlicher Hinsicht kommt es, wenn von einem Dritten bzw. dem finanzierenden Institut selbst das Projektmanagement übernommen wird, unseres Erachtens nämlich nicht. Damit erfolgt in diesen Fällen auch kein Austausch der privaten Partner ohne erneuten Wettbewerb.

Frage 14:

Für eine Klärung vertraglicher Rahmenbedingungen für ÖPP auf Gemeinschaftsebene sehen wir, zumindest derzeit, keinen Bedarf. Aufgrund der Vielgestaltigkeit der in Fragen kommenden Verträge und damit der Fülle an unterschiedlichen Regelungen, die das jeweilige Projekt nach sich zieht, kommt hier eine Vereinheitlichung unseres Erachtens nicht in Betracht. Etwas anderes könnte sich dann ergeben, wenn sich nach einer bestimmten Zeit, während der Erfahrungen mit ÖPP gesammelt wurden, vertragliche Probleme herauskristallisieren, die ihren Ursprung im Gemeinschaftsrecht haben. In diesem Falle könnten dann ggf. gemeinschaftsrechtliche Vorgaben erforderlich werden.

Außerhalb des Vertragsrechts könnten ggf. steuerrechtliche Rahmenbedingungen anzupassen bzw. zu verändern sein. In erster Linie wäre hierbei an das gemeinschaftsrechtlich weitgehend harmonisierte Umsatzsteuerrecht zu denken. Sichergestellt sein muss in erster Linie, dass sich die Fälligkeit der Umsatzsteuer bei ÖPP-Projekten, deren Laufzeit sich i.d.R. über einen längeren Zeitraum erstreckt, nicht nach dem Zeitpunkt der Fertigstellung der Bauleistung richtet, sondern nach den jeweiligen Zeitpunkten, in denen dem privaten Partner Erträge aus dem Projekt tatsächlich zufließen.

Frage 15:

Besondere Probleme mit der Vergabe von Unteraufträgen bei ÖPP-Konstruktionen sind uns derzeit nicht bekannt. Generell besteht jedoch die Besorgnis, dass bei der Vergabe von Unteraufträgen die besonderen Belange des Mittelstandes (in Deutschland gesondert normiert in § 97 Abs. 3 GWB) keine ausreichende Berücksichtigung finden könnten.

Frage 16:

Ausführlicherer Regeln für die Vergabe von Unteraufträgen bedarf es u.E. derzeit (noch) nicht. Hier gilt es, Erfahrungen mit weiteren Projekten abzuwarten. In Abhängigkeit davon könnte sich künftig ggf. ein Bedarf zur Anpassung etwa dahingehend ergeben, dass Nachunternehmer durch die Vertragsgestaltung nicht unangemessen benachteiligt werden. .

Frage 17:

Vor dem Hintergrund unserer Einschätzung zu Frage 16 halten wir eine ergänzende Initiative auf Gemeinschaftsebene zur Klärung oder Umgestaltung der Regeln für die Vergabe von Unteraufträgen derzeit für nicht erforderlich.

Frage 18:

Auch die Einrichtung institutionalisierter ÖPP wurde vom Zentralverband des Deutschen Baugewerbes in Einzelfällen mit initiiert und begleitet. Die Erfahrungen mit diesen wenigen Fällen lassen uns nicht zu der Schlussfolgerung gelangen, dass die gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen nicht eingehalten werden.

Frage 19:

Vor dem Hintergrund unserer Antwort zu Frage 18 halten wir eine Initiative auf Gemeinschaftsebene zur Klärung oder Vertiefung der Verpflichtungen, die die öffentlichen Auftraggeber in Bezug auf den Wettbewerb zwischen potentiell an einem institutionalisierten ÖPP-Projekt interessierten Wirtschaftsteilnehmern haben, für nicht erforderlich. Ausreichend ist hier u.E. die konsequente Anwendung bestehenden Rechts.

Frage 20:

Uns sind derzeit keine Maßnahmen oder Verfahren bekannt, die in der Europäischen Union die Einrichtung von ÖPP verhindern.

Frage 21:

Andere ÖPP-Formen aus Drittländern sind uns nicht bekannt.

Frage 22:

Der Aufbau eines Netzwerkes zum Austausch über Fragen Öffentlich Privater Partnerschaften und bewährter Verfahrensweisen durch die Kommission erachten wir für sinnvoll. Insofern könnte auf die Erfahrungen, die mit der Einrichtung eines entsprechenden Netzwerkes in Deutschland gemacht wurden, zurückgegriffen werden. Hier wurde unter Federführung des

Bundesministeriums für Wirtschaft und Arbeit in den vergangenen Jahren ein solches Netzwerk aufgebaut.

Zweckverbände sending standard replies:

- Fernwasserversorgung Franken
- Wasserverband Siegen-Wittgenstein
- Zweckverband Ammertal-Schönbuchgruppe (ASG)
- Zweckverband Fernwasserversorgung Spessartgruppe
- Zweckverband Hohenloher Wasserversorgungsgruppe
- Zweckverband Mutlanger Wasserversorgungsgruppe
- Zweckverband Wasserversorgungsverband Allmersbach im Tal
- Zweckverband Wasserversorgung Kleine Kinzig
- Zweckverband Hardtwasserversorgungsgruppe
- Zweckverband Mittelhessische Wasserwerke
- Zweckverband RiesWasserVersorgung
- Zweckverband Wasserversorgung Nordostwürttemberg
- Zweckverband Wasserversorgung Söllbachgruppe der Reckenberg-Gruppe

Zweckverband Ammertal-Schönbuchgruppe

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Europäische Kommission
Konsultation „Grünbuch zu ÖPP“
KOM (2004) 327
C 100 2/005

B – 1049 Brüssel e-mail MARKT-D1-PPP@cec.eu.int

Stellungnahme zum GRÜNBUCH
ZU ÖFFENTLICH-PRIVATEN PARTNERSCHAFTEN UND DEN GEMEINSCHAFTLICHEN RECHTSVORSCHRIFTEN FÜR ÖFFENTLICHE AUFTRÄGE UND KONZESSIONEN

Beantwortung der 22 Fragen zum Grünbuch Öffentlich-private Partnerschaften ÖPP

1. Welche Formen von ÖPP auf Vertragsbasis sind Ihnen bekannt? Gibt es in Ihrem Land spezifische (gesetzliche oder andere) Rahmenbedingungen für derartige Konstruktionen?

Antwort:

a) *ÖPP auf Vertragsbasis werden praktiziert durch Vergabe öffentlicher Aufträge im Bereich der Liefer- und Dienstleistungsaufträge im Rahmen bestehender Vergaberichtlinien. Für Dienstleistungskonzessionen werden privatrechtliche Verträge im Rahmen einschlägiger Gesetze abgeschlossen.*

b) *Die Rahmenbedingungen für derartige Konstruktionen sind völlig ausreichend.*

2. Nach Auffassung der Kommission wird die Umsetzung des wettbewerblichen Dialogs in einzelstaatliche Rechtsvorschriften den betroffenen Parteien ein Verfahren an die Hand geben, das sich ganz besonders für die Vergabe öffentlicher Aufträge in Zusammenhang mit der Einrichtung einer ÖPP auf

Vertragsbasis eignet und gleichzeitig die Grundrechte der Wirtschaftsteilnehmer wahrt. Stimmen Sie dem zu? Falls nein, warum nicht?

Antwort:
Nein. Die Frage ist wohl bezogen auf Dienstleistungs-Konzessionen. Hier ist das Vergaberecht nicht anwendbar. Für die Vergabe öffentlicher Aufträge ist der wettbewerbliche Dialog bereits vorgesehen und damit ein Instrument des Vergaberechts.

3. Sehen Sie in Bezug auf diese Aufträge neben der Wahl des Vergabeverfahrens andere Punkte, die mit dem Gemeinschaftsrecht über öffentliche Aufträge in Konflikt stehen könnten? Wenn ja, nennen Sie diese und begründen Sie!

Antwort:
Nein.

4. Haben Sie bereits einmal ein Verfahren zur Vergabe einer Konzession in der Europäischen Union organisiert, daran teilgenommen bzw. ein solches organisieren oder daran teilnehmen wollen? Welche Erfahrungen haben Sie gemacht?

Antwort:
Keine Stellungnahme

5. Halten Sie das derzeitige Gemeinschaftsrecht für präzise genug, um die konkrete und effektive Teilnahme von Gesellschaften oder Gruppierungen aus anderen Staaten an den Konzessionsvergabeverfahren sicherzustellen? Sind Sie der Ansicht, dass in dieser Hinsicht normalerweise ein tatsächlicher Wettbewerb herrscht?

Antwort:

a) *Ja*
b) *Das geltende Recht ermöglicht eine Teilnahme am Wettbewerb*

6. Halten Sie einen Vorschlag für einen gemeinschaftlichen Rechtsakt zur Festlegung eines Verfahrensrahmens für die Konzessionsvergabe für wünschenswert?

Antwort:
Nein

7. Allgemeiner gefragt: Wenn Sie ein neues Gesetzgebungsvorhaben der Kommission für erforderlich halten, gibt es dann objektive Gründe dafür, in diesem Rechtsakt sämtliche ÖPP auf Vertragsbasis zu behandeln und sie ein und demselben Regelwerk für die Vergabe zu unterwerfen, ganz gleich ob die Vorhaben als öffentliche Aufträge oder als Konzessionen einzustufen sind?

Antwort:
Ein neues Gesetzgebungsverfahren der Kommission wird ***nicht*** *für erforderlich gehalten.*
Im übrigen: Nein

8. Ist Ihrer Erfahrung nach der Zugang der ausländischen Akteure zu privat initiierten ÖPP gewährleistet? Für den Fall, dass die Vergabestellen zur Initiative aufrufen, wird dieser Aufruf dann angemessen bekannt gemacht, so dass alle interessierten Akteure Kenntnis davon haben können? Wird für die Ausführung des ausgewählten Projekts ein Auswahlverfahren auf Basis eines effektiven Wettbewerbs organisiert?

Antwort:

- *a) Ja*
- *b) Alle interessierten Akteure haben hinreichend Gelegenheit sich Kenntnis über Bekanntmachung von ausgeschriebenen ÖPP zu verschaffen.*
- *c) Ja*

9. Wie könnte Ihrer Auffassung nach die Entwicklung privat initiierter ÖPP in der Europäischen Union unter Wahrung der Grundsätze der Transparenz und der Gleichbehandlung und ohne Verstoß gegen das Diskriminierungsverbot gewährleistet werden?

Antwort:
Die Entwicklung privat initiierter ÖPP in der EU ist bereits unter den gegebenen rechtlichen Voraussetzungen gewährleistet.

10. Welche Erfahrungen haben sie in der Phase im Anschluss an die Auswahl des privaten Partners im Rahmen von ÖPP auf Vertragsbasis gemacht?

Antwort:
Keine Stellungnahme

11. Sind Ihnen Fälle bekannt, in denen die Ausführungsbedingungen, einschließlich der Klauseln zur Anpassung im Zeitverlauf, eine diskriminierende Wirkung entfalten konnten oder eine ungerechtfertigte Behinderung der Dienstleistungs- oder Niederlassungsfreiheit darstellten? Falls ja, bitte beschreiben Sie die Art der aufgetretenen Probleme!

Antwort:
Nein

12. Sind Ihnen Praktiken oder Mechanismen zur Bewertung von Angeboten bekannt, die eine diskriminierende Wirkung haben?

Antwort:
Nein

13. Sind Sie wie die Kommission der Auffassung, dass bestimmte Interventionsklauseln in Bezug auf die Grundsätze der Transparenz und der Gleichbehandlung problematisch sein können? Sind Ihnen andere Typen von Klauseln bekannt, deren Anwendung zu ähnlichen Problemen führen kann?

Antwort:
Nein

14. Halten Sie es für erforderlich, dass bestimmte Aspekte der vertraglichen Rahmenbedingungen für ÖPP auf Gemeinschaftsebene geklärt werden? Falls ja, was sollte geklärt werden?

Antwort:
Nein

15. Sind Ihnen bei ÖPP-Konstruktionen besondere Probleme mit der Vergabe von Unteraufträgen bekannt? Welche?

Antwort:
Nein

16. Rechtfertigt die Existenz von ÖPP auf Vertragsbasis, die die Übertragung eine Aufgabenpakets an einen einzigen privaten Partner impliziert, ihrer Auffassung nach, dass ausführlichere Regeln für die Vergabe von Unteraufträgen eingeführt werden und/oder dass der Anwendungsbereich erweitert wird?

Antwort:
Nein

17. Halten Sie, allgemeiner gesprochen, eine ergänzende Initiative auf Gemeinschaftsebene zur Klärung oder Umgestaltung der Regeln für die Vergabe von Unteraufträgen für erforderlich?

Antwort:

Nein

18. Welche Erfahrungen haben Sie mit der Einrichtung institutionalisierter ÖPP gemacht? Lassen Ihre Erfahrungen Sie zu der Schlussfolgerung gelangen, dass die gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und

Konzessionen bei institutionalisierten ÖPP-Konstruktionen eingehalten werden? Falls nein, warum nicht?

Antwort:
In Deutschland gibt es bereits einige 100 institutionalisierte ÖPP, insbesondere durch Beteiligung großer Stromkonzerne an Stadtwerke-GmbH's, sowie durch Gründung von GmbH's unter Beteiligung verschiedener Stadtwerke. Hier werden die gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen bei institutionalisierten ÖPP-Konstruktionen eingehalten. Weitere gemeinschaftliche Rechtsvorschriften sind nicht erforderlich.

19. Halten Sie eine Initiative auf Gemeinschaftsebene für erforderlich, um die Verpflichtungen zu klären oder zu vertiefen, die die öffentlichen Auftraggeber in Bezug auf den Wettbewerb zwischen potenziell an einem institutionalisierten ÖPP-Projekt interessierten Wirtschaftsteilnehmern haben? Falls ja, welche Aspekte halten Sie für besonders wichtig und welche Form sollte eine solche Initiative haben? Falls nein, warum nicht?

Antwort:
Nein. Die hohe Anzahl bereits gegründeter institutionalisierter ÖPP belegt, dass eine Initiative auf Gemeinschaftsebene nicht erforderlich ist. Für institutionalisierte ÖPP gibt es im europäischen Primärrecht keine Ermächtigung für eine generelle europäische Regelung. Im übrigen sei auf das Subsidiaritätsprinzip verwiesen, das den Mitgliedsstaaten das Recht gibt, über Form und Erbringung öffentlicher Dienstleistungen selbst zu entscheiden. Weitergehende Regelungen auf Gemeinschaftsebene würden dieses Recht verletzen oder einschränken.

Allgemein und unabhängig von den in diesem Grünbuch aufgeworfenen Fragen:
20. Welche Maßnahmen oder Verfahren behindern in der Europäischen Union die Einrichtung von ÖPP?

Antwort:
Keine
Dort, wo keine Ausschreibungspflicht besteht (z.B. für Dienstleistungskonzessionen) wird geltendes Recht respektiert unter Beachtung des Subsidiaritätsprinzips.

21. Kennen Sie andere ÖPP-Formen aus Drittländern? Kennen Sie aus Ihren Erfahrungen in solchen Ländern bewährte Verfahrensweisen, die auch für die EU beispielgebend sein könnten? Falls ja, welche?

Antwort:

a) *Keine Stellungnahme*
b) *nein*

22. Denken Sie dass es nützlich wäre, im Hinblick auf den großen Investitionsbedarf einzelner Mitgliedstaaten zum Erreichen einer sozialen und dauerhaften Entwicklung gemeinsam und in regelmäßigen Abständen über diese Fragen unter den betroffenen Akteuren nachzudenken und bewährte Verfahrensweisen auszutauschen? Sollte die Kommission nach Ihrer Auffassung ein derartiges Netzwerk aufbauen?

Antwort:

a) *Ja, unter der Voraussetzung, dass von vorne herein sowohl Mitgliedsstaaten als auch den Trägern der Daseinsvorsorge (insbesondere den Kommunen) die Wahlfreiheit über Rechtsform und Ausgestaltung von Leistungen im bestehenden Rechtsrahmen eingeräumt wird und keine weitere Ausschreibungspflichten eingeführt werden.*
b) *Unter den Prämissen nach Ziffer a) könnte ein derartiges Netzwerk aufgebaut werden, wobei es keine präjudizierenden Resultate des Netzwerks geben darf und bewährte Strukturen in den Mitgliedsstaaten respektiert, deren Weiterentwicklung gefördert und lokales Handeln von überzogener Anwendung der Prinzipien von Privatisierung und Wettbewerb freigestellt werden.*

Holzgerlingen, den 29. Juli 2004

Zweckverband Ammertal-Schönbuchgruppe

Astrid Stepanek
Geschäftsführerin

Per e-mail an die EU-Kommission MARKT-D1-PPP@cec.eu.int

IBEC

European Commission
C 100 2/005
B – 1049 Brussels

30 July 2004

Re: **Consultation on the Green Paper on public-private partnerships (PPP) and Community law on public procurement**

To whom it may concern,

Please find attached comments from the Irish Business and Employers Confederation (IBEC) PPP Council on the above.

IBEC is Ireland’s premier business representative organisation with over 8,000 members. The Confederation provides a comprehensive range of services to the business community and has offices in Dublin, the regions and in Brussels.Further information may be found at: www.ibec.ie.

IBEC's Public Private Partnership Council responds to the need to secure real improvements in public services and to generate investment opportunities for business. The Council consists of members drawn from among financial institutions, legal firms, consultants and contractors with an interest in the PPP process. It liases with the Irish government and agencies in the promotion of PPPs. The group also provides a forum for members who either are promoting specific projects or those providing services to potential investors.

We hope that you find these comments useful in your consultation process. If you have any queries on the submission, please do not hesitate to contact us.

Regards

Erik O Donovan

pp. Mr Jim Barry
Chairman
IBEC PPP Council

IBEC RESPONSE TO THE COMMISSION CONSULTATION ON ITS GREEN PAPER ON PUBLIC PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON CONTRACTS AND CONCESSIONS

Question 1

What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?

Broadly speaking contractual PPPs in Ireland include:

(a) design, build and operate ("DBO");
(b) design, build, operate and finance ("DBOF");
(c) build, operate and finance ("BOF");
(d) design, build and finance ("DBF"); and
(e) operation of services related to an asset for not less than 5 years (which may include financing).

There is primary legislation in Ireland in relation to these set ups, being the State Authorities (Public Private Partnership Arrangements) Act, 2002.

Question 2

In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

PPP contracts (and in particular concessions contracts) require a certain element of flexibility if they are to permit the private partner to add value, either in terms of pricing and funding arrangements, technological proposals or legal structure. IBEC would not welcome any procedure that places a constraint on this flexibility.

In relation to the competitive dialogue procedure specifically, we would comment: -

(a) It is difficult to see how it can be determined that the contracting authority is "objectively" unable to define the technical means capable of satisfying their needs or objectives, or the legal and financial make-up of a project;

(b) We see difficulties in the contracting authority conducting a dialogue with the candidates in terms of their ensuring that one tenderer is not given an advantage over another. This is particularly relevant in the case of any dialogue of a technical nature. We feel this is likely to result in an increase in proceedings being taken against contracting authorities.

(c) We are pessimistic as to the level of participation candidates will engage in at the dialogue stage, since they will be concerned to protect their intellectual property rights and any commercially sensitive information. As a result, it is doubtful as to whether a meaningful dialogue can be conducted which will permit the contracting authority identify the solution(s) which are capable of meeting their needs.

(d) The practical implication of Article 29 is that the funders of the candidates would need to partake in the dialogue procedure. This is not provided for in the Directive. In any event, any such participation will increase the bid costs unnecessarily for each of the candidates and in our view may be a barrier to the funding of PPP projects.

With regard to Clause 24 of the Green Paper, we are concerned with the Commission's view that the negotiated procedure will not be permitted in cases where the contracting authority cannot price the contract because of the complexity of the legal and financial package. Particularly in the case of "pilot projects" we do not see how the legal and financial package can be arrived at without negotiation, notwithstanding the existence of the competitive dialogue procedure.

Question 3

In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.

No, we do not consider there are other points, which may pose a problem in terms of Community Law on public contracts.

Question 4

Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

(We do not propose to answer this question).

Question 5

Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?

In the area of works concessions we consider that the current legal framework is sufficiently detailed to allow the participation of non-national companies or groups. The experience in Ireland is that non-national companies or groups have participated in the procedures for the award of concessions.

Experience on the larger projects in Ireland has indicated that significant marketing is undertaken by the procuring authority in addition to advertising in the European Journal in order specifically to ensure that non-national entities are made aware of the opportunities.

Experience has shown that genuine competition has been achieved within the current PPP framework however additional value for money could be generated for the public sector through allowing greater flexibility on key commercial issues whilst remaining within the boundaries of transparency and fairness.

Question 6

In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

We do not believe that a Community legislative initiative to regulate the procedure for the award of concessions is necessary or desirable.

Question 7

More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

See answer to Question 6. We would be concerned to see the award arrangements for contracts being extended to concessions.

Question 8

In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?

See answer to Question 5. There is no experience in Ireland of contracting authorities issuing an invitation to present an initiative.

Question 9

In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?

See answer to Question 8.

The best formula to ensure development of PPP's should consider the following:

- Re-imbursement of bid costs to the losing Bidder (s) within EU competitions

- Relaxation of the rules/interpretation of the rules to ensure that proper commercial negotiation can take place in order to drive greater efficiency and value into the process
- Relaxation of the rules to reduce bid costs
- More detailed interpretation of the procurement directives to reduce potential for litigation on results of competition. Fast track process to deal with such litigation
- Relaxation of stability and growth pact rules to allow countries with infrastructural deficit to take greater advantage of potential existing within PPP's

Question 10

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

In Ireland the PPP contracts formulate the conditions and terms for performance over the contract period. The duration of the partner relationship is set out in the contract, which is typically a 20-30 year term. The provisions relating to adjustment/indexation, in our view, identify precisely the circumstances and conditions under which adjustments can be made to the contractual relationship.

Question 11

Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?

We are not aware of any such cases.

Question 12

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

We are not aware of any such practices or mechanisms.

Question 13

Do you share the Commission’s view that certain “step-in” type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other “standard clauses” which are likely to present similar problems?

We would be very concerned about any proposal to regulate funders “step-in” rights. Step-In rights give Senior Lenders an opportunity to revive a project, thus avoiding the disruption of termination. If step-ins were to require a new competition, we are of the view that Senior Lenders would not be willing to wait around while a new operator was being procured.

If legislative proposals were introduced in this area, we believe that Senior Lenders will be even more focussed on the Compensation on Termination provisions in PPP contracts, since they will be more likely to rely on getting their money back under the contract than stepping-in.

We would question the effect on the operation of the project during the intervening period if a new competition was required and question who would fund the cost of the competition (at a point of funding crisis).

It should also be noted that step-in agreements typically provide for a step-out if the effects of the step-in come to an end. We do not see how this could be dealt with in the context of requiring a new competition.

We are not aware of other “standard clauses” that are likely to present a similar problem.

The whole purpose of step in rights is to give the banks a last opportunity to bring the project back on track and the bank to appoint new contractors in order to recover/manage their debt exposure. Forcing a new competition would in all likelihood create a conflict with this purpose.

Question 14

Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?

We do not feel there is a need at this stage to clarify the contractual framework of PPPs at Community level.

Question 15

In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.

We are not aware of any specific problems and we do not consider that there is a need to clarify or adjust the rules on subcontracting in the context of a PPP.

Question 16

In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

See answer to Question 15.

Question 17

In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

See answer to Question 15.

Question 18

What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not?

(We do not propose to answer this question).

Question 19

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

We do not think that such an initiative needs to be taken at Community level.

Question 20

In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?

(We do not propose to answer this question).

Question 21

Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of "good practice" in this framework which could serve as a model for the Union? If so, please elaborate.

(We do not propose to answer this question).

Question 22

More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

We would welcome a Forum for the exchange of information and experiences, but recognise that the scope of such would be limited by confidentiality obligations. Also, any such Forum would have to rely on the goodwill of participants to feed into the process.

AGI
ASSOCIAZIONE IMPRESE GENERALI

1. What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?

Italian legislation recognise and regulate two PPP types.

First option is **concession**[1], which can be settled on two different schemes: i) the ordinary one (UE model) in which the financial revenue of the construction exploitation comes from third parts (users) payment (i.e. tolls); ii) PFI, in which are the same contracting bodies who pay the concessionaire for the use of the infrastructure/building (i.e. hospital, school and so on). According to Concession Green Book indications, Italian law requires that, also in this second case, the exploitation risk remain, at least in part, on the concessionaire.
In both referred schemes, the initiative can start from the public part, by publishing a notice according to concessions rules, or from privates, who can make free proposals in the framework of programmatic instruments adopted from Public Authorities (if it is so, the concession notice is published after the adoption of the proposal to be put it in concurrence for verifing if the market is able to forward better conditions).
To be underlined that concessions awarding procedures are, according to Italian legislation, regulated in the same way EU Directives requires for public works contract, so that, from this point of view, no difference exists.

Second option is **general contracting,** which provides the implementation in the national legal framework of the widest contractual relationship considered under public works directive (execution with whatever means, of a work corresponding to the requirements specified by the contracting authority).
In fact, according to the Italian legislation, the list of tasks attached to General Contractor activity can easily bring this figure to PPP definition, as adopted in the Commission paper COM(2004) 327 final.
In fact, in addition to design and execution, General Contractor has to provide: i) the acquisition of ground area for the construction settlement; ii) the financial resources to cover the total amount or a part (untill the end of 2006 no more than 20%) of the advanced payments; iii) special co-operation in supporting Public Authorities against criminal activities infiltration; (iv) if required, expertise on the construction (subsequent) exploitation phase (which in any case only pertains to contracting authority[2]).

[1] Law n°109/94, artt.2, 19 and 37 bis ss; Dlgs n°190/02, artt. 7 and 8.

[2] The main difference between General Contracting and construction concession is that only in the second case contractors carry the exploitation risk

A third case of PPP is **Global service** which is a not codified contract with special appliance in facility management field, which in any case, according to Italian legislation, entirely falls (as well as **outsourcing**) under services directive previsions (or works Directive if works are relevant more than services).

2. In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

We all know that the final version of competitive dialogue as well as defined in 2004/18/CE directive is the outcome of a long adjustment process which can be considered, at the end, satisfactory. The problem is now how national legislation will apply the rule; in this framework, PPP green paper guide lines will be very helpful. Commission watching in order to avoid violation at national level of the Directives prescriptions true significance is expected.

Crucial is to maintain the option that "at the end of the dialogue, candidates will be invited to submit their final tender on the basis of the solution or solutions identified in the course of the dialogue. These tenders must contain all the elements required and necessary for the performance of the project".

3. In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.

Other than selection of high importance is the awarding of the contract; should be granted, at this stage, the possibility for each selected bidders to address the final offer on the same contractual object and technical solution of the other competitors.

4. Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

Should be noted, in principle, that Italian contractors meet many difficulties in accessing concession awarding procedures within European Union.
This situation is unsatisfactory, the more in consideration of the fact that Italian market is sensibly more open if compared with different area. This is due to the fact that Italian legislation:
(i) doesn't recognise special legal status to exempt services concessions from ordinary awarding procedures (in fact services concessions are treated or like services contracts, falling under 92/50 CE Directive, or like works concessions);
(ii) treats concessions awarding procedures the same as Directives do for work contracts.
Evidence of what in above is given, for instance, by water market, which in Italy is totally opened to European concurrence, since 1994, trough concessions awarding procedures, the results of which frequently is in favour of no national contractors (standing alone or in groups). Same amount of notices doesn't appear considering the rest of EC countries and this situation should be seriously inspected. The same happens on the electricity market.
In conclusion, what Italian General Contractors think on the subject is that all EC countries has to open in the same way concessions/services market to EU concurrence; the more, even when awarding procedures according to directives rules are/will be published, special care should be take, directly from the Commission, to inspect if the national legislation/local administrative procedures effectively are/remains in line with Directives requirement on the subject.

5. Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?

Even if Directives legal framework regarding the award of concessions could be ameliorated (as already noted Italian legislation treats concessions awarding procedures the same way EC Directives does for public works contracts) the problem to be considered from the Commission in short term period is the real appliance of existing rules, case by case. This need comes not only considering national previsions implementing EC rules but also single contracting bodies behaviours.

6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

Before (or in parallel of) planning a new directive, relevant efforts the Commission should devote to guarantee effective application of the ordinary principles of no discrimination and opening of the market, according to existing Directives, as specified in COM (2004) 327 def., point 30.
In this perspective the adoption of a “green paper” containing advises and best practices on PPP is expected; the more Commission control level should be raised, and its offices allowed to make direct intervention at national level by testing contracting authorities/body activity .

7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

In principle a new legislative action on PPP should cover concession awarding side; regarding work contracts, correct EC directive 18/2004 implementation at national level is sufficient.

8. In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?

Considering PPP on private initiative ground, first should be noted that codified procedure on how to manage the awarding of such type of contract/concessions, only in few EC countries exist; as far as Directives are concerned, only “competitive dialogue” can be considered – for the future - as an European answer to such exigency to refer to.

The practical outcome of this situation is that questions on how adequate is the level of advertising concerned when contracting Authorities decide to invite interested contractors to present private initiative only in these cases can be raised; when such codified procedures doesn't exist this kind of arguments cannot be raised because although the problem exists (even more than in the other case), it is no visible.

This relevant argument a part, according to EC rules and principles, the publication of a notice at European level should be done; the problem which still stands is at what stage of the procedure should be better to do so.

According to a point of view, publication could be done once the contracting authority has decided if the proposal (initiative) is acceptable under public interest view; then rise the exigency to put the proposal on the market to verify, from the contracting body/authority if the proposed conditions can be improved.

A different idea is of publishing the notice at an earlier stage of the procedure, for instance when the contracting authority decides to ask the market for a PPP (the model could be the competitive dialogue procedure).

Last approach doesn't solve the problem of how to treat the right of the private sector to make a proposal to a contracting authority and how give to it the right recognition.

In any case should be accepted that one publication (only) at European level of the awarding procedure should be sufficient even if the procedure is settled on different steps.

9. In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?

Competitive dialogue could be an option.

As an alternative, private sector should be, in principle, free to make proposals on PPP initiative to contracting authorities/bodies; even if only at a preliminary level, proposal should be well defined and complete; as far as the proposal is accepted the contracting authority should put it on the market with an awarding procedure according to EC rules for verifying if economical and/or technical conditions can be improved; special clauses of protection (such as preference) for the “proposer” of the initiative (to guarantee private interest to make proposal) and for contractors taking part to market-verification (such as a “looser fee”) should jointly be adopted to complete the legal framework of the system.

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

According to Italian legislation, a formal awarding procedure like EC Directive provides for public works contract applies; at this stage clauses of preference and looser fee also apply.

11. Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?

Condition of execution, namely from the technical side, can strongly interfere with the final choice of the contractor.

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

13. Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment.? Do you know of other "standard clauses" which are likely to present similar problems?

Step in clauses are mostly requested from banks and insurance companies in order to minimise the risk of financial exposures in PPP initiative, where private finance contribution is requested.
In this framework such clauses are, in principle, useful and can be accepted as well as no problems on transparency and/or equal treatment arise; in this sense should be considered that, according to Italian legislation, step in clauses apply only for concessions, to replace by banks contractors, chosen after a formal awarding procedure according to EC Directives, in default.

14. Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?

Please refer to what has been said in point 8 and 9 on private initiative PPP

15. In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.

In this context no particular problems arise.
Of course, as well as it happens for every type of contract, limitations on this side (i.e. in the amount of the subcontract accepted by the client or in subcontractors choice) are not in line with (main) contractors needs.
This approach is (if possible) more relevant when you consider such complex and large tasks(execution with what ever means) committed to a contractor which is the real reason of using PPP by contracting authorities/bodies.

16. In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

According to above (point 15) the wideness of tasks committed to contractors assuming PPP requires wider field in which subcontracting has to be admitted.

17. In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

Not in principle. The definition of execution whit whatever means which is the legal basis of PPP seems, at least at European level, sufficient to justify the right approach on this issue.

18. What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not ?

The Italian legislation impose the publication of a notice for the selection of the private partner in case of institutionalised PPP. Problems can arise only considering the qualification requested to enter this special kind of procedure for

the choice of a partner. At European level (EC Directives) no regulation on this matter exists, but Commission evaluations on the fact that *participation of the contracting body in the mixed entity, which becomes the joint holder of the contract at the end of the selection procedure, does not justify not applying the law on public contracts and concessions* ***when selecting*** *the private partner* have to be shared.
In fact, in many cases institutionalised PPP seems to be finalised more to bypass EC Directives than for searching real alternatives to concessions or (more simple) works contracts. That's the reason why, according to Commission paper *the conditions governing the creation of the entity must be clearly laid down when issuing the call for competition for* ***the tasks*** *which one wishes to entrust to the private partner.* ; in fact when those tasks are the execution (designe and execution or execution by whatever mean) of a public works contract, corresponding Directives should in any case apply.

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

Of course such an initiative should be taken. Contracting authorities/bodies purpose of selecting a private partner should be at least published at European level. Qualification requested to bidder for accessing the procedure should be coherent with the tasks to be committed to the private sector: if those task refers to activities falling under works directive, all the contents of this Directive should apply, .

20. In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?

The risk of loosing control, specially from contracting authorities, on each (potential) single part of a PPP contract (conception, financing, works execution, supply, management once the project is completed and so on) seems to be the highest barrier, at European and national level, for PPP development.
Another relevant problem depends on the incertitude of the legal framework, which discourage private finance in accessing public works initiative.

21. Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of “good practice” in this framework which could serve as a model for the Union? If so, please elaborate.

22. More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

Such kind of initiative should be higly welcome.

Documento di posizione AISCAT su:

Libro Verde UE - COM (2004) 327
relativo al Partenariato Pubblico-Privato
ed al Diritto Comunitario
degli appalti pubblici e delle concessioni

Roma, 29 luglio 2004

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1. PREMESSA

Il presente documento rappresenta il contributo dell'AISCAT – Associazione Italiana delle Società Concessionarie di Autostrade e Trafori – alla consultazione promossa dalla Commissione Europea in materia di Partenariato Pubblico-Privato. Attraverso tale documento, l'Associazione si prefigge lo scopo di portare all'attenzione di codesta Commissione, che ringraziamo per l'opportunità fornitaci, la posizione e l'esperienza del comparto autostradale italiano in concessione riguardo il complesso tema dell'intervento privato nella realizzazione e/o gestione di opere pubbliche, campo nel quale ci auguriamo si possa quanto prima addivenire ad una armonizzazione in ambito europeo al fine di portare uniformità e certezza di regole a tutti gli operatori sia pubblici che privati.

Nel condividere questo obiettivo con la Commissione, l'AISCAT conferma la sua piena disponibilità a contribuire in modo fattivo al dibattito aperto, anche al di là della partecipazione al processo di consultazione in corso.

Consapevole che l'iter appena avviato vedrà una lunga serie di attività successive e che il processo in corso durerà presumibilmente diversi anni, l'AISCAT vuole essere presente, nei modi previsti dalle procedure comunitarie, nei diversi passi che verranno intrapresi, e si rende fin d'ora disponibile a partecipare attivamente a seminari e dibattiti, ulteriori consultazioni che si dovessero aprire sul tema.

Tutto ciò forte di un'esperienza del settore delle autostrade a pedaggio italiane, più appresso descritto nel dettaglio, che è stato precursore delle iniziative di PPP in Europa, considerando che la prima autostrada a pedaggio italiana fu aperta al traffico nel 1925 e che quindi il relativo schema di PPP era stato impostato già diversi anni prima.

Nel fare ciò si intende porsi nel solco tracciato dalla stessa Commissione Europea, Direzione Generale Trasporti ed Energia la quale nella sua comunicazione COM 2003/0132, nella Parte I "Strumenti finanziari e di gestione più efficienti per lo sviluppo della rete Transeuropea di Trasporto", dichiara che "bisogna diffondere le buone pratiche e aggiornare il quadro normativo esistente per rendere più interessanti le formule PPP, in particolare per gli investitori privati........”.

L’AISCAT ritiene infatti assolutamente corretta questa posizione definita dalla Direzione Generale Trasporti ed Energia, che sottolinea come i PPP siano di per sé non un fine, ma un mezzo per coinvolgere capitale privato nell’infrastrutturazione dell’Unione.

2. L'AISCAT, I SUOI MEMBRI, LE CONCESSIONARIE AUTOSTRADALI IN ITALIA

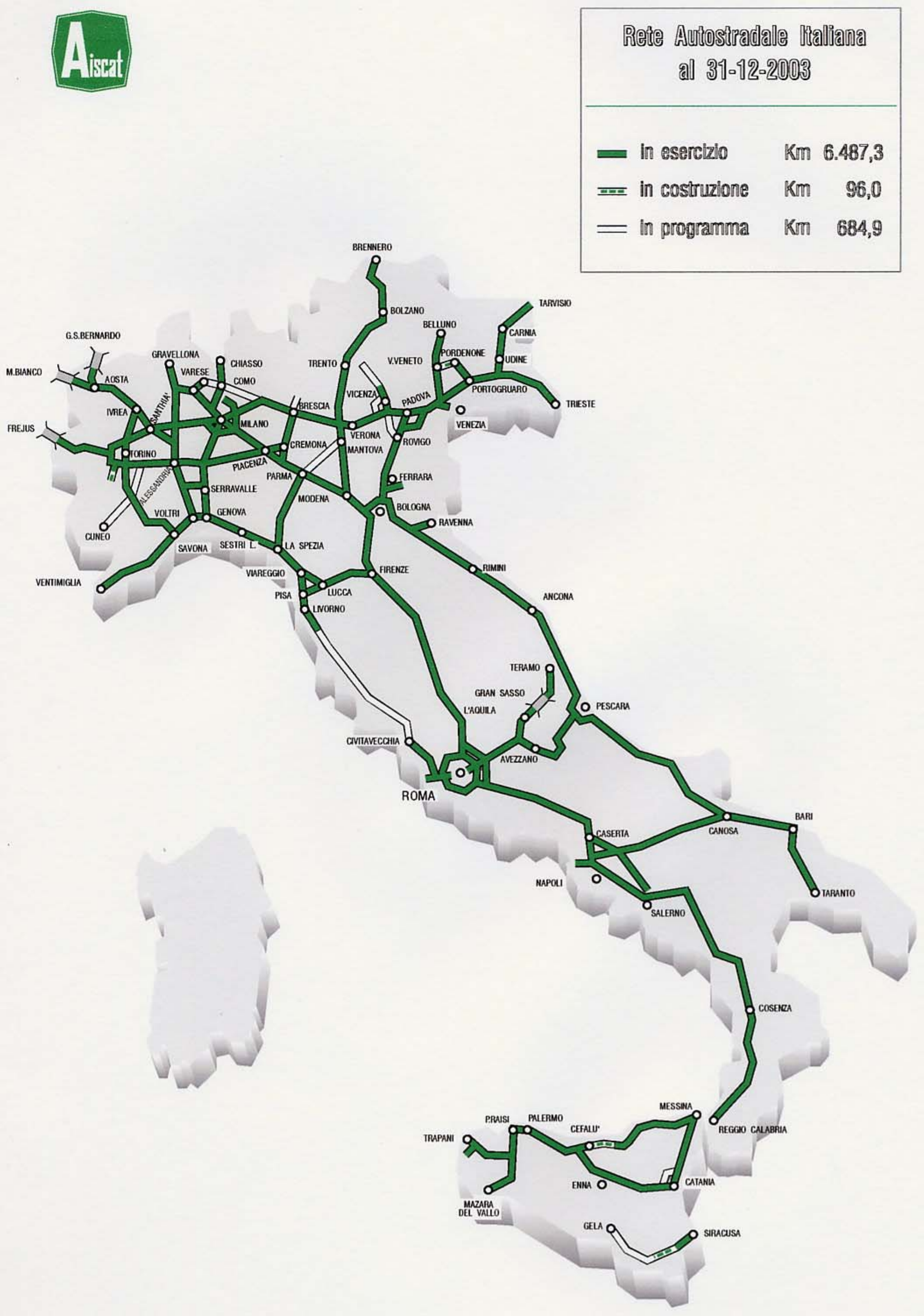
2.1 L'AISCAT ed i suoi membri

L'AISCAT - Associazione Italiana Società Concessionarie di Autostrade e Trafori - è stata costituita nel 1966 con il compito di raccogliere e confrontare le esperienze e le esigenze comuni alle Associate, interessandosi a tutte le problematiche inerenti la programmazione, la costruzione e l'esercizio delle autostrade e trafori in concessione a pedaggio.

L'attenzione dell'AISCAT è da sempre stata indirizzata su due direttrici fondamentali:

- Armonizzazione delle procedure e comportamenti di ciascuna Associata nelle modalità operative del servizio, nei rapporti con gli utilizzatori e con le Amministrazioni Pubbliche di riferimento: il tutto nel rispetto delle singole autonomie decisionali;
- Promozione di posizioni comuni, relativamente ad interessi ed esigenze del settore, e loro conseguente rappresentazione in tutte le sedi competenti, nazionali ed internazionali.

All'Associazione aderiscono, come associate effettive, le società, enti o consorzi titolari di una concessione per la costruzione e/o l'esercizio di autostrade o trafori autostradali a pedaggio in Italia; attualmente, le Associate sono 23 e la loro competenza si estende per circa 5.500 chilometri di rete.

Aiscat
Rete Autostradale Italiana
al 31-12-2003
in esercizio Km 6.487,3
in costruzione Km 96,0
in programma Km 684,9
BRENNERO
BOLZANO
TARVISIO
BELLUNO
CARNIA
G.S.BERNARDO
GRAVELLONA
CHIASSO
TRENTO
V.VENETO
PORDENONE
UDINE
M.BIANCO
AOSTA
VARESE
COMO
PORTOGRUARO
IVREA
SANTHIA'
BRESCIA
VICENZA
PADOVA
TRIESTE
VENEZIA
FREJUS
MILANO
VERONA
CREMONA
MANTOVA
ROVIGO
TORINO
PIACENZA
PARMA
FERRARA
ALESSANDRIA
SERRAVALLE
MODENA
BOLOGNA
VOLTRI
GENOVA
RAVENNA
CUNEO
SAVONA
SESTRI L.
LA SPEZIA
VENTIMIGLIA
VIAREGGIO
FIRENZE
RIMINI
PISA
LUCCA
LIVORNO
ANCONA
TERAMO
GRAN SASSO
L'AQUILA
PESCARA
CIVITAVECCHIA
AVEZZANO
ROMA
BARI
CASERTA
CANOSA
NAPOLI
TARANTO
SALERNO
COSENZA
MESSINA
P.RAISI
PALERMO
CEFALU'
REGGIO CALABRIA
TRAPANI
ENNA
CATANIA
MAZARA DEL VALLO
GELA
SIRACUSA

SOCIETA’ CONCESSIONARIE	KM IN ESERCIZIO
AUTOSTRADE PER L'ITALIA	2.854,6
ITALIANA TRAFORO MONTE BIANCO	5,8
ITALIANA TRAFORO DEL GRAN SAN BERNARDO (S.I.TRA.S.B.)	12,8
ITALIANA TRAFORO AUTOSTRADALE DEL FREJUS (S.I.T.A.F.).	79,2
RACCORDO AUTOSTRADALE VALLE D'AOSTA (R.A.V.)	27,0
AUTOSTRADE VALDOSTANE (S.A.V.)	67,4
AUTOSTRADA TORINO-IVREA-VALLE D'AOSTA (A.T.I.V.A.)	152,9
AUTOSTRADA TORINO-ALESSANDRIA-PIACENZA (S.A.T.A.P.)	291,9
AUTOSTRADA TORINO-SAVONA	130,9
MILANO MARE - MILANO TANGENZIALI	177,6
AUTOSTRADE CENTROPADANE	88,6
AUTOSTRADA BRESCIA-VERONA-VICENZA-PADOVA	182,5
AUTOSTRADA DEL BRENNERO	314,0
AUTOVIE VENETE	180,3
AUTOSTRADE DI VENEZIA E PADOVA	41,8
AUTOSTRADA DEI FIORI	113,3
AUTOCAMIONALE DELLA CISA	101,0
AUTOSTRADA LIGURE TOSCANA (S.A.L.T.)	154,9
AUTOSTRADA TIRRENICA (S.A.T.)	36,6
STRADA DEI PARCHI	281,4
TANGENZIALE DI NAPOLI	20,2
AUTOSTRADE MERIDIONALI (S.A.M.)	51,6
CONSORZIO PER LE AUTOSTRADE SICILIANE	227,0

2.2 Le concessioni autostradali in italia

In Italia la concessione di autostrade, quale species del genus concessione di costruzione e gestione di opere pubbliche, venne utilizzata sin dalla realizzazione della prima autostrada – la Milano Laghi – nel 1925, con alcune caratteristiche, tra le quali il pedaggio, fino ad oggi mantenute costanti per le autostrade italiane.

La prima legge generale di riferimento dell'istituto è stata la n. 1137 del 1929, di grande rilievo per aver stabilito che non solo i soggetti pubblici, ma anche i privati potevano essere destinatari della concessione.

Successivamente, su questo terreno normativo di base, sono state adottate parecchie leggi speciali, volte a prevedere e disciplinare fattispecie ad hoc.

Negli anni '50, la Legge n. 463 del 1955 (c.d. "Legge Romita") ha rappresentato il primo momento di programmazione settoriale e di disciplina complessiva della materia autostradale, caratterizzata dalla scelta del metodo concessionale come strumento principale per la costruzione della rete autostradale. Con tale legge, in particolare, si è proceduto alla definizione di una serie di aspetti del rapporto concedente-concessionario la cui determinazione era originariamente rimessa alla autonomia delle parti in sede di convenzione.

Sulla base essenzialmente di tale impianto normativo, tra gli anni 50 e la prima metà degli anni '70, l'Italia ha costruito una rete autostradale a pedaggio tra le più importanti d'Europa. Successivamente, è intervenuto il blocco nella costruzione delle autostrade voluto con la legge n. 287 del 28 aprile 1971.

L'evoluzione della legislazione italiana in materia, secondo uno schema conforme con i principi comunitari è stata rimarcata in particolare con la legge 109/94 (c.d. Legge Merloni) e successive modificazioni – attualmente in vigore -

con la quale viene previsto che l’affidamento dei lavori pubblici in concessione avvenga esclusivamente nel caso in cui questa abbia ad oggetto, oltre alla esecuzione, anche la gestione delle opere e stabilisce che l’unica procedura ammessa è quella della licitazione privata.

Nella fase di transizione tra vecchio e nuovo regime normativo, di estrema importanza per il settore è stata la c.d. Direttiva Costa-Ciampi emanata nel 1998 dal Ministro dei Lavori Pubblici, di concerto con il Ministro del Tesoro, in cui sono stati fissati i criteri ed i principi da seguire in fase di revisione delle concessioni autostradali. Il senso di tale provvedimento è stato quello di sottolineare da un lato la necessità del ricorso per il futuro, a procedure di evidenza pubblica per l’affidamento delle concessioni, e di fissare, dall’altro, i criteri per risolvere le controversie insorte sul pregresso.

3. IL LIBRO VERDE E LE SUE DOMANDE: ANALISI DI DETTAGLIO

1. *Quali tipi di operazioni di PPP puramente contrattuali conoscete? Tali operazioni sono oggetto di una regolamentazione specifica (legislativa o di altro tipo) nel vostro Paese?*

In Italia, il fenomeno di PPP puramente contrattuali è molto diffuso. L' esperienza più importante è certamente quella autostradale, applicazione, diffusa, sia per la lunga pratica che per l'estesa, su tutto il territorio nazionale. Negli ultimi tempi però, soprattutto sotto la spinta delle innovazioni introdotte dalla legge n. 109 del 11 febbraio 1994, come successivamente modificata, il PPP si è andato molto sviluppando. Ciò grazie al fatto che i privati possono non solo suggerire all'amministrazione concedente le opere di PPP da inserire in programma, ma anche rendersi promotori di iniziative per le quali presentano il progetto preliminare e il piano economico finanziario. In questo modo, si solleva l'amministrazione da una serie di adempimenti senza perciò compromettere la concorrenzialità dell'operazione, dal momento che il concedente, dopo aver riconosciuto il pubblico interesse dell'iniziativa, deve scegliere con gara le imprese che, nella successiva fase negoziata, concorreranno con il promotore per l'affidamento della concessione.

Si tratta, tuttavia, di una procedura non certo snella, perché i momenti concorsuali rischiano di moltiplicarsi se già nel momento programmatorio le proposte da inserire in programma riguardanti la stessa opera risultano più di una, ma con caratteristiche diverse.

Meno diffuso è, invece, il PFI. Soltanto recentemente, con la modifica introdotta nella citata legge 109 dalla legge n. 166 del 2002 è stato legislativamente sancita la possibilità di una concessione bilaterale, senza cioè la presenza dell'utente (art. 19, 2-ter). Ma si tratta di istituto la cui utilizzazione è stata finora pressocchè nulla.

Inoltre, accanto alla figura della concessione ad iniziativa del promotore, trattata negli articoli 37-bis e seguenti della legge n. 109/94, il legislatore italiano ha normato (art. 19 e art. 21 Legge 109/94) la concessione ad iniziativa dell'amministrazione, la cui procedura di aggiudicazione è modellata sullo schema della licitazione privata, contrariamente alla Direttiva comunitaria che prevede l'unico obbligo del rispetto di pubblicità e termini,

Quanto ai settori ex esclusi, oggi speciali, la situazione italiana è analoga a quella europea, nel senso cioè che non è disciplinato il modo in cui viene scelto il concessionario. Nella Comunicazione interpretativa del 2000 (par. 3.3), è prospettata però una soluzione che presenta un aspetto problematico, perché non è sempre agevole stabilire quando un ente si possa considerare "operante specificamente in uno dei quattro settori" (Direttiva 93/38) e, conseguentemente stabilire quando, viceversa, si debba applicare la direttiva sui settori "tradizionali", trattandosi di enti non operanti specificatamente nei quattro settori. Sarebbe gradito un chiarimento in questo senso.

2. ***Secondo la Commissione, il recepimento nel diritto nazionale della procedura di dialogo competitivo permetterà alle parti interessate di disporre di una procedura particolarmente adeguata all'aggiudicazione dei contratti qualificati come appalti pubblici in occasione dell'attuazione di un PPP di tipo puramente contrattuale, pur preservando i diritti fondamentali degli operatori economici. Condividete questo punto di vista? Se no, perché?***

La normativa sul dialogo competitivo, di cui all'art. 29 della direttiva 2004/18/CE, è sicuramente importante, perché cerca di dare soluzione al nodo di realizzazione di interventi particolarmente complessi anche allorquando le amministrazioni interessate sono impossibilitate ad individuare i mezzi per soddisfare le proprie esigenze o a valutare ciò che il mercato può offrire.

Si ritiene, però, che sarebbe utile che la Commissione chiarisse meglio sia i presupposti in presenza dei quali è possibile fare ricorso a detta nuova procedura e sia le modalità di svolgimento della procedura stessa, in particolare laddove si ipotizza che essa *" si svolga in fasi successive, in modo da ridurre il numero di soluzioni da discutere*".

Né risulta chiara nei suoi meccanismi operativi la possibilità di pervenire ad una pluralità di offerte, così come non sembra preservare i "diritti d'ingegno" il fatto che le amministrazioni interessate entrino in possesso dell'apporto del privato senza nemmeno prevedere in via generalizzata forme di rimborso dei costi sostenuti per i partecipanti al dialogo.

Nel complesso, peraltro, l'intera procedura potrebbe risultare di difficile attuazione pratica per la parte concernente il divieto di rilevare agli altri partecipanti *"le* ***informazioni riservate*** *comunicate dal candidato partecipante al dialogo…".*

3. ***Per quanto riguarda questi contratti, esistono secondo voi altri punti, oltre a quelli relativi alla scelta della procedura d'aggiudicazione, che potrebbero causare problemi riguardo al diritto comunitario degli appalti pubblici? Se sì, quali e per quali ragioni?***

Si ritiene opportuno segnalare che nell'applicazione in Italia non viene 'utilizzata la procedura negoziata prevista per i casi in cui il bando riguardi : "..lavori la cui natura o i cui imprevisti non consentano una fissazione preliminare e globale dei prezzi". In tali casi, infatti, non si è ritenuto fosse consentito dalle disposizioni comunitarie il ricorso alle procedure derogatorie, ma si è reputato che tali situazioni giustificassero unicamente un compenso c.d. " a misura".

Inoltre è la stessa portata del concetto di "rischio" – diffusamente considerato nell'ambito della Comunicazione interpretativa del 2000 - che sembrerebbe ancora non ben chiara. Basti pensare che le nuove direttive comunitarie di cui al "pacchetto legislativo" non menzionano il rischio nemmeno con riferimento alla gestione.

Per contro In Italia, esso è stato finora connesso strettamente ed unicamente al concetto di "gestione/sfruttamento" di un'opera. E ciò proprio perché il concetto di "rischio" è stato considerato sempre e solo come sommatoria tra "rischio di costruzione" e "rischio della domanda" senza tenere in alcun conto il "rischio della disponibilità", perché non chiaro e, come tale, non considerato.

4. *Avete già organizzato, partecipato, o avuto l'intenzione di organizzare o partecipare ad una procedura d'attribuzione di una concessione nell'Unione? Che esperienza ne avete ricavato?*

Le principali esperienze avute dall'Aiscat in ambito di concessioni europee hanno riguardato i seguenti progetti:

Facenti capo all'associata *Autostrade per l'Italia S.p.A.*

M6 Toll – Gran Bretagna
La Birmingham Northern Relief Road, la prima autostrada a pedaggio in Inghilterra, è stata aggiudicata in concessione alla società Midland Expressway Limited (MEL), partecipata da Autostrade SpA (25%) e dall'australiana Macquire Infrastructure Group (75%).
L'infrastruttura, di 43 km, è entrata in esercizio a dicembre 2003 ed è stata realizzata in project financing, senza beneficiare di fondi o garanzie governative.
La concessione ha una durata di 53 anni; il pedaggio iniziale ed i suoi successivi adeguamenti non sono sottoposti a vincoli.

Esazione del pedaggio - Austria
L'iniziativa consiste nella realizzazione e gestione di un sistema di telepedaggio per gli autoveicoli pesanti su circa 2.000 km di rete viaria in Austria.
La gara, indetta dall'Ente austriaco per la gestione del sistema stradale e autostradale (ASFINAG), è stata aggiudicata alla società EUROPASS (100% Autostrade SpA) nel 2002.
Il sitema di esazione è entrato in esercizio a gennaio 2004: la concessione ha una durata di 10 anni da tale data.
Lo schema di project financing su cui è stato costruito l'intervento prevede un fee annuale corrisposto da Asfinag ad Europass per la realizzazione e gestione del sistema. Il compenso non sarà legato all'andamento del traffico, né verrà indicizzato alle tariffe.

Facenti capo alle Associate *Autostrada Torino-Milano (ASTM)* e *SINA*

A69 – Gran Bretagna
La RoadLink A69 è una delle società interessate dal programma DBFO (Design, Build, Finance & Operate) con cui il governo inglese ha cercato di incrementare il settore privato della gestione dei servizi, tra cui anche quello

delle autostrade e delle strade extraurbane principali, nel caso specifico a fronte della corresponsione di un pagamento, da parte della Highways Agency, in funzione dell'entità del traffico veicolare (cd pedaggio ombra). La A69 è stata data in concessione al Consorzio RoadLink A69 Ltd. (Henry Boot, Impregilo, AWG Project Investment PLC, Pell Frischmann, ASTM – SINA) per un periodo di 30 anni, includendo nella concessione la costruzione di un tratto di tangenziale per una lunghezza di circa 3,6 km (Haltwhistle bypass), il rifacimento di parte della pavimentazione, il rifacimento o la sistemazione di opere esistenti, il miglioramento dell'illuminazione di alcuni punti critici ed altre opere similari. Per dare vita alla Concessione e procedere alla realizzazione delle opere di ammodernamento si è proceduto ad accendere un finanziamento con la Loyds Bank Plc. Al termine della concessione la RoadLink A69 Ltd. Dovrà restituire alla Highways Agency l'autostrada in condizioni già predefinite.

5. ***Ritenete che l'attuale quadro giuridico comunitario sia sufficientemente preciso per garantire la partecipazione concreta ed effettiva di società o gruppi non nazionali alle procedure d'aggiudicazione di concessioni? Secondo voi, in questo contesto è abitualmente garantita una concorrenza reale?***

L'attuale quadro giuridico europeo garantisce dal punto di vista formale l'accesso ai mercati nel rispetto delle condizioni previste dal Trattato.
Nondimeno, la complessità delle normative nazionali, per lo più risultante dalla stratificazione normativa accumulata negli anni, vanifica spesso tale principio, rendendo di fatto non sostanziale il rispetto dello spirito del Trattato. Ancora più "opaca" risulta poi la realtà operativa di quei Paesi che sono tuttora privi di normativa in proposito.

In tale quadro , un importante passo avanti potrebbe essere rappresentato, ad esempio, dalla creazione di una banca dati, accessibile via internet, contenente le normative nazionali (applicabili alle concessioni) di tutti gli Stati membri, normative che andrebbero tradotte in tutte le lingue ufficiali della UE (posto che la traduzione nelle tre sole "lingue di lavoro" europee – inglese, francese, tedesco – non sembra sufficiente a garantire un'adeguata parità di trattamento); laddove un Paese non avesse una normativa specifica sul tema, si dovrebbero in ogni caso fornire informazioni circa le *consuetudini* in esso presenti sull'argomento.
Una simile banca dati, lungi dal costituire la soluzione a tutti i menzionati problemi, avrebbe comunque il considerevole merito di garantire a priori migliori condizioni di accesso al mercato transnazionale delle concessioni, visto che permetterebbe di superare uno dei principali ostacoli – se non il primo – incontrato in queste occasioni dagli operatori del settore, ossia quello della comprensione delle normative straniere.

6. *Pensate che un'iniziativa legislativa comunitaria mirante a regolamentare la procedura d'aggiudicazione di concessioni sia auspicabile?*

L'Italia ha sinora ritenuto necessario regolamentare con legge la procedura di aggiudicazione delle concessioni di lavori pubblici e la figura del promotore, che su tale istituto si innesta.

Ciò ha irrigidito gli interventi delle amministrazioni - dato anche il contenuto specifico delle regole che sono state individuate dal legislatore nazionale - ma ha consentito di trattare in maniera uniforme un istituto che ha avuto una diffusione considerevole nel Paese e che da ultimo, ha registrato una larga diffusione di interventi promossi dai "promotori".

Inoltre, va sottolineato positivamente il fatto che la attivazione del meccanismo del promotore ha consentito di prestare maggiormente attenzione alle esigenze del sistema produttivo e del territorio, spingendo innanzitutto i decisori a compiere, in tempi compatibili con l'economia anzichè con la sola "politica", scelte condivise intorno a esigenze concrete.
Riteniamo che si tratti di un' esperienza di cui potrebbe essere utile tener conto a livello comunitario.
Detto questo, va comunque sottolineato che affrontare il tema delle concessioni senza inquadrarlo nel più vasto ambito dei PPP sarebbe un'operazione incompleta e lascerebbe spazio a incertezze e confusione nell'applicazione delle forme di PPP che non ricadono in questo ambito.
Appare quindi opportuno omogeneizzare a livello europeo i PPP in generale e collocare le concessioni al loro interno.

7. *In maniera più generale, se ritenete che sia necessario che la Commissione proponga una nuova azione legislativa, esistono a vostro parere ragioni oggettive per regolamentare tramite un tale atto tutti i PPP di tipo contrattuale, siano essi qualificabili come appalti pubblici o come concessioni, per sottoporle a identici regimi d'aggiudicazione?*

Sicuramente pratiche e, ancor più, regole omogenee, utilizzate da parte di tutti gli operatori degli Stati membri garantirebbero una concorrenza maggiore di quanto non avvenga oggi.

Tuttavia, si deve osservare che solo una ricognizione dettagliata e completa delle realtà operative praticate nei vari Paesi prima del varo di qualsiasi normativa legislativa potrebbe ridurre le difficoltà di pratiche/regole che comunque andrebbero costruite in maniera armonica e sistematica e sufficientemente chiara.

Inoltre, va tenuto in grande conto che " l'allargamento" ha unito Paesi con tradizioni molto differenti tra loro ed è scontata la problematicità di pervenire nel breve, medio periodo ad una uniformità applicativa da parte di tutti gli operatori in forza delle differenti esperienze, culture e strutture sulle quali poter contare.

Ne consegue una proposta di operare per “passi successivi”, comunque verso un quadro generale che racchiuda all’interno della trattazione dei PPP tutte le fattispecie di interesse, non limitandosi cioè a trattare nel dettaglio solo alcune di esse, tralasciando le altre.

Da notare anche che il concetto di omogeneità non implica automaticamente il ricorso a procedure e scelte identiche indipendentemente dal settore considerato; infatti, il ricorso ai PPP nel caso dell’edilizia pubblica potrebbe richiedere clausole diverse da quelle applicabili ai trasporti, e ciò atteso che il fine da raggiungere è il coinvolgimento dei capitali privati e non una uniformazione forzata delle procedure.
In quest’ottica si potrebbe pertanto pensare all’individuazione di specificità settoriali, che porterebbero ad una normativa differenziata “orizzontalmente”, ma uguale in tutta Europa, invece che “verticalmente” (cioè per Stato Membro come è oggi), così da pervenire a regimi di aggiudicazione omogenei, piuttosto che a “regimi di aggiudicazione identici”.

8. ***In base alla vostra esperienza, l'accesso degli operatori non nazionali alle formule di PPP di iniziativa privata è garantito? In particolare, nei casi in cui le amministrazioni aggiudicatrici invitano a presentare un'iniziativa, tale invito è generalmente oggetto di pubblicità adeguata ad assicurare l'informazione di tutti gli operatori interessati? Viene organizzata una procedura di selezione realmente concorrenziale per garantire l'attuazione del progetto stesso?***

Allo stato attuale, ed in base alle esperienze sinora registrate in Italia, l’accesso al partenariato pubblico-privato da parte di operatori extranazionali risulta garantito, sotto il profilo formale, sia per quanto riguarda le procedure di selezione del contraente privato sia per quanto riguarda le successive procedure di aggiudicazione.

Pur tuttavia, il semplice rispetto delle garanzie formali non sembra sufficiente al raggiungimento di una reale e sostanziale concorrenza, qualora non vengano preventivamente ed a monte chiariti, con esattezza e soprattutto uniformità, i criteri che dovrebbero permettere di arrivare all’adozione di principi quali trasparenza, non discriminazione e parità di trattamento; ci si riferisce ad esempio allo stesso concetto di “pubblicità adeguata” – riportato proprio nella presente domanda – riguardo al quale sarebbe quantomeno auspicabile che venga stabilito, a livello europeo, cosa debba intendersi con il termine “adeguata”.

9. ***Quale sarebbe secondo voi la migliore formula per assicurare lo sviluppo di PPP di iniziativa privata nell'Unione europea pur garantendo il rispetto dei principi di trasparenza, di non discriminazione e di parità di trattamento?***

Premesso che una compiuta risposta a tale domanda potrà, evidentemente, essere formulata solo dopo aver conosciuto gli esiti della presente consultazione, secondo la scrivente è tuttavia opportuno in questa sede portare all'attenzione della Commissione la seguente riflessione:

in una futura, ed eventuale, attività normativa a livello europeo, la regolazione del partenariato dovrebbe essere intesa non come il "fine" ultimo da raggiungere, bensì come il "mezzo" per imprimere una accelerazione nello sviluppo infrastrutturale dei Paesi membri. Perdendo di vista questo aspetto difatti, si rischierebbe di arrivare ad avere una normativa sul PPP magari perfettamente garantista ed inappuntabile dal punto di vista giuridico, ma assolutamente inutile dal lato sostanziale in quanto – ad esempio – giudicata troppo onerosa e vincolante dagli operatori e quindi, di conseguenza, lasciata in disparte.

10. ***Che esperienza avete riguardo alla fase successiva alla selezione del partner privato nelle operazioni di PPP contrattuali?***

Sembrerebbe opportuno che la disciplina della fase esecutiva dei fenomeni di PPP tenesse conto di una caratteristica naturale del rapporto: la durata di tale momento, normalmente diluita in un rilevante arco temporale, cui corrisponde la difficile prevedibilità, al momento dell'instaurarsi del rapporto, delle evoluzioni della realtà e delle precise condizioni e modalità di futuro adeguamento del rapporto contrattuale.

Rilevato che nello stesso Libro Verde si tiene sostanzialmente conto di tale problematica, sembrerebbe opportuno chiarire, al livello comunitario la portata di concetti quali "modifica sostanziale dell'oggetto del contratto", specie se dalla differente valutazione della sostanzialità di una modifica, deve dipendere l'avvio o meno di una nuova procedura concorsuale.

11. ***Siete a conoscenza di casi nei quali le condizioni d'esecuzione – comprese le clausole d'aggiornamento - hanno potuto avere un'incidenza discriminatoria o hanno potuto costituire un ostacolo ingiustificato alla libera prestazione di servizi o alla libertà di stabilimento? Se sì, potete descrivere il tipo di problemi incontrati?***

Non siamo a conoscenza di casi del tipo indicato.

12. ***Siete al corrente di pratiche o di meccanismi di valutazione di offerte con conseguenze discriminatorie?***

Premesso che l'AISCAT, in quanto Associazione di categoria, non partecipa a gare e quindi non entra in diretto contatto con le relative procedure, è doverosa una certa cautela nell'esprimere un giudizio su talune pratiche attualmente invalse a livello nazionale e per le quali si potrebbe formalmente adombrare la non ottemperanza al Diritto Comunitario.
Difatti alcune di esse, e si fa l'esempio della normativa italiana relativa alla figura del "promoter", talvolta oggetto di critica, nella pratica stanno dimostrando notevole efficacia nello stimolare l'ingresso del settore privato nella realizzazione di infrastrutture.
Alcuni esempi nazionali potrebbero pertanto contribuire alla definizione di quelle "specificità settoriali" introdotte in precedenza al punto 7.

13. ***Condividete la constatazione della Commissione secondo la quale alcune operazioni del tipo "step-in" possono porre problemi in termini di trasparenza e di parità di trattamento? Conoscete altre "clausole tipo" la cui attuazione potrebbe causare problemi simili?***

In Italia la normativa vigente prevede il c.d. "subentro", di cui all' art. 37.octies della legge n. 109/94 e s.m.i., grazie al quale viene impedita la risoluzione di un rapporto concessorio allorquando, su designazione dei finanziatori, una nuova società subentra nella concessione e fa cessare entro breve termine le cause di inadempimento, previo assenso da parte del concedente, condizionato al fatto che la società designata abbia caratteristiche tecniche e finanziarie sostanzialmente equivalenti all' originario concessionario.
Manca, però,ancora il decreto ministeriale di fissazione dei criteri e delle modalità attuative delle previsioni della norma stessa.

Peraltro, nel condividere l'auspicio della Commissione per una maggiore trasparenza e parità di trattamento, si deve richiamare l'attenzione sul fatto che il problema resta reale e qualora la soluzione sperimentata a livello italiano non fosse condivisa occorrerebbe comunque trovare positivo sbocco al problema, specie nell' ambito di operazioni complesse come le concessioni di costruzione e gestione.

14. ***Ritenete che sia necessario chiarire a livello comunitario alcuni aspetti attinenti al quadro contrattuale dei PPP? Se sì, su quale(i) aspetto(i) dovrebbe incentrarsi tale chiarificazione?***

Nel raccogliere l'invito della Commissione, si ritiene che sarebbe recepito con grande favore un contributo chiarificatore in ordine a:

- il concetto di "rischio", atteso che le stesse chiarificazioni apportate da parte di Eurostat non possono ritenersi esaustive di una problematica che, quantomeno in Italia, continua ad essere cruciale per la stessa corretta comprensione del concetto di “partenariato pubblico privato” accolto a livello comunitario;

- la specificazione delle modalità applicative della norma di cui all’art. 61 della direttiva 2004/18, concernente la aggiudicazione al concessionario di lavori complementari alla concessione, le cui finalità, peraltro, risultano assolutamente manifeste, ancorché l’aver operato una pedissequa trasposizione dalla normativa sugli appalti nell’ambito delle concessioni non giovi alla chiarezza applicativa;
- la linea di demarcazione tra contributo pubblico ed “aiuto di Stato”, in particolare con riferimento alle garanzie pubbliche offerte al privato;
- la esatta linea di demarcazione tra concessione di lavori e concessione di servizi, atteso che entrambe mutuano la propria definizione dall’appalto, ma la prima è regolamentata dal diritto comunitario, mentre la seconda è retta solamente dai principi del Trattato.
- le ragioni del trattamento penalizzante usato nei confronti dei concessionari che siano anche amministrazioni aggiudicatrici i quali, a differenza dei concessionari privati, sembrerebbero ora dover soggiacere a due livelli di concorsualità (a monte e a valle).

15. *Nel contesto delle operazioni di PPP, siete al corrente di problemi particolari incontrati in materia di subappalto? Quali?*

Il maggior problema che, nel concreto, si pone sull’ argomento scaturisce dalla difficoltà di comprendere, su un piano logico e sistematico, che cosa giustificherebbe un trattamento tanto penalizzante, quale quello vigente, nei confronti del concessionario che risulti anche amministrazione aggiudicatrice.
Infatti, unicamente in questa ipotesi, il diritto comunitario renderebbe obbligatorio un doppio livello di concorsualità. Non si comprenderebbe però come detto concessionario possa operare sul mercato al pari degli altri concessionari privati, se solamente lui risulta gravato da oneri ulteriori rispetto al rischio di gestione che grava su tutti, indistintamente, i concessionari.

Il tenore delle norme vigenti, peraltro, non sembrerebbe giustificare nemmeno l’eccezione cui fa riferimento il Libro Verde, eccezione che non risulta specificata nel pacchetto legislativo, secondo cui la società di progetto che abbia essa stessa lo status di organismo aggiudicatore “ è obbligata ad assegnare i propri contratti o le proprie concessioni nel quadro di un bando di gara, sia che i contratti siano conclusi con i propri azionisti, sia che non lo siano”, salvo un solo caso, ossia : “. quello in cui le prestazioni affidate da una società di progetto ai propri azionisti sono già state oggetto di un bando da parte del partner pubblico, precedentemente alla costituzione della società di progetto”.

16. ***Il fenomeno dei PPP di tipo contrattuale, che implica il trasferimento di un insieme di compiti ad un unico partner privato, giustifica secondo l'introduzione, riguardo al fenomeno dei subappalti, di norme più dettagliate e dal campo d'applicazione più vasto?*** **17.** ***In maniera più generale, ritenete che si dovrebbe prendere un'iniziativa complementare a livello comunitario al fine di chiarire, o sistemare, le norme relative ai subappalti?***

Tutte le forme di partenariato, di tipo contrattuale o istituzionalizzato, sono tra loro accomunate da due elementi, vale a dire una rilevante complessità operativa e l'esigenza del rispetto dei principi fondamentali di trasparenza, parità di trattamento e non discriminazione.
In questo contesto, l'introduzione di eventuali norme più dettagliate e dal campo di applicazione più vasto, finalizzate a regolamentare maggiormente il fenomeno dei subappalti, potrebbe dare risposta positiva ad esigenze di maggior tutela e garanzia dei subappaltatori stessi, ma è dubbio che l'aggravio conseguente favorirebbe una maggiore diffusione dei PPP stessi.

L'esperienza italiana – caratterizzata fino al recente passato da norme particolarmente rigide in proposito, poi modificate in senso meno restrittivo - testimonia proprio l'importanza di trovare il giusto punto di equilibrio tra interessi contrapposti.

18. ***Quale esperienza avete del lancio di operazioni PPP di tipo istituzionalizzato? In particolare, la vostra esperienza vi porta a pensare che il diritto comunitario degli appalti pubblici e delle concessioni sia rispettato nel caso di operazioni PPP istituzionalizzate? Se no, perché?***

Indubbiamente, il silenzio del diritto comunitario in merito alle forme di PPP istituzionalizzato non ha giovato ad un corretto utilizzo degli strumenti stessi.

19. ***Ritenete che debba essere presa un'iniziativa a livello comunitario per chiarire o precisare gli obblighi degli organismi aggiudicatori riguardo alle condizioni che devono regolamentare la concorrenza tra operatori potenzialmente interessati da un progetto di tipo istituzionalizzato? Se sì, su quali punti particolari e sotto quale forma? Se no, perché?***

Per il caso di assunzione di controllo da parte di un'entità pubblica sarebbe quantomeno opportuno un chiarimento per consentire di comprendere come agire a livello operativo per una corretta applicazione del concetto di "influenza certa".

IN MANIERA GENERALE, ED INDIPENDENTEMENTE DAI PROBLEMI SOLLEVATI IN QUESTO DOCUMENTO:

20. *Quali sono le misure o le pratiche che ritenete di ostacolo alla creazione di PPP nell'Unione europea?*

L'esperienza italiana è stata, nel complesso volta ad irrigidire in funzione della trasparenza, la stessa normativa europea. Nel tempo, però, la eccessiva rigidità ha dimostrato, specie in taluni casi, i limiti intrinseci, imponendo correttivi e l'introduzione di norme più flessibili.

D'altro canto, la gestione di un appalto ordinario molto spesso sfocia in un contenzioso copioso; a maggior ragione è difficile immaginare che rispetto ad una concessione di costruzione e gestione o altro contratto di partenariato a lunga durata tutto possa essere preventivato con anticipo di decenni.

21. Conoscete altre forme di PPP sviluppate nei paesi al di fuori dell'Unione? Conoscete esempi di 'buone pratiche 'sviluppate in questo contesto, cui l'Unione potrebbe ispirarsi? Se sì, quali?

La nostra associata *Autostrade per l'Italia* ha avuto modo di partecipare al progetto, realizzato mediante PPP, per la costruzione e gestione dell'autostrada *Dulles Greenway* in USA.
L'infrastruttura, lunga 29,3 km, collega il Dulles International airport alla cittadina di Leesburg in Virginia USA ed è stata aperta al traffico nel settembre 1995.
Il progetto è stato finanziato e realizzato completamente da un raggruppamento di imprese private (TRIP II) a cui ha partecipato Autostrade S.p.A. tramite la sua controllata Autostrade International.
La concessione è stata affidata mediante trattativa diretta dallo Stato della Virginia, tramite l'ente di gestione delle strade Virginia Department of Transportation(VDOT) alla Trip II ed ha la durata di 40 anni più 2,5 anni per la costruzione, che è stata affidata ad un'impresa socia di minoranza di TRIP II.

22. *In termini più generali, e tenuto conto dei considerevoli investimenti necessari in alcuni Stati membri, al fine di realizzare uno sviluppo economico-sociale durevole, pensate che sia utile una riflessione collettiva su tali questioni che prosegua ad intervalli regolari tra gli attori interessati e che permetta uno scambio di 'buone pratiche? Ritenete che la Commissione dovrebbe dare impulso ad una tale rete?*

Per tutte le considerazioni sopra svolte la risposta al quesito della Commissione non può che essere positiva e lo scambio di "buone pratiche" largamente auspicato come strumento che, tra l'altro, consentirebbe di tener conto non solo dei profili problematici di tipo giuridico, ma anche di quelli di natura economica ed istituzionale che nel concreto si pongono per tutti gli operatori.

ANCE

ASSOCIAZIONE NAZIONALE COSTRUTTORI EDILI

Direzione Legislazione Opere Pubbliche

Note

Re: Green Paper on Public-Private Partnerships and Community law on public contracts and concessions

Following due examination of the text in question, ANCE considers it appropriate to give answers to the questions raised by the Commission, explaining more precisely certain aspects involved in the phenomenon of Public-Private Partnership which are considered particularly important for the building sector.

Regarding the questions raised, hereafter please find the following considerations, concerning specifically the sector of **public works**.

QUESTION NO. 1

The Italian set-up recognises and governs fundamentally two types of PPPs:

- The **concession** of construction and running, in the two different variants: ordinary, in which the public administration issues a call for bids for entrusting the carrying out and running of a work and the concessionaire recovers the funding relative to the work through payments collected from third party users; and the procedure of the promoter *(project financing),* in which initiative for the project is taken by the private promoter, who may be entrusted on a basis of concession with the carrying out and running of the work itself.

- The **General Contractor**, which constitutes implementation of the "execution by any means", foreseen by the Community directives. In fact the services entrusted to the general contractor comprise not only the planning and execution, but also the partial financing of the work and other activities of administrative back-up.

However, in addition to these patterns of award, the Italian legislation in particular sectors, such as that of prison building, foresees further forms of search for a private partner by the adjudicating bodies, which may cause some perplexity. For example, reference could be made to those cases of what is termed financial leasing of real estate "undergoing construction", by means of which a competition is called for determining the "financial lessee" (banks or financial subjects) which then have to see to the carrying out of the work which will be leased to the administration by means of direct and discretionary awarding to the executor subjects in possession of the qualification requirements prescribed for contractors by the rules on public works.

These perplexities pertain to the compatibility of such operations with Community law: in fact, in ANCE's opinion, choice of the executor by the financing lessee adjudicating the competition must respect the rules on competition.

QUESTION NO. 2

As regards competitive dialogue, it is considered that this particular procedure may be used for certain forms of PPP, providing the rules pertaining to advertising are complied with and confidentiality is ensured regarding the solutions provided by the competing firms.

QUESTION NO. 3

As a general rule, no particular problems arise regarding such contracts, apart from choice of the tendering procedure.

QUESTION NO. 4

We are not in a position to answer this question.

QUESTION NO. 5

We consider that the fundamental rules relative to advertising, transparency and non-discrimination are sufficient to guarantee the participation of foreign competitors in the competitions for the awarding of concessions. However, we would stress that particular attention must be paid on the subject of real competition to the need to ensure reciprocity between the member States in the field of treatment of workers.

QUESTION NO. 6

As far as concessions are concerned, we do not consider that a Community legislative initiative is necessary. We would prefer to see the adoption of a new interpretative communication which takes account of the observations made in the Green Paper and which spells out clearly the specificities of the individual procedures.

QUESTION NO. 7

Not applicable, since we gave a negative answer to the previous question.

QUESTION NO. 8

The Italian set-up envisages and lays down a procedure on private initiative, which is that of project financing. The general rule is that the administration makes known the fact that in the framework of approved programming there are works which may be carried out in project financing, by publishing an indicative notice according to the procedures of publication proper to competition announcements. It is considered that such publicising is appropriate for guaranteeing the participation of foreign subjects.

Once more in the phase of choice of who will carry out the project initially proposed by the promoter, the presentation of other offers is ensured, by calling a competition aimed at singling out those subjects due to compete in a subsequent phase with the promoter of the initiative.

With the appropriateness of the procedure foreseen by the Italian legislation for guaranteeing maximum competition continuing to hold good, the Association underlines the importance, if the financing project is to find concrete application in the Italian market, of ensuring that the promoter receives the advantages foreseen by the rules (and in particular the right to adjust his own proposal to that adjudicated as more acceptable by the administration – the so-called right of pre-emption). In this connection, it is considered that guarantee of respect of the rules on competition and equality of treatment of national and foreign competitors derives from the publicising of such advantages, by means of explicit indication in the indicative notice published.

QUESTION NO. 9

In our opinion, the development of private initiative PPPs may be ensured precisely by offering advantages for those taking the initiative, as foreseen by the Italian legislation: in the case of the administration considering the tender of some other competitor more profitable, the right of pre-emption, described heretofore, or alternatively, if the latter should not be exercised, ensuring that the promoter receives remuneration implying partial coverage of the costs sustained in proposing the initiative.

QUESTION NO. 10

We are not in a position to answer this question.

QUESTION NO. 11

We are not aware of cases such as those described in the question.

QUESTION NO. 12

We are not aware of cases such as those described in the question.

QUESTION NO. 13

We are of the opinion that clauses of "step-in" type may be necessary in certain contractual situations encompassed in the phenomenon of the PPPs, without however presenting problems in terms of transparency and equality of treatment. Reference is made to situations in which the financing subject could call for replacement of the concessionaire by a subject taking over from him having equivalent technical financial suitability to that of the previous subject and who guarantees completion of the works. Such a possibility should be permitted in specific cases, such as that of bankruptcy of the awardee subject or serious non-performance of the contract, precisely for the purpose of avoiding rescission of the latter.

QUESTION NO. 14

To our mind a Community intervention, in the form of interpretative communication, aimed at clarifying the nature and definition of the different typologies of contractual PPP would be quite appropriate.

QUESTION NO. 15

As far as we know, subcontracting in the framework of operations of PPP has not given rise to any particular problems.

QUESTION NO. 16

We do not consider it appropriate to foresee any further rules, since discipline relative to concession foresees the faculty for the administration to rule that part of the work should be entrusted to third parties.

QUESTION NO. 17

See the previous point.

QUESTION NO. 18

There have been cases in which a single competitive procedure aims at choice of the private partner, who at the same time is adjudicated the works that the company now being set up will be required to carry out, as its exclusive or main purpose.

In fact, in cases of this kind, the possibility of adjudication of the works is made subordinate to the necessary acquisition of the status of partner of the promoter, which as a rule does not seem to correspond to the interests and operative procedures of enterpreneurs operating in the constructions field.

Secondly, where it is admitted that the same juridical person may at one and the same time assume the role of shareholder of the promoting company and of contractor for the same, in fact this leads to a confusion of roles, with partial identification between promoter and executor, and accordingly between controller and controlled.
Finally, approval of such a methodology may lead to the serious risk of a sort of monopoly on the part of the private partner in all the contracts (or at least a large part of them) that the joint venture, in the course of its activity, will be carrying out.

QUESTION NO. 19

With reference to the hypothesis laid down in the previous paragraph, it would be advisable to clarify by interpretative communication (that is, if such a procedure should be considered expedient, also through a specific Community directive on the institutionalised PPP) that in any case the procedure for choice of the private partner should be kept distinct from the procedures which, downstream, the joint venture will be carrying out for awarding of the works. In other words, it should be clarified that the public subject must carry out a first and autonomous competitive procedure for choice of the private partner, which thereafter, once the joint venture has been set up would lead on to autonomous competition procedures open to all competitors possessing the prescribed requisites, without excluding in advance that the company holding quotas in the joint venture may also take part in such competitions, on an equal footing with the other competitors.

QUESTION NO. 20

We do not consider that there are any barriers to the introduction of PPPs in Europe, however on condition that clear clarification is provided that:

a. the private partner is chosen on the basis of a competitive procedure; and

b. once set up, the mixed company must act in full respect of the procedures ensuring public transparency, and accordingly proceed to contracts downstream of choice of the private subject.

QUESTION NO. 21

We are not in a position to answer this question.

QUESTION NO. 22

Any such initiative could not fail to have our approval.

29 July 2004

LIBRO VERDE

RELATIVO AI PARTENARIATI PUBBLICO PRIVATI
ED AL DIRITTO COMUNITARIO DEGLI APPALTI PUBBLICI E DELLA CONCESSIONI

Osservazioni, proposte e risposte a quesiti

Il presente documento rappresenta il contributo che l'ANCI (Associazione Nazionale dei Comuni Italiani) vuol dare alle procedure di consultazione aperte con la pubblicazione – il 30 Aprile scorso – da parte della Commissione Europea, del **Libro Verde relativo ai partenariati pubblico privati ed al diritto comunitario degli appalti pubblici e della concessioni COM (2004) 327.**

In via preliminare, va detto che l'ANCI apprezza e condivide gli scopi del succitato "Libro Verde" che, nelle intenzioni della Commissione, mirano ad avviare un dibattito sul migliore modo di garantire che i PPP possano svilupparsi in un "*contesto di concorrenza efficace e di chiarezza giuridica"*. Ciò al fine di promuovere e favorire percorsi efficaci di crescita e coesione socio-economica all'interno di ciascun Stato membro. Lo sviluppo di forme di partenariato pubblico privato per la gestione dei servizi pubblici locali, come affermato dalla stessa Commissione, rientra tra i mezzi per favorire tali percorsi. Ciò è ribadito dal Libro Verde sui Servizi d'interesse generale: i servizi pubblici sono fattore di coesione e di avvicinamento dei cittadini,… condizione economica essenziale perchè le imprese possano stabilirsi in ogni territorio dell'U.E.". Il tema dei servizi pubblici locali e le privatizzazioni delle relative gestioni, è allora strettamente connesso alle innovative strategie gestionali ed organizzative che gli Enti Locali pongono in essere per *lo sviluppo e la crescita socio-economica delle Comunità amministrate*, e non solo per fare cassa in "presenza di restrizioni di bilancio e assicurare finanziamenti privati al settore pubblico" come affermato dalla Commissione. Essi riguardano infatti bisogni fondamentali della vita sociale ed economica della collettività che vive in un determinato territorio, con caratteristiche peculiari, diverse e diversificate, risultano indispensabili per garantire condizioni favorevoli e "competitive" per l'insediamento di attività produttive e di fornire una adeguata risposta alle esigenze delle comunità amministrate, ma anche come strumento per consentire di evidenziare e valorizzare le potenzialità inespresse e latenti dei territori. Liberalizzazione del mercato dei servizi nel rispetto della libera concorrenza, valorizzazione e diffusione delle forme di partenariato pubblico-privato, politiche strutturali del settore in grado di favorire la competitività nel mercato, aumento degli investimenti infrastrutturali, sono le strategie di politica economica sostenute dai Comuni e dall'ANCI. E' dunque necessario assicurare agli Enti Locali un'autonomia gestionale e organizzativa che consenta la migliore scelta sulle forme di partenariato pubblico-privato.

In questo, la posizione della Commissione sul partenariato pubblico-privato istituzionalizzato, tra cui rientrano le società miste, sembra *restrittiva* e rischia di creare problemi all'armonizzazione della normativa nazionale sui Servizi Pubblici Locali approvata dal Governo Italiano alla fine dello scorso anno, con quella in fase di elaborazione dalla Commissione.

Va segnalato infatti che la Commissione propone un modello di società mista distante da quello che si è affermato nella prassi e nella normativa del settore vigente nel nostro Paese. In particolare, il modello di società mista ipotizzato dalla Commissione nel ***libro verde*** sembra essere quello di una concessione che assume la forma della società nella quale il partner privato realizza gli incarichi specificati nel bando di gara e il partner pubblico controlla, dall'interno della società, il modo in cui gli incarichi stessi vengono realizzati.

Si riportano di seguito le risposte ad alcuni quesiti di diretto interesse dei Comuni, in particolare i quesiti n. 6, 7, 18 e 19

6. Pensate che un'iniziativa legislativa comunitaria mirante a regolamentare la procedura d'aggiudicazione di concessioni sia auspicabile?

7. In maniera più generale, se ritenete che sia necessario che la Commissione proponga una nuova azione legislativa, esistono a vostro parere ragioni oggettive per regolamentare tramite un tale atto tutti i PPP di tipo contrattuale, siano essi qualificabili come appalti pubblici o come concessioni, per sottoporle a identici regimi d'aggiudicazione?

L’ANCI non è favorevole ad un iniziativa legislativa comunitaria mirante a regolamentare la procedura di aggiudicazione di concessioni, ciò proprio per salvaguardare l’autonomia contrattuale delle parti nelle assunzioni di obblighi e rischi derivanti dal rapporto concessorio e date le specificità delle singole Amministrazioni Locali le cui azioni mirano al soddisfacimento di bisogni diversi e diversificati sul territorio di cittadini e imprese.

18. Quale esperienza avete del lancio di operazioni PPP di tipo istituzionalizzato? In particolare, la vostra esperienza vi porta a pensare che il diritto comunitario degli appalti pubblici e delle concessioni sia rispettato nel caso di operazioni PPP istituzionalizzate? Se no, perché?

19. Ritenete che debba essere presa un'iniziativa a livello comunitario per chiarire o precisare gli obblighi degli organismi aggiudicatori riguardo alle condizioni che devono regolamentare la concorrenza tra operatori potenzialmente interessati da un progetto di tipo istituzionalizzato? Se sì, su quali punti particolari e sotto quale forma? Se no, perché?

La nostra esperienza è rappresentata dalla riforma in materia di servizi pubblici locali approvata negli ultimi mesi dello scorso anno. La riforma assicura alle Amministrazioni Pubbliche e dunque agli Enti Locali un’ampia autonomia in ordine alla scelta delle forme di gestione dei servizi di interesse generale:
La riforma, in particolare, prevede che l’erogazione dei servizi d’interesse generale avvenga con conferimento della titolarità del servizio a :

a) società di capitali individuate con procedura ad evidenza pubblica;

b) a società con capitale misto pubblico-privato nelle quali il socio privato venga scelto con procedura ad evidenza pubblica;

c) a società a capitale interamente pubblico a condizione che gli enti pubblici titolari del capitale sociale esercitino sulla società un controllo analogo a quello esercitato sui propri servizi, e che la società a capitale pubblico realizzi la parte più importante della propria attività con l'Ente e con gli enti pubblici che la controllano.

Nel nostro ordinamento esiste dunque un modello delle società miste che non coincide incide né con quello ipotizzato dalla Commissione né con quello "in house", ma per certi versi, li comprende entrambi. Le società miste previste dall'ordinamento interno condividono con gli organismi in house la possibilità di essere affidatarie dirette degli incarichi ad esse attribuiti, nonché la prevalenza della loro attività a favore dell'ente o degli enti pubblici che le costituiscono.

L'aspetto più interessante è che le società miste previste dall'ordinamento interno condividono con le società miste ipotizzate dalla Commissione la necessità che il socio privato venga scelto mediante una procedura concorrenziale. Pertanto, se è vero che alle società miste previste dall'ordinamento interno gli incarichi sono ad esse affidati direttamente, è del pari vero che il coinvolgimento dei privati nello svolgimento di tali incarichi avviene attraverso una procedura concorrenziale e, quindi, nel rispetto del diritto comunitario degli appalti pubblici e delle concessioni.

La scelta compiuta nel nostro ordinamento – in un contesto che definisca meglio i confini tra l'attività di gestione da un lato e quella di programmazione, regolamentazione e monitoraggio dall'altro – può essere degna di approfondimenti a livello comunitario, nel caso si volesse procedere con un'iniziativa della Commissione in tale materia.

Contributo alla consultazione della UE
"Libro Verde relativo ai partenariati pubblico-privati ed al diritto comunitario degli appalti pubblici e delle concessioni"

Presentato da:

Unioncamere

e

CCIAA di Roma

Documento elaborato da ***AeT* - Ambiente e Territorio,** Azienda Speciale della Camera di Commercio di Roma, in collaborazione con la D.ssa Lidia Zaninotto e il Dr. Federico Merola

1. PREMESSA

Il presente documento rappresenta il contributo dell' Unioncamere - Unione Italiana delle Camere di Commercio, Industria, Artigianato e Agricoltura - alla consultazione promossa dalla Commissione Europea in materia di partenariato pubblico privato.

Attraverso il presente elaborato il sistema camerale italiano si prefigge l'obiettivo di portare all'attenzione della Commissione sia l'esperienza maturata nel ruolo di interprete delle esigenze del mondo produttivo nazionale in campo infrastrutturale, sia la posizione che si va delineando per le Camere di Commercio nazionali quali attori diretti di interventi di partenariato, riconosciuti come tali dalla normativa nazionale.

Inoltre il sistema camerale gestisce il monitoraggio ufficiale delle attività di collaborazione tra pubblica amministrazione e privati, volta alla realizzazione di infrastrutture o allo svolgimento di servizi di interesse pubblico. In particolare, in quest'ultima veste, Unioncamere e Camera di Commercio di Roma hanno promosso l'**Osservatorio Nazionale del Project Financing** *(www.infopieffe.it)*, insieme al Ministero dell'Economia e delle Finanze e all'Unità Tecnica della Finanza di Progetto/Comitato Interministeriale per la Programmazione Economica (CIPE). Conseguentemente, tutti i dati riportati nel presente elaborato costituiscono altrettanti dati ufficiali ricavati dall'Osservatorio.

2. UNIONCAMERE, le CAMERE DI COMMERCIO INDUSTRIA, ARTIGIANATO e AGRICOLTURA ITALIANE

L'Unioncamere è una struttura nata come associazione volontaria delle Camere di Commercio il 9 maggio 1901. Il 31 marzo 1928 è stata sciolta. L'8 maggio 1946 è stata ricostituita.
Questa ha come capisaldi normativi (relativamente alla giurisprudenza italiana):

1. Il D.P.R. 30 giugno 1954, n. 709 con il quale è stata riconosciuta la personalità giuridica di diritto pubblico.
2. Il D.P.R. 31 dicembre 1985, n. 947 che ha approvato il nuovo statuto
3. La L. 11 luglio 1998, n. 266 che ha sottratto l'ente alla disciplina della contrattazione del pubblico impiego posta dalla legge quadro 11 luglio 1980
4. Il D.Lgs. 3 febbraio 1993, n. 29 (art. 73, c. 5) per la disciplina del personale
5. La L.29 dicembre 1993, n. 580 che ridefinito, agli artt. 7 e 22 le funzioni statuarie e le forme di finanziamento dell'Unione
6. Il D.P.C.M. 5 gennaio 1995 che ha approvato il nuovo statuto modificato al fine di armonizzarne le norme alla L.580/1993 e al D.Lgs. 29/1993 con la separazione dei poteri di indirizzo e verifica – posti in capo agli organi collegiali – e quelli riservati alla dirigenza.

In particolare l'art. 7 della L. 580/1993 ha precisato che l'Unioncamere cura e rappresenta gli interessi generali delle Camere di Commercio; promuove, realizza e gestisce, direttamente o per il tramite di proprie aziende speciali, non ché mediante la partecipazione ad organismi anche associativi, ad, enti, a consorzi e a società anche a prevalente capitale privato, servizi ed attività di interesse delle Camere di commercio e delle categorie economiche.
L'Unioncamere inoltre lavora in collaborazione con le organizzazioni imprenditoriali, con numerosi enti ed organismi nazionali ed internazionali attraverso la sede di Bruxelles cura i rapporti del sistema camerale con la Commissione dell'Unione europea e la partecipazione a Eurochambres. Presso l'Unioncamere sono stati costituiti ed operano vari comitati e commissioni per lo studio ed il coordinamento di procedure e di norme.
L'Unioncamere ha sede a Roma, piazza Sallustio, 21.

Attualmente la rete delle 103 Camere di Commercio partecipa con quasi 335 milioni di euro in oltre 600 società italiane che si occupano di infrastrutture, detenendone in media una quota partecipativa del 10%. Questa percentuale media sale al 44% se vengono considerate società riguardanti il sistema fieristico ed espositivo.

3. CONSIDERAZIONI SINTETICHE SUL LIBRO VERDE UE-COM (2004) 327

Prima di procedere alla risposta puntuale dei quesiti posti dalla Commissione sul Documento COM (2004) 327, si ritiene possa essere utile riportare sinteticamente le principali considerazioni svolte in tema di Partenariato Pubblico-Privato e di diritto comunitario degli appalti pubblici e delle concessioni dal sistema delle Camere di Commercio italiane.

1. La prima considerazione attiene alla definizione di "partenariato pubblico privato". Le riflessioni formulate al riguardo dalla Commissione UE nascono indubbiamente da una serie di constatazioni sul come "normalmente" si connota il fenomeno.
   Ma è proprio il concetto di "normalità" che fa sollevare qualche perplessità per la differente tradizione giuridica esistente tra Paesi che si riconoscono nella "common law" e Paesi che si rifanno ad un'impostazione "sistematica " del diritto.
   In altri termini, si ritiene che sarebbe apprezzato uno sforzo per **definire più precisamente i confini del partenariato pubblico privato,** eliminando una serie di dubbi e perplessità che nel dettaglio saranno più oltre evidenziati.
   D'altro canto, solamente una volta definito quanto più esattamente possibile il fenomeno e, dunque, una volta definito "l'oggetto", si potrà passare a riflettere sulle possibili regole applicabili al medesimo, onde garantire uno sviluppo del fenomeno in condizioni di concorrenza effettiva e di chiarezza giuridica, come auspicato dalla Commissione UE.

2. In questo contesto, la seconda considerazione attiene alle “regole” da applicarsi ai PPP, regole che in taluni casi risultano già codificate in maniera rigida, in altri in maniera più blanda, in altri ancora sfuggono ad ogni inquadramento di diritto derivato e, da ultimo, vedono talune fattispecie assoggettate solamente alla base minima di principi derivanti dagli articoli da 43 a 49 del Trattato Cee, con la conseguenza di determinare un’ampia divergenza di approcci sul piano nazionale, come sottolineato dallo stesso Libro Verde.
   Pare logico concludere nel senso che la divergenza di approcci non possa continuare a fare perno sulla differente applicazione dei principi del Trattato e che si renda, quindi, necessaria un’iniziativa che garantisca un approccio giuridicamente più certo ed economicamente più concorrenziale.
   Ma, trattandosi di operazioni che dovranno essere attuate nell’ambito di un’Europa oramai allargata a Paesi tra loro con tradizioni giuridiche, amministrative ed economiche profondamente differenti, detta iniziativa regolamentatrice non potrà che concernere interventi da assumere sulla base di **dati conoscitivi assolutamente completi ed esaustivi dei fenomeni da trattare e delle modalità attuative finora utilizzate**, tenendo conto dei contesti in cui si va ad operare.

3. La terza considerazione di carattere generale è strettamente conseguente a quanto sinora osservato: se una volta conosciuto esattamente il quadro nel quale si va ad operare e definite puntualmente le esigenze da soddisfare si reputerà necessario codificare con un’iniziativa legislativa l’intero fenomeno dei partenariati pubblici privati, **le regole non potranno che essere scarne ed essenziali**. Ciò per poter sollecitare l’interesse dei privati ad agire e per poter essere efficacemente applicate da Paesi tra loro con tradizioni così profondamente diverse. Nel frattempo potrebbe essere oltremodo utile per una reciproca conoscenza e maggiore concorsualità di fatto, procedere alla pubblicazione, nelle lingue dei singoli Paesi, delle regole dirette e indirette che vengono utilizzate per i PPP nelle differenti realtà nazionali.

4. Una migliore apertura alla concorrenza passa per regole essenziali, ma anche per regole scarne, chiare e di facile applicazione.
   Non tutte le norme già vigenti, però, sono di facile applicazione, a cominciare da quelle sul **dialogo competitivo.**
   Del pari, non tutte le norme vigenti sono chiare, atteso che, ad esempio, il concetto di gestione - che differenzia la concessione dall’appalto - è stato collegato, dalla stessa Commissione Ue al **concetto di rischio,** i cui contorni però vengono individuati nel Libro Verde sia in taluni tipi di appalto sia nelle concessioni, con la conseguenza, denunciata dalla stessa Commissione, che procedure avviate come concessioni potrebbero dover essere poi tramutate in procedure di appalto e viceversa.
   Infine, **non tutte le regole vigenti sono scarne**, atteso che sembrano permanere ingiustificate duplicazioni di livelli procedurali, come, ad esempio, nel caso delle **concessioni di lavori attribuite ad organismi**

di diritto pubblico, i quali, pur dopo una competizione per ottenere la concessione, sarebbero chiamati a valle a rispettare integralmente le regole sugli appalti fissate dalla direttiva in luogo delle regole ben più snelle spettanti a tutti gli altri concessionari per i rispettivi appalti.

5. Proprio quest'ultimo esempio evidenzia come si renda necessario indagare ulteriormente anche il fenomeno definito dal Libro Verde come "**partenariato istituzionalizzato**", specie quando a tale realtà si assommano le regole proprie delle concessioni di lavori pubblici riferite a soggetti qualificabili come organismi di diritto pubblico.
   Analogamente dicasi con riferimento all'esigenza di approfondire ulteriormente i risvolti della **fase "gestionale" dei PPP,** che danno vita ai profili più delicati ed ai contrasti più radicali, concernendo rapporti già consolidati e che dovrebbero ulteriormente durare nel tempo.

6. Altra esigenza fortemente sentita **a livello operativo è quella di un ausilio** per comprendere prima, e correttamente applicare poi, concetti elaborati, magari ripetutamente, dalla **giurisprudenza comunitaria**, taluni dei quali continuano però a restare di difficile traduzione pratica a fronte delle singole fattispecie concrete: si pensi all'elaborazione concettuale legata alla "sentenza Tekal" **sugli interventi c.d. "in house**", ovvero al concetto di **"influenza certa"** riferita ai casi di assunzione di controllo da parte di un'entità pubblica ed oggetto di riflessioni nell'ambito dello stesso partenariato "istituzionalizzato" trattato dal Libro Verde. Senza trascurare l'importanza di chiarire concetti quali: "**modifica sostanziale dell'oggetto del contratto**", atteso che dalla differente valutazione della sostanzialità della modifica dipende l'avvio o meno di una nuova procedura concorsuale e, dunque, la legittimità o meno dell'agire del committente.

7. Da ultimo si riconosce che il Libro Verde sui PPP costituisce uno strumento per agevolare l'interpretazione delle norme vigenti. Si rende però necessario indagare ulteriormente i molteplici profili di "**diritto transitorio**" che si pongono specialmente in Paesi, come l'Italia, in cui la tradizione di ricorso alle concessioni è molto radicata e vi sono concessioni operative già da molti anni e che saranno tali ancora per molti anni a venire.

RISPOSTE AI QUESITI SPECIFICI POSTI DALLA COMMISSIONE UE

1. Quali tipi di operazioni di PPP puramente contrattuali conoscete? Tali operazioni sono oggetto di una regolamentazione specifica (legislativa o di altro tipo) nel vostro paese?

Nell'ambito della normativa italiana figura essenzialmente la concessione di lavori pubblici, la quale è disciplinata sia tramite la riproduzione delle regole comunitarie (artt. 2 e 19 della legge n.109/94 e s.m.i.), sia tramite le specifiche regole concernenti la figura del "promotore", di cui agli artt. 37 bis e seguenti della legge n. 109/94 e s.m.i.

A ciò si è recentemente aggiunta la previsione di cui all'art.19, comma 2 ter della legge n.109/94 e s.m.i. con la quale il legislatore si è limitato a prevedere che: "*Le amministrazioni aggiudicatrici possono affidare in concessione opere destinate all'utilizzazione diretta della pubblica amministrazione, in quanto funzionali alla gestione di servizi pubblici, a condizione che resti al concessionario l'alea economico-finanziaria della gestione dell'opera".*

Detta previsione non è stata finora accompagnata da norme di dettaglio e non ha trovato in concreto effettivo utilizzo.

2. Secondo la Commissione, il recepimento nel diritto nazionale della procedura del dialogo competitivo permetterà alle parti interessate di disporre di una procedura particolarmente adeguata all'aggiudicazione dei contratti qualificati come appalti pubblici in occasione dell'attuazione di un PPP di tipo puramente contrattuale, pur preservando i diritti fondamentali degli operatori economici. Condividete questo punto di vista? Se no, perché?

La normativa sul dialogo competitivo, di cui all'art. 29 della direttiva 2004/18/CE, è sicuramente importante, perché mira a trovare una soluzione per la realizzazione di interventi particolarmente complessi anche allorquando le amministrazioni interessate si trovino nell'impossibilità oggettiva di individuare preliminarmente i mezzi per soddisfare le proprie esigenze o di valutare ciò che il mercato può offrire in termini di soluzioni tecniche e/o giuridico-finanziarie.

A tal fine è stata introdotta una procedura specifica che unifica sia la fase di approfondimento, definizione e scelta dell'oggetto contrattuale da parte dell' amministrazione e sia la fase di aggiudicazione all'operatore economico che ha concorso alla definizione del progetto stesso. Si auspica che la struttura di detta procedura possa rivelarsi più efficace e snella di quanto finora perseguibile con un susseguirsi di procedure articolate per fasi, che procedevano dalla puntuale individuazione dei mezzi/soluzioni utilizzabili, alla definizione del progetto prescelto, fino all'individuazione dell'operatore in grado di realizzarlo, ma si conta anche che ciò possa avvenire nel rispetto pieno dei principi comunitari, in primis quello di trasparenza.

Propedeutico, peraltro, a tutto ciò risulta il fatto che sarebbe oltremodo utile che la Commissione provvedesse – anche solamente mediante una comunicazione o altro strumento non normativo – a chiarire meglio i presupposti in presenza dei quali è possibile fare ricorso a detta nuova procedura, onde scongiurare la possibilità che eventuali dubbi sul campo di applicazione comportino l'avvio di ricorsi.

Analogamente dicasi in ordine alle modalità di svolgimento della procedura, laddove si ipotizza che essa "*…si svolga in fasi successive, in modo da ridurre il numero di soluzioni da discutere*". Per Paesi come l'Italia l'applicazione di detta previsione sarebbe risultata, probabilmente, maggiormente chiara e proficua qualora la stessa domanda di invito da parte dei candidati fosse stata accompagnata dalla obbligatoria presentazione di ipotesi di soluzione, in modo da orientare subito l'amministrazione interessata circa i mezzi utilizzabili o le soluzioni possibili presenti sul mercato, da affinare, poi, unitamente ai partecipanti al dialogo stesso.

In tal modo, peraltro, si sarebbe pervenuti, a conclusione del dialogo competitivo, ad un'unica soluzione sulla quale i partecipanti sarebbero stati chiamati a presentare l'offerta finale. Il testo in vigore, invece, ipotizza come possibile risultato del dialogo competitivo anche una pluralità di proposte non omogenee tra loro, rispetto alle quali presentare le offerte finali dei partecipanti.

Proprio questa possibilità appena accennata non risulta in sé chiara nei meccanismi operativi e, ancor più, non sembra preservare i diritti fondamentali degli operatori economici, in primis quelli al riconoscimento dei c.d. "diritti d'ingegno", specie allorquando le amministrazioni interessate non prevedano nemmeno premi o pagamenti in favore dei partecipanti al dialogo competitivo che non dovessero risultare vincitori.

Nel complesso, peraltro, l'intera procedura potrebbe risultare di difficile attuazione pratica per la parte in cui – correttamente – si prevede che "*le amministrazioni non possono rivelare agli altri partecipanti le soluzioni proposte né altre informazioni riservate comunicate dal candidato partecipante al dialogo…".*

Ma l'aspetto forse più delicato della fattispecie del dialogo competitivo, sulla quale occorrerebbe riflettere ulteriormente, in modo da contenere quanto più possibile questa procedura nell'ambito di casi ben definiti è la possibilità di mettere in gara sullo stesso piano idee diverse senza necessariamente creare competizione sulla realizzazione - più o meno efficiente - della soluzione finale prescelta. E' infatti di immediata evidenza che se a gareggiare sono operatori tra loro anche molto diversi, i quali propongono soluzioni difformi nel contenuto, tutto questo non assicura che il portatore della "migliore" soluzione sia anche il soggetto più affidabile ed efficiente per realizzarla.

In definitiva, dunque, o si riescono a definire condizioni obiettive chiare che consentono il dialogo competitivo, oppure si rischia di assecondare il ricorso ad una procedura "opaca", che, in ultima analisi potrebbe anche assecondare l'incapacità di programmazione e controllo sulla progettazione della PA, portando, al limite, operatori meno efficienti di altri all'aggiudicazione di commesse, attraverso la proposta di soluzioni non specularmente confrontabili in termini di costi e qualità con quelle scartate.

Il tutto potrebbe spingere il PPP in un contesto di discrezionalità negativo per il pieno rispetto dei principi di trasparenza e pari opportunità.

3. Per quanto riguarda questi contratti esistono, secondo voi altri punti, oltre a quelli relativi alla scelta della procedura di aggiudicazione, che potrebbero causare problemi riguardo al diritto comunitario degli appalti pubblici? Se sì, quali e per quali ragioni?

Si ritiene opportuno segnalare che l'applicazione in Italia delle direttive previgenti alla n. 18 del 2004 non ha sostanzialmente comportato l'utilizzo della procedura negoziata prevista per i casi in cui il bando riguardi: *"..lavori la cui natura o i cui imprevisti non consentano una fissazione preliminare e globale dei prezzi".*

Un chiarimento comunitario in proposito, ulteriore rispetto a quello già contenuto nel Libro Verde, potrebbe essere oltremodo utile per un maggior ricorso anche in Italia alla procedura negoziata, atteso che per il diritto nazionale e per la cultura giuridica italiana le incertezze che gravano sulla natura e sulla dimensione dei lavori da realizzare, per come illustrati sia pure a titolo di esempio nel Libro Verde stesso, non consentono certamente il ricorso alle procedure derogatorie, ma giustificano unicamente un compenso c.d. "a misura", ossia rapportato alla portata dei lavori realizzati nel concreto, misurati effettivamente al completamento e solo presuntivamente quantificati al momento del lancio della procedura.

D'altro canto, va ricordato che, in applicazione della normativa italiana, nessun appalto pubblico di lavori è stato sinora considerato come riconducibile ad alcuna forma di partenariato pubblico-privato e, pertanto, la ricostruzione operata dalla Commissione - in forza della quale sia le situazioni eccezionali appena sopra richiamate, sia le nuove procedure di appalto dette di "dialogo competitivo" sarebbero, invece, riconducibili ad un partenariato di tipo puramente contrattuale - rischiano di ingenerare incertezze tra gli operatori e paralisi da parte delle amministrazioni aggiudicatici. Ciò non significa, tuttavia, che gli operatori italiani non abbiano un grande interesse a ricorrere alle forme di PPP per come delineate dalla Commissione. Basta considerare che le forme di partenariato riepilogate dalla Commissione sono tutte connotate dalla possibilità - ammessa a livello comunitario ma assolutamente negata a livello nazionale - del ricorso a procedure negoziate con bando o, comunque, a forme di affidamento meramente rispettose dei principi del Trattato di non discriminazione, trasparenza e pubblicità e, come tali, notevolmente più snelle e flessibili.

Peraltro, è la stessa portata del concetto di "rischio" - diffusamente utilizzato nell'ambito della Comunicazione interpretativa del 2000 sulle concessioni - che sembrerebbe assumere differente estensione in Italia, rispetto al resto dell'Europa e, comunque, non ben chiara.

Non a caso, peraltro, le nuove direttive comunitarie n. 17 e n. 18 del 2004 sugli affidamenti nei settori "tradizionali" e nei "settori speciali" non menzionano mai il concetto di rischio, nemmeno con riferimento alla fase della gestione.

Per contro, in Italia, il concetto di rischio è stato finora connesso strettamente ed unicamente al concetto di "gestione/sfruttamento" di un'opera. Ne è conseguito, ad esempio, che il "rischio della costruzione" è connaturato ad ogni appalto pubblico di lavori e persino quando esso è risultato accompagnato dall'assunzione da parte del soggetto privato del "rischio della disponibilità", non ha contribuito a classificare né l'intervento come un partenariato pubblico privato, e nemmeno a computare gli attivi legati all'intervento del privato come "attivi non pubblici" ai fini dell'impatto sul deficit/sull'eccedenza pubblica e sul debito pubblico.

E ciò proprio perché il concetto di rischio è stato considerato sempre come sommatoria tra "rischio di costruzione" e "rischio della domanda", senza tenere in alcun conto il "rischio della disponibilità", perché non chiaro e, come tale, non utilizzabile.

4. Avete già organizzato, o avuto l'intenzione di organizzare o partecipare ad una procedura d'attribuzione di una concessione nell' Unione? Che esperienza ne avete ricavato?

Non sono state ancora sviluppate esperienze in tal senso.

5. Ritenete che l'attuale quadro giuridico comunitario sia sufficientemente preciso per garantire la partecipazione concreta ed effettiva di società o gruppi non nazionali alle procedure di aggiudicazione di concessioni? Secondo voi, in questo contesto è attualmente garantita una concorrenza reale ?

Peraltro, l'esperienza italiana evidenzia anche una presenza del tutto marginale di imprese straniere alle procedure indette in Italia. L'unico caso rilevato sulla base dei dati dell'Osservatorio nazionale sul Partenariato Pubblico Privato riguarda l'aggiudicazione con il sistema del promotore alla società RAPT INTERNATIONAL per la progettazione costruzione e gestione di un sistema di tranvia integrato tra i comuni di Firenze e Scandicci per un valore di circa 252 milioni e mezzo di euro.

Dalle rilevazioni dell'Osservatorio, peraltro, risulta che l'effettuazione della pubblicazione per le aggiudicazioni, ancorché prevista per legge al di sopra di certi importi, avviene soltanto nel 30% dei casi; l'attività di indagine diretta svolta dall'Osservatorio sul campo, consente tuttavia di portare tale percentuale attorno al 60%, ma di alcuni casi aggiudicati non si viene a conoscenza in alcun modo.

6. Pensate che un'iniziativa legislativa comunitaria mirante a regolamentare la procedura d'aggiudicazione di concessioni sia auspicabile?

L'Italia ha regolamentato con legge la procedura di aggiudicazione delle concessioni di lavori pubblici e la figura del promotore, che su tale istituto si innesta. Ciò ha, per un verso indiscutibilmente irrigidito gli interventi delle amministrazioni, dato anche il contenuto specifico delle regole che sono state individuate dal legislatore nazionale, ma, per altro verso, ha altrettanto indiscutibilmente consentito di trattare in maniera uniforme un istituto che nel Paese ha storicamente avuto una diffusione considerevole e che da ultimo, ha registrato un marcato incremento di interventi promossi da "promotori".

Ciò ha consentito la realizzazione e la messa a disposizione dei cittadini di opere che, diversamente, non avrebbero potuto essere realizzate tempestivamente e - fatto da sottolineare molto positivamente - ha spinto i decisori a compiere scelte condivise, intorno ad esigenze concrete, in tempi compatibili con l'economia, laddove in passato venivano tenuti in conto i soli tempi della "politica".

Queste considerazioni, evidentemente, fanno propendere per l'utilità di un'iniziativa comunitaria in materia, non necessariamente a livello normativo, al fine di omogeneizzare nella sostanza gli interventi tra tutti i paesi dell'UE, traendo eventualmente anche insegnamento dai profili che hanno mostrato criticità nell'esperienza normativa italiana.

7. In maniera più generale, se ritenete che sia necessario che la Commissione proponga una nuova azione legislativa, esistono a vostro parere ragioni oggettive per regolamentare tramite un tale atto tutti i tipi di PPP di tipo contrattuale, siano essi qualificabili come appalti pubblici o come concessioni, per sottoporle a identici regimi di aggiudicazione?

Il quesito, nell'associare l'appalto al PPP ripropone essenzialmente l'esigenza, già segnalata precedentemente, di definire esattamente il significato di partenariato pubblico-privato. Ma prescindendo ora da tale aspetto, si è del parere che - sicuramente - pratiche e, ancor più, regole omogenee, utilizzate da parte di tutti gli operatori degli Stati membri garantirebbero una con-correnza maggiore di quanto non avvenga oggi con riferimento a una risorsa particolare e soprattutto scarsa, come il territorio. Lo conferma, d'altro canto l'esperienza maturata nell'Europa a "15", tra la fase di introduzione del diritto comunitario sugli appalti e la realtà attuale. Si ritiene, pertanto, che anche gli operatori italiani potrebbero essere maggiormente avvantaggiati da una realtà più omogenea in un mercato oramai allargato a 25.

Tuttavia, si deve osservare che un'azione legislativa che non fosse preceduta da una ricognizione dettagliata e completa delle realtà operative praticate nei vari Paesi potrebbe accrescere le difficoltà, anziché concorrere a ridurle.

Analogamente dicasi circa un quadro di pratiche/regole che non risultasse costruito in maniera armonica e sistematica o che non risultasse sufficientemente chiaro.

D’altro canto si conviene sul fatto che non sempre risulta facile la traduzione in norme di concetti che possono essere persino ben definiti - come ha dimostrato l’esperienza recente per l’introduzione a livello di direttive comunitarie di concetti oramai acquisiti dalla stessa giurisprudenza comunitaria - la cui utilizzazione può risultare ben precisa con riguardo al singolo caso, ma di difficile trasposizione nel diritto positivo comunitario.

Inoltre, va tenuto in grande conto il fatto che l’allargamento - intervenuto rispetto a Paesi con tradizioni molto differenti da quelle degli Stati membri che sinora hanno costituito l’Europa - sottolinea sia l’importanza dell’adozione di regole omogenee e condivise, sia la problematicità di pervenire ad una uniformità applicativa da parte degli operatori, in forza delle differenti esperienze, culture e strutture sulle quali poter contare.

Ne consegue una proposta di operare per “passi successivi”, muovendo da un approfondimento e un confronto delle conoscenze, ad esempio rendendo disponibili in tutte le lingue i sistemi di regole dei vari Paesi in tema di PPP nonchè dalla diffusione di una cultura della concorrenza sul territorio maggiormente sentita, con riferimento in particolare all’applicazione concreta e diffusa dei principi del Trattato, per passare quindi all’utilizzo di buone pratiche operative ed, eventualmente, in prospettiva pervenire al varo di nuove norme, le quali sicuramente servirebbero a ridurre i costi legati in particolar modo all’attuazione di operazioni a livello transnazionale.

8. In base alla vostra esperienza, l’acceso degli operatori non nazionali alle formule di PPP di iniziativa privata è garantito? In particolare, nei casi in cui le amministrazioni aggiudicatici invitano a presentare un’iniziativa, tale invito è generalmente oggetto di pubblicità adeguata ad assicurare l’informazione di tutti gli operatori interessati? Viene organizzata una procedura di selezione realmente concorrenziale per garantire l’attuazione del progetto stesso?

Le norme impongono la pubblicità a livello comunitario per gli appalti e le concessioni di importo superiori ai 5 milioni di euro. Per importi inferiori, ed è il caso della maggioranza degli avvisi, viene assicurata la pubblicità a livello nazionale: per quanto riguarda la procedura del “promotore” la Tabella 1 evidenzia l’incremento degli avvisi dovuto essenzialmente alle indicazioni inserite relativamente alla pubblicità per la selezione delle proposte nell’ambi-to delle modifiche e integrazioni, apportate nell’agosto 2002, alla L. 109/94.

9. Quale sarebbe secondo voi la migliore formula per assicurare lo sviluppo di PPP di iniziativa privata nell’Unione Europea pur garantendo il rispetto dei principi di trasparenza, di non discriminazione e di parità di trattamento?

L’esperienza italiana sta prestando grande attenzione al fenomeno del PPP. L’introduzione accanto al sistema concessorio classico di una forma “originale” di promotore basata su due fasi: la prima delle quali costituita dall’invito pubblico a presentare progetti che verranno poi selezionati dall'amministrazione committente, individuandone le imprese come promotori e una seconda fase, caratterizzata dalla messa in gara dei progetti selezionati con il diritto di prelazione del promotore. Detta normativa ha modificato il quadro previdente e accresciuto sensibilmente le possibilità di ricorrere allo strumento, che sta tuttora registrando un alto tasso di interesse, ancorché la sua applicazione sembri trovare ancora resistenze.

L'analisi dei dati raccolti dall'Osservatorio Nazionale sul PPP evidenzia, infatti, un trend crescente di avvisi per l'individuazione di soggetti promotori e una relativamente bassa percentuale di opere che vanno in gara. Di contro cresce anche il ricorso alla concessione di costruzione e gestione preferita spesso per la maggiore snellezza procedurale e la maggiore conoscenza già maturata dei relativi meccanismi operativi (vedi Tabella 3 relativa all'andamento dell'anno 2002 rispetto al 2003 e Tabella 4 con i dati più recenti di confronto tra primo semestre 2003 e primo semestre 2004).

In termini più generali, si ritiene che, analogamente a quanto avviene normalmente nei contesti privatistici, un'efficiente fase progettuale si dimostra spesso il miglior presupposto per un corretto processo decisionale e un'efficace fase realizzativa. Non solo: mantenere la fase progettuale e decisionale separata da quella realizzativa, favorisce, di norma, la possibilità di operare in trasparenza e in un contesto di pari opportunità per gli operatori.

Per questo motivo dovrebbe essere incentivata la possibilità per la PA di avvalersi di tutti i supporti esterni idonei ad assisterla nell'ambito dell'intera fase iniziale e di gestione di un PPP, come avviene in ambito privatistico in circostanze simili.

10.Che esperienza avete riguardo alla fase successiva alla selezione del partner privato nelle operazioni di PPP contrattuali?

Per quanto riguarda il "promotore" propriamente detto nel sistema italiano si evidenzia come la procedura di individuazione del promotore e il passaggio alla messa in gara del progetto approvato dall'amministrazione pubblica richieda, come risulta dai dati dell'Osservatorio nazionale sul PPP promosso dal sistema camerale, mediamente 11 mesi. Si riscontra altresì una percentuale intorno al 24% di rimessa in gara del progetto o di esperienze non andate a buon fine.

11.Siete a conoscenza di casi nei quali le condizioni di esecuzione – comprese le clausole d'aggiornamento – hanno potuto avere un'incidenza discriminatoria o hanno potuto costituire un ostacolo ingiustificato alla libera prestazione di servizi o alla libertà di stabilimento ? Se si, potete descrivere il tipo di problemi incontrati ?

Non si hanno esperienze specifiche di condizioni di esecuzione discriminatorie.

Su un piano più generale, si ritiene che occorra, comunque, scongiurare la possibilità che - al contrario di quanto paventato dalla Commissione - si verifichino pratiche discriminatorie nei confronti dei vecchi sottoscrittori di contratti di concessione.

In Italia, infatti, esistono molte concessioni che sono state affidate molti anni fa, ossia in tempi in cui le regole oggi applicabili non erano certo così chiare e indiscusse.

Per tali concessioni non è fuori luogo paventare il pericolo che siano operate letture "retroattive" delle clausole contrattuali e delle condizioni a suo tempo pattuite e ciò alla luce di valutazioni, che solo recentemente sono divenute chiare e oggetto di specifico inserimento nei bandi.

12.*Siete al corrente di pratiche o di meccanismi di valutazione delle offerte con conseguenze discriminatorie?*

I dati dell'Osservatorio Nazionale evidenziano, dopo l'introduzione della normativa sulla prelazione, un'accelerazione delle iniziative sia per la ricerca del soggetto promotore, che, soprattutto, nel successivo passaggio di gara per l'aggiudicazione. Come emerge dai dati, le iniziative avviate sulla base della nuova formula sono aumentate, mentre il ricorso alla procedura della concessione di costruzione e gestione ha registrato un rallentamento. In particolare, dal settembre 2002 allorché le nuove norme sono entrate in vigore, infatti, il ricorso al promotore è cresciuto del 48% contro un calo del 10,6% della concessione (vedi Tabella 1).

La nuova normativa introdotta nel luglio del 2002, fortemente semplificata e affinata nel suo complesso rispetto all'architettura precedente ha, comunque, facilitato la conclusione delle gare sia del promotore che secondo la classica concessione di costruzione e gestione. Il confronto tra i periodi settembre – agosto settembre 2001-2002 e 2002 –2003 evidenziano, infatti, un'accelerazione delle aggiudicazioni di oltre il 200% per il promotore e di una percentuale leggermente al di sotto per le concessioni (vedi Tabella 2).

Tabella 1. - PPP: avvisi di gara per procedura.

	Settembre '01- Agosto '02				Settembre '02- Agosto '03				Variazioni %			
	Totale	di cui con importo segnalato			Totale	di cui con importo segnalato			Totale	di cui con importo segnalato		
	Numero	Numero	Importo	Importo medio	Numero	Numero	Importo	Importo medio	Numero	Numero	Importo	Importo medio
PF fase II - Licitazione privata	64	61	2.144.444.175	35.154.823	95	94	779.744.097	8.295.150	48,4	54,1	-63,6	-76,4
Concessione di costruzione e gestione	123	79	435.791.570	5.516.349	110	97	2.342.081.120	24.145.166	-10,6	22,8	437,4	337,7
TOTALE	**187**	**140**	**2.580.235.745**	**18.430.255**	**205**	**191**	**3.121.825.217**	**16.344.635**	**9,6**	**36,4**	**21,0**	**-11,3**

Fonte: Osservatorio Nazionale sul Project Financing (www.infopieffe.it) elaborazione Cresme per AeT - Ambiente e Territorio, Azienda speciale della Camera di Commercio di Roma
** compresi gli avvisi con importo non segnalato*

Tabella 2. - PPP: risultati di gara per procedura

	Settembre '01- Agosto '02				Settembre '02- Agosto '03				Variazioni %			
	Totale	di cui con importo segnalato			Totale	di cui con importo segnalato			Totale	di cui con importo segnalato		
	Numero	Numero	Importo	Importo medio	Numero	Numero	Importo	Importo medio	Numero	Numero	Importo	Importo medio
PF fase II - Licitazione privata	6	6	66.234.659	11.039.110	19	19	1.815.857.771	95.571.462	216,7	216,7	2.641,6	765,8
Concessione di costruzione e gestione	18	13	56.096.434	4.315.110	52	49	403.977.922	8.244.447	188,9	276,9	620,1	91,1
TOTALE	**24**	**19**	**122.331.093**	**6.438.479**	**71**	**68**	**2.219.835.694**	**32.644.643**	**195,8**	**257,9**	**1.714,6**	**407,0**

Fonte: Osservatorio Nazionale sul Project Financing (www.infopieffe.it) elaborazione Cresme per AeT - Ambiente e Territorio, Azienda speciale della Camera di Commercio di Roma
** compresi gli avvisi con importo non segnalato*

Tabella 3. - Partenariato Pubblico Privato : avvisi di gara per procedura

	Gennaio - Dicembre 2002		**Gennaio - Dicembre 2003**		**Variazioni % 2003/2002**	
	Numero*	Importo	Numero*	Importo	Numero	Importo
PF fase I - Selezione di proposte	225	1.617.823.479	543	3.411.301.086	141,3	110,9
PF fase II - Licitazione privata	77	893.997.954	99	1.189.896.665	28,6	33,1
Concessione di costruzione e gestione	127	527.263.527	147	3.115.872.744	15,7	491,0
Altre concessioni	105	227.202.603	218	122.169.062	107,6	-46,2
Altre procedure	54	21.244.232	103	556.941.489	90,7	2521,6
TOTALE	**588**	**3.287.531.795**	**1.110**	**8.396.181.045**	**88,8**	**155,4**

Fonte: Osservatorio Nazionale sul Project Financing (www.infopieffe.it) elaborazione Cresme per AeT - Ambiente e Territorio, un'Azienda speciale della Camera di Commercio di Roma
** compresi gli avvisi con importo non segnalato*

Tabella 4. - PPP: avvisi di gara per procedura

	Gennaio - Giugno 2003		**Gennaio - Giugno 2004**		**Variazioni %**		**Giugno 2003**		**Giugno 2004**		**Variazioni %**	
	Numero*	Importo	Numero*	Importo	Numero*	Importo	Numero*	Importo	Numero*	Importo	Numero	Importo
PF fase I - Selezione di proposte	358	2.003.707.415	517	3.815.092.857	44,4	90,4	60	156.682.110	160	607.487.262	166,7	287,7
PF fase II - Licitazione privata	41	208.835.825	64	345.688.524	56,1	65,5	8	19.060.313	12	58.863.291	50,0	208,8
Concessione di costruzione e gestione	50	201.926.219	164	697.915.371	228,0	245,6	9	36.610.849	21	72.684.143	133,3	98,5
Altre concessioni	93	76.120.932	113	1.385.814.177	21,5	1.720,5	22	20.363.497	19	7.080.274	- 13,6	- 65,2
Altre procedure	37	148.144.741	89	345.613.717	140,5	133,3	8	57.481.999	14	2.510.000	75,0	- 95,6
TOTALE	**579**	**2.638.735.131**	**947**	**6.590.124.647**	**63,6**	**149,7**	**107**	**290.198.768**	**226**	**748.624.970**	**111,2**	**158,0**

Fonte: Osservatorio Nazionale sul Project Financing (www.infopieffe.it) elaborazione Cresme per AeT - Ambiente e Territorio, Azienda speciale della Camera di Commercio di Roma
** compresi gli avvisi con importo non segnalato*

13 *Condividete la constatazione della Commissione secondo la quale alcune operazioni del tipo "step-in" possono porre problemi in termini di trasparenza e di parità di trattamento? Conoscete altre "clausole tipo" la cui attuazione potrebbe causare problemi simili" ?*

In linea astratta e generale non vi è dubbio che operazioni del tipo "step-in"possono porre problemi in termini di trasparenza e di parità di trattamento. Questo sicuramente accade tutte le volte in cui viene di fatto consentita la sostituzione del partner privato senza che vi sia un processo di selezione analogo a quello che aveva dato luogo alla designazione iniziale.

Peraltro, il rischio che la PA cerchi di sottrarsi in "corso d'opera" o di contratto agli obblighi che ha dovuto rispettare inizialmente potrebbe essere concreto ogni qual volta siffatte clausole lasciassero alla PA un ruolo decisivo in materia. Così come potrebbe diventare concreta, in circostanze di questo tipo, la tentazione di generare stati di "crisi" sull'andamento del contratto per cambiare discrezionalmente la controparte.

Non si può, tuttavia, tacere il fatto che clausole di step-in spesso sono poste a favore di soggetti privati, quali ad esempio, le istituzioni finanziarie che hanno accettato di assumere in proprio taluni rischi sostanziali, liberandone di conseguenza il soggetto pubblico. In queste circostanze, non consentire l'adozione di clausole di "step-in" potrebbe essere controproducente ai fini del ribaltamento dei rischi di mercato su operatori privati.

Saper distinguere diventa, quindi, fondamentale per l'efficacia della regolamentazione di settore e alcuni chiari principi generali dovrebbero essere condivisi.

In particolare:

- In forme di PPP di lungo periodo, la sostituzione della controparte privata anche da parte del soggetto pubblico non può mai essere esclusa del tutto;
- Tale sostituzione, però, non può essere totalmente discrezionale ma rimessa a: oggettive inadempienze contrattuali, conclamata incapacità di rispettare i termini e le condizioni sottoscritte, eventi imprevedibili e, naturalmente, cause di ordine pubblico, sicurezza e salute pubblica;
- Inoltre, qualora l'attribuzione dei rischi sostanziali del progetto, tuttavia, sia effettivamente trasferita su operatori privati, finanziari e non, e nella misura in cui questo avviene, la possibilità di sostituzione deve essere attribuita anche a tali soggetti ai quali, per contro, non si può chiedere che un'eventuale sostituzione del soggetto escluso avvenga secondo procedure e modalità tipiche della PA.

Più difficile da inquadrare è la fattispecie - che saremmo tentati di definire "insidiosa" - della sostituzione del soggetto privato unicamente per generali considerazioni di efficienza nell'eseguire le prestazioni di propria competenza o per l'oggettiva perdita di competitività della propria azione. Nei rapporti di medio-lungo periodo, infatti, non è detto che l'operatore inizialmente più efficiente in generale e/o rispetto allo specifico progetto sia anche quello che costantemente mantiene nel tempo questo vantaggio competitivo rispetto agli altri operatori.

Inoltre, è sempre possibile che il progetto perda valore nelle priorità del partner privato iniziale, che, quindi porrà meno cura e determinazione nello svolgimento dei propri compiti, generando un danno per la PA, i beneficiari dell'opera/servizio e anche per i suoi diretti concorrenti, tenuti fuori da un potenziale progetto in virtù di una sorta di "rendita contrattuale".

Queste osservazioni hanno un risvolto importante: quello per cui ogni disciplina in materia di PPP, tanto più se ribalta costi e rischi di realizzazione di progetti di pubblico interesse su soggetti privati, non può impedire sempre e comunque clausole di step-in a beneficio di soggetti privati. Anzi, al contrario può e deve consentirlo, ma solo a fronte di un'effettiva assunzione di costi e di rischi.

Queste considerazioni richiamano, peraltro, la necessità di rispettare i principi di trasparenza e concorrenza non solo nel momento iniziale dell'aggiudicazione di un progetto, ma anche durante l'intera vita del PPP che lo riguarda. Al contempo, però, evidenziano la difficoltà di conseguire questo obiettivo senza principi chiari e coerenti, volti a limitare la discrezionalità "politica" del pubblico e a delimitare quella eventualmente concessa a soggetti privati, nell'ambito di specifiche fattispecie "di equilibrata convenienza".

Un'ipotesi da non sottovalutare quale possibile soluzione per il perseguimento di questo difficile equilibrio potrebbe essere quella di richiedere che l'esecuzione di un contratto di lungo periodo sia sempre accompagnata da chiari requisiti minimi da soddisfare a carico sia della componente pubblica che privata, sotto il controllo di soggetti pubblici tecnici (e non "politici"), che potrebbero assumere anche un ruolo di arbitratore del contratto (Authority di settore o altri soggetti).

Sul tema va ricordato, comunque, che in Italia la normativa vigente prevede già il c.d. "subentro" (art. 37.octies della legge n.109/94 e s.m.i.), ossia lo strumento grazie al quale viene impedita la risoluzione di un rapporto concessorio allorquando, su designazione dei finanziatori, una nuova società subentra nella concessione e fa cessare entro breve termine le cause di inadempimento, previo assenso da parte del concedente, condizionato al fatto che la società designata abbia caratteristiche tecniche e finanziarie sostanzialmente equivalenti all'originario concessionario.

Tuttavia, manca ancora il decreto ministeriale di fissazione dei criteri e delle modalità attuative delle previsioni della norma in parola, nel cui ambito potrebbe essere introdotto l'obbligo di specificare chiaramente l'eventuale utilizzo della norma da parte della amministrazione aggiudicatrice, qualora il rapporto concessorio venisse risolto.

Una norma di tenore similare, invece, è già operativa in Italia, limitatamente agli appalti di lavori pubblici (art. 10, comma 1-ter della legge n. 109/94 e s.m.i.), per i casi di fallimento o risoluzione del contratto. Ma essa si caratterizza per il fatto che l'amministrazione interpella il soggetto che si è classificato secondo in gara (ed eventualmente anche il terzo), al fine di stipulare un possibile nuovo contratto alle medesime condizioni economiche già proposte dall'interessato in sede di offerta.

Si tratta di una norma sicuramente più trasparente di quella sopra citata - riferita alle concessioni e al promotore - ma il suo meccanismo operativo difficilmente potrebbe essere proficuamente traslato nell'ambito delle concessioni.

Pertanto, nel condividere l'auspicio della Commissione per una maggiore trasparenza e parità di trattamento, si deve richiamare l'attenzione sul fatto che il problema resta reale e la sua soluzione è necessaria, specie nell'ambito di operazioni complesse come le concessioni di costruzione e gestione.

14 Ritenete che sia necessario chiarire a livello comunitario alcuni aspetti attinenti al quadro contrattuale dei PPP ? Se sì, su quale(i) aspetto(i) dovrebbe incentrarsi tale chiarificazione?

La disciplina comunitaria del PPP è in larga parte ispirata alle forme di cooperazione più tradizionali, che sono l'appalto e la concessione.

Il primo affida al privato i rischi inerenti il proprio processo produttivo ma nella sostanza non libera completamente il soggetto pubblico dalle conseguenze economiche negative derivanti dal concretizzarsi di tali rischi.

La concessione ha modalità di applicazione notevolmente diverse e da questo punto di vista si è dimostrata spesso uno strumento valido e flessibile per regolare rapporti contrattuali di lungo periodo, diversi da quelli societari.

In quest'ottica, una disciplina meno articolata favorirebbe la flessibilità negoziale ma, in qualche caso, potrebbe incidere negativamente, ad esempio su principi importanti in un contesto di crescente coinvolgimento privato nei servizi pubblici.

In particolare, potrebbero meritare attenzione e maggiori chiarimenti gli aspetti relativi:

- alla durata del contratto e alle clausole di prolungamento, che dovrebbero essere giustificati in un'ottica di trasparenza iniziale e concorrenza per impedire forme di "rendita contrattuale" a favore dei privati;
- agli aspetti connessi con le posizioni di conflitto di interesse e alla ripartizione dei diversi rischi associati ad un progetto.

Sotto quest'ultimo profilo, un raccordo con i criteri adottati dall'Eurostat e un affinamento ulteriore di questi criteri sarebbe estremamente utile anche ad una più efficiente regolamentazione del PPP.

In particolare, potrebbe essere utile prevedere che il quadro contrattuale di un PPP chiarisca sempre in modo esatto la puntuale ripartizione dei rischi quale elemento economico rilevante ai fini di una corretta comparazione di offerte diverse, facendo riferimento almeno ai principali rischi di un progetto quali il rischio di costruzione (completamento e rispondenza ai requisiti concordati); il rischio di disponibilità (o mancata disponibilità) dell'opera, il rischio di mercato, il rischio finanziario ecc.. Solo l'esatta identificazione e attribuzione di questi rischi consente, infatti, di equiparare offerte che, usualmente, quanto più si complicano nel contenuto, tanto meno sono confrontabili in termini di prezzo.

In ogni caso, si ritiene che sarebbe accolto con grande favore un intervento chiarificatore della Commissione anche in ordine a:

- la linea di demarcazione tra contributo pubblico ed "aiuto di Stato", in particolare con riferimento alle garanzie pubbliche offerte al privato;
- la rilevanza del finanziamento del progetto da parte dei privati nell'ambito del partenariato pubblico privato, considerato che in Italia esiste una figura specifica, quella del general contractor, il quale si connota e si distingue rispetto al normale appaltatore essenzialmente per il fatto che prefinanzia in parte l'opera da realizzare, ma fino a questo momento, in Italia, detta peculiarità non è valsa a connotare il general contractor come un operatore di partenariati pubblici-privati, al punto che esso risulta alternativo rispetto al "promotore" (rispettivamente artt. 9 e 8 del d.l.gvo n. 190/2002);
- l'esatta linea di demarcazione tra concessione di lavori e concessione di servizi, atteso che entrambe mutuano la propria definizione dall'appalto, ma la prima è totalmente regolamentata dal diritto comunitario, mentre la seconda è retta solamente dai principi del Trattato e ciò considerato altresì il fatto che esiste un'area grigia, rappresentata dalla presenza, nella normativa "base" sugli appalti, dell' obbligo di applicare le regole proprie degli appalti di servizi anche relativamente ai lavori "accessori" ad un appalto di servizi;
- la specificazione delle modalità applicative della norma di cui all'art. 61 della direttiva 2004/18, concernente l'aggiudicazione al concessionario di lavori complementari, le cui finalità, peraltro, risultano assolutamente manifeste, ancorché l'aver operato una pedissequa trasposizione dalla normativa sugli appalti a quella sulla concessione comporti la necessità di un'interpretazione che renda concretamente utilizzabile nei confronti del concessionario una previsione che, diversamente, perderebbe di positiva rilevanza;
- le situazioni che nel concreto consentono il legittimo ricorso alle previsioni derogatorie stabilite per i casi "in house", atteso che le elaborazioni giurisprudenziali non risultano di per sé sole sufficientemente chiare per gli stessi operatori del diritto comunitario e che ancora maggiori dubbi sorgono correlando dette disposizioni con quelle sul diritto societario;
- analoga riflessione vale per il caso di "modifica sostanziale dell'oggetto del contratto" che renderebbe obbligatorio il ricorso alla gara, laddove una modifica non rientrante nel concetto di "sostanziale" sarebbe estranea a detto onere.

15. Nel contesto delle operazioni di PPP, siete al corrente di problemi particolari incontrati in materia di subappalto? Quali?

Il maggior problema che, nel concreto, si pone sull'argomento scaturisce dalla difficoltà di comprendere, su un piano logico e sistematico, che cosa giustificherebbe un trattamento così diversificato, quale quello vigente, nei confronti del concessionario che risulti anche amministrazione aggiudicatrice rispetto a chi non può essere considerato tale.

Infatti, non solo la concessione di costruzione e gestione è oggi maggiormente regolamentata rispetto ad altre forme di intervento, ma, addirittura, nel caso di concessionario equiparato ad un organismo di diritto pubblico, la direttiva 2004/18 specifica che esso deve rimettere in gara la totalità delle proprie attività.

Ciò, con la conseguenza, sul piano giuridico e unicamente in questa ipotesi, che il diritto comunitario rende obbligatorio un doppio livello di concorsualità e con l'effetto, sul piano economico, di non consentire di comprendere come detto concessionario possa operare sul mercato al pari degli altri concessionari privati, se solamente lui risulta gravato da oneri ulteriori rispetto al rischio di gestione che grava su tutti, indistintamente, i concessionari.

Il tenore delle norme vigenti, peraltro, non sembrerebbe giustificare nemmeno l'eccezione cui fa riferimento il Libro Verde - ma non le Direttive vigenti, comprese quelle recentissimamente adottate dalla UE - laddove prevede che la società di progetto che abbia essa stessa lo status di organismo aggiudicatore *"…è obbligata ad assegnare i propri contratti o le proprie concessioni nel quadro di un bando di gara, sia che i contratti siano conclusi con i propri azionisti, sia che non lo siano"*, salvo un solo caso, ossia : "…. *quello in cui le prestazioni affidate da una società di progetto ai propri azionisti sono già state oggetto di un bando da parte del partner pubblico, precedentemente alla costituzione della società di progetto".*

16 Il fenomeno dei PPP di tipo contrattuale, che implica il trasferimento di un insieme di compiti ad un unico partner privato, giustifica l'introduzione, riguardo al fenomeno dei subappalti, di norme più dettagliate e dal campo di applicazione più vasto?

17.In maniera più generale, ritenere che si dovrebbe prendere un'iniziativa complementare a livello comunitario al fine di chiarire o sistemare, le norme relative ai subappalti?

Tutte le forme di partenariato, di tipo contrattuale o istituzionalizzato, sono tra loro accomunate da due elementi, vale a dire una rilevante complessità operativa e l'esigenza imprescindibile del rispetto almeno dei principi fondamentali del Trattato, vale a dire trasparenza, parità di trattamento e non discriminazione.

In questo contesto, l'introduzione di eventuali norme più dettagliate e dal campo di applicazione più vasto, finalizzate a regolamentare maggiormente il fenomeno dei subappalti, sicuramente darebbe risposta positiva ad esigenze di maggior tutela e garanzia dei subappaltatori stessi, ma è dubbio che l'aggravio conseguente favorirebbe una maggiore diffusione dei PPP stessi. L'esperienza italiana testimonia proprio l'importanza di trovare il giusto punto di equilibrio tra interessi contrapposti.

18. Quale esperienza avete del lancio di operazioni di PPP di tipo istituzionalizzato? In particolare, la vostra esperienza vi porta a pensare che il diritto comunitario degli appalti pubblici e delle concessioni sia rispettato in caso di operazioni PPP istituzionalizzato? Se no, perché?

Secondo l'Osservatorio Nazionale del PPP promosso dal sistema delle Camere di commercio, i bandi per la ricerca del socio privato di società miste sono stati 140 nel periodo gennaio 2002 - giugno 2004. Gli esiti rilevati soltanto 14, percentuale del 10%, spiegabile anche con la mancanza di importo nella maggior parte dei bandi di questo tipo. Il settore di maggiore interesse risulta quello dei servizi pubblici (40% sul totale) quali acqua, energia, gas, telecomunicazioni e igiene urbana.

19. Ritenete che debba essere presa un'iniziativa a livello comunitario per chiarire o precisare gli obblighi degli organismi aggiudicatori riguardo alle condizioni che devono regolamentare la concorrenza tra operatori potenzialmente interessati da un progetto di tipo istituzionalizzato? Se sì, su quali punti particolari e sotto quale forma? Se no, perché?

Si evidenzia, in primo luogo che sarebbe opportuno che la UE chiarisse specificatamente l'aspetto concernente il caso in cui l'assunzione di controllo da parte di un'entità pubblica ricade nella fattispecie della "influenza certa", per consentire di comprendere come agire a livello operativo correttamente.

Su un piano più generale, poi, va ricordato che, indubbiamente, il silenzio del diritto comunitario in merito alle forme di PPP istituzionalizzato non ha giovato ad un corretto utilizzo degli strumenti stessi.

E' certo, comunque, che le forme di PPP istituzionalizzato offrono spesso buone opportunità ma presentano sicuramente numerosi rischi.

La Joint Venture tra un operatore pubblico e un operatore privato, anche quando la scelta iniziale di quest'ultimo viene fatta attraverso trasparenti procedure di confronto competitivo, concretizza spesso non solo una forma di intervento privato in sfere tradizionalmente pubbliche, ma anche una forma di intervento pubblico in attività private. Molto spesso iniziative realizzate in questo modo denunciano la difficoltà da parte di soggetti pubblici di separare le funzioni di programmazione e controllo della PA da quelle di gestione del processo produttivo, proprie dei soggetti economici privati.

Mentre l'interesse da parte dei privati a queste forme di collaborazione è evidente - e risiede essenzialmente nell'avere al medesimo tavolo decisionale quel soggetto "controparte" che, sotto altri profili, può incidere notevolmente sia sul buon andamento dell'iniziativa e sia anche sul livello di profitto che da essa può derivare - molto spesso l'interesse pubblico non è altrettanto chiaro. In ultima analisi, può ritenersi che il PPP istituzionalizzato presenti il limite di non lasciare la PA in posizione di "terzietà" rispetto al soggetto privato selezionato per l'esecuzione e la gestione di un progetto.

Tutto ciò, senza considerare i molteplici profili di conflitto di interesse che il PPP istituzionalizzato pone:

- tra PA e privato;
- tra privato costruttore e privato gestore;
- tra imprenditori e finanziatori;
- tra PA e queste diverse categorie di protagonisti.

Peraltro, un progetto che può durare dai 15 ai 30 anni dovrebbe sempre mantenere la possibilità di adeguare il proprio generale livello di efficienza alle mutate circostanze, nel rispetto evidentemente dell'equilibrio economico generale concordato in sede di contratto iniziale.

Non di rado, proprio per consentire l'equilibrio tra queste contrapposte ma legittime esigenze, nei vari Paesi sono state istituite o utilizzate specifiche Authority tecniche, pubbliche ma non "politiche", terze rispetto alla PA affidataria del contratto, ma non rispetto agli interessi che la medesima PA aveva inteso soddisfare nell'ambito della realizzazione del progetto. Una soluzione, questa, che rischia però di perdere efficacia nelle forme di PPP istituzionalizzato.

Poiché, tuttavia, è evidente che in molti casi la strada di un PPP istituzionalizzato risulta, almeno nell'ottica della PA, l'unica via praticabile per la realizzazione di determinati progetti con il coinvolgimento dei privati, diventa di immediata evidenza la necessità di regolamentare questa fattispecie, alla stregua di quanto è stato fatto in passato con le figure dell'appalto e della concessione di costruzione e gestione.

In maniera generale, ed indipendentemente dai problemi sollevati in questo documento:

20 Quali sono le misure o le pratiche che ritenete di ostacolo alla creazione di PPP nell' Unione Europea?

L'esperienza italiana ha registrato una prima fase durante la quale il quadro normativo è stato caratterizzato da grande rigidità e vincolismo.

Successivamente, però, il legislatore ha dovuto registrare i limiti della propria posizione ed ha optato per una normativa con un maggior grado di flessibilità.

Pertanto, si ritiene di poter affermare che anche una legislazione non equilibrata costituisce un ostacolo concreto alla creazione di PPP.

21 Conoscete altre forme di PPP sviluppate nei Paesi al di fuori dell'Unione? Conoscete esempi di "buone pratiche" sviluppate in questo contesto, cui l'Unione potrebbe ispirarsi? Se sì, quali?

Data la complessità dei temi in discussione e la scarsa probabilità di arrivare, almeno in alcuni ambiti, a definire in tempi brevi una disciplina coordinata e coerente (si pensi ad es. alle problematiche legate alle forme di PPP istituzionalizzato) la strada della riflessione collettiva su tali questioni, che prosegua ad intervalli regolari tra attori interessati e che permetta uno scambio di "buone pratiche", appare l'unica possibile e dovrebbe, pertanto, essere certamente perseguita dalla Commissione.

A tale scopo l'Osservatorio italiano sul PF si candida quale punto di riferimento permanente per una valutazione e un'analisi dei dati relativi all'Italia e offre da ora la piena disponibilità a partecipare a riunioni, lavori preparatori, tavole rotonde, elaborazione di studi analitici e proposte di disciplina normativa, nei modi e nelle forme che saranno ritenuti maggiormente utili e appropriati dalla Commissione.

22 In termini più generali, e tenuto conto dei considerevoli investimenti necessari in alcuni Stati membri, al fine di realizzare uno sviluppo economico-sociale durevole, pensate che sia utile una riflessione collettiva su tali questioni che prosegua ad intervalli regolari tra gli attori interessati e che permetta uno scambio di "buone pratiche" ? Ritenete che la Commissione dovrebbe dare impulso ad una tale rete?

Per tutte le considerazioni sopra svolte la risposta al quesito della Commissione non può che essere positiva e lo scambio di "buone pratiche" largamente auspicato come strumento che, tra l'altro, consentirebbe di tener conto non solo dei profili problematici di tipo giuridico, ma anche di quelli di natura economica ed istituzionale che nel concreto si pongono per tutti gli operatori nella realtà della Comunità Europea allargata a 25 Paesi, con tradizioni, esperienze e substrati amministrativi e culturali spesso profondamente differenti tra loro.

CONFINDUSTRIA

Osservazioni sul

LIBRO VERDE
Della Commissione Europea
relativo ai partenariati pubblico-privati ed al diritto comunitario degli appalti pubblici e delle concessioni

PREMESSA

La collaborazione tra privati e pubblica amministrazione, volta alla realizzazione di infrastrutture o allo svolgimento di servizi di interesse pubblico, ha da sempre rappresentato uno degli aspetti più problematici da disciplinare, non solo a livello comunitario, ma anche a livello nazionale per le diverse forme che tale collaborazione assume e per gli interessi in gioco.

Il Libro Verde della Commissione UE sul PPP, pertanto, rappresentando un utile strumento di analisi delle situazioni esistenti nei vari Paesi membri, e un primo eventuale passo verso regole condivise a livello comunitario, non può che essere salutato con favore dagli operatori.

Quanto alla nozione di "partenariato pubblico-privato" contenuta nel Libro Verde, deve osservarsi come questa sia molto ampia, riferendosi in generale a forme di cooperazione tra le autorità pubbliche e il mondo delle imprese che mirano a garantire il finanziamento, la costruzione, il rinnovamento, la gestione o la manutenzione di un infrastruttura o la fornitura di un servizio.

E’ sicuramente apprezzabile che la Commissione abbia avviato una ricognizione delle situazioni in essere nei diversi Stati sulle questioni attinenti al PPP con l’obiettivo di delineare, ove risultasse opportuno e/o necessario, un quadro di regole comuni e condivise per la disciplina delle forme di collaborazione tra autorità pubbliche e parti private, volte ad assicurare l'erogazione di servizi pubblici e la realizzazione di opere pubbliche.

Il conseguimento di tale obiettivo agevola anche l'effettiva realizzazione di regole comunitarie fondamentali, che rappresentano una indispensabile condizione per un ordinato sviluppo del mercato interno, come il concreto dispiegarsi del principio di reciprocità che nel campo dei PPP assume un rilievo di particolare importanza, considerata la delicatezza dei profili coinvolti e la esigenza di evitare il manifestarsi di posizioni dominanti contrastanti con la caratteristica di mercato aperto e concorrenziale.

La ricerca di maggiore omogeneità tra le diverse forme di PPP nei Paesi europei, compresi quelli di più recente ingresso nell'UE, non implica necessariamente rigidità di regolamentazione, tramite un eventuale, specifico intervento legislativo, né con riguardo ai tempi di applicazione, per tener conto del diverso punto di partenza dei vari Paesi, né con riguardo alla standardizzazione dei modelli attuativi: il ricorso a procedure e forme di PPP deve infatti potersi adeguare alle diverse esigenze dei settori coinvolti, considerate al riguardo anche le politiche di liberalizzazione perseguite dalla stessa UE in materia di servizi pubblici.

Lo sviluppo di PPP nel caso dell'edilizia pubblica potrebbe infatti richiedere clausole diverse da quelle applicabili, ad esempio, nel campo dei trasporti, fermo restando che qualunque intervento deve essere informato ai principi di trasparenza, di parità di trattamento, di reciprocità concorrenziale e di apertura effettiva dei mercati, con maggiore coinvolgimento dei capitali privati e non deve rappresentare l'occasione per una uniformazione forzata delle procedure.

Sotto tale profilo vanno pertanto individuate le possibili specificità settoriali che porterebbero ad una normativa differenziata "orizzontalmente", ma uguale in tutta Europa, invece che "verticalmente" (cioè per Stato Membro come è oggi), così da pervenire a regimi di aggiudicazione omogenei, piuttosto che a "regimi di aggiudicazione identici".

In questo contesto, si richiama l'attenzione su un **primo aspetto**: con il termine partenariato la Commissione Europea non fa riferimento a ogni generica forma di collaborazione tra soggetto pubblico e soggetti privati, bensì a quelle che presentano particolari caratteristiche, quali:

a) una durata piuttosto lunga;

b) il finanziamento del progetto da parte del settore privato, anche attraverso complesse relazioni tra i diversi soggetti privati impegnati;

c) una distinzione tra il ruolo del soggetto pubblico, cui spetta definire gli obiettivi del progetto, nell'interesse della collettività pubblica, e il ruolo del soggetto privato che deve individuare modalità pratiche per raggiungere gli obiettivi definiti dall'ente (si è detto, infatti, che attraverso le operazioni di PPP muta il ruolo dell'ente pubblico che diventa un mero organizzatore e controllore dell'attività del privato il quale, invece, svolge compiti operativi);

d) una ripartizione dei rischi tra partner pubblico e privato, essendo chiaro per la commissione che non necessariamente deve essere il partner privato ad assumersi tutti i rischi.

Un **secondo aspetto** importante è che, con il Libro Verde, la Commissione non intende arrivare a conclusioni o assumere posizioni, ma soltanto avviare il dibattito sull'applicazione del diritto comunitario degli appalti pubblici e delle concessioni al fenomeno delle PPP.

Nel far ciò la Commissione non manca di ribadire che “il diritto comunitario degli appalti e delle concessioni non si esprime riguardo all'opzione degli Stati se garantire un servizio pubblico attraverso i propri stessi servizi o se affidarli invece a terzi” (punto 17).

In altri termini, secondo la Commissione, il diritto comunitario si mostra sostanzialmente indifferente circa le opzioni organizzative esercitate dalle stesse amministrazioni che sono libere di scegliere se svolgere un lavoro o un servizio in proprio, direttamente o tramite soggetto interno delegato (appalti in house) oppure ricorrendo al mercato (outsourcing), purché tali opzioni siano svolte nel rispetto della disciplina comunitaria.

Tali considerazioni non sono di poco conto ove si tiene presente come, invece, a livello nazionale, non siano mancate sentenze dei supremi giudici amministrativi in cui si è negato che tale libertà organizzativa (nel decidere se provvedere internamente o rivolgersi al mercato) debba sussistere.

Nella prospettiva del Consiglio di Stato, infatti, la disciplina dei servizi pubblici locali non avrebbe solo la funzione di garantire la concorrenza tra le imprese ma anche quella, ben più penetrante, di incidere nelle stesse forme di organizzazione interna degli enti pubblici, costringendoli ad appaltare all'esterno tutte le attività economiche riconducibili ai contratti disciplinati dalle direttive comunitarie, salvo che disposizioni speciali non consentano di derogarvi.

Di fronte alle preoccupazioni da più parti manifestate sulla tendenza alla c.d. “internalizzazione”, il Consiglio di Stato ha rimesso alla Corte di Giustizia dell’UE la questione circa la compatibilità col diritto comunitario - in particolare con la libertà di prestazione di servizi, il divieto di discriminazione e l'obbligo di parità di trattamento, trasparenza e libera concorrenza, di cui agli artt. 12, 45, 46, 49 e 86 del Trattato - dell'affidamento diretto, ossia in deroga alle norme della direttiva 95/50/CE, della gestione di servizi pubblici tramite una società per azioni a capitale interamente pubblico.

Sul punto merita di richiamare la parte dell’ordinanza di rimessione in cui i giudici osservano che "l'affidamento diretto a società per azioni, del tutto autonome salvo l'esercizio dei poteri propri del possessore della maggioranza delle azioni, secondo le norme del diritto commerciale comune, sembra esporre la gestione delle pubbliche risorse a procedure diverse da quelle destinate a garantire la crescita del mercato interno. Si riscontra un impiego sempre più frequente della detta deroga, e ciò comporta la sottrazione di aree assai ampie di attività economiche all'iniziativa imprenditoriale privata, in contrasto con la stessa ragion d'essere dell'Unione Europea” (C.d.S., Sez. V, ordinanza n. 2316 del 22.4.2004).

Sembra pertanto necessario attendere le decisive puntualizzazioni della Corte per stabilire definitivamente quale sia la misura del controllo che determina l'assenza di autonomia del prestatore del servizio e, quindi, la sostanziale identità soggettiva con l'amministrazione che affida il servizio. In altri termini si deve chiarire “quando” si può dire che sussista una reale, e non fittizia, assenza di terzietà tra i due soggetti, che è il presupposto per l'affidamento *in house*.

Un **terzo aspetto** rilevante è che la Commissione distingue tra PPP di tipo contrattuale e PPP di tipo istituzionalizzato, con riferimento al tipo di legami esistenti tra i soggetti.

Rientrano nella prima ipotesi l'appalto, la concessione e le operazioni di PF che nello schema elaborato dal nostro ordinamento sono ricondotte al modello concessorio.

Il termine contrattuale fa riferimento, pertanto, ai legami tra i vari soggetti. Ed infatti i rapporti tra l'amministrazione e il soggetto titolare della gestione sono regolati da un contratto di servizio (che regola appunto il rapporto di concessione) e i rapporti tra il titolare della gestione del servizio e l'utenza sono regolati da un contratto che disciplina l'erogazione individuale del servizio, per il quale l'utente paga la relativa tariffa.

LE PRINCIPALI CRITICITÀ

1. SITUAZIONI DI MERCATO

Nel Libro Verde (capitolo 1.1, paragrafo 3) viene rilevato che l’aumento del ricorso a operazioni di PPP è riconducibile a vari fattori, tra cui le restrizioni di bilancio cui gli Stati membri devono far fronte, che determinerebbero l’opportunità di assicurare il contributo di finanziamenti privati al settore pubblico. Nello stesso paragrafo si valorizza l’idea che i PPP si stiano sviluppando anche per effetto di una evoluzione dello Stato, che passa da un ruolo di operatore diretto ad un ruolo d’organizzatore, di regolatore e di controllore.

Si tratta di una visione teorica che non tiene conto di come, invece, le restrizioni di bilancio inducono gli enti locali (Comuni, ma anche Province e Regioni) a svolgere, in pratica, direttamente o tramite società allo scopo costituite, attività economiche per realizzare utili, eventualmente per limitare le perdite economiche di altre attività connesse[1].

[1] Un esempio chiaro, per i settori rappresentati, è costituito dalla “assimilazione” ai rifiuti domestici o urbani dei rifiuti prodotti dalle utenze commerciali e industriali, che di per sé, secondo costante giurisprudenza, anche della Corte di Giustizia, non rientrano nel “servizio

Queste attività economiche alcune volte rientrano, o vengono considerate, nell'ambito dei **servizi pubblici**, in altri casi si caratterizzano comunque per una posizione "speciale" dell'ente pubblico (ad esempio in quanto proprietario di immobili o terreni che vengono utilizzati nell'attività economica).

I partenariati con il privato cui spesso si ricorre, di tipo istituzionale, sono giustificati e determinati dalla necessità di partecipare dell'esperienza e del know-how produttivo delle imprese private. Gli esempi sono numerosi, e spaziano dalla gestione di musei e mostre – custodia, biglietteria, ristorazione e vendita di souvenir, libri, ecc. – ai servizi di pulizia e di manutenzione di immobili di proprietà o a gestione pubblica (come le scuole di ogni ordine e grado), dalla gestione dei parcheggi auto a pagamento alla gestione di servizi ambientali, anche nel libero mercato e in concorrenza con le imprese private che vi operano[2].

L'ampia discrezionalità con cui determinate attività possono essere considerate di "interesse generale" favorisce in particolare la possibilità di interventi in regime di esclusiva (monopolio) da parte degli enti locali. Si tratta di monopoli che hanno ricadute negative sui costi sostenuti dal sistema industriale e che incidono sulla competitività produttiva dell'area[3], sia nell'ambito del territorio nazionale che nell'ottica della competitività di sistema dell'Unione europea nei confronti delle altre aree dello scenario mondiale.

In questi casi, per lo più, **non** si ha una evoluzione dell'ente pubblico da un ruolo di operatore diretto ad un ruolo d'organizzatore, di regolatore e di controllore, ma **esattamente l'opposto**. Si precisa peraltro che quanto asserito non deve essere letto solo come valutazione negativa: in alcuni casi si individuano effettivamente **nuove aree di mercato**, che vengono gestite in PPP; in altri casi, invece, il soggetto misto nato dal partenariato sostituisce o entra in competizione con gli operatori privati.

pubblico", e, in quanto merci anche suscettibili di valorizzazione, e comunque ai fini dello smaltimento più appropriato, possono liberamente circolare sul territorio, non solo nazionale. Attraverso l'assimilazione, invece, le attività di raccolta e smaltimento dei rifiuti prodotti in ambito industriale e commerciale vengono ricondotte al servizio pubblico in monopolio e, essendo più remunerative – anche per effetto delle maggiori capacità economiche dei soggetti passivi della tassa/tariffa sui rifiuti – consentono di ridurre i costi per le utenze domestiche.

[2] Il recupero e il riciclaggio, ad esempio, per costante giurisprudenza comunitaria sono affidati al libero mercato; peraltro frequentemente vengono realizzati con denaro pubblico e/o in PPP con operatori del settore – pubblici o privati – impianti pubblici che operano in concorrenza con imprese private.

[3] Cfr. Autorità per l'Energia, Relazione 2004.

2. *IN HOUSE PROVIDING*: NECESSITÀ DI UNA DEFINIZIONE CHIARA

Come è stato fatto cenno, il Libro Verde precisa che non intende affrontare il tema della scelta se esternalizzare o meno la gestione dei servizi pubblici. Sulla base dell'esperienza nazionale, il sistema delle imprese associate ritiene, invece, che sarebbe necessario, preventivamente, individuare e delimitare con precisione l'ambito degli affidamenti diretti (*in house providing*), oggi non definiti espressamente nelle norme dell'Unione Europea.

In Italia, sulla questione, è in atto un vivace dibattito, al centro del quale si pone la ormai famosa *sentenza Teckal* del 18 novembre 1999, con la quale la Corte di Giustizia UE ha stabilito che le direttive comunitarie in materia di affidamento di appalti pubblici devono essere applicate ogni qual volta ci si trovi in presenza dell'incontro della volontà di **due persone giuridicamente distinte**.

L'applicazione di dette direttive **può essere esclusa limitatamente alle ipotesi eccezionali** in cui "nel contempo l'ente locale eserciti sulla persona di cui trattasi un controllo analogo a quello esercitato sui propri servizi e questa persona realizzi la parte più importante della propria attività con l'ente o gli enti locali che la controllano" (*sentenza Teckal*, cit., par. 50). In tale ipotesi, in effetti, l'affidamento in questione non rientra nel campo di applicazione delle direttive in materia di appalti, dal momento che **deve essere esclusa la stessa esistenza di un rapporto contrattuale rilevante** ai termini di tali direttive.

La Commissione rileva che l'**ipotesi eccezionale** contemplata dalla *sentenza Teckal* **non può valere** ad escludere in maniera generale dal campo di applicazione delle regole comunitarie in materia di appalti pubblici e di concessioni ogni affidamento di un servizio che venga effettuato da un **ente locale in favore di una società a capitale maggioritariamente o totalmente pubblico**.

Per quanto riguarda in particolare la nozione di "controllo analogo a quello esercitato sui propri servizi" di cui alla giurisprudenza in discorso, **la Commissione sottolinea che affinché tale tipo di controllo sussista non è sufficiente il semplice esercizio degli strumenti di cui dispone il socio di maggioranza secondo le regole proprie del diritto societario**.

Il controllo contemplato dalla *sentenza Teckal* fa infatti riferimento ad un rapporto che determina, da parte dell'amministrazione controllante, un assoluto potere di direzione, coordinamento e supervisione dell'attività del soggetto partecipato, e che riguarda l'insieme dei più importanti atti di gestione del medesimo. In virtù di tale rapporto il soggetto partecipato, **non possedendo alcuna autonomia decisionale in relazione ai più importanti atti di gestione**, si configura come un'entità distinta solo formalmente dall'amministrazione, ma che in concreto continua a costituire parte della stessa. Solo a tali condizioni si può ritenere che fra amministrazione ed aggiudicatario non sussista, agli effetti pratici, un **rapporto dl terzietà** rilevante ai fini dell'**applicazione delle regole comunitarie in materia di appalti pubblici**.

Esistono, dunque, considerevoli limitazioni all'adozione della forma di affidamento *in house*, come pure all'affidamento a Società miste (anche se il socio privato è individuato tramite gara pubblica).

Di tali limitazioni il legislatore italiano non sembra abbia tenuto conto minimamente: con la recente approvazione del DL 269/2003 (che modifica l'art.113 della legge 267/2000) viene infatti introdotta la possibilità di una larga diffusione dell'affidamento diretto nella gestione di servizi pubblici, privilegiando, della sentenza prima citata, più l'angolo della permissività che l'area della applicazione restrittiva.

Sussistono notevoli elementi di indeterminatezza, in particolare sulla natura stessa della "persona" e sul concetto di controllo analogo. Non è infatti chiaro se la natura di una società di capitali sia compatibile con tale definizione, né quali siano le modalità di esercizio di un "controllo analogo".

Per le imprese private vanno delimitati con estrema chiarezza gli elementi oggettivi che caratterizzano l'istituto dell'affidamento *in house*, sancendo la portata eccezionale e assolutamente residuale dello stesso, come d'altronde previsto dalla c.d. clausola di sussidiarietà secondo la quale l'amministrazione è legittimata ad occupare spazi di mercato che altrimenti rimarrebbero aperti all'iniziativa privata solo se si dimostra che l'intervento pubblico sia più efficiente o efficace a realizzare obiettivi di interesse pubblico. In questi casi non si può parlare di impresa, ma di amministrazione, e quindi si accede alla sfera della libertà di autonoma organizzazione.

Parallelamente è opportuno riproporre il tema della c.d. **clausola di reciprocità** in modo che sia sancito l'assoluto divieto di attività extraterritoriale per le società che dovessero gestire il servizio in regime di affidamento diretto.

In ipotesi di affidamento concorsuale, viceversa, sempre con riferimento ai principi di parità di trattamento e non discriminazione e attesa la neutralità della Commissione europea per la proprietà pubblica o privata delle aziende, è necessario prevedere meccanismi di garanzia per le ipotesi in cui l'ente pubblico proprietario o comproprietario della società di gestione sia anche titolare del servizio e quindi ente aggiudicatore.

3. LE SOCIETÀ MISTE: UN CASO DI PPP ISTITUZIONALIZZATO

Il sempre maggiore ricorso a forme di partenariato istituzionalizzato richiederebbe una presa d'iniziativa a livello comunitario per chiarire e precisare gli obblighi degli organismi aggiudicatori nella scelta del partner privato.

In Italia con il citato DL 269/2003 è stata introdotta nell'ordinamento una terza forma di gestione, alternativa all'affidamento concorsuale e all'*in house providing*, con la possibilità di affidare l'esercizio dei servizi pubblici locali a società miste, in cui il partner privato sia scelto con procedura ad evidenza pubblica e con l'obbligo di rinnovare la gara alla scadenza del periodo di affidamento.

Tale previsione richiama l'attenzione su diversi aspetti e, in particolare, pone i seguenti quesiti:

1. Quali procedure seguire per la scelta del partner privato?
2. Quali dovrebbero essere gli elementi sui cui basare la scelta?
3. Qual è la quota minima di partecipazione privata in una società mista e quali poteri il partner privato deve poter esercitare?
4. È corretto e possibile prevedere il periodico rinnovo della gara per la quota privata?
5. In caso affermativo, quali procedure possono garantire l'effettiva concorrenzialità e la contendibilità della quota privata?

3.1. Le procedure

In Italia non esistono norme specifiche sulle procedure da seguire nella scelta del partner privato di una società mista, ad eccezione del caso di società a maggioranza privata (art. 12 della legge 498/92 e DPR 533/96).

In particolare sarebbe necessario esplicitare nella normativa comunitaria la necessità di garantire quanto riportato nel Libro verde al punto 58 dove si afferma che la scelta del partner privato, quando è destinato a svolgere incarichi attribuiti tramite un atto che può essere definito appalto pubblico o concessione, "non può essere basata esclusivamente sulla qualità del suo contributo in capitali o della sua esperienza, ma dovrebbe tener conto delle caratteristiche della sua offerta per quanto riguarda le caratteristiche specifiche da fornire".

Nell'ambito della codifica dei PPP di tipo istituzionalizzato, "che implica la creazione di un'entità ad hoc detenuta congiuntamente dal settore pubblico e dal settore privato"[4], andrebbero pertanto inseriti concetti per finalizzare la scelta del partner privato sulla base di specifici **progetti gestionali**. È proprio la scelta tra le diverse proposte possibili che consentirà all'Ente Pubblico di individuare la soluzione migliore per la gestione del servizio, a tutto vantaggio dei cittadini. Il semplice bandire una gara basata su criteri di scelta puramente legati ad aspetti del tipo "prezzo più alto" di acquisto delle quote, se ha l'obiettivo di massimizzare il prezzo di vendita, nulla porta sotto il profilo di qualità ed efficienza del servizio. Se infatti questo fosse l'unico scopo, non ci sarebbe bisogno di una nuova norma ad

[4] Riferito al caso di creazione di impresa ex novo nel quadro di un'operazione giuridica specifica, non al caso di imprese miste preesistenti che partecipano alle procedure d'aggiudicazione di appalti pubblici o di concessioni. Il carattere misto di un'impresa che partecipa ad una procedura di appalto non implica infatti alcuna deroga alle norme applicabili nel quadro dell'aggiudicazione di un appalto pubblico o di una concessione. Solo qualora l'impresa in oggetto abbia le caratteristiche di un'impresa *in house*, ai sensi della *sentenza Teckal* della Corte di Giustizia, l'amministrazione aggiudicatrice può tralasciare l'applicazione delle norme abituali.

hoc, che sarebbe meramente ripetitiva dei principi immanenti nell’ordinamento che già impongono la cessione di beni da parte dell’Ente Pubblico attraverso gara pubblica.

3.2. I criteri per la scelta del partner privato

La procedura per la scelta del partner privato, che tende a confondersi con quella dell’attribuzione di incarichi, dovrebbe seguire regole analoghe a quelle previste per gli appalti pubblici e le concessioni, concentrandosi sugli aspetti legati all’attribuzione dell’incarico e non limitandosi a quelli in capitale o legati all’esperienza del partner privato. Sostanzialmente il partner privato parteciperebbe ad una procedura per attribuirsi un incarico (l’erogazione di un servizio pubblico, in questo caso) da svolgersi tramite una società mista a prevalente capitale pubblico nella quale dovrebbe quindi assumere un ruolo rilevante. In questo senso il Libro Verde parla espressamente di assunzione del controllo di un’entità pubblica da parte di un operatore privato.

3.3. La quota minima e il ruolo del partner privato

Per assumere tale rilevante ruolo, il partner privato deve poter acquisire una partecipazione azionaria significativa nella società mista. Una partecipazione del 5% senza reali poteri all’interno della società rappresenterebbe, infatti, un aggiramento dell’obbligo di ricorrere a procedure di evidenza pubblica per affidare lo svolgimento del servizio ad un soggetto terzo. Cosa possibile solo nell’ambito dell’*in house providing*, con le limitazioni e l’eccezionalità prima ricordate.

3.4. Il periodico rinnovo della gara

Non è chiaro se possa essere considerata compatibile con il diritto comunitario la previsione di ripetere periodicamente la gara per la scelta del partner privato della società mista. Questa, una volta costituita, diventa un soggetto terzo e come tale, al termine del periodo di affidamento, dovrebbe partecipare alle procedure concorsuali al pari di altri soggetti terzi. In questo senso il Libro Verde ricorda che “l'applicazione del diritto comunitario degli appalti pubblici e delle concessioni non dipende dal carattere pubblico, privato o misto del co-contraente dell'organismo aggiudicatore”. Gli eventuali meccanismi per limitare nel tempo la partecipazione del soggetto privato andrebbero quindi meglio precisati.

3.5. Le procedure da seguire per garantire la contendibilità del mercato

Il Libro Verde sembra indicare come strada da seguire la costituzione di un impresa mista ex novo con una durata limitata all’esecuzione dell’incarico, scaduto il quale si dovrebbe svolgere una nuova gara per scegliere il partner privato di una nuova entità mista. Tale soluzione appare maggiormente coerente con il diritto comunitario, ma andrebbe espressamente prevista.

4. SCELTA DEL PARTNER PRIVATO E AFFIDAMENTO DI LAVORI

Un ulteriore elemento di problematicità giuridico operativa riguarda il particolare profilo dell'affidamento dei lavori eventualmente necessari per l'espletamento del servizio pubblico.

Un primo aspetto da precisare al riguardo afferisce all'individuazione del modello gestionale entro il quale si sviluppa l'intervento da parte dell'Ente aggiudicatore e cioè se si opera all'interno dello schema della concessione di costruzione e gestione, assoggettato alle norme sui lavori pubblici, ovvero all'interno della contigua ma distinta figura della concessione di servizi, cui è annessa la realizzazione di lavori.

Con riferimento a quest'ultima fattispecie si pone la questione se la procedura per la scelta del socio privato va tenuta distinta dalle procedure che, a valle, la società mista espleterà per l'attribuzione dei lavori.

Sarebbe opportuno che la Commissione chiarisse, anche tramite una direttiva comunitaria specifica sul PPP istituzionalizzato, che tale distinzione va operata in qualsiasi caso.

In altri termini, andrebbe chiarito che il soggetto pubblico deve esperire una prima ed autonoma procedura di gara per la scelta del socio privato; successivamente, una volta costituita, la società mista deve dare luogo ad autonome procedure di gara aperte a tutti i concorrenti in possesso dei requisiti prescritti, non escludendosi a priori che a tali gare possa partecipare, in posizione paritaria con gli altri concorrenti, anche l'impresa detentrice delle quote della società mista.

Dunque si ritiene che non vi siano barriere all'introduzione del PPP in Europa, ma a condizione che in modo inequivocabile sia chiaro:

a) che il partner privato va scelto con procedura di gara;

b) che una volta costituita, la società mista deve agire nel pieno rispetto delle procedure ad evidenza pubblica, e perciò procedere ad appalti a valle della scelta del socio privato.

LE RISPOSTE DEL SISTEMA INDUSTRIALE AL LIBRO VERDE

PPP contrattuale

Domanda n. 1

Quali tipi di operazioni di PPP puramente contrattuali conoscete? Tali operazioni sono oggetto di una regolamentazione specifica (legislativa o di altro tipo) nel vostro paese?

Considerato che con l'espressione di PPP contrattuale la Commissione fa riferimento ad ogni tipo di collaborazione pubblico-privato, basata esclusivamente su legami contrattuali tra i vari soggetti, in tale nozione si può fare rientrare anche l'**appalto** che è definito, a livello comunitario appunto, come un "contratto a titolo oneroso tra una amministrazione pubblica e un soggetto privato avente ad oggetto la realizzazione di un opera ovvero la prestazione di forniture o servizi".

L'appalto, a differenza degli altri modelli, è già stato fatto oggetto di specifica regolamentazione attraverso le direttive appalti (da ultimo peraltro riviste con l'adozione della Dir. 2004/18/CE e Dir. 2004/17/CE).

L'ordinamento italiano conosce e disciplina fondamentalmente due tipi di PPP:

❖ la **concessione** di costruzione e gestione, nei **due differenti schemi**:

  ordinario, nel quale l'amministrazione pubblica un bando per l'affidamento della realizzazione e gestione di un'opera ed il concessionario recupera il finanziamento relativo all'opera attraverso i compensi riscossi presso i terzi utenti;

  la procedura del **promotore** (*project financing*), nella quale l'iniziativa del progetto è presa dal privato-promotore, che può vedersi affidare in concessione la realizzazione e gestione dell'opera stessa;

❖ il **contraente generale**, che costituisce l'attuazione dell'**esecuzione con qualsiasi mezzo**, previsto dalle direttive comunitarie. Le prestazioni affidate al contraente generale comprendono, infatti, oltre alla progettazione ed all'esecuzione, anche il finanziamento in parte dell'opera ed altre attività di supporto all'amministrazione.

Si segnala, infine, come accanto al partenariato contrattuale che si sostanzia in "concessioni", si siano verificate, sia a livello centrale (gare indette da Consip S.p.a per le amministrazioni centrali e periferiche) sia a livello territoriale (soprattutto nel settore sanità), gare di appalto basate non sulla prestazione di mezzi, ma con obbligazione di risultato, e con la richiesta da parte dell'ente pubblico committente di una pluralità di servizi (dalle pulizie alle manutenzioni, dalla ristorazione ai servizi di portierato o di lavaggio biancheria ecc.) **da parte di un unico fornitore** cui vengono richieste soprattutto capacità organizzative e finanziarie, piuttosto che requisiti operativi riferiti ai servizi da svolgere (gare c.d. di *facility management* o di *global service*).

Accanto a queste ipotesi, si segnalano casi di procedure di **compravendite di cose future**[5] o di **gare di appalto di locazione finanziaria, riservate a istituti di credito**[6], sul modello PFI inglese, aventi però come oggetto sostanziale – ma non dal punto di vista formale e giuridico – la realizzazione e successiva gestione economica di opere e infrastrutture come carceri o discariche.

Si fa riferimento, a titolo di esempio, a quei casi di c.d. leasing finanziario immobiliare "in costruendo", con i quali è indetta una gara per la ricerca del "locatario finanziario" (banche o soggetti finanziari) che poi dovranno provvedere alla realizzazione dell'opera che sarà locata all'amministrazione tramite affidamento diretto e discrezionale a soggetti esecutori, in possesso dei requisiti di qualificazione prescritti per gli appaltatori dalla disciplina sui lavori pubblici.

Si tratta di affidamenti che possono destare qualche perplessità pur presentando contenuti innovativi e importanti, con significative ricadute sulle quali occorre riflettere, in particolare sotto il **profilo concorrenziale**, cioè dei soggetti partecipanti e dei **requisiti richiesti** che discendono dalla scelta (con contenuti anche discrezionali) dell'oggetto e dello strumento contrattuale da parte della amministrazione committente.

Le perplessità attengono alla compatibilità di simili operazioni con il diritto comunitario: al riguardo si evidenzia che la scelta dell'esecutore, da parte del locatario finanziatore aggiudicatario della gara, deve rispettare le norme sulla concorrenza.

In queste fattispecie si incide quindi alla radice sui contenuti primari della procedura, cioè il mercato cui si riferisce: industriale, finanziario, immobiliare. ecc..

Sempre nelle fattispecie sopra accennate, si pongono anche problemi in merito alle modalità di individuazione dei gestori del processo operativo (di costruzione, di manutenzione e gestione servizi), che non vengono individuati in sede di gara,

[5] Cfr . Delibera Autorità di Vigilanza sui LL.PP., n. 105/2003 sulle "compravendite di cosa futura" utilizzate in luogo del ricorso alle procedure concorsuali di appalto/concessione da parte dell'INAIL, aventi come oggetto sostanziale la costruzione e gestione di strutture ospedaliere.

[6] Si vedano le recenti gare indette dal Ministero della Giustizia, ai sensi della legge n. 14/11/2002, n. 259, art. 6, di conversione del d.l. 201/2002, nelle quali con la formula della locazione finanziaria si intende dare in appalto a banche (la gara è riservata agli istituti finanziari) la costruzione ex novo delle carceri di Varese e Pordenone. Il vincitore finanzierà *in toto* le opere, scegliendo direttamente (cioè, in quanto privato, senza procedura ad evidenza pubblica) sia l'impresa di costruzioni che eseguirà l'opera, ricevendo a consegna lavori e a remunerazione degli stessi un canone per l'utilizzo della struttura da parte dell'amministrazione penitenziaria per un certo numero di anni.

ma sono scelti liberamente – e, nel quadro attuale, legittimamente – dall'affidatario o dal venditore sulla base di scelte fiduciarie.

Chiaramente l'istituto del **sub-appalto**, rispetto al quale la recente direttiva unificata sugli appalti pubblici ha introdotto alcune innovative e condivise affermazioni volte ad assicurare maggiore trasparenza, **non è idoneo a "interpretare"** e disciplinare le fattispecie, ben più complesse, qui accennate.

Dialogo competitivo

Domanda n. 2

Secondo la Commissione, il recepimento nel diritto nazionale della procedura di dialogo competitivo permetterà alle parti interessate di disporre di una procedura particolarmente adeguata all'aggiudicazione dei contratti qualificati come appalti pubblici in occasione dell'attuazione di un PPP di tipo puramente contrattuale, pur preservando i diritti fondamentali degli operatori economici. Condividete questo punto di vista? Se no, perché?

Domanda n. 3

Per quanto riguarda questi contratti, esistono secondo voi altri punti, oltre a quelli relativi alla scelta della procedura d'aggiudicazione, che potrebbero causare problemi riguardo al diritto comunitario degli appalti pubblici? Se sì, quali e per quali ragioni?

Ritentiamo che il dialogo competitivo possa rappresentare un valido strumento per consentire un dialogo/collaborazione tra pubblico e privato nella definizione della migliore soluzione tecnica per il soddisfacimento di esigenze di interesse pubblico (individuato dall'ente appaltante) a condizione che siano definiti alcuni aspetti di questa figura che, come delineata dalle nuove direttive appalti, destano delle perplessità. In particolare si tratta di chiarire meglio i presupposti in presenza dei quali è possibile fare ricorso alla procedura, le modalità di svolgimento della stessa e di definire le norme a tutela della riservatezza dei dati comunicati dai partecipanti al dialogo. È evidente che per incoraggiare effettivamente lo sviluppo di un confronto costruttivo tra operatori privati deve essere assicurato agli stessi la salvaguardia della riservatezza delle loro proposte e soluzioni tecnologiche che spesso prevedono la messa a disposizione del proprio *know-how*. Gli operatori economici presenteranno dunque soluzioni innovative solo qualora venga vietata la divulgazione delle loro proposte ai concorrenti, nonché l'utilizzo a posteriori dei loro contributi in altre procedure di gara, con sanzioni in caso di violazione di suddetti obblighi di riservatezza.

Concessioni

Domanda n. 4

Avete già organizzato, partecipato, o avuto l'intenzione di organizzare o partecipare ad una procedura d'attribuzione di una concessione nell'Unione? Che esperienza ne avete ricavato?

Domanda n. 5

Ritenete che l'attuale quadro giuridico comunitario sia sufficientemente preciso per garantire la partecipazione concreta ed effettiva di società o gruppi non nazionali alle procedure d'aggiudicazione di concessioni? Secondo voi, in questo contesto è abitualmente garantita una concorrenza reale?

Domanda n. 6

Pensate che un'iniziativa legislativa comunitaria mirante a regolamentare la procedura d'aggiudicazione di concessioni sia auspicabile?

Domanda n. 7

In maniera più generale, se ritenete che sia necessario che la Commissione proponga una nuova azione legislativa, esistono a vostro parere ragioni oggettive per regolamentare tramite un tale atto tutti i PPP di tipo contrattuale, siano essi qualificabili come appalti pubblici o come concessioni, per sottoporle a identici regimi di aggiudicazione?

In Italia le regole fondamentali relative a pubblicità, trasparenza e non discriminazione dovrebbero essere sufficienti a garantire la partecipazione di concorrenti stranieri alle gare per l'affidamento delle concessioni, almeno nel campo dei lavori.

Si segnala, tuttavia, la particolare attenzione che deve essere riservata in materia di reale concorrenza alla necessità di assicurare la **reciprocità** tra gli Stati membri, specie in tema di trattamento dei lavoratori.

A livello comunitario, invece, Il quadro giuridico in ordine alle procedure d'attribuzione di concessioni non sembra tale da garantire la partecipazione concreta ed effettiva di società o gruppi di società non nazionali. Non sono previste, infatti, norme comuni vincolanti per tutti gli stati membri, né un coordinamento delle varie legislazioni nazionali che potrebbe in qualche modo offrire delle certezze giuridiche che sono il presupposto per poter sviluppare la concorrenza.

Così, se l'accesso al mercato italiano è possibile, seppur con qualche difficoltà, da parte di operatori non nazionali, risulta, invece, praticamente impossibile che operatori italiani possano/riescano ad entrare su mercati stranieri. Persiste dunque una evidente "asimmetria operativa", che rende improcrastinabile l'individuazione di regole di reciprocità concorrenziale.

Ciò senza contare che, in mancanza di input comunitari, molti Stati, pur avendone la facoltà, non hanno disciplinato la procedura per l'affidamento delle concessioni, con la conseguenza di lasciare libera l'autorità pubblica concedente a dettare norme volta per volta.

Allo stesso modo la legislazione nazionale, pur dettando principi di base, lascia spazio alla discrezionalità dell'amministrazione concedente in ordine a due aspetti fondamentali:

a) l'erogazione eventuale di un contributo;

b) l'ammontare dello stesso.

Più precisamente, la concessione di lavori pubblici (art.19 della legge 109/94 come modificato dalla legge 166/2000) prevede:

a) che è rimessa alla amministrazione concedente la scelta se erogare o meno a favore del concessionario un contributo che va ad aggiungersi ai proventi derivanti dalla gestione dell'opera (mentre l'originaria formulazione dell'art. 19 prevedeva che il concessionario potesse erogare il contributo solo in presenza, nella gestione, di prezzi o tariffe amministrati, controllati o predeterminati);

b) che il soggetto concedente possa erogare a favore del concessionario un contributo che potrebbe anche superare il 50% dell'importo complessivo dell'appalto (limite questo previsto nella originaria formulazione), con la conseguenza che il contributo può in realtà arrivare a coprire la parte prevalente dell'importo, riducendo di molto il rischio di gestione ("il concedente assicura al concessionario il perseguimento dell'equilibrio economico finanziario degli investimenti e della connessa gestione in relazione alla qualità del servizio da prestare, anche mediante un prezzo previsto in sede di gara");

c) che la durata della concessione possa essere superiore ai 30 anni.

Non è espressamente disciplinata, invece, la **concessione di servizi** e, peraltro, non esiste nella nostra legislazione una definizione rigorosa dei servizi pubblici, essendo solo prevista la differenza tra i servizi che la pubblica amministrazione intende assicurare per se stessa e servizi che la stessa amministrazione dovrebbe o potrebbe erogare direttamente all'esterno, a beneficio della collettività indeterminata che ad essa fa riferimento.

Le gare per le concessioni di servizi devono avere per oggetto il confronto tra due o più progetti gestionali. Per la carenza di criteri codificati di valutazione di un progetto gestionale di servizio, le gare attualmente svolte hanno, nella quasi totalità, adottato regole formulate per la valutazione dei cosiddetti "appalti di lavori". Occorrerebbe pertanto che fossero individuati criteri di valutazione specifici.

Alla luce delle considerazioni espresse si ritiene opportuno, oltre che auspicabile un intervento legislativo comunitario volto a regolamentare le concessioni ma senza sottoporre ad identico regime tutti i PPP contrattuali, qualificabili come appalti o come concessione. Per le procedure d'aggiudicazione, ad esempio, già la mera circostanza che nella concessione si preveda comunque un rischio di gestione mancante nell'appalto, giustifica una diversa, seppur simile, regolamentazione.

Project Financing

Domanda n. 8

In base alla vostra esperienza, l'accesso degli operatori non nazionali alle formule di PPP di iniziativa privata è garantito? In particolare, nei casi in cui le amministrazioni aggiudicatici invitano a presentare un'iniziativa, tale invito è generalmente oggetto di pubblicità adeguata ad assicurare l'informazione di tutti gli operatori interessati? Viene organizzata una procedura di selezione realmente concorrenziale per garantire l'attuazione del progetto stesso?

Domanda n. 9

Quale sarebbe secondo voi la migliore formula per assicurare lo sviluppo di PPP di iniziativa privata nell'Unione europea pur garantendo il rispetto dei principi di trasparenza, di non discriminazione e di parità di trattamento?

L'ordinamento italiano conosce e disciplina una procedura ad iniziativa del privato, ed è quella di *project financing*. La norma prevede che l'amministrazione dia conoscenza del fatto che all'interno della programmazione approvata vi sono opere che possono essere realizzate in *project financing*, mediante pubblicazione di un avviso indicativo pubblicato secondo le modalità di pubblicazione proprie dei bandi di gara. Si ritiene che tale pubblicità sia idonea a garantire la partecipazione di soggetti stranieri.

Anche in fase di scelta del realizzatore del progetto inizialmente proposto dal promotore viene assicurata la presentazione di altre offerte, mediante l'indizione di una gara diretta ad individuare i soggetti che dovranno concorrere in una fase successiva con il promotore dell'iniziativa.

Ferma restando l'idoneità della procedura prevista dalla legislazione italiana a garantire la massima concorrenza, si sottolinea l'importanza, affinché il *project financing* possa trovare concreta applicazione nel mercato italiano, di assicurare al promotore i vantaggi previsti dalla normativa (ed in particolare il diritto di adeguare la propria proposta a quella aggiudicata più conveniente dall'amministrazione – c.d. diritto di prelazione).

Al riguardo, si ritiene che la garanzia del rispetto delle regole concorrenziali e della parità di trattamento dei concorrenti nazionali ed esteri derivi dalla pubblicità di tali vantaggi, mediante adeguata esplicitazione nell'avviso indicativo che viene pubblicato.

Sull'inquadramento delle operazioni di PF nel nostro ordinamento e sui limiti che il sistema ancora presenta, si possono fare alcune osservazioni.

La prima è che tali operazioni vengono ricondotte al modello concessorio e, pertanto, al PF si applicano le disposizioni in tema di concessione previste nella legge-quadro.

Ciò premesso, considerate le innovazioni introdotte dalla L. 166/2002 all'istituto della concessione di lavori pubblici, con particolare riferimento all'eliminazione dei vincoli temporali e di contribuzione pubblica precedentemente previsti, nonché all'utilizzo per opere gestite direttamente dalla PA, molte delle operazioni di PF, pur rispondendo formalmente al modello concessorio, hanno minimizzato, e anche perso, la connotazione essenziale legata al rischio di gestione.

La caratteristica dell'istituto è che l'opera realizzata deve essere in grado, tendenzialmente, di autofinanziarsi, ossia di generare un flusso di cassa derivante dalla gestione che consenta di remunerare l'investimento effettuato.

Senza l'alea correlata alla gestione non vi è concessione, ma appalto (nel quale non vi è rischio imprenditoriale circa la copertura dei costi sostenuti in quanto il pagamento del corrispettivo è certo).

Dunque nel caso in cui la contribuzione pubblica sia particolarmente elevata (vi sono bandi in cui la stessa è dell'80% del valore dell'opera o anche superiore), si ha uno sviamento dalla causa tipica e, stante il diritto di prelazione riconosciuto al promotore rispetto a eventuali concorrenti, un ritorno alle vecchie concessioni di lavori pubblici che altro non erano se non appalti affidati a trattativa privata.

Il promotore (privato o anche pubblico) si vede assegnare senza reale concorrenza un'opera che trova in sostanza finanziamento sul bilancio dell'ente: su un piano strettamente civilistico la causa del contratto di concessione subisce una consistente alterazione generando un negozio indiretto la cui liceità e validità sono fortemente in discussione.

Anche su tale aspetto, permane dubbio che sia conciliabile con le regole comunitarie e, pertanto, andrebbe opportunamente sottoposto ad un intervento chiarificatore del legislatore europeo.

Al riguardo va segnalato che l'eventuale regolazione deve rappresentare il mezzo per accelerare il processo d'infrastrutturazione dei Paesi UE, non il fine di una attività normativa garantista ed inappuntabile dal punto di vista giuridico che si rivelasse, in concreto, troppo onerosa e vincolante per gli operatori e, di conseguenza, scarsamente applicata.

La fase successiva alla selezione del partner privato

Domanda n. 10

Che esperienza avete riguardo alla fase successiva alla selezione del partner privato nelle operazioni di PPP contrattuale?

Domanda n. 11

Siete a conoscenza di casi nei quali le condizioni d'esecuzione – comprese le clausole d'aggiornamento – hanno potuto avere un'incidenza discriminatoria o hanno potuto costituire un ostacolo ingiustificato alla libera prestazione di servizi o alla libertà di stabilimento? Se sì, potete descrivere il tipo di problemi incontrati?

Domanda n. 12

Siete al corrente di pratiche o di meccanismi di valutazione di offerte con conseguenze discriminatorie?

Domanda n. 13

Condividete la constatazione della Commissione secondo la quale alcune operazioni del tipo **step-in** ***possono porre problemi in termini di trasparenza e di parità di trattamento? Conoscete altre "clausole tipo" la cui attuazione potrebbe causare problemi simili?***

Domanda n. 14

Ritenete che sia necessario chiarire a livello comunitario alcuni aspetti attinenti al quadro contrattuale dei PPP? Se sì, su quale (i) aspetto (i) dovrebbe incentrarsi tale chiarificazione?

L'esperienza della fase post selezione è caratterizzata dalla notevole carenza di controlli e di richiami – se del caso – al rispetto delle obbligazioni assunte in sede di aggiudicazione della gara.

Elementi vincolanti possono derivare, poi, dal fatto che spesso i concorrenti sono costretti ad accettare in sede di gara, condizioni di esecuzione che possono rivelarsi onerose, non potendo come noto presentare offerte condizionate a pena di esclusione. In particolare si tratta di condizioni relative ai pagamenti dei corrispettivi e prezzi che vengono dilazionati nel tempo, ovvero legati ad eventi senza data certa.

Si ritiene, infine, che clausole del tipo *step-in* possano essere necessarie in alcuni schemi contrattuali rientranti nell'ambito dei PPP, senza tuttavia porsi in contrasto con i principi di trasparenza e parità di trattamento. Si fa riferimento a situazioni in cui il soggetto finanziatore potrebbe chiedere la sostituzione del concessionario mediante indicazione di un soggetto subentrante che abbia idoneità tecnico finanziaria equivalente a quella del precedente soggetto e che garantisca il completamento dei lavori. Tale possibilità dovrebbe essere consentita in casi specifici, quale quello di fallimento del soggetto affidatario o di grave inadempimento del contratto, proprio al fine di evitare la risoluzione dello stesso.

Anche per la disciplina delle condizioni di esecuzione dei PPP e del quadro contrattuale relativo appare opportuno un intervento comunitario, diretto a dare base omogenea di riferimento alle modalità applicative in ambito europeo ed a chiarire la natura e la definizione delle diverse tipologie di PPP contrattuale.

Il subappalto

Domanda n. 15

Nel contesto delle operazioni di PPP, siete al corrente di problemi particolari incontrati in materia di subappalto? Quali?

Domanda n. 16

Il fenomeno dei PPP di tipo contrattuale, che implica il trasferimento di un insieme di compiti ad un unico partner privato, giustifica secondo voi l'introduzione, riguardo al fenomeno dei subappalti, di norme più dettagliate e dal campo d'applicazione più vasto?

Domanda n. 17

In maniera più generale, ritenete che si dovrebbe prendere un'iniziativa complementare a livello comunitario al fine di chiarire, o sistemare, le norme relative ai subappalti?

Anche per questo profilo, nel campo dei lavori, il subappalto nell'ambito di operazioni di PPP non ha dato luogo a particolari problematiche e pertanto non sembra necessaria l'emanazione ulteriore di regole, atteso che la disciplina relativa alla concessione prevede la facoltà per l'amministrazione di imporre che parte dei lavori siano affidati a terzi.

Tuttavia tenuto conto che il legislatore nazionale ha richiamato espressamente la disciplina prevista per il subappalto dei lavori pubblici anche nel caso di forniture e servizi (358/92 e 157/95), e che tale richiamo suscita perplessità in considerazione del fatto che alcune disposizioni chiaramente attagliate allo schema dei lavori pubblici sono difficilmente applicabili *tout court* alle forniture e servizi, sarebbe auspicabile un intervento chiarificatore della Commissione in tema di subappalti.

PPP istituzionalizzato

Domanda n. 18

Quale esperienza avete del lancio di operazioni PPP di tipo istituzionalizzato? In particolare, la vostra esperienza vi porta a pensare che il diritto comunitario degli appalti pubblici e delle concessioni sia rispettato nel caso di operazioni PPP istituzionalizzate? Se no, perché?

Domanda n. 19

Ritenete che debba essere presa un'iniziativa a livello comunitario per chiarire o precisare gli obblighi degli organismi aggiudicatori riguardo alle condizioni che devono regolamentare la concorrenza tra operatori potenzialmente interessati da un progetto di tipo istituzionalizzato? Se sì, su quali punti particolari e sotto quale forma? Se no, perché?

Domanda n. 20

Quali sono le misure o le pratiche che ritenete di ostacolo alla creazione di PPP nell'Unione europea?

Domanda n. 21

Conoscete altre forme di PPP sviluppate nei paesi al di fuori dell'Unione? Conoscete esempi di "buone pratiche" sviluppate in questo contesto, cui l'Unione potrebbe ispirarsi?

Domanda n. 22

In termini più generali, e tenuto conto dei considerevoli investimenti necessari in alcuni Stati membri, al fine di realizzare uno sviluppo economico-sociale durevole, pensate che sia utile una riflessione collettiva su tali questioni che prosegua ad intervalli regolari tra gli attori interessati e che permetta uno scambio di "buone pratiche"? ritenete che la Commissione dovrebbe dare impulso ad una tale rete?

Ai sensi del Libro Verde, le operazioni di PPP di tipo istituzionalizzato implicano la creazione di un'entità detenuta congiuntamente da partner pubblico e da partner privato (costituzione di SpA miste per la gestione dei servizi pubblici) ovvero il passaggio a controllo privato di una impresa pubblica già esistente (privatizzazione di imprese pubbliche che gestiscono servizi pubblici).

Nel nostro ordinamento viene quindi ammesso il modello della SpA mista a condizione che il socio privato venga selezionato con gara.

La scelta di un partner privato destinato a svolgere incarichi nel quadro del funzionamento di un'impresa mista non può essere basata esclusivamente sulla qualità del suo contributo in capitali o della sua esperienza, ma dovrebbe tenere conto delle caratteristiche della sua offerta – che economicamente deve essere la più vantaggiosa – per quanto riguarda le prestazioni specifiche da fornire[7].

La partecipazione dell'organismo aggiudicatore all'impresa mista[8], che al termine della procedura di selezione diventa contitolare del contratto, non giustifica la mancata applicazione del diritto dei contratti e delle concessioni in occasione della selezione del partner privato. L'applicazione del diritto comunitario degli appalti pubblici e delle concessioni non dipende infatti dal carattere pubblico, privato o misto del co-contraente dell'organismo aggiudicatore, ma semplicemente dalla decisione di affidare un compito ad un terzo, ovvero a una persona giuridicamente distinta.

Se l'entità mista funge da organismo aggiudicatore[9], tale funzione implica anche il rispetto del diritto applicabile in materia di appalti pubblici e di concessioni, laddove tale diritto assegni al partner privato dei compiti che l'amministrazione aggiudicatrice non abbia bandito precedentemente alla costituzione dell'impresa mista. Il partner privato non può, infatti, approfittare della propria posizione privilegiata nell'entità mista per riservarsi alcuni compiti senza procedere preliminarmente a un bando.

Si sono riscontrati casi nei quali, con un'unica procedura di gara, si mira alla scelta del partner socio privato, che al tempo stesso diviene aggiudicatario, ad esempio, dei lavori che la costituenda società dovrà eseguire, quale oggetto esclusivo o prevalente.

In casi del genere, di fatto, la possibilità di aggiudicazione dei lavori viene subordinata alla preventiva necessaria acquisizione della posizione di socio della committente, e ciò in linea di massima non sembra rispondere agli interessi ed alle modalità operative delle imprese, in particolare di quelle che operano nel campo delle costruzioni.

In secondo luogo, laddove si ammetta che una stessa persona giuridica possa al tempo stesso assumere il ruolo di azionista della società committente e di appaltatore della medesima, di fatto, si dà luogo ad una commistione di ruoli, con parziale identificazione tra committente ed esecutore, e perciò tra controllore e controllato.

[7] Punto 58, Libro Verde.

[8] Punto 63, Libro Verde.

[9] Punto 64, Libro Verde.

Infine, l'avallare tale metodologia può determinare il serio rischio di una sorta di monopolio da parte del partner privato di tutti gli appalti (o perlomeno di gran parte di questi) che la società mista, nel corso della sua attività, dovrà realizzare.

Sul punto, peraltro, si segnala come sarebbe auspicabile definire se sia consentito o meno alle SpA collocare successivamente le proprie azioni sul mercato.

La cessione delle quote finanziarie dovrebbe essere libera perché ciò rappresenta un modo per finanziare la società, senza però incidere sulla gestione imprenditoriale della SpA che dovrebbe restare immutata.

In altri termini occorre distinguere nettamente il profilo della collocazione delle quote azionarie – che rappresenta un profilo meramente finanziario e che dunque deve essere lasciato libero e consentito in ogni momento della vita della società – ed il profilo della scelta del socio privato, che viceversa, ancorché si sostanzi anch'esso nella sottoscrizione di quote, rappresentando invece la scelta di un socio gestore del servizio, deve restare immutata per tutta la durata del contratto, pena la violazione delle regole concorsuali.

In buona sostanza sarebbe auspicabile un intervento normativo il quale pur senza vietare *tout court* la collocazione di quote sociali sul mercato non permetta che detta collocazione possa risolversi in meccanismo che surrettiziamente consenta l'affidamento di un servizio ad un soggetto che non ha partecipato ad alcuna gara.

Del resto, già la giurisprudenza italiana, in vigenza dell'art. 22 della legge 142/90, aveva chiarito che **la scelta del socio privato non è la scelta di un socio qualsiasi**, ma di chi nella società deve assumere precisi obblighi per la gestione di un pubblico servizio (Consiglio Stato sez. V, 19 febbraio 1998, n. 192).

Quanto invece alla società costituita con capitale pubblico totalitario, trattandosi di un modello mutuato dai principi della nota *sentenza Teckal*, resta comunque da definire chiaramente quale sia la misura del controllo che determina l'assenza di terzietà del soggetto affidatario.

In generale si rilevano, dunque, nodi che meritano soluzione a livello europeo in un quadro di reciprocità tra Paesi membri e di certezza di principi.

Si tratta, almeno in parte, di problematiche da ricondurre alla tematica "servizi pubblici" e "servizi di interesse generale", questioni che non possono essere sempre circoscritte al tema dei partenariati, per lo più derivanti da deroghe al regime ordinario che si consentono nel caso di attività qualificate come servizi di interesse generale[10].

[10] Se è vero che il "carattere misto di una impresa che partecipa ad una procedura di appalto non implica alcuna deroga alle norme applicabili nel quadro di una aggiudicazione di un appalto pubblico o di una concessione" e che "solo qualora l'impresa *in oggetto* (sic !!) abbia le caratteristiche di un'impresa in house … l'amministrazione aggiudicatrice può tralasciare l'applicazione delle norme abituali (nota a piè pagina, Punto n. 51, Libro Verde) è anche vero che occorre verificare, senza eludere il problema, le condizioni per cui lo stesso soggetto-

Tuttavia, si sottolinea come, sia pure in un quadro normativo incerto e fonte di continue perplessità, il modello della società mista abbia una importante funzione di sviluppo per taluni settori d'attività. E' il caso dell'esercizio di servizi di gestione rifiuti urbani e di igiene ambientale nel cui ambito la diffusione della SpA mista ha consentito non solo la creazione di soggetti operativi con un livello dimensionale più adeguato alle esigenze del mercato e del servizio, ma anche il superamento, in molte realtà territoriali, della frammentazione della gestione da parte degli enti locali.

Si tratta di un fenomeno significativo, con una diversa rilevanza a seconda delle regioni, ma da valutare positivamente, soprattutto dove si è proceduto a creare nuove società miste con partner industriali per la gestione integrata dei servizi per ambiti territoriali ottimali.

In altri termini, pur in presenza di condizioni giuridiche connotate da incertezze, e non sempre nella massima trasparenza, la costituzione di società miste ha spesso costituito, nel settore, uno strumento di crescita industriale, sia per le imprese private che per gli enti locali e le popolazioni interessate.

to-impresa ha, eventualmente avvalendosi anche di società di scopo che vantano i requisiti della casa madre, contemporaneamente la gestione a titolo di *in house* e la gestione a seguito di procedura concorrenziale.

Confservizi

Green Paper on Public-Private Partnership and Community Law on Public Contracts and Concessions

Replies, comments and suggestions

On the 30 of April 2004 the European Commission issued the “Green Paper on Public-Private Partnership (PPP) and Community Law on Public Contracts and Concessions COM(2004) 327. This document represents the contribution of Confservizi to the consultation procedure deriving from the Green Paper.

In the framework of PPP the arguments for social cohesion become of strategic importance for all European citizens, and their relevance still increase if we refer to the *Third Report on Economic and Social Cohesion*, issued by the Commission, in which there is argued that “economic growth in the EU has slowed appreciably over the three past years … as a result, unemployment has risen again in many parts of the Union with all the social implication which this entails” (p. v). Moreover, “the challenge for cohesion policy … is to provide effective support for economic restructuring and for the development of innovative capacity in order to arrest declining competitiveness, falling relative levels of income and employment and depopulation” (p. vii). At the same time, “partnership in the design and implementation of programmes has become stronger and more inclusive, involving a range of private sector entities, including the social partners, as well as regional and local authorities”, even if “concerns have grown over … the need to ensure that programmes are flexible enough to adapt to change” (pp. xix-xx). To sum up, EU is facing a difficult economic fluctuations with potentially relevant implications coming from the enlargement, making social cohesion a central problem for citizens and partnership with flexible programmes a strategic instruments to overcome the critical period.

Services of General Interest (SGIs) lie at the heart of such process. It is commonly accepted that the living standards of the population are primarily determined by the functioning of SGIs, and all Member States have their own tradition in organize them in a way that considers the citizens' *desiderata*. Within this framework, the appropriate development of a common framework for SGIs could be useful only if there is the adequate sensibility to a range of different problems, one of which – just one among many different aspects to be considered – is the promotion of the internal market in natural monopoly sectors. Moreover, as the Commission remind in the White Paper on services of general interest COM(2004) 374, article 86 (2) provides: “Undertakings entrusted with the operation of services of general economic interest … shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.”

Another fundamental aspect relates to the definition of public partner in PPP procedures and it is now calling for careful evaluation. With reference to the notion of “contracting body”, the reference made in footnote number 12 of the Green Paper is inappropriate, since it reports a definition – that includes both national, regional and local authorities, and the contracting authorities of the type “public authorities” and “public undertakings” – introduced by the Directives 93/38/EEC and 2004/17/EC that is proper only with reference to the application of that directives, but is not obviously extendable to the notion of public partner in a PPP. This is also confirmed by the recent Resource Book on PPP Case Studies, in which there are described some experiences of PPP involving – as private participants – some enterprises that could be included in the notion of “public undertakings” of the above directives. It is clear and obvious that this legislation should be addressed to monopoly providers and to public administration, but if we consider public enterprises in a very comprehensive definition, including even those operating in competitive markets, there could be the actual possibility of discriminating them in favour of private operators.

Another general question refers to the participation to bidding procedures, in liberalized Member States, of operators coming from Member States that have not yet carried out or initiate liberalization processes. A reciprocity participation *criterium* should be defined to prevent opportunistic policy by Member States and the realization of dominating market position by some operators.

In the remaining part of the document, Confservizi provides for the replies to some of the questions included in the Green Paper. For questions 6th, 7th and 18th, 19th Confservizi provides combined answers.

6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?
7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

On this subject, we consider that a new Community legislative initiative is not necessary, because of the following arguments:

- the new instruments recently introduced in the new directives (2004/17/EC e 2004/18/EC) contribute to the solution of several problems arising in the award procedures, also with reference to concession;
- the nature of concession consists of the (partial or total) risk transfer from public authorities to private contractors, and the formal agreement by which to shape the risk sharing has to be left to contractual initiatives by parties, due to the enormous difficulties related to classify and examine all the possible risk causes in all different contexts and the possible contractual mechanism to manage them, being a basic condition to give a Community legislation on this subject;
- the difficulties in deeply clarifying the concession object, and the related award *criteria*, on Community basis, since it frequently involves the ability to be responsive to local community *desiderata* that are not easy to manage by contracts;
- the duration of the concession agreement, that has to be determined considering the investment depreciation and remuneration, but it could also involve some renegotiation procedure related to monitoring activities carried out by public authorities, that are quite difficult to regulate on Community basis.

8. In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?

With reference to question 8, we believe that equality of treatment does not only mean adequate advertising, but it implies other several relevant complication, among which we mention

- the absence of Community definition of the participation criteria of awarding procedure, since it is not really clear the nature of the formal assignment of task that may lead to the exclusion of a bidder from a procedure (the participation criteria should be designed in order to allow the maximum possible number of participants, so it should not be based on the ownership of them)
- the possibility of potential equal knowledge among participants is not only related to procedure advertising, but it relies on the immediate availability of all relevant material concerning the awarding procedures, including public funds' availability and regulation.

9. In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?

We have always to guarantee the respect of all Treaty principles, but it consists not of including the PPP initiatives only under the ruling on public contracts, since it involves many other relevant aspects. On this subject, an interesting example is the Italian law on Project Financing, concerning the realization of public works through public authorities initiatives in which there is an adequate consideration for private proposals also on the definition of the projects to be realized. There were huge expectations about the effects of this legislation (called Merloni Law), but the final results we have obtained are disappointing, due to the very limited use of these instruments by operators. The main reason is related to a “crowding out normative effect”, consisting of the great attention that the Merloni Law has on the respect of public contracts’ legislation that has lead to neglect the financial complications. To manage similar initiatives the related legislation has to adequately balance many different problems, one of which – but not the only one – is the respect of public procurement legislation.

18. What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not ?
19. Do you think that an initiative needs to be taken at Community level to clarify or define the obligations of the contracting bodies regarding the conditions requiring a call for competition between operators potentially interested in an institutionalised project? If so, on what particular points and in what form ? If not, why not?

Our more relevant experience is the Italian Reform approved by the end of 2003. The fundamental idea of the reform is to allow to public authorities a range of solutions with respect to the organization of SGIs:

- the public procurement procedure (PP),
- the establishment of a mixed ownership enterprise (MOE) in which the private partner has to be selected through competitive bidding procedures, assuring the complete and rigorous respect of national and community legislations,
- the establishment of a completely public enterprise in which public authorities exercise over it a control which is similar to that which they exercise over their own departments and, at the same time, that enterprise carries out the essential part of its activities with the controlling authorities (in house providing, IHP).

The first option (PP) is a literal application of the community law on public contracts to the concession of SGIs, the third option (IHP) is the acceptance of the commonplace concept elaborated in the Teckal Case by the ECJ, while the second solution (MOE) is more complex, involves more opportunities and risks: it is the new instrument on which our Government invites us to build our new development. The Italian choice to introduce MOE in the national legislation on SGIs, and within the European framework and the Treaty principles, appears very forward looking.

The efficient functioning of MOE asks for a clear and certain legal framework concerning the forms of cooperation between public and private partners, probably identifying this solution with what has been called Institutional Public Private Partnership (IPPP). This solution requires an adequate ruling on:

- the boundaries between the management activities, on one hand, and programming, monitoring and regulating activities on the other hand, providing for a coherent separation of roles and responsibilities among the different subjects involved, with particular attention to the contract administration and the assignment of tasks, that should also introduce rules on risks allocation and management between the service provider (IPPP) and the authority entrusted of controlling (contracting authorities);
- the appropriate degree of flexibility in defining the allocation of management tasks and responsibilities between the partners when the selected private partner does not have the control over the enterprise, because of a minority shareholding participation;

- the selection procedure, that has to be simplified as much as possible, to meet in the short term the requirement and the ever increasing needs and expectations of the citizens;
- the subject-matter of the contract or concession, in order to clarify in advance that the activities carried out by the company are the ones foreseen in the selection procedure;
- the concession duration, that has not to be confused with the duration of the newly established enterprise, in order to clarify *ex ante* that the procedure refers to a service provision for a predetermined and not extendable period of time, unless the repetition of the initial procedure.

Confservizi believes that if there is the necessity for a Commission initiative on this subject, it should be prepared in order to clarify some legal aspects of common interests, as the ones we have just listed.

Rome 30/07/2004

(Parere Federcasa finale.doc- 17/08/04)

Contributo di FEDERCASA

al Libro verde su Public Private Partnership

30 luglio 2004

FEDERCASA, la Federazione italiana per la casa, che rappresenta i 111 operatori pubblici dell'abitazione sociale italiani, che costruiscono e gestiscono alloggi prevalentemente in locazione destinati a famiglie a basso reddito (unità immobiliari gestite oltre 1 milione), partecipa al dibattito sollevato dal Libro verde rispondendo alle domande più pertinenti rispetto al settore dell'abitazione sociale

Premessa

La situazione del settore dell'edilizia sociale pubblica in Italia è oggetto di una serie di fenomeni che influenzano l'oggetto del Libro verde:
- la devoluzione delle competenze al livello regionale e locale, che si accompagna all'esaurimento delle risorse pubbliche per la costruzione di nuovi alloggi (fino al 1998 assicurate da un prelevamento sul monte salari);
- la riorganizzazione regionale degli strumenti, che vede gli organismi in una fase di trasformazione: da soggetti pubblici non economici ed esclusivamente dedicati alla loro missione primaria in direzione dei ceti più deboli a soggetti pubblici cosiddetti "economici", con l'obbligo di bilancio in pareggio e la possibilità di agire anche in altre fasce di mercato (locazione e/o vendita per i ceti medi, studenti, immigrati) e di offrire servizi anche ad altri soggetti pubblici (ad esempio i comuni). A queste trasformazioni si associa sempre più spesso la ricerca di modelli societari "misti" che consentano di associare risorse e *know how* di soggetti privati a quelli degli operatori tradizionali.

Tutti questi fenomeni, è evidente, hanno uno stretto rapporto con l'oggetto della consultazione.

Temi rilevanti per Federcasa

In questo quadro, per quanto riguarda Federcasa, in quanto organismo di rappresentanza degli Enti pubblici che costruiscono e gestiscono gli alloggi di edilizia sociale in Italia, i temi rilevanti per il settore sono i seguenti:

1) evitare la discriminazione di cui sono già stati oggetto alcuni Istituti, nel momento in cui hanno partecipato, come soggetti privati, in virtù della loro trasformazione imprenditoriale a gare per l'affidamento delle concessioni per il servizio di gestione del patrimonio immobiliare dei Comuni o di altri soggetti (Enti previdenziali). Gli ostacoli che si pongono in questo caso sono di due ordini:

- il problema della territorialità (vincolo statutario ancora legato alla concezione degli enti come strutture assistenziali e con attività totalmente priva di lucro);
- il problema dello statuto degli Enti che consente interpretazioni non univoche e sulla quale già si è espresso il Consiglio di Stato con sentenza n. 6275/02 del 28 maggio 2002, escludendo la possibilità dell'Aler di Milano dalla partecipazione alla gara per l'affidamento del servizio di gestione del patrimonio immobiliare del Comune, in quanto considerato, in base al suo statuto, ente strumentale del Comune stesso.

La non discriminazione degli enti pubblici è peraltro espressamente contemplata sia dalle Direttive appalti della UE che da ripetute sentenze che nel definire i vari soggetti pubblici o privati si basano esclusivamente sulla *mission* e mai sullo statuto (di ente pubblico o di società privata, per es.). L'apparente vantaggio derivante agli enti pubblici dalla possibile commistione di attività prive di lucro con attività commerciali è peraltro superata dalla Direttiva "trasparenza", che obbliga alla divisione dei bilanci (Dir CEE 80/723). In questo senso anche un Partenariato Pubblico-Pubblico può rientrare nella classificazione della PPP.

2) Trovare un quadro normativo certo per la creazione da parte degli enti di strutture societarie miste con imprese di costruzione e/o manutenzione, che consentano di fondere il *know how* dei gestori del patrimonio con quello degli imprenditori privati.
Il problema che si pone è multiplo:
- l'inquadramento comunitario della procedura di selezione del partner privato (pubblicità, requisisti, inquadramento del bando nel quadro normativo nazionale e comunitario)
- la durata del rapporto/contratto (pari al servizio messo a gara in caso di partenariato su base contrattuale: ma che succede nel caso di un rapporto su base istituzionale?) ;
- il ruolo del partner privato come esecutore di lavori della società mista;
- la possibilità di individuare i limiti (della possibilità di affidamento) dei lavori in house, attraverso criteri che tengano conto anche della convenienza dell'ente pubblico.

Risposte alle domande del LV

Questi temi comportano la risposta alle seguenti domande del LV:

12. *Siete al corrente di pratiche o di meccanismi di valutazione di offerte con conseguenze discriminatorie?*
La risposta è sì, vedi il caso dell'Aler di Milano citato al punto 1.

14. *Ritenete che sia necessario chiarire a livello comunitario alcuni aspetti attinenti al quadro contrattuale dei PPP? Se sì, su quale(i) aspetto(i) dovrebbe incentrarsi tale chiarificazione?*
Sì, è necessario chiarire, anche in relazione alle evoluzioni delle normative comunitarie su trasparenza ed aiuti di stato, il concetto comunitario di **organismo privato** e di **organismo pubblico** ai fini della non discriminazione nelle gare per l'affidamento di servizi quale quello della gestione del patrimonio di edilizia sociale pubblica

17. *In maniera più generale, ritenete che si dovrebbe prendere un'iniziativa complementare a livello comunitario al fine di chiarire, o sistemare, le norme relative ai subappalti?*
La risposta è No

18. *Quale esperienza avete del lancio di operazioni PPP di tipo istituzionalizzato? In particolare, la vostra esperienza vi porta a pensare che il diritto comunitario degli appalti pubblici e delle concessioni sia rispettato nel caso di operazioni PPP istituzionalizzate? Se no, perché?*
19. *Ritenete che debba essere presa un'iniziativa a livello comunitario per chiarire o precisare gli obblighi degli organismi aggiudicatori riguardo alle condizioni che devono regolamentare la concorrenza tra operatori potenzialmente interessati da un progetto di tipo istituzionalizzato? Se sì, su quali punti particolari e sotto quale forma? Se no, perché?*
Per quanto riguarda l'edilizia residenziale sociale pubblica, alcune normative di riorganizzazione del settore invitano (in alcuni casi obbligano) gli enti pubblici titolari del settore alla costituzione di società miste per lo svolgimento di alcune funzioni (manutenzione, progettazione, costruzione ecc.).
La procedura per la scelta del partner privato mal si inquadra nella procedura comunitaria (in particolare per il settore della manutenzione ordinaria, in Italia, non è rispettata la collocazione della stessa nel settore dei servizi, con la conseguenza dell'apertura di un contenzioso con le associazioni delle imprese di costruzione, che si ritengono potenziali titolari degli incarichi).
Rimane aperto il problema della possibilità di affidamento *in house* dei lavori dell'ente che ha costituito la società alla società stessa, per i periodi successivi alla prima scadenza del contratto messo a gara, nonché del rapporto fra la società ed il socio privato, a sua volta prestatore del servizio in oggetto.
Più che un intervento normativo diretto, sarebbe utile una comunicazione della Commissione tendente a chiarire le "zone grigie" del diritto comunitario.

22. *In termini più generali, e tenuto conto dei considerevoli investimenti necessari in alcuni Stati membri, al fine di realizzare uno sviluppo economico-sociale durevole, pensate che sia utile una riflessione collettiva su tali questioni che prosegua ad intervalli regolari tra gli attori interessati e che permetta uno scambio di 'buone pratiche'? Ritenete che la Commissione dovrebbe dare impulso ad una tale rete?*
La risposta è sì a entrambe le domande.

FISE FEDERAZIONE IMPRESE DI SERVIZI

LIBRO VERDE

RELATIVO AL PARTENARIATO PUBBLICO-PRIVATO ED AL DIRITTO COMUNITARO DEGLI APPALTI PUBBLICI E DELLE CONCESSIONI

FISE – Federazione Imprese di Servizi, è l'Associazione che rappresenta, in ambito Confindustria, una serie di comparti di servizi nei quali le imprese operano in base a contratti pubblici di appalto o di concessione (dai servizi di pulizia/servizi integrati ai servizi postali, anche di trasporto, dalle varie fasi della gestione rifiuti al noleggio autovetture)

FISE non può non apprezzare l'iniziativa assunta dalla Commissione Ue di presentare un Libro Verde sui Partenariati Pubblico - Privati, trattandosi di materia in cui si riscontrano importanti opportunità di sviluppo ma, nel contempo, situazioni che, anche perché innovative, possono determinare conseguenze anomale sotto il profilo della trasparenza e della concorrenza nel mercato interno comunitario.

Il tema, peraltro, è articolato e complesso, vista l'eterogeneità degli istituti giuridici che possono rientrare, secondo la stessa Commissione Ue, nell'ambito dei PPP. Alcuni aspetti trattati, inoltre, appaiono riconducibili a istituti già disciplinati dalle norme comunitarie e nazionali sugli appalti pubblici o dalle normative nazionali in materia di gestione di servizi di interesse generale. Si auspica che tale complessità non sia di per sé ragione precluda gli interventi che dovessero apparire necessari per assicurare le migliori condizioni di trasparenza nel mercato interno.

Da parte FISE si intende puntualizzare principalmente solo gli aspetti di più diretto interesse associativo, sulla base delle esperienze concrete e/o delle analisi effettuate.

IL MERCATO

Nel capitolo 1.1, paragrafo 3, del Libro Verde viene rilevato che l'aumento del ricorso a operazioni di PPP è riconducibile a vari fattori, tra cui **le restrizioni di bilancio** cui gli Stati membri devono far fronte, che determinerebbero l'opportunità di assicurare il contributo di finanziamenti privati al settore pubblico. Nello stesso paragrafo si valorizza l'idea che i PPP si stiano sviluppando anche per effetto di una evoluzione dello Stato, che passa da un ruolo di operatore diretto ad un ruolo d'organizzatore, di regolatore e di controllore.

Si tratta di una visione condivisa sotto il profilo teorico, ma parziale sotto il profilo pratico, non tenendosi conto di come, soprattutto a livello territoriale, le restrizioni di bilancio inducono anche gli enti pubblici (Comuni, ma anche Province e Regioni) a svolgere direttamente o tramite società allo scopo costituite, attività economiche per realizzare utili o limitare le perdite di altre attività collegate[1].

[1] Un esempio chiaro, per i settori rappresentati, è costituito dalla "assimilazione" ai rifiuti domestici o urbani dei rifiuti prodotti dalle utenze commerciali e industriali, che di per sé, secondo costante giurisprudenza, anche della Corte di Giustizia, non rientrano nel "servizio pubblico", e, in quanto merci anche suscettibili di valorizzazione, e comunque ai fini dello smaltimento più appropriato, possono liberamente circolare sul territorio, non solo nazionale. Attraverso

Queste attività economiche alcune volte rientrano, o vengono considerate, nell'ambito dei **servizi pubblici**, in altri casi si caratterizzano comunque per una posizione "speciale" dell'ente pubblico (ad esempio in quanto proprietario di immobili o terreni che vengono utilizzati nell'attività economica).

I partenariati con il privato cui spesso si ricorre, di tipo istituzionale, sono giustificati e determinati dalla necessità di partecipare dell'esperienza e del know-how produttivo delle imprese private. Gli esempi sono numerosi, e spaziano dalla gestione di musei e mostre – custodia, biglietteria, ristorazione e vendita di souvenir, libri, ecc. - alla gestione di centri sportivi; dai servizi di pulizia e manutenzione di immobili di proprietà o a gestione pubblica (come le scuole di ogni ordine e grado) alla gestione dei parcheggi auto a pagamento, fino alla gestione di servizi ambientali, anche nel libero mercato e in concorrenza con le imprese private che vi operano[2].

La ampia discrezionalità con cui determinate attività possono essere considerate di "interesse generale" favorisce in particolare la possibilità di interventi in regime di esclusiva (monopolio) da parte degli enti locali. Si tratta di monopoli che hanno ricadute negative sui costi sostenuti dal sistema industriale e che incidono sulla competitività produttiva dell'area[3], sia nell'ambito del territorio nazionale che nell'ottica della competitività di sistema dell'Unione europea nei confronti delle altre aree dello scenario mondiale.

In questi casi, per lo più, **non** si ha una evoluzione dell'ente pubblico da un ruolo di operatore diretto ad un ruolo d'organizzatore, di regolatore e di controllore, ma **esattamente l'opposto**. Si precisa peraltro che quanto asserito non deve essere letto solo come valutazione negativa: in alcuni casi si individuano effettivamente **nuove aree** di mercato, che vengono gestite in PPP; in altri casi, invece, il soggetto misto nato dal partenariato sostituisce o entra in competizione con gli operatori privati.

Tanto premesso, si articola il documento assumendo a riferimento la interessante e stimolante distinzione operata nel Libro Verde tra PPP di tipo contrattuale e PPP di tipo istituzionalizzato.

A) IL PARTENARIATO CONTRATTUALE

I) Nel Libro Verde vengono fatte rientrare nell'ambito dei partenariati di tipo contrattuale diverse forme di collaborazione tra soggetto pubblico e operatore privato per lo più riconducibili all'istituto della **concessione**.

Alcuni dei servizi rappresentati da FISE, e segnatamente quelli di gestione dei rifiuti domestici o urbani da parte di imprese private, sono tradizionalmente svolti in base a concessioni che, per effetto dell'entrata in vigore nel nostro ordinamento della direttiva n. 92/50 sugli appalti pubblici di servizi e successive modifiche e integrazioni, si sono conformate, nelle diverse fasi procedurali, agli "appalti". Anche le concessioni di costruzione e gestione relative agli impianti di trattamento intermedio o finale dei rifiuti sono di regola affidate nel rispetto delle relative norme comunitarie e nazionali.

l'assimilazione, invece, le attività di raccolta e smaltimento dei rifiuti prodotti in ambito industriale e commerciale vengono ricondotte al servizio pubblico in monopolio e, essendo più remunerative - anche per effetto delle maggiori capacità economiche dei soggetti passivi della tassa/tariffa rifiuti - consentono di ridurre i costi per le utenze domestiche, e quindi del servizio pubblico in senso proprio.

[2] Il recupero e del riciclaggio, ad esempio, per costante giurisprudenza comunitaria sono affidati al libero mercato; peraltro frequentemente vengono costruiti con denaro pubblico e/o in PPP con operatori del settore - pubblici o privati – impianti pubblici che operano in concorrenza con imprese private.

[3] Cfr. **Repubblica**, mercoledì 7 luglio 2004, "Le bollette più care d'Europa – L'Authority: prezzi gas e luce superiori anche del 50%".

Problemi rilevanti si determinano peraltro nel mercato per effetto di contratti o atti amministrativi di affidamento a imprese, anche costituite nella forma della Società per azioni o a responsabilità limitata, a prevalente o totale capitale pubblico, senza alcuna procedura concorrenziale, **ma attraverso l'ingresso nel capitale societario** dell'ente locale che procede all'affidamento, richiamando la nozione di *in-house* per motivare la mancanza di procedura ad evidenza pubblica[4]. Si evidenzia che si tratta di un processo diverso dalla costituzione di una società mista o dalla privatizzazione di una società pubblica. Si fa infatti riferimento a processi in cui la società – per lo più a prevalente capitale pubblico – già esite ed è operativa; l'ente locale, anzichè indire una gara, entra nel capitale sociale con una quota variamente proporzionate e affida il servizio alla società partecipata.

E' un problema ben conosciuto a livello comunitario, che corrisponde a quegli aspetti segnalati in premessa di una crescita dell'intervento diretto degli enti locali in attività economiche, oggetto allo stato anche di alcune cause pendenti presso la Corte di Giustizia, richiamate nello stesso Libro Verde.

II) Vista **la domanda n. 1** posta nel Libro Verde sulle operazioni di PPP puramente contrattuali conosciute, si segnala come accanto al partenariato contrattuale che si sostanzia in "concessioni", si sono verificate, sia a livello centrale (gare c.d. di global service indette da Consip S.p.a per la pulizia e manutenzione degli immobili di amministrazioni centrali e periferiche) sia a livello territoriale (soprattutto nel settore sanità), gare di appalto basate non sulla prestazione di mezzi, ma con obbligazione di risultato, e con la richiesta da parte dell'ente pubblico committente di una pluralità di servizi (dalle pulizie alle manutenzioni, dalla ristorazione ai servizi di portierato o di lavaggio biancheria, ecc.) **da parte di un unico fornitore,** cui vengono richieste soprattutto capacità organizzative e finanziarie, piuttosto che requisiti operativi riferiti ai servizi da svolgere (gare c.d. *di facility management* o di *global service*).

Accanto a queste ipotesi, si segnalano le procedure di **compravendite di cose future**[5] o le gare di appalto **di locazione finanziaria, riservate a istituti di credito,** sul modello PFI inglese, aventi però come oggetto sostanziale – ma non dal punto di vista formale e giuridico – la realizzazione e successiva gestione di opere e infrastrutture come, per esempio, si è verificato per alcuni istituti penitenziari**[6]**.

Si tratta di affidamenti che presentano contenuti innovativi e importanti, con significative ricadute sulle quali occorre riflettere, in particolare sotto il profilo **concorrenziale**, cioè dei soggetti partecipanti e **dei requisiti richiesti** che discendono dalla scelta (con contenuti anche discrezionali) dell'oggetto e dello strumento contrattuale da parte dell'amministrazione committente.

[4] Cfr. anche le direttive Ce nn. 80/723 e 2000/52 sulla trasparenza delle relazioni finanziarie tra gli Stati membri e loro imprese pubbliche; si tratta peraltro di direttive poco "conosciute" e comunque di fatto non sufficienti a evitare che soggetti industriali che operano in monopolio esercitino anche attività in concorrenza sostenendo le attività con le posizioni di vantaggio derivanti dalla posizione di monopolista.

[5] Cfr. **Delibera Autorità di vigilanza LL.PP. n. 105/2003** sulle "compravendite di cosa futura" utilizzate in luogo del ricorsa alle procedure concorsuali di appalto/concessione da parte dell'INAIL, aventi come oggetto sostanziale la costruzione e gestione di strutture ospedaliere.

[6] Si vedano le recenti gare indette dal **Ministero della Giustizia**, ai sensi della legge n. 14/11/2002, n. 259, art. 6, di conversione del D.L. 201/2002, nelle quali con la formula **della locazione finanziaria** si intende dare in appalto a banche (la gara è riservata agli istituti finanziari) la **costruzione ex novo dei carceri** di Varese e Pordenone; il vincitore finanzierà in toto le opere, **scegliendo direttamente** (cioè, in quanto privato, senza procedura ad evidenza pubblica) **l'impresa di costruzioni** che eseguirà l'opera ricevendo a consegna lavori e a remunerazione degli stessi un canone per l'utilizzo della struttura da parte dell'amministrazione penitenziaria per un certo numero di anni.

In queste fattispecie si incide in effetti alla radice sui contenuti primari della procedura, cioè sul mercato e sugli attori cui si riferisce, con rischi rilevanti di distorsioni o di limitazioni concorrenziali (per esempio privilegiando le dimensioni e le capacità finanziarie a scapito delle capacità operative di tipo industriale e produttivo).

Sempre nelle fattispecie sopra accennate, si pongono anche problemi in merito alle modalità di individuazione dei gestori del processo scelti operativo (di costruzione, di manutenzione e gestione servizi), che non vengono individuati in sede di gara, ma sono liberamente – e, nel quadro attuale, legittimamente - dall'affidatario o dal venditore sulla base di scelte fiduciarie.

Chiaramente l'istituto del **sub-appalto,** rispetto al quale la recente direttiva unificata sugli appalti pubblici contiene disposizioni volte ad assicurare trasparenza, **non è idoneo a "interpretare**" e disciplinare le fattispecie, ben più complesse, qui accennate. Il sub appalto di regola ricorre infatti tra imprese che operano nel medesimo campo di attività, costituendo una modalità organizzativa di esecuzione.

B) IL PARTENARIATO ISTITUZIONALIZZATO

E' noto alla Commissione Ue (cfr. il punto 3, par. 53, del Libro Verde) che nella gestione dei rifiuti si ha frequente ricorso a PPP istituzionalizzati, cioè alla costituzione di **società miste**, secondo i modelli puntualmente illustrati nel Libro Verde (paragrafo 55).

Si tratta di questioni ben conosciute da **FISE**, che annovera **fra i propri associati** numerose e importanti società a capitale misto pubblico/privato che operano nel settore della gestione dei rifiuti; si segnala anche di avere aziende associate a capitale misto operanti nel settore delle pulizie e servizi integrati.

Sono noti e ben illustrati nel Libro Verde i molti aspetti problematici che la costituzione e la operatività delle società miste pone sotto il profilo giuridico/formale ai fini del rispetto delle norme europee e nazionali in materia di appalti e concessioni.

Si tratta di problematiche ben note e ampiamente esaminate anche a livello nazionale: a parte la giurisprudenza, si ricordano i diversi importanti e stimolanti interventi dell' Autorità Garante della Concorrenza e del Mercato[7] e dell'Autorità di Vigilanza sui Lavori Pubblici[8].

Certamente alcuni nodi meritano soluzione a livello europeo in un quadro di reciprocità tra Paesi membri e di certezza di principi. Si tratta peraltro, in buona parte, di problematiche

[7] L'Autorità Garante della Concorrenza e del Mercato, in una prima fase, si era posta il problema della concorsualità nella scelta del socio privato, con riferimento alle società a prevalente capitale pubblico, non mettendo in discussione l'affidamento diretto alla società mista (Parere del 20 febbraio 1997); in successivo Parere del 12 novembre 1997 si era posto in luce come l'affidamento diretto è giustificato da un rapporto di strumentalità della società con l'ente beneficiario del servizio e come pertanto appaia opportuno, per evitare che qualunque partecipazione, anche di infimo valore, possa consentire l'affidamento diretto, "far definitivamente e interamente transitare la disciplina delle società miste in quella applicabile a tutte le imprese non legate da rapporti di strumentalità con l'ente locale, prevedendo perciò che la gara avvenga per l'assunzione della gestione del servizio e non per l'individuazione del socio privato". Con Parere del 21 ottobre 1999 vengono mossi ulteriori rilievi critici al modello dalla mista, sottolineandosi come l'oggetto sociale delle società miste titolari dell'affidamento non consenta a queste ultime di svolgere, per conto dell'affidante, attività estranee al nucleo essenziale del servizio pubblico in assenza di meccanismi di gara e come debba essere prevista la revoca dell'affidamento diretto ove l'ente locale non abbia più il controllo della società mista stessa, essendo questa divenuta a prevalente capitale privato o comunque controllata da soci privati.

[8] Si veda per esempio Autorità per la Vigilanza sui Lavori Pubblici, Determinazione del 14 gennaio 2004, n. 1, in materia di promozione della costituzione di una società per azioni per la progettazione e gestione a tariffa o a pedaggio della rete autostradale e di infrastrutture di viabilità a pedaggio nel Lazio, ove si critica la possibilità per il socio privato scelto ad evidenza pubblica di poter eseguire direttamente i lavori, in ragione della natura di organismo di diritto pubblico della stessa società mista.

da ricondurre alla più ampia tematica dei "servizi pubblici" o "servizi di interesse generale", oggetto tra l'altro di recentissimo **Libro Bianco** da parte della stessa Commissione Ue, non sempre essendo questioni che possono essere confinale al solo tema dei partenariati.

In altri termini molti degli aspetti problematici derivano dalle deroghe al regime ordinario che si consentono nel caso di attività che vengono qualificate come servizi di interesse generale[9].

Peraltro nel caso di processi di "privatizzazione", con eventuale collocazione in borsa, di quote azionarie di società in precedenza interamente pubbliche si pone il problema se tali società possano essere esaminate nell'ambito della problematica dei PPP oppure debbano essere semplicemente ricondotte nell'ambito del diritto civile e societario comune. I noti principi comunitari della **irrilevanza della proprietà, pubblica o privata,** ai fini della applicazione delle regole di mercato alle società, richiamati anche dal Libro verde, dovrebbero far ritenere che società quotate in borsa non siano mai da ricondurre all'interno della problematica dei PPP, essendo normali società di diritto comune a tutti gli effetti.

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In tali sintetiche premesse preme sottolineare come, sia pure in un quadro normativo incerto, il modello della società mista per la gestione di servizi di gestione rifiuti urbani e di igiene ambientale **abbia avuto un importante sviluppo** nel Paese, creando di fatto soggetti operativi con un livello dimensionale più adeguato alle esigenze del mercato e del servizio e consentendo, in molte realtà territoriali, il superamento della frammentazione della gestione da parte degli enti locali.

Si tratta di un fenomeno significativo, con una diversa rilevanza a seconda della regione, ma da valutare nel complesso positivamente, soprattutto dove si è proceduto a creare nuove società miste con partner industriali per la gestione integrata dei servizi per ambiti territoriali ottimali.

Volendo fornire dei dati, da Indagine condotta dall'Associazione sulle Forme di Gestione dei servizi di igiene urbana[10], effettuata intervistando tutti i comuni italiani con popolazione superiore ai 5.000 abitanti e il 10% di quelli con popolazione inferiore, le società miste nel 2002 servivano il 12% degli 8.100 comuni italiani nella raccolta e trasporto, contro il 2,6% del 1998; nelle raccolte differenziate lo sviluppo era ancora più significativo: 12,8% dei comuni italiani nel 2002 contro il 2,3% del 1998.

Sempre da tale Indagine risulta che le società miste crescono nel periodo considerato (1998 – 2002) anche nella proprietà delle discariche (da 1,4 al 5% dei comuni serviti), nella gestione delle discariche (da 2,2, a 7,6%) e nella proprietà e gestione degli inceneritori (da poco sopra il 3% a sopra l'8%).

Una successiva Indagine, condotta nel 2004, sullo stato di attuazione degli Ambiti Territoriali Ottimali nel settore[11], ha confermato tale analisi, consentendo di verificare come in alcune realtà la società mista vada a costituire un soggetto-impresa nuovo, che si sostituisce a forme di gestione non industriale, costituendo una delle modalità con cui si cerca, a livello territoriale, di realizzare economie di scala in un contesto di sviluppo.

[9] Se è vero che il "carattere misto di una impresa che partecipa ad una procedura di appalto non implica alcuna deroga alle norme applicabili nel quadro di una aggiudicazione di un appalto pubblico o di una concessione" e che "solo qualora l'impresa *in oggetto* (sic !!) abbia le caratteristiche di un'impresa in house… l'amministrazione aggiudicatrice può tralasciare l'applicazione delle norme abituali (nota a piè pagina n. 51 del Libro Verde) è anche vero che occorre verificare, senza eludere il problema, le condizioni per cui lo stesso soggetto-impresa ha contemporaneamente, eventualmente avvalendosi anche di società di scopo che vantano i requisiti della casa madre, la gestione a titolo di "in-house" e la gestione a seguito di procedura concorrenziale.

[10] "Le Forme di Gestione", 2002, Secondo Rapporto., scaricabile da < www. Fise.org >.

[11] Rapporto "Ambito Territoriale Ottimale – analisi attuazione e prospettive", 2004., scaricabile da < www. Fise.org> .

In altri termini, pur in presenza di condizioni giuridiche connotate da incertezze, e non sempre nella massima trasparenza, la costituzione di società miste ha spesso costituito, nel settore rifiuti urbani, uno strumento di crescita industriale, sia per le imprese private che per gli enti locali e le popolazioni interessate.

Situazioni da tenere distinte dalle denunciate situazioni in cui l'ingresso di un ente locale nel capitale di una società già esistente giustifica l'affidamento diretto da parte dello stesso ente locale, ovvero dal persistere di affidamenti diretti per società di capitale, anche quotate in borsa, grazie alla presenza di soci pubblici (nazionali) nel capitale sociale.

Segnalando come i due Rapporti sopra citati siano scaricabili dal nostro sito (www.fise.org), si unisce comunque sintesi del Rapporto sugli Ambiti territoriali ottimali e la parte relativa alle regioni Emilia – Romagna e Calabria, ritenute indicative di quanto sopra rilevato.

Roma 28 luglio 2004 - ***Prot.n. p48668GH***

Osservatorio Servizi Igiene Urbana

promosso da:

FISE ASSOAMBIENTE
Associazione Imprese Servizi Ambientali

PadovaFiereSpa

RAPPORTO
Ambito Territoriale Ottimale: analisi, attuazione e prospettive

SINTESI

Premessa

Nel nostro Paese il settore dei rifiuti urbani sta vivendo una fase di trasformazione strutturale; le modifiche del quadro normativo in materia ambientale e le innovazioni della disciplina delle forme di gestione dei servizi pubblici locali hanno senz'altro dato un'importante spinta al riassetto, creando le premesse per uno sviluppo in senso moderno di una politica integrata dei rifiuti, in linea con le direttive europee in materia.

Il processo di industrializzazione dei servizi di igiene urbana va tuttavia dispiegandosi con lentezza – anche rispetto a quanto sta accadendo in altri servizi di pubblica utilità – in quanto trova degli elementi di ostacolo e incertezza in un sistema di gestioni che risulta tutt'oggi fortemente frammentato, oltre che storicamente caratterizzato da assetti monopolisitici.

La realizzazione degli Ambiti Territoriali Ottimali per la gestione dei rifiuti urbani, previsti e disciplinati dalla legislazione di settore, si pone quindi come momento centrale per coniugare l'ottimizzazione qualitativa del processo con la modernizzazione dell'intero comparto. Sviluppo che non può e non deve essere solo dimensionale, ma che deve seguire anche logiche che favoriscano la qualità, la specializzazione di impresa e il confronto concorrenziale, premiando l'economicità, l'efficacia e l'efficienza gestionale degli operatori.

In questo contesto si colloca il Rapporto su "**Ambito Territoriale Ottimale: analisi, attuazione e prospettive",** elaborato da FISE Assoambiente nell'ambito **dell'Osservatorio Servizi Igiene Urbana, costituito tra PadovaFiere e FISE Assoambiente** per elaborare specifici studi e rapporti sul reale andamento del mercato del settore e fornire un supporto conoscitivo a quanti direttamente coinvolti in termini operativi o di regolazione amministrativa e ambientale.

L' Ambito Territoriale Ottimale

Il Rapporto si incentra preliminarmente sulla nozione di Ambito Territoriale Ottimale nell'ordinamento vigente, evidenziando come la Corte di Giustizia delle Comunità europee, la Corte Costituzionale e la magistratura amministrativa abbiano puntualmente ribadito, in più occasioni, che la bacinizzazione - con le conseguenti limitazioni alla circolazione dei rifiuti - **debba propriamente riferirsi ai rifiuti urbani e non alle attività di smaltimento dei rifiuti speciali o alle attività di recupero,** anche in ragione della variabilità della produzione e del mercato.

Il Rapporto evidenzia inoltre che da un lato la normativa ambientale sembra convergere, in termini di obiettivo, verso un unico Ambito Territoriale Ottimale come luogo geografico e sede amministrativa per la gestione unitaria dei rifiuti prodotti su un dato territorio, superando la frammentazione gestionale connessa e conseguente alla privativa comunale e assicurando a livello di bacino l'autosufficienza nello smaltimento; d'altro lato la stessa normativa consente però di **distinguere tra Ambito Ottimale ai fini dello smaltimento finale e Ambito ai fini della raccolta e del trasporto dei rifiuti urbani**. Distinzione formale poi ampiamente sviluppata a livello di legislazione regionale e di piani, dove risultano quasi sempre individuati **sub–bacini**, rispetto al livello provinciale, ai fini della raccolta e trasporto dei rifiuti urbani.

Parallelamente in non poche regioni è individuato, ai fini dello smaltimento finale - soprattutto dove sono previsti o realizzati impianti di termovalorizzazione - un Ambito di dimensioni geografiche superiori a quello provinciale. Esempi evidenti sono la **Lombardia,** che ha fatto coincidere con il territorio della regione l'Ambito Territoriale Ottimale a fini dello smaltimento, ma anche la **Sicilia**, dove sono previsti 27 sub-ambiti per la raccolta e il trasporto e quattro termovalorizzatori in tutto il territorio per servire le 9 province e i 27 subambiti e la **Campania**, dove è implicita la scissione tra soggetto che gestisce gli impianti di trattamento finale e soggetti deputati alla gestione delle fasi a monte.

L'analisi concreta, condotta regione per regione, contenuta nella parte centrale del Rapporto e la teoria economica, esposta nelle conclusioni, convergono quindi nell'attestare che **la fase della raccolta dei rifiuti non è associata alla presenza di rilevanti economie di scala.**

La raccolta dei rifiuti è tuttora un'attività ad elevata intensità di lavoro, anche se l'innovazione tecnologica ha progressivamente aumentato il peso del fattore capitale. In particolare, la dimensione ottimale dell'ambito risulta funzionale ai costi della logistica (centro operativo, stazione di trasferenza, officina, ecc.) e ai costi di spostamento di uomini e mezzi, ed è influenzata essenzialmente dalla densità abitativa. L'ambito ottimale di raccolta dipende, quindi, dalle caratteristiche morfologiche ed urbanistiche del territorio, mentre l'assenza di economie di scala oltre una certa soglia dimensionale giustifica e/o impone di suddividere gli ATO per sub-ambiti territoriali.

Si tratta di un aspetto importante sotto il profilo della **contendibilità**. È evidente che se il dimensionamento del servizio in termini geografici e di abitanti serviti non supera determinate soglie sono di più gli operatori che possono competere. Nelle attività di raccolta, gli investimenti fissi sono principalmente costituiti dall'acquisto degli automezzi, che oltretutto non sono vincolati all'uso in una specifica località e sono pertanto in parte recuperabili (*no sunk cost condition*): si tratta quindi di attività in teoria fortemente contendibili, come attesta la rilevante presenza di imprese private nel mercato. La definizione di Ambiti di dimensioni eccessive avrebbe l'effetto di limitare in senso oligopolistico la concorrenza senza ragioni di ordine né tecnico né economico.

Come evidenziato anche nel capitolo finale del Rapporto, sono diverse invece le caratteristiche del trattamento e dello smaltimento dei rifiuti. Le attività risultano caratterizzate da connotazioni tecnologiche complesse, e presentano delicate implicazioni di natura ambientale.

La fase del trattamento, sia per quanto riguarda gli impianti di incenerimento che gli impianti di produzione di compost e CDR, risulta fortemente capital intensive e presenta economie di scala assai spiccate soprattutto per quanto riguarda la termodistruzione. Anche in relazione alla necessità di assicurare il conferimento dei rifiuti prodotti in misura adeguata alle capacità dell'impianto, il trattamento dei rifiuti si configura come un settore caratterizzato da un limitato numero di operatori più stabili sul territorio, in cui anche la concorrenza deve articolarsi diversamente rispetto alla concorrenza per la raccolta.

La contendibilità del mercato e le forme di gestione

Negli anni più recenti i crescenti vincoli di finanza pubblica e i sempre più complessi problemi di carattere ambientale connessi alla gestione dei rifiuti hanno favorito nel settore delle utilities ambientali il verificarsi di cambiamenti nella struttura dell'offerta.

Gli obiettivi sono stati prevalentemente perseguiti agendo contemporaneamente in due direzioni: da un lato favorendo la progressiva introduzione di una maggiore competizione nelle forme di gestione, al fine di favorire maggiore efficienza, efficacia ed economicità del servizio di igiene urbana e dall'altro promuovendo una parziale/totale privatizzazione delle società pubbliche.

Fino ad oggi questo processo non ha tuttavia prodotto i risultati attesi. **In molte realtà territoriali del nostro Paese non si sono ancora create le condizioni per lo sviluppo di un vero mercato competitivo e di dimensioni industriali**. Il Rapporto mostra, però, un'evoluzione interessante in alcune realtà regionali, dal **Piemonte alla Sicilia**, passando per la **Toscana, l'Emilia Romagna** e la **Calabria**. In queste regioni, con modelli operativi assolutamente diversi, si persegue la separazione tra regolazione e gestione e/o forme di partenariato pubblico/privato in un quadro contrassegnato dal perseguimento di obiettivi di sviluppo industriale anche in termini dimensionali.

E' tuttavia un processo in corso: troppo spesso laddove il servizio veniva gestito in affidamento diretto, si riscontra tutt'oggi una tendenza a confermare gli affidamenti agli operatori pubblici esistenti, senza il ricorso a procedure ad evidenza pubblica, allargando a volte l'area del monopolio all'intero ATO. Anche in realtà regionali dove il processo di costituzione degli ambiti ottimali sembra avanzato (come ad esempio l'**Emilia Romagna**), in effetti questo è da ricondurre più alla concentrazione di imprese pubbliche, cioè a una concentrazione dell'offerta in condizioni di monopolio, che a una concentrazione della domanda.

Cambiamenti sono comunque rilevabili nella struttura degli operatori del mercato e, più in generale, nel rapporto fra pubblico e privato, con la creazione di nuove società miste pubblico-private generalmente di dimensioni piuttosto rilevanti e con la trasformazione delle stesse società ex municipalizzate in società miste, anche con una significativa partecipazione dei privati.

Il Rapporto esamina, **nel secondo capitolo**, le recenti modifiche legislative in **materia di servizi pubblici locali**, introdotte con la manovra finanziaria per il 2004: il processo di industrializzazione del comparto della gestione dei rifiuti urbani, la definizione ed attuazione degli Ambiti Territoriali Ottimali e la disciplina delle forme di gestione dei servizi pubblici locali sono infatti fortemente intrecciati.

In particolare il d.d.l. di delega al Governo per il riordino della legislazione in materia ambientale, il cui testo originario era presentato dall'attuale Esecutivo il 19 ottobre 2001, intende, tra l'altro, concludere il progetto di liberalizzazione delle *local public utilities*, individuando i criteri fondamentali del processo per il settore della gestione dei rifiuti urbani e assimilati, collegando l'affidamento dei servizi tramite gara alla realizzazione degli Ambiti Ottimali ed alla costituzione di un soggetto amministrativo d'Ambito.

La riforma attuata con l'art. 14 del recente decreto legge n. 269 del 30 settembre 2003, convertito con modificazioni in legge 24 novembre 2003, n. 326 e il successivo intervento contenuto nell'art. 4, comma 234, legge 24 dicembre 2003, n. 350 (legge finanziaria 2004) hanno però cambiato la disciplina di riferimento. Mentre la riforma di cui all'art. 35, legge n. 448/2001 a regime prevedeva solo la procedura concorsuale ad evidenza pubblica per l'affidamento dei servizi e, per la gestione degli impianti, anche la forma della società mista a prevalente capitale pubblico, **la riforma attuata con la manovra finanziaria 2003 reintroduce l'affidamento diretto a società strumentali e interamente controllate dagli enti locali,** sia per la gestione dei servizi che per la gestione degli impianti, quale modalità alternativa alla gara; inoltre prevede la possibilità di erogazione del servizio **tramite società a capitale misto pubblico/privato**, mentre la precedente riforma aveva escluso a regime tale opzione per i servizi "a rilevanza industriale", riservandola ai soli servizi privi di rilevanza industriale.

Certamente l'intervento legislativo attuato con la manovra finanziaria per il 2004 sembra ripristinare la situazione giuridica antecedente alla riforma del 2001, ed in particolare il quadro normativo originario come definito dal d.lgs. 267/2000; gli aspetti critici della riforma si sommano poi a ulteriori ragioni di criticità insite nel nostro ordinamento, quali **la privativa per gli assimilati e la mancata definizione di parametri per l'assimilazione, che consentono un ingiustificato dilatarsi della nozione di servizio pubblico,** con le connesse limitazioni alla libera concorrenza e al mercato, con conseguenze spesso negative sotto il profilo dell'efficienza e dell'economicità.

Peraltro non deve sfuggire come la riforma potrebbe avere un impatto sul mercato diverso e più forte di quello che può apparire a prima vista, soprattutto se applicata puntualmente, senza rinvii e proroghe ulteriori. La nozione di "*in-house*", per esempio, non sembra attagliarsi più a molte delle ex aziende speciali, che sempre più spesso si caratterizzano per una autonomia decisionale e per il perseguimento di finalità imprenditoriali di sviluppo industriale anche fuori dal territorio di origine, o in attività diverse dai servizi pubblici.

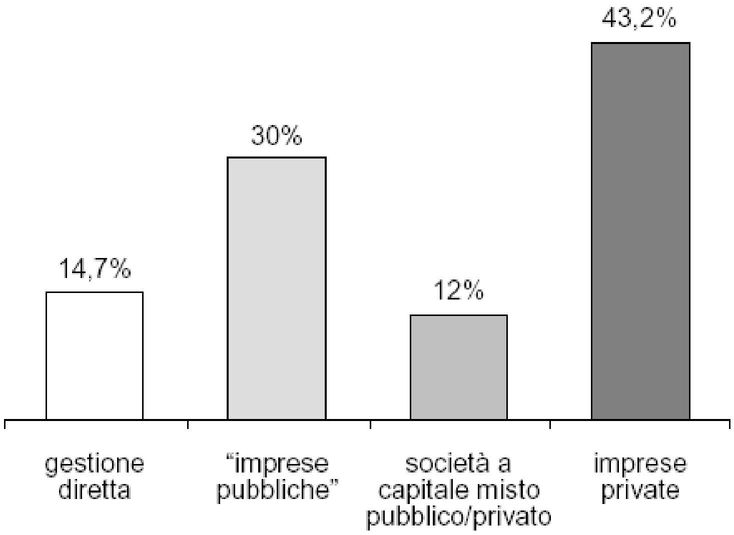
Una corretta applicazione delle norme non dovrebbe consentire che la gestione degli ATO sia affidata con modalità diverse dalla gara, eventualmente effettuata per la scelta del partner operativo.

Il continuo richiamo a nozioni comunitarie operato dal legislatore nazionale in tema di forme di gestione non potrà non determinare un più puntuale recepimento, nel campo dei servizi pubblici locali in genere, dei principi comunitari in materia di aiuti di stato e di trasparenza nelle relazioni finanziarie tra amministrazioni e imprese pubbliche (anche ai fini anche della disciplina della possibilità di operare in concorrenza). La maggiore omogeneità della legislazione nazionale rispetto a quella europea di riferimento costituisce inoltre un elemento di sostegno della legislazione nazionale stessa rispetto a possibili sviluppi a livello di normative regionali, che difficilmente, per questa ragione, potranno metterne in discussione gli aspetti fondanti.

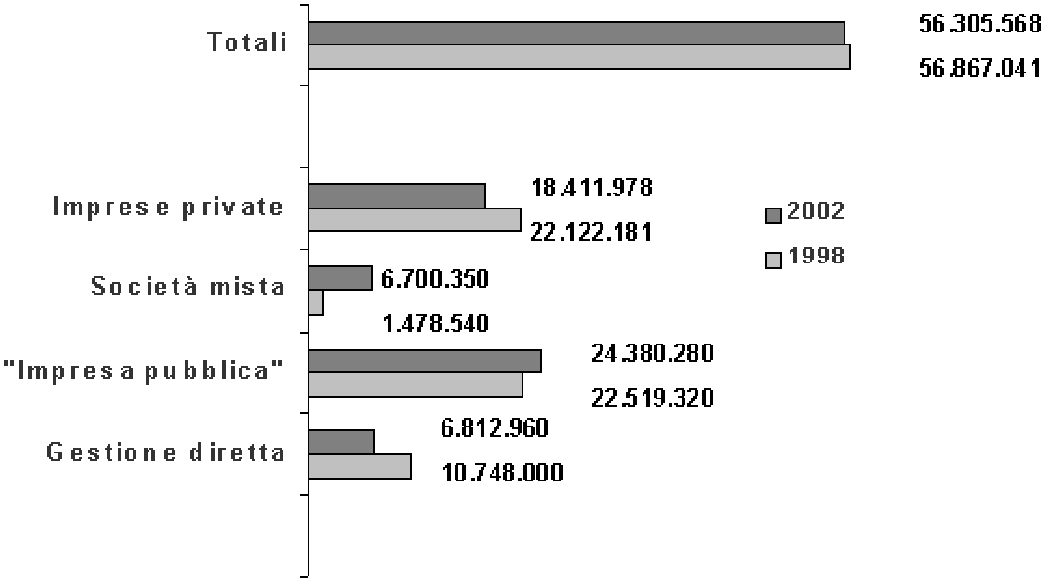
Il quadro delineato dalla riforma, ancorché scarsamente orientato verso il mercato e verso lo sviluppo industriale, dovrebbe quindi positivamente caratterizzarsi per un più alto livello di certezza giuridica, favorendo la possibilità di strategie di impresa più a lungo termine. I principi contenuti nella **"delega ambientale" dovrebbero poi costituire il quadro di riferimento specifico per il processo di industrializzazione e sviluppo dimensionale del comparto**.

L'effettività degli intenti dovrebbe però trovare una sede idonea di garanzia che verifichi l'andamento del mercato e abbia capacità di indirizzo sostenute da strumenti di intervento adeguati. Occorre evitare che la riforma attuata dal legislatore nel 2003 determini, soprattutto in una prima fase, un raffreddamento del processo di crescita del settore e del processo di realizzazione degli Ambiti Territoriali Ottimali, che fisiologicamente implicano un gestore scelto con modalità concorrenziali di dimensione sovracomunale, e quindi terzo rispetto ad ogni ente locale ed alle singole collettività,.

Sotto quest'aspetto emerge dal Rapporto - che riprende l'indagine condotta nella seconda metà del 2002 per conto di FISE Assoambiente da Field Service Italia sulle forme di gestione - **un quadro con una forte presenza di imprese private e a capitale misto,** ma ancora frenato da misure legislative e da dimensioni ad oggi ancora non adeguate a raccogliere appieno la sfida della modernizzazione



Forme di gestione della raccolta e trasporto – percentuali comuni serviti



Forme di gestione della raccolta e trasporto dei rifiuti solidi urbani: Proiezione in relazione al numero di abitanti.

La attuazione degli Ambiti Territoriali Ottimali nelle realtà regionali

La parte centrale del Rapporto è costituita dall'analisi, regione per regione, dello stato di attuazione e realizzazione degli Ambiti Territoriali Ottimali a livello provinciale. L'analisi ha approfondito gli aspetti normativi e di organizzazione dei bacini, evidenziando le diverse modalità attuative caratteristiche, individuate attraverso indagini documentali e/o sui siti di riferimento, sostenute da verifiche con le rappresentanze del sistema confederale e delle amministrazioni locali. Non si escludono scostamenti dovuti a evoluzioni non registrate dalle fonti citate o in esse riportati in modo incompleto. In alcuni casi, per non appesantire l'esposizione, alcuni dati sono stati riassunti.

VALLE D'AOSTA

Piano regionale — Approvato con DCR n. 3188/2003.

Delimitazione degli ATO — È stato realizzato un ATO unico per quanto riguarda lo smaltimento, mentre il territorio regionale è stato suddiviso in nove sottobacini, coincidenti con il territorio delle otto comunità montane e con il territorio del Comune di Aosta, per ciò che riguarda invece le operazioni di raccolta e trasporto.

Stato di attuazione — **Attuato**. Lo smaltimento è assicurato dalla Regione che è proprietaria degli impianti attraverso società a capitale misto partecipata dalla Regione stessa.

PIEMONTE

Normativa regionale	L.R. n. 24/2002
Piano regionale	DCR n. 436-11546 del 30 luglio 1997
Delimitazione degli ATO	Sono stati individuati otto ATO coincidenti con il territorio delle province alcuni dei quali sono suddivisi in bacini e per ogni bacino è prevista la realizzazione di un consorzio obbligatorio dei comuni che vi appartengono. È prevista la scissione dei consorzi presenti che mantengono esclusivamente le funzioni di governo mentre attribuiscono i complessi aziendali aventi ad oggetto l’attività di gestione in capo ad una società di capitali di nuova costituzione.
Piani provinciali	I piani provinciali sono stati tutti approvati dalla Giunta regionale, tranne il Piano di Cuneo.
Stato di attuazione	**In avanzata fase di attuazione**. La legge regionale attuativa dell’art. 35 della legge n. 448/2001 sta promuovendo un’interessante crescita imprenditoriale.

LOMBARDIA

Normativa regionale	L.R. n. 26/2003
Delimitazione degli ATO	La Regione è considerata bacino unico per quanto concerne l’autosufficienza a livello di smaltimento, mentre per l’organizzazione della raccolta e trasporto è suddivisa in 11 ATO coincidenti con il territorio delle province. In alcuni casi sono previsti dei sub-bacini di raccolta.
Piani provinciali	I piani provinciali risultano tutti approvati
Stato di attuazione	La nuova legge regionale è piuttosto recente pertanto il sistema **non risulta ancora implementato**.

TRENTINO ALTO ADIGE

Delimitazione degli ATO	La Regione è suddivisa in due ATO coincidenti con le province autonome. Il territorio di ogni provincia è a sua volta suddiviso in comprensori, enti pubblici intermedi tra provincia e comuni, che spesso non coincidono con i bacini d’utenza della gestione dei rifiuti.
Piani provinciali	I piani provinciali risultano entrambi approvati.
Stato di attuazione	**In corso di attuazione**.

VENETO

Normativa regionale	L.R. 3/2000
Piano regionale	DGR 451/2000
Delimitazione degli ATO	Sono presenti sette ambiti coincidenti con il territorio delle province.
Piani provinciali:	Tutte le province hanno provveduto all'adozione dei Piani che risultano tuttavia non ancora approvati a livello regionale.
Stato di attuazione	**Meramente formale**. Sono presenti enti di bacino a livello subprovinciale costituiti in base al previgente piano regionale.

FRIULI VENEZIA GIULIA

Normativa regionale	L.R. n. 30/1987
Piano regionale	Adottato con DPGR 44/01
Delimitazione degli ATO	Sono stati individuati quattro ATO coincidenti con il territorio delle province. Non sono previsti sub ambiti, tranne per il caso del Bacino 2 – Udinese, dove, secondo le previsioni del Piano, in fase attuativa ed ai soli fini organizzativi, la Provincia stessa provvederà alla individuazione di sub-bacini.
Piani provinciali	Solo la Provincia di Pordenone ha già adottato il Programma attuativo del Piano regionale; le altre province stanno ancora portando avanti l'iter di approvazione.
Stato di attuazione	**In corso di attuazione.**

LIGURIA

Normativa regionale	L.R. n. 18/1999
Piano regionale	Adottato con DCR 17/2000
Delimitazione degli ATO	Sono stati individuati quattro ATO coincidenti con il territorio delle province, le quali possono tuttavia prevedere, attraverso i Piani provinciali, gestioni a livello sub-provinciale, purché, anche in tali ambiti, sia superata la frammentazione della gestione.
Piani provinciali:	Tutti i Piani provinciali di gestione dei rifiuti sono stati adottati
Stato di attuazione	**In corso di attuazione**.

EMILIA ROMAGNA

Normativa regionale	L.R. n. 25/1999, modificata con L.R. n. 1/2003
Delimitazione degli ATO	Il territorio è suddiviso in nove ambiti coincidenti con le province e con l'area metropolitana di Bologna.
Stato di attuazione	**Attuato**. Molto avanzata la realizzazione di gestioni unitarie per ambiti, caratterizzata dalla concentrazione di imprese pubbliche già operanti sul territorio.

TOSCANA

Normativa regionale	L.R. n. 25/1998; attualmente è in discussione un progetto di modifica, rilevante sotto il profilo delle forme di gestione
Piano regionale	DCR n. 88/1998
Delimitazione degli ATO	Sono presenti dieci ATO, per lo più coincidenti con le province.
Piani provinciali:	Tutti adottati, alcuni in fase di modifica.
Stato di attuazione	**Attuato**. Sistema avanzato, con un ridotto numero di gestori, spesso a capitale misto, nel territorio della regione.

UMBRIA

Normativa regionale	L.R. n. 14/2002
Piano regionale	Adottato con DCR 226/2002
Delimitazione degli ATO	Sono stati individuati quattro ATO che non corrispondono al territorio delle province, in quanto, sulla base delle esperienze maturate durante la vigenza del previgente Piano regionale, si è individuata una scala ottimale di gestione di dimensione inferiore al territorio provinciale.
Piani provinciali	Spetta agli ATO predisporre dei Piani di gestione conformi agli indirizzi del D.lgs n. 22/1997 e a quanto stabilito dal Piano regionale.
Stato di attuazione	**In corso di attuazione,** ma sconta una certa carenza di strumenti che ne stimolino l'attuazione

MARCHE

Normativa regionale	L.R. n. 28/1999
Piano regionale	Adottato con DCR 284/99
Delimitazione degli ATO	Sono stati individuati quattro ATO coincidenti con il territorio delle province, i quali vengono a loro volta articolati dai Piani provinciali in Bacini di recupero e smaltimento ed Aree di raccolta.
Piani provinciali	Tutti i Piani provinciali di gestione dei rifiuti sono stati adottati.
Stato di attuazione	**In corso di attuazione**. I consorzi obbligatori sono stati costituti solo a Macerata.

LAZIO

Normativa regionale	L.R. n. 27/1998; Regione in emergenza: stato di emergenza prorogato sino al 31 dicembre 2004, con D.P.C.M. del 23 gennaio 2004.
Piano regionale	Adottato con DCR n. 112/2002; Piano di emergenza del 15 giugno 2003.
Delimitazione degli ATO	Sono stati individuati cinque ATO coincidenti con il territorio delle province. Negli ATO di Roma e Latina sono stati individuati rispettivamente sei e tre sub-bacini.
Piani provinciali:	Tutti approvati tranne quello della Provincia di Frosinone.
Stato di attuazione:	**Meramente formale**

ABRUZZO

Normativa regionale	L.R. n. 83/2000
Piano regionale	Allegato alla L.R. n. 83/2000
Delimitazione degli ATO	Sono stati individuati quattro ATO coincidenti con il territorio delle province. In conseguenza dei tre livelli di governo stabiliti nel Piano regionale (ATO, Bacino di smaltimento, Area di raccolta), sono state previste forme di cooperazione tra i comuni ricadenti in ciascun ATO o in ciascun sub-ambito. I Consorzi presenti ricalcano quelli previsti dalla legge previgente.
Piani provinciali:	Solo le Province di Teramo e Chieti hanno approvato i Piani provinciali.
Stato di attuazione	**Non attuato**; a livello locale persistono situazioni diversificate in quanto alcuni comuni non aderiscono ai consorzi presenti o, pur aderendo, organizzano comunque in maniera autonoma la gestione dei rifiuti

MOLISE

Normativa regionale	L.R. n. 25/2003
Piano regionale	Ancora in vigore la L.R. 8 marzo 1984, n. 6, con la quale la Regione ha approvato il Piano regionale. Il Piano risulta aggiornato con DCR n. 10/2001, recante l'approvazione del Piano di emergenza dei rifiuti urbani nella Regione Molise.
Delimitazione degli ATO	Sono stati individuati tre ATO non coincidenti con il territorio delle province. All'interno di ciascun ATO sono stati individuati sottoambiti di riferimento.
Piani provinciali:	Il Piano provinciale di gestione dei rifiuti della provincia di Isernia risulta in fase di approvazione.
Stato di attuazione	**Non attuato**.

CAMPANIA

Normativa regionale	Regione in emergenza dal 1994 - L.R. n. 10/1993
Piano regionale	Piano del 31/12/1996, aggiornato con ord. 2/5/1997 e modificato sostanzialmente con ord. commissariale 319 del 30/9/2002
Delimitazione degli ATO	Identificati formalmente con il territorio delle province ai fini dello smaltimento e dell'organizzazione amministrativa (due sub-ambiti per Napoli); sono previsti 18 consorzi ex L.R. 10/93; la gestione della raccolta è demandata ai soggetti di cooperazione, mentre la gestione post-racccolta agli EPAR, Ente provinciale d'ambito; per lo smaltimento finale sono previsti termovalorizzatori gestiti da soggetti privati.
Stato di attuazione	**Sostanzialmente paralizzata**, anche per effetto di impugnative giudiziarie, l'efficacia dell'ord. 319; tuttora irrisolto il problema dell'autosufficienza regionale nello smaltimento.

PUGLIA

Normativa regionale	In emergenza dal 1994 – L.R n. 17/93 e 13/96
Piano regionale	Piano 6/3/2001, DPRG n. 41/2001, integrato con decreto n. 269/2002
Delimitazione degli ATO	15, ripartiti per le 5 province; prevista la costituzione di Autorità di bacino
Stato di attuazione	**In corso di attuazione**; a fine 2003 avviate le procedure di gara per buona parte dell'impiantistica finale prevista a superamento del sistema discarica.

BASILICATA

Normativa regionale	L.R. n. 6/2001
Piano regionale	Approvato contestualmente alla legge regionale.
Delimitazione degli ATO	Sono stati individuati due ATO coincidenti con il territorio delle province.le caratteristiche del territorio e la distribuzione della popolazione hanno favorito la suddivisione degli ATO in sub-bacini autosufficienti dal punto di vista dello smaltimento.
Piani provinciali:	Entrambe le province della Basilicata hanno predisposto il Piano provinciale di organizzazione della gestione dei rifiuti.
Stato di attuazione	**Formalmente attuato**, ma gli impianti sono ancora in corso di realizzazione

CALABRIA

Normativa regionale	In emergenza dal 1997
Piano regionale	Approvato nel 2001
Delimitazione degli ATO	5 ATO corrispondenti alle province – 14 sub-bacini, con gestione da parte di società miste di bacino della raccolta differenziata, non esclusa peraltro la gestione integrata.
Stato di attuazione	**In avanzato stato di attuazione**.

SARDEGNA

Piano regionale	Approvato con DGR n. 57/2 del 17 dicembre 1998.
Delimitazione degli ATO	Gli Ambiti coincidono con le province; le modalità organizzative e gestionali di ciascun ATO devono essere esplicate attraverso sub-ambiti; i comuni devono convenzionarsi, per la costituzione di consorzi per la gestione unitaria.
Piani provinciali:	Sono in fase di predisposizione i Piani provinciali di Oristano e Sassari.
Stato di attuazione	**Non attuato**: i servizi consortili coinvolgono solo una piccola parte dei comuni, con una popolazione solo dell’8% su base regionale.

SICILIA

Normativa regionale	In emergenza dal 1999
Piano regionale	Adottato con ord. comm. 1166/2002
Delimitazione degli ATO	In teoria coincidenti con le 9 province – Ai fini dello smaltimento si prevede peraltro una dimensione sovraprovinciale – 4 termovalorizzatori – e ai fini della raccolta sono istituiti 25 (poi divenuti 27) sub-ambiti, con gestione da parte di S.p.A. d’ambito.
Piani provinciali:	Piani predisposti dalle S.p.A. d’ambito nel 2003.
Stato di attuazione	**In corso di attuazione** – le S.p.A. d’ambito sono già costituite.

Emergono anche dal suesposto quadro riassuntivo le interessanti e stimolanti disomogeneità e differenze tra regioni, a riprova di un “federalismo” sostanziale, con valore positivo per gli stimoli che ne derivano, anche se vi sono situazioni di inefficienza che devono essere poi sanate da interventi esterni, come si è verificato nelle regioni dichiarate in **stato di emergenza**.

Tra gli elementi da considerare, lo sviluppo delle società miste, sia con riferimento agli impianti che alla gestione dei servizi; significative in merito esperienze come quelle della **Calabria,** che ha promosso la costituzione di società miste per la gestione delle raccolte differenziate, creando realtà industriali sul territorio prima non esistenti per realizzare attività che non erano effettuate in maniera sufficiente. Da rilevare che le società miste si realizzano nel settore sia come società nuove che per effetto della privatizzazioni di società esistenti, e sono presenti soprattutto nel Centro Italia.

Significativo, sotto altro profilo, quanto si sta verificando in **Piemonte** per effetto del recepimento a livello regionale della riforma contenuta nell’art. 35 della legge n. 48/2001, con una separazione tra funzioni di controllo e regolazione amministrativa rispetto alla gestione operativa, che sta comportando un interessate, anche se non ancora consolidato, sviluppo imprenditoriale.

Peraltro in molte regioni, non solo del Sud e delle Isole, la presenza percentualmente importante di imprese private si accompagna a una persistente frammentazione gestionale. Occorrerà pertanto che i processi di sviluppo non penalizzino l’imprenditoria locale perseguendo logiche di concentrazione che risulterebbero anticoncorrenziali.

Le conclusioni

Conclude il Rapporto un’analisi economica – curata da CLES S.r.l. con la supervisione scientifica del Prof. Paolo Leon - volta ad approfondire le implicazioni degli Ambiti Territoriali Ottimali, valutare le prospettive del mercato ambientale, con riferimento sia alla gestione dei servizi che degli impianti, e delineare linee di indirizzo per gli operatori economici e le amministrazioni interessate.

Emerge, da alcune prime analisi comparate, che la **concorrenza per il mercato**, volta a individuare il gestore, è spesso più efficace ed efficiente di una liberalizzazione totale dei servizi, che possono essere offerti da una pluralità di operatori in concorrenza tra loro nel medesimo ambito.

Da un punto di vista empirico appare quindi opportuno ed economicamente conveniente affidare la raccolta dei rifiuti ad unico operatore per ciascun ambito o sub ambito territoriale al fine di non duplicare i costi del servizio. La gestione dei rifiuti è quindi di fatto un monopolio naturale contendibile e la concorrenza si può sviluppare in linea di massima solo tra soggetti che si contendono l’affidamento del servizio o dei diversi servizi che compongono la attività. E’ quindi corollario che il regolatore disponga di tutte le informazioni necessarie per regolamentare efficacemente il settore, evitando il determinarsi di distorsioni in termini di efficienza allocativa.

L’analisi si conclude individuando o confermando alcuni punti fermi che sono le premesse di nuovi approfondimenti e di nuovi sviluppi:

1. **L'attuazione degli ATO è necessaria**. Pur con tutte le particolarità e i distinguo che si è cercato di evidenziare, l'unico elemento certo è rappresentato proprio dalla opportunità di accelerare il processo di formazione degli ATO, come precondizione necessaria – seppure non sufficiente – allo sviluppo di un mercato più competitivo ed efficiente. Se la possibilità di massimizzare le economie di scala attraverso l'identificazione della "giusta dimensione" degli ATO non è agevole la definizione di ATO adeguati contribuisce comunque ad accrescere l'efficienza del sistema.

2. **Realizzare gli ATO è possibile**. Le leggi e i piani regionali prevedono tutti la costituzione di ATO, ovvero ne delegano la perimetrazione alle Province. I Piani provinciali attribuiscono quasi tutti agli ATO ruoli precisi nel campo delle localizzazione e del dimensionamento degli impianti di smaltimento e in molti casi sono previste anche forme di consorzio obbligatorio dei comuni per effettuare la raccolta o procedere al suo affidamento. Lo scarso grado di attuazione non sembra per lo più imputabile a carenze normative – o di pianificazione – se non per il fatto che le leggi regionali sui rifiuti in genere non prevedono strumenti di enforcement (incentivi o penalizzazioni analoghi a quelli che la legge nazionale prevede per esempio per il conferimento in discarica – con lo scopo di incentivare la RD e gli impianti tecnologici –; oppure poteri sostitutivi in caso di inerzia dei comuni o dei consorzi).

3. **L'attuazione degli ATO non è sufficiente**. La costituzione degli ATO – anche laddove sta avvenendo - non sempre sta portando alla nascita di un sistema realmente competitivo. Per ciò che riguarda i servizi di raccolta e trasporto dei rifiuti sembra riscontrabile una tendenza da parte dei nuovi ATO o sub ATO a confermare l'affidamento diretto alle società pubbliche o miste che erano già in precedenza affidatarie del servizio. Maggiori spazi di mercato per i privati sembrerebbero viceversa aprirsi nel campo della realizzazione e/o gestione degli impianti di trattamento e smaltimento dei rifiuti.

4. **Quello degli ATO non è comunque un mercato unico**. E' opportuno che il concetto di ATO venga chiaramente distinto in due livelli: raccolta - ed eventualmente impianti di trattamento intermedio – e impianti finali (discarica e inceneritori): il primo livello a carattere subprovinciale (in linea di massima); il secondo a carattere provinciale o interprovinciale. Questo permette una razionalizzazione (selezione e/o concentrazione) degli operatori della raccolta a livelli ottimali – o comunque non antieconomici – senza legarla alla disponibilità di impianti tecnologici complessi (inceneritori) o di difficile localizzazione (discariche) che lascerebbero uno spazio eccessivo agli operatori già presenti.

5. **Le soluzioni gestionali vanno ancora "studiate"**. Il D.Lgs. 22/97 e s.m.i. prescrive la costituzione degli ATO e la gestione comune dei rifiuti urbani da parte dei comuni inclusi nel suo perimetro, senza però indicarne le forme. I modelli gestionali presenti nelle diverse realtà territoriali del nostro Paese (gestore unico integrato verticalmente/frammentazione delle gestioni; affidamento della gestione dei servizi ad imprese pubbliche, private o miste) sono pertanto il risultato di scelte in gran parte operate in ciascun contesto regionale e locale e quindi influenzate da fattori di natura politica, sociale ed economica. A ciò si aggiunga il fatto che molte Regioni meridionali (Puglia, Campania, Sicilia, Calabria) ma anche del Centro (Lazio) si trovano attualmente in uno stato di emergenza, che si protrae purtroppo da diversi anni. Appare quindi opportuna una più approfondita analisi comparata dei livelli di produttività, efficacia ed efficienza dei diversi modelli gestionali per evidenziare e/o confermare gli aspetti caratteristici più rilevanti o più complessi.

6. **Quale mercato e con quali regole?** Il criterio del massimo ribasso, frequentemente utilizzato in sede di gara, sembra destinato a privilegiare le imprese meno dotate dal punto di vista delle professionalità, delle attrezzature, e in qualche caso della stessa regolarità. Orientare la selezione verso **l'offerta economica più vantaggiosa** comporta invece una valutazione delle competenze progettuali, tecniche, organizzative e di programmazione delle imprese concorrenti, favorendo le più strutturate e innovative (anche nella raccolta c'è un amplissimo spazio di innovazione, non tanto nei mezzi, quanto nell'impiego di ICT e di sistemi georeferenziati (SIT) nella programmazione dei percorsi di raccolta e nella gestione degli uomini e dei mezzi. Ma soprattutto in questo modo si possono selezionare e stimolare migliori competenze tecniche nella gestione degli impianti.

Lo sviluppo dimensionale delle imprese connesso con la realizzazione degli ATO incrementerà il ricorso a appalti/subappalti da parte del gestore di riferimento: occorrerà introdurre regolazioni e controlli per assicurare trasparenza ed adeguate garanzie ed evitare che venga ribaltato sul subfornitore l'onere di perseguire a tutti i costi il risparmio economico.

Regione Emilia Romagna

La normativa

La Regione Emilia Romagna ha provveduto a dare specifica attuazione alle disposizioni del D.Lgs. n. 22/1997 in materia di Ambiti Territoriali Ottimali, attraverso l'adozione della L.R. n. 25/1999, concernente la "Delimitazione degli ambiti territoriali ottimali e la disciplina delle forme di cooperazione tra gli Enti locali per l'organizzazione del servizio idrico integrato e del servizio di gestione dei rifiuti urbani".

L'articolo 2 di tale legge, recentemente modificata con L.R. n. 1/2003, ha individuato, in corrispondenza con il territorio di ciascuna Provincia e con l'Area metropolitana di Bologna, i seguenti nove ambiti:

- Ambito Territoriale Ottimale di Piacenza
- Ambito Territoriale Ottimale di Parma
- Ambito Territoriale Ottimale di Reggio Emilia
- Ambito Territoriale Ottimale di Modena
- Ambito Territoriale Ottimale di Bologna
- Ambito Territoriale Ottimale di Ferrara
- Ambito Territoriale Ottimale di Ravenna
- Ambito Territoriale Ottimale di Forlì-Cesena
- Ambito Territoriale Ottimale di Rimini

I comuni e le province di ciascun ATO, hanno poi provveduto a costituire una forma di cooperazione per la rappresentanza unitaria degli interessi degli enti locali associati e per l'esercizio unitario di tutte le funzioni amministrative spettanti ai comuni, scegliendo tra le forme della convenzione e quella del consorzio di funzioni. Le forme di cooperazione così definite, l'ultima delle quali costituita già nell'ottobre del 2002, esercitano le proprie funzioni come Agenzia di ambito per i servizi pubblici, avente personalità giuridica di diritto pubblico.

L'Agenzia è dunque il nuovo soggetto pubblico cui compete l'organizzazione, in forma associata, del servizio di gestione dei rifiuti urbani su scala provinciale, al fine di garantirne la gestione unitaria secondo criteri di efficienza, efficacia ed economicità, nel rispetto dell'ambiente e del territorio. All'Agenzia compete l'esercizio unitario delle funzioni amministrative di organizzazione, regolazione e vigilanza di tale servizio pubblico, precedentemente svolte dai singoli comuni, con esclusione di ogni attività di gestione diretta del servizio medesimo. Ad essa spetta inoltre la scelta della forma di gestione e la definizione dei rapporti con i gestori dei servizi anche per quanto attiene alla relativa instaurazione, modifica o cessazione.

Ai sensi dell'art. 16 della L.R. n. 25/1999, al fine di superare la frammentazione delle gestioni e razionalizzare l'organizzazione del servizio, le Agenzie, entro diciotto mesi dalla loro istituzione, devono effettuare le necessarie ricognizioni per individuare le gestioni esistenti che operano in coerenza con le previsioni del Piano provinciale di gestione e che rispondono ai criteri di efficienza, efficacia ed economicità. Le gestioni che non rispondono a tali requisiti e le gestioni dirette devono essere superate attraverso la confluenza in quelle ammesse o attraverso l'individuazione di un nuovo soggetto gestore.

Le Agenzie provvedono successivamente a stipulare, con le gestioni salvaguardate, una convenzione per la gestione del servizio nel periodo di transizione, la quale, a seconda dei parametri fissati dallo stesso articolo, può avere una durata variabile dai tre ai dieci anni. In particolare le convenzioni hanno la durata di cinque anni qualora stipulate con un soggetto derivante dalla fusione di almeno due delle gestioni esistenti e salvaguardate, e di dieci anni qualora stipulate con un gestore che effettui il servizio per almeno il settantacinque per cento della popolazione dell'Ambito. Nei sei mesi antecedenti la scadenza della convenzione l'Agenzia espleta le procedure per l'affidamento del servizio di gestione dei rifiuti urbani ai sensi della normativa vigente.

Queste disposizioni assumono particolare rilievo se si considera che l'Emilia Romagna si caratterizza per la forte presenza di imprenditoria pubblica (di origine municipale, con molti casi di gestione pluriservizio), la quale risulta predominante sia rispetto al privato, sia in riferimento alle gestioni in economia, oramai in progressiva diminuzione. Nel tempo è inoltre cresciuta l'estensione territoriale di impresa e dunque la dimensione dei servizi stessi; tale tendenza si sta ulteriormente sviluppando in questo periodo grazie ad una politica industriale di alleanze e di aggregazione delle imprese.

Tra queste va rammentata in particolare la recente costituzione di Hera Holding S.p.A., dal 1° novembre 2002, frutto dell'unione di 12 imprese[1]. E' interessante poi notare l'evoluzione in corso nel versante ovest della Regione, dove si stanno realizzando accordi e varie forme di alleanze che potrebbero portare nel medio termine anche alla costituzione di un secondo importante polo gestionale di gestione dei rifiuti. Infatti AGAC di Reggio Emilia si è aggiudicata il 40% di Tesa S.p.a., di cui il Comune di Piacenza è il socio di maggioranza (58%).

Come vedremo meglio in seguito tuttavia, non tutte le Agenzie hanno ultimato le ricognizioni, e conseguentemente in alcuni Ambiti Territoriali Ottimali non sono ancora state stipulate le convenzioni per la gestione del servizio relativo ai rifiuti

[1] AMF (Faenza), Ami (Imola), Amia (Rimini), Amir (Rimini), Area (Ravenna), Asc (Cesenatico), Geat (Riccione), Seabo (Bologna), Sis (S. Giovanni in Marignano), Taularia (Imola), Team (Lugo) e Unica (Forlì – Cesena), a cui di recente si è aggiunta l'acquisizione (42%) dell'Agea di Ferrara.
La nuova società e stata suddivisa in cinque società operative:
- Hera Bologna S.r.l.: è la società operativa territoriale che opera nel territorio servito dall'ex Seabo S.p.A. nella Provincia di Bologna. Comuni serviti: 49.
- Hera Ami S.r.l.: è la società operativa nata dalla fusione della Amf (Faenza) e di Ami (Imola). Comuni serviti : 25.
- Hera Ravenna S.r.l.: ricopre il territorio precedentemente servito da Area e Team. Comuni serviti: 12
- Hera Forlì-Cesena S.r.l.:Questa società ricopre il territorio di Unica S.p.A. (nata dalla fusione di Cis, Aura e Amga) e di Asc Cesenatico. Comuni serviti: 30.
- Hera Rimini S.r.l.: sono confluite AMIA S.p.A., AMIR S.p.A., SIS S.p.A. e dal 1° luglio 2003 anche Geat S.p.A. Comuni serviti: 35 (di cui 15 nella provincia di Pesaro-Urbino).

urbani. L'art. 16, L.R. n. 25/1999 prevede comunque che, qualora l'Agenzia non provveda entro diciotto mesi dalla sua istituzione, la Giunta regionale, previa diffida ad adempiere nel termine di trenta giorni, può nominare un commissario ad acta per provvedere agli adempimenti necessari.

In ogni caso, con la stipula della convenzione, l'Agenzia subentra ai comuni nel rapporto con le forme di gestione ed organizza le attività del servizio nel rispetto delle previsioni dei Piani provinciali di gestione dei rifiuti. E' da notare che l'art. 18 bis della L.R. n. 25/1999, prevede la possibilità, per il gestore affidatario, di effettuare il servizio pubblico anche a mezzo di società operative da esso controllate maggioritariamente. In tale caso l'eventuale scelta del socio privato delle società operative è effettuata attraverso procedure ad evidenza pubblica e il rispetto delle clausole della convenzione è garantita da un disciplinare d'obbligo predisposto dall'Agenzia di ambito.

Gli Ambiti Territoriali Ottimali

Piacenza

I 48 comuni e la Provincia di Piacenza si sono costituiti in Consorzio nell'ottobre del 2002, ma l'Agenzia d'ambito non ha ancora ultimato le ricognizioni previste dall'art. 16 della L.R. n. 25/1999. Attualmente la gestione dei servizi di raccolta dei rifiuti urbani e differenziati nell'ATO di Piacenza è dunque realizzata con due modalità principali, rispettivamente in economia ed attraverso una società per azioni a prevalente capitale pubblico.

Gestione	Forma giuridica	Numero Comuni serviti	Popolazione servita	Percentuale popolazione
Tesa	S.p.A.	43	258.665	98,2%
In economia		5	4.644	1,8%

Dati Relazione annuale sullo stato dei servizi idrici, di gestione dei rifiuti urbani e sull'attività svolta – Anno 2003 – Autorità regionale per la gestione dei servizi idrici e di gestione dei rifiuti urbani – Regione Emilia Romagna [2]

Tesa S.p.A. è attualmente controllata dal Comune di Piacenza (58% delle azioni) ed è partecipata da AGAC S.p.A (40% delle azioni) e dal Consorzio Ambientale Pedemontano (2% delle azioni). La presenza di TESA S.p.A. nei comuni della Provincia è molto variegata rispetto alla tipologia di servizi offerti. Eccettuato il capoluogo, infatti, ciascun comune ha scelto di stipulare o meno convenzioni per ciascun servizio di raccolta differenziata.

Di conseguenza, TESA S.p.A. svolge in alcuni comuni della Provincia tutti i servizi di raccolta, in altri solo quelli per alcune frazioni. Anche per quanto riguarda le isole ecologiche, in alcuni casi TESA S.p.A. si fa carico dell'intera gestione mentre in altri svolge il solo servizio di svuotamento dei contenitori e trasporto dei materiali.

[2] I dati della presente così come delle successive tabelle sono tratti dalla Relazione annuale sullo stato dei servizi idrici, di gestione dei rifiuti urbani e sull'attività svolta – Anno 2003 – Autorità regionale per la gestione dei servizi idrici e di gestione dei rifiuti urbani – Regione Emilia Romagna. Si richiamano anche gli elaborati dell'Osservatorio sui Servizi Pubblici della Regione.

Parma

La forma di cooperazione scelta dai comuni e dalla Provincia di Parma è il Consorzio, costituito nell'ottobre del 2002. Anche in questo Ambito Territoriale Ottimale sono ancora in corso le ricognizioni per individuare le gestioni esistenti che operano in coerenza con le previsioni del Piano provinciale di gestione e che rispondono ai criteri di efficienza, efficacia ed economicità.

La situazione attuale relativamente al servizio di gestione dei rifiuti urbani è dunque la seguente:

Gestione	Forma giuridica	Numero Comuni serviti	Popolazione servita	Percentuale popolazione
AMPS	S.p.A.	25	270.129	70,2%
Oppimitti	S.r.l.	15	46.103	12%
Manutencoop	Soc. Coop.	2	41.230	10,7%
AGAC	S.p.A.	4	25.347	6,6%
Economia	-	1	2.180	0,5%

AMPS S.p.A. è una azienda multiutility, nata come azienda municipalizzata e trasformata in società per azioni nel 1998 e parzialmente privatizzata[3].

Reggio Emilia

Gli Enti locali della Provincia di Reggio Emilia hanno provveduto ad associarsi tramite la forma della Convenzione già nel dicembre del 2001. L'Agenzia d'ambito dell'ATO di Reggio Emilia sta tuttavia ancora ultimando le ricognizioni per il servizio di gestione dei rifiuti urbani. La situazione attuale è dunque la seguente:

Gestione	Forma giuridica	Numero Comuni serviti	Popolazione servita	Percentuale popolazione
AGAC	S.p.A.	37	402.561	85,9%
SABAR	S.p.A	8	66.173	14,1%

AGAC Servizi energetici e ambientali è la Società per azioni di proprietà di tutti i 45 Comuni della Provincia di Reggio Emilia. E' stata costituita il 1 febbraio 2001, dalla trasformazione del Consorzio AGAC, ed è operante dal 1974. Serve 41 comuni, 37 della Provincia di Reggio Emilia e 4 della Provincia di Parma.

SABAR S.p.A. invece è l'azienda degli 8 Comuni della Bassa Reggiana che dal 1° ottobre 1994 gestisce i servizi ambientali nel territorio di riferimento.

Modena

Il Consorzio dell'ATO di Modena è stato costituito il 18 marzo del 2003. Dalle ricognizioni effettuate dall'Agenzia d'ambito è emerso che le gestioni effettuate da

[3] L'attuale assetto societario di AMPS S.p.A. vede come azionista di maggioranza il Comune di Parma (64,29%), seguito dalla LDV Holding B.V. (San Paolo IMI – 17,31), dalla Edizioni Holding S.p.A. (Gruppo Benetton – 17,31%) e dal Comune di Noceto (1,03%).

META S.p.A. nel settore del ciclo dei rifiuti urbani presentano i requisiti di salvaguardabilità di cui all'art. 16 della L.R. n. 25/1999.
I comuni che effettuavano una gestione diretta possono dunque affidarle, previo consenso dell'Agenzia, la gestione del ciclo dei rifiuti o suoi segmenti, anche anticipatamente rispetto alla stipula delle relative convenzioni.

META S.p.A. è una società per azioni a prevalente capitale pubblico nata dall'unificazione di due aziende municipalizzate modenesi, l'AMIU che operava nel settore ambientale e l'AMCM attiva nel settore energetico. I suoi principale azionisti sono i Comuni di Modena, Castelfranco, Vignola, Pavullo nel Frignano e Spilamberto, nonché la Carimonte Holding S.p.A. ed altri azionisti privati. AIMAG S.p.A. invece, nata nel 1970 come azienda speciale del Consorzio tra i Comuni di Mirandola, San Felice e Cavezzo, si è trasformata in Società per azioni il 1° gennaio 2001.

Gestione	Forma giuridica	Numero Comuni serviti	Popolazione servita	Percentuale popolazione
META	S.p.A.	29	366.822	58,4%
AIMAG	S.p.A.	10	134.472	21,4%
SAT	S.p.A.	5	105.335	16,8%
Sorgea	S.r.l.	1	15.117	2,4%
Economia	-	2	6.434	1,0%

Bologna

I sessanta comuni e la Provincia di Bologna si sono associati tramite Convenzione nel gennaio del 2002. L'Agenzia d'ambito per i servizi pubblici dell'ATO di Bologna ha terminato la ricognizione amministrativa, infrastrutturale, gestionale ed economico-finanziaria del servizio gestione rifiuti urbani ed ha concluso per la salvaguardabilità di HERA S.p.A. La durata della convenzione da stipularsi con tale società non è stata ancora determinata, ma verrà stabilita solo in seguito all'accertamento dei parametri di cui all'art. 16 della L.R. n. 25/1999.

Gestione	Forma giuridica	Numero Comuni serviti	Popolazione servita	Percentuale popolazione
Hera	S.p.A	32	719.355	79%
Co.se.a Ambiente	S.p.A.	14	55.169	6,1%
Manutencoop	Soc.Coop. a.r.l.	1	15105	1,6%
Brodolini	S.r.l.	3	29.150	3,2%
Tuttoservizi	S.p.A.	1	3.613	0,4%
CUTI	Soc.Coop. a.r.l.	1	5.177	0,6%
CMV	S.r.l.	1	6.653	0,7%
Economia		7	76.370	8,4%

Hera Bologna S.r.l. è una delle cinque società operative territoriali interamente controllate dalla capogruppo Hera S.p.A., la quale definisce le linee strategiche e coordina le attività operative a livello centrale. Le Società Operative Territoriali, ciascuna nelle aree geografiche di propria competenza, hanno il compito di eseguire le attività operative connesse ai servizi pubblici offerti dal Gruppo HERA.

Il CO.SE.A. Consorzio Servizi Ambientali è un Ente pubblico economico nato nel 1993 dalla trasformazione del "Consorzio per la gestione della discarica controllata dell'Appennino Bolognese", è costituito da 22 comuni associati di cui 7 nella Regione Toscana (Provincia di Pistoia) e 15 nella Regione Emilia-Romagna (Provincia di Bologna). E' strutturato come Ente pubblico a struttura aziendale e si è ormai definitivamente affermato come Consorzio interregionale multiservizi che opera su tutta l'area appenninica posta a cavallo delle due province, quella bolognese e quella pistoiese.

Ferrara

Gli enti locali della provincia di Ferrara si sono associati tramite convenzione nell'aprile del 2002, ma l'Agenzia d'ambito non si è ancora insediata. Non sono di conseguenza iniziate le ricognizioni per verificare le gestioni esistenti che operano in coerenza con le previsioni del Piano provinciale di gestione e che rispondono ai criteri di efficienza, efficacia ed economicità.

La situazione attuale nel territorio dell'ATO di Ferrara è dunque la seguente:

Gestione	Forma giuridica	Numero Comuni serviti	Popolazione servita	Percentuale popolazione
AREA	S.p.A.	17	102.255	29,5%
CMV Servizi	Azienda speciale	3	40.114	11,6%
AGEA	S.p.A.	1	131.408	37,9%
Soglia (dal 01.07.01)	Azienda speciale	4	21.716	6,2%
Economia	-	4	51.227	14,8%

Ravenna

I diciotto comuni e la Provincia di Ravenna si sono associati tramite convenzione già nel luglio del 2000. Dalle ricognizioni effettuate dall'Agenzia d'ambito è emerso che tutte le gestioni esistenti risultano salvaguardabili in quanto, almeno il 60% dei parametri relativi alle tre macro aree in cui è stata divisa l'analisi, rientra all'interno dei valori- limite definiti per il riconoscimento della salvaguardia.

Sono state considerate meritevoli di salvaguardia le seguenti gestioni:

- AMF S.p.A.;
- AMI S.p.A.;
- AREA S.p.A.;
- TEAM S.p.A.

L'assemblea ha approvato all'unanimità le "salvaguardie" in data 14 marzo 2002, senza disporre nulla sulla durata delle stesse. Tutte e quattro le società sono confluite in HERA S.p.A, operativa nel settore delle multiutility dal 1° novembre 2002, che è divenuta titolare di tutti i rapporti contrattuali in essere.

Gestione	Forma giuridica	Numero Comuni serviti	Popolazione servita	Percentuale popolazione
Hera	S.p.A.	18	356.903	100%

Forlì – Cesena

I trenta comuni e la Provincia di Forlì-Cesena si sono associati tramite convenzione nel novembre del 2000. L’Agenzia d’ambito ha terminato l’istruttoria nel gennaio del 2003, concludendo per la “salvaguardabilità” di HERA S.p.A, la quale ricopre ora il territorio di Unica S.p.A. (nata dalla fusione di Cis, Aura e Amga) e di Asc Cesenatico.

Gestione	Forma giuridica	Numero Comuni serviti	Popolazione servita	Percentuale popolazione
Hera	S.p.A.	27	348.895	97,1%
Sogliano Ambiente	S.p.A.	3	10.496	2,9%

Rimini

I venti comuni e la Provincia di Rimini si sono costituiti in consorzio nel settembre del 2000. Le ricognizioni effettuate dall’Agenzia d’ambito hanno rilevato che AMIA S.p.A. e GEAT S.p.A. sono gestioni salvaguardabili, poiché rispondono alle previsioni del piano provinciale di gestione, nonché ai criteri di efficienza, efficacia ed economicità, così come stabilito dall’art. 16 della LR n. 25/1999.

L’Agenzia di ambito ha inoltre rilevato che AMIA S.p.A. effettua il servizio sul 75% della popolazione dell’ambito, ed ha quindi deliberato di concederle la salvaguardia del ciclo integrato rifiuti per la durata di 10 anni a decorrere dalla stipula della convenzione. L’11 marzo 2002, l’Assemblea dell’ATO ha infine deliberato la concessione della salvaguardia per il servizio gestione rifiuti solidi urbani a GEAT S.p.A. per la durata di 3 anni dalla stipula della convenzione. Dal 1° novembre 2002 entrambe le Società sono confluite in HERA S.p.A., che è dunque divenuta titolare di tutti i rapporti contrattuali in essere.

Gestione	Forma giuridica	Numero Comuni serviti	Popolazione servita	Percentuale popolazione
Hera	S.p.A.	20	270.530	100%

Gli impianti

Si riporta qui di seguito, a conclusione dell’analisi dell’organizzazione regionale, la situazione impiantistica esistente in relazione ai diversi ambiti sopra esaminati.

	Discariche 1° cat.	Inceneritori	Imp. Compostaggio
Piacenza	3	1	1
Parma	2	-	-
Reggio Emilia	3	1	1
Modena	7	1	3
Bologna	5	1	2
Ferrara	6	2	1
Ravenna	2	1cdr	2
Forlì-Cesena	3	1	3
Rimini	-	1	2
Totale	**31**	**9**	**13**

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

1. What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?

Since 1999, five purely contractual PPP set-ups have been applied in the Netherlands. All of them are in the form of a Design, Build, Finance & Maintain/Operate contract, whereby the private sector is asked to take responsibility for the design, building, maintenance/operation and financing, advance or otherwise.

These contracts do not have any separate legal framework. The five contracts referred to above could be concluded under the existing legislation. A contract whereby the final user compensates the private party (the concession holder) directly for the service to be provided (as in a real toll set-up) did not occur in the Netherlands yet. One of the obstacles for this is that specific legislation has been created in the Netherlands for the levying of toll with restrictions on the collection of toll.

2. In the Commission’s view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

So far the negotiations procedure has proved sufficiently adequate to award concession contracts. If the competitive dialogue procedure would provide more opportunities for companies to have a dialogue with prospective contract-awarding authorities without running the risk of an invalid tendering procedure, this competitive dialogue procedure would be the preferred one, provided that no further requirements are set with respect to the tendering procedure, which is complex enough as it is.

3. In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.

No.

4. Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

Dutch building companies have participated in such procedure. In our opinion, the tendering rules are interpreted by the Tendering Agencies in a stricter manner than necessary to prevent unequal treatment from occurring. As a result, the degree of freedom is limited and it is difficult to translate the wishes of the final user in a correct manner. Particularly, matching the designing party to the final user may be complex due restricted possibilities for consultation. In addition, the procedure's requirements are extensive and the process is time-consuming. Organisation of financing in combination with the tendering procedure causes problems, both regarding the accrual of costs and acquiring sufficient security. These problems occur with the financiers' due diligence. In the current Dutch procedure this expensive procedure is undertaken simultaneously with the negotiating phase, whereas due diligence should actually, according to its nature, be reserved for a phase in which there is no competition any longer.

5. Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?

Yes, the legal framework is sufficiently detailed. For the time being, language barriers and specific properties (financing structure and size) of the Dutch market do not make it attractive to foreign tenderers. In view of the limited number of projects, competition in the current Dutch market is already rather prominent as far as purely contractual PPP set-ups are concerned.

6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

No.

7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

If this would be so, we think that the same regulatory framework may be used for both subcategories of purely contractual PPP set-ups.

8. In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?

Yes, the finest example is the Zuiderzeelijn project. The government adopts private initiative and then markets it on the market with open competition, and it even arouses enthusiasm among the competition abroad with regard to the project.

9. In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?

Private initiative will succeed only, if the initiative itself is appreciated. Thus private initiatives must be rewarded, irrespective of whether the party proposing the initiative is going to carry it out. Thus the development of the initiative must be rewarded, and then this initiative may be adopted by the government and be marketed whilst involving the competition.

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

Four out of five projects in the Netherlands are now in the phase of execution.

11. Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?

No, contracts have provisions to prevent the pushing up of prices. In view of the transfer of the risk to private parties in the PPP set-ups, which is an important motive for the added value of these set-ups, the involvement of other service providers is not desirable. For they will disrupt the balance between the integral service and the distribution of risks. Individual provisions in the contract itself must prevent unfair competition from occurring. Consequently, such provisions are prevailing in the contracts we are cognisant of.

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

No.

13. Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment.? Do you know of other "standard clauses" which are likely to present similar problems?

No, step-in type arrangements are an integral part of the set-up. Without such rights a PPP set-up cannot be structured and PPP set-ups will cease to exist. Step in type arrangements are an indispensable component for effecting the transfer of risks and the linking of performance to financing. Without step-in rights, financiers do not have any guarantee to safeguard their investments and they will cease to invest in PPP projects.

14. Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?

No.

15. In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.

No.

16. In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

The concession holder himself must be able to decide whether and how to attract subcontractors. For the contract awarding authority has secured the best contract (party) by integrally contracting out the entire service. Further guidelines will undo this optimum organisation and only be a cause for pushing up costs. The concession holder must not have any obligations at Community level with regard to the subcontracting of components of contractual PPP projects.

17. In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

No.

18. What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not ?

No specific experience, although we think that European rules on tendering are not/have not been complied with as strictly as in the case of purely contractual PPP set-ups. In view of the fact that, only recently, a number of projects has as yet been put out to tender after intervention of the legal system, it may be assumed that the current regulatory framework provides sufficient handles for guaranteeing the compliance with equal competition.

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

If any authority wishes to participate in an institutional PPP, and contributes funds or other means, such set-up must be open to participation on the basis of competition, without any other considerations playing a part. It is, however, very well possible that the current regulatory framework provides sufficient opportunities to do so.

20. In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?

None.

21. Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of “good practice” in this framework which could serve as a model for the Union? If so, please elaborate.

Apparently, a procedure has been developed in the Unites States whereby private initiatives are encouraged with due observance of competition by limiting the timeframe of the tendering procedure. This enables the private party that takes the initiative to take a lead on the competition where its initiative is concerned (for they have made preparations at their own initiative).

22. More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

Yes, PPP is a continually changing and developing market. Thus, items for consideration may alter as yet.

POLSKA
KONFEDERACJA
PRACODAWCÓW
PRYWATNYCH

Warsaw, July 30, 2004

PKPP/ /KK/2004

European Commission
Consultation on the Green Paper on Public-Private Partnerships and Community Law on Public Procurement
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Dear Sir, Dear Madam,

In response to the publication on April 30, 2004 of a European Commission Green Paper on Public-Private Partnerships (PPP) and Community Law on Public Contracts and Concessions (COM (2004) 327 Final), hereby I would like to present the position of the Polish Confederation of Private Employers (PKPP) on the above-mentioned document.

The PKPP welcomes the initiative undertaken by the European Commission, in order to launch a broad discussion about the issue of PPP and the need for further community action in this regard. We believe it is a useful start of a long-term regulatory strategy.

First of all, let us stress that Poland belongs to the group of countries, along Spain, France and Italy, which decided to establish a distinct PPP legislative framework. The PPP Act was adopted by the Polish Government on June 29, 2004 and sent to Parliament for further discussion (please see the draft PPP Act of June 21, 2004 available on PKPP website in Polish version through the following link: http://www.prywatni.pl/upload/plik/rm_projekt_ppp_2243831.pdf). The PKPP believes that its adoption would be particularly useful in the face of the challenge constituted by the absorption of EU Structural Funds and the co-financing of infrastructural projects in Poland.

As long as the EU Commission Green Paper is concerned, here are our general remarks concerning its contents:

- We understand the significance of the new Directive 2004/18/EC on Public Procurement and especially the role of the procedure of "competitive dialogue" (Art. 29) for very complex contracts.

- We believe that community action is necessary in the field of PPP, in order to ensure a full compliance with art. 43 and 49 TEC. Hence, we support the view that the absence of EU rules "may serve as an unjustifiable barrier to the freedom to provide services or freedom of establishment" . It is of great importance that a Directive is proposed, introducing homogeneous rules for the sector of concessions and other forms of PPP, thus guaranteeing an indispensable legal certainty, which is a pre-requisite for the development of trans-European PPP projects. The lack of clear community rules may also lead to increased transaction costs and a sub-optimal allocation of resources throughout the Union. The introduction of a single legal framework could also intensify the absorption of Structural and Cohesion Funds intended for the 10 New Member States of the EU.

- The PKPP believes it is necessary to base the reflection of the Commission on the Eurostat decision of February 11, 2004 (STAT/04/18) regarding the accounting treatment in national accounts of contracts undertaken by government units in the framework of partnerships with non-governmental units. The off-balance sheet classification of such assets, in case the private partner meets the conditions enumerated therein, is crucial in the face of budgetary constraints in most EU countries. It is key to the development of more PPP schemes in Europe.

We hope that this Green Paper will lead in the near future to a concrete Commission Action Plan on PPP.

Sincerely,

By proxy,

Krzysztof Kania
Director, European Union and External Relations Dpt.
Polish Confederation of Private Employers (PKPP)

Aeas

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RESPUESTAS DE LA ASOCIACIÓN ESPAÑOLA DE ABASTECIMIENTOS DE AGUA Y SANEAMIENTOS (AEAS) AL LIBRO VERDE DE LA COMISIÓN EUROPEA SOBRE LA COLABORACIÓN PÚBLICO-PRIVADA Y EL DERECHO COMUNITARIO EN MATERIA DE CONTRATACIÓN PÚBLICA Y CONCESIONES. COM (2004) 327 FINAL

INTRODUCCIÓN

La AEAS es una Asociación que agrupa a Organismos públicos, Servicios, Empresas y profesionales interesados en la problemática que plantea el agua y el saneamiento. Constituida en 1973, sus miembros colectivos (Corporaciones locales, empresas mixtas y privadas) suministran agua y prestan servicios de saneamiento a una población Española de más de 31 millones de habitantes. Entre sus fines principales está la colaboración con las administraciones Españolas competentes en la normativa, uso, control y calidad sanitaria del agua, y también con los organismos de la Unión Europea que tengan competencia en esas materias.

La AEAS es miembro de la EUREAU, Unión Europea de Asociaciones Nacionales de Distribuidores de Agua y de Servicios de Saneamiento, de la que son miembros veinte de los Estados miembros de la Unión Europea, de la mayor parte de los Estados candidatos y de todos los Estados de la AELC. En el seno de dicha Asociación, la AEAS ha contribuido de forma activa a las reflexiones y debates de la Unión Europea que inciden de forma directa o indirecta sobre el sector del agua. No obstante, la peculiaridad del mercado español del agua – resultado de las condiciones geográficas, climatológicas y medioambientales particulares del país y de sus tradiciones jurídicas – aconseja su participación directa y constructiva en los procedimientos legislativos de la Unión Europea sobre el sector del agua.

La AEAS comparte mayoritariamente los razonamientos recogidos en el escrito presentado por la EUREAU al Libro Verde sobre Colaboración Publico-Privada (CPP en adelante), pero considera conveniente hacer unas reflexiones complementarias que ayuden a conocer a fondo la realidad y las tradiciones existentes en el sector del agua, antes de llevar a cabo cualquier iniciativa destinada a regular el sector de las concesiones y otras formas de CPP (véase el punto 15 del Libro Verde)

Por ello, se presentan a continuación los comentarios de la AEAS a las preguntas que formula la Comisión Europea en el Libro Verde sobre CPP, precisando que solo se comentan las cuestiones que tienen incidencia sobre el sector del agua, absteniéndose de formular comentarios generales sobre CPP.

LA CPP PURAMENTE CONTRACTUAL Y EL DERECHO COMUNITARIO DE LA CONTRATACIÓN PÚBLICA Y LAS CONCESIONES

1. *¿Qué tipos de operaciones de CPP puramente contractual conoce? ¿Se ha creado en su país algún marco específico (legislativo o de otro tipo) para esta clase de operaciones?*

La colaboración público privada está regulada en España por el Real Decreto Legislativo 2/2000, de 16 junio, que aprueba el Texto Refundido de la Ley de Contratos de las Administraciones Públicas. En concreto, el Real Decreto regula en su Libro Segundo (artículos 120 y siguientes) las diferentes modalidades de contratos que pueden celebrar las entidades o empresas privadas con la Administración Pública.

Esta legislación se refiere tanto a contratos de concesión de obras públicas (que puede incluir la realización de la obra y la explotación de la misma o sólo esta última) como de gestión de servicios públicos. La concesión de obra pública ha sido recientemente regulada mediante al ley 13/2003, de 23 de mayo, que ha incorporado un nuevo título al Libro Segundo de la Ley mencionada antes. Ambas leyes tienen carácter de básicas y por tanto son aplicables a todas las Administraciones Públicas: la estatal, la autonómica y la local. No obstante, en el ámbito de los servicios de titularidad local - como es el caso de los servicios de abastecimiento de agua y saneamiento - debe tenerse también muy en cuenta el Reglamento de Servicios de las Corporaciones Locales (del año 1955, que se encuentra vigente en todo lo que no contradice las normas legales anteriormente citadas), y en su caso las normas reglamentarias aprobadas por las Comunidades Autónomas.

La modalidad de contrato más frecuente en el abastecimiento y saneamiento de poblaciones es el contrato de gestión de servicios públicos, previsto y regulado en los artículos 154 y siguientes del mencionado RDL 2/2000. Según su artículo 156, la contratación de la gestión de los servicios públicos puede adoptar cuatro modalidades distintas:

a. concesión por la que el empresario gestiona el servicio a su propio riesgo y ventura,
b. gestión interesada, en cuya virtud la Administración y el empresario participan en los resultados de la explotación del servicio en la proporción que se establece en el contrato,
c. concierto con persona natural o jurídica que venga realizando prestaciones análogas a las que constituyen el servicio público de que se trate, y
d. sociedad de economía mixta en la que la Administración participa, por sí o por medio de una entidad pública, en concurrencia con personas naturales o jurídicas.

Por lo que se refiere al procedimiento de adjudicación, los contratos de concesión de obra pública y de gestión de servicios públicos se adjudican generalmente por concurso. Puede hacerse también mediante procedimiento negociado, por el que el contrato se adjudica a un empresario justificadamente elegido por la Administración previa consulta y negociación de los términos del contrato con uno o varios empresarios. Este tipo de adjudicación está restringido a casos en que no pueda promoverse concurrencia en la oferta, de imperiosa urgencia, contratos secretos o reservados, de presupuesto de primer establecimiento inferior a 30.000 euros y plazo inferior a cinco años, y los que no lleguen a adjudicarse por falta de licitadores.

La etapa de selección del socio privado

2. *En opinión de la Comisión, la transposición al Derecho nacional del procedimiento de diálogo competitivo permitirá que las partes interesadas dispongan de un procedimiento particularmente adaptado a la adjudicación de contratos calificados de contratos públicos durante la puesta en marcha de una CPP de tipo puramente contractual, al tiempo que se protegen los derechos fundamentales de los operadores económicos. ¿Comparte esta opinión? Si su respuesta es negativa, ¿por qué?*

AEAS no puede aún formular, en estos momentos, su posición sobre el procedimiento “de diálogo competitivo” previsto en la Directiva 2004/18/CE, pero expresa su preocupación ante la aplicación, sin matices, de este procedimiento a algunas fórmulas de la CPP. En este sentido considera que la reflexión y el debate sobre la CPP - y el más amplio sobre los contratos públicos - debería contemplar las ventajas e inconvenientes de la aplicación del procedimiento de “diálogo competitivo” a algunas de las fórmulas de la CPP, en concreto a las concesiones.

No obstante, puede avanzarse que dicho procedimiento debería estar reservado exclusivamente a los casos en que, por la complejidad del propio contrato, el organismo adjudicador no sea objetivamente capaz de definir los medios técnicos o la organización jurídica o financiera de un proyecto.

3. *En lo que se refiere a este tipo de contratos, ¿existen, en su opinión, otros elementos, diferentes de los relativos a la elección del procedimiento de adjudicación, que puedan plantear problemas en relación con el Derecho comunitario en materia de contratación pública? En caso afirmativo, ¿cuáles y por qué motivos?*

   Tal como se ha dicho, la AEAS no puede aportar actualmente una respuesta definitiva respecto a esta cuestión. Insiste en todo caso en la necesidad de llevar a cabo una reflexión exhaustiva sobre la aplicación del procedimiento de “diálogo competitivo” al sector del agua.

Colaboración de tipo puramente contractual: el acto de adjudicación se califica de concesión.

4. *¿Alguna vez ha organizado o deseado organizar un procedimiento de adjudicación de concesión o ha participado o deseado participar en un procedimiento de este tipo en la Unión Europea? ¿Qué experiencia conserva de ello?*

   La AEAS, en tanto que Asociación, no cuenta entre los objetivos que presiden a su actividad, participar en procedimientos de adjudicación de concesión en la Unión Europea. Sin embargo, algunos miembros de la AEAS han participado en procedimientos de adjudicación de contratos públicos en países de la Unión Europea. Considera por ello positivo que la Unión Europea inicie un estudio profundo de las distintas situaciones existentes con el fin de adoptar, en su caso, las iniciativas necesarias para garantizar el cumplimiento de los principios básicos de libre concurrencia, igualdad de trato y no discriminación en los Estados miembros que actualmente no disponen de legislación al respecto. No obstante y para no distorsionar la legislación existente en algunos países como España, Francia o Italia, la normativa a adoptar por la UE debiera ser de mínimos, prácticamente limitada a proclamar los principios básicos antes enunciados.

5. *¿Considera que el marco jurídico comunitario actual es lo suficientemente preciso como para garantizar la participación concreta y real de empresas o agrupaciones no nacionales en los procedimientos de adjudicación de concesiones? ¿Cree que, en general, se garantiza una competencia real en este marco?*

   Cuando una autoridad pública decide confiar la prestación de un servicio a un tercero, está obligada a respetar la normativa en materia de contratación pública y concesiones, aunque se trate de un servicio considerado de interés general. Además, el Parlamento Europeo ha reconocido que el cumplimiento de estas disposiciones legales puede constituir un instrumento eficaz para evitar las trabas indebidas de la competencia (véase el Libro Verde 1.1.7). Sin embargo, la AEAS considera que el actual marco jurídico comunitario no garantiza aún una competencia real entre operadores de diferentes Estados miembros. La Comisión Europea sigue sin tomar una posición clara y definitiva en relación con la situación de desigualdad de condiciones de competencia a las que están sometidas las empresas privadas originarias de Estados que poseen un nivel importante de apertura de su mercado respecto a las empresas públicas originarias de Estados cuyo mercado está cerrado a la competencia.

La AEAS considera que el actual marco jurídico comunitario debe ser perfeccionado en el sentido de garantizar una competencia real entre operadores del sector de diferentes Estados miembros. La AEAS ya trasladó en su momento a la Comisión Europea[1] que resulta imposible hablar de un "mercado del agua" a escala comunitaria. En este sentido, considera que el suministro del agua está estrechamente vinculado a condiciones geográficas y técnicas locales y su reglamentación tiene en cuenta las particularidades y tradiciones jurídicas aplicables en cada uno de los Estados miembros.

6. *¿Cree que es conveniente una iniciativa legislativa comunitaria destinada a regular el procedimiento de adjudicación de concesiones?*

La figura de la concesión administrativa, así como otras diversas formas de asociación entre el sector público y el sector privado, son objeto en España, Francia y otros países, de una detallada regulación, fruto de una larga tradición legislativa, administrativa y de jurisprudencia. Otros Estados miembros de la Unión, por el contrario, desconocen estas figuras o les otorgan una importancia menor.

En el primer grupo de Estados, el marco jurídico aplicable ha alcanzado una complejidad que no es fácilmente reducible a unas normas básicas. Entre otros aspectos, hay que tener en cuenta los siguientes: (i) modalidades de gestión directa e indirecta de los servicios públicos y las características más importantes de cada uno de los sistemas, con especial atención al de la concesión y a la empresa mixta; (ii) necesidad de mantener el equilibrio financiero del contrato; (iii) potestades de la Administración; (iv) derechos y deberes del concesionario; (v) pliegos de condiciones económicas y administrativas; (vi) plazos necesarios para recuperar las inversiones realizadas; (vii) régimen de tarifas; (viii) contratación de la gestión de servicios; (ix) responsabilidades por incumplimiento de obligaciones; (x) reglamentación de los servicios; y (xi) relación contractual con los usuarios.

Cualquier intento armonizador de la Comisión, en definitiva, debe partir de la existencia en algunos países de un régimen tradicional y consolidado. La caracterización de tales regímenes está intrínsecamente ligada a las tradiciones administrativas de cada país, formando un conjunto normativo de gran incidencia en la actividad económica en sectores muy diversos, en la actuación de las Administraciones públicas y en la gestión de servicios básicos.

Por todo ello, la Comisión debe plantearse la necesidad de instaurar un régimen uniforme de estos fenómenos en la UE. En opinión de la AEAS, resultaría más conveniente introducir algunas normas mínimas que elaborar *ex novo* un régimen exhaustivo que substituya o modifique radicalmente las legislaciones nacionales.

[1] Véanse las respuestas presentadas por la AEAS a las preguntas planteadas por la Comisión en el ámbito del Libro Verde sobre los servicios de interés general (COM(2003) 270 final – 15.09.2003

Cualquier iniciativa en este sentido debe ser estudiada con mucho detenimiento, pues se corre el riesgo de obligar a países con una larga tradición en la materia a introducir reformas cuyas consecuencias prácticas pueden acarrear serias dificultades para los operadores económicos que actúan en el sector del agua. En cualquier caso, se sugiere a la Comisión que promueva un estudio para identificar las coincidencias y las disparidades entre las legislaciones nacionales en vigor, de forma que se pudiera:

a. constatar la necesidad real de proceder a una armonización legislativa en el ámbito de la Unión Europea, y
b. en el supuesto de comprobar tal necesidad, construir un modelo legislativo que tenga en cuenta, lo máximo posible, las reglamentaciones nacionales existentes sobre el sector.

Si, finalmente, la Unión Europea opta por aprobar una iniciativa concreta que regule las CPP, la AEAS considera imprescindible que en la misma se incluya una definición precisa de qué es lo que debe entenderse por “tercero”, porque este concepto será el que, en definitiva, va a determinar la aplicación o no del régimen de concesiones públicas u otras fórmulas de CPP. En este sentido, cree que la legislación y jurisprudencia Españolas – en lo referente a la definición de “Tercero” - establece unos criterios que permiten determinar con precisión y claridad la aplicación, en cada caso, de la normativa sobre contratación pública. A efectos de aplicación del régimen de concesiones públicas u otras formas de CPP, la legislación Española considera como terceros (y, por tanto, sus contratos deben someterse a las normas de contratación pública), todas aquellas entidades en las que intervengan personas, privadas o públicas, distintas de la administración contratante. En cambio, no son terceros (y, por tanto, están exoneradas de la aplicación de las reglas de contratación pública) exclusivamente aquellas entidades con capital íntegramente público, creadas para la prestación de un servicio propio de la administración contratante. En este sentido, la AEAS considera que si la Comisión Europea decide aprobar una iniciativa de regulación de la CPP, la legislación Española podrá constituir una buena base de trabajo.

Si, finalmente, la Unión Europea considerase necesario adoptar una iniciativa legislativa específica, la AEAS considera también esencial que se tenga en cuenta que la duración de los contratos de CPP debe ser suficiente para permitir la amortización del capital invertido y para asegurar la eficiencia en la mejora constante de las redes e infraestructuras afectas al servicio. Y todo ello en aras a obtener no sólo una rentabilidad suficiente para el operador privado, sino, sobre todo, para conseguir una mayor eficacia en la propia prestación del servicio público concedido.

Un ejemplo de lo que se acaba de decir, en el sentido de que la duración de los contratos debe ser suficiente, puede encontrarse en la situación existente en España en relación con los contratos de gestión de las instalaciones de depuración de aguas residuales, que, en general, tienen una duración muy breve (incluso de un solo año). Tal brevedad conlleva problemas importantes de gestión del servicio, en primer lugar porque la propia naturaleza de los contratos imposibilita que las empresas que optan a los mismos sean suficientemente sólidas como para garantizar la correcta prestación del servicio; en segundo lugar, porque una perspectiva de negocio tan corta limita sobremanera el interés de la empresa gestora para acometer las necesarias inversiones que reviertan en la eficiencia de la gestión del servicio contratado.

7. *De manera más general, si considera que es necesario que la Comisión proponga una nueva acción legislativa, ¿cree que hay razones objetivas para que en dicho acto se contemplen todas las CPP de tipo contractual, tanto si se consideran contratos públicos como concesiones, para someterlas a regímenes de adjudicación idénticos?*

   Tal como se ha indicado, la AEAS no es partidaria de que se proceda a cualquier iniciativa legislativa a escala comunitaria sin llevar previamente a cabo un estudio exhaustivo sobre sus ventajas, inconvenientes y alcance. En efecto, y a primera vista, hay que tener en cuenta que la CPP obedece a criterios y está destinada a dar una respuesta – al menos en el sector del agua – a situaciones muy complejas en que hay que valorar no solo las responsabilidades compartidas, sino también el riesgo, la inversión, las obligaciones, la duración del contrato y los objetivos a alcanzar.

   Por todo ello, será bienvenida la iniciativa de la Comisión de llevar a cabo una reflexión más profunda en este ámbito sin que ello signifique, a priori, que se pretende uniformizar el régimen jurídico de la CPP con los demás contratos públicos.

Cuestiones específicas relativas a la selección de un operador económico en el marco de una CPP de iniciativa privada

8. *De acuerdo con su experiencia, ¿tienen los operadores no nacionales el acceso garantizado a las fórmulas de CPP de iniciativa privada? En particular, cuando los poderes adjudicadores invitan a presentar una iniciativa, ¿se suele dar una publicidad adecuada a la invitación, de manera que la información llegue a todos los operadores interesados? ¿Se organiza un procedimiento de selección realmente competitivo para la puesta en marcha del proyecto seleccionado?*

   En España no hay experiencia en el ámbito de la organización de una CPP de iniciativa privada. En cualquier caso, la AEAS considera que la legislación española en el ámbito de la CPP ya mencionada ofrece todas las garantías de no discriminación y transparencia necesarias a la participación de operadores no nacionales en procedimientos CPP en España.

9. *¿Cuál sería, en su opinión, la mejor fórmula para el desarrollo de operaciones de CPP de iniciativa privada en la Unión Europea en las que se garantice el respeto de los principios de transparencia, no discriminación e igualdad de trato?*

   De forma complementaria a la respuesta anterior, AEAS no puede aportar su opinión a esta cuestión ya que no posee suficiente información al respecto. No obstante, se considera que sería una buena cuestión para estudiar en el ámbito de la red de expertos nacionales que la Comisión tiene intención de instituir.

10. *¿Cuál es su experiencia en relación con la etapa posterior a la selección del socio privado en las operaciones de CPP contractuales?*

    En la etapa de ejecución del contrato ya concedido, los problemas más usuales que se producen se refieren a los casos en los que el contratista reclama la aplicación del principio de equilibrio económico de la concesión. Por ello, en el hipotético caso de que la UE acabe finalmente adoptando algún instrumento legislativo específico, será conveniente que el mismo previera de forma adecuada las causas y circunstancias en las que procederá la aplicación de aquel principio.

11. *¿Conoce algún caso en el que las condiciones de ejecución (incluidas las cláusulas de adaptación en el tiempo) hayan podido tener efectos discriminatorios o hayan podido constituir un obstáculo injustificado a la libre prestación de servicios o a la libertad de establecimiento? En caso afirmativo, describa el tipo de problemas encontrados.*

12. *¿Conoce alguna práctica o mecanismo de evaluación de ofertas con efectos discriminatorios?*

    Una de estas prácticas podría ser la de valorar criterios de admisión (experiencia, recursos, medios, etc.) una vez esta capacitación ya ha sido demostrada y validada por la propia administración, de tal manera que las ofertas se evalúan en la forma de un concurso de méritos y recursos en lugar de considerarse los aspectos esenciales del mismo (precio, proyecto, calidad, nivel de prestación, mejoras, etc.), en claro detrimento del fin de la licitación y en beneficio de los licitadores establecidos. En España tales situaciones acaban en general siendo controladas y corregidas por los Tribunales de Justicia.

13. *¿Está de acuerdo con la afirmación de la Comisión según la cual determinadas fórmulas de tipo step-in pueden plantear problemas en términos de transparencia e igualdad de trato? ¿Conoce otras «cláusulas tipo» cuya aplicación pueda plantear problemas similares?*

    La AEAS está de acuerdo con la afirmación de la Comisión, aunque considere que no es posible generalizarla. En efecto, determinadas cláusulas contractuales mediante las cuales las instituciones financieras se reservan el derecho de actuar en lugar del gestor del proyecto, o incluso designar un nuevo gestor de proyecto, pueden implicar en la práctica el cambio del socio privado sin convocatoria de concurso.

    En cualquier caso, se considera que hay que analizar con más detenimiento los casos que se hayan podido producir en la Unión Europea al abrigo de dichas cláusulas y, para responder a las inquietudes legítimas de la Comisión, cree que sería deseable que cualquier cambio significativo del contrato en relación con el operador sea sometido a autorización previa de la entidad adjudicadora, cuya resolución, a su vez, solo podrá basarse en motivos relacionados con la gestión del servicio.

14. *¿Considera necesario aclarar a escala comunitaria determinados aspectos correspondientes al marco contractual de las operaciones de CPP? En caso afirmativo, ¿a qué aspecto o aspectos debería referirse dicha aclaración?*

    Véase la respuesta a la pregunta 6.

15. *En el marco de las operaciones de CPP, ¿sabe de algún problema concreto que se haya planteado en materia de subcontratación? Descríbalo.*

    La AEAS no tiene conocimiento de ningún problema concreto.

16. *En su opinión, el fenómeno de las operaciones de CPP de tipo contractual, al implicar el traspaso de un conjunto de tareas a un único socio privado, ¿justifica la introducción de normas más detalladas o la ampliación del ámbito de aplicación en lo que se refiere a la subcontratación?*

    En el contrato de gestión de servicios públicos la legislación española solo contempla la subcontratación de prestaciones accesorias al contrato principal (artículo 170 del RDL 2/2000). En este sentido, la AEAS considera que la introducción de nuevas normas reguladoras armonizadas a nivel comunitario relativas a la subcontratación, debe necesariamente estar precedida de un estudio sobre las normativas nacionales existentes en los Estados miembros en este ámbito.

17. *De manera más general, ¿considera que debería adoptarse una iniciativa complementaria a escala comunitaria para aclarar u organizar las normas relativas a la subcontratación?*

    Véase la respuesta anterior.

LA CPP INSTITUCIONALIZADA Y EL DERECHO COMUNITARIO EN MATERIA DE CONTRATACIÓN PÚBLICA Y CONCESIONES

Toma del control de una entidad pública por parte de un operador privado

18. *¿Cuál es su experiencia en materia de puesta en marcha de operaciones de CPP de tipo institucionalizado? En concreto, ¿su experiencia le lleva a pensar que el Derecho comunitario en materia de contratación pública y concesiones se respeta en el caso de operaciones de CPP institucionalizada? Si su respuesta es negativa, ¿por qué?*

    La CPP de tipo institucionalizado supone la creación de una entidad en que participan, de manera conjunta, el socio público y el privado, sea mediante la creación de una entidad en que participan ambos sectores, sea mediante la entrada de capital privado en una empresa pública preexistente.

    Esta modalidad de prestación de los servicios públicos está perfectamente prevista y regulada en la legislación española prácticamente desde el primer momento en que se empezó a regular la intervención de las entidades privadas en la gestión de los servicios públicos. Tal regulación se encuentra no sólo en la legislación en materia de contratación pública (RDL 2/2000) sino también en el ámbito de los servicios públicos locales (como es el abastecimiento de agua) en la Legislación de régimen local (Ley 7/1985 Reguladora de las Bases de Régimen Local, RDL 781/1986 por el que se aprueban las disposiciones legales vigentes en materia de régimen local, y Decreto de 17 de junio de 1955 por el que se aprueba el Reglamento de Servicios de las Corporaciones Locales). Puede afirmarse que dicha legislación es suficientemente completa como para permitir al órgano contratante seleccionar la oferta más ventajosa y garantizar que dicha selección se realice respetando los principios de no discriminación, transparencia e igualdad.

    En todo caso, la AEAS considera conveniente que una eventual regulación Europea específica de los contratos de concesión bajo esta modalidad, establezca taxativamente que la selección del socio privado debe realizarse mediante un sistema de selección que prime la oferta técnica.

19. *¿Considera que debe tomarse una iniciativa a escala comunitaria para aclarar o precisar las obligaciones de los organismos adjudicadores en cuanto a las condiciones en las que deben ser convocados los operadores potencialmente interesados por un proyecto de tipo institucionalizado? En caso afirmativo, ¿en qué puntos particulares y en qué forma? Si su respuesta es negativa, ¿por qué?*

    En línea con todos los argumentos expuestos hasta ahora, la AEAS cree que antes de proceder a adoptar ninguna iniciativa a escala comunitaria de tipo normativo sería necesario estudiar en detalle las distintas situaciones existentes con el fin de poder garantizar el cumplimiento de los principios básicos de libre concurrencia, igualdad de trato y no discriminación en aquellos Estados miembros que en la actualidad no disponen de legislación al respecto.

    Este estudio debería permitir la adopción posterior de las iniciativas mínimas necesarias para asegurar que estas operaciones se realicen con una mayor transparencia, igualdad y no discriminación en aquellos países donde no existe legislación suficiente al respecto, pero al mismo tiempo respetando y no distorsionando el marco jurídico aplicable en aquellos países que, como España, tienen una larga tradición y experiencia normativa al respecto. Se trataría, como en el caso de la CPP puramente contractual, de medidas limitadas prácticamente a la proclamación de aquellos principios básicos de la contratación pública.

20. *¿Qué medidas o prácticas cree que constituyen obstáculos a la puesta en marcha de operaciones de CPP en el seno de la Unión Europea?*

    Como ya se dijo, la AEAS considera que en lo que respecta el sector del agua a nivel comunitario no se garantiza hoy por hoy la competencia real entre operadores económicos en el acceso a nuevos mercados; la AEAS cree que esto deriva de la naturaleza muy específica del sector del agua.

    Ello no impide que la AEAS invite la Comisión a llevar a cabo una reflexión mas profunda sobre los problemas de competencia que hayan podido ser detectados o que puedan plantearse en la Unión Europea.

21. *¿Conoce otras formas de CPP desarrolladas en terceros países? ¿Conoce ejemplos de «mejores prácticas» desarrolladas en este marco, que puedan servir de inspiración a la Unión? En caso afirmativo, ¿cuáles?*

    La AEAS desconoce otras formulas desarrolladas en países terceros que puedan servir de referencia a la UE.

22. *De forma más general, y teniendo en cuenta la necesidad de importantes inversiones en ciertos Estados miembros a fin de lograr un crecimiento económico social y sostenible, ¿estima que sería útil una reflexión colectiva sobre estas cuestiones, que se llevaría a cabo a*

intervalos regulares entre los sectores concernidos, y que permitiría un intercambio de mejores practicas?, ¿Considera que la Comisión debería propiciar una red de este tipo?

La AEAS es partidaria de llevar a cabo una reflexión colectiva, implicando a todos los operadores y sobre diversas cuestiones en el ámbito del sector del agua a nivel de la Unión Europea y acoge muy favorablemente la idea de la Comisión de crear y animar una red de expertos nacionales representantes de todos los sectores implicados en la prestación de servicios en el ámbito del agua con la finalidad de reflexionar en conjunto tanto sobre la problemática específica del sector como sobre las eventuales soluciones.

La AEAS llama finalmente la atención de la Comisión sobre la necesidad de tener en cuenta, en sus reflexiones, las especificidades del sector del agua, no solo en lo que respecta a la CPP, sino también y de forma más general, en el ámbito de la contratación pública, los servicios de interés general o las condiciones de competencia. En este sentido, se sugiere a la Comisión que impulse la creación de un grupo de trabajo formado por expertos nacionales y representantes de las Asociaciones nacionales del sector del agua, para que asesoren a la Comisión respecto a las iniciativas legislativas u otras que tenga la intención de llevar a cabo y que puedan tener efectos directos o indirectos sobre el sector. El mismo grupo podría encargarse de coordinar el estudio al que se hace referencia a lo largo del escrito que se presenta a la Comisión.

Madrid, 26 de julio de 2004

Nota: AEAS autoriza que su contribución sea introducida en el sitio web del Libro Verde de la Comisión Europea sobre la colaboración público-privada y el derecho comunitario en materia de contratación pública y concesiones.

Asociación Española de Empresas Gestoras de los Servicios de Agua a Poblaciones

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RESPUESTAS DE LA ASOCIACIÓN ESPAÑOLA DE EMPRESAS GESTORAS DE LOS SERVICIOS DE AGUA A POBLACIONES (AGA) AL LIBRO VERDE DE LA COMISIÓN EUROPEA SOBRE LA COLABORACIÓN PÚBLICO-PRIVADA Y EL DERECHO COMUNITARIO EN MATERIA DE CONTRATACIÓN PÚBLICA Y CONCESIONES. COM (2004) 327 FINAL

INTRODUCCIÓN

La AGA fue creada en 1995 y es una Asociación de ámbito español integrada por entidades mercantiles, consorcios, y otras entidades y organismos públicos que gestionan, total o parcialmente, servicios comprendidos en el ciclo integral del agua.

Considerada por la Administración Pública española como la Asociación Empresarial más representativa del sector del agua, el personal integrado en las organizaciones de sus miembros supone el 40,3% de toda la población ocupada en dicho sector.

Entre los fines de la Asociación cabe destacar algunos, con clara vinculación a los temas suscitados por el Libro Verde sobre la Colaboración Público-Privada (CPP en adelante) a que se refiere este documento, que legitiman a la AGA como parte interesada en el debate:

- El análisis conjunto de los problemas comunes de su actividad económica y la promoción de iniciativas que mejoren los procesos productivos,
- la cooperación con otros grupos sociales en la tutela de los recursos hídricos y del medio ambiente,
- la armonización de los intereses de sus asociados sin coartar la libre competencia,
- el intercambio de informaciones y estudios para que los bienes y servicios se adapten a las necesidades y exigencias de los clientes, y
- la participación en la preparación de la normativa legal que afecte al sector, en especial la referida a recursos hídricos, modos de gestión de los servicios públicos y contratación administrativa.

Por su estrecho contacto con la Asociación Española de Abastecimientos de Agua y Saneamiento (AGA), la AGA ha tenido conocimiento de las respuestas dadas por aquella Asociación a las preguntas planteadas por la Comisión en el citado Libro Verde, que comparte en su totalidad, y reproduce poniéndolas en su propio nombre.

LA CPP PURAMENTE CONTRACTUAL Y EL DERECHO COMUNITARIO DE LA CONTRATACIÓN PÚBLICA Y LAS CONCESIONES

1. *¿Qué tipos de operaciones de CPP puramente contractual conoce? ¿Se ha creado en su país algún marco específico (legislativo o de otro tipo) para esta clase de operaciones?*

La colaboración público privada está regulada en España por el Real Decreto Legislativo 2/2000, de 16 junio, que aprueba el Texto Refundido de la Ley de Contratos de las Administraciones Públicas. En concreto, el Real Decreto regula en su Libro Segundo (artículos 120 y siguientes) las diferentes modalidades de contratos que pueden celebrar las entidades o empresas privadas con la Administración Pública.

Esta legislación se refiere tanto a contratos de concesión de obras públicas (que puede incluir la realización de la obra y la explotación de la misma o sólo esta última) como de gestión de servicios públicos. La concesión de obra pública ha sido recientemente regulada mediante al ley 13/2003, de 23 de mayo, que ha incorporado un nuevo título al Libro Segundo de la Ley mencionada antes. Ambas leyes tienen carácter de básicas y por tanto son aplicables a todas las Administraciones Públicas: la estatal, la autonómica y la local. No obstante, en el ámbito de los servicios de titularidad local - como es el caso de los servicios de abastecimiento de agua y saneamiento - debe tenerse también muy en cuenta el Reglamento de Servicios de las Corporaciones Locales (del año 1955, que se encuentra vigente en todo lo que no contradice las normas legales anteriormente citadas), y en su caso las normas reglamentarias aprobadas por las Comunidades Autónomas.

La modalidad de contrato más frecuente en el abastecimiento y saneamiento de poblaciones es el contrato de gestión de servicios públicos, previsto y regulado en los artículos 154 y siguientes del mencionado RDL 2/2000. Según su artículo 156, la contratación de la gestión de los servicios públicos puede adoptar cuatro modalidades distintas:

a. concesión por la que el empresario gestiona el servicio a su propio riesgo y ventura,
b. gestión interesada, en cuya virtud la Administración y el empresario participan en los resultados de la explotación del servicio en la proporción que se establece en el contrato,
c. concierto con persona natural o jurídica que venga realizando prestaciones análogas a las que constituyen el servicio público de que se trate, y
d. sociedad de economía mixta en la que la Administración participa, por sí o por medio de una entidad pública, en concurrencia con personas naturales o jurídicas.

Por lo que se refiere al procedimiento de adjudicación, los contratos de concesión de obra pública y de gestión de servicios públicos se adjudican generalmente por concurso. Puede hacerse también mediante procedimiento negociado, por el que el contrato se adjudica a un empresario justificadamente elegido por la Administración previa consulta y negociación de los términos del contrato con uno o varios empresarios. Este tipo de adjudicación está restringido a casos en que no pueda promoverse concurrencia en la oferta, de imperiosa urgencia, contratos secretos o reservados, de presupuesto de primer establecimiento inferior a 30.000 euros y plazo inferior a cinco años, y los que no lleguen a adjudicarse por falta de licitadores.

La etapa de selección del socio privado

2. *En opinión de la Comisión, la transposición al Derecho nacional del procedimiento de diálogo competitivo permitirá que las partes interesadas dispongan de un procedimiento particularmente adaptado a la adjudicación de contratos calificados de contratos públicos durante la puesta en marcha de una CPP de tipo puramente contractual, al tiempo que se protegen los derechos fundamentales de los operadores económicos. ¿Comparte esta opinión? Si su respuesta es negativa, ¿por qué?*

AGA no puede aún formular, en estos momentos, su posición sobre el procedimiento “de diálogo competitivo” previsto en la Directiva 2004/18/CE, pero expresa su preocupación ante la aplicación, sin matices, de este procedimiento a algunas fórmulas de la CPP. En este sentido considera que la reflexión y el debate sobre la CPP - y el más amplio sobre los contratos públicos - debería contemplar las ventajas e inconvenientes de la aplicación del procedimiento de "diálogo competitivo" a algunas de las fórmulas de la CPP, en concreto a las concesiones.

No obstante, puede avanzarse que dicho procedimiento debería estar reservado exclusivamente a los casos en que, por la complejidad del propio contrato, el organismo adjudicador no sea objetivamente capaz de definir los medios técnicos o la organización jurídica o financiera de un proyecto.

3. *En lo que se refiere a este tipo de contratos, ¿existen, en su opinión, otros elementos, diferentes de los relativos a la elección del procedimiento de adjudicación, que puedan plantear problemas en relación con el Derecho comunitario en materia de contratación pública? En caso afirmativo, ¿cuáles y por qué motivos?*

   Tal como se ha dicho, la AGA no puede aportar actualmente una respuesta definitiva respecto a esta cuestión. Insiste en todo caso en la necesidad de llevar a cabo una reflexión exhaustiva sobre la aplicación del procedimiento de "diálogo competitivo" al sector del agua.

Colaboración de tipo puramente contractual: el acto de adjudicación se califica de concesión.

4. *¿Alguna vez ha organizado o deseado organizar un procedimiento de adjudicación de concesión o ha participado o deseado participar en un procedimiento de este tipo en la Unión Europea? ¿Qué experiencia conserva de ello?*

   La AGA, en tanto que Asociación, no cuenta entre los objetivos que presiden a su actividad, participar en procedimientos de adjudicación de concesión en la Unión Europea. Sin embargo, algunos miembros de la AGA han participado en procedimientos de adjudicación de contratos públicos en países de la Unión Europea. Considera por ello positivo que la Unión Europea inicie un estudio profundo de las distintas situaciones existentes con el fin de adoptar, en su caso, las iniciativas necesarias para garantizar el cumplimiento de los principios básicos de libre concurrencia, igualdad de trato y no discriminación en los Estados miembros que actualmente no disponen de legislación al respecto. No obstante y para no distorsionar la legislación existente en algunos países como España, Francia o Italia, la normativa a adoptar por la UE debiera ser de mínimos, prácticamente limitada a proclamar los principios básicos antes enunciados.

5. *¿Considera que el marco jurídico comunitario actual es lo suficientemente preciso como para garantizar la participación concreta y real de empresas o agrupaciones no nacionales en los procedimientos de adjudicación de concesiones? ¿Cree que, en general, se garantiza una competencia real en este marco?*

   Cuando una autoridad pública decide confiar la prestación de un servicio a un tercero, está obligada a respetar la normativa en materia de contratación pública y concesiones, aunque se trate de un servicio considerado de interés general. Además, el Parlamento Europeo ha reconocido que el cumplimiento de estas disposiciones legales puede constituir un instrumento eficaz para evitar las trabas indebidas de la competencia (véase el Libro Verde 1.1.7). Sin embargo, la AGA considera que el actual marco jurídico comunitario no garantiza aún una competencia real entre operadores de diferentes Estados miembros. La Comisión Europea sigue sin tomar una posición clara y definitiva en relación con la situación de desigualdad de condiciones de competencia a las que están sometidas las empresas privadas originarias de Estados que poseen un nivel importante de apertura de su mercado respecto a las empresas públicas originarias de Estados cuyo mercado está cerrado a la competencia.

La AGA considera que el actual marco jurídico comunitario debe ser perfeccionado en el sentido de garantizar una competencia real entre operadores del sector de diferentes Estados miembros. La AGA ya trasladó en su momento a la Comisión Europea[1] que resulta imposible hablar de un “mercado del agua” a escala comunitaria. En este sentido, considera que el suministro del agua está estrechamente vinculado a condiciones geográficas y técnicas locales y su reglamentación tiene en cuenta las particularidades y tradiciones jurídicas aplicables en cada uno de los Estados miembros.

6. *¿Cree que es conveniente una iniciativa legislativa comunitaria destinada a regular el procedimiento de adjudicación de concesiones?*

La figura de la concesión administrativa, así como otras diversas formas de asociación entre el sector público y el sector privado, son objeto en España, Francia y otros países, de una detallada regulación, fruto de una larga tradición legislativa, administrativa y de jurisprudencia. Otros Estados miembros de la Unión, por el contrario, desconocen estas figuras o les otorgan una importancia menor.

En el primer grupo de Estados, el marco jurídico aplicable ha alcanzado una complejidad que no es fácilmente reducible a unas normas básicas. Entre otros aspectos, hay que tener en cuenta los siguientes: (i) modalidades de gestión directa e indirecta de los servicios públicos y las características más importantes de cada uno de los sistemas, con especial atención al de la concesión y a la empresa mixta; (ii) necesidad de mantener el equilibrio financiero del contrato; (iii) potestades de la Administración; (iv) derechos y deberes del concesionario; (v) pliegos de condiciones económicas y administrativas; (vi) plazos necesarios para recuperar las inversiones realizadas; (vii) régimen de tarifas; (viii) contratación de la gestión de servicios; (ix) responsabilidades por incumplimiento de obligaciones; (x) reglamentación de los servicios; y (xi) relación contractual con los usuarios.

Cualquier intento armonizador de la Comisión, en definitiva, debe partir de la existencia en algunos países de un régimen tradicional y consolidado. La caracterización de tales regímenes está intrínsecamente ligada a las tradiciones administrativas de cada país, formando un conjunto normativo de gran incidencia en la actividad económica en sectores muy diversos, en la actuación de las Administraciones públicas y en la gestión de servicios básicos.

Por todo ello, la Comisión debe plantearse la necesidad de instaurar un régimen uniforme de estos fenómenos en la UE. En opinión de la AGA, resultaría más conveniente introducir algunas normas mínimas que elaborar *ex novo* un régimen exhaustivo que substituya o modifique radicalmente las legislaciones nacionales.

Cualquier iniciativa en este sentido debe ser estudiada con mucho detenimiento, pues se corre el riesgo de obligar a países con una larga tradición en la materia a introducir reformas cuyas consecuencias prácticas pueden acarrear serias dificultades para los operadores económicos que actúan en el sector del agua. En cualquier caso, se sugiere a la Comisión que promueva

[1] Véanse las respuestas presentadas por la AGA a las preguntas planteadas por la Comisión en el ámbito del Libro Verde sobre los servicios de interés general (COM(2003) 270 final – 15.09.2003

un estudio para identificar las coincidencias y las disparidades entre las legislaciones nacionales en vigor, de forma que se pudiera:

a. constatar la necesidad real de proceder a una armonización legislativa en el ámbito de la Unión Europea, y
b. en el supuesto de comprobar tal necesidad, construir un modelo legislativo que tenga en cuenta, lo máximo posible, las reglamentaciones nacionales existentes sobre el sector.

Si, finalmente, la Unión Europea opta por aprobar una iniciativa concreta que regule las CPP, la AGA considera imprescindible que en la misma se incluya una definición precisa de qué es lo que debe entenderse por “tercero”, porque este concepto será el que, en definitiva, va a determinar la aplicación o no del régimen de concesiones públicas u otras fórmulas de CPP. En este sentido, cree que la legislación y jurisprudencia Españolas – en lo referente a la definición de “Tercero” - establece unos criterios que permiten determinar con precisión y claridad la aplicación, en cada caso, de la normativa sobre contratación pública. A efectos de aplicación del régimen de concesiones públicas u otras formas de CPP, la legislación Española considera como terceros (y, por tanto, sus contratos deben someterse a las normas de contratación pública), todas aquellas entidades en las que intervengan personas, privadas o públicas, distintas de la administración contratante. En cambio, no son terceros (y, por tanto, están exoneradas de la aplicación de las reglas de contratación pública) exclusivamente aquellas entidades con capital íntegramente público, creadas para la prestación de un servicio propio de la administración contratante. En este sentido, la AGA considera que si la Comisión Europea decide aprobar una iniciativa de regulación de la CPP, la legislación Española podrá constituir una buena base de trabajo.

Si, finalmente, la Unión Europea considerase necesario adoptar una iniciativa legislativa específica, la AGA considera también esencial que se tenga en cuenta que la duración de los contratos de CPP debe ser suficiente para permitir la amortización del capital invertido y para asegurar la eficiencia en la mejora constante de las redes e infraestructuras afectas al servicio. Y todo ello en aras a obtener no sólo una rentabilidad suficiente para el operador privado, sino, sobre todo, para conseguir una mayor eficacia en la propia prestación del servicio público concedido.

Un ejemplo de lo que se acaba de decir, en el sentido de que la duración de los contratos debe ser suficiente, puede encontrarse en la situación existente en España en relación con los contratos de gestión de las instalaciones de depuración de aguas residuales, que, en general, tienen una duración muy breve (incluso de un solo año). Tal brevedad conlleva problemas importantes de gestión del servicio, en primer lugar porque la propia naturaleza de los contratos imposibilita que las empresas que optan a los mismos sean suficientemente sólidas como para garantizar la correcta prestación del servicio; en segundo lugar, porque una perspectiva de negocio tan corta limita sobremanera el interés de la empresa gestora para acometer las necesarias inversiones que reviertan en la eficiencia de la gestión del servicio contratado.

7. *De manera más general, si considera que es necesario que la Comisión proponga una nueva acción legislativa, ¿cree que hay razones objetivas para que en dicho acto se contemplen todas las CPP de tipo contractual, tanto si se consideran contratos públicos como concesiones, para someterlas a regímenes de adjudicación idénticos?*

Tal como se ha indicado, la AGA no es partidaria de que se proceda a cualquier iniciativa legislativa a escala comunitaria sin llevar previamente a cabo un estudio exhaustivo sobre sus ventajas, inconvenientes y alcance. En efecto, y a primera vista, hay que tener en cuenta que la CPP obedece a criterios y está destinada a dar una respuesta – al menos en el sector del agua – a situaciones muy complejas en que hay que valorar no solo las responsabilidades compartidas, sino también el riesgo, la inversión, las obligaciones, la duración del contrato y los objetivos a alcanzar.

Por todo ello, será bienvenida la iniciativa de la Comisión de llevar a cabo una reflexión más profunda en este ámbito sin que ello signifique, a priori, que se pretende uniformizar el régimen jurídico de la CPP con los demás contratos públicos.

Cuestiones específicas relativas a la selección de un operador económico en el marco de una CPP de iniciativa privada

8. *De acuerdo con su experiencia, ¿tienen los operadores no nacionales el acceso garantizado a las fórmulas de CPP de iniciativa privada? En particular, cuando los poderes adjudicadores invitan a presentar una iniciativa, ¿se suele dar una publicidad adecuada a la invitación, de manera que la información llegue a todos los operadores interesados? ¿Se organiza un procedimiento de selección realmente competitivo para la puesta en marcha del proyecto seleccionado?*

   En España no hay experiencia en el ámbito de la organización de una CPP de iniciativa privada. En cualquier caso, la AGA considera que la legislación española en el ámbito de la CPP ya mencionada ofrece todas las garantías de no discriminación y transparencia necesarias a la participación de operadores no nacionales en procedimientos CPP en España.

9. *¿Cuál sería, en su opinión, la mejor fórmula para el desarrollo de operaciones de CPP de iniciativa privada en la Unión Europea en las que se garantice el respeto de los principios de transparencia, no discriminación e igualdad de trato?*

   De forma complementaria a la respuesta anterior, AGA no puede aportar su opinión a esta cuestión ya que no posee suficiente información al respecto. No obstante, se considera que sería una buena cuestión para estudiar en el ámbito de la red de expertos nacionales que la Comisión tiene intención de instituir.

10. *¿Cuál es su experiencia en relación con la etapa posterior a la selección del socio privado en las operaciones de CPP contractuales?*

    En la etapa de ejecución del contrato ya concedido, los problemas más usuales que se producen se refieren a los casos en los que el contratista reclama la aplicación del principio de equilibrio económico de la concesión. Por ello, en el hipotético caso de que la UE acabe finalmente adoptando algún instrumento legislativo específico, será conveniente que el mismo previera de forma adecuada las causas y circunstancias en las que procederá la aplicación de aquel principio.

11. *¿Conoce algún caso en el que las condiciones de ejecución (incluidas las cláusulas de adaptación en el tiempo) hayan podido tener efectos discriminatorios o hayan podido constituir un obstáculo injustificado a la libre prestación de servicios o a la libertad de establecimiento? En caso afirmativo, describa el tipo de problemas encontrados.*

12. *¿Conoce alguna práctica o mecanismo de evaluación de ofertas con efectos discriminatorios?*

    Una de estas prácticas podría ser la de valorar criterios de admisión (experiencia, recursos, medios, etc.) una vez esta capacitación ya ha sido demostrada y validada por la propia administración, de tal manera que las ofertas se evalúan en la forma de un concurso de méritos y recursos en lugar de considerarse los aspectos esenciales del mismo (precio, proyecto, calidad, nivel de prestación, mejoras, etc.), en claro detrimento del fin de la licitación y en beneficio de los licitadores establecidos. En España tales situaciones acaban en general siendo controladas y corregidas por los Tribunales de Justicia.

13. *¿Está de acuerdo con la afirmación de la Comisión según la cual determinadas fórmulas de tipo step-in pueden plantear problemas en términos de transparencia e igualdad de trato? ¿Conoce otras «cláusulas tipo» cuya aplicación pueda plantear problemas similares?*

    La AGA está de acuerdo con la afirmación de la Comisión, aunque considere que no es posible generalizarla. En efecto, determinadas cláusulas contractuales mediante las cuales las instituciones financieras se reservan el derecho de actuar en lugar del gestor del proyecto, o incluso designar un nuevo gestor de proyecto, pueden implicar en la práctica el cambio del socio privado sin convocatoria de concurso.

    En cualquier caso, se considera que hay que analizar con más detenimiento los casos que se hayan podido producir en la Unión Europea al abrigo de dichas cláusulas y, para responder a las inquietudes legítimas de la Comisión, cree que sería deseable que cualquier cambio significativo del contrato en relación con el operador sea sometido a autorización previa de la entidad adjudicadora, cuya resolución, a su vez, solo podrá basarse en motivos relacionados con la gestión del servicio.

14. *¿Considera necesario aclarar a escala comunitaria determinados aspectos correspondientes al marco contractual de las operaciones de CPP? En caso afirmativo, ¿a qué aspecto o aspectos debería referirse dicha aclaración?*

    Véase la respuesta a la pregunta 6.

15. *En el marco de las operaciones de CPP, ¿sabe de algún problema concreto que se haya planteado en materia de subcontratación? Descríbalo.*

    La AGA no tiene conocimiento de ningún problema concreto.

16. *En su opinión, el fenómeno de las operaciones de CPP de tipo contractual, al implicar el traspaso de un conjunto de tareas a un único socio privado, ¿justifica la introducción de normas más detalladas o la ampliación del ámbito de aplicación en lo que se refiere a la subcontratación?*

    En el contrato de gestión de servicios públicos la legislación española solo contempla la subcontratación de prestaciones accesorias al contrato principal (artículo 170 del RDL 2/2000). En este sentido, la AGA considera que la introducción de nuevas normas reguladoras armonizadas a nivel comunitario relativas a la subcontratación, debe necesariamente estar precedida de un estudio sobre las normativas nacionales existentes en los Estados miembros en este ámbito.

17. *De manera más general, ¿considera que debería adoptarse una iniciativa complementaria a escala comunitaria para aclarar u organizar las normas relativas a la subcontratación?*

    Véase la respuesta anterior.

LA CPP INSTITUCIONALIZADA Y EL DERECHO COMUNITARIO EN MATERIA DE CONTRATACIÓN PÚBLICA Y CONCESIONES

Toma del control de una entidad pública por parte de un operador privado

18. *¿Cuál es su experiencia en materia de puesta en marcha de operaciones de CPP de tipo institucionalizado? En concreto, ¿su experiencia le lleva a pensar que el Derecho comunitario en materia de contratación pública y concesiones se respeta en el caso de operaciones de CPP institucionalizada? Si su respuesta es negativa, ¿por qué?*

    La CPP de tipo institucionalizado supone la creación de una entidad en que participan, de manera conjunta, el socio público y el privado, sea mediante la creación de una entidad en que participan ambos sectores, sea mediante la entrada de capital privado en una empresa pública preexistente.

    Esta modalidad de prestación de los servicios públicos está perfectamente prevista y regulada en la legislación española prácticamente desde el primer momento en que se empezó a regular la intervención de las entidades privadas en la gestión de los servicios públicos. Tal regulación se encuentra no sólo en la legislación en materia de contratación pública (RDL 2/2000) sino también en el ámbito de los servicios públicos locales (como es el abastecimiento de agua) en la Legislación de régimen local (Ley 7/1985 Reguladora de las Bases de Régimen Local, RDL 781/1986 por el que se aprueban las disposiciones legales vigentes en materia de régimen local, y Decreto de 17 de junio de 1955 por el que se aprueba el Reglamento de Servicios de las Corporaciones Locales). Puede afirmarse que dicha legislación es suficientemente completa como para permitir al órgano contratante seleccionar la oferta más ventajosa y garantizar que dicha selección se realice respetando los principios de no discriminación, transparencia e igualdad.

    En todo caso, la AGA considera conveniente que una eventual regulación Europea específica de los contratos de concesión bajo esta modalidad, establezca taxativamente que la selección del socio privado debe realizarse mediante un sistema de selección que prime la oferta técnica.

19. *¿Considera que debe tomarse una iniciativa a escala comunitaria para aclarar o precisar las obligaciones de los organismos adjudicadores en cuanto a las condiciones en las que deben ser convocados los operadores potencialmente interesados por un proyecto de tipo institucionalizado? En caso afirmativo, ¿en qué puntos particulares y en qué forma? Si su respuesta es negativa, ¿por qué?*

    En línea con todos los argumentos expuestos hasta ahora, la AGA cree que antes de proceder a adoptar ninguna iniciativa a escala comunitaria de tipo normativo sería necesario estudiar en detalle las distintas situaciones existentes con el fin de poder garantizar el cumplimiento de los principios básicos de libre concurrencia, igualdad de trato y no discriminación en aquellos Estados miembros que en la actualidad no disponen de legislación al respecto.

Este estudio debería permitir la adopción posterior de las iniciativas mínimas necesarias para asegurar que estas operaciones se realicen con una mayor transparencia, igualdad y no discriminación en aquellos países donde no existe legislación suficiente al respecto, pero al mismo tiempo respetando y no distorsionando el marco jurídico aplicable en aquellos países que, como España, tienen una larga tradición y experiencia normativa al respecto. Se trataría, como en el caso de la CPP puramente contractual, de medidas limitadas prácticamente a la proclamación de aquellos principios básicos de la contratación pública.

20. *¿Qué medidas o prácticas cree que constituyen obstáculos a la puesta en marcha de operaciones de CPP en el seno de la Unión Europea?*

    Como ya se dijo, la AGA considera que en lo que respecta el sector del agua a nivel comunitario no se garantiza hoy por hoy la competencia real entre operadores económicos en el acceso a nuevos mercados; la AGA cree que esto deriva de la naturaleza muy específica del sector del agua.

    Ello no impide que la AGA invite la Comisión a llevar a cabo una reflexión mas profunda sobre los problemas de competencia que hayan podido ser detectados o que puedan plantearse en la Unión Europea.

21. *¿Conoce otras formas de CPP desarrolladas en terceros países? ¿Conoce ejemplos de «mejores prácticas» desarrolladas en este marco, que puedan servir de inspiración a la Unión? En caso afirmativo, ¿cuáles?*

    La AGA desconoce otras formulas desarrolladas en países terceros que puedan servir de referencia a la UE.

22. *De forma más general, y teniendo en cuenta la necesidad de importantes inversiones en ciertos Estados miembros a fin de lograr un crecimiento económico social y sostenible, ¿estima que sería útil una reflexión colectiva sobre estas cuestiones, que se llevaría a cabo a intervalos regulares entre los sectores concernidos, y que permitiría un intercambio de mejores practicas?, ¿Considera que la Comisión debería propiciar una red de este tipo?*

    La AGA es partidaria de llevar a cabo una reflexión colectiva, implicando a todos los operadores y sobre diversas cuestiones en el ámbito del sector del agua a nivel de la Unión Europea y acoge muy favorablemente la idea de la Comisión de crear y animar una red de expertos nacionales representantes de todos los sectores implicados en la prestación de servicios en el ámbito del agua con la finalidad de reflexionar en conjunto tanto sobre la problemática específica del sector como sobre las eventuales soluciones.

    La AGA llama finalmente la atención de la Comisión sobre la necesidad de tener en cuenta, en sus reflexiones, las especificidades del sector del agua, no solo en lo que respecta a la CPP, sino también y de forma más general, en el ámbito de la contratación pública, los servicios de interés general o las condiciones de competencia. En este sentido, se sugiere a la Comisión que impulse la creación de un grupo de trabajo formado por expertos nacionales y representantes de las Asociaciones nacionales del sector del agua, para que asesoren a la Comisión respecto a las iniciativas legislativas u otras que tenga la intención de llevar a cabo y que puedan tener efectos directos o indirectos sobre el sector. El mismo grupo podría encargarse de coordinar el estudio al que se hace referencia a lo largo del escrito que se presenta a la Comisión.

Madrid, 26 de julio de 2004

Nota: AGA autoriza que su contribución sea introducida en el sitio web del Libro Verde de la Comisión Europea sobre la colaboración público-privada y el derecho comunitario en materia de contratación pública y concesiones.

Colaboración público - privada
Contratación pública
Libro verde sobre la colaboración público - privada y el Derecho comunitario en materia de contratación pública
C- 100 2/2005
B-1049 Bruxelles

Señor encargado de la publicación :

En relación a lo anunciado por la Secretaría General sobre el llamado libro verde CPP, en nombre de los numerosos farmacéuticos integrados en las Asociaciones profesionales : "Asociación para la Mejora del Servicio Farmacéutico", "Asociación Andaluza de farmacéuticos sin farmacia" y de la "Asociación de farmacéuticos en Paro" de Madrid , me permito exponerle a esa Comisión para su consideración , los siguientes puntos que describen **una situación de privilegios económicos en España para las farmacias establecidas que se encubre bajo una injusta forma de "colaboración pública" con la administración del Estado español** ,falseándose a nuestro entender el sentido de una colaboración efectiva para los ciudadanos que , por esa improcedente formalidad , resultan perjudicados.
También en el presente escrito como anexo , se ofrece una solución práctica considerada óptima para el caso , la cual describimos para consideración de la Comisión y naturalmente para que nuestra propuesta , sea apoyada con toda la fuerza posible por la Secretaría General .

Denuncia de la situación actual
Este caso se denuncia para su conocimiento y corrección porque ,con el pretexto de una "colaboración pública" (sui generis), se obtienen e imponen por la fuerza condiciones que **restringen y encarecen el servicio** , **en beneficio del oligopolio farmacéutico de España** , según se explica :

1º En nuestro país se establecen para la dispensación farmacéutica , ***condicionantes excluyentes de servicio*** (haciéndolos pasar por criterios "técnicos") , para vulnerar las reglas de la libre competencia y consolidar los extraordinarios privilegios de los farmacéuticos establecidos .

2º Es la Administración del Estado , por la presión de los intereses establecidos bajo la forma de oligopolio , quien ***estabiliza normativamente (oficialmente)*** esta forma lucrativa de explotación comercial del medicamento **en contra como se verá ,del ciudadano y de las propias instituciones del Estado como es la Seguridad Social** .
La presión del holding farmacéutico es tan grande sobre la Administración española que consigue **articular *leyes de protección para la dispensación oligopólica de los medicamentos bajo la apariencia de tutelarse una finalidad sanitaria*** ; se utiliza para ello sin demostración objetiva , unos "supuestos argumentos técnicos " , de resultado restrictivo **para así impedir la competencia material e intelectual** y, consecuentemente , para privilegio exclusivo de los únicos farmacéuticos establecidos .

3º Por esta estabilización normativa conseguida de la Administración por el oligopolio farmacéutico, se da lugar a una asociación profesional farmacéutica única o holding (la gran patronal única de la dispensación) que maneja totalmente a los Colegios farmacéuticos regionales y a su cúspide : El Consejo General de Colegios regionales , ***acaparándose formalmente de hecho la distribución y dispensación de los medicamentos en exclusiva en todo el Estado español .***

4º Esta verticalidad de dominio total que parte de las oficinas de farmacia existentes y que asciende ante el organismo nacional (Consejo General de Colegios Farmacéuticos) da lugar a estructuras auxiliares de hipercorporativismo comercial : Cooperativas de la distribución mayorista , **de ellos mismos** y un importante banco financiero propio : Bancofar , **con lo que el dominio comercial del sector farmacéutico de distribución y dispensación está totalmente monopolizado y en condiciones de invadir con éxito ,fijando condiciones propias y con total impunidad administrativa , el sector parafarmacéutico , cosmético y de herboristería como de hecho ocurre** .

5º Como resultado: Un sistema de oligopolio único en privilegios económicos con cifras de negocio multimillonarias y consecuentemente de impedimento de establecimiento profesional para decenas de miles de farmacéuticos **y de impedimento de ofertas a la baja en los precios de los medicamentos al propio Estado o a sus instituciones , entre ellas a la Seguridad Social , la principal perjudicada .**

Como se ha conseguido esta inapropiada e insólita situación

Después de un Decreto de la Dictadura del General Franco (1942) que **secuestró la histórica libertad de ejercicio profesional farmacéutico** y dio pie a este monopolio , se viene utilizando por el holding para evitar la liberalización del sector , deformadamente , la figura de, **"empresa al servicio del Estado"** que aunque es un concepto artificioso e impropio se ha aceptado por la Administración , habiéndose conseguido a partir de esta calificación , asentar el oligopolio , privilegios únicos para una farmacia oligopolica extraordinariamente lucrativa que ahora llaman , " modelo mediterráneo".

Bajo la apariencia de que la farmacia es una "empresa privada de utilidad pública" (lo que no es cierto porque **solo puede ser de colaboración administrativa una de sus múltiples actividades comerciales**) se ha conseguido como se dice , una explotación oligopólica de medicamentos y afines , en contra de la deseable pluralidad y competencia .

Interés para su publicación : El libro verde

Se ha analizado la situación y como resultado se demuestra que esta situación de oligopolio , no obedece a criterios técnicos ni mucho menos éticos sino , al fruto de la argucia dialéctica de los interesados para establecer , después de tanto tiempo de elaboración ,un status de privilegios económicos de acuerdo con la Administración que influida , rechaza sistemáticamente cualquier petición de instalación de farmacias para mantener el oligopolio .

Pero como la farmacia en sí no es objeto de intervención electiva sino solo una de sus actividades comerciales , la de suministro al Estado , se ha llegado tras el análisis de la situación , a la siguiente propuesta que se expone para su conocimiento , **ya explicada y sugerida a la Administración española para la liquidación de la actual explotación oligopólica , y para , dar paso a las ventajas de la libre competencia a favor del Estado y por tanto también a favor del ciudadano** .

Esta propuesta que denominamos : **La farmacia como empresa de colaboración estatal**"desearíamos fuese aceptada por la Comisión y desearíamos también que fuese de obligado cumplimiento para los estados miembros) , según:

1. El Estado utilizará dos recursos principales : **Reglamentación y selección** (elección de farmacias) a partir de , **la total libertad de establecimiento farmacéutico** . La selección se hará , solo para ***determinados servicios de dispensación de medicamentos que la justifiquen***.
2. La forma de selección (contratación) será por **publicidad y transparencia *mediante concurso o plural oferta de todos los establecimientos farmacéuticos posibles sin restricción alguna a la participación*** .
3. *La selección de este tipo servicio* ***será temporal*** .
4. *Las farmacia seleccionadas porque ofrezcan las mejores y más económicas dispensaciones adquirirán temporalmente la calificación de* **empresas de colaboración pública o estatal** *,pudiéndose naturalmente producir en el transcurso del tiempo como garantía de efectividad , altas y bajas en esta colaboración con la Administración .*

Entendemos que , es esta la forma eficaz de colaboración con el Estado , quién a partir de este planteamiento , contratará con total garantía el servicio de dispensación de medicamentos a su cargo , destruyéndose la opacidad comercial que rodea al medicamento .
De esta manera ,tras la liquidación del oligopolio , surgirán en España más del doble de establecimientos de los existentes que podrán tomar parte en los concursos (en cada selección periódica) para el suministro de medicamentos con cargo a la Seguridad Social ,lo cual además de un hecho plausible , **significaría la restitución de una libertad secuestrada**.
También de esta forma , se liberan otras distribuciones monopolizados por el holding farmacéutico actual en España (parafarmacia , herboristería ,dietética, etc) .

En el archivo siguiente que se adjunta se describe con un ejemplo como se llevaría a cabo esta mecánica de contratación de la farmacia con el Estado Español ,**lo que puede ser extensivo a cualquier estado miembro de la CE**, para conseguir homogéneamente la clasificación temporal de la farmacia como : "empresa de colaboración estatal".
Firmado : R de Lara
Av . de Francia 44 . 41012 Sevilla -Espagne
De acuerdo a las intenciones de la Comisión : Se ruega no sea difundido mi nombre ni mi dirección , pero si puede ser difundido el contenido de este texto total o parcialmente y del siguiente si la Comisión lo juzga oportuno.
Se ruega si es posible contestación .

LICITACIÓN DE MEDICAMENTOS CON CARGO A LA S. SOCIAL UN TIPO DE MECANISMO COMO EJEMPLO PARA LA REDACCIÓN DE UN REGLAMENTO DE CONCURSO PARA LA DISPENSACION DE RECETAS CON CARGO A LA SEGURIDAD SOCIAL

Inserción en : Boletín Oficial de la Comunidad Autónoma de ....

Anuncio legal de convocatoria de ofertas de licitación para la dispensación de recetas de la S. Social en las farmacias .

Periodo de suministro a la S. Social : 18 meses (discrecional).

Recepción de ofertas : A partir del dia siguiente a la fecha de publicación de esta convocatoria . Fecha final de recepción 30 días siguientes a la fecha de la publicación de esta convocatoria

Resolución de la licitación a favor de la S. Social :

Mecanismo de adjudicación del suministro a los usuarios de la S. Social y valor del descuento a aplicar sobre los precios de referencia de los medicamentos

CONCURSO PUBLICO

A) Un valor del descuento (%) que se establecerá el límite para acogerse o no a la **selección de farmacias por el Estado** .

Forma de obtener el valor del descuento limitador :

Selección de farmacias por el Estado ,farmacias seleccionadas .

Serían las que ofrecieran a la Seguridad Social iguales o superiores descuentos al valor considerado como **descuento limitador** .

El descuento limitador que marca la selección de farmacias ,sería aquel que corresponde al valor de descuento del **ordinal n** ,en una serie de valores de descuento que se ordenan desde el mayor al menor de los descuentos que presentan las farmacias oferentes .

El ordinal n corresponde al numero de farmacias a seleccionar representa p.e. las tres cuartas partes de las farmacias existentes (este módulo es discrecional) en cada demarcación siempre después de la liberalización de la instalación de los establecimientos farmacéuticos

Resultado de la licitación :
Las farmacias en número de **n ,** cuyas ofertas hayan sido seleccionadas por el anterior regla , obtendrán en su demarcación la acreditación de : Dispensadoras de medicamentos con
cargo a la S. Social durante el periodo de contratación .

B) Discrecional. Cabe la posibilidad , para las farmacias seleccionadas , de que la Administración les mantenga a cada una de ellas el valor del descuento que ha ofertado , pero también cabe , el aplicar (como mejora para sus intereses) el valor mínimo del descuento seleccionado, es decir , el que corresponde al propio descuento limitador .

C) Grandes ciudades . Regirá la convocatoria por distritos o demarcaciones

D) Publicación de los resultados en el propio Boletín Oficial de la C. Autónoma

E) Modelo de participación en el concurso en impreso correspondiente.

UN EJEMPLO PRACTICO DEL MECANISMO DE SELECCIÓN PARA LA ADJUDICACIÓN TRANSPARENTE DE LA DISPENSACIÓN DE RECETAS CON CARGO A LA SEGURIDAD SOCIAL POR CONCURSO .

Ejemplo:

Caso de una ciudad con ocho farmacias (antes de la liberalización tenía 4 ó menos).

Ordinal (discrecional**): Número correspondiente a : p.e. ¾ del total de las farmacias existentes después de la liberalización de establecimiento farmacéutico**

Ordinal **n = 6 , (** 6º)
(serían seis las farmacias que serían seleccionadas, **dos más** que las que existían antes de la liberalización ,por lo tanto mejor servicio que antes)

El resultado de la licitación podría ser el siguiente :

F -1 no oferta reducción , la F -2 un 5 % , la F- 3 un 7´2 % , la F- 4 un 7 ´1 % , la F -5 un 10 , la F- 6 un 7´5 % , la F- 7 un 9 % y la F-8 un 4 %.

Primer paso :
Ordenamiento en función decreciente del valor de los descuentos :
F -5, F -7, F -6 , F -3 , F- 4 , F- 2 , F -8 y F-1

n, da lugar a seis porcentajes de descuento seleccionados , que corresponden a las seis farmacias que son seleccionadas .
Son:

F-5 , F- 7 , F-6 , F-3 F- 4 y F-2 (las seis primeras) .

Segundo paso :

Elección del descuento(s) .
Descuento(s) a aplicar :
Dos modalidades principales entre otras posibles:
a) A cada farmacia de las seis seleccionada como suministradoras , **se le aplicará a la facturación de las recetas con cargo a la Seguridad Social el mismo porcentaje de descuento que ha ofertado** .
o,
b) A cada farmacia de las seis seleccionadas se le aplicará en su facturación de recetas con cargo a la Seguridad Social el valor inferior de los seis descuentos seleccionados ,**el descuento limitador** .
(en el ejemplo el 5 %)

BCCB RESPONSE to the EC GREEN PAPER on PUBLIC-PRIVATE PARTNERSHIPS and COMMUNITY LAW ON PUBLIC CONTRACTS & CONCESSIONS, COM (2004) 327 final

INTRODUCTION to BCCB

The BCCB Project Finance Committee on behalf of the wider membership of BCCB has compiled this response to the EC Green Paper on Public-Private Partnerships And Community Law On Public Contracts & Concessions, COM (2004) 327 - Final. This BCCB committee co-ordinates its activities on PPP very closely with IFSL's PPP Export Group. These two groups represent the private sector in the UK Trade & Investment *Export Advisory Group*. The rotating chairmanship of the UKTI Export Advisory Group is drawn from IFSL and BCCB with BCCB currently providing the chairmanship. The following companies have provided significant input into this paper through the co-ordination of pother members and organisations:

- Vector Management Limited – *BCCB Member firm* – on behalf of BCCB
- International Capital Partnerships Ltd – *IFSL Member firm* – on behalf of IFSL
- Halcrow – *BCCB Member firm* – on behalf of BCCB and IPFA
- WSP International – *BCCB Member fir*m – on behalf of EIC

The BCCB is the major private sector association covering all British exporting consultancy sectors and construction companies working overseas. The Membership includes Plcs, partnerships, SMEs and independent consultants, working across the spectrum of professional expertise from aviation to law, water engineering, healthcare, tourism and transport. BCCB's aim is to promote British expertise internationally and to further the interests of British expertise and construction internationally as a whole.

BCCB is the United Kingdom member of the EIC (European International Contractors).

A BCCB brochure entitled *Public Private Partnerships (PPP), Facilities Management & Outsourcing* which covers the BCCB views on best practice in PPP. It is available on the BCCB web site *bccb.org.uk* and then click *News* and then *Publications*. This brochure forms part of the suite of three documents that comprise a brief guide from UK Trade & Investment entitled *How to Access UK Expertise in Public Private Partnership.* The third element of the guide is the IFSL brochure *Public Private Partnerships: UK Expertise for International markets, 2003.*

INTRODUCTION TO RESPONSE

The Procurement Directives enshrine distinctions in public works and services contracting that are 15 years old and therefore no longer reflect the increasingly sophisticated ways by which the Public Sector does business with the Private Sector[1]. In particular in many States there has been a move away from strict cost-based procurement to *value based transactions.*

[1] In fact the whole distinction and lighter regime applied to "concessions" is a result of successful lobbying by the municipal concession industry. Their arguments at the time were that the "Stadtwerke" system and the privatisation models effectively closed those markets from competition, therefore the municipal concession model should not alone be subject to the full rigors of the Directives.

This distinction is very important. Encapsulated in the phrase "Value for Money" (VFM) this approach unpacks the concept of "economically most advantageous". There are three major strands:

- The public sector client specifies the required output of any works but confides large elements of the design and all the construction to the private partner
- Evaluation concentrates not on the cost of works but on the global cost of financing, amortising and operating the facilities over an extended (even whole-life) term
- Risks are allocated to the party to the contract most capable of containing and managing those risks. Risks have to be evaluated, as competing bidders will adopt different approaches to the risks they are willing to bear. Risk evaluation puts on common economic footing bids that are not like-for like.

In tandem with this change in approach the Public Sector is learning to switch focus from the detail of physical works to the maintainable quality of service that is to flow from any infrastructure-type investment. PPP procurement in particular, embodies this change of philosophy.

The wide-ranging elucidation of the term PPP can be confusing. In the UK model PPP is further advanced in its theory and its practice than in many other countries. The evolution of the UK model recognises that large-scale transfer of risk which is involved in full divestiture, concessions/build-own-operate, build-operate-transfer can be workable where there is a robust off-take arrangement or a clearly evident commercial upside. It also addresses the fact that this can be problematic in some infrastructure sectors where basic commercial viability is difficult to demonstrate.

PPP as a method of providing public services should contain an expectation of service improvement, a commitment to transparency, the dismantling of monopolies and the reform of public services. It permits public authorities to reform public services, dramatically reduce capital expenditure and convert the cost of infrastructure into affordable operating expenditure spread across an appropriate time scale. This innovative approach has ramifications on the way that public services are delivered, with the emphasis being placed on the service outputs required.

The considerable PPP experience accumulated over the past 10 years in many Member States, but especially in the UK demonstrates an economic advantage for the Public Purse of, on average, in excess of 15% . This has been achieved whilst respecting high standards of transparency and impartiality in the selection of the private partner.

Under Directive-inspired legislation, there is a presumption that the eventual arrangement falls into a pre-defined procurement category. Negotiation is only admissible where "the nature of the works or the risks attaching thereto do not permit overall pricing", and competitive dialogue is only permissible where "the contracting body is objectively unable to define the technical means that would best satisfy its needs and objectives, or in cases where it is objectively unable to define the legal and /or financial form of the project".

This is no longer consistent with the perspective of the procuring authorities in many Member States. Current best practice in the UK points to the decision of procurement route coming downstream from an analysis of which method is likely to provide VFM for the Public Purse and then having the safeguards in place to prevent distortion of the competitive process. If the PPP route recommends itself, it is clearly a contractual structure that straddles the historic categories defined in the legislation. It is also clearly imperative, and in both parties interests, for there to be the opportunity for extensive pre-contract discussion/negotiation, especially about risk transfer and pricing if the optimum balance is to be achieved. Negotiation should not however distort the fundamental specifications of output to the advantage of any particular bidder.

Currently, therefore, we are faced with the anomalous situation where the legislation is running behind best economic and good public management practice. To bring the Directives into line may recommend the admission of a new contract-type.

This would be a PPP (defined as a "global" contract encompassing elements of design, works, services and finance over an extended term) which are based on long-term partnership between the public and private sectors, and which would inherit the automatic right to dialogue and negotiation in the procurement process, subject to the Public Authority establishing appropriate safeguards for transparency, impartiality and VFM.

The experience of PPPs is that they have led a very significant increase in cross-border provision in areas that traditionally were dominated by domestic supply. Also PPP has been the engine for very considerable acceleration in infrastructure and public services investment. The evidence is strongly that it is the most economically efficient method. Given the enormous infrastructure deficit facing the New Member States, procurement legislation must be brought into step with the methods that work best.

DETAILED RESPONSES TO SPECIFIC QUESTIONS

1. What types of purely contractual PPP set-ups do you know? Are these set-ups subject to specific supervision (legislative or other) in your country?)

- *Contractual PPPs all share certain key features: output specifications, private sector involvement in the three critical project phases of design (to a greater or lesser degree), construction and operation (always of the technical functions, sometimes of the user-facing aspects of the resulting service) , length of term and ,critically, PRIVATE FINANCE. Design-Build and Design-Build-Operate contracts where payment is made by the authority when costs are incurred or works delivered should be categorized differently.*
- *Otherwise terminology differs (DBFO, DCMF, BOO, BOOT etc…). Mostly these variants boil down to whether the Private contractor has formal ownership (rather than economic responsibility for) the infrastructure at any stage during the infrastructure's working life. The most important and defining characteristic of a PPP is that it is value-based (VFM).*
- *In the UK (as in other countries that have drawn from the UK for their PPP practices) the Public Sector promoter is effectively obliged to observe a highly structured set of procedures, to follow Ministry of Finance standardised contracts, be subject to independent " gateway (good process) reviews" throughout the procurement process, and most importantly carry out a Value for Money benchmarking exercise prior to contract to prove that the PPP solution is economically superior to the public sector alternative.*
- *In the UK The National Audit Office carries out post –contract studies on a selective basis which assess the success and propriety of the PPP procurements. These studies are presented to Parliament (rather than only to the government of the day) and are published.*

2. In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not why not?

- *The competitive dialogue procedures should provide a helpful clarification of the intention of the Procurement Directives and codify practices that have been a feature* *of good UK PPP practice for a number of years. It is however very important that this is used by the Public promoter to bring clarity to the output specifications and not as a means of making the technical solution of any given candidate available to all. Also it is clear that competitive dialogue will rarely obviate the need for negotiation of the contract and technical detail.*

- *Whilst the competitive dialogue allows bidders to optimise their offers in line with the contracting authorities' potential review of the initial project specifications, it creates the threat that entrepreneurial ideas and innovations are circulated to competitors during the tender process, which will deter qualified bidders from competing for PPP projects.*
- *Even with the increasingly rigid application of project frameworks in the UK, which have been published as drafts and have taken account of representations from concession companies, equity investors, lenders and lawyers, it has been found necessary to make changes to accommodate special project characteristics as the projects have moved toward financial close. For all tenderers to fully develop their project and project documentation prior to submission would involve both the tenderers and the public bodies in substantially greater costs and could very well cause the former to withdraw from bidding in PPP projects.*

3. In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so what are these? Please *elaborate*?

- *Cohesion and structural funding should be clearly compatible with PPPs and there should be no presumption that EU–grant aid must imply public ownership of the resulting infrastructure*
- *The Green Paper appears to outlaw the negotiated procedure used in UK – advocating that everything is subject to the Competitive dialogue of Law 2004/18/EC. The use of this procurement approach has Intellectual Property Right issues. The expectation of service improvement and the reform of public services, both essential benefits that should be achieved from the involvement of the private sector will be completely destroyed. The competitive dialogue as currently drafted will result in commercial organisations refusing to invest in innovative design thinking at stage 1. The result is likely to be the loss of any anticipated service improvement, cost benefit through innovation and reform of the provision of public services: it may result in the construction of "big lumps of primitive concrete" everywhere with competition being solely based on who can place concrete cheapest, rather than on who can come up with the cleverest cost saving design approach. The important life-cycle costing will not be adequately managed, and as the initial design and construction costs are generally in the order of 30% of the overall cost of the project throughout its life, the real benefit of the involvement of the private sector will be marginalized. Notwithstanding this engineering concern the bidders bidding costs will increase significantly with this approach.*

– *Apparently the EU can challenge the length of time of the Concession. At the start of a project a conservative view must be taken to attract private finance including downside scenarios and Concession length is often calculated on a pessimistic view. Under the Green Paper it appears that there is the real risk that any project that transpires into something more successful than was initially considered during the feasibility and tendering stages would suffer from the EU interceding and declaring the Concession period too long and ask for it to be reduced. Trying to put together Bankable projects under this threat will be nigh on impossible.*

4. Have you already organised, participated in, or wished to organize or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

– *No comment to make*

5. Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the awards of concessions? In your opinion is genuine competition normally guaranteed in this framework?

– *The Treaty provides adequate provision for non-discriminatory involvement for non-national companies and therefore additional legislation on that particular aspect is unnecessary.*

6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions desirable?

– *The most important element of legislation must be to ensure a clear and reliable framework for the protection of investment, particularly in the case where the EU has a direct financial involvement in PPP projects through the structured funds.*

7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

– *Where there is significant financial or political engagement by the Public sector to facilitate the creation of infrastructures and the provision of services a consistent set of procurement rules should apply. There is no obvious reason why structuring contractor rewards as a function of usage/user payments should invite a less onerous regime. Concessions should be assimilated to a broader category of PPP contracting.*

8. In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?

– *No comment to make.*

9. In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency non-discrimination and equality of treatment?

- *National Authorities should be encouraged to publish clear process guidance/ regulation for private initiative PPPs, which should enshrine the core principles. It is of critical importance that the Private Sector promoter of such schemes should receive a fair economic return on their investment if for any reason other parties are chosen to fulfil the PPP. Evaluation criteria in particular should be explicit. The Commission should have a role in assimilating and disseminating good practice.*

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

- *Satisfactory and in accordance with contract. Abusive contract extensions have not been a feature of UK PPP contracting*

11. Are you aware of cases in which the conditions of execution including the clauses on adjustments over time may have a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or the freedom of establishment?

- *Mostly the clauses that govern adjustments over time properly protect the interest of the public sector client and are not discriminatory. Indeed in many PPPs the price of ongoing service provision has to be brought in line with the market by regular benchmarking or re-tendering.*

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

- *See comments on sub-contracting below.*

13. Do you share the Commission's view that certain step-in type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other standard clauses, which are likely to present similar problems?

- *Step-in rights are an essential component of the security afforded to the providers of finance. They are a cornerstone of the well-balanced PPP contract and are in the interests of both parties. They are only very rarely exercised and then, in extremis, to prevent the catastrophe of an interruption in core public services. They are envisaged as a temporary crisis measure and most PPP contracts foresee "step-outs" when the problems have been addressed.*

- *PPP development is predicated on the ability to source funding from the global project finance markets and the nascent secondary market for PPP finance. These essential funding sources will disappear or become significantly more expensive if standard protections for the capital providers are withdrawn.*

- *Neither the Public nor Private sector would welcome regulatory intervention on this point, as it would be bound to work against the Public interest.*

14. Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, what aspects should be clarified?

- *PPP contracting (assimilating concession-type structures) should be properly recognised as a contract category for which both the negotiated and competitive dialogues are well adapted. All further clarification should be at national level.*

15. In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting?.

- *In respect of those requirements, which favour sub-contracting to SMEs, in general, normal market mechanisms should be allowed to apply as smaller enterprises will naturally benefit from the increased economic activity engendered by a successful PPP programme.*
- *Procurement legislation should be directed to securing adherence to the open market principle and not confused by micro-economic engineering.*

16. In your opinion does the phenomenon of contractual PPPs, involving the transfer of a sets of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

- *The procurement competition should be limited to the concession and thereafter the winning concessionaire should be free to deliver the project through the life of the concession on a commercial basis without further reference to applying further EU procurement rules for subcontractors (as proposed in Para 51 & 52).*
- *An important element of successful PPPs is that financial model timing and costing uncertainties are kept to a minimum. At the time of the primary competition for the concession, the bidders cannot carry out EU procurement rules in order to ascertain indicative subcontractor costs to include in their financial model on which they will base their tender offer. If subsequent to award EU procurement rules apply then bidders must include in their programme significant periods of time for procurement activity and safety time margin for legal challenges. If these programme activities are built into the model, the time periods themselves could turn a potentially viable PPP project into a non - viable project.*
- *There must be a balance in the PPP legislation between the need for true competition and the practicalities and potentially project detrimental implications of introducing procurement law beyond the appointment of the concessionaire.*
- *It is recommended that the procurement rules for subcontracting be deleted in the final PPP legislation.*

17. In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

- *No*

18/19 Questions regarding institutional PPPs

- *The points made in the Green Paper are well taken. If a Public Authority intends to be involved as an equity participant in a PPP delivery vehicle, this intention and the full terms of participation should be disclosed to all candidates at the start of procurement.*

20. In your view, which measures or practices act as barriers to the introduction of PPPs within the European Union.

- *At present the processes for the agreement and disbursement of grant aid towards infrastructure development is not easily compatible with proper and robust PPP contracting. As several Member States are perceiving the average 15% advantage (17% in the UK according to HM Treasury) to the Public Purse of the PPP approach,* *this very considerable economic benefit should be extended to all projects that could receive grant assistance.*

- *Technical assistance to the New Member States should be increased significantly to encourage the development of effective national PPP practices and programmes.*

21. Do you know of other forms of PPPs, which have been developed in countries outside the Union? Do you have examples of good practice in this framework, which could serve as a model for the Union? If so please elaborate.

- *The Commission may find some of the project experience and practices in Australia informative.*

22. More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

- *The most productive initiative at the Commission level would be in response to the comments made in14 and 20 above.*
- *There are already PPP networks for the exchange of best practice and much dialogue between actors. A further forum would only be of limited interest. Cataloguing good practice and examples of successful projects would be far more useful. In this respect the Resource Book is an excellent example and is an initiative to be built on. What is required is focused PPP programme development and support, especially for the New Member States. The Commission should act as a catalyst for good and successful PPP contracting which fully respect the Treaty principles, and emulating only the best practices such as those employed in the UK.*
- *Structural and other grant aid should be made fully compatible with PPP contracting.*

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Construction Confederation’s submission to the European Commission’s consultation on the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions

Introduction

1.1 The Construction Confederation welcomes the opportunity to respond to the European Commission’s consultation seeking views on the EU Green Paper on Public Private Partnerships (PPPs). Our submission focuses on specific areas of concern to our members.

1.2 The Construction Confederation is the main trade association for building and civil engineering contractors in the UK. We represent over 5,000 contractors, which deliver 75% of the total construction turnover in the UK. Members of the Confederation include leading PPP contractors in the UK.

1.3 Private and public sector collaboration is particularly significant in the UK and is continually evolving. The Private Finance Initiative (PFI) is just one aspect of complex contracting in the UK. As of December 2003, over 400 PFI projects have been completed and are operational. A further 217 are in the pipeline, bringing the combined capital value of these projects to over £56 billion.

1.4 As the UK Government and other EU member states increasingly look to PPPs to improve the quality of public services and infrastructure, the policy and legal framework governing PPP projects in the European Union will be key to their long-term success.

Green Paper

2.1 Definitions

There are many different types of PPPs implemented across the UK (e.g. Private Finance Initiative, Build Operate Transfer, Design Build Finance Operate). The Green Paper recognises the various contractual relationships and attempts to define how each of the existing models fit within the overall definitions of contractual PPP or institutionalised PPP. We support the Commission’s assessment of the PFI model as a purely contractual PPP and understand on the basis of the explanation given in the Green Paper that a UK example of an institutionalised PPP would be the National Air Traffic Services.

2.2 The Confederation encourages the Commission to maintain consistency in using these definitions for public works contracts and concessions and similarly joint ventures between the public and private partners. At the moment, we do not believe further definitions are required. Instead, we consider it more important that member states are given the flexibility to assess the appropriateness of a model for each individual project.

2.3 Internal Market

The Construction Confederation supports the Commission's aim of establishing a fair and transparent EU regulatory framework for procurement and, where appropriate, the removal of unnecessary obstacles to facilitate access to PPP projects across the EU. PPP projects differ from traditional procurement projects, as they often involve a potentially complex contractual structure and are long-term. It is therefore essential that the regulatory framework provides flexibility to deliver such projects whilst also encouraging innovation.

2.4 However, we do not support the view that such a regulatory framework should focus solely on competition. European public procurement rules must deliver fair competition but also ensure value for money.

2.5 EU Public Procurement Directives

The Construction Confederation has closely followed the last four years of negotiation on the public procurement directives, particularly the EU public sector procurement directive. Whilst we recognise that the Commission delayed publication of the Green Paper until after agreement was reached through the conciliation process, we still consider the timing of this Green Paper to be premature. We believe that sufficient time must be given to national authorities to implement the directives and furthermore, allow a period of time for the rules to be operational before considering the deficiency or otherwise of the legislative regime.

2.6 The Confederation strongly believes that at present there is no need for additional legislation in the area of public procurement. The latest negotiations have provided an opportunity to harmonise and update legislation, whilst introducing new procedures, most notably the competitive dialogue procedure, to deal with the evolution of PPPs. We would be very concerned by any further reform proposals, which could threaten to disrupt the legal procurement framework at this time. Instead, the focus should be on ensuring that the new legislation is transposed into clear and workable rules for both the private and public sector.

2.7 Competitive Dialogue

The Construction Confederation hopes that this new procedure will provide the much-needed flexibility for complex procurement projects. We believe that it is a good example of the balance required between competition and value for money. This sort of competitive negotiation process is essential to encourage suppliers to bid and secure a fair and best value outcome. Evidently, commercial confidentiality will be key during the discussion phase with contracting authorities.

2.8 Cross-Border Procurement

As previously mentioned, the Confederation supports the Commission's aim to ensure the legal procurement framework does not result in obstacles, which prevent access to PPP projects across the EU. However, we believe that it is important to recognise that direct cross-border procurement is limited. Bidding for such contracts is more generally undertaken through subsidiaries or through joint ventures, as local knowledge is key. Therefore, we do not consider that large scale legislative reform would dramatically increase cross-border procurement.

Conclusion

3.1 The Construction Confederation recognises that this Green Paper is intended to launch a debate on PPPs and the application of Community law. Nevertheless, we believe that the existing public procurement rules provide sufficient transparency and fair competition and focus should be on implementing the recently agreed directives. At this present time, we do not consider there to be any need for further reform. The Confederation would be willing, however, to assist the Commission in better understanding the operation of PPPs in the UK, if further consultation work is to be carried out.

COSLA

A Response to the European Consultation

“Green Paper on PPPs and the Community Law on Public Contracts and Concessions”

COSLA

Executive Summary

COSLA calls upon the European Commission not to introduce detailed and restrictive legislation at a European level on the area of Public Private Partnerships. Such legislation at a European level would not add value to the PPP process, timeframes or making PPPs an attractive option to either the public or private partner. If the Commission do look to introduce any legislation it is important that this is a wide and flexible framework. PPPs are a fast evolving area and not all member states have substantial experience of working with them. It is very important that the public sector bodies can learn from their own experiences, the experiences of other public sector bodies within their regions and the experiences across member states. Therefore such an exchange or experiences facilitated by the Commission would be very welcomed.

A restrictive framework would not allow the work of PPP to develop or be refined. It is important that PPP contracts learn from advances in technology, good practice, major developments and that these are continuously taken account of. PPPs are still very much a learning process and no one should want legislation to stifle this learning. Perceptions and understanding of PPPs has already changed, for example the perception of risk transfer was initially that the private sector took on all the risk but in practice this has not been the case. This will enable PPPs to be more attractive to both the private sector and to public sector bodies.

Any legislation must allow for each regions public sector bodies to enter into clear, transparent and equitable PPP contracts that can learn from PPP experiences and take advantages of developments and local priorities.

COSLA

Response to European PPP Green Paper

This report summarises COSLA's response to the European Commission's Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions.

COSLA, the Convention of Scottish Local Authorities, is the representative voice of Scottish local government representing around 5 million citizens.

Scotland has a single tier of local government, comprising of 32 councils with populations ranging in size from 20,000 to just over 600,000. The net expenditure of Scotland's councils is around £8.3 billion a year (2003/04) and they employ just under 300,000 staff.

COSLA has seven key objectives including:

- Developing external relationships with bodies such as the Scottish Executive, and the Scottish, UK and European Parliaments;
- Addressing and influencing key constitutional issues for Local Government; and,
- Influencing the development of the public policy framework in line with the political direction set by the political leadership of COSLA.

Scottish Local Authorities have a wealth of experience in undertaking public procuring and in particular with PPPs. This PPP experience is across a number of sectors within Local Government and also of varying degrees of size and service delivery. This report highlights a number of examples and experiences gained by Scottish Local Authorities during recent years. The report brings in evidence and direct input from a wide variety of public sector officers and Local Authorites. COSLA's report includes the views of urban and rural authorities with the officers working on proposed and existing PPPs within Scotland feeding directly into this response.

The European Commission recognised that Public Private Partnerships (PPPs) were becoming a significant option for member states and their regions. While PPPs and Public Finance Initiatives (PFIs) have been operating within the regions of the United Kingdom for a number of years now the numbers of PPPs or PFIs within other member states have not been as great. As member states are beginning to seek to implement PPPs a number of concerns and uncertainties are being experienced. As recourse to address these issues the Commission has prepared the Green Paper, which seeks to establish the legislative position and to build on the experiences of previous and current PPPs within Member States.

The Current Position

PPPs are not currently defined by the Commission but are recognised as a co-operation between the public and private sectors. A PPP is characterised at Commission level as being of a relatively long duration, that funding is normally a combination of private and public funds, that the private sector partner is required to ensure that services or conditions of contract are met and delivered and that the distribution of risks and rewards are an important factor when entering into a PPP agreement.

The Commission currently looks for certain issues to be addressed and met within PPP work; these are transparency, equality and non-discrimination. The public sector can be held accountable to show that the project is undertaken.

Main Areas of Concern

European Legislation A Backward Step

To introduce detailed and restrictive PPP legislation at a Commission level would be detrimental to the good workings of a PPP. Such European legislation would hinder the development and advancement of service delivery through developments in technology, service delivery and learning from the experiences of PPPs across the member states. PPPs are seen as bringing the experience and good practice of the private sector into the public sector. The introduction of too restrictive legislation on PPPs will further hinder the perceived and realisable benefits of public-private working. The private sector are not used to working within the legislative framework of the public sector and this type of legislation at a European level will make PPPs less attractive to the private sector and increase their perceived risk of investing into a PPP.

Local Authority Autonomy

It is for Local Authorities within Scotland to choose whether a PPP is the best recourse to tackling the area of concern. This issue fits with the current requirement for transparency that the Commission seeks. Scotland’s Local Authorities are locally elected and locally accountable and therefore must ensure that their electorate can see that their own authority is delivering best value. Further subjecting PPPs to additional restrictive legislation could potentially damage the delivery of efficient and effective local services to meet local priorities. This must be recognised if the Commission seek to introduce any legislation.

Transfer of Risk and Reward

As highlighted by the green paper one significant area of a PPP is the relationship between risk and reward within the PPP agreement. Often the assumption is that the private sector is the body that is experiencing the majority of the risk and therefore should be rewarded by receiving the majority of the reward. When private sector businesses are costing for a PPP contract the transfer of risk is reflected within the costing work they submit. However, the perceived transfer of risk is not always the reality and a recent study of PPPs within England found that in only eight out of fifty-five PPP ventures did the private sector take the responsibility for the risks that they had costed for. It is important that the legislation does address the issue of risk and responsibility and recognises that previous PPP experiences have found that risk assessments have not been reflective of the actual risk undertaken. Fresh media allegations have arisen that central British Government have subsidised failing PPPs to ensure that PPP projects are attractive to the private sector and the returns achieved by private firms will encourage further private sector bodies to undertake PPP work. Any legislation that the Commission introduce should seek to ensure that the private contractor is accountable for the risk they have costed for. It would be an inappropriate use of the public purse if the public sector faced higher payments due to risk levels and then had to meet the costs resulting from these same risks resulting at a later date.

Learning from Experiences

While COSLA welcomes the Commission’s desire to make far-reaching and encompassing legislation for PPPs across Europe there must be sufficient scope for local flexibility. Not only will this scope allow for local autonomy but more importantly experiences and development within existing PPPs should be able to be recognised in future planning processes and within future PPP contracts. One local authority within Scotland entered into a PPP contract for the building of six secondary schools, during the building process the private contractor went into liquidation. The experiences learnt from this PPP have now been used as a benchmarking tool for all future PPPs within Scotland. It is important that the regions are able to learn from experiences within their member state and across the European Union and that the legislation is able to accommodate the outcomes of these experiences. The desire of the Commission to encourage this sharing of experiences is warmly welcomed.

Continuation of In-House Options

The legislation looks to set out the best possible framework to ensure that the implementation of any PPP project can ensure the three requirements of transparency, equality and non-discrimination. While working to ensure this, it is important that any legislation does not conclude that PPPs always be introduced or that they are always the best value for money. Ensuring that a PPP is undertaken within the constraints of best value should not mean a conclusion that PPPs are the only option and that other options do not represent best value. This becomes more of an issue with institutionalised PPPs where some Local Authorities within Scotland have sought to implement other in-house options than an institutionalised PPP. Scottish Local Authorities have been subject to a best value audit since 1997, therefore if an authority chooses to undertake work outwith a PPP this will be subject to a best value audit and Local Authorities should not have to justify alternative PPP choices to the Commission.

Offering Tenders

It is important that Local Authorities are able to enter into tendering arrangements with as much autonomy as possible. Each PPP is different and addresses a unique situation and issues. Local Authorities, indeed the public sector as a whole, must be able to outline the specific criteria and requirements that they are setting for their proposed PPP. To subject this tendering phase to further legislation will extend the already lengthy timeframe of establishing a PPP contract and create further uncertainties and less service delivery. The tendering process is the riskiest phase for the private firm seeking to enter a PPP contract. The private firm must undertake a significant job of work to cost and promote their tender. In Scotland this is already subject to legislation and has caused some private sector firms to not enter into tender negotiations. Subjecting PPPs to further tendering legislation will reduce the number of private firms who are willing to enter into the tendering process and thus reduce the potential for private sector competition.

The Commission also appear to seek that all PPPs are tendered European wide. It is important that the Commission is clear on what would be deemed a trans-border tender. While respecting internal market procedures there should be no additional pressure placed on public sector bodies. PPPs were advertised as incorporating the benefits of the private sector with the service delivery of the public sector. By ensuring that a local authority tenders in media that can be accessed by all, such as the Official Journal, this would enable enterprising private contractors to seek out potential tenders within the European Union. Within the green paper the Commission is seeking to ensure that best value is delivered within PPP contracts. The Commission should seek to clarify what constitutes value for money whilst ensuring that PPP projects are tendered across member states. It would seem appropriate that a project must be of a significant scope and or size to warrant additional tendering costs.

Competitive Dialogue

The Commission introduced the procedure of competitive dialogue within the area of public procurement and now wish to introduce this into the area of PPPs. The Commission recognise that this will enable public bodies to enter into dialogue with businesses tendering for the PPP contract “in order to identify the solutions best suited to their [the public sector body’s] needs.” The public sector body will then assess tenders on the pre-stated award criteria and then select the private sector business that has been successful. It is important that the selection of the tender is based on this pre-stated but that the Commission recognise that this is not always the cheapest option. Best value does not necessarily mean the lowest price. A clear and transparent pre-stated criteria and an open and transparent tendering process will ensure that public sector bodies achieve a best value PPP that meets the requirements and criteria that they have looked for. The introduction of competitive dialogue recognises the unique and varied nature of each PPP project and the ability of a public sector body to choose the private tender that best meets the needs and requirements of its criteria is paramount to the delivery of a successful PPP.

Secondary Markets and Transparency

An issue that has recently come to light within PPPs in Great Britain is that of “secondary markets.” A secondary market is where the private contractor who entered into the original PPP sells on their share of the PPP contract to another private sector provider. The service is still delivered and the requirements of the contract met but the private company who entered into the original agreement can make sizeable profits without any share of this being passed to the public sector.

It is the area of private sector profits from PPPs that creates the greatest public attention and reaction with a PPP initiative. The Commission should seek to ensure that there is transparency within PPP contracts. While commercial confidentiality is to be maintained it must be recognised that PPPs are publicly accountable contracts and the transparency that the Commission seek on PPPs should be ensured.

Examples of Scottish PPP Experiences

PPPs in Education

Within Scotland the investment requirements in order for authorities to address these needs of school estates are so substantial as to be beyond the normal levels of capital allocations available and there have been three main reasons for implementing PPPs within schools estates.

The first need is that there is a substantial backlog maintenance need within the national school estates. This arises as a result or year on year deterioration of the school stock. Much of Scotland's schools estates were built in the 1960s, or earlier, and this deterioration over 40 or more years has arisen because authorities have not had capital allocations enabling them to address the issue with the level of investment required. This is in keeping with one reason the Commission hold for the rise in PPP projects with the Green paper stating that at a European level, “it was recognised that recourse to PPPs could help to put in place trans-European [projects] which had fallen very much behind schedule, mainly owing to a lack of funding”.

Secondly, falling school rolls or geographical changes in population in most authorities has led to a need for school rationalisations in order to reduce the spare capacities within schools and the stock as a whole or in a particular geographical area. Where this has been the case the options are either to move the two schools into one of the existing schools and refurbish this or to build a new school. Particularly in the latter case substantial investment is required which has increased the use of PPPs.

The third reason is bringing school estates stock into line with 21st Century Educational requirements. These requirements cover a number of aspects that Local Authorities need to address in order to improve the service delivery within education. Areas such as facilities for those with special needs, e-learning and support facilities for pupils/parents have building implications within the general context of making schools “fit for the 21st century”. The costs over the full estate are significant and have added to the pressure for new build or significant adaptation options at cost levels leading to PPP solutions.

Under the section 94 capital consents the capital allocations were such that these issues could not be addressed, as Local Authorities were not able to deliver all their priorities and have sufficient capital to address the priorities outlined above. PPP projects enable these needs to be met, but also enable Local Authorities to benefit from addressing these early rather than facing increased costs due to significant backlogs lasting over a protracted number of years.

PPP projects for refurbishment are generally felt to be less attractive to the private sector. Initially the private sector were attracted by the perceived profits of PPP work and felt that refurbishment PPPs would be as successful as new build work. The risks however with a refurbishment PPP are felt to be significantly greater with an increased likelihood of payments to the PPP contractor being forfeited due to difficulties being encountered as a result of the latent problems in existing buildings.

Due to the experiences of previous private sector contractors within refurbishment PPP projects the private sector now seem to be costing projects accordingly and it is far easier to deliver a PPP project for new build packages than those having significant refurbishment content.

PPPs in Waste

There are a number of concerns expressed by Scottish Local Authorities when addressing the use of PPPs within Waste initiatives. These experiences are very relevant when looking to address the use and effectiveness of PPPs.

Local Authorities have found traditional PPPs to be an inappropriate tool to address the complexity of waste initiatives or the constantly changing variables or the number of inter-related components especially as Scotland is looking to increase the scale and scope of partnership working across public sector bodies. This partnership working causes difficulties with the traditional PPP contract being an agreement between one public sector body and a private contractor with legislation and guidance currently existing for PPPs not having looked to address these issues. The proposal for the ability and opportunity to share experiences and good practice between the regions could prove beneficial.

Developments and new legislation can also result in the initial PPP negotiations and costings needing to be revised, e.g. if an authority wishes to ensure recycling levels of 10% but during negotiations the Scottish Executive set requirements for Local Authorities to have recycling levels of 15%. The complex nature of a waste PPP increases the risk for the private contractor. This has led to a reduced number of potential private contractors and reduced competition; in three recent waste PPP tenders only one has had more than one private contractor submitting a bid.

One Local Authority has taken the step of entering into negotiations with the main bidder but also awarded a reserve bidder during contract negotiations. This reserve bidder takes on the vital role of keeping the pressure of market forces on the main bidder and thus keeping the costs submitted during negotiations down. Without this reserve bidder there would be no need for the main contractor to keep costs down, as they would be in a simulated monopoly.

PPPs and Public Contracts

Prior to the introduction of the new Local Government in Scotland Act the prevailing legislation precluded the private sector partners from accessing public sector contracts for goods and services. The only way that PPP projects could access public contracts was if the public authority retained responsibility for the goods or services required. One example of this situation was for a new extension to a college campus where a Local Authorities contract energy rates were more competitive than the private sector partner could achieve. The college therefore assumed responsibility for the payments so that they could benefit from the public sector contract.

With the new prudential regime in place it is now possible for the PPP partner to access public sector contracts for projects. The basic options now are one, for the public authority to retain responsibility for the loose furniture/equipment; and two, for the PPP partner to have responsibility for the loose items, the difference now being that they have the option either to arrange/access their own contracts or to access the requirements from a suitable public sector contract if this offers Best Value.

One difficulty that has been identified is the common requirement for the PPP projects to want very long guarantee periods (usually 25 to 30 years) for items like loose furniture. The best option for making a contract for furniture for school projects is a framework agreement but the maximum period allowed by the European Union under the public sector directives is 4 years. Even with a call off contract current Commission precedents and legislation do not view anything longer than 5 years favourably as the view held is that long term contracts restrict competition. Again the issue of risk is very prevalent here. The presumption that continuity of supply and even continued existence of the manufacturer can be maintained over the period in question cannot be guaranteed. The changes within the economic climate in a period of this length also mean the potential for further unseen risks.

PPPs Outwith Local Authority Remit

There have been a number of high profile PPP projects within the United Kingdom within the health agenda. These have received significant press attention and aspects of the PPP contract have come under public scrutiny. With both the Belfast Royal Infirmary and the Edinburgh Royal Infirmary the hospital car parks have received adverse public attention. The car park at Belfast Royal infirmary cost roughly £2m to construct and the private contractor receives subsidies from the hospital to keep the cost of parking down. The result is that within five years the cost of construction is fully met and the contractor will make significant returns year on year for the next 15 years. The car park at the Edinburgh Royal Infirmary was charging a higher rate of charges to users than the same firm was charging at Edinburgh Airport. As the new hospital is on the outskirts of Edinburgh there is a monopoly on the parking available to members of the public and therefore no alternative parking within easy access of the hospital.

The Edinburgh Royal Infirmary is a 30-year PPP in which the NHS Trust passed the site of the existing hospital to the private contractor in return for a purpose built hospital on a new site. The contractor therefore received a large area of prime retail site in the heart of Edinburgh and in addition to this owns the asset of the new hospital on the outskirts of the city for which it also receives annual rent of £11m per annum.

Conclusion

PPPs are an option for Local Authorities and the discretion and decision to apply these should remain with the regions and not be dictated by European Legislation. Regions should be able to learn from the experiences of PPPs within their region and member state and also from other European member states. It is important that if there is to be forthcoming legislation that this legislation is relevant and appropriate to PPP work taking place across the various member states. It should not be so restricting that lessons learnt cannot be applied to future PPP work. The Commission recognises that member states have a far greater knowledge of PPP projects and that their experiences are a resource that the Commission wishes to use. By working together the Commission should be able to introduce legislation that is beneficial to the regions and develops the PPP agenda from its current position rather than seeking to establish the current arrangements.

It is very important that the public sector bodies can learn from their own experiences, the experiences of other public sector bodies within their regions and the experiences across member states. Therefore such an exchange or experiences facilitated by the Commission would be very welcomed.

The scope and use of PPPs is very different across member states, their regions and most importantly across each area of the public sector. The issues that are paramount to a PPP for roads will not necessarily be the issues that are paramount for a PPP in education. It is important that legislation or guidelines are therefore enabling rather than restrictive to allow for innovation, advancement and crucially the delivery of the best possible services and public facilities.

Further Information

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INTERNATIONAL FINANCIAL SERVICES, LONDON

RESPONSE TO EU GREEN PAPER ON PUBLIC PRIVATE PARTNERSHIPS

LONDON

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INTERNATIONAL FINANCIAL SERVICES, LONDON
RESPONSE TO EU GREEN PAPER ON PUBLIC PRIVATE PARTNERSHIPS

Introduction

This response to the EU Green Paper on Public Private Partnerships has been compiled by members of International Financial Services London working with the British Consultants and Contractors (BCCB) Bureau. These two groups represent the private sector in the UK Trade & Investment *Export Advisory Group*. The rotating chairmanship of the UKTI Export Advisory Group is drawn from IFSL and BCCB with BCCB currently providing the chairmanship. The following companies have provided significant input into this paper through the co-ordination of other members and organisations:

- Vector Management Limited – *BCCB Member firm* – on behalf of BCCB
- International Capital Partnerships Ltd – *IFSL Member firm* – on behalf of IFSL
- Halcrow – *BCCB Member firm* – on behalf of BCCB and IPFA
- WSP International – *BCCB Member fir*m – on behalf of EIC

The document below, from "Introduction to Response" has been agreed with and is basically identical too the BCCB response lodged separately (The introduction has been expanded). We believe it is important to submit two documents, however, as the introduction relating to each organisation explains the different constituencies and experiences of the member organisations.

IFSL

International Financial Services, London is a private sector, not-for-profit membership organisation, funded by its Members, the Bank of England and the Corporation of London (the public authority for London's financial centre). IFSL has 35 years experience of successful promotion of the UK's financial and supporting professional services industry.

While not a UK Government organisation IFSL does have an official role with regard to United Kingdom Trade and Investment (UKTI), the Government's overseas trade promotional arm, as their financial services promotional partner. As such, it is involved in setting UK government Financial Services priority markets and approving British Diplomatic Post's financial services promotional plans.

IFSL role as regards the promotion of PPP

IFSL PPP Export Group

The IFSL PPP Export Group is a UK Government approved contact body for those overseas Governments (at Central, Regional and Municipal level) wishing to learn more of the UK's expertise in Public Private Partnerships. As such, it is responsible for drafting (with the BCCB) the UK Government's international PPP promotional strategy. IFSL formed its PPP Export Group in April 2000 and the group is chaired by Dr. Tim Stone, Global Chairman of PFI/PPP Business at KPMG, probably the foremost expert in the internationalisation of PPP worldwide. Other members of the group include leading practitioners in the banking, legal, advisory, accounting and risk management fields together trade associations and UK government organisations such as Partnerships UK, HM Treasury and the Department of Health. Members of the IFSL group include former members of both the Private Finance Panel and the Treasury Task Force on PPP as well as former civil servants who ran many of the UK's initial PPP projects programmes (e.g. roads and prisons).

Overseas activity

Since the group was formed IFSL has organised over 40 seminars on PPP internationally.

UK activity

In the UK IFSL has organised meetings or visit programmes for well over 100 overseas Government delegations interested in PPP visiting London. In the EU IFSL is currently working particularly closely with the Economic ministry in Latvia, the Finance ministries of Portugal, Czech Republic and Hungary, the Bavarian government and many others. IFSL offers unrivalled access to expert practitioners and relevant UK Government contacts for those overseas governments wishing to find out more about UK experience on PPP. All in all IFSL is currently working with around 40 governments worldwide at central, regional and municipal level on this subject.

Promotional Partner

Some Governments have chosen to formalise their relationship with IFSL by appointing them as promotional partner with the idea of using IFSL's contacts and network to promote their PPP project plans and assist them on their policy thinking. The governments of Mexico, Latvia, and Turkey come into this category.

PPP briefings, seminars and visit programmes

IFSL organises a number of different types of event for overseas government groups at Central, Regional and Municipal levels.

IN THE UK

Roundtable discussions for visiting officials

IFSL arranges for experts to participate in discussions about aspects of PPP. These sessions usually last for several hours and can look at all elements of the PPP process; including the history of the initiative in the UK, policy issues, advantages and disadvantages, finance, risk management and legal aspects etc. Sessions concentrating on one particular sector: such as transport, health, education etc have also been arranged.

Seminar presentations

For a larger audience IFSL arranges for a series of presentations on the various aspects of PPP.

Longer visit programmes

IFSL organises longer programmes in the UK including an introductory seminar, meetings with UK government PPP units, visits to operational PPP projects etc.

Press Briefings

IFSL arranges interviews and visit programmes for foreign journalists wishing to find out more about PPP.

OVERSEAS

Much of the work IFSL does with governments is of the "first contact" type. These are initial discussions with officials or ministers as to what PPP is, how it works and its appropriateness for the country concerned.

Roundtables

These are usually high-level discussions at Ministerial level to enable governments to debate policy and practical issues with UK experts and representatives of UK government departments involved in PPP. Recent examples include meetings with the Finance and Transport Ministers of Denmark, the Finance Ministries of Portugal, Latvia, Lithuania, Czech Republic and Hungary.

Workshops

Detailed one or two day sessions looking at the PPP process organised for a government department or other interested group. IFSL organised a two day PPP roads workshop for the Hungarian Transport and Economy Ministry in Budapest and a two day workshop with the Finance Ministry of Portugal.

Seminars

These are usually aimed at government officials and are either of an introductory nature or concentrate in more detail on one particular sector.

IFSL Supporting Material

The IFSL brochure *Public Private Partnerships: UK expertise for international markets* gives a basic introduction to the concepts and issues involved in PPP. It is available in French, Hungarian, German, Polish, Spanish, and Latvian. This brochure forms part of the suite of three documents that comprise a brief guide from UK Trade & Investment entitled *How to Access UK Expertise in Public Private Partnership.*

The third element of the guide is the BCCB brochure *Public Private Partnerships (PPP), Facilities Management & Outsourcing.*

IFSL has also produced a number of case studies by sector to illustrate some of the issues involved. The IFSL paper *PFI in the UK: Progress and Performance* summarises some of the recent statistical reports on the performance of PPP in the UK.

IFSL GENERAL COMMENTS

IFSL has been working with government organisations in: Denmark, Finland, Estonia, Latvia, Lithuania, Poland, Hungary, Czech Republic, Slovakia, Germany, France, Portugal, Spain, Malta, and Belgium on developing their PPP policies.

PPP is seen as a way to improve the delivery of public services across the Union. It is not in IFSL's view, primarily, an accounting trick to move projects off balance sheet. It is not really about finance. It is a way to reform the delivery of public services to the benefit of the citizen. Recognition of this fundamental tenet from the EU centrally seems not always to be truly appreciated. Every single new EU country is looking to the UK model to reform their infrastructure and public service delivery but the necessary support to implement their plans is currently not available. What is needed, above all, is a recognition from the EU that in order to implement a PPP programme sufficient to *attract significant international investment* there needs to be resources available for countries to draw on to enable them to set up the *institutional infrastructure* necessary to permit them to start a programme. The limited success of PPP in the new EU countries so far is not due to any lack of interest in the process but rather due to the fact they need resources to establish a legal and administrative infrastructure such that they can attract these international investors. The EU could have a significant role here in providing technical advice/resources to assist at the policy stage. This is the single greatest barrier to the spread of PPP in new countries. The increasing interest in PPP from EU countries such as France, Germany and Denmark (as well as the other 80 countries around the world now looking at PPP) is going to make it even more difficult for the new EU countries to attract the funding they need for their PPP programmes and yet, without these programmes the chances of their infrastructure improving *in the long term* are remote. ***Help on getting PPP programmes moving is the one single most useful thing the EU can do.***

Around the world governments are facing the same dilemma. How to meet rising popular expectations and demand for better public services; both for "social" services such as schools, hospitals and prisons and transport and for "infrastructure" services such as roads, bridges, railways and utilities. This is at a time when, increasingly, government deficits have to be kept down. The pressure on public finances is intense, especially in a period of slow economic growth, and depressed tax revenues. It is a dilemma that in the past might have been solved by cutting public spending and, in particular, capital spending. In addition, there is the rising pressure for funds to renew, maintain and operate the existing infrastructure. Competition for such funding is often intense; not just between infrastructure projects but also with the many other demands on public sector finance.

In most administrations the capital, maintenance and operations budgets are separate. In times of fiscal pressure maintenance budgets ("nice to have") are often easy areas to cut to relieve pressure on operational budgets ("must have"). It is a very short-sighted strategy which is, nonetheless, all too common. This is especially true given the short-term planning processes involved in most public sector spending institutions where the tyranny of the annual budget takes precedence over a long-term strategic approach. Very soon there is not only no money available for new infrastructure but there is no money available to maintain existing infrastructure; which then deteriorates even more until it becomes essentially unfit for use, adding pressure to the demands for new infrastructure. This is why the construction, operation and maintenance of infrastructure must be seen as one thing. *To provide funds for the building of new infrastructure without making funds available for its operation and maintenance only delays the problem not solves it.* This, for example, is why it is critical for EU accession countries to look to a PPP solution for their infrastructure needs rather than rely purely on EU handouts. The danger of structural and cohesion type funding is that it enables new infrastructure to be built without the wherewithal to operate and maintain those structures.

INTRODUCTION TO RESPONSE

In the UK, as in many Member States, Government and Public Bodies transact with the Private Sector under normal contract law. Their constraints are a question of competence, which is governed by public law. So long as competence is established, they may opt for the contractual structure that provides best value for the Public Purse. It is essential that any categorisation of contractual form under procurement legislation does not fetter the Public Sector's flexibility in this respect. This consideration in no way conflicts with the overriding obligation to transact fairly and impartially with full regard to open market principles.

The current Procurement Directives enshrine distinctions in public works and services contracting that are 15 years old and therefore no longer reflect the increasingly sophisticated ways by which the Public Sector does business with the Private Sector. In particular in many States there has been a move away from strict cost-based procurement to value based transactions.

This distinction is very important. Encapsulated in the phrase "Value for Money" (VFM) this approach unpacks the concept of "economically most advantageous". There are three major strands:

- The public sector client specifies the required output of any works but confides large elements of the design and all the construction to the private partner
- Evaluation concentrates not on the cost of works but on the global cost of financing, amortising and operating the facilities over an extended (even whole-life) term
- Risks are allocated to the party to the contract most capable of containing and managing those risks. Risks have to be evaluated, as competing bidders

will adopt different approaches to the risks they are willing to bear. Risk evaluation puts on common economic footing bids that are not like-for like.

In tandem with this change in approach the Public Sector is learning to switch focus from the detail of physical works to the maintainable quality of service that is to flow from any infrastructure-type investment. PPP procurement in particular, embodies this change of philosophy.

The wide-ranging elucidation of the term PPP can be confusing. In the UK model PPP is further advanced in its theory and its practice than in many other countries. The evolution of the UK model recognises that large-scale transfer of risk which is involved in full divestiture, concessions/build-own-operate, build-operate-transfer can be workable where there is a robust off-take arrangement or a clearly evident commercial upside. It also addresses the fact that this can be problematic in some infrastructure sectors where basic commercial viability is difficult to demonstrate.

PPP as a method of providing public services should contain an expectation of service improvement, a commitment to transparency, the dismantling of monopolies and the reform of public services. It permits public authorities to reform public services, dramatically reduce capital expenditure and convert the cost of infrastructure into affordable operating expenditure spread across an appropriate time scale. This innovative approach has ramifications on the way that public services are delivered, with the emphasis being placed on the service outputs required.

The considerable PPP experience accumulated over the past 10 years in many Member States, but especially in the UK demonstrates an economic advantage for the Public Purse of, on average, in excess of 15% . This has been achieved whilst respecting high standards of transparency and impartiality in the selection of the private partner.

Under Directive-inspired legislation, there is a presumption that the eventual arrangement falls into a pre-defined procurement category. Negotiation is only admissible where "the nature of the works or the risks attaching thereto do not permit overall pricing", and competitive dialogue is only permissible where "the contracting body is objectively unable to define the technical means that would best satisfy its needs and objectives, or in cases where it is objectively unable to define the legal and /or financial form of the project".

This is no longer consistent with the perspective of the procuring authorities in many Member States. Current best practice in the UK points to the decision of procurement route coming downstream from an analysis of which method is likely to provide VFM for the Public Purse and then having the safeguards in place to prevent distortion of the competitive process. If the PPP route recommends itself, it is clearly a contractual structure that straddles the historic categories defined in the legislation. It is also clearly imperative, and in both parties' interests, for there to be the opportunity for extensive pre-contract discussion/negotiation, especially about risk transfer and pricing if the optimum balance is to be achieved. Negotiation should not however distort the fundamental specifications of output to the advantage of any particular bidder.

Currently, therefore, we are faced with the anomalous situation where the legislation is running behind best economic and good public management practice. To bring the Directives into line may recommend the admission of a new contract-type.

This would be a PPP (defined as a "global" contract encompassing elements of design, works, services and finance over an extended term) which are based on long-term partnership between the public and private sectors, and which would inherit the automatic right to dialogue and negotiation in the procurement process, subject to the Public Authority establishing appropriate safeguards for transparency, impartiality and VFM.

The experience of PPPs is that they have led a very significant increase in cross-border provision in areas that traditionally were dominated by domestic supply. Also PPP has been the engine for very considerable acceleration in infrastructure and public services investment. The evidence is strongly that it is the most economically efficient method. Given the enormous infrastructure deficit facing the New Member States, procurement legislation must be brought into step with the methods that work best.

DETAILED RESPONSES TO SPECIFIC QUESTIONS

1. What types of purely contractual PPP set-ups do you know? Are these set-ups subject to specific supervision (legislative or other) in your country?)

- *Contractual PPPs all share certain key features: output specifications, private sector involvement in the three critical project phases of design (to a greater or lesser degree), construction and operation (always of the technical functions, sometimes of the user-facing aspects of the resulting service), length of term and, critically, PRIVATE FINANCE. Design-Build and Design-Build-Operate contracts where payment is made by the authority when costs are incurred or works delivered should be categorized differently.*
- *Otherwise terminology differs (DBFO, DCMF, BOO, BOOT etc…). Mostly these variants boil down to whether the Private contractor has formal ownership (rather than economic responsibility for) the infrastructure at any stage during the infrastructure's working life. The most important and defining characteristic of a PPP is that it is value-based (VFM).*

In the UK (as in other countries that have drawn from the UK for their PPP practices) the Public Sector promoter is effectively obliged to observe a highly structured set of procedures, to follow Ministry of Finance standardised contracts, be subject to

- *independent " gateway (good process) reviews" throughout the procurement process, and most importantly carry out a Value for*

Money benchmarking exercise prior to contract to prove that the PPP solution is economically superior to the public sector alternative.

- *In the UK the National Audit Office carries out post –contract studies on a selective basis which assess the success and propriety of the PPP procurements. These studies are presented to Parliament (rather than only to the government of the day) and are published.*

2. In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not why not?

- *The competitive dialogue procedures should provide a helpful clarification of the intention of the Procurement Directives and codify practices that have been a feature of good UK PPP practice for a number of years. It is however very important that this is used by the Public promoter to bring clarity to the output specifications and not as a means of making the technical solution of any given candidate available to all. Also it is clear that competitive dialogue will rarely obviate the need for negotiation of the contract and technical detail.*
- *Whilst the competitive dialogue allows bidders to optimise their offers in line with the contracting authorities' potential review of the initial project specifications, it creates the threat that entrepreneurial ideas and innovations are circulated to competitors during the tender process, which will deter qualified bidders from competing for PPP projects.*
- *Even with the increasingly rigid application of project frameworks in the UK, which have been published as drafts and have taken account of representations from concession companies, equity investors, lenders and lawyers, it has been found necessary to make changes to accommodate special project characteristics as the projects have moved toward financial close. For all tenderers to fully develop their project and project documentation prior to submission would involve both the tenderers and the public bodies in substantially greater costs and could very well cause the former to withdraw from bidding in PPP projects.*

3. In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so what are these? Please *elaborate*?

- *Cohesion and structural funding should be clearly compatible with PPPs and there should be no presumption that EU–grant aid must imply public ownership of the resulting infrastructure*

The Green Paper appears to outlaw the negotiated procedure used in UK – advocating that everything is subject to the Competitive dialogue of Law 2004/18/EC. The use of this procurement approach has Intellectual Property Right issues. The expectation of service improvement and the reform of public services, both essential benefits that should be achieved from the involvement of the private sector will be completely

- *destroyed. The competitive dialogue as currently drafted will result in commercial organisations refusing to invest in innovative design thinking at stage 1. The result is likely to be the loss of any anticipated service improvement, cost benefit through innovation and reform of the provision of public services: it may result in the construction of "big lumps of primitive concrete" everywhere with competition being solely based on who can place concrete cheapest, rather than on who can come up with the cleverest cost saving design approach. The important life-cycle costing will not be adequately managed, and as the initial design and construction costs are generally in the order of 30% of the overall cost of the project throughout its life, the real benefit of the involvement of the private sector will be marginalized. Notwithstanding this engineering concern the bidders bidding costs will increase significantly with this approach.*
- **Apparently the EU can challenge the length of time of the Concession. At the start of a project a conservative view must be taken to attract private finance including downside scenarios and Concession length is often calculated on a pessimistic view. Under the Green Paper it appears that there is the real risk that any project that transpires into something more successful than was initially considered during the feasibility and tendering stages would suffer from the EU interceding and declaring the Concession period too long and ask for it to be reduced. Trying to put together Bankable projects under this threat will be nigh on impossible.**

4. Have you already organised, participated in, or wished to organize or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

- *No comment to make*

5. Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the awards of concessions? In your opinion is genuine competition normally guaranteed in this framework?

- *The Treaty provides adequate provision for non-discriminatory involvement for non-national companies and therefore additional legislation on that particular aspect is unnecessary.*

6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions desirable?

- ***The most important element of legislation must be to ensure a clear and reliable framework for the protection of investment, particularly in the case where the EU has a direct financial involvement in PPP projects through the structured funds.***

7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

Where there is significant financial or political engagement by the Public sector to facilitate the creation of infrastructures and the provision of services a consistent set of procurement rules should apply. There is no obvious reason why structuring

- *contractor rewards as a function of usage/user payments should invite a less onerous regime. Concessions should be assimilated to a broader category of PPP contracting.*

8. In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?

- *No comment to make.*

9. In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency non-discrimination and equality of treatment?

- National Authorities should be encouraged to publish clear process guidance/ regulation for private initiative PPPs, which should enshrine the core principles. It is of critical importance that the Private Sector promoter of such schemes should receive a fair economic return on their investment if for any reason other parties are chosen to fulfil the PPP. Evaluation criteria in particular should be explicit. The Commission should have a role in assimilating and disseminating good practice.

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

- *Satisfactory and in accordance with contract. Abusive contract extensions have not been a feature of UK PPP contracting*

11. Are you aware of cases in which the conditions of execution including the clauses on adjustments over time may have a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or the freedom of establishment?

- *Mostly the clauses that govern adjustments over time properly protect the interest of the public sector client and are not discriminatory. Indeed in many PPPs the price of ongoing service provision has to be brought in line with the market by regular benchmarking or re-tendering.*

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

- *See comments on sub-contracting below.*

13. Do you share the Commission's view that certain step-in type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other standard clauses, which are likely to present similar problems?

- Step-in rights are an essential component of the security afforded to the providers of finance. They are a cornerstone of the well-balanced PPP contract and are in the interests of both parties. They are only very rarely exercised and then, in extremis, to prevent the catastrophe of an interruption in core public services. They are envisaged as a temporary crisis measure and most PPP contracts foresee "step-outs" when the problems have been addressed.

- PPP development is predicated on the ability to source funding from the global project finance markets and the nascent secondary market for PPP finance. These essential funding sources will disappear or become significantly more expensive if standard protections for the capital providers are withdrawn.
- Neither the Public nor Private sector would welcome regulatory intervention on this point, as it would be bound to work against the Public interest.

14. Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, what aspects should be clarified?

- *PPP contracting (assimilating concession-type structures) should be properly recognised as a contract category for which both the* *negotiated and competitive dialogues are well adapted. All further clarification should be at national level.*

15. In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting?

- *In respect of those requirements, which favour sub-contracting to SMEs, in general, normal market mechanisms should be allowed to apply as smaller enterprises will naturally benefit from the increased economic activity engendered by a successful PPP programme.*
- *Procurement legislation should be directed to securing adherence to the open market principle and not confused by micro-economic engineering.*

16. In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

- *The procurement competition should be limited to the concession and thereafter the winning concessionaire should be free to deliver the project through the life of the concession on a commercial basis without further reference to applying further EU procurement rules for subcontractors (as proposed in Para 51 & 52).*
- *An important element of successful PPPs is that financial model timing and costing uncertainties are kept to a minimum. At the time of the primary competition for the concession, the bidders cannot carry out EU procurement rules in order to ascertain indicative subcontractor costs to include in their financial model on which they will base their tender offer. If subsequent to award EU procurement rules apply then bidders must include in their programme significant periods of time for procurement activity and safety time margin for legal challenges. If these programme activities are built into the model, the time periods themselves could turn a potentially viable PPP project into a non - viable project.*
- *There must be a balance in the PPP legislation between the need for true competition and the practicalities and potentially project detrimental implications of introducing procurement law beyond the appointment of the concessionaire.*
- *It is recommended that the procurement rules for subcontracting be deleted in the final PPP legislation.*

17. In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

- *No*

18/19 Questions regarding institutional PPPs

- *The points made in the Green Paper are well taken. If a Public Authority intends to be involved as an equity participant in a PPP delivery vehicle, this intention and the full terms of participation should be disclosed to all candidates at the start of procurement.*

20. In your view, which measures or practices act as barriers to the introduction of PPPs within the European Union.

- *At present the processes for the agreement and disbursement of grant aid towards infrastructure development is not easily compatible with proper and robust PPP contracting. As several Member States are perceiving the average 15% advantage (17% in the UK according to HM Treasury) to the Public Purse of the PPP approach, this very considerable economic benefit should be extended to all projects that could receive grant assistance.*
- *Technical assistance to the New Member States should be increased significantly to encourage the development of effective national PPP practices and programmes.*

21. Do you know of other forms of PPPs, which have been developed in countries outside the Union? Do you have examples of good practice in this framework, which could serve as a model for the Union? If so please elaborate.

- *The Commission may find some of the project experience and practices in Australia informative.*

22. More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

- *The most productive initiative at the Commission level would be in response to the comments made in14 and 20 above.*
- *There are already PPP networks for the exchange of best practice and much dialogue between actors. A further forum would only be of limited interest. Cataloguing good practice and examples of successful projects would be far more useful. In this respect the Resource Book is an excellent example and is an initiative to be built on. What is required is focused PPP programme development and support,*

especially for the New Member States. The Commission should act as a catalyst for good and successful PPP contracting which fully respect the Treaty principles, and emulating only the best practices such as those employed in the UK.

- *Structural and other grant aid should be made fully compatible with PPP contracting.*

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working for the Local Government Association
in Europe and worldwide

EC Green Paper – Procurement and Public Private Partnerships

Initial response of Local Government International Bureau (LGIB), UK.

July 2004

i) The LGIB, in conjunction with the Local Government Association (LGA), is the organisation which represents the views of local authorities in England and Wales on European and International matters.

ii) The current document is an initial response. The final response will be submitted to the Commission once it has received political approval from members of the UK's Local Government Association (LGA).

iii) Attached in annex 1 is the response of the 4Ps, the UK organisation dedicated to supporting local government's involvement with PPPs. We endorse the comments of the 4Ps made in annex 1, which elaborate on some of the points of principle outlined below.

Summary

- We welcome the Green Paper as the launch of an important dialogue on EU procurement rules regarding public-private partnerships (PPPs) and concessions. It is in the interests of local authorities and all other parties to ensure that PPPs are free to develop across the EU under conditions of open competition and greater legal certainty. However, a wider dialogue is needed on PPPs above and beyond the relatively narrow scope of the Green Paper.

- The EU's role in this area should be one of co-ordination rather than legislation, allowing Member States the freedom to organise and finance their own PPP arrangements.

- The experiences of the various PPP agencies and programmes in the UK should be examined and, where appropriate, act as a model for PPP development in other Member States.

- The EU lacks an overall vision for PPPs. Greater coherence on PPP issues is required between different areas of EU competence, particularly state aids, procurement, cohesion and internal market policies.

Response of LGIB

Local government's experience with PPPs

1.0 The Green Paper asks what the experiences have been of working with public-private partnerships. Joint entity or 'institutional' type PPP's are of particular importance to local government in the UK. Many local authorities are directly involved, for example, in joint entities such as urban regeneration companies, waste collection consortia, health trusts, or public safety partnerships etc. Other authorities may have involvement in multi-agency bodies in the areas of social services, leisure or culture.

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Specific PFI (private finance initiative) projects have also involved local authorities in improving schools, housing, hospitals, and prisons. In addition, several PFI projects have concentrated on the development of the UK's road infrastructure, such as the new M6 toll motorway in the West Midlands.

2.0 Local authorities' relatively long experience of working in PPP type arrangements over the past decade has therefore meant that there is growing understanding of both the benefits and pitfalls presented by a public-private partnership type approach. Working in conjunction with the private sector has undoubtedly secured new sources of finance and has introduced new skills and management expertise into the delivery of public projects in the UK. Our experiences have shown, for example, that PPPs can provide efficiency savings in the region of 15%, when compared with traditional forms of public procurement[1].

3.0 The UK government has therefore supported PPPs through the creation of specialist agencies. The 4Ps, for example is a national support agency dedicated to helping local government in their project procurement. Partnerships UK is another national body which can provide financial support and become a project partner in large PPPs on behalf of the public sector.

The UK's approach to enhancing local government's involvement with PPPs has been further underlined by the Local Government Act 2003, which gave local authorities new powers to engage with the private and voluntary sector to deliver public services.

4.0 However, there have also been a range of problems with PPPs (a fact which is not explored by the Green Paper). There have been many instances, for example, of rising costs, initial under-estimation by contractors, and contractors suffering financial difficulties (particularly in the construction sector). In addition, projects have also been know to start as traditional concessions but revert to becoming joint entities with the public sector, when the private sector is unable to manage the concession independently. All these problems damage the public interest, and in several cases, have meant that the desired efficiency savings have not been realised.

5.0 We therefore feel a much wider dialogue is needed on PPPs above and beyond the relatively narrow scope of the Green Paper. The Green Paper concentrates specifically on the application of Community law to PPPs, while avoiding the wider issues of the desirability, viability, and effects of PPPs within different Member States. These questions are however central when discussing the need for more Community rules in this area. Such a 'wider' dialogue should go beyond the economic issues and also consider the social and labour market effects of PPPs, including the effect on workforce conditions, workforce morale, and the longer term public interest. The Commission may therefore feel inclined to issue a subsequent communication, which has a far wider focus that than of the current Green Paper.

A flexible legal framework for all Member States which promotes innovation

6.0 As outlined in the Green Paper, LGIB recognises that the current legal framework for the procurement of PPPs and concessions is fragmentary and unclear. National laws based on the Treaty or the specific procurement Directives, are not at present harmonised. The result is that the treatment of

[1] '*Developing PPPs in a new Europe*'. PricewaterhouseCoopers, June 2004.

PPPs and concessions varies widely between Member States. Uncertainty surrounding how EU legislation applies to PPPs also adds to the overall risks, and therefore the costs, associated with PPP projects. There are several cases, for example, where competitors have sort recourse through the European Court of Justice (ECJ) over alleged competition and state aids infringements. In addition, Europe's overall competitiveness is harmed if PPPs are being inefficiently implemented, due to legal uncertainty.

7.0 LGIB would therefore be in favour of some form of harmonisation of practices between Member States, so that all parties can realise the potential offered by PPPs. The rules regarding service concessions in particular need to be defined the bring service concession in line with the legislation regarding works concessions.

8.0 However, outside of service concessions, we would have concerns over a legislative approach[2] towards PPPs in general. Instead, an approach based on the Open Method of Co-ordination (OMC) and the sharing of best practice would be preferable. The Commission's role would therefore be one of facilitating and co-ordinating new, non-legislative, measures across Member States, as necessary to promote PPPs, rather than creating new legislation which may restrict the procurement options available to local authorities. This approach would ensure that flexibility is maintained, and that the widest possible choice of PPP arrangements would continue to be available at the local level.

9.0 In a similar vein, LGIB supports the recommendations in the recent report by the consultancy group PricewaterhouseCoopers[3] which highlights the need for improved understanding and institutional capacity to deliver PPPs across Europe. As part of this process, the Commission should, in addition, be invited to develop a discernable PPP policy for the European Union which provides a common vision of how the public and private sectors can work more closely together. Such a vision should not and would not undermine the right of local authorities to choose if a PPP is in fact the best project solution. It would simply facilitate and promote best practice in PPP operation should that be chosen as the best option.

Specific Issues raised in the Green Paper

- Definition of PPPs

10.0 The Green Paper distinguishes between 'contractual' and 'institutional' PPPs. However, there are several delivery vehicles in operation in the UK which operate a 'hybrid' of both 'contractual' and 'institutional' PPP arrangements. The Commission may therefore consider creating a third category of PPP, a 'hybrid' PPP, to help classify these more complex projects.

- The Negotiated Procedure

11.0 Local government has concerns over the current restrictive use of the 'Negotiated Procedure'. The Negotiated Procedure is in widespread use in PFI and other PPP projects in the UK, yet it is only intended to be used 'exceptionally' according to the Commission. The continued use of the negotiated procedure is especially important given that it is too early to use the new 'Competitive Dialogue' procedure, outlined in the recent legislative package on procurement which has not yet been transposed into national

[2] As does the Commission itself. See the recent speech on PPPs by Frits Bolkenstein, Internal Market Commissioner , '*PPPs, The players have the floor'* 17.05.2004.

[3] '*Developing PPPs in a new Europe'*. PricewaterhouseCoopers, June 2004.

law. A wider use of the Negotiated Procedure than that envisaged by the Commission is therefore likely to continue in the UK to facilitate the development of PPPs.

- Duration of Contracts

12.0 The Commission's intentions as regards limiting contract duration are driven by a desire to open up both concessions and PPPs to competition as soon as a 'reasonable return on invested capital' is achieved by the operator. Framework agreements are normally subject to a four year maximum for example. While we support this aim, many current PPP arrangements in the UK are of significantly longer duration. It is important therefore that future requirements for contract duration are applied only to newly-formed entities. It is also important to ensure that the requirement to frequently introduce competition is duly balanced with the need to provide sufficient incentives to attract the private sector partner in the first instance.

13.0 In addition, if an operator is performing successfully, it may well be in the public interest to allow service delivery to mature and improve over a longer period (such as ten years). Longer contract durations would also allow for greater innovation and experimentation to find the best ways of delivering public services. Shorter-term contracts on the other hand, lead the operator to focus on maximising revenue generation before the next competition. The flexibility to offer longer-term contracts is therefore essential to the success of PPPs as a vehicle, and must remain present in any future revisions of procurement rules.

- **Modifications to contract**

14.0 The Green Paper states that 'substantial modification to the actual subject of the contract, must be considered equivalent to the conclusion of a new contract, requiring a new competition' (paragraph 49). While we sympathise with this general approach, experience in the UK and in France suggests that re-opening negotiations and holding a new competition usually results in a better deal for the original private partner, rather than any improvements to the public interest. Mechanisms to strengthen the position of the public interest in new negotiations should therefore be sought.

- Subcontracting

15.0 In many cases, the 'institutional' PPP or joint entity itself is required to subcontract out elements of work or service delivery to a third party. The Green Paper makes reference (paragraph 51) to the sub-contracting rules. The need to hold a competition when sub-contracting appears to rest on whether the PPP is 'acting in the role of contracting body' or not. The situation is unclear. The PPP may be 'a' contracting body, but it would not be 'the' contracting body or original 'contracting authority'. It is therefore unclear under what conditions sub-contracting would require a competition.

16.0 It might be sensible for the requirement for PPPs to hold competitions when subcontracting, to be proportional to the size of the PPP and/or the size of the contract to be outsourced. Smaller PPPs should not be required to hold open competitions for small-scale subcontracting activities where the administrative burden and costs involved would be too great. The Commission should explore if such thresholds governing the requirement for competition when subcontracting would be helpful in achieving this balance. Alternatively, if the current procurement thresholds are also applicable to subcontracting arrangements, this should be made more explicit.

A State aids regime which supports public sector involvement in PPPs

17.0 A complicated state aids regime, is one further factor which inhibits public sector involvement in PPPs. Even though PPP creation should normally follow EC procurement rules rather than state aid rules, issues surrounding the legitimacy of public support are common. The ECJ 'Altmark' judgement[4] confirmed that compensation provided to companies to support the delivery of public services (whether PPPs or not) is not classed as state aid providing certain conditions are met. The judgement is welcomed by local authorities, but the conditions attached to this judgement are open to interpretation. The Commission has suggested that the judgement won't in fact apply in the majority of cases. The Commission has also published a Decision to exempt smaller amounts of aid to Services of General Economic Interest (SGEIs), and a Framework governing larger amounts of aid. The provisions in these documents are welcome, particularly in terms of exempting smaller amounts of aid from the need to be notified to the Commission.

18.0 The many different instruments and texts now relating to State Aid and SGEIs do not however provide a clear overall picture of the rules affecting the provision and financing of public services. This lack of certainty effects the funding of operators of public services whether they are involved in a PPP or working independently on a contractual basis. Is it recommended therefore, that the Commission 'proof' both their texts relating to state aid for public services to ensure that their application to PPPs is clear and consistent.

PPPs and the proposed Directive on Services the Internal Market

19.0 As with state aid legislation, the Commission's proposed Directive on services in the internal market is not clear on how it applies to PPPs. While it is clear that public services (SGEIs) delivered *directly* by local authorities are exempt from the Directive, services delivered *indirectly* through joint ventures such as PPPs would appear to fall within its scope, and therefore be covered by the problematic 'Country of Origin' principle[5]. To ensure the promotion of PPPs, public services (SGEIs), should be exempt from the Directive whether delivered directly or indirectly. Public authorities should not be subject to a range of extra legal provisions because they have chosen an 'indirect' or PPP type delivery model rather than 'direct' delivery model.

A better integration between European funding and the promotion of PPPs

20.0 Finally, it would also be helpful to have greater clarity around the use of European funding to support PPPs. ERDF (European Regional Development Fund) and ESF (European Social Fund) programmes should, for example, promote the fact that they can be used to help foster PPP development. This approach has proved particularly important when developing the Trans-European Transport Network where TENs monies have, in fact, been used to support the development of PPPs to build transport infrastructure. Other areas of local government's work such regeneration, or environmental/waste partnerships may also benefit from such an approach whereby funding streams are more explicitly 'PPP friendly'.

[4] ECJ 24 July 2003, Case C-280/00

[5] To promote competition in service delivery across the EU, the principle states that those delivering services from a base in another Member State are not subject to any additional regulatory or legal requirements imposed by the 'host' nation.

Conclusion

21.0 When seeking to harmonise PPP and concession procurement practices across Europe, the Commission should consider the benefits of a non-legislative approach based on the 'Open Method of Co-ordination.' Technical co-operation between Member States and the sharing of best practice will form an important part of this approach.

22.0 The experiences of the various PPP agencies and programmes in the UK should be examined and, where appropriate, act as a model for PPP development in other Member States (including the new local authority 'Regional Centres of Procurement Excellence' initiative).

23.0 Greater coherence on PPP issues is required in different areas of EU legislation, and there is a pressing need to launch a wider debate about the consequences of choosing PPPs over traditional methods of public service provision. (It is important for example that PPPs are chosen for the benefits they offer to the public interest and not simply because they allow fiscal investment outside of public guidelines).

24.0 Whilst respecting the rights of Member States to determine their own arrangements, the EU needs an overall policy and vision for PPPs to promote their development across the Union, and raise Europe's competitiveness.

25.0 Local Government International Bureau looks forward to an ongoing dialogue with the Commission and all other parties on these issues.

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Annex 1 – 4Ps response.

The 4Ps, is the national support agency dedicated to helping local government in their project procurement and PPP issues.

The table below aims to set out the main areas in which the Green Paper might affect current UK activities on PPPs and PFI. The specific aim of the Green Paper "is to launch a debate on the application of Community law on public contracts and concessions to the PPP phenomenon. Once underway such a debate will concentrate on the rules that should be applied when taking a decision to entrust a mission or task to a third party."

Issue	**Green Paper proposal**
Use of negotiated procedure Paragraphs 24-27	The Commission re-emphasize that the Negotiated Procedure, commonly used in PFI and some other PPPs such as the NHS Local Improvement Finance Trusts ("LIFT") and Building Schools for the Future ("BSF") , should be regarded as exceptional. The grounds for using the procedure set out in the old Directives and current UK regulations ought to be interpreted exceptionally but question is what does this mean? The statement about this in the Green paper is probably the most explicit the Commission has ever been about the use of this procedure. The paragraphs following make it quite clear that the Commission believes the new Competitive Dialogue procedure in the Classical Directive will be the most appropriate procedure for "particularly complex" contracts. However the UK central government view is that "the statements in paragraph 24 of the Green Paper on the use of the negotiated procedure for works contracts reflect the narrow interpretation which the Commission has consistently placed on Article 7(2) of the Works Directive. But the UK view still remains that the provisions in the Works and Services Directives allowing the use of the negotiated procedure may be applied more widely, as indicated in paragraphs 3.2.4 and 3.2.5 of the Treasury Taskforce's guidance note.
Length of contract term Paragraph 46	This relates mainly to long term partnerships such as PFI, LIFT and BSF where the length of term awarded to the private sector partner, together with exclusive rights granted at the same time, introduces some potential conflict with the principles of the internal market and the EU competition provisions. The Commission's previous Interpretive Communication on Concessions said "The principle of proportionality also requires that competition and financial stability be reconciled; the duration of the concession must be set so that it does not limit open competition beyond what

	is required to ensure that the investment is paid off and there is a reasonable return on invested capital whilst maintaining a risk inherent in exploitation by the concessionaire." The Commission is now saying that this rule also applies to PPPs. It is worth noting here that framework agreements are subject to 4 year maximum terms under the new directive. It is not clear whether any changes would be required to long term PPPs to bring them within the Commissions regime here and if so what effect would that have on the commerciality and bankability of such projects Also does the Commission's approach potentially stifle innovation by Contractors and what effect might it have on variant bids for example?
Step in rights Paragraph 48	Commonly in PFI contracts the funders have a right to step in to replace a failing, or ailing, contractor and replace it with another in order to "save" the project. The Commission points out that such provisions may lead to the appointment of a new contractor without the use of a competitive process. However the provisions are intended to preserve the integrity of the Project and prevent the failure of a contractor giving rise to excessive delays and costs to the public sector client. The payments made by the public sector are secured and do not alter notwithstanding that a different legal entity is appointed to the remainder of the contract.
Sub-contracting Paragraph 51 on purely contractual PPPs and paragraph 64 on institutional PPPs.	This remark occurs in the section on purely contractual PPPs but could also be relevant in relation to institutional PPPs (i.e. Joint Venture Companies) , on which see below. It concerns a situation where a project company awards sub-contracts to its own shareholders; "In this respect, the Commission wishes to point out that when the project company is itself in the role of contracting body, it must conclude its contracts or concession contracts in the context of a competition, whether or not these are concluded with its own shareholders." The phrase "contracting body" is not clear; where the Commission wants to talk about entities subject to the public procurement regime it usually uses the phrase "contracting authority" (as in paragraph 24). Normally a PFI SPV would not be considered a contracting authority in this sense. So it is uncertain whether the

	Commission is simply saying that where a project company is a contracting authority (for whatever reason) it must use competitive procedures to appoint its own sub-contractors? Or is it saying that where a project company appoints sub-contractors it must always use a competitive process? In paragraph 64 the Commission raises a similar point in relation to the JV company set up in Institutional PPPs. Two examples where problems might arise here: in the first case the new ALMO companies, which would be classed as contracting authorities, often use services from their shareholder local authorities without competitive tenders. Second most LIFT companies, which will not be contracting authorities, will award at least some contracts to their shareholders without competition.
Institutional PPPs – golden shares Paragraph 62	The Commission recognizes a distinction between purely contractual PPPs, such as PFI, and institutional PPPs where the public and private sector entities join together to create a separate legal entity owned and controlled by each, though not necessarily in equal parts. This 'distinction' misses the fact that many PPPs now being attempted are hybrids between purely contractual PPPs and Joint Venture PPPs and it does not address Joint Ventures underpinned by other arrangements e.g. LIFT, BSF etc. The distinction is unhelpful and unrealistic. A number of issues arise which are specific to joint venture type PPPs; these include: The principles of free movement of capital (Article 56 of the Treaty) prohibit public authorities making their participation in the joint entity contingent on excessive privileges which do not derive from normal company law. This is perhaps unlikely to affect LA participation in LIFT, or BSF for example where the shareholder's agreement entrenches certain rights for minority shareholders, since these are often used commercially by minority shareholders in the private sector, But this is not free from doubt; the Commission ought therefore to clarify that the very existence of Institutional PPPs, as defined in the Green Paper, will not fall foul of the provisions of Article 56.
Use of competition	Para 60/61 discuss processes where the company is set up simultaneously with or after the award of public contracts and mentions number of problems including

Paragraphs 60-64	the fact that the lifetime of the entity may not coincide with the duration of the contract or concession awarded and encourage extension of the task without true competition at time of renewal. The Commission emphasizes that, except in cases which fall within the scope of the Teckal judgement, where a contracting authority assigns a task to a third party JV company, of whatever nature and mixture, it needs to use a competitive procedure where this task does not form part of the original scope of the contract. From Teckal– participation in the contracting entity does not justify not applying the procurement law unless the contracting body exercises control over the third party similar to that which it exercises over its own departments and at the same time that person carries out the essential part of its activities with the controlling local authority. Only entities that fulfil these 2 conditions at the same time can be treated as equivalent to in-house entities. The next paragraph goes on to emphasize that the JV company itself, where it has the "quality of a contracting body", needs to use competitive tenders in awarding its own contracts. Given the potentially ambiguous nature of the Commission's text here, this may have an adverse effect on the practicality of Joint Venture PPPs and discourage the commercial sector from joining public authorities in corporate vehicles

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1 INHALT UND ZIEL DES DOKUMENTS:

Die Kommission der Europäischen Gemeinschaften hat am 30.4.2004 ein Grünbuch „Zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen" vorgelegt (KOM [2004] 327 endg). Unter Punkt 4 des Grünbuches ruft die Kommission interessierte Kreise dazu auf, ihre Kommentare zu den in diesem Grünbuch gestellten Fragen zu übermitteln. Diesbezügliche Beiträge sind bis spätestens 30.7.2004 an die Kommission zu richten, und zwar entweder per Post (Kennwort: Konsultation „Grünbuch zur öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften bei öffentlichen Aufträgen und Konzessionen" C100 2/005, B-1049 Brüssel) oder per E-Mail an: MARKT-D1-PPP@cec.eu.int.

Ziel dieses Dokumentes ist es einerseits, aufzuzeigen, welche offenen Frage im Zusammenhang mit PPP-Modellen und vergaberechtlichen Fragestellungen im Grünbuch nicht beantwortet bzw neu aufgeworfen werden, andererseits die Ansätze der Kommission kritisch zu beleuchten. Dies insbesondere auch vor dem Hintergrund der derzeit nicht detailliert geregelten Rechtslage hinsichtlich der vergaberechtlichen Einordnung der sowie diesbezüglicher Vorschriften für PPP-Modelle. Ziele dieses Dokumentes ist auch, durch Aufzeigen praktischer Probleme aus der Sicht eines mit der Konzeptionierung von PPP-Modellen befassten Unternehmens an der Meinungsbildung mitzuwirken.

Die Gliederung des nachfolgenden Dokumentes orientiert sich an den von der Kommission im Rahmen des Grünbuches an interessierte Kreise gestellten Fragen, wobei jedoch nicht zu jeder einzelnen Frage gesondert Stellung genommen wird, sondern vielmehr zu den sich aus den betreffenden Fragen ergebenden „Themenblöcken".

In der deutschsprachigen Fassung des Grünbuches ist nicht von „PPP", sondern von „ÖPP" (öffentlich-private Partnerschaften) die Rede, weshalb – zur terminologischen Übereinstimmung mit dem Grünbuch – in der Folge ebenfalls „ÖPP" verwendet wird.

2 FRAGE 1: SPEZIFISCHE RAHMENBEDINGUNGEN IN ÖSTERREICH FÜR ÖPP AUF VERTRAGSBASIS?

In Österreich bestehen derzeit keine spezifischen Rechtsvorschriften für ÖPP-Modelle auf Vertragsbasis; nur soweit ÖPP-Modelle auf Vertragsbasis vom Vergaberecht erfasst sind, ist das Bundesgesetz über die Vergabe von Aufträgen, BGBl 2002 I/99 (Bundesvergabegesetz 2002 – BVergG) anzuwenden. Spezifische Einzelregelungen können sich – je nach Inhalt des ÖPP-Projektes – lediglich aus einzelnen Vorschriften der Materiengesetze bzw –verordnungen ergeben. Diese Materiengesetze und Verordnungen (zB Regelungen über Kanalgebühren, die Bemautung von Straßen etc.) regeln jedoch nicht Form und Abschluss des ÖPP-Vertrages selbst, sondern stellen allenfalls rechtliche Rahmenbedingungen auf, die im Rahmen der Leistungserbringung bzw Entgelteinhebung zu berücksichtigen sind, und zwar unabhängig davon, ob die Leistung im Rahmen eines ÖPP-Modells erbracht wird oder nicht.

3 FRAGEN 2 UND 3: WAHL DES VERGABEVERFAHRENS UND WETTBEWERBLICHER DIALOG ALS GEEIGNETES VERFAHREN?

Zunächst möchten wir auf rechtliche und praktische Probleme hinweisen, die durch die von der Kommission in Pkt 2.1.1 des Grünbuches vorgenommene Auslegung der Ausnahmeregelung des Art 7 Abs 2 der Baukoordinierungsrichtlinie 93/37/EWG (BKR) bei der Vergabe von ÖPP-Modellen im Wege von Bauaufträgen auf Grundlage des derzeit (und für die absehbare Zukunft) noch geltenden Vergaberechtsrahmens auftreten. Dazu ist festzuhalten, dass die in Rz 24 (Seite 10 des Grünbuches) von der Kommission geäußerte Ansicht, in welchen Sonderfällen die Inanspruchnahme des Verhandlungsverfahrens nach Art 7 Abs 2 BKR zulässig ist, weil es sich „um Arbeiten handelt, die ihrer Natur nach oder wegen der damit verbundenen Risiken eine vorherige globale Preisgestaltung nicht zulassen", sehr eng ist. Zu restriktiv erscheinen insbesondere die in Fußnote 29 angeführten Beispiele von Bauarbeiten in geologisch instabilen oder archäologischen Zonen. Die Kommission ist aber offenbar der Auffassung, dass sonstige Probleme einer vorherigen Preisfestlegung, etwa aufgrund des Umstandes, dass die rechtliche und finanztechnische Konstruktion sehr komplex ist, die Durchführung eines Verhandlungsverfahrens nicht rechtfertigen. Diese Aussage erscheint in der von der Kommission getroffenen allgemeinen Formulierung problematisch: Einerseits ist nicht einsichtig, warum lediglich geologische oder archäologische Risiken zur Unmöglichkeit der Vorgabe eines Entgeltmechanismus durch den Auftraggeber führen sollen. Gerade die Lokalisierung und Zuteilung wirtschaftlicher und rechtlicher Risiken – in ÖPP-Modellen – stellt den Ausschreibungsersteller, aber auch die Bieter, vor erhebliche Schwierigkeiten, wenn nicht das Verhandlungsverfahren gewählt werden kann. Die Erfahrung zeigt nämlich, dass komplexe über längere Zeiträume geschlossene ÖPP-Verträge die Notwendigkeit mit sich bringen, dass über den Vertragsinhalt (auch von Konzessionsverträgen) mit den ausgewählten Bietern verhandelt werden kann. Ohne Verhandlungen ist es nicht möglich, die zahlreichen Risiken, die ein lange Zeit laufendes ÖPP-Modell für beide Vertragsteile mit sich bringt, optimal zu verteilen und damit den volks- und betriebswirtschaftlichen Nutzen eines ÖPP-Modelles nicht zu gefährden. In diesem Zusammenhang ist auch darauf hinzuweisen, dass die Entgeltmechanismen in aller Regel sehr komplex sind und insbesondere auf die jeweilige Risikozuteilung angepasst werden müssen, sodass auch für diesen erheblichen Vertragsaspekt die

Möglichkeit zum Verhandeln gegeben sein muss. De facto hat allerdings die einschränkende Auslegung dieses Ausnahmetatbestandes durch die Kommission zur Konsequenz, dass ÖPP-Projekte in aller Regel nicht als öffentlicher Bauauftrag vergeben werden können. Die einzige dem Auftraggeber verbleibende Möglichkeit zur Vergabe von ÖPP-Projekten, bei denen Bauleistungen den wesentlichen Charakter des Vorhabens ausmachen, besteht daher darin, dass eine Baukonzession gewählt wird, ungeachtet dessen, ob diese Vertragsform auf das in Frage kommende ÖPP-Projekt angewandt werden kann oder nicht (zB aus politischen oder wirtschaftlichen Überlegungen). Zusätzlich besteht hier – wie noch gezeigt wird – für den Auftraggeber (wie auch die Bieter) ein nicht unbeträchtliches Verfahrensrisiko, wenn sich im Laufe des Verfahrens herausstellen sollte, dass sich die zum Zeitpunkt der Verfahrenseinleitung vorgenommene Einordnung des Vertrages auf Grundlage der Verfahrensergebnisse nicht mehr aufrecht erhalten lässt. Die Schwierigkeit der im Vorhinein vorzunehmenden Einordnung des Vertrages beruht ganz wesentlich auf den fehlenden klaren (gemeinschaftsrechtlichen) Kriterien, nach denen Baukonzessionen von Bauaufträgen abzugrenzen sind. Unserer Ansicht nach ist hier der Gemeinschaftsgesetzgeber aufgerufen, klarere Abgrenzungskriterien festzulegen.

Die von der Kommission in Rz 25 auf Seite 10 aufgezeigte Möglichkeit der Durchführung eines „wettbewerblichen Dialogs“ kann diese Notwendigkeit der Durchführung eines Verhandlungsverfahrens für ÖPP-Vorhaben nicht ersetzen: Art 29 Abs 1 der Richtlinie 2004/18/EG stellt es den Mitgliedsstaaten frei, das Verfahren des „wettbewerblichen Dialoges“ einzuführen. Dies zeigt, dass zunächst eine Umsetzung ins innerstaatliche Recht erforderlich ist, damit im Geltungsbereich der vergaberechtlichen Bestimmungen ein derartiges Verfahren gewählt werden kann. In Österreich besteht auf Basis des derzeit geltenden Bundesvergabegesetzes 2002 nicht die Möglichkeit zur Durchführung eines derartigen „wettbewerblichen Dialoges“, sodass – jedenfalls bis zu einer Umsetzung – für sehr komplexe Aufträge, wie dies ÖPP-Modelle in aller Regel sind, zumindest auf das Verhandlungsverfahren zurückgegriffen werden muss. Für ÖPP-Projekte, die in näherer Zukunft abgeschlossen werden sollen, stellt der „wettbewerbliche Dialog“ daher keine Alternative dar, selbst wenn sich der betreffende Mitgliedsstaat für die Einführung dieses Verfahrens entscheiden sollte, zumal davon ausgegangen werden muss, dass eine Umsetzung ins innerstaatliche Recht einen gewissen Zeitraum in Anspruch nehmen wird. Nach den bisher in Österreich erlassenen Übergangsvorschriften im Zusammenhang mit den Novellen vergaberechtlicher Bestimmungen musste stets jene Rechtslage bis zum Abschluss des Vergabeverfahrens angewendet werden, die zum Zeitpunkt der Einleitung des Verfahrens (etwa durch Bekanntmachung des Vorhabens im Amtsblatt) gegolten hat.

Es ist der Kommission allerdings zuzustimmen, dass – sollte dieses Verfahren umgesetzt werden – der „wettbewerbliche Dialog“ in der Zukunft als grundsätzlich geeignetes Verfahren für den Abschluss eines ÖPP auf Vertragsbasis angesehen werden kann. Die Praktikabilität dieses neuen Verfahrens wird ganz entscheidend von der Umsetzung ins österreichische Recht abhängen, insbesondere von der genaueren Verfahrensausgestaltung. (Im Rahmen des „wettbewerblichen Dialogs“ soll es dem Auftraggeber möglich sein, mit den ausgewählten Bewerbern alle Aspekte des Auftrags zu erörtern. Aus unserer Sicht unterscheidet sich diese Phase des Dialogs im Grundsatz nicht von dem bereits jetzt verwendeten zweistufigen Verhandlungsverfahren: Auch im Rahmen eines Verhandlungsverfahrens wird nach Auswahl der am besten geeigneten Bewerber ein „Dialog“ in Form von einer oder mehrerer Verhandlungsrunden geführt. Was im Rahmen des „wettbewerblichen Dialogs“ rechtmäßigerweise erörtert werden darf, darf sich also grundsätzlich nicht von dem unterscheiden, was zum Inhalt von Verhandlungen im Rahmen des Verhandlungsverfahrens gemacht werden kann und darf.)

Die Praxis wird auch noch zeigen, ob es möglich ist, bereits in der Bekanntmachung – also noch vor Beginn der Dialogphase – die Zuschlagskriterien so konkret anzugeben, dass anhand dieser Kriterien die Angebote, welche nach Abschluss der Dialogphase erstattet werden, sachgerecht und hinreichend genau beurteilt werden können. Wie noch unten näher auszuführen sein wird, ist es nämlich sehr leicht vorstellbar, dass im Rahmen der Verhandlungen zu einem ÖPP-Projekt zum Teil nicht unwichtige Aspekte abgeändert werden und die Dialogphase zeigt, dass bestimmte Aspekte für die Entscheidung des Auftraggebers wesentlich sind, weshalb sie im Zuschlagskriteriensystem einen entsprechenden Niederschlag finden sollten, um eine sachgerechte Entscheidung des Auftraggebers zu ermöglichen. Dasselbe gilt für die in Rz 25 genannte Voraussetzung, dass die wesentlichen Elemente des Angebotes oder der Ausschreibung in der Dialogphase nicht verändert werden. Hier kann sich in der Praxis zeigen, dass – dies betrifft vor allem die Risikozuweisungen – es manchmal erforderlich ist, von dem ursprünglichen Konzept auch in wesentlichen Punkten abzugehen, damit überhaupt wirtschaftlich akzeptable Angebote gelegt werden.

4 FRAGEN 4 BIS 7: NEUER RECHTSRAHMEN FÜR KONZESSIONSVERGABEN

Österreich hat mit dem derzeit laufenden Straßenprojekt PPP-Ostregion den ersten Schritt zur Implementierung von ÖPP-Projekten im Straßeninfrastrukturbereich in Österreich gesetzt. Über konkrete Erfahrungen kann aufgrund des derzeitigen

Projektstandes noch nicht berichtet werden, doch sind bestimmte Schwachstellen im Rechtsrahmen bereits jetzt absehbar.

Der Kommission ist zuzustimmen, dass es nicht einfach ist, von Vornherein festzulegen, ob das ausgeschriebene Vorhaben ein öffentlicher (Bau- oder Dienstleistungs) Auftrag oder ein Konzession ist. Zutreffend zeigt die Kommission dabei das Problem auf, dass sich im Laufe des Verfahrens die Einstufung als öffentlicher Auftrag oder Konzession ändern kann und dies zu erheblicher Rechtsunsicherheit sowohl für den Auftraggeber als auch die Bieter führt. Denn es darf nicht übersehen werden, dass die Durchführung eines Verfahrens zur Vergabe eines ÖPP-Vertrages (vor allem, wenn es sich um einen Konzessionsvertrag handelt) auf beiden Seiten erheblichen Zeitaufwand und Kosten verursacht. Insbesondere wenn sich erst zu einem verhältnismäßig späten Verfahrenszeitpunkt zeigt, dass der nunmehr zur Rede stehende Auftrag nicht mehr als Konzession zu beurteilen oder die Einordnung zumindest fraglich ist, wären alle vergangenen Aufwendungen frustriert, wenn sich das Verfahren insgesamt als nicht mehr rechtmäßig darstellen würde.

Um diesem Rechtsrisiko auszuweichen, könnte ein öffentlicher Auftraggeber verleitet sein, von Vornherein die „sichere“ Variante zu wählen und den Auftrag als „klassischen“ öffentlichen Auftrag ausschreiben. Wie aber oben bereits aufgezeigt, wäre es – folgt man der Auffassung der Kommission – öffentlichen Auftraggebern in aller Regel verwehrt, ÖPP-Vorhaben, deren wesentlicher Inhalt Bauleistungen sind, im Wege des Verhandlungsverfahrens zu vergeben. Damit würden jedoch in vielen Fällen volks- und betriebswirtschaftlich wertvolle Optimierungspotenziale verloren gehen. Im Zusammenhang mit dem hier diskutierten Thema ist zunächst aber anzumerken, dass – quasi vorgelagert zum obigen Problemfeld – aus der Sicht der Rechtsanwender nicht hinreichend klar definiert ist, wann überhaupt ein Konzessionsvertrag im vergaberechtlichen Sinn vorliegt. Die Beurteilungskriterien sowohl aus der Rechtsprechung des EuGH (vgl etwa EuGH, Rs C-324/98, Telaustria) aber auch der Mitteilung der Kommission zu Auslegungsfragen im Bereich Konzessionen im Gemeinschaftsrecht, vom 29.4.2000, ABl 2000/C 121/02, lassen einige Fragen offen, deren Klärung für eine rechtssichere Einordnung unter Konzessionen oder öffentliche Aufträge entscheidend ist. Dazu wäre es beispielsweise hilfreich, nähere Definitionen darüber zu treffen, welche konkreten Risiken bzw welches Risikoausmaß für das Vorliegen einer Konzession notwendig ist. Auch wären nähere Vorgaben für die Entgeltkomponente einer Konzession wünschenswert: So ist bislang nicht hinreichend geklärt, ein wie hoher Anteil des Auftragswertes vom Auftraggeber bezahlt werden kann, ohne dass dies einer Konzession entgegen steht. Gem Art 1 Abs 3 und 4 der Richtlinie

2004/18/EG besteht bei Konzessionen die Gegenleistung entweder im Recht zur Nutzung der Leistung oder in diesem Recht zuzüglich der Zahlung eines Preises. Nach herrschender Auffassung ist begriffswesentlich, dass der Auftragnehmer durch die Übernahme des Nutzungsrechtes auch ein Nutzungsrisiko übernehmen muss, damit eine Konzession vorliegt. In diesem Zusammenhang stellt sich die Frage, wie viel Prozent des Auftragswertes (bzw des geplanten Entgeltes) vom Auftraggeber direkt als Preis gezahlt werden können. Unserer Ansicht nach darf dabei nicht die nominelle Nennung eines bestimmten Prozentsatzes ausschlaggebend sein, sondern die Überlegung, ob mit dem vom Konzessionär trotz Zuzahlung eines Preises übernommenen Risiko ein wirtschaftlich bedeutendes Risiko verbunden ist. Mit anderen Worten: Selbst wenn die Zuzahlung des öffentlichen Auftraggebers die rein aus der Nutzung der Leistung erzielten Einnahmen (wesentlich oder deutlich) übersteigt, wäre dieser Umstand für sich allein noch nicht konzessionsschädlich, solange mit dem auf die Nutzung der Leistung entfallenden Entgeltanteil ein wirtschaftliches Risiko verbunden ist, das der Konzessionär zu tragen hat. Es liegt auf der Hand, dass eine Klärung dieser Frage für die Konzeptionierung von ÖPP-Modellen zielführend wäre. Gerade im Zuge der Konzeptionierung und Verhandlungen über ein ÖPP-Modell kann sich nämlich herausstellen, dass es erforderlich ist, dass der Auftraggeber einen bestimmten Prozentsatz der Auftragsleistungen unmittelbar bezahlt, da anderenfalls entweder die Finanzierungskosten oder das Risiko für den privaten Bieter so hoch würden, dass er nicht mehr bereit wäre, zu für den Auftraggeber akzeptablen wirtschaftlichen Konditionen anzubieten. Andererseits wäre es aber dem Auftraggeber nicht immer möglich, gänzlich ohne substanzielle Beteiligung eines privaten Partners das geplante Vorhaben aus budgetären Gründen zum gewünschten Zeitpunkt zu verwirklichen.

Selbige Überlegung gilt entsprechend auch für die Frage, ob die Zusage eines Mindestnutzungsentgeltes, das durch den öffentlichen Auftraggeber garantiert wird, die Einordnung als Konzession verhindert. Unserer Ansicht nach darf auch die Zusage eines Mindestnutzungsentgeltes der Qualifikation des betreffenden Vertrages als Konzessionsvertrag nicht hinderlich sein, solange dadurch nicht jegliches Risiko seitens des Konzessionärs beseitigt wird.

Aus unserer Sicht wäre es – insbesondere für die Möglichkeit, Infrastrukturprojekte im Rahmen von ÖPP abzuwickeln – daher höchst wünschenswert, wenn bereits in naher Zukunft Rechtssicherheit hinsichtlich zweier Aspekte geschaffen wird:

- Es sollte detailliert geklärt werden, wann eine Konzession im Sinne der vergaberechtlichen Vorschriften vorliegt, sodass der Auftraggeber mit ausreichender Sicherheit die richtige Wahl der Verfahrensart treffen kann.
- Darüber hinaus sollte sichergestellt werden, dass ein einmal als Verfahren zur Vergabe einer Konzession begonnenes Vergabeverfahren auch in dem hierfür geltenden Rechtsrahmen zu Ende geführt werden kann, selbst wenn sich im Zuge der Verhandlungen (oder eines „wettbewerblichen Dialoges“) herausstellen sollte, dass – insbesondere aufgrund von erforderlichen Risikoverschiebungen – eine Einstufung des zu vergebenden Vertrages als Konzession nicht mehr gegeben ist. Es sollte – ähnlich wie dies bei der Schätzung des Auftragswertes auch geschieht, die ja letztlich auch im Vorhinein getroffen wird und für die Einordnung unter vergaberechtliche Rahmenbedingungen maßgeblich ist – zulässig sein, ein korrekterweise als Konzessionsvergabeverfahren begonnenes Verfahren jedenfalls nach den hierfür geltenden Rechtsvorschriften zu Ende zu führen. Dabei wird nicht verkannt, dass es möglicherweise erforderlich ist, hierzu entsprechend konkrete Rechtsvorschriften zu erlassen (etwa um Missbrauch und Umgehungen vorzubeugen, vor allem aber, um den Begriff der Konzession klarer zu definieren).

Zu Frage 7 ist anzumerken, dass aus österreichischer Sicht grundsätzlich nichts dagegen spricht, sämtliche ÖPP auf Vertragsbasis in einem solchen allenfalls zu erlassenden Rechtsakt demselben Regelwerk zu unterwerfen, unabhängig davon, ob das Vorhaben als öffentlicher Auftrag oder als Konzession einzustufen ist. Allerdings wäre dann naturgemäß auch eine entsprechend klare Definition von „ÖPP“ erforderlich.

5 FRAGEN 8 UND 9: PRIVAT INITIIERTE ÖPP

Grundsätzlich ist private Initiative für PPP-Projekte zu begrüßen. Das vorliegende Grünbuch geht inhaltlich aber nicht auf die Wettbewerbsgefährdungen ein, die sich aus derartigen privaten Initiativen ergeben können. Als Grundsatz muss – dies nicht zuletzt aufgrund von Art 2 der Richtlinie 2004/18/EG – jedenfalls sichergestellt werden, dass jenes private Unternehmen, von dem das Projekt initiiert wurde, keinen Wettbewerbsvorteil daraus zieht, dass es einen Informationsvorsprung gegenüber den übrigen Interessenten in Bezug auf das konkrete Projekt hat. Dazu ist es erforderlich, dass all jene Informationen, deren einseitige Kenntnis zu einem Wettbewerbsvorsprung führen könnten, auch den übrigen Interessenten offengelegt werden, und zwar so rechtzeitig, dass die übrigen Interessenten diese Informationen bei allfälligen Angeboten (etwa im Rahmen der Risikobewertung und Kalkulation) berücksichtigen können. Auch besteht die Gefahr, dass der öffentliche Auftraggeber verleitet sein könnte, bei der Konzeption des ÖPP-Modells oder der Leistungsbeschreibung nach den Vorgaben und

Vorschlägen des privaten Initiators vorzugehen; es liegt auf der Hand, dass damit ein Risiko hinsichtlich potenziell diskriminierender Anforderungen gegeben ist, zumal private Initiatoren ihren Vorschlag vermutlich zunächst auf ihre eigenen Möglichkeiten und Potenziale optimieren werden. Aus diesem Grund ist etwa im österreichischen Bundesvergabegesetz geregelt, dass Unternehmer, die an der Erarbeitung der Unterlagen für das Vergabeverfahren unmittelbar oder mittelbar beteiligt waren, sowie mit diesen verbundenen Unternehmen, soweit durch ihre Teilnahme ein fairer und lauterer Wettbewerb ausgeschlossen wäre, von der Teilnahme am Vergabeverfahren auszuschließen sind, sofern auf ihre Beteiligung in begründeten Ausnahmefällen nicht verzichtet werden kann (§ 21 Abs 3 BVergG 2002).

Ein möglicher Ansatz, die oben aufgezeigten Problemfelder zu handhaben, findet sich in Art 29 der Richtlinie 2004/18/EG in den Bestimmungen über den „wettbewerblichen Dialog“ (etwa Abs 3, 2. und 3. Satz, Abs 6).

6 FRAGEN 10 BIS 14: ANPASSUNG VON VERTRAGSKLAUSELN

Zutreffend stellt die Kommission dar, dass die Anpassung lang laufender Vertragsbeziehungen im Rahmen eines ÖPP-Projektes an Veränderungen des ökonomischen oder technischen Umfelds sowie an das öffentliche Interesse oftmals auch nach Vertragsabschluss erforderlich ist. Es ist jedoch davon auszugehen, dass – dies liegt bereits im immanenten Interesse der Vertragsparteien – Preisanpassungs- und Revisionsklauseln präzise formuliert sind. Dies betrifft insbesondere die Umstände und Bedingungen, unter den die Vertragsbeziehungen angepasst werden können (vgl Rz 47 des Grünbuches, Seite 16). Problematisch ist allerdings die Anforderung der Kommission, dass diese Klauseln offenbar schon in der Phase der Partnerauswahl ausformuliert sein sollten. Selbst wenn dies möglich ist, hängt die konkret dem Vertragsabschluss zugrunde liegende Preisanpassungsklausel (dies gilt selbstverständlich auch für sonstige Revisionsklauseln) wohl ganz maßgeblich vom konkret ausverhandelten Preismodell und sonstigen konkret ausverhandelten Vertragsbedingungen ab, sodass es nicht zielführend erscheint, wenn diese Klausel ab dem Zeitpunkt des Beginns der Partnerauswahlphase unveränderlich sein müssen. Gerade die Möglichkeit der Preisanpassung oder auch Anpassung sonstiger Vertragsbedingungen im Hinblick auf geänderte Umstände stellt ja einen wesentlichen Faktor der Risikoverteilung zwischen den Vertragspartnern dar. Wenn daher dieser Aspekt der Risikoverteilung mit den Bietern nicht verhandelt werden darf, kann dies zu einer suboptimalen Risikoallokation und damit volkswirtschaftlich zu hohen Kosten des Projektes führen.

Dasselbe gilt für „Interventionsklauseln“: Nur wenn einem Finanzierungsinstitut ausreichende Sicherheit geboten wird, werden die Finanzierungsbedingungen wirtschaftlich vorteilhaft sein. Ein wesentlicher Aspekt dieser Sicherheit ist dabei, dass das Finanzierungsinstitut in Krisenfällen zumindest einen bestimmten Zugriff auf das finanzierte Projekt hat. Bei lang laufenden Projekten mit einem hohen Investitionsvolumen würde daher die Unzulässigkeit von Interventionsklauseln voraussichtlich zu einer Verteuerung der Finanzierungskosten und damit insgesamt zu einem höheren Preis für die zu erbringende Leistung führen.

Dabei wird aber nicht übersehen, dass eine völlig freie Interventionsmöglichkeit bzw eine freie Übertragbarkeit der Kontrolle über das Projekt auch an Dritte zu wettbewerblichen Bedenken führen kann. Es scheint aber nicht erforderlich, dass etwa die Ausübung eines „step-in-right“ dazu führen muss, dass das Projekt einem neuerlichen Bieterwettbewerb unterzogen werden muss; dies insbesondere dann nicht, wenn die „step-in“-Klausel bereits Gegenstand des ursprünglichen Wettbewerbes war, also den interessierten Kreisen bereits ursprünglich bekannt war, dass der Auftraggeber eine Übertragungsmöglichkeit (wenn auch nur in begründeten Einzelfällen) vorgesehen hat bzw akzeptiert hat. Auch darf nicht außer Betracht gelassen werden, dass die Frage des Eintritts in das laufende Projekt wirtschaftlich ähnlich zu betrachten ist wie ein „Verkauf“ des laufenden Projektes. Diese „Verkaufs“-Vereinbarung wird wohl regelmäßig zwischen privatwirtschaftlichen Unternehmen abgeschlossen werden, daher regelmäßig ohnehin unter Wettbewerbsbedingungen zustande kommen. Es erscheint daher nicht zwingend erforderlich, diesen Vorgang einem neuerlichen „Bieterwettbewerb“ nach vergaberechtlichen Gesichtspunkten zu unterziehen.

Etwas zu eng erscheinen die Grenzen, die die Kommission in Rz 49 des Grünbuches, Seite 17, hinsichtlich der Zulässigkeit nachträglicher Vertragsänderungen zieht: Es ist zuzugestehen, dass nachträgliche Änderungen am Maßstab der Gleichbehandlung der Wirtschaftsteilnehmer und des Transparenzgebotes zu prüfen sind. Dabei ist aber wesentlich, dass die in Rede stehenden Vereinbarungen – wie bereits oben angedeutet – oftmals lange Laufzeiten (20 bis 30 Jahre) haben und oft auch in wirtschaftlich oder politisch sensiblen Bereichen angesiedelt sind, die maßgeblichen Änderungen über diesen Zeitraum unterliegen können. Die Zulässigkeit nachträglicher Änderungen an unvorhersehbare Ereignisse oder Gründe der öffentlichen Ordnung, Sicherheit oder Gesundheit zu knüpfen, erscheint daher zu restriktiv. Dies würde unrealistisch hohe Anforderungen an den Projektvertrag stellen; selbst ein sorgfältig erstellter Vertrag wird nicht in allen Fällen sämtliche Eventualitäten und Entwicklungsmöglichkeiten, selbst wenn diese objektiv voraussehbar gewesen wären, über einen 20-30 jährigen Zeitverlauf adäquat abbilden können.

In diesem Licht wäre es auch ausgesprochen problematisch, wenn man jede inhaltliche Änderung in Bezug auf den Vertragsgegenstand dem Abschluss eines neuen Vertrages gleichsetzen würde (Rz 49, letzter Satz des Grünbuches, Seite 17) und damit einen erneuten Aufruf zum Wettbewerb verlangen würde. Dieses Erfordernis eines neuen Aufrufes zum Wettbewerb sollte auf wesentliche Änderungen eingeschränkt werden, sofern solche Änderungen nicht (wie von der Kommission ohnehin angedeutet) aufgrund eines unvorhersehbaren Ereignisses erforderlich werden oder aus Gründen der öffentlichen Ordnung, Sicherheit oder Gesundheit gerechtfertigt sind. Bei der Frage, ob eine Änderung wesentlich ist, müsste dabei der Projektumfang insgesamt, der Projektgegenstand, aber auch die bereits vergangene Projektlaufzeit und die noch verbleibende Restdauer berücksichtigt werden. Denn es ist davon auszugehen, dass eine Änderung in bestimmten Vertragspunkten gegen Ende der Projektlaufzeit auf das Projekt insgesamt wesentlich weniger Auswirkungen hat, als wenn diese Änderung bereits kurze Zeit nach Beginn des Projektes erfolgt wäre. Denn es hätte eine solche Änderung zum konkreten Zeitpunkt – wäre sie schon zum Zeitpunkt des ursprünglichen Bieterwettbewerbs bekannt gewesen – möglicherweise geringere Auswirkungen auf die gelegten Angebote zur Folge gehabt.

Zu Frage 14 ist weiters zu bedenken, dass es schwierig erscheint, vorab und allgemein bestimmte Aspekte der vertraglichen Rahmenbedingungen für ÖPP auf Gemeinschaftsebene zu klären, zumal die Erfahrung zeigt, dass ÖPP-Verträge in aller Regel sehr komplexe Vertragswerke sind, die im Detail auf den Einzelfall zugeschnitten sein müssen. Die Vorgabe starrer vertraglicher Rahmenbedingungen würde die Gefahr in sich bergen, dass damit ein für beide Teile optimaler Interessensausgleich verhindert und damit die volkswirtschaftlichen Kosten des Projektes gesteigert werden.

7 FRAGEN 15 BIS 17: UNTERAUFTRÄGE

Zutreffenderweise wird im Grünbuch aufgezeigt, dass der Einsatz von Unterbeauftragten (Subunternehmern) eine Reihe rechtlicher Fragen aufwirft. Besondere Bedeutung bekommt diese Frage neuerlich durch die Tatsache, dass ÖPP-Projekte oftmals über eine lange Zeitspanne laufen. Es kann daher (weder rechtlich noch wirtschaftlich) sichergestellt werden, dass sich Unterbeauftragte über die Laufzeit des Projektes nicht ändern (müssen). Auch würde durch ein striktes Unterbinden von Unteraufträgen ein sich möglicherweise im Zeitablauf ergebendes Optimierungspotenzial von Vornherein ausgeschlossen werden.

Dies führt dazu, dass der öffentliche Auftraggeber von den Bietern zwar verlangen kann, in ihrem Angebot jene Subunternehmer (und deren Leistungsteil) zu benennen, die er bei der Auftragsdurchführung einzusetzen beabsichtigt. Damit ist aber – wie oben aufgezeigt – nicht sichergestellt, dass die Subunternehmer tatsächlich zum Einsatz kommen bzw tatsächlich über die gesamte Projektlaufzeit eingesetzt werden. Dem Wechsel von Subunternehmern kommt daher eine besondere Bedeutung zu, weshalb die Umstände, bei deren Eintritt ein Subunternehmerwechsel zulässig ist, ebenso wie der Modus der Auswahl des Subunternehmers im Vertrag gesondert geregelt werden sollten. Darüber hinaus wäre eine Klarstellung vorteilhaft, dass es zulässig ist, die Anzahl von Subunternehmern bereits im Rahmen des Aufrufes zum Wettbewerb bzw in den Ausschreibungsunterlagen zu beschränken. Begründet liegt der Vorteil darin, dass eine höhere Anzahl von Subunternehmerverhältnissen auch einen höheren Management- und Verwaltungsaufwand seitens des öffentlichen Auftraggebers auslöst. Darüber hinaus hat in den meisten Fällen der öffentliche Auftraggeber mangels direktem Vertragsverhältnis keinen ausreichenden Zugriff auf den Subunternehmer, sodass er diesen nicht hinreichend beeinflussen oder kontrollieren kann. Gerade in jenen Fällen, in denen Subunternehmer wichtige Leistungsteile übernommen haben, kann dies zu Problemen führen, weil (insbesondere im Hinblick auf die Größe und das finanzielle Volumen von ÖPP-Projekten) die vertragliche Haftung des Auftragnehmers zur Sicherstellung der Interessen des Auftraggebers nicht immer ausreicht. Für öffentliche Auftraggeber wäre es daher jedenfalls von Vorteil, wenn klargestellt wird, dass einerseits die Anzahl der einzusetzenden Subunternehmer limitiert werden kann, andererseits für die Bieter verbindlich festgelegt werden darf, dass bestimmte Leistungsteile nicht an Subunternehmer weitergegeben werden dürfen.

8 FRAGEN 18 UND 19: INSTITUTIONALISIERTE ÖPP

Die Kommission hält zutreffend fest, das Wirtschaftsgebilde, auf die die vom Gerichtshof in der Rechtssache Teckal aufgestellten Bedingungen zutreffen, ohne Durchführung eines Vergabeverfahrens Aufträge (d.h. sämtliche Vertragsarten inklusive Konzessionsverträge) erhalten können (siehe Rz 63 des Grünbuchs). Anzumerken ist, dass die vom Gerichtshof postulierten Bedingungen einen gewissen Auslegungsspielraum gewähren. Unserer Ansicht nach dürfen die eine vergabefreie „In-house“-Beauftragung ermöglichenden Bedingungen nicht so restriktiv ausgelegt werden, dass dem „In-house“-Prinzip und den sich daraus ergebenden Gestaltungsmöglichkeiten für öffentliche Auftraggeber jegliche Anwendungsmöglichkeit verschließt. Wir verkennen nicht, dass das „In-house“-Prinzip nicht als Möglichkeit zur Umgehung vergaberechtlicher Bindungen missbraucht werden darf. Allerdings folgt daraus noch nicht, dass schlechthin jede Gründung eines gemeinwirtschaftlichen Gebildes bzw die (nachfolgende) Beauftragung eines gemeinwirtschaftlichen Gebildes mit der Erbringung von bestimmten Leistungen von vergaberechtlicher Relevanz ist. Es wird daher bei den verschiedenen Sachverhaltskonstellationen anhand des Einzelfalles zu prüfen sein, ob ein „Vertrag“ im Sinne des Vergaberechts oder – auf Grundlage der vom Gerichtshof formulierten „In-house“-Bedingungen – ein vergabefreier Vorgang vorliegt.

Hierzu ist weiters zu bemerken, dass – wie die Kommission zutreffend festhält – Privatisierungsvorgänge (verstanden als Übertragung eines Unternehmens bzw von Unternehmensanteilen vom öffentlichen auf den privaten Sektor) grundsätzlich nicht dem Vergaberecht unterliegen, sondern „lediglich“ dem Anwendungsbereich des EG-Vertrags, insbesondere den Grundfreiheiten sowie dem EG-Wettbewerbsrecht (vgl Rz 65ff des Grünbuchs). Um diesen Vorgaben des EG-Vertrags im Rahmen der Anteilsübertragung auf den privaten Sektor genüge zu tun, ist die öffentliche Hand gehalten, ein den Grundsätzen der Nicht-Diskriminierung sowie Transparenz genügendes Verkaufs-Verfahren einzuhalten; soferne solche Privatisierungsvorgänge nicht ohnedies über öffentlich zugängliche Foren (zB Börsen) abgewickelt werden, werden dazu in aller Regel (weniger formalisierte) „Wettbewerbsverfahren“ (oder Bietverfahren) angewendet. Die Abwicklung von Privatisierungsvorgängen über zwar nicht dem Vergaberecht unterliegende, aber den Grundsätzen der Transparenz, Nicht-Diskriminierung und Gleichbehandlung genüge tuende „öffentliche Bietverfahren“ wird nicht zuletzt durch die von der Kommission dargelegte Auffassung gefördert, wonach bei Einhaltung einer solchen Vorgangsweise grundsätzlich davon ausgegangen werden könnte, dass damit keine Gewährung einer verbotenen staatlichen Beihilfe verbunden ist. Unserer Ansicht nach sollen diese Grundsätze aber auch dann gelten, wenn das zu privatisierende Unternehmen bereits vor der Anteilsübertragung mit der Erfüllung bestimmter Aufgaben durch die öffentliche Hand betraut worden ist. Für die Frage der Rechtmäßigkeit der Beauftragung des zu privatisierenden Unternehmens ist der Zeitpunkt maßgebend, in dem die Beauftragung erfolgt ist. Mit anderen Worten: Eine im Einklang mit den vergaberechtlichen Bestimmungen ohne Durchführung einer Ausschreibung durchgeführte Beauftragung eines (gemeinwirtschaftlichen) Gebildes (zB durch zulässige „In-house“-Beauftragung) darf nicht durch die nachfolgende Privatisierung dieses (gemeinwirtschaftlichen) Gebildes unrechtmäßig werden. In einem solchen Fall wäre daher lediglich zu prüfen, ob die für Privatisierungen geltenden gemeinschaftsrechtlichen Vorgaben eingehalten worden sind. Selbst die Nicht-Einhaltung dieser Vorgaben macht aber die zuvor gemeinschaftsrechtskonforme Beauftragung des zu privatisierenden (gemeinwirtschaftlichen) Gebildes nicht unrechtmäßig.

AKD Prinsen Van Wijmen
Advocaten • Notarissen

Laga & Philippe

COMMENTS OF AKD PRINSEN VAN WIJMEN and LAGA & PHILIPPE ON: GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACT AND CONCESSIONS

Question 1.
What type of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?

It is not always clear and obvious to detect the "theoretical" differences between various types of PPP, being either "purely contractual" or "institutionalised".

Very often there is a combination of a contractual PPP and an institutional PPP: the public authority and the private party (or parties) first sign an agreement in which they agree to form a special purpose vehicle and then they actually form the special purpose vehicle (SPV).

In the Netherlands there is no specific PPP legislation. In Flanders, there is a framework - decree on PPP (july 18th, 2003). In this decree, a definition of PPP-projects is given, being *"projects set up by public and private parties, together and in cooperation, in order to achieve a mutual added value"*. The decree only sets out a few headlines, leaving the actual details of PPP – agreements and SPV's untouched. Essential and most important in the decree is the possibility, given by the decree, to set up PPP concerning public goods (f.i. city halls, public sports centres, rail tracks, roads, etc.).

Question 2.
In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

We share this point of view only partly. Although the competitive dialogue procedure is an interesting addition to the already existing procedure, we notice the following difficulties:

- The role of the private parties is becoming more important. It's a procedure that essentially weighs on the private partners' shoulders. There is a risk that the public sector will think this procedure is a solution for everything and forgets to formulate clearly the goals it wants to achieve. This can finally lead to very unclear discussions and long negotiations, followed by agreements that have very little to do with the starting point.

- A definition or description of "complex projects" seems to be very adequate, since the competitive dialogue, in the perspective of the directive, can not be used in "small" or "easy" PPP's. It seems more obvious to create a general procedural framework that applies on all PPP. Also see question 6.
- It will not be interesting for private parties to propose new methods, solutions or products if there is a greater risk the private party will not gain the deal, for example if there are to many participants.
- Moreover, we doubt whether private parties are prepared to give up know how, if there is a risk that a competitor will run away with the know how.
- The possibility to pay the participants for their efforts in the procedure (Article 29.8 Directive 2004/18/EC) should be used. Otherwise it is doubtful whether private parties will make the effort to seriously participate.

Essential in the whole PPP – approach is the initiating partner, being private or public. Keeping in mind that finally, in order to grant a PPP project, a transparent procedure has to be applied, this leads to an undesirable situation in which a private partner might see the project he willingly suggested or proposed to a public partner go to another competitor together with the attached know how. It seems that the directive does not bring about a solution for these types of situations, since the whole procedure always starts with a public partner perspective. In reality, the initiative often lies with the private partner.

Question 6.
In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

We understand the Commission here questions the opportunity of a generic legislation on concessions-procedures and PPP–procedures. An increased, over detailed legal initiative could endanger the creativity mostly needed in PPP–projects.

However, it would be helpful if the existing rules and principles would be clarified, for example in a Commission's notice: e.g. Commission Guidelines/Notice on transparency, or to answer the question: From what moment on a concession becomes a public contract (nr. 34 Green paper)?

In the case a separate procedure would be created, it should be a simplified / simple PPP – procedure, applicable on all PPP projects, regardless financial impact, technical difficulties, form (purely contractual or institutionalised) etc.

It seems however more adequate to apply the existing negotiation procedures on PPP projects.

Question 13.
Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other "standard clauses" which are likely to present similar problems?

These clauses should not be a problem if, except for the contracting private party, none of the other conditions of the contract are changed.

The new contracting private party should either fulfil the criteria for qualitative selection, or in the award procedure and the tender the "step-in" possibility should have been mentioned and e.g. the way to choose the "step-in" party should be laid down.

The step-in procedure can never lead to another agreement with a new private partner. The partner who "steps in", replaces the former partner with all his rights and obligations under the already existing and lasting agreement. When properly stipulated and used, these type of clauses are no threat to an equal competition.

"Step-in" clauses are essential to PPP – projects since they often aim to provide financial backup and support.

Question 14.
Do you think there is a need to clarify certain aspects of the contractual framework of PPP at Community level? If so, which aspects should be clarified?

Yes, see answer to question 6.

Question 19.
Do you think that an initiative needs to be taken at Community level to clarify or define the obligations of the contracting bodies regarding the conditions requiring a call for competition between operators potentially interested in an institutionalised project? If so, on what particular points and in what form? If not, why not?

Yes, see answer to question 6 and 14.

What can be said for purely contractual PPP can be said for institutional PPP as well, as the last ones are very often based on preceding agreements.

A lot comes down to the definition and qualification of transparency standards.

Question 20.
In your view which measures or practices act as barriers to the introduction of PPP within the European Union?

Most of the remarks made in answer 2 apply here as well. Most important is that the public sector sometimes argues that PPP is a possibility for the private sector to earn money without investing it. The public sector should be aware that the money has to be invested first (either by the private or the public sector or both) before a project can generate profit. Only when a project is likely to be in some way or another profitable for them private parties will be interested to invest.

The public sector should be aware that PPP is only interesting and useful when and if it creates a win-win situation. Private parties will not be interested, if there is no win in it for them. Both private and public parties should have a clear view on the goals they want to achieve. Otherwise there is a risk that the negotiations will lead to a win – lose situation in which case the losing party probably will try to get rid of the contract/partnership at a certain moment or at least is less willing to do its utmost to bring the project to a favourable conclusion. Especially when the private sector has taken the initiative for a certain project there is a risk that the public party does not have a sufficiently clear view on the goals of and risks for the public party.

Some general remarks

- Nr 46 Green paper: How to define “a reasonable return on invested capital”?
- According to the Dutch law of compulsory purchase (the *Onteigeningswet*) the public sector cannot proceed to purchase the land under a compulsory purchase scheme, if the owner is willing and able to build the works the public sector wants. In many cases the land needed for the development is already largely held by a developer or operator that anticipated the compulsory purchase. In those cases the public sector has no other choice than to award the contract to this party, because none of the other possible parties owns the needed land. It should be clarified how to deal with this situation.

26 juillet 2004

Livre vert de la Commission européenne sur les partenariats public-privé et le droit communautaire des marchés publics et des concessions.

CONTRIBUTION DE SUEZ

Le Livre vert publié par la Commission européenne le 30 avril dernier consulte les opérateurs et toutes parties intéressées sur les partenariats public-privé et le droit communautaire des marchés publics et des concessions. Suez salue cette initiative de la Commission. Ainsi que le relève le Livre vert, le terme « partenariat public-privé » n'est en effet pas défini au niveau communautaire. Aussi, Suez appuie la Commission dans son souci d'analyser si le cadre communautaire existant est approprié aux enjeux et aux caractéristiques spécifiques des partenariats public-privé[1].

Suez, entreprise européenne, d'origine franco-belge, partenaire du développement durable, exerce ses activités dans l'énergie, dans les métiers du gaz et de l'électricité (avec notamment les sociétés Electrabel, Distrigaz, Fluxys, Elyo) ainsi que dans l'environnement, dans les métiers de l'eau, de l'assainissement et dans ceux du traitement, du recyclage, du tri et de la valorisation des déchets (avec les sociétés Suez Environnement, Degrémont et Sita). Forte de ses 172 000 collaborateurs, Suez travaille dans plus de 100 pays. Elle a réalisé un chiffre d'affaires de 39,6 milliards d'euros en 2003. 80% de ce chiffre d'affaires est réalisé dans l'Europe des 25, où Suez emploie plus de 130 000 personnes.

Suez dispose d'une forte légitimité à exprimer sa position sur le sujet posé par le Livre vert. Suez possède en effet une expérience séculaire des PPP dont elle pratique les différentes formes depuis 150 ans. Les entreprises du groupe sont, historiquement, nées du développement des PPP. Ces partenariats ont imprégné l'expérience, le savoir-faire et la culture de Suez :

- Suez a été créé pour réaliser le canal de Suez, projet d'aménagement à vocation universelle, dans une logique de PPP puisqu'il s'agissait d'une concession. La Compagnie universelle du Canal de Suez a géré ce canal pendant près d'un siècle,
- la Société Générale de Belgique a été créée en 1822 pour favoriser l'industrie nationale et développer des projets en France et en Chine,
- dans la seconde moitié du XIXème siècle, la société Lyonnaise des Eaux et de l'Eclairage a été créée pour répondre aux besoins de collectivités locales dans les grandes infrastructures de réseaux d'énergie et d'eau. Elle a géré des contrats de concessions de gaz et d'électricité en France jusqu'aux nationalisations de 1945 ; 80% de son chiffre d'affaires était ainsi réalisé dans les domaines de l'électricité et du gaz dans des projets de PPP,
- Sita a été créée en 1919 pour l'enlèvement des déchets à Paris à la demande de la Ville.

[1] cf. point 18 du Livre vert.

Suez soutient également la démarche de la Commission visant à amorcer un débat sur la meilleure façon d'assurer que les PPP « puissent se développer dans un contexte de concurrence efficace et de clarté juridique »[2]. Un tel contexte est nécessaire au développement et à la réalisation de PPP dans l'Union européenne. Les PPP constituent en effet des formules permettant d'engager les investissements d'infrastructures et de services qui sont jugés prioritaires par la puissance publique. Ils facilitent le développement rapide et de bonne qualité des infrastructures et des services d'intérêt général dans les Etats membres. En effet, les PPP conjuguent l'expertise opérationnelle (savoir-faire technique, expérience du terrain, capacité d'innovation, efficacité de gestion, réactivité, adaptabilité, souci du consommateur) et la capacité de financement des entreprises, avec les missions d'organisation, de conception, de régulation et de contrôle que peut assumer la puissance publique, grâce à une claire répartition des rôles.

Les différentes formules de PPP peuvent, en outre, apporter une contribution significative à l'attractivité ainsi qu'à la compétitivité de l'Union européenne. Les besoins en investissements sont considérables : ils concernent à la fois les infrastructures, dont les besoins en investissements de l'UE 15 ont été évalués à 600 milliards d'euros par la Commission[3] pour les grands réseaux de transport et les infrastructures nécessaires à la protection de l'environnement ; les besoins sont également substantiels dans le domaine des services et d'accès aux réseaux. Ceux-ci vont en outre être fortement accrus suite à l'élargissement.
Parallèlement, par sa stabilité politique et économique, et depuis la création de l'euro, l'Union européenne constitue un pôle fortement attractif pour l'épargne mondiale et, de ce fait, une zone d'investissements potentiels importante.

La Commission souligne, à juste titre, que la problématique des PPP se situe en aval du choix économique et organisationnel effectué par une autorité locale ou nationale. En effet, la mise en œuvre d'un PPP constitue une prérogative de l'autorité publique, seule à même de décider du mode d'organisation d'un service ou de gestion d'une infrastructure. Suez souligne qu'il est également essentiel de distinguer les PPP de la notion de privatisation. A la différence des PPP, la privatisation entraîne un transfert définitif de la propriété des actifs alors que les PPP permettent à l'autorité publique d'en demeurer propriétaire et d'assurer ainsi l'orientation stratégique, la régulation et le contrôle du service.

Avant de répondre aux questions posées dans le Livre vert, Suez souhaite appeler l'attention de la Commission sur les principaux éléments suivants.

Afin de garantir le développement des PPP dans un contexte de concurrence efficace et de clarté juridique, il serait souhaitable, dans le respect de la liberté de choix des autorités publiques quant au mode d'organisation des services et dans le respect des principes du traité, que la Commission précise dans une directive, qui serait commune à tous les PPP - contractuels et institutionnels - les principes et éléments suivants :

- la définition des PPP,
- le principe de publicité préalable et de mise en concurrence sur l'attribution du contrat,
- une définition du terme « tiers » qui limite les dérogations au principe de mise en concurrence,
- l'égalité d'accès aux subventions publiques.

[2] cf. point 16 du Livre vert.
[3] cf. Communication de la Commission européenne « une initiative européenne pour la croissance ». Novembre 2003.

1. La définition des PPP

La distinction faite par la Commission entre PPP contractuels et PPP institutionnels est justifiée.

A cet égard, il serait opportun de sécuriser la définition communautaire de la concession, afin d'éviter les problèmes d'interprétation soulevés par la Communication interprétative de la Commission sur les concessions en droit communautaire, qui sont source d'insécurité juridique et peuvent limiter l'attractivité[4] et le financement des projets. Au-delà du critère du mode de rémunération (paiement par le consommateur ou par l'autorité publique), il serait économiquement plus pertinent d'adopter une définition des concessions qui prenne en compte à la fois les critères du risque et de l'objet du PPP. Ainsi, par exemple, une concession pourrait être définie comme le contrat par lequel une collectivité locale confie à une entreprise la gestion d'un service d'intérêt général, et dont la rémunération comporte un risque significatif lié aux résultats de l'exploitation.

Aussi, un contrat de construction et d'exploitation (BOT[5]) d'une usine de traitement d'eau, où l'opérateur supporte un risque significatif lié aux évolutions du volume d'eau vendue, serait-il logiquement qualifié de concession au sens communautaire. Il en serait de même pour un contrat de construction et d'exploitation d'usine d'incinération, dans le cas où les recettes de l'opérateur dépendent de façon significative de ventes à un prix non garanti sur le marché de production d'électricité.

Ces cas sont en situation d'insécurité juridique, puisque, par exemple, ils relèvent en droit français de la procédure de délégation de service public (proche de la notion de « concession de services » européenne) alors qu'ils sont soumis aux directives marchés publics en droit communautaire.

2. Le principe de publicité préalable et de mise en concurrence sur l'attribution du contrat

Lorsqu'un organisme public décide de faire intervenir un tiers dans le cadre d'un PPP, que ce soit sous forme contractuelle ou institutionnelle, il est essentiel de respecter les principes de publicité préalable et de mise en concurrence sur le contrat.

La législation communautaire en vigueur concernant les obligations de publicité préalable n'est pas suffisante et est parfois source d'insécurité juridique : par exemple, dans le domaine des concessions, l'obligation explicite de publicité ne concerne que les concessions de travaux dans les secteurs dits classiques, et aucun modèle d'avis communautaire n'est adapté au cas de la concession de service. Les contrats de concessions de service et de travaux étant généralement mixtes, un principe d'obligation de publicité commun à tous les PPP, et notamment aux concessions, permettrait d'éviter toute incertitude d'application.

Le principe de mise en concurrence sur le service implique notamment, lors de la mise en place d'un PPP institutionnel (c'est à dire une société dans laquelle l'entreprise privée détient des parts du capital et participe à la gestion du service en tant qu'opérateur) que la mise en concurrence porte sur l'attribution du contrat. Au moyen d'objectifs de performance, elle permet en effet d'améliorer le service aux consommateurs.

3. La définition du terme « tiers »

Lorsqu'un organisme public confie une mission de service public à un tiers, le principe de mise en concurrence s'applique. La définition juridique du terme « tiers » est donc essentielle car elle délimite les cas d'exonération aux règles de mise en concurrence. La dérogation au principe de concurrence doit être strictement limitée aux deux conditions cumulatives suivantes :

- l'entité qui se voit octroyer le contrat réalise l'intégralité de son chiffre d'affaires avec l'organisme adjudicateur,
- l'entité qui se voit octroyer le contrat ne dispose pas d'autonomie décisionnelle et est soumise aux mêmes procédures de contrôle que celles qui s'appliquent aux propres services de l'organisme adjudicateur.

[4] C'est notamment le cas dans les nouveaux Etats membres, dont l'expérience en matière de concession est parfois assez récente et nécessite un encadrement juridique.

[5] Voir infra. les définitions fournies en réponse à la question1.

4. L'égalité d'accès aux subventions publiques

Les actuelles inégalités d'accès aux subventions publiques constatées constituent une des principales discriminations dont souffrent les opérateurs privés (cf. exemples dans la réponse à la question 12).

REPONSES AUX QUESTIONS POSEES PAR LA COMMISSION DANS LE LIVRE VERT.

1) Quels types de montages de PPP purement contractuels connaissez-vous ? Ces montages font-ils l'objet d'un encadrement spécifique (législatif ou autre) dans votre pays ?

La terminologie liée aux PPP est confuse. Le terme « PPP » lui-même, recouvre différentes réalités selon le pays ou le contexte dans lequel il est employé.

Les métiers de Suez consistent principalement à gérer des services publics sous une forme contractuelle ou institutionnelle avec des autorités publiques. Au sein de l'Union européenne, dans le secteur de l'eau et de l'assainissement, environ un tiers des habitants sont desservis par un opérateur privé via une forme de PPP et, pour ces mêmes métiers, environ 6% des européens sont desservis par une société du groupe Suez.

En fonction de la volonté de l'organisme adjudicateur, Suez intervient sous différentes formes de PPP comme les marchés de gérance ou O&M[6], les régies intéressées, les contrats de délégation de service public (affermages, concessions), les BOT ou bien encore les PFI britanniques, qui regroupent des contrats très variés. Selon le type de PPP choisi, le degré de participation de l'opérateur dans le financement des investissements ainsi que la nature de la relation entre l'opérateur et le consommateur final varient.
Il est fréquent que pour mieux s'adapter aux besoins de l'organisme adjudicateur, le PPP choisi soit hybride entre deux des modèles cités ci-dessus.

Les définitions précises d'un O&M, d'un contrat de délégation de service public, et d'un contrat « d'infrastructures », principales formes contractuelles mises en œuvre par les sociétés de Suez sont les suivantes :

- **Opération et Maintenance (O&M)**

- L'opérateur privé prend en charge le fonctionnement opérationnel du service, sur un secteur géographique précis, et avec un niveau de responsabilité déterminé. A ce titre, l'opérateur privé peut se voir conférer une autorité sur le personnel sous statut public, en charge du service et assure la gestion quotidienne et la maintenance des installations.
- L'autorité publique rétribue l'opérateur privé pour les prestations effectuées. Cette rétribution peut être modulée en fonction de critères de performance identifiés et mesurés.

- **Construction et gestion d'infrastructures, type Build Operate and Transfer (BOT)**

- L'opérateur privé se voit confier la responsabilité de la conception, du financement, de la construction (ou de la réhabilitation) et de la gestion, sur une durée déterminée, d'un équipement majeur. En contrepartie, il est rémunéré par l'autorité publique, en lui facturant le service rendu pour ce nouvel équipement.
- Ce type de contrat est particulièrement bien adapté[7] lorsque les projets de développement de la collectivité portent seulement sur la réalisation d'une infrastructure bien déterminée, par exemple : usine de traitement d'eau, usine d'incinération.

[6] O&M = Operation and Maintenance

[7] Comme rappelé dans l'introduction, il arrive que les catégories de PPP ne soient pas semblables dans les droits nationaux et le droit communautaire. Par exemple, certains schémas de BOT sont classés dans les délégations des service public dans le droit français.

- **Délégation de Service Public (DSP)**

- L'opérateur privé se voit confier par l'autorité publique la responsabilité opérationnelle de la gestion du service pendant une durée déterminée. L'opérateur, qui se rémunère en principe directement auprès des consommateurs, finance tout ou une partie du renouvellement (affermage) et des infrastructures nouvelles (concession). Dans la pratique peu de contrats répondent à une stricte distinction entre affermage et concession[8].
- Dans tous les cas la collectivité publique prend les décisions essentielles, notamment en ce qui concerne les tarifs et les objectifs à atteindre, et conserve un contrôle étroit sur les conditions d'exécution du service public.

Lorsque le PPP contractuel est qualifié de marché public, les règles nationales, qui comprennent au moins la transposition des directives marchés publics, s'appliquent. C'est le cas par exemple pour les contrats d'O&M.

Dans le cas de montages PPP qui ne relèvent pas des directives marchés publics (par exemple les concessions ou les affermages), trois pays de l'Union européenne ont, à notre connaissance, mis en place un encadrement législatif :

- la loi Sapin en France (1993) : cette loi, avec ses décrets d'application, impose la procédure de mise en concurrence des contrats de délégation d'un service public après publicité. Cette procédure n'est pas différenciée entre les contrats d'affermage, de concessions et autres montages complexes.
- la législation espagnole : le décret royal 2/2000 qui encadre les contrats administratifs, complété par la loi 13/2003 qui s'applique aux concessions de travaux publics, donnent les principes relatifs à la passation des contrats, et garantissent la concurrence. De plus, les services locaux comme l'eau et l'assainissement, font l'objet d'une réglementation locale spécifique, qui détaille les procédures applicables pour l'attribution de contrats.
- la législation italienne (loi Merloni de 1994, loi des finances de 2002 et paquet législatif sur les services publics locaux de 2003) : suite à la modernisation du secteur de l'eau initiée par la loi Galli de 1994, sur chacun des 91 territoires recouvrant le pays, un opérateur doit[9] être sélectionné : soit l'appel d'offres porte sur le contrat, soit il porte sur le choix du partenaire privé qui rentre dans le capital de la société exploitante. Des cas d'exonérations sont prévus, notamment pour les cas dits de « in-house » ainsi que pour les sociétés cotées avant le 10 octobre.2003.

Comme il est souligné en introduction du présent document, il serait souhaitable de préciser et d'améliorer la définition communautaire de la concession en retenant (au-delà du critère du mode de rémunération) à la fois les critères du risque et de l'objet du PPP. Ainsi, une concession pourrait être définie comme le contrat par lequel une collectivité locale confie à une entreprise la gestion d'un service d'intérêt général, et dont la rémunération comporte un risque significatif lié aux résultats de l'exploitation.

[8] En effet, il est fréquent qu'un contrat d'affermage prévoit des travaux à la charge du délégataire et réciproquement, il est exceptionnel qu'une concession mette tous les travaux à la charge du concessionnaire.

[9] Quelques cas d'exonération sont prévus, où plusieurs opérateurs pourront co-exister sur le même territoire.

2) De l'avis de la Commission, la transposition en droit national de la procédure de dialogue compétitif permettra aux parties concernées de disposer d'une procédure particulièrement adaptée à la passation des contrats qualifiés de marchés publics lors de la mise en place d'un PPP de type purement contractuel, tout en préservant les droits fondamentaux des opérateurs économiques. Partagez-vous ce point de vue ? Si non, pourquoi ?

Suez accueille favorablement la mise en place de la procédure de dialogue compétitif dans le cadre des marchés publics. En effet, même si sa mise en œuvre peut s'avérer complexe, cette procédure devrait permettre de promouvoir l'innovation technologique au sein de l'Union.
Il conviendra cependant de veiller à ce que la mise en œuvre de cette procédure respecte la propriété intellectuelle des concurrents. En effet, celle ci est menacée si l'organisme adjudicateur remet en concurrence l'ensemble des candidats sur la solution qu'il aura jugée bonne suite à la mise en commun des idées des différents soumissionnaires. Aussi, devrait-il être envisagé qu'à la suite de la première étape - qui consiste à la sélection par l'organisme adjudicataire d'un nombre restreint de concurrents sur la base de pré-projets – l'organisme adjudicateur poursuive avec les concurrents un dialogue parallèle, sur la base des solutions de chacun des candidats retenus, sans faire pression sur un candidat pour qu'il accepte que sa solution soit divulguée aux autres candidats.

En tout état de cause, la procédure de dialogue compétitif n'a de sens que dans les cas pour lesquels l'organisme adjudicateur n'est pas en mesure de définir a priori les choix technologiques liés à la prestation à réaliser.
Cette procédure, limitée à juste titre à certains marchés publics, présente une certaine flexibilité adaptée à des marchés complexes et au degré d'indétermination technique forte, mais elle ne propose pas la souplesse nécessaire aux négociations des contrats de concessions de services (cf. réponse à la question 7). En d'autres termes, la procédure de dialogue compétitif a pour but de définir le projet technique avant appel d'offres, alors que la phase de négociation dans le cadre de l'attribution d'un contrat de concession a pour but de définir le contrat qui liera les parties pendant une durée longue. En effet, la procédure de dialogue compétitif est inopérante pour définir avec précision la répartition des risques et des responsabilités entre les parties. Pas plus ne l'est-elle pour arrêter la répartition des responsabilités financières des parties. Aussi, cette procédure ne peut-elle remplacer la nécessaire phase de négociation entre les parties à un PPP.
Pour prendre un exemple concret, la procédure de dialogue compétitif pourrait être utilisée pour la réalisation d'une unité de traitement des boues de station d'épuration par exemple, car l'essentiel du projet dépend d'un choix technologique. Elle n'est en revanche pas pertinente le cas d'une délégation globale de la gestion du service d'assainissement.

3) En ce qui concerne ces contrats, existe-t-il selon vous des points autres que ceux relatifs au choix de la procédure d'adjudication, susceptibles de poser problème au regard du droit communautaire des marchés publics ? Si oui, lesquels et pour quelles raisons ?

Bien qu'elle ne relève pas directement du droit communautaire, une certaine dérive liée aux marchés dits « à reconduction », utilisés en France, notamment dans le domaine de la collecte des déchets est constatée.
Dans ces contrats, lorsque la collectivité locale décide de ne pas actionner la reconduction, le prestataire doit arrêter les prestations. En revanche, si au contraire, la collectivité locale décide de reconduire le contrat, le prestataire qui ne le souhaiterait plus n'a aucun droit de refus. Une telle situation n'est pas satisfaisante dans la mesure où elle a pour effet de rendre très malaisée la cotation des marchés par les candidats lors de la remise initiale des offres, tout en les forçant à intégrer ce risque dans leur prix. Une telle dérive ne répond pas à l'objectif de rationalisation des deniers publics.
Il serait donc tout à fait souhaitable de pallier les dérives de ce type de marchés, notamment en permettant au prestataire de refuser leur reconduction.

4) Avez-vous déjà organisé, participé, ou souhaité participer, à une procédure d'attribution d'une concession au sein de l'Union? Quelle expérience en avez-vous ?

Suez, avec ses différentes filiales, répond en moyenne à plus de 500 appels d'offres par an dans l'UE, essentiellement en France et en Espagne, pour des concessions de service (au sens communautaire).

Cette expérience a permis de constater que :

- les règles et pratiques des différents Etats Membres sont très hétérogènes ;
- il arrive que l'attention des collectivités locales soit parfois focalisée sur les aspects financiers ou tarifaires au détriment du niveau de qualité de service proposé. Ce fut par exemple le cas lors de l'appel d'offres pour le choix du gestionnaire des services d'eau et d'assainissement de Prague en 2001, où le choix de l'adjudicataire fut effectué sur le seul critère financier (prix d'achat des actions de la société titulaire du contrat) ;
- pour qu'une procédure d'attribution de concession soit réussie et qu'elle conduise à un PPP adapté, jouissant d'une sécurité juridique et d'une solidité économique suffisantes, il est nécessaire de passer par une étape de négociation significative entre l'autorité publique et l'opérateur (cf. réponse question 7) ;
- les règles de passation de contrats de concession, comme la loi Sapin[10] en France, donnent parfois lieu à des excès au contentieux. En effet, la complexité des procédures permet un grand nombre de recours purement formels, sans que l'infraction invoquée porte grief à celui qui la met en avant. Pour assurer une plus grande sécurité juridique, les directives recours devraient limiter la recevabilité des recours aux seuls moyens faisant grief au requérant.

5) Estimez vous que le cadre juridique communautaire actuel est suffisamment précis pour assurer la participation concrète et effective de sociétés ou groupements non-nationaux aux procédures de passation de concessions? Une concurrence réelle est-elle, selon vous, habituellement assurée dans ce cadre ?

En pratique et malgré le manque d'homogénéité des règles nationales quand elles existent, la publicité réalisée dans le cadre de passation de concessions suffit à signaler le lancement de la procédure aux opérateurs potentiellement intéressés. Dans certains pays, comme la France, la législation nationale en vigueur impose des règles de publicité précises.

En France, Lyonnaise des Eaux, filiale de Suez Environnement, est à l'origine de l'arrêt du Conseil d'Etat « Communauté de communes du Piémont de Barr ». Comme demandé, le Conseil d'Etat a considéré qu'une collectivité ne pouvait pas confier à un syndicat départemental la gestion d'une station d'épuration sans procéder à une publicité préalable. Malgré cette jurisprudence, il existe encore des cas en France où une collectivité locale attribue un contrat de concession de services d'eau à une régie voisine sans mise en concurrence.
D'une façon générale, afin d'échapper à la jurisprudence « Piémont de Barr », il arrive que les syndicats départementaux dans le domaine de l'eau et de l'assainissement incitent les communes à transférer leurs compétences afin de ne pas avoir à se soumettre à une procédure de mise en concurrence.

Ainsi, l'adoption d'une directive sur les PPP, qui préciserait les quatre points détaillés dans la première partie de ce document (cf. p. 3 et 4) et rappelés à la question suivante, permettrait de sécuriser la législation communautaire grâce à une clarification dans le droit positif de l'obligation de publicité préalable pour tous les PPP et de la définition de la notion de « tiers ».

[10] La loi Sapin comporte 8 étapes principales, qui peuvent chacune donner lieu à de nombreux recours.

6) Pensez-vous qu'une initiative législative communautaire, visant à encadrer la procédure de passation de concessions, est souhaitable ?

La question d'une éventuelle initiative législative communautaire dans le domaine des PPP se décline en trois points :

- quels PPP seraient concernés ?
- quel serait le contenu de l'outil législatif ?
- quel outil législatif serait utilisé ?

Suez estime qu'une initiative législative commune à tous les PPP, et non pas limitée aux seuls contrats de concessions, est souhaitable. Cet outil législatif, qui serait vraisemblablement une directive, devrait comporter les principes et éléments suivants :

1. la définition des PPP,
2. le principe de publicité préalable et de mise en concurrence sur l'attribution du contrat,
3. la définition du terme « tiers », qui limite les cas dérogatoires au principe de mise en concurrence,
4. l'égalité d'accès aux subventions publiques.

Chacun des ces points est développé dans la première partie du présent document (cf. p. 3 et 4).

Si un tel outil juridique devait être adopté, il devrait :

- respecter les caractéristiques des contrats de concession et ne pas condamner leur viabilité économique. Par exemple (cf. réponse à la question 7), les contrats de concession ne devraient pas être soumis aux règles d'attribution des marchés publics ;
- préserver l'équilibre économique des contrats en cours, sans les remettre en cause avant leur terme, afin de respecter les engagements pris par les parties ainsi que l'intérêt des usagers.

7) De manière plus générale, si vous estimez qu'il est nécessaire que la Commission propose une nouvelle action législative, existerait-il à votre avis des raisons objectives de viser dans cet acte tous les PPP de type contractuel, qu'ils soient qualifiés de marchés publics ou de concessions, pour les soumettre à des régimes de passation identiques ?

Si un outil législatif visant à encadrer les procédures de passation de concessions devait être adopté, il ne devrait en aucun cas être semblable à la réglementation européenne en vigueur pour les marchés publics.

Les concessions se caractérisent notamment par une prise de risques par le concessionnaire en matière d'investissements et de risques commerciaux sur une durée longue. De plus, le concessionnaire, en contact direct avec les consommateurs, assume une mission d'intérêt général, qu'il doit réaliser en respectant les règles et les objectifs fixés par la collectivité tout en bénéficiant d'une certaine autonomie.

Ainsi, la mise au point d'un contrat de concession nécessite une phase de négociation plus longue et plus complexe que dans le cas d'un marché public afin d'ajuster la répartition des risques, le contenu des missions et le financement de l'opération. L'appréciation par la collectivité publique de la relation de confiance qui peut s'instaurer avec l'opérateur est encore plus essentielle qu'en matière de marchés publics.

De plus, et contrairement aux marchés publics, il doit être possible de réviser périodiquement les contrats de concession, qui sont à juste titre d'une durée relativement longue, en fonction d'événements extérieurs ou d'ajustement des besoins de l'organisme adjudicateur (cf. question 14).

8) Selon votre expérience, l'accès des opérateurs non-nationaux aux formules de PPP d'initiative privé est-il assuré? En particulier, lorsqu'il existe une invitation des pouvoirs adjudicateurs à présenter une initiative, cette invitation fait-elle généralement l'objet d'une publicité adéquate permettant l'information de tous les opérateurs intéressés ? Une procédure de sélection véritablement concurrentielle est-elle organisée pour assurer la mise en œuvre du projet retenu ?

9) Quelle serait selon vous la meilleure formule pour assurer le développement des PPP d'initiative privée dans l'Union européenne tout en assurant le respect des principes de transparence, de non discrimination et d'égalité de traitement ?

Suez ne dispose pas de la pratique de projets d'initiative privée.

10) Quelle expérience avez-vous de la phase postérieure à la sélection du partenaire privé dans les opérations de PPP contractuels ?

L'expérience montre que la vie d'un contrat est toujours affectée par un certain nombre de changements ou bouleversements exogènes. Il est alors nécessaire pour les deux parties de convenir des modifications à apporter au contrat d'origine, dans le respect de certains principes (par exemple de l'équilibre économique initialement défini). Dans le cas de concessions, la durée du contrat (cf. question 14) implique des clauses de rendez-vous réguliers (par exemple quinquennaux) entre l'organisme adjudicataire et le titulaire du contrat.

11) Avez-vous connaissance de cas dans lesquels les conditions d'exécution – y compris les clauses d'adaptation dans le temps - ont pu avoir une incidence discriminatoire ou ont pu constituer une entrave injustifiée à la libre prestation de services ou à la liberté d'établissement ? Si oui, pouvez-vous décrire le type de problèmes rencontrés ?

Suez n'a pas connaissance de telles discriminations ou entraves.

12) Avez-vous connaissance de pratiques ou de mécanismes d'évaluation d'offres ayant des incidences discriminatoires ?

La plupart des discriminations dont souffrent les opérateurs privés sont moins liées aux mécanismes d'évaluation des offres qu'aux désavantages structurels qui pénalisent les offres du secteur privé.

Dans le domaine fiscal par exemple, les régies d'assainissement allemandes sont exemptées de TVA alors que les opérateurs privés se voient imposer une facturation avec une TVA de 16%. En France, la plupart des régies d'eau, d'assainissement et de gestion des déchets ne sont pas assujetties à l'impôt sur les sociétés ou à la taxe professionnelle ni à certaines redevances d'occupation du domaine public et ont des charges moindres pour les cotisations des retraites de leurs employés que les opérateurs privés. De plus, les régies de gestion des déchets sont exemptées de TVA.

Il est par ailleurs essentiel de veiller, au moyen du contrôle communautaire des aides d'Etat, à ce que l'octroi de subventions soit non discriminatoire entre les opérateurs, quel que soit leur statut.
En France, par exemple, il est pratiquement impossible de bénéficier d'aides des départements et des régions pour des travaux financés par les délégataires et non par des régies[11].
De plus, même lorsque le financement des infrastructures est à la charge de la collectivité publique, des discriminations sont parfois constatées en fonction du mode de gestion du service : le Conseil d'Etat français a

[11] En effet, la loi réserve le bénéfice de certaines subventions aux régies et les concessionnaires ne peuvent pas y prétendre.

validé en décembre 2003 la décision du Conseil Général des Landes d'accorder aux communes en régie un taux de subvention supérieur à celui accordé aux communes ayant délégué leurs services d'eau potable et d'assainissement.
Ces mesures discriminatoires sont un frein évident au développement des PPP. Aussi Suez promeut un outil législatif reposant sur quatre principes dont celui de l'égalité d'accès aux subventions publiques (cf. introduction p.4).

13) Partagez-vous le constat de la Commission selon lequel certains montages financiers, en particulier les montages de type "step-in" peuvent poser problème en termes de transparence et d'égalité de traitement ? Connaissez vous d'autres "clauses types" dont la mise en œuvre est susceptible de poser des problèmes similaires ?

Du fait même qu'un candidat est évalué sur ses compétences et sa capacité financière à assumer une opération, une substitution, après attribution du projet à un candidat, pourrait à priori être considérée comme contraire aux règles de concurrence.

Toutefois, la réalité est autre. Tant la personne publique que les opérateurs souhaitent, dans la mesure du possible, procéder à des opérations déconsolidantes. Or, dans une telle situation, seul un établissement financier peut admettre dans ses comptes une opération à caractère consolidant, ce qui paraît devoir, dans ces conditions, justifier la présence d'établissements financiers « aux côtés » du gestionnaire du service d'intérêt général.
Les clauses de step-in sont ainsi devenues nécessaires à la mise en œuvre de beaucoup de PPP et permettent d'obtenir des financements à meilleur coût.

Il est par ailleurs important de rappeler que les clauses de step-in ont un caractère essentiellement dissuasif : à notre connaissance aucune clause de ce type n'a été activée dans le domaine de l'eau et des déchets à ce jour.

Pour répondre aux inquiétudes légitimes de la Commission, Suez considère souhaitable qu'un changement significatif au niveau de l'opérateur (comme l'activation d'une clause de step-in) dans le cadre d'un contrat soit soumis à l'autorisation de la collectivité locale, laquelle ne peut faire valoir, pour s'y opposer, que des motifs mettant en cause la gestion du service ou les garanties présentées par l'opérateur.
Ce raisonnement doit également s'appliquer en cas de changement majeur dans l'actionnariat de l'opérateur. En effet, s'il est souhaitable qu'une autorité publique puisse s'opposer à une modification du capital de l'opérateur, les motifs du refus, comme l'a souligné le Conseil d'Etat en France, ne doivent pas être discrétionnaires.

14) Estimez-vous qu'il serait nécessaire de clarifier au niveau communautaire certains aspects relevant du cadre contractuel des PPP ? Si oui, sur quel(s) aspect(s) devrait porter cette clarification ?

Forte de son expérience séculaire des PPP, Suez tient à souligner les deux points suivants, relatifs à la durée des contrats et à leurs éventuels avenants.

La durée des contrats.

La mesure qui consisterait à limiter la durée des concessions de services ou de ne prendre comme seul critère la durée d'amortissement des investissements, est souvent considérée comme une mesure simple et efficace visant à dynamiser la concurrence. Cette question mérite un examen plus approfondi.

En effet, la détermination de la durée des contrats ne saurait s'appuyer uniquement sur des conditions d'amortissement et de rentabilité raisonnable. Par exemple, des contrats trop courts dans le secteur de l'eau ou de l'assainissement menaceraient l'optimisation du couple entretien/renouvellement des infrastructures. Une conséquence serait l'augmentation des coûts d'exploitation et un probable sous-investissement[12].

De plus, et indépendamment des investissements effectués, l'achèvement des objectifs de performance sur lesquels l'opérateur s'est engagé dans le contrat suppose une durée suffisamment longue. C'est par exemple le cas lorsqu'un contrat de concession prévoit des objectifs de réduction des pertes en eau. Dans certains nouveaux Etats membres, la seule réalisation d'un diagnostic précis de la situation des réseaux (dans le secteur de l'eau et de l'assainissement les réseaux sont en effet enterrés) nécessite une analyse de plusieurs années. De plus, la réalisation des objectifs de performance nécessite la formation du personnel, laquelle n'est efficace que dans la durée.

En outre, une courte durée des contrats nécessiterait de fréquentes mises en concurrence sur le service (dont l'objet réduit limiterait les possibilités d'innovation) dont le coût élevé pénaliserait les consommateurs. La concurrence ne serait ainsi pas stimulée. Au contraire, l'opérateur sortant disposerait dans ce cas d'un avantage significatif. En France, le Conseil de la Concurrence a confirmé ce raisonnement, en considérant, dans un avis rendu en 2001, que pour créer les conditions d'une saine concurrence, les contrats devaient avoir une durée suffisamment longue pour être attractifs.

Pour finir, l'expérience montre que la vie d'un contrat est souvent affectée par un certain nombre de changements ou de bouleversements exogènes. La durée est nécessaire pour que l'opérateur puisse anticiper et s'adapter à ces situations puis introduire, pour y faire face, les innovations techniques et de gestion pertinentes pour continuer à assurer la bonne qualité du service.

Les avenants éventuels aux contrats.

Comme souligné en réponse à la question 7, l'une des caractéristiques des contrats de concession est de pouvoir être adaptés dans le temps, sans toutefois remettre en cause l'égalité des candidats lors de l'appel d'offres. Une limitation excessive des possibilités d'avenants conduirait à limiter l'intérêt, pour une collectivité, de conclure un contrat de gestion de service si celui-ci devait être remis en cause ou résilié suite à chaque changement dans l'environnement du contrat. En obligeant à la résiliation des contrats avant terme, l'absence de possibilités d'avenants entraînerait également le risque de coûts supplémentaires pour les collectivités ainsi que pour les consommateurs.

15) Dans le contexte des opérations de PPP, avez-vous connaissance de problèmes particuliers rencontrés en matière de sous-traitance ? Lesquels ?
16) Le phénomène des PPP de type contractuel, impliquant le transfert d'un ensemble de tâches à un unique partenaire privé, justifie-t-il selon vous que des règles plus détaillées et/ou d'un champ d'application plus large soient mise en place en ce qui concerne le phénomène de sous-traitance ?
17) De manière plus générale, estimez-vous qu'une initiative complémentaire devrait être prise au niveau communautaire en vue de clarifier, ou d'aménager, les règles relatives à la sous-traitance ?

En application des directives marchés publics, les règles applicables en matière de sous-traitance sont différentes pour un concessionnaire selon que les dispositions de la directive « secteurs spéciaux » lui sont ou non applicables. Or de grandes incertitudes subsistent sur la notion de droits exclusifs et spéciaux que ne lève pas la nouvelle directive 2004-17. En effet, l'interprétation à donner à la nouvelle définition de ces droits par cette directive est délicate s'agissant d'entreprises dont tous les contrats n'ont pas été attribués selon une même procédure (cas des activités eau et assainissement en France). Par ailleurs, les règles applicables au secteur de l'assainissement sont confuses : la notion d'activité liée à l'eau potable est imprécise. Il ne peut être satisfaisant de prétendre assujettir ou non à une procédure formalisée les achats d'un concessionnaire dans le domaine de l'assainissement selon l'étendue des compétences de la collectivité publique, organisatrice du service[13].
En conséquence, une clarification des textes sur ces différents points serait bienvenue afin de lever ces incertitudes, sources d'insécurité juridique et donc frein au développement des partenariats concernés.

[12] Cas rencontrés par exemple dans des contrats de traitement des eaux usées en Espagne

[13] Critère défini par la Communication interprétative sur les concessions pour déterminer si un contrat de concession de travaux est soumis à publicité communautaire.

18) Quelle expérience avez-vous de la mise en place d'opérations de PPP de type institutionnalisé ? En particulier, votre expérience vous conduit-elle à penser que le droit communautaire des marchés publics et des concessions est respecté dans le cas de montages de PPP institutionnalisé? Si non, pourquoi ?

Pour une plus grande exhaustivité, et compte tenu des régimes législatifs différents dans les métiers de l'énergie et de l'environnement, Suez a jugé pertinent d'apporter une réponse d'une part en ce qui concerne les métiers de l'énergie et, d'autre part, en ce qui concerne l'environnement.

Dans le domaine de l'énergie

En Belgique, depuis la fin des années 1950, environ 80 % de la distribution publique d'électricité et 90 % de la distribution publique de gaz sont assurées par des PPP de type institutionnalisé. Ces montages font l'objet d'un encadrement législatif spécifique dans les trois régions du pays, en dehors du droit des marchés publics.

Cet encadrement législatif soumet les contrats de PPP de type institutionnalisé à une tutelle administrative :

- les décisions des communes, préalables à la constitution d'un PPP et, ultérieurement , celles relatives à son fonctionnement ou à sa liquidation, sont soit susceptibles de suspension et d'annulation, soit soumises à l'approbation de l'autorité de tutelle ;
- les actes des organes de gestion et de contrôle des PPP sont également soumis à une tutelle administrative générale (suspension ou annulation) ou spéciale (approbation) ainsi qu'à des règles de publicité ;
- les communes disposent toujours de la majorité des voix et des mandats, de façon à assurer la maîtrise des pouvoirs publics. L'associé privé se voit reconnaître un droit de veto limité à la protection de ses intérêts financiers d'actionnaire ;
- les travaux qui ne sont pas exécutés par du personnel de la structure, de même que les fournitures et les services donnent lieu à l'application de la législation des marchés publics.

L'ouverture du marché de l'énergie va de pair avec la création d'autorités de régulation auxquelles les PPP sont soumis :

- une autorité fédérale de régulation (la CREG) est chargée essentiellement d'approuver les tarifs d'accès aux réseaux d'électricité et de gaz ;
- trois autorités régionales de régulation sont chargées d'approuver les plans de développement, de vérifier l'exécution des obligations de service public applicables aux gestionnaires de réseau de distribution.

Les éléments qui précèdent, la durée des PPP institutionnels (de 18 à 30 ans maximum, selon les régions) ainsi que leurs spécificités, expliquent qu'ait été créée une législation spécifique aux PPP.

Dans le domaine de l'environnement

Un certain nombre de contrats ou de marchés sont attribués sans mise en concurrence à des établissements publics ou à des sociétés d'économie mixte, ce qui parait contraire aux principes dégagés par la jurisprudence en matière de phénomènes dits de « in-house ». Par exemple, l'attribution de marchés à la société Aquafin (société en charge de l'assainissement dans la région des Flandres en Belgique, dont l'actionnariat est composé à 80% par une holding détenue par la région des Flandres et à 20% par une société privée) s'est faite sans mise en concurrence.

Il paraît ainsi nécessaire de créer un droit positif clair sur ce thème. Ainsi qu'il est souligné en introduction de ce document, lorsqu'un organisme public confie une mission de service public à un tiers, le principe de mise en concurrence s'applique. La définition du terme « tiers » est donc essentielle car elle délimite les cas d'exonération aux règles de mise en concurrence. La dérogation au principe de concurrence doit être *strictement* limitée aux deux conditions cumulatives suivantes :

- l'entité qui se voit octroyer le contrat réalise l'intégralité de son chiffre d'affaires avec l'organisme adjudicateur,
- l'entité qui se voit octroyer le contrat ne dispose pas d'autonomie décisionnelle et est soumise aux mêmes procédures de contrôle que celles qui s'appliquent aux propres services de l'organisme adjudicateur.

Par ailleurs, la mise en place de PPP institutionnalisés présente dans certains pays une insécurité juridique qui nuit à l'attractivité des projets et à leur financement. C'est le cas par exemple dans le secteur de l'eau en Italie.
En effet, la modernisation de ce secteur s'appuie sur la mise en place de PPP institutionnels, dont la compatibilité avec les principes du traité est incertaine : souvent, une société à capitaux publics se voit attribuer un contrat de concession sans mise en concurrence et ensuite la vente d'une partie du capital de cette société fait l'objet d'un appel d'offres.
De plus, la multiplication des textes réglementaires sur la procédure de passation et l'absence d'une véritable coordination entre eux, crée une incertitude chez les opérateurs notamment quant à la durée des concessions. Cette imprécision du cadre juridique peut être démontrée d'une part, par l'insertion, dans les contrats signés entre opérateurs et organismes adjudicateurs, de clauses spécifiques relatives à la résiliation anticipée due à une éventuelle réduction de la durée de la concession (méthode de valorisation des actions et modalités de participation de l'actionnaire privé dans un nouvel appel d'offres) et, d'autre part, par la déclaration récente d'une autorité publique locale (l'AATO de Torinese) sur l'inexistence de règles juridiques claires sur le sujet.

19) Estimez-vous qu'une initiative devrait être prise au niveau communautaire en vue de clarifier ou de préciser les obligations des organismes adjudicateurs quant aux conditions dans lesquelles doivent être mis en concurrence les opérateurs potentiellement intéressés par un projet de type institutionnalisé? Si oui, sur quels points particuliers et sous quelle forme? Si non, pourquoi ?

Les PPP institutionnels ne sont pas directement visés par la Communication interprétative de la Commission sur les concessions en droit communautaire publiée en 2000. Or la mise en place de PPP institutionnels, dont le développement s'accélère en Europe, est parfois fragilisée par un manque de sécurité juridique.

Plutôt qu'une initiative en vue de clarifier les modalités de mise en concurrence dans le cadre de PPP institutionnels, il semble souhaitable en revanche que la Commission réaffirme et précise, dans une directive sur l'ensemble des PPP, un certain nombre de principes communs à tous les PPP, contractuels ou institutionnels.

L'affirmation du principe de publicité préalable et de mise en concurrence sur le contrat permettrait notamment de renforcer la sécurité juridique des montages de PPP institutionnels. En effet, si le principe de mise en concurrence dans le cadre de la mise en place d'un PPP contractuel semble généralement acquis et appliqué, il est essentiel qu'il soit également respecté dans le cadre de la mise en place d'un PPP institutionnel.
De façon concrète, lorsque l'achat de parts de la société exploitante, à capitaux jusqu'alors publics, accorde un pouvoir de gestion à l'investisseur privé, alors la mise en concurrence sur l'ouverture du capital d'une société titulaire d'un contrat, ne peut valablement se substituer à la mise en concurrence sur l'attribution du contrat. Dans ce cas, c'est donc l'attribution du contrat, qui peut être assorti de la vente de parts, qui doit faire l'objet de la mise en concurrence.
En revanche, l'entrée au capital d'investisseurs privés, sans droit particuliers liés à la gestion du service, ne doit pas être soumise à une obligation d'appel d'offres (exemple : cas d'une mise en bourse d'une partie du capital).
La mise en place du PPP institutionnel de Murcie, en Espagne, est un exemple de mise en concurrence dans le but d'améliorer le service : le prix d'achat correspondant à la part de capital de la société à capitaux publics en vente, était fixé en fonction des éléments du bilan de la société et la sélection de l'entreprise privée (attribution du contrat) portait sur l'offre technique et les engagements de qualité du service.

Par ailleurs, l'élaboration d'un droit positif pour les phénomènes dits de « in-house » (cf. troisième principe énoncé dans le propos introductif) permettra de clarifier le fait qu'une société d'économie mixte ne peut en aucun cas se voir attribuer un marché ou un contrat sans mise en concurrence.

D'autre part, une telle initiative législative, prise au niveau communautaire, devrait également tenir compte de la nécessité de préserver l'équilibre économique des contrats en cours, sans les remettre en cause avant leur terme, afin de respecter les engagements pris par les parties ainsi que l'intérêt des usagers. Elle devra également tenir compte de l'existence d'une réglementation européenne sectorielle dans le domaine de l'énergie.

20) Quelles sont les mesures ou pratiques que vous estimez constitutives d'entraves à la mise en place des PPP au sein de l'Union européenne ?

Les pratiques discriminatoires évoquées dans la réponse à la question 12 constituent des entraves à la mise en place des PPP au sein de l'Union européenne. Le projet de loi néerlandais qui vise notamment à interdire la mise en place de contrats de concession dans le domaine de l'eau, constitue potentiellement une entrave à la mise en place de PPP aux Pays-Bas ainsi qu'au principe de la libre prestation de services prévu par le traité.

Par ailleurs, la politique communautaire en matière d'utilisation de fonds communautaires n'est pas clairement en faveur du développement des PPP. Ce manque de clarté freine le développement de tels projets, notamment dans les nouveaux Etats Membres. Pour Suez, les objectifs affirmés par les Chefs d'Etat et de gouvernement à Lisbonne en mars 2000, ainsi que l'adoption d'une initiative européenne pour la croissance au Conseil européen de Bruxelles en octobre 2003, devraient conduire la Commission à adopter une attitude claire et positive sur les possibilités de réaliser des PPP et d'obtenir conjointement des fonds communautaires afin d'éviter de priver d'effets de levier importants et de gains d'efficacité reconnus pour conduire des projets d'infrastructures et assurer une gestion efficace et pérenne des projets réalisés.

A titre d'exemple, le mode de consultation sur financements européens concernant la construction d'infrastructures ne prévoit aujourd'hui pas de fonds européens pour financer des projets de PPP sous forme de BOT ou d'un DBO[14]. Le mode de consultation actuel est limité aux contrats de travaux sans opération et maintenance et sans investissement de la part des opérateurs privés. Si les PPP en BOT ou en DBO peuvent intégrer un financement communautaire portant sur le contrat de travaux, il n'existe toutefois pas de financement européen pour la globalité du PPP ; ce qui explique le faible nombre de PPP en DBO ou en BOT bénéficiant de fonds européens. Cette situation est préjudiciable au développement de l'investissement dans le domaine des infrastructures dans les nouveaux Etats membres.

En outre, ce mode de consultation pour les travaux sous fonds européens présente certaines lacunes. Il est en effet effectué aujourd'hui :

- sans vérification préalable de la conformité administrative et technique des offres au cahier des charges puisque leur ouverture est faite en un seul temps ;
- sur la base d'un prix d'opération et maintenance qui n'est que théorique et qui n'engage pas les candidats, ce qui biaise ainsi les offres de certains candidats sans que ceux-ci soient contractuellement tenus de respecter les coûts d'opération et maintenance annoncés ;
- sans pré-sélection ou examen préalable des références techniques et financières des candidats ;
- sur la base d'une conception (design) excessivement préétablie des projets et ainsi sans possibilité pour les opérateurs de travaux, possédant un savoir-faire technique spécialisé, de proposer des solutions techniques optimisées en tirant, par exemple, profit de récents développements technologiques.

Pour favoriser le développement des PPP dans l'UE dans un contexte de concurrence efficace, il serait ainsi souhaitable d'organiser des modes de consultation qui permettent de pallier ces lacunes.

Aussi, Suez suggère l'élaboration d'un guide et de procédures pratiques à destination des Etats membres, des autorités locales et des acteurs concernés afin de les aider à développer des montages de PPP qui puissent permettre de mobiliser les fonds communautaires, dans le respect des principes du traité. A cet égard, les documents publiés par la Commission « Guidelines for successful PPPs » (publié en 2003) et, plus récemment, le « PPP Resource book » (juin 2004) ne répondent pas à ces besoins.

Une réflexion, menée par la Commission avec les acteurs concernés, pourrait être lancée à cette fin (cf. infra question 22).

[14] « Design-build, operate » : PPP où l'autorité confie à l'opérateur privé la conception, la construction et l'exploitation, pour une période déterminée, d'une nouvelle installation. Celle-ci demeure propriété de l'autorité publique. Le risque lié à la conception et à la gestion est supporté par l'opérateur privé, qui est rétribué par l'autorité publique. L'opérateur privé s'engage sur un coût global de construction et d'exploitation. Le financement de l'investissement est supporté par l'autorité publique.

21) Connaissez-vous d'autres formes de PPP développées dans les pays en dehors de l'Union ? Connaissez-vous des exemples de « bonnes pratiques » développées dans ce cadre, dont l'Union pourrait s'inspirer ? Si oui, lesquelles ?

Suez n'a pas connaissance d'autres formes de PPP développées hors de l'Union.

22) De façon plus générale, et compte tenu des besoins importants d'investissements nécessaires dans certains Etats membres, afin de poursuivre un développement économique et social durable, estimez-vous utile une réflexion collective sur ces questions qui se poursuivrait à des intervalles réguliers entre les acteurs concernés, et qui permettrait un échange des meilleures pratiques ? Est-ce que vous considérez que la Commission devrait animer un tel réseau ?

Suez considère qu'une réflexion sur ces questions, qui se poursuivrait à intervalles réguliers entre les acteurs concernés par les PPP serait très utile, compte tenu, d'une part de la nécessité d'assurer le développement des PPP au sein de l'UE élargie dans un contexte de concurrence efficace et de clarté juridique et, d'autre part, compte tenu des besoins en investissements nécessaires dans certains pays de l'Union.

Une telle réflexion devrait porter sur les principaux thèmes soulevés par le Livre vert ainsi que sur les aides d'Etat. Elle devrait également aborder les questions liées aux financements des PPP au moyen de fonds communautaires afin de favoriser les effets de leviers nécessaires au développement de projets d'infrastructures et à la gestion durable et pérenne des ouvrages réalisés.

Pour Suez, la Commission européenne devrait animer un tel réseau. Celui-ci devrait, notamment, impliquer les opérateurs dotés d'une expérience concrète des PPP au sein de l'Union européenne ainsi que des représentants des autorités des Etats membres, en particulier des autorités locales. Des contacts bilatéraux sur ces sujets devraient également être organisés par la Commission sur ces questions. Suez se tient naturellement à la disposition de la Commission pour évoquer ces sujets et partager son expérience des partenariats public-privé en Europe.

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Prague, July 30, 2004

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European Commission
Directorate General for Internal Market
Consultation "Green Paper on PPPs and the Community law on public contracts and concessions”
C 100 2/005
B-1049

Dear Sirs

Comments by Kocian Solc Balastik on the Commission´s Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions

1. Introduction

1.1. Kocian Solc Balastik (“**KSB**”) is the largest Czech law firm, with offices in Prague, Brussels and Karlovy Vary. KSB has very broad experience in advising on public procurement law issues governed by national legislation before the accession of the Czech Republic to the EU, as well as national and European legislation after 1 May 2004. KSB has advised on several projects based on project financing principles as well as genuine PPP projects, including the very first large PPP project in the Czech Republic.

1.2. KSB welcomes the opportunity to comment on the Commission’s Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions (the “**Green Paper**”),[1] since it believes that the Green Paper and any follow-up steps based thereupon might pave the way to efficient use of all the advantages inherent to PPP throughout the Community and, in particular, may act as a useful introduction of this type of project in the new Member States, which lack the requisite degree of experience to carry out this type of project, particularly in accordance with Community law.

1.3. KSB believes that its contribution to the discussion initiated by the Green Paper, as set out below, has particular value, as its views originate in a Member State where a successful PPP has yet to be developed, since the Czech Republic has so far experienced failures rather than successes in developing this type of cooperation between the private and public sector. The aim of this contribution is to comment on the Green Paper from the perspective of that experience, as we feel the process of learning from failures is the most efficient course of action. In addition, KSB’s intention is to firmly place its comments within the existing national legal framework, and briefly assess its functionality in connection with implementation of PPP.

[1] COM (2004) 327 final of 30 April 2004

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2. General Remarks on PPP implementation in the Czech Republic

2.1. The outcome of applying PPP principles in the Czech Republic is very open-ended. A few small projects have succeeded,[2] but larger projects (assuming these have got past the blueprint stage) have faced many problems and have simply died.

2.2. In general, the following matters have significantly contributed to failure:

(a) An inadequate legal framework;

(b) Despite lack of previous adequate experience, attempts to start with huge, complex projects rather than small, easy ones;

(c) Lack of familiarity with typical PPP features and usual timeframes;

(d) Unrealistic expectations (in financial terms and also as regards timing);

(e) Political pressure (upcoming elections).

2.3. From the Green Paper's point of view, the above legislative aspects are of prime importance. The very first suggestions relating to PPP projects arose at the beginning of the 1990s. At this time, the entire legal system of the Czech Republic was experiencing significant amendment and PPP was not a key topic for legislators. Thereafter, PPP did not attract the attention of legislators for several years. In 2000/2001, the idea of a pilot project, the construction of 90 kilometres of motorway, was strongly promoted and eventually started being put into effect.

2.4. Unfortunately, the legal framework was a step behind the concept. The outcome was to adapt existing legislation to the project, rather than *vice versa*. In addition to amendment of the Public Procurement Act[3], there have been substantial amendments to the Surface Roads Act[4] whereunder the notion of concession was introduced into Czech law. For your convenience, we have provided for the amended provisions, together with the new provisions on concessions, in a working English translation as an Annex hereto.

2.5. Although the amendments to the Surface Road Act were partly inspired by Community instruments relating to concessions[5], they appear to have been overly tailored to a particular project. This is particularly apparent from the list of mandatory particulars to be included in a

[2] For example, a project in which a private company renovated a hospital heating system, a subsequent task being to maintain and operate the system to ensure adequate heat supplies to satisfy hospital requirements. Also, a project to upgrade Prague's water supply and sewerage system can be regarded a PPP project.

[3] Act. No. 199/1994 Coll., the Public Procurement Act, as amended. This Act is no longer in force, being replaced on 1 May 2004 by Act No. 40/2003 Coll., the Public Procurement Act, intended fully to comply with Community law.

[4] Act No. 13/1997 Coll., the Surface Roads Act, as amended.

[5] In the Government proposal for adoption of the amendment (Chamber of Deputy's Doc. 1226, 3rd Election Period, 2002), reference is made to Directive 93/37/EEC with respect to Article 18b and to the Commission Interpretative Communication on concessions under Community law (No. 2000/C121/02) with respect to Article 18d, paragraphs 1 and 2, and Article 18f, paragraph 2.

concession contract. In consequence, we believe these provisions are too restrictive, preventing them from becoming the general pattern for future projects; the result is to undermine the importance of these provisions as a pilot act of law, the intention of which was to introduce the concept of the concession into the Czech legal system.

2.6. Other than the ill-fated provisions of the Surface Roads Act, there is currently no other framework or special legislation that could directly govern implementation of PPP in the Czech Republic.

2.7. Although it is possible to implement some projects without the need to amend existing legislation, in general, legislative amendments will be required if the use of PPP is to expand and be properly implemented.[6] Any amendments will need to touch upon the following areas:[7]

(a) Public procurement (the new Public Procurement Act has not yet transposed Directives 2004/17 and 2004/18, in particular, the "competitive dialogue procedure");

(b) Treatment of property by the public sector (currently, certain restrictions apply to acquisition, alienation, charging and lease of such property);

(c) Conclusion of concession contracts (a general framework to allow a lawful and valid grant of "concession" style arrangements common in other countries utilizing PPP projects);

(d) Infrastructure user fees (detailed rules required);

(e) Fiscal discipline (mandatory rules for assumption of obligations by the public sector crucial).

2.8. In addition, it may be helpful to adopt rules to provide for:

(a) Clarification of ownership and security interest rights in a PPP setting;

(b) Delineation of the rights and powers of the State, regional districts and municipalities in the application of PPP projects;

(c) Modification of tax and accounting regulations as necessary to allow the effective financial functioning of entities in a PPP framework;

(d) Creation of administrative conditions conducive to project development (e.g. fast tracking of zoning construction permits, etc.)

[6] *See* Public Private Partnership – Legal Feasibility Study in the Czech Republic, October 2003 (hereinafter the "***Legal Feasibiliy Study***"), p. 1, as published (in Czech) by the Ministry of Finance of the Czech Republic (accessible at http://www.mfcr.cz/download/ppp/Aktuality/PPP-pravo.pdf)

[7] *See* Legal Feasibility Study, p. 1

(e) Establishment of an informed and competent central autonomous PPP body to act as a co-ordinating interface between private investors on the one hand and the many governmental entities on the other hand.

2.9. Bearing in mind the above matters and the importance of PPP for further development of public services, at the beginning of 2004 the Government of the Czech Republic approved the Public Private Partnership Policy (hereinafter the "***PPP Policy***"),[8] wherein the Government outlined basic principles for the further development and promotion of PPP. At the same time, the Ministry of Finance was entrusted with the task of preparing methodology and a system of implementing PPP. The material prepared by the Ministry of Finance is to be tabled for a meeting of the Government by the end of July 2004.

3. Detailed Comments on the Green Paper

3.1. Types of Contractual PPP Set-Ups

Given the historical developments in the second half of the last century, it has long not been the case in the Czech Republic that end users of most public services (such as health care, schools, penitential centres, transport infrastructure) directly pay for the use of these services. Therefore, the "concessive model" is very likely to face difficulties in being promoted in the Czech Republic and, we believe, in some other post-communist countries too.

In the event of an set-up where a link between the private partner and the end user is required, and the end user is requirement to pay a fee or charge to the private partner, such a fee or charge would need to be of a symbolic nature only, and the public partner would have to make up any difference in the actual costs of the service.

As far as KSB is aware, none of the projects so far implemented (including those where an attempt at implement has been made) have sought to impose any form of direct or indirect payments on end users. The truth is that the nature of most projects has not allowed application of the principle of end user payment. The only exception seems to be the D47 motorway project, where a shadow-toll principle was to be used.

In general, contractual PPP set-ups are not subject to any specific supervision in the Czech Republic due to the lack of a sufficient legal framework. The only exceptions are the provisions of the Surface Road Act on concession agreements as referred to above.

3.2. Competitive Dialogue Procedure

KSB is of the view that traditional public procurement procedures are not suitable for PPP projects and therefore welcomes the competitive dialogue procedure as outlined in Directive 2004/18/EC. If properly transposed into national law and then correctly implemented, the competitive dialogue procedure might become a basic public procurement tool for PPP projects.

[8] Government Decision No. 7 of 7 January 2004.

Please note however that the competitive dialogue procedure seems to be more demanding with regard to implementation in terms of proper management and co-ordination, negotiation experience, and other aspects, something that the public partner is not necessarily accustomed to. Also, this procedure can be even more vulnerable to favouring a particular bidder, and the risk of corruption is increased. Hence this procedure will require competent and impartial personnel in charge on the side of the public partner, and such personnel may be difficult to find particularly in countries where PPP experience is low or does not exist at all.

3.3. Award of Concessions

Although KSB has not, as yet, participated in a procedure for the award of a concession outside the Czech Republic, it has gained some experience from the participation by foreign partners in tenders organised in the Czech Republic. On the basis of that experience, mostly of a pre-accession nature, we consider the national legal framework in this area, which has been inspired by Community law, sufficient to ensure genuine competition. In our opinion, effective participation of non-national companies is guaranteed in general and not only as regards procedures for the award of concessions.

With reference to the Community legislative initiative to regulate the procedure for the award of concessions, we take the view that it would be preferable to wait until such time as initial experience of how the competitive dialogue procedure functions becomes apparent, rather than to introduce a new piece of legislation in circumstances where the existing provisions might prove satisfactory.

3.4. Participation of Non-national Operators in PPP and Advertising Practice

In our experience, non-national operators have faced no substantial difficulties in accessing PPP schemes. Given the lack of experience of local operators, in some cases there has been no alternative.

At the outset of PPP development in the Czech Republic, advertising the intention to launch a project was seriously neglected and hence genuine competition was not well ensured. In particular, in the case of some large projects, an operator had already been selected at the time the decision to launch the project was announced. Although the situation has gradually improved since the very first stages, advertising continued to take place at national, rather than Community, level.

3.5. Further Development of Private Initiative PPPs in the EU

Given the complexity of implementing PPP principles on the basis that too many areas of national law are affected and not harmonised at a Community level, it is difficult to identify the best formula to ensure development of PPP within the EU.

KSB believes that the development of PPP should be natural rather than artificial. Given the variety of national frameworks and their differing levels of focus on regulation of PPP, there seems to be no one-fit-all formula available that would pave the way to achieving the unqualified success of private initiative PPPs within the EU.

In our view, the best way to progress in this area would be to create a set of guidance materials for implementing PPP that could eventually lead to gradual harmonization of implementation procedures.[9] Such guidance material would also be flexible enough to be easily tailored to any developments, which in the area of PPP are inevitable. If it proves a success, the guidance material could be followed by a piece of legislation unifying all the rules and giving them binding legal force.

Also, promotion and education activities could be more meaningful than any binding and sacred formula. Public sector officials and administrators would be the best target group for such activities, as it largely depends on such people's level of knowledge and experience as to whether they are able to reap all the benefits offered by the principles of PPP, thereby achieving the aims of the project.

3.6. Post-selection Procedure

In our opinion, a prerequisite for the post-selection procedure to proceed smoothly is efficient and thorough preparation and implementation of the tender procedure, thereby preventing unexpected problems crucial to the project implementation from arising from the outset. In our experience, most detrimental to the post-selection procedure are disputes regarding the scope of the project concerned and the manner of implementation thereof which were not properly resolved before the tender procedure was launched or during, provided that the tender had the character of a competitive dialogue procedure.

This proves that the crucial stage for success of any PPP project is its pre-tender and tender phase, rather than the post-selection phase.

As concerns the "step-in" arrangement, we share the Commission's view that it may present a problem with regard to transparency and equality of treatment to the extent that it involves a replacement of the concession holder in its entirety.[10] On the other hand, however, we consider this arrangement necessary for creditors to be able to protect their interests. In our view, the exercise of step-in rights should be time limited to recovery of the business; the entity exercising the rights concerned together with the public partner should be obliged to select a new operator in accordance with applicable public procurement rules. We believe this objective is achievable through contractual arrangements, while the legislation should be limited to allowing the exercise of step-in rights for a limited period of time, until a new operator is selected.

3.7. Sub-contracting

We fully share the Commission's view as expressed in the Green Paper, i.e. if the special purpose project company is itself in the role of a contracting body, then public procurement rules apply. Otherwise, it is free to sub-contract by whatever means it wishes.

[9] *See e.g.* Guidelines for Infrastructure Development through Build-Operate-Transfer (BOT) Projects, prepared by the United Nations Industrial Development Organisation.

[10] Step-in rights may also consist of lighter forms as a replacement of management, assumption of certain rights or obligations, or acquisition of shares in the project company.

KSB is convinced that one of the principles of PPP lies in the fact that the private sector can provide certain services better and cheaper than the public sector. Consequently, it should be inherent to each project that the private partner will exert its best effort to provide services of the highest quality for minimal costs. In a normal situation, the private partner should therefore be able to use sub-contracting according to its own rules. However, such freedom in sub-contracting is justifiable only in circumstances where any payment the private partner receives from the public partner does not depend on its actual costs.

Regulation of sub-contracting would then be desirable only for those projects where the private partner is rewarded on the basis of actual costs incurred.

3.8. Institutionalised PPPs

Institutionalised PPPs are implemented in the Czech Republic at a municipal level rather than for large projects going beyond municipal borders. Those set-ups are almost exclusively used for projects regarding the construction, operation and maintenance of local water supply and sewerage systems and local gas distribution systems.

In our experience, funding provided by European structural funds and PPPs are not always entirely compatible. It very often happens that finding structural funds excludes application of PPP principles and vice versa.

In this respect, KSB believes that a closer study of mutual co-existence of the above financing instruments would be desirable.

We believe that any collective discussion and mutual exchange of experience will undoubtedly be of great help not only for the Commission, but also for all stakeholders.

4. Conclusion

4.1. Although major PPP principles are well known, their application in practice may significantly differ, for the most part currently depending on national legislation. As the Commission has noted, only a few Member States have developed special legislation making provision for PPP. In some cases, PPP-targeted legislation has been influenced by particular projects carried out in the Member State concerned.

4.2. Since PPP projects might become of prime importance in the near future, as one of several major tools in financing and operating the public infrastructure, KSB believes that a certain level of uniformity needs to be introduced into the piecemeal national frameworks. However, unification of PPP implementation rules needs to occur naturally, rather than artificially. The best solution seems to be to start with guidance material flexible enough to be adjusted to effect gradual developments in a relatively new area of public-private co-operation.

4.3. Without prejudice to the adoption of binding legislative acts regulating particular aspects of PPP implementation, if it is necessary to ensure compliance with the principles of Community law, a framework legislation should not be adopted until a minimum level of unification is reached on a natural basis, e.g. with the help of guidance material prepared by the Commission.

Comments by Kocian Solc Balastik on the Commission´s Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions

Prague, Brussels, 30 July 2004

There comments have been submitted on behalf of Kocian Solc Balastik. Please address any follow-up to these comments to:

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Yours faithfully,

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Bouygues Construction : éléments de réponses au Livre Vert PPP COM(2004)327 fin

Question 1

Quels types de montage de PPP purement contractuels connaissez-vous ? Ces montages font-il l'objet d'un encadrement spécifique (législatif ou autre) dans votre pays ?

Au sein de Bouygues Construction, nous avons une expérience significative des concessions dans plusieurs pays européens ainsi que des PFI anglais. Selon leur forme (concession, crédit bail, bail emphytéotique, convention d'exploitation, PFI,…) ces différentes formes de PPP font l'objet d'un encadrement spécifique plus ou moins élaboré.

Nous considérons que les marchés de type PPP purement contractuels présentent des différences très importantes avec les marchés publics au sens de la directive. Le paragraphe 2 du 1.1 « le phénomène PPP » du livre vert explicite les éléments qui caractérisent normalement les opérations de PPP (ces éléments sont à nos yeux une justification de la différence avec les marchés publics). Le mode de procurement de ces marchés complexes est aussi très différent, mais aucun des textes que nous connaissons ne reconnaît suffisamment cette différence. Le développement des PPP nécessite une participation active des partenaires privés. Les phases de sélection et la phase de préparation des contrats après sélection du partenaire sont longues et coûteuses pour le secteur privé comme pour le secteur public. Le développement des PPP nécessite que les règles existantes ou en préparation assurent au secteur privé (opérateurs –préteurs …) la sécurité indispensable.

Question 2 :

De l'avis de la Commission, la transposition en droit national de la procédure de dialogue compétitif permettra aux parties concernées de disposer d'une procédure particulièrement adaptée à la passation des contrats qualifiés de marchés publics lors de la mise en place d'un PPP de type purement contractuel, tout en préservant les droits fondamentaux des opérateurs économiques. Partagez-vous ce point de vue ? Si non, pourquoi ?

Réponse : La transposition en droit national de la procédure de dialogue compétitif permettra aux parties concernées de disposer d'un outil utile pour la passation des PPP de type purement contractuel.

La procédure présente beaucoup de similarités avec la pratique actuelle des PFI anglais pour lesquels le client public dialogue avec les candidats sur les solutions proposées, réduit graduellement le nombre des participants et finalement entre dans une phase de dialogue exclusif avec un groupement avant la signature du contrat. En ce sens, la procédure de dialogue compétitif codifie la pratique actuelle.

Il est à noter que les projets de PFI anglais sont généralement traités en procédure négociée et que la procédure du dialogue compétitif pourrait être utilisée dans ce cadre. L'article 29 de la directive 2004/18/EC appelle cependant un certain nombre de commentaires.

1. La définition de la procédure de dialogue compétitif est très peu explicite en ce qui concerne la phase qui suit la sélection d'un partenaire et conduit au closing de l'opération.

   Pour que le coût de la phase de compétition soit acceptable par le secteur privé, une partie importante de la préparation finale des contrats est réalisée après la sélection d'un partenaire, par exemple :
   - Le développement de la Conception jusqu'à un stade avancé permettant de sécuriser l'ensemble des intervenants sur les aspects techniques de l'opération (due diligence des banques –agences de rating, …)
   - L'obtention des permis et autorisations
   - La documentation juridique
   - La documentation financière

Notre expérience de ces phases (sur les PFI anglais) nous montre que la préparation de ces éléments nécessite une période longue (de 6 à 12 mois) au cours de laquelle des modifications légères inévitables sont introduites (mais qui ne changent pas matériellement la substance de l'engagement du partenaire privé).

Il nous paraît essentiel que la réglementation reconnaisse ces aspects qui sont aujourd'hui insuffisamment codifiés.

Tout d'abord en précisant l'étendue des négociations possibles avec le partenaire retenu et qui ne devrait pas selon nous être moindre que la liberté laissée dans la procédure négociée.

Ensuite en précisant la définition des « marchés particulièrement complexes « éligibles à la procédure de dialogue compétitif. Notre expérience anglaise nous démontre que les projets de type PFI (projets comprenant le financement, la conception, la construction et l'ensemble des services sur une période longue avec un transfert de risques important vers le partenaire privé) doivent rentrer dans cette catégorie.

2. Il est important de respecter la confidentialité du savoir-faire des candidats qui ne saurait être utilisé au profit des autres concurrents. En la matière il apparaît que l'article 6 de la Clause 29 de la Directive 2004 / 18 / CE ayant trait au dialogue compétitif ne permet pas d'offrir une complète garantie : en effet il apparaît que l'adjudicateur pourrait éventuellement utiliser les résultats intermédiaires du dialogue compétitif pour définir les paramètres de la demande d'offre finale.

3. La procédure doit être la plus courte possible et pour ce faire, les conditions suivantes doivent être remplies:
   - Définition précise du programme dès l'origine de l'appel d'offres. Ce programme doit définir la performance à atteindre et non les moyens pour y parvenir.
   - Limitation du nombre de concurrents au stade de la pré-qualification car pour être efficace, le dialogue compétitif demande une grande disponibilité des équipes du Client public.
   - Limitation du dialogue compétitif lors de la phase finale du dialogue à 2 candidats
   - Cahier des charges définissant le cadre juridique précis et la répartition des risques entre secteur public et privé
   - Critères de sélection clairs et transparence.

4. Les coûts de développement doivent être acceptables par le privé :
   - La proposition initiale ne peut être que préliminaire afin de limiter les coûts à risques engagés par les concurrents (consultants, avocats, banques).
   - Les coûts de développement doivent être reportés à la fin de la procédure au fur et à mesure de la réduction du nombre de candidats
   - La force d'innovation du secteur privé ne doit pas être restreinte :
   - En matière de financement, les candidats doivent rester libres afin de mettre en concurrence les différentes solutions de financement pour proposer la solution optimum
   - Les solutions techniques alternatives doivent pouvoir être formulées
   - La trop grande définition du cahier des charges en amont doit être évitée (Superposition des rôles des entreprises et consultants/bureaux d'ingénierie du client)

5. Les pouvoirs adjudicateurs peuvent prévoir des prix ou des paiements aux participants au dialogue.

Question 3 :

En ce qui concerne ces contrats, existe-t-il selon vous des points autres que ceux relatifs au choix de la procédure d'adjudication, susceptibles de poser problème au regard du droit communautaire des marchés publics ? Si oui, lesquels et pour quelles raisons ?

En complément des éléments développés dans la réponse précédente, il nous paraît utile de mentionner le point suivant :

> Dans la procédure PFI anglaise, il est relativement fréquent que des modifications des membres du Consortium interviennent entre la remise de l'offre et la signature du contrat . La directive ne précise pas clairement dans quelle mesure ces changements peuvent être réalisés et un complément d'information sur ce sujet serait utile.

Question 4 :

Avez-vous déjà organisé, participé, ou souhaité organiser ou participer à une procédure d'attribution de concession au sein de l'Union ? Quelle expérience en avez-vous ?

Nous avons participé à de nombreuses procédures d'attribution de concessions au sein de l'union.

Question 5 :

Estimez-vous que le cadre juridique communautaire actuel est suffisamment précis pour assurer la participation concrète et effective de sociétés ou groupements non-nationaux aux procédures de passation de concessions ? Une concurrence réelle est-elle, selon vous, habituellement assurée dans ce cadre ?

Notre réponse à cette question s'applique aux concessions mais aussi à l'ensemble des PPP.

Le cadre juridique communautaire actuel (Traités, directive 2004/18/CE, communication interprétative sur les concessions) traite essentiellement des conditions de consultation et impose évidemment le respect des traités. Il devrait, en théorie, permettre une libre concurrence entre des entreprises nationales et non nationales. Il nous semble qu'une plus grande efficacité, donc une plus grande liberté d'accès des groupements non-nationaux aux procédures de passation serait obtenue par une plus grande vigilance européenne et des Etats membres pour la mise en œuvre effective des principes des traités dans les pratiques courantes plutôt que par un cadre juridique communautaire renforcé.

Question 6 :

Pensez-vous qu'une initiative législative communautaire, visant à encadrer la procédure de passation de concessions, est souhaitable ? Si oui, estimez-vous que la nouvelle procédure de dialogue compétitif pourrait constituer une procédure de passation adéquate pour la mise en place de PPP contractuels.

Nous ne pensons pas qu'une initiative législative communautaire visant à encadrer la passation des concessions est souhaitable.

Pour les autres types de PPP contractuels,ainsi que nous l'avons mentionné dans notre réponse à la question n°2, la procédure de dialogue compétitif est un outil utile et nécessaire pour la passation des contrats mais insuffisant à certains égards. Dans cette même réponse nous avons développé un certain nombre de remarques et/ou suggestions visant à améliorer l'efficacité de cette procédure. En particulier, la procédure de dialogue compétitif ne couvre de façon satisfaisante la phase postérieure à la sélection d'un partenaire et précédent la signature des accords définitifs et le closing financier des opérations.

Question 7 :

D'une manière plus générale, si vous estimez qu'il est nécessaire que la Commission propose une nouvelle action législative, existerait-il à votre avis des raisons objectives de viser dans cet acte tous les PPP de type contractuel, qu'ils soient qualifiés de marchés publics ou de concessions, pour les soumettre à des régimes de passation identique ?

Nous ne pensons pas qu'il soit souhaitable de proposer une nouvelle action législative qui aurait pour effet de traiter tous les PPP de façon identique. Pour les raisons exposées dans les réponses aux questions précédentes, nous pensons que si la législation devait évoluer vers un régime commun, ce sont les règles applicables aux PPP non qualifiés de concessions qui devraient être assouplies.

Question 8 :

Selon votre expérience, l'accès des opérateurs non-nationaux aux formules de PPP d'initiative privée est-il assuré ? En particulier, lorsqu'il existe une invitation des pouvoirs adjudicateurs à présenter une initiative, cette invitation fait-elle généralement l'objet d'une publicité adéquate permettant l'information de tous les opérateurs intéressés ? Une procédure de sélection véritablement concurrentielle est-elle organisée pour assurer la mise en œuvre du projet retenu ?

Par manque d'information, nous n'avons pas de commentaire particulier sur ce point

Question 9 :

Quelle serait selon vous la meilleure formule pour assurer le développement des PPP d'initiative privée dans l'Union européenne tout en assurant le respect des principes de transparence, de non-discrimination et d'égalité de traitement ?

Si l'on veut promouvoir les PPP d'initiative privée au sein de l'union, il est nécessaire que le secteur privé trouve une motivation à proposer des idées innovatrices. Nous comprenons bien que le respect des traités impose de mettre le projet en concurrence mais l'une des solutions permettant de maintenir la motivation du secteur privé à proposer des PPP d'initiative privée serait l'octroi d'un droit de premier refus à l'initiateur de la proposition.

A défaut de l'acceptation du bénéfice de ce droit par le soumissionnaire une indemnisation pour un montant à définir devrait lui être accordée.

Il est également indispensable que le fonctionnement de la procédure de dévolution garantisse la confidentialité des informations et le maintien de la possession et de l'usage des innovations que proposent les soumissionnaires.

Ainsi que nous l'avons indiqué dans une réponse précédente, il apparaît que l'article 6 de la Clause 29 de la Directive 2004/18/CE ayant trait au dialogue compétitif ne semble pas offrir ce type de garantie : en effet l'adjudicateur pourrait éventuellement utiliser les résultats des premières phases du dialogue compétitif pour redéfinir les paramètres de la demande d'offre finale.

Question 10 :

Quelle expérience avez-vous de la phase postérieure à la sélection du partenaire privé dans les opérations de PPP contractuels ?

Nous avons une expérience significative de la phase postérieure à la sélection du partenaire prive dans les opérations de PPP contractuels dans le domaine des concessions d'une part et sur le marchés des PFI anglais (6 projets signés et un en préparation). Nous insistons à nouveau sur l'importance de cette phase longue de la préparation d'un contrat PPP qui doit être reconnue et codifiée dans la réglementation.

La conduite de ces phases sur les opérations PFI en Angleterre nous semble être un bon exemple de la façon dont elles doivent être conduites et encadrées.

Question 11 :

Avez-vous connaissance de cas dans lesquels les conditions d'exécution – y compris les clauses d'adaptation dans le temps – ont pu avoir une incidence discriminatoire ou ont pu constituer une entrave injustifiée à la libre prestation de services ou à la liberté d'établissement ? Si oui, pouvez-vous décrire le type de problèmes rencontrés ?

Nous n'avons pas connaissance de cas où les conditions d'exécution et de changement dans le temps aient pu avoir une incidence discriminatoire où constituer une entrave.

Il est selon nous inévitable que des variations aient lieu pendant le déroulement d'un contrat dont la durée est de l'ordre de 30 ans. Il y a en effet des risques associés à la durée (changement de la loi par exemple) que ni le secteur bancaire ni les opérateurs privés ne sont prêts à accepter sur une durée aussi longue. La prise en compte de ce besoin d'évolution dans les contrats peut très bien se faire sans remettre en cause les principes d'égalité de traitement et de transparence.

Question 12 :

Avez-vous connaissance de pratiques ou de mécanismes d'évaluation d'offres ayant des incidences discriminatoires ?

L'imposition dans la réglementation européenne et dans celle des états membres d'une plus grande transparence dans la définition et l'application des critères d'attribution devrait diminuer le risque de pratiques discriminatoire dans l'évaluation des offres.

Question 13 :

Partagez-vous le constat de la Commission selon lequel certains montages du type « step-in » peuvent poser problème en termes de transparence et d'égalité de traitement ? Connaissez-vous d'autres « clauses types » dont la mise en œuvre est susceptible de poser des problèmes similaires ?

Nous ne pensons pas que les clauses de type « step-in » peuvent présenter un problème en termes de transparence ou d'égalité de traitement.

Ces dispositions sont nécessaires pour sécuriser le secteur bancaire qui n'a pas de sécurité autre que la régularité des flux financiers en provenance de l'autorité contractante. L'exercice d'un droit de step-in permet aux préteurs d'intervenir en cas de difficulté sérieuse dans la société projet.

Nous considérons que le « step-in » des prêteurs doit être encouragé par l'autorité publique comme un moyen de régler les problèmes beaucoup plus avantageux pour le secteur public qu'une terminaison qui auraient des conséquences très dommageables.

Question 14 :

Estimez-vous qu'il est nécessaire de clarifier au niveau communautaire certains aspects relevant du cadre contractuel des PPP ? Si oui, quel devrait en être le contenu et la forme ?

Nous n'avons pas de commentaires sur ce point.

Question 15 :

Dans le contexte des opérations de PPP, avez-vous connaissance de problèmes particuliers rencontrés en matière de sous-traitance ? Lesquels ?

Non, dans le contexte des opérations de PPP où nous intervenons, nous ne rencontrons pas de problème particulier en matière de sous-traitance.

Question 15 :

Le phénomène des PPP de type contractuel, impliquant le transfert d'un ensemble de tâches à un unique partenaire privé, justifie-t-il selon vous que des règles plus détaillées et/ou d'un champ d'application plus large soient mises en place en ce qui concerne le phénomène de sous-traitance ?

Non, nous ne pensons pas que le phénomène des PPP justifie des règles plus détaillées en matière de sous-traitance. Les opérations de type PPP sont des opérations complexes, qui comprennent le plus souvent la conception et la construction de grands projets. Ces projets sont donc très souvent trop importants pour pouvoir être traités directement par des petites ou moyennes entreprises et le seraient quel que soit le mode de dévolution. Ces entreprises interviennent donc sur ces projets en sous-traitance d'une entreprise générale avec un transfert de risques compatible avec leur taille et leur surface financière. L'introduction des PPP ne devrait donc rien changer dans ce domaine, les entreprises générales sous-traiteront la même proportion de leur activité que par le passé.

Question 17 :

De manière plus générale, estimez-vous qu'une initiative complémentaire devrait être prise au niveau communautaire en vue de clarifier, ou d'aménager, les règles relatives à la sous-traitance?

Non, nous ne pensons pas qu'une initiative complémentaire est nécessaire concernant les règles relatives à la sous-traitance.

Question 18 :

Quelle expérience avez-vous de la mise en place d'opérations de PPP de type institutionnalisé? En particulier, votre expérience vous conduit-elle à penser que le droit communautaire des marchés publics et des concessions est respecté dans le cas de montages de PPP institutionnalisé? Si non, pourquoi?

Le concept même de PPP institutionnalisé couvre des réalités très différentes d'un pays à l'autre. La logique de création d'une société d'économie mixte relève d'une réflexion très différente du PPP. La mise en compétition d'une société d'économie mixte dans le cadre d'un PPP doit répondre aux mêmes conditions générales que pour les autres concurrents. De ce point de vue, des distorsions de concurrence existent aujourd'hui, ainsi que le souligne le Livre vert.

Question 19 :

Estimez-vous qu'une initiative doit être prise au niveau communautaire en vu de clarifier ou de préciser les obligations des organismes adjudicateurs quant aux conditions dans lesquelles doivent être mis en concurrence les opérateurs potentiellement intéressés par un projet de type institutionnalisé? Si oui, sur quels points particuliers et sous quelle forme? Si non, pourquoi?

Une initiative s'impose pour préciser les obligations des organismes adjudicateurs mais il semble que cela doit faire l'objet d'une différenciation avec les PPP.

De façon générale et indépendamment des questions soulevées dans ce document:

19. Quelles sont les mesures ou les pratiques que vous estimez constitutives d'entraves à la mise en place des PPP au sein de l'Union européenne?

Nous n'avons pas de commentaire sur ce point.

21. Connaissez-vous d'autres formes de PPP développées dans les pays en dehors de l'Union? Connaissez-vous des exemples de 'bonnes pratiques' développées dans ce cadre, dont l'Union pourrait s'inspirer? Si oui, lesquelles?

Nous n'avons pas de commentaire sur ce point

22. De façon plus générale, et compte tenu des besoins importants d'investissements nécessaires dans certains Etats membres, afin de poursuivre un développement économique social et durable, estimez-vous utile une réflexion collective sur ces questions qui se poursuivrait à des intervalles réguliers entre les acteurs concernés, et qui permettrait un échange des meilleures pratiques? Est-ce que vous considérez que la Commission devrait animer un tel réseau ?

Il apparaît effectivement très souhaitable qu'une réflexion en commun entre la CE et les professionnels se poursuive à intervalles réguliers sur tous ces sujets. En effet, les difficultés rencontrées ne sont pas seulement liées à l'imperfection des outils juridiques mais également à un déficit de compréhension partagé de ce qu'est un PPP, de son intérêt, de sa place dans des politiques de recherche de développement et de compétitivité

PROPOS LIBRES

Nous avons formulé ci-dessous quatre suggestions qui permettraient selon nous d'aider au développement des PPP dans les pays de la communauté.

Proposition 1 :
Concernant le développement efficace et rapide des PPP, leur variété et leur complexité laissent à penser qu'il sera difficile de développer une initiative législative au niveau Européen qui, de façon pratique, réponde et respecte l'ensemble des besoins, des secteurs et des histoires des différents pays et régions de l'UE. L'approche de l'UE s'avérerait donc potentiellement plus efficace si elle était focalisée sur une clarification des règles et des principes.

Dans ce cadre, il apparaît qu'il est important de promouvoir les éléments principaux qui font le succès des PPP :

- Le PPP se développera d'autant plus rapidement que l'UE encouragera le développement de la maîtrise des compétences fondamentales suivantes :
    - Secteur Public : Gestion de projets ; Capacité de mise en place de comparatifs de type PSC (Public Sector Comparator) et d'évaluation des offres
    - Secteur privé : Conception / Construction ; Maintenance ; Juridique et financier
- Le PPP se développera d'autant plus rapidement que l'UE favorisera la capitalisation des expériences acquises :
    - Les expériences, notamment en Grande-Bretagne, ont mis une longue période pour s'établir, mais elles ont permis de créer des pratiques adaptées et des praticiens expérimentés et reconnus
    - Le développement des PPP en Europe serait d'autant plus rapide qu'il capitaliserait sur les pratiques déjà établies.
- Le PPP se développera d'autant plus rapidement que l'UE favorisera l'homogénéisation de l'approche du partage des risques, permettant ainsi aux acteurs de pouvoir se positionner partout en Europe sans avoir à réétudier l'ensemble des conditions contractuelles. Il est utile de citer pour référence le partage des risques suivant :
    - Secteur privé
        - Conception/construction (délais, spécifications, coûts…)
        - Maintenance /exploitation
        - Risque financier (après closing)
    - Secteur public
        - Obtention des permis / autorisations
        - Force majeure et assimilée
        - Qualité / état du sol
        - Assurances
        - Changement de loi/règlement/fiscalité
        - Risque de taux (jusqu'au closing)

Proposition 2 :

L'établissement d'une 'Task Force Européenne' à haut niveau pourrait permettre de clarifier les pratiques du PPP et de soutenir les intervenants publics et privés du secteur

Les expériences passées du PPP montrent qu'il est indispensable que le secteur public connaisse parfaitement le fonctionnement des PPP afin qu'il assume au mieux ses rôles de coordination et de client.

Pour parvenir à ce résultat, et comme cela a été montré notamment en Grande-Bretagne, la mise en place d'une 'task-force' peut constituer un outil extrêmement efficace de développement harmonieux du PPP en intervenant en tant que point de référence et conseiller.

Une telle **task force** pourrait répondre aux besoins des acteurs en assumant, par exemple, les rôles suivants :

- **Soutien aux états et aux administrations locales**
  - Épauler les autorités pour l'établissement des cadres juridiques pour les PPP
  - Faciliter l'identification des projets qui constituent de 'bons candidats' pour des PPP
  - Travailler avec les autorités sur l'ensemble des phases des projets, de l'appel d'offre à la réalisation
- **Centre d'expertise et de référence**
  - Identifier les compétences requises au niveau local pour mener à bien les projets
  - Proposer des formations sur les PPP (à destination des états mais aussi des intervenants du secteur public)
  - Permettre le transfert des leçons d'expérience d'un pays et / ou d'un secteur à l'autre
  - Suivre l'évolution des PPP et mener les enquêtes et recherches nécessaires à leur bonne compréhension
- **Force de proposition en matière de politiques publiques**
  - Contribuer à l'établissement et au suivi de programmes et de projets PPP pan-européens
  - Formuler des solutions permettant d'allier PPP et fonds BEI et / ou UE
  - Développer des solutions financières novatrices
  - Constituer une source d'enseignements et de retour sur expérience pour l'UE
- **Interlocuteur privilégié**
  - Répondre et interagir avec les autorités nationales et locales
  - Travailler avec les industriels, les intervenants exploitants et financiers du secteur

Cette task-force serait d'autant plus pertinente qu'elle :

- **Rassemblerait l'ensemble des efforts existants** (comme la Task Force de la commission avec la National Statistics Institute a paru le faire en rassemblant la BEC, la BEI, l'UE etc.)
- **Serait guidée dans ses réflexions par des représentants du secteur public mais aussi par des intervenants clefs du secteur privé** tels que des constructeurs, exploitants, préteurs et investisseurs
- Interviendrait **en tant que conseil aux plus hauts niveaux décisionnels européens**

Proposition 3 :

La mise en place rapide des suggestions formulées dans le document de l'UE portant sur 'l'initiative de croissance' permettrait de répondre à nombre de défis du secteur.

L'initiative de croissance a identifié un programme de construction d'infrastructures de transport prioritaire en Europe, le 'Quickstart Program'. Celui-ci s'inscrit notamment dans le plus vaste réseau européen de transport (TEN) et tous deux nécessitent des moyens financiers considérables.

L'initiative de croissance identifie l'outil des PPP comme une piste prometteuse pour répondre au défi du financement des 'Quickstart' et du 'TEN'. En conséquence, elle propose un certain nombre de mesures pour faciliter la mise en place du PPP parmi lesquelles les suggestions suivantes paraissent particulièrement appropriés :

- **Mise en place d'une garantie de risques commerciaux par l'UE ou la BEI**
  - Beaucoup de projets souffrent du fait que les acteurs ne soient pas à même de porter l'intégralité du risque commercial. Ceci est par exemple vrai pour le risque trafic post-construction qui est difficilement assumé par les marchés financiers.
  - La proposition de l'initiative de croissance paraît particulièrement attractive notamment si elle :
    - Permet une prise de risque significative
    - Est économiquement intéressante
    - Est applicable à un maximum de secteurs et de type de projets
    - Se matérialise rapidement

- **Etablissement d'un fonds de titrisation des dettes commerciales par l'UE / BEI**
  - Les capacités de prêts par des banques commerciales sont limitées par leur bilan et ne permettront à priori pas de répondre à l'ensemble des besoins du secteur des transports et des PPP.
  - Ce sujet pourrait être néanmoins traité si la liquidité des moyens de refinancement est améliorée, et, en la matière, la proposition de l'initiative de croissance qui propose d'établir un fonds de titrisation des dettes dédiées aux projets européens, paraît constituer une piste de réflexion appropriée.

- **Fonds d’Investissements Européens**
    - Les PPP nécessitent des prises de participations sous forme de capital et de quasi capital.
    - Il n’existe cependant qu’un nombre limité de participants qui puissent offrir ce type de financement au stade du développement et de la construction.
    - Les industriels ont alors souvent à prendre ces apports à leur charge et, leur capacité étant limitée par leur bilan et les règles comptables, ce système atteint rapidement ses limites.
    - Un fonds d’investissement ‘capital risque’ de taille significative et pouvant intervenir sur de nombreux projets pourrait alors constituer un des éléments de réponse sur ce sujet.

Proposition 4 :

La modification de procédures BEI permettrait de mieux répondre aux besoins

La BEI dispose des ressources, des compétences et du mandat nécessaire pour répondre aux défis que posent les transports européens et leur financement.

Il apparaît cependant que l’action de la BEI est parfois gênée par des processus propres qui pourraient bénéficier d’être améliorés.

On peut citer en exemple :

- **State aid clearance** : celle-ci pourrait être une formalité remplie après le closing financier, mais elle apparaît souvent avant celui-ci. Ceci conduit à des retards et à des confusions en particulier car le closing n’ayant pas eu lieu, le projet n’est matériellement pas sujet à une clearance.
- **Flexibilté** : la BEI ne semble disposer que de peu de marge de manœuvre pour s’adapter aux projets et aux besoins et contrainte auxquels ils doivent répondre.
- **Couverture** : la BEI requiert des niveaux de couverture de l’ordre de 115% de ces prêts. Ceci paraît un niveau très élevé qui ne peut pas être toujours fourni par le reste des participants au projet (investisseurs et préteurs).

Direction Générale
Le Directeur Délégué
Pierre DAURES

Paris, le 27 juillet 2004

Nos Réf.: 251 – HTH/cg

Commission Européenne
Monsieur Alexander Schaub
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Objet : Réponse au Livre Vert PPP

Monsieur le Directeur général,

Permettez moi tout d'abord de vous féliciter et de vous remercier d'avoir pris l'initiative d'ouvrir une large consultation sur le partenariat public - privé (PPP). En effet, comme l'a souligné la Commission dans sa communication sur l'initiative de croissance, les PPP sont un outil essentiel de l'équipement rapide de l'Europe élargie dans les 20 ans qui viennent.

Pour que ce type de contrat soit l'outil efficace et utile que tout le monde attend, il faut, à nos yeux, améliorer un certain nombre des dispositions actuellement proposées. C'est le sens des réponses élaborées par nos différents métiers en fonction de leur secteur d'activité et qui sont transmises directement à vos services dans le cadre de cette consultation.

Permettez moi de souligner ici quelques aspects communs à toutes les branches de notre groupe et qui me paraissent, de ce fait, extrêmement importants :

a) Les directives « Marchés publics » proposent une définition très large des marchés publics qui peut s'appliquer à différentes formes de PPP. Toutefois, à nos yeux le concept de PPP est spécifique et ne se réduit pas à celui de l'acquisition d'un bien ou d'un service tel que peut le couvrir un « marché public ». En tout cas, les mesures contenues dans les directives n'apportent pas, pour le partenaire privé, une sécurité juridique suffisante et elles sont même parfois franchement inadaptées.

b) Le dialogue compétitif, ne peut suffire. Une phase négociée restera toujours nécessaire pour finaliser un contrat de partenariat. En effet, ce n'est que durant cette phase que pourront être harmonisés le « design » définitif de l'ouvrage ou du service et son closing financier. Or cette négociation ne peut être conduite avec plusieurs candidats à la fois. Bien entendu cette négociation doit intervenir après une phase de compétition. Elle ne peut être considérée comme une libre négociation avec un fournisseur sur la seule base de la crédibilité de celui-ci.

c) Des principes simples de répartition des risques entre les deux partenaires (public et privé) devraient être posés au niveau européen afin de limiter la propension de chacun à abuser de ses pouvoirs propres ou de ne pas supporter les conséquences de ses décisions externes. Par exemple, il est anormal que, par une mesure fiscale ou tarifaire (de sa compétence) un Etat rompe sans compensation, l'équilibre économique d'un contrat conclut sur 30 ans.

En résumé, il nous apparaît judicieux que la Commission travaille à un encadrement juridique des PPP en tant que mode spécifique de collaboration entre les deux secteurs pour la fourniture de services publics et non en adaptation des textes relatifs aux marchés publics.

Comme suggéré dans le Livre Vert, cela pourrait passer par une réflexion collective pilotée par la Commission et la conduisant, dans un premier temps, à émettre une recommandation.

Cette recommandation consoliderait la jurisprudence de la Cour de justice, proposerait une définition large des PPP, et fixerait les principes de la consultation des offreurs, de la gestion des contrats et de la répartition des risques.

Par la suite, une culture commune du PPP ayant été mise en place, un projet de Directive cadre pourrait être proposé. Le Délégué général du Groupe, Henri Thomé, est à votre disposition pour poursuivre l'échange avec vos services et se faire accompagner des responsables des métiers du Groupe Bouygues.

Espérant avoir répondu à votre attente, je vous prie de bien vouloir agréer, Monsieur le Directeur Général, l'expression de ma considération distinguée.

Pierre DAURES

REVUE DES CONCESSIONS
et des Délégations de Service Public

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Ce 30 juillet 2004

Commission européenne
Consultation "Livre vert sur les PPP et le droit
communautaire des marchés publics et des concessions"
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Observations et Suggestions à la

COMMISSION des COMMUNAUTES EUROPEENNES

Après la publication du LIVRE VERT

sur les Partenariats Public-Privé et le Droit Communautaire des Marchés Publics et des Concessions

Préambule

Dans son LIVRE VERT publié le 30 Avril 2004, la Commission a invité les parties intéressées par les questions abordées « ...à lui transmettre leurs observations sur les questions posées dans le présent Livre Vert ».

C'est le cas de la Revue des Concessions et des Délégations de Service Public dont le site Internet www.concession-bot.com – et les autres sites qui lui sont associés – participe à l’étude des questions posées par le Partenariat Public-Privé non seulement en Europe (où elle dispose de nombreux correspondants qui l’informent des projets dans les différents Etats, y compris en Russie) mais encore dans le reste du Monde puisque ces questions intéressent les Etats préoccupés de la bonne fin de leurs projets d’intérêt général.

La Revue est dans ces circonstances à l’écoute des expériences étrangères dans le domaine des concessions (bot en droit anglo-saxon) tout particulièrement, mais aussi lorsqu’un projet ne peut finalement se réaliser que par le biais d’un marché public et non d’une concession.

L’expérience de la Revue est d’ailleurs maintenant de plus de 100 ans dans le droit des concessions, même si l’essentiel de cette longue durée a concerné les applications de la concession dans l’économie française et dans les pays qui lui étaient liés.

L’examen des multiples projets nationaux dont elle a actuellement connaissance conduit bien souvent à s’interroger sur la définition des termes utilisés. On constate alors une confusion dans l’emploi des concepts. Il y a même un abus de langage.

Ainsi on constate depuis quelques années une mode intellectuelle qui vise à qualifier de Partenariat Public-Privé tout contrat dès l’instant où il réunit une personne publique et une personne privée sans se préoccuper de savoir quel droit s’applique : est-ce le droit des marchés publics (avec les Directives ou la jurisprudence communautaires qui en sont le corollaire), est ce le droit des concessions (avec la jurisprudence qui lui est propre, ainsi les principes rappelés par la Communication interprétative de la Commission de 2000) ?

En réalité on s’aperçoit que lorsqu’on a utilisé l’appellation « Partenariat Public-Privé », on n’est pas plus avancé sur la connaissance du régime juridique du contrat en cause. Il faut ensuite rechercher dans le contenu du contrat si, pour le service public en cause, la gestion est directe ou indirecte (gestion déléguée).

Le Partenariat doit-il être un conglomérat de contrats de toute nature (sorte de fourre-tout qui ne servira pas à grand chose) ou doit-il correspondre à une forme contractuelle spécifique, comme le veulent les opérateurs qui cherchent une troisième voie ?

Lorsque le projet de Livre Vert utilise la formule « les différentes formes de PPP », il évite l'écueil principal qui est de savoir si dans un cas donné on est en présence d'une gestion directe (qui justifiera le recours à un marché public) ou si on est en présence d'une gestion déléguée (auquel cas il n'y aura pas de marché public sauf si l'exploitant est une personne adjudicatrice). Il n'y a pas plusieurs types de gestion d'une activité de service public. Il n'y en a que deux (direct ou indirect) et si les formules peuvent varier, c'est seulement à l'intérieur de chacun des deux grands modes de gestion.

Une clarification des concepts est donc non seulement nécessaire mais encore impérative puisqu'elle influence les décisions des Etats membres quant à la réalisation de leurs infrastructures publiques ou la gestion de leurs services publics.

La remarque du Livre Vert selon laquelle « le recours aux PPP ne saurait toutefois être présenté comme une solution miracle pour le secteur public faisant face à des contraintes budgétaires » est donc particulièrement bien venue.

C'est dire tout l'intérêt du projet de Livre Vert, à l'égard duquel les observations suivantes sont présentées mais uniquement pour ce qui touche au Chapitre I du Livre Vert, c'est-à-dire « Le PPP purement contractuel et le Droit communautaire des marchés publics et des concessions », domaine tout particulier de notre expérience.

Dans ces conditions nos observations et suggestions se décomposeront en trois parties :

1ère partie : les observations et remarques proprement dites sur les développements du Livre Vert concernant les concessions, marchés publics et partenariats public-privé. Ces observations entrent dans le cadre de la première branche de la distinction annoncée au point 2O du projet, c'est-à-dire les PPP de type purement contractuel ;

2ème partie : Les réponses aux 15 questions qui intéressent spécifiquement le domaine d'activité qui nous est tout particulièrement connu ;

3ème partie : Nos suggestions à l'égard de questions importantes qui ne sont pas abordées dans le projet de Livre Vert.

Ière Partie : **Observations et Remarques**

Celles-ci suivront l'ordre des développements du Livre Vert.

a) « Le phénomène « partenariat public-privé »

- Si le partenariat public-privé doit être défini en droit communautaire comme une forme de coopération, il ne pourra d'ores et déjà pas recouvrir le droit des concessions. En effet la concession n'est pas une forme de coopération, mais la délégation à un tiers (public ou privé) d'une prérogative de puissance public, à savoir la gestion d'un service public pour le compte de la personne publique qui en a la responsabilité à la fois en droit et au niveau politique (puisque les élus rendent compte devant les citoyens de la gestion des services publics).

Il n'y a pas de coopération (terme utilisé aux points 1 et 2) mais l'existence de rapports d'autorité et de sanction de la personne publique envers celui à qui elle a confié le soin de gérer le service en ses lieu et place, et à certaines conditions. C'est pour cette raison que le passage du point 7 aux termes duquel « Les autorités publiques ont également recours à des structures de partenariat avec le secteur privé pour assurer la gestion de services public, notamment au niveau local … » est sujet à discussion dans la mesure où la distribution d'eau ou d'énergie, comme la gestion des déchets, sont des domaines d'élection traditionnels de la concession au vrai sens du terme.

La doctrine des Avocats généraux de la Cour de Justice évite d'ailleurs soigneusement l'utilisation du concept de coopération, qui n'est pas compatible avec le régime même de la concession.

- Si le financement d'une opération est assuré par le secteur privé, comment celui-ci se remboursera-t-il de ses investissements ? C'est ici que se pose la vraie question du financement. Si le remboursement provient en dernière analyse de la personne publique, n'est-ce pas un marché déguisé ? (l'exemple des redevances payées par la personne publique à la place des usagers, comme dans l'exemple des péages virtuels, sera analysé ci-dessous). Si le remboursement provient essentiellement de l'usager, ce sera une concession. De même si les risques financiers sont transférés sur le secteur privé, cela impliquera qu'il ne s'agit pas d'un marché mais d'une concession, surtout si cette formule contractuelle est recherchée en raison des contraintes budgétaires de la personne publique cocontractante.

C'est dire qu'on ne peut s'arrêter à la seule indication que « le mode de financement » est assuré par le secteur privé. Il est nécessaire d'aller plus loin dans l'analyse de la charge définitive du financement.

- De même encore la participation de l'opérateur privé à la conception du projet ne peut être retenue comme un signe distinctif original du partenariat public-privé. En effet en France, avant comme après la loi Sapin (qui est visée dans le Livre Vert), il est souvent demandé aux candidats à la concession de concevoir et présenter un programme en faveur du service, un projet de modernisation d'un service d'intérêt général, la collectivité n'ayant pas les services avertis des dernières techniques innovantes. La tâche de conception s'ajoute aux tâches de financement, de réalisation et d'exploitation d'un équipement public ou d'un service nécessitant de nombreux équipements. Il en va de même avec les marchés publics puisque nombre de pays connaissent la formule du marché dit de « conception réalisation).

C'est dire que la notion de PPP donnée au point 21 du projet de Livre Vert ne peut assurer une originalité du PPP par rapport à la concession ou aux différents types de marchés publics déjà connus.

On doit donc rechercher quel est l'avantage supplémentaire que peut constituer l'appellation « partenariat public-privé par rapport au marché public ou à la concession.

Le Livre Vert vise le partenariat public-privé comme d'une dénomination générale (ainsi p. 11 il est parlé de « …contrats qualifiés de marchés publics lors de la mise en place d'un PPP de type purement contractuel). Or on ne peut en rester à une dénomination générale sans contenu autonome par rapport aux marchés publics ou aux concessions, car ce serait nier l'intérêt que les opérateurs cherchent à donner à cette qualification.

Il est donc nécessaire de définir le partenariat public-privé comme une notion autonome, à défaut elle n'aurait guère d'intérêt juridique puisque le droit communautaire ne peut permettre à cette appellation de jouer le rôle de contrat dérogatoire aux deux systèmes connus que sont les marchés publics et les concessions.

Le but des présentes observations n'est donc pas de revenir sur les grandes libertés communautaires qui encadrent la procédure de passation de tout contrat relevant de la Commande Publique et qui sont rappelées par la Commission au point 8 du Livre Vert, mais de faire observer que dans nombre des cas étudiés le PPP se révèle n'être finalement qu'un « faux nez » qui cache l'existence déguisée soit d'un marché public soit d'une concession. On utilise l'expression à la mode pour tenter de se soustraire aux contraintes légales.

Ainsi il est connu que sur certains chantiers publics, ce sont les entreprises privées qui doivent consentir à l'Etat des facilités de trésorerie, sous l'appellation de PPP ! Que sont donc ces partenariats forcés camouflés derrière des marchés publics classiques ?

De telles anomalies ont fait dire à un représentant de la BEI que « les risques politiques et juridiques (incertitude des opérateurs, requalification possible des contrats) sont finalement bien plus importants que les risques techniques et financiers »

Il importe donc de savoir si le PPP peut se distinguer de ces deux régimes bien identifiés depuis longtemps **par un régime juridique autonome**.

- Il faut à ce sujet savoir si le Partenariat Public-Privé doit être considéré comme ayant son champ d'application limité à la réalisation d'infrastructures (comme cela est indiqué au point 4) ou s'il s'étend aux services publics (comme cela est signalé au point 7).

L'exemple du PFI britannique ne peut représenter une modalité distincte de la concession dans la mesure où l'étude des contrats existants en Grande Bretagne montre qu'il s'agit d'une forme de gestion déléguée de service public impliquant la réalisation d'équipements publics avec ensuite l'exploitation de ceux-ci. Le fait que la personne publique paie le prestataire à la place de l'usager – compte tenu des options politiques en vigueur – n'empêche pas que le prestataire prend en charge les dépenses liées à l'exécution du service. La rémunération du prestataire se rapproche de la rémunération par l'usager dans la mesure où elle tient compte de la fréquentation de l'équipement. Il y a un risque de nature concessive.

D'ailleurs le Portugal qui pratique ce système en utilisant le procédé du « péage virtuel » admet sans ambiguïté qu'il ne s'agit que d'une modalité nouvelle du droit des concessions.

b) Le PPP purement contractuel et le droit communautaire des marchés publics et des concessions

- La constatation faite au point 31, selon laquelle très peu de pays membres ont souhaité se doter de législations internes visant à encadrer la phase de passation des concessions, s'explique par le caractère fondamental de la concession qui est *l'intuitus personae*.

Ce caractère s'explique par l'existence de risques financiers sérieux sur toute la durée du contrat, qui est une durée longue (20,30,40 ans), ce qui n'existe pas dans les marchés publics. L'attribution du contrat résidait donc traditionnellement dans un lien de confiance personnelle, qui ne peut se retrouver dans une procédure de type marché public avec des critères objectifs de sélection.

Ceci étant dit, l'intuitus personae ne saurait couvrir l'arbitraire dans le choix du concessionnaire ni l'exclusion de candidats au prétexte de privilégier la préférence nationale.

En France, la loi Sapin – citée par le Livre Vert – a permis de concilier les deux exigences : la confiance personnelle associée à l'intuitus personae et les impératifs de la mise en concurrence de la procédure d'attribution. Il faut toutefois noter que la tendance est d'aller de plus en plus vers une transposition de la procédure de passation des marchés publics dans le secteur des concessions. Il en résulte une grave dégradation des caractères et des qualités du régime de la concession.

- La difficulté à identifier dès l'origine la nature du contrat (marché public ou concession) ne devrait pas exister. En France, le Conseil d'Etat sanctionne les modifications importantes au projet de contrat soumis aux candidats retenus au nom du respect des règles de concurrence. Dans un tel cas, il n'hésite pas à prononcer l'annulation de toute la procédure, ce qui oblige la collectivité publique à tout recommencer depuis le début.

Il en résulte que les collectivités publiques s'abstiennent désormais de toute remise en cause du régime juridique choisi dès le début de la procédure de passation.

- Pour répondre à la préoccupation de la Commission telle qu'elle s'exprime au point 36, il n'y aurait que des avantages à soumettre la procédure de passation des concessions à un régime autonome, différent par conséquent de celui existant pour la passation d'autres PPP contractuels. En effet la dimension des projets en concession est telle qu'elle justifie une procédure spécifique d'attribution, distincte de celle du marché public qui est limité dans le temps et dans les risques financiers.

C'est dire qu'une procédure commune aux marchés publics et aux concession – telle que la menace en est faite au point 36 – offrirait de nombreuses difficultés politiques ou juridiques.

- Au point 37, le projet de Livre vert relate que certains Etats membres permettent au secteur privé de prendre l'initiative d'une opération PPP, en soumettant à la collectivité publique une proposition de projet de construction et de gestion d'infrastructure.

Une telle possibilité existait effectivement en France aussi, avant que la loi Sapin (déjà citée) ne réserve à la seule collectivité le soin de lancer une nouvelle procédure d'attribution. L'initiative d'un opérateur privé pour obtenir un contrat sur la base d'un projet innovant pour le service en cours pourrait même tomber sous le coup du délit de favoritisme, sanctionné pénalement avec comme peine accessoire l'interdiction de soumission à toute nouvelle procédure de passation. C'est ce qui explique la quasi disparition d'une pratique qui existait autrefois pour le bien de la collectivité : en effet elle permettait à la collectivité de vérifier si les propositions d'un candidat mettaient ou non en évidence le caractère obsolète du contrat en cours. Si elle était informée d'une nouvelle technique ou d'une nouvelle forme de gestion, une telle démarche permettait à la collectivité d'abandonner le contrat en cours pour prendre d'autres relations contractuelles plus innovantes.

Il y a une autre raison à cette quasi disparition, qui doit être connue de la Commission.

La publicité organisée autour de la procédure de passation fait courir le risque à l'inventeur, candidat à la concession, de voir son idée ou sa technique diffusée auprès de tous ses concurrents qui auront à se déterminer d'après cette idée ou cette technique. Aussi afin d'éviter ce risque, les entreprises novatrices évitent désormais ce genre de démarche et préfèrent faire connaître discrètement qu'elles possèdent une technique qu'elles ne révéleront qu'une fois le contrat attribué.

D'ailleurs le texte du projet de Livre Vert met en lumière ce risque lorsqu'il est écrit : « …si l'autorité publique souhaite mettre en œuvre un projet présenté, il doit organiser la mise en concurrence de tous les opérateurs économiques potentiellement intéressés par le développement du projet retenu … ».

La leçon de ce qui se déroule actuellement est que s'il n'y a pas de protection de l'inventeur, il n'y aura pas d'initiative privée en faveur de techniques venant du secteur privé.

- Le principe figurant au point 45, relatif à l'évaluation régulière de la performance de l'exploitant est parfaitement judicieuse et pertinente. Il est d'ailleurs de plus en plus couramment imposé dans les contrats de BOT ou dans les contrats de concession dans les autres Etats du monde que ceux de l'Union européenne. Ce principe est d'autant plus adapté au régime de la concession que le concessionnaire a une obligation de résultat : satisfaire en permanence les usagers et rendre un service plus efficace et plus moderne qu'au début du contrat.

- A l'inverse, la pratique rapportée au point 48 du projet de Livre Vert doit être radicalement proscrite.

Il n'est pas envisageable que la collectivité publique et les habitants de celle-ci deviennent les otages d'institutions financières qui se réservent le droit de substituer au gestionnaire en place un nouveau gestionnaire au prétexte que la rentabilité de la concession n'est plus aussi haute qu'ils l'avaient prévu au départ.

Seule la collectivité publique doit décider du maintien ou non de l'exploitant, compte des obligations contractuelles qui sont les siennes. Les relations financières entre l'exploitant et ses banquiers ou préteurs de deniers doivent rester étrangères à la collectivité publique.

- Enfin la sous-traitance (ou sous-concession si on vise la concession) doit certes respecter les principes rappelés au point 51 de droit communautaire, mais aussi le principe de l'intuitus personae qui veut que le concessionnaire principal ne puisse se décharger de sa tâche que si la collectivité accepte la personnalité du sous-traitant et l'objet de la sous-traitance ou si celle-ci a été définie à l'avance dans le projet de contrat soumis à la procédure de mise en concurrence.

2ème Partie : Réponses aux 15 questions

a) Plusieurs types de montages de PPP purement contractuel sont identifiés. Mise à part les exemples d'équipements publics (comme la construction en France de 18 prisons selon la formule du PPP admise par une récente Ordonnance de juin 2004), on peut citer des exemples d'équipements sociaux. Ainsi la gestion et le fonctionnement d'une halte garderie itinérante et d'un relais d'assistance maternelle ont-ils été confiés en France à une association de familles rurales, alors qu'un syndicat de communes assurait le financement de l'équipement. Afin de garantir des coûts réduits un contrat « petite enfance » est en cours de signature avec la Caisse d'Allocations Familiales . Afin de favoriser des modes d'accueil des plus petits en milieu rural, une communauté de communes a financé une halte garderie alors qu'une association de familles rurales s'occupe de la gestion du service en association avec une caisse d'allocations familiales.

Dans ces exemples, il n'existe aucun encadrement législatif ou réglementaire en France, à l'inverse de ce qui existe pour les grands équipements de l'Etat. Il s'agit d'un PPP d'initiative spontanée. Le problème est qu'on ne sait plus qui est le responsable de ce qu'il convient de reconnaître comme l'existence d'une activité de service public.

b) question n°4 : Praticiens habituels de ce secteur, nous avons naturellement organisé au côté de collectivités organisatrices des procédures de passation de contrats de partenariat, ou participé à de très nombreuses procédures d'attribution de concession en France, mais aussi en Italie ou au Portugal.

La nécessité de satisfaire les exigences d'une population au moyen d'équipements publics toujours plus performants et plus modernes, avec l'exigence de permettre leur amortissement pendant la durée de la concession, conduit à une exigence : concevoir un contrat dont l'exécution se projette dans le temps. Il faut alors anticiper les événements, permettre au contrat une souplesse contractuelle à concevoir et à mettre en place, qui n'est pas envisageable dans un marché public dont l'objet est déterminé avec une durée à court ou moyen terme.

Si la préférence locale ou nationale reste une difficulté certaine pour le choix de l'attributaire final, les contrôles de plus en plus importants des instituons financières dans chaque Etat limite les risques de favoritisme.

c) question n°5 : En fonction de plusieurs années d'expérience, on doit admettre que le cadre juridique communautaire actuel est tout à fait insuffisant pour imposer la participation effective de sociétés ou groupements non-nationaux aux procédures de passation. Il n'y a pas de véritable concurrence, même si certains groupes suscitent la création de filiales ad hoc dans un autre Etat membre afin de se donner des chances de réussir une procédure d'attribution.

d) question n°6 : Compte tenu de l'ensemble des observations qui sont portées à la connaissance de la Commission, on doit reconnaître qu'une initiative législative communautaire est amplement nécessaire afin d'imposer une procédure harmonisée de passation des concessions.

On doit rappeler qu'une demande en ce sens a été adressée à la Commission il y a plusieurs années par des Etats membres dont l'Allemagne, la Belgique, la France etc.

Toutefois cette intervention législative ne saurait être l'occasion d'une dénaturation des caractères intrinsèques du régime de la concession, notamment par une assimilation avec les caractères du régime des marchés publics. Cette réserve est importante dans notre réponse à la question n°6.

e) question n° 7 : Pour les raisons données ci-dessus l'intervention législative communautaire ne saurait mêler dans une procédure de passation des régimes contractuels aussi différents que les marchés publics par rapport aux concessions, dont les finalités et les enjeux financiers sont si étrangers les uns des autres.

f) question n°8 : Comme cela a été dit, l'accès des opérateurs non-nationaux aux formules de PPP d'initiative privée n'est pas assuré dans la plupart des Etats européens. L'invitation à présenter une initiative ne fait certainement pas l'objet d'une information de tous les opérateurs intéressés puisque cette invitation a été réservée à l'un d'eux et qu'il est convenu le plus souvent de conserver la plus grande discrétion possible sur les modalités de la rencontre entre la collectivité et l'opérateur novateur.

g) La meilleure formule pour assurer le développement des PPP d'initiative privée, tout en assurant le respect des principes de transparence, de non discrimination et d'égalité de traitement serait d'assurer **la rémunération obligatoire de l'inventeur** par le versement de royalties ou autres formes de compensation à la diffusion de son idée.

h) Notre longue expérience de la phase postérieure à la sélection du partenaire privé se prolonge jusqu'aux événements qui motivent et justifient une rupture prématurée du contrat, en passant par les avenants de rétablissement de l'équilibre financier du contrat , l'étude des adaptations contractuelles possibles compte tenu d'événements soudains extérieurs aux parties.

Depuis toutes ces années que nous suivons les questions abordées dans le projet de Livre Vert , nous pouvons affirmer que nous avons vu presque toutes les hypothèses possibles qui peuvent survenir dans la vie d'un contrat.

C'est la raison pour laquelle nous sommes consulté de la part de toutes sortes d'organismes, de collectivités ou d'opérateurs et que nous avons écrit de nombreuses articles, ouvrages, fascicules, etc.

Notre expérience dans les différents Etats du Monde a d'ailleurs conduit à la rédaction d'une étude comparative de la gestion des services d'intérêt général dans plus de 13O pays dans le monde. Cette étude a fait l'objet d'un livre intitulé « **la gestion déléguée dans le monde : concession ou bot ?** »

i) question n° 12 : Les exemples de pratiques ou de mécanismes d'évaluation des offres ayant des incidences discriminatoires existent dans presque tous les pays, dès lors que certaines collectivités territoriales décident d'orienter la procédure de passation pour favoriser soit un candidat soit un type d'activité favorable aux thèses économiques ou politiques des élus.

j) Nous avons indiqué dans la première partie combien étaient inacceptables les clauses de « step-in ». Nous renvoyons aux développements qui y sont consacrés.

D’autres clauses posent des problèmes similaires comme celles qui imposent à la collectivité la société issue d’opérations boursières, dont elle ne connaît pas à l’avance le profil, le sérieux technique, la surface financière, etc. Du côté des collectivités, il en va de même pour les clauses qui imposent au concessionnaire de subir certaines événements politiques ou économiques sans pouvoir demander la moindre compensation.

k) question n° 15 : du rappel du respect de l’intuitus personae ci-dessus découle l’existence de problèmes liés au non respect de ce principe, qui ont été énoncés ci-dessus à la fin de la 1ère partie.

l) question n° 16 : On doit rappeler qu’en droit des concessions, la sous-traitance (ou sous concession) est une exception à l’obligation d’exécution personnelle qui pèse sur le concessionnaire lui-même. Elle doit donc être encadrée afin d’éviter des conflits avec la collectivité publique qui verrait son concessionnaire se décharger d’une partie plus ou moins grande de ses obligations sur des sous-traitants que la collectivité ne connaissait pas lors de la procédure d’attribution de la concession.

C’est dire que s’il doit y avoir de nouvelles règles en ce domaine, elles devront préserver le droit de la collectivité d’exiger que tout projet de sous-traitance lui soit soumis a priori afin qu’elle puisse en prendre connaissance et décider s’il y a lieu ou non de s’y opposer.

3ème Partie : Suggestions sur certains aspects non traités

- L’un des aspects non traités concerne la place de l’usager dans la mise en œuvre de la concession.

Or il est essentiel que les usagers puissent contrôler l’exécution du service public par le concessionnaire, notamment au regard de ses obligations contractuelles figurant dans le contrat signé avec la collectivité organisatrice.

Le droit de contrôle de l’usager permet de surveiller le respect du droit de la concurrence, d’écarter les clauses empreintes d’un favoritisme redouté, de contrôler que le concessionnaire met en œuvre les moyens nécessaires à la modernisation du service ainsi qu'à la recherche de la performance qui lui a été assignée par la collectivité publique.

En un mot, le contrôle de l'usager permet d'éviter qu'existe un champ clos entre la collectivité organisatrice et l'exploitant. Il y a trop de concessions d'envergure où la connaissance des documents contractuels est refusée aux citoyens, pour des raisons qui ne sont pas indiquées. Le secret n'a pas lieu d'être dans la commande publique.

L'usager doit donc avoir la possibilité de consulter les documents contractuels pour vérifier qu'ils sont bien respectés. C'est dire que les principes édictés au point 44 au sujet des documents de consultation doivent pouvoir bénéficier aux usagers, et non plus seulement aux différents candidats.

Le futur Livre Vert gagnerait donc à préserver cette avancée démocratique qui existe normalement en droit des concessions.

- Dans sa Communication Interprétative sur les concessions de 2000, la Commission avait indiqué ne pas devoir faire état des partenariats public-privé dans la définition du régime communautaire des concessions. Or le Livre Vert semble revenir sur cet acquis juridique en associant PPP et concession.

Il conviendrait donc de savoir dans quelles conditions le PPP peut ou non être défini séparément de la concession, ou du marché public.

Dans le même ordre d'idée, la définition de la concession donnée au point 9 est celui de la Directive travaux, mais en aucun cas celle beaucoup plus exacte de la Communication Interprétative de 2000. En 2004, on ne plus résumer la concession à cette définition partielle et réductrice de la Directive travaux.

De même il semble difficile d'affirmer que « …les concessions de service, échappent à tout encadrement de droit dérivé.. » (point 11) ou que « ..Peu de dispositions de droit dérivé coordonnent les procédures de passation de contrats qualifiés de concessions en droit communautaire. » (point 28) alors que la Communication Interprétative de 2000 avait pris soin d'établir une liste des principes à respecter lorsqu'on voulait se réclamer du droit des concessions, et que la doctrine des Avocats généraux près la Cour de Justice, voire la jurisprudence de la Cour elle-même, ont tracé les conditions indispensables pour une qualification communautaire de la concession.

Il n'y a pas de néant juridique en ce domaine. Le PPP n'arrive pas sur un terrain vierge !

Si un travail de clarification doit être accompli, c'est bien pour aboutir à une définition homogène de la concession, qu'elle concerne l'exécution d'une mission de service public ou la réalisation de travaux publics.

Plus encore, il serait intellectuellement plus exact d'abandonner la formule utilisée tout au long du projet de Livre Vert « droit des marchés publics et des concessions ». On sait désormais que le droit des marchés publics n'est pas adapté à la spécificité des concessions et que ses principes ne sont pas transposables aux concessions, à l'exception des principes régissant le respect des règles de concurrence lors de la procédure de passation. C'est d'ailleurs ce qu'avait intelligemment souligné la Commission dans la Communication Interprétative de 2000.

Une formule plus adaptée serait « droit des marchés publics ou celui des concessions ».

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ELEMENTS DE REPONSE AU LIVRE VERT DE LA COMMISSION EUROPEENNE SUR LES PARTENARIATS PUBLICS/PRIVES ET LE DROIT COMMUNAUTAIRE DES MARCHES PUBLICS ET DES CONCESSIONS

Objet : Cette note a pour objet de répondre aux questions posées dans le livre vert de la Commission Européenne sur les PPP et le droit communautaire des marchés publics et des concessions du 30 avril 2004.

1 - LES MONTAGES DE PPP CONTRACTUELS EN FRANCE

Les PPP, en tant que tels, ont été introduits en France par l'Ordonnance n° 2004-559 du 17 juin 2004.

Cette Ordonnance permet effectivement, tant à l'Etat et ses Etablissements publics qu'aux Collectivités territoriales, leurs Etablissements publics, et également les Etablissements publics de santé, de recourir au financement privé pour la mise en place de projets globaux comportant la conception, la réalisation, le financement, la rénovation et l'exploitation d'un ouvrage public.

Toutefois, il existait en France, préalablement à cette Ordonnance, des formes de PPP. En effet, notamment, le recours au bail emphytéotique administratif a permis à certaines Collectivités, puis aux Etablissements publics de santé (Ordonnance n° 2003-850 du 19 septembre 2003) de recourir à un partenariat avec une entreprise privée confiant ainsi à celle-ci la conception, la construction et la maintenance de biens sur un terrain mis à disposition par la personne publique, ainsi qu'un financement privé par recours à un système de crédit-bail.

Le PPP étant un mode de pré-financement ou de financement privé d'équipements collectifs, la France a une longue expérience de montages contractuels permettant le déploiement de tels mécanismes :

…/…

- concession de travaux et/ou de service public (englobée, depuis 1993, dans la catégorie générique des conventions de délégation de service public, où l'on retrouve également l'affermage ou encore la régie intéressée),

- marchés d'entreprise de travaux publics (marchés de construction – maintenance ou de construction – exploitation permettant un étalement de prix à payer par la collectivité tout au long du contrat de tels marchés étant aujourd'hui très encadrés),

- mais aussi des procédés tirés de la pratique du droit privé, soit consacrés par certains textes (bail emphytéotique administratif, crédit-bail lié à la protection de l'énergie, …) soit permis, dans certains cas, par la jurisprudence (VEFA…).

Le problème est que le droit français des constructions publiques (loi sur la maîtrise d'ouvrage publique du 11 juillet 1985, Code des marchés publics,…) et de la domanialité publique (inaliénabilité) limite fortement le recours à des modalités de construction et de financement « exotiques ».

Les nouvelles formes de PPP en France (loi du 29 août 2002 pour les bâtiments de police et de gendarmerie et du 9 septembre 2002 pour les établissements pénitentiaires, ordonnances du 19 septembre 2003 pour les établissements publics de santé et du 17 juin 2004 sur les partenariats publics privés) comportent à la fois la continuité de l'existant (exemple : bail emphytéotique administratif) et une rupture de l'existant, en ce sens qu'ils assouplissent les règles des contrats publics et du domaine public.

En tout état de cause, l'ensemble des partenariats publics privés, pris dans un sens large, sont strictement encadrés par des lois ou règlements.

2 - LA PROCEDURE DE DIALOGUE COMPETITIF EST-ELLE ADAPTEE EN MATIERE DE PPP ? PRESERVE-T-ELLE LES DROITS FONDAMENTAUX DES OPERATEURS ECONOMIQUES ?

Il nous semble que la procédure de dialogue compétitif est tout à fait adaptée à la mise en place de partenariats publics privés dès lors qu'il est difficile pour une personne publique de prédéfinir en totalité ses besoins – mais aussi, et surtout, les solutions techniques et financières permettant d'y parvenir - au regard d'un projet global.

Toutefois, cette approche ne doit pas avoir pour effet d'aboutir à une incompétence de la personne publique au regard des projets qui lui seront proposés. En effet, la personne publique doit conserver en interne l'ensemble des compétences qui lui permettent de mener à bien un projet, et notamment au niveau du choix du projet et de sa mise en œuvre.

Enfin, il doit être rappelé que les partenariats publics privés ne relèvent pas, en France, de la législation applicable en matière de marchés publics. Au contraire, les PPP sont hors Code des marchés publics, et ce, même s'ils en reprennent certaines dispositions.

Quant à la question de savoir si les PPP préservent les droits fondamentaux des opérateurs économiques, on est à même de se demander si les PPP ne dénaturent pas la « commande publique ».

En effet, d'une part, le pré-financement privé suppose un endettement à long terme de la personne publique, laquelle n'a pas de vision à plus de quelques années sur son budget ; et d'autre part, la globalisation du projet implique que les titulaires seront soit des Sociétés déjà importantes, soit des mandataires de groupements solidaires.

Ce dernier point risque de nuire aux PME dès lors que celles-ci ne seront plus sollicitées en direct et n'interviendront qu'en tant que sous-traitants du titulaire, lequel risque de leur imposer des conditions contractuelles très strictes au nom de la commande publique.

C'est ce qu'a souhaité éviter le Conseil Constitutionnel français dans sa décision du 23 juin 2003, laquelle ne semble pas avoir été suivie par l'ordonnance du 17 juin 2004.

Au demeurant, il nous apparaît tout aussi essentiel de privilégier les droits fondamentaux de l'ensemble des opérateurs que de mettre en place des partenariats publics privés.

3 - LES PPP SONT-ILS SUSCEPTIBLES DE POSER DES DIFFICULTES AU REGARD DU DROIT COMMUNAUTAIRE DES MARCHES PUBLICS ?

Un encadrement des PPP au niveau communautaire est nécessaire afin que ceux-ci ne puissent être considérés comme conclus dans le cadre d'un détournement de procédure applicable en matière de marchés publics.

4 - LA PARTICIPATION DE NOTRE CABINET A UNE PROCEDURE D'ATTRIBUTION DE CONCESSION AU SEIN DE L'UNION EUROPEENNE

En France, nous assistons certaines collectivités publiques pour la passation de leurs concessions (eau, déchets, transferts, gestion d'équipements sportifs ou de loisirs…) :

La procédure étant très bien encadrée par la réglementation interne, les règles de mise en concurrence et de traitement égalitaire sont toujours bien respectées.

Trois observations sur ce plan :

- Dans certains secteurs, la concurrence est faible (peu de candidats potentiels). Les textes ne peuvent bien évidemment pas résoudre un tel état de fait,

- Dans d'autres cas, des systèmes d'entente illégale se développent. Là encore, les textes ne peuvent rien (il faut les détecter et les sanctionner),

- Enfin, quelles que soient les règles existantes, la collectivité choisira toujours son entreprise de manière « intuitu personae » (entreprise en qui elle a confiance).

En effet, à titre d'exemple, nous avons pu travailler, en matière de déchets, sur un marché entre deux pays de l'Union Européenne, pour lequel la personne publique avait préalablement orienté son choix vers un titulaire prédéterminé ; les règles de mise en concurrence n'ayant, en l'espèce, qu'encadré un tel choix.

5 - LE CADRE JURIDIQUE COMMUNAUTAIRE ACTUEL EST-IL SUFFISAMENT PRECIS POUR ASSURER LA PARTICIPATION CONCRETE ET EFFECTIVE DE SOCIETES OU GROUPEMENTS NON NATIONAUX AUX PROCEDURES DE PASSATION DE CONCESSION ? EXISTE-T-IL UNE CONCURRENCE REELLE DANS CE CADRE ?

En liaison avec ce qui a été indiqué ci-dessus, la concurrence effective ne dépend pas uniquement des textes, mais aussi et surtout de la pratique des acteurs publics et privés, de l'état réel de la concurrence entre opérateurs, de la volonté politique d'assurer une telle concurrence mais aussi de contrôler et sanctionner les irrégularités…

Cela étant, un cadre reste nécessaire. Aujourd'hui, et bien que le traité de Rome et ses principes (liberté d'établissement…) servent de fondement juridique, les concessions, notamment de service public, sont insuffisamment encadrées. Il faut un minimum, comme la loi SAPIN du 29 janvier 1993 en droit français.

6 - UNE INITIATIVE LEGISLATIVE COMMUNAUTAIRE VISANT A ENCADRER LA PROCEDURE DE PASSATION DE CONCESSION EST-ELLE SOUHAITABLE ?

Oui, en liaison avec ce qui vient d'être exposé, la procédure de passation de concession devrait être encadrée.

En fait, il faudrait une initiative permettant de mettre en place un régime général des contrats publics en Europe (marchés, concessions, PPP) avec, tout en maintenant les spécificités, des procédures de passation unifiées.

En effet, l'existence actuelle de différentes procédures ne favorise pas la passation de contrats publics entre les différents pays des Etats membres, notamment en termes de cohérence et de sécurité juridique (cf ci-dessus).

7 - SI UNE NOUVELLE ACTION LEGISLATIVE S'AVERAIT NECESSAIRE, DEVRA-T-ELLE VISER TOUS LES PPP DE TYPE CONTRACTUEL (QU'IL S'AGISSE DE MARCHES PUBLICS OU DE CONCESSION) POUR LES SOUMETTRE A DES REGIMES DE PASSATION IDENTIQUES ?

Oui, car cela serait plus cohérent et plus sécurisant pour les acheteurs et les collectivités publiques. Mais il est important de ne pas trop encadrer afin de leur laisser une marge de manœuvre en toute responsabilité (conformément à l'esprit du Code des marchés publics français de janvier 2004).

8 - L'ACCES DES OPERATEURS NON NATIONAUX AUX FORMULES DE PPP EST-IL ASSURE PAR UNE PUBLICITE ADEQUATE ET UNE PROCEDURE DE SELECTION VERITABLEMENT CONCURRENTIELLE ?

Jusqu'à présent, cela dépend des PPP :

- concessions et autres délégations : loi SAPIN du 29 janvier 1993 (bien encadré)

- marchés publics, METP : Code des marchés publics (même chose)

- crédit-bail, VEFA, bail emphytéotique administratif (pas suffisamment encadré – exemple bail emphytéotique du Code Général des Collectivités Territoriales pas soumis à concurrence)

- régime général Ordonnance du 17 juin 2004 instaurant les PPP en France : procédures plus encadrées (dialogue compétitif et/ou appel d'offres restreint)

Et surtout, donc, cette dernière ordonnance permet l'initiative privée (offres spontanées de sociétés vers des personnes publiques), laquelle n'est jamais permise par les autres textes.

Cela étant, le mode de fonctionnement de l'initiative privée est peu détaillé. Dès lors, il conviendrait d'approfondir cette nouveauté, tout en résolvant la question suivante :

Une entreprise ayant proposé un projet finalement retenu par la collectivité, et qui se retrouve attributaire à l'issue de la procédure de concurrence ne va-t-elle pas se faire accuser de favoritisme ?

A nouveau, il n'y a pas de formule textuelle miracle. Cela dépend de la pratique et du comportement des acteurs.

En tout état de cause, la réglementation en matière de PPP est à ce jour insuffisante et imprécise, mais nous sommes dans l'attente de la publication de décret d'application de l'Ordonnance du 17 juin 2004 sur les PPP.

9 - QUELLE POURRAIT ETRE LA MEILLEURE FORMULE POUR ASSURER LE DEVELOPPEMENT DES PPP D'INITIATIVE PRIVEE DANS L'UNION EUROPEENNE, TOUT EN ASSURANT LE RESPECT DES PRINCIPES DE TRANSPARENCE, DE NON DISCRIMINATION ET D'EGALITE DE TRAITEMENT ?

En premier lieu, pour que soit respectés les principes de transparence, de non discrimination et d'égalité de traitement, il est important de mettre en œuvre des règles de publicité et de concurrence très encadrées.

Toutefois, il n'est pas certain que les principes de non discrimination et d'égalité de traitement soient totalement compatibles.

A titre d'exemple, lors d'un appel d'offre européen en matière de fourniture d'électricité, on est amené à se demander si une entreprise de taille moyenne qui sera sollicitée au titre de l'égalité de traitement, ne sera pas ensuite discriminée, en pratique, en raison de sa taille.

Dès lors, il nous apparaît qu'une meilleure définition de leurs besoins, en interne, par les personnes publiques est nécessaire afin de « rentabiliser » le recours au PPP en évitant de formuler des appels d'offres trop larges ou de faire perdre du temps à un candidat lors de la mise en place d'une procédure de dialogue compétitif très poussée.

10 - NOTRE EXPERIENCE DANS LE CADRE DE LA PHASE POSTERIEURE A LA SELECTION DU PARTENAIRE PRIVE DANS LES PPP CONTRACTUELS

C'est, entre autres, la problématique des avenants qui est visée.

En France, les avenants (en matière de marchés publics, de par les textes ; et de conventions de délégation, de par la jurisprudence surtout) sont encadrés (pas de bouleversement de l'économie ni de changement de l'objet du contrat) même s'il reste des marges de manœuvre importantes pour les personnes publiques (pas de pourcentage d'augmentation du montant du contrat au-delà duquel l'avenant est nécessairement illégal).

Faut-il en faire de même pour tous les contrats publics, y compris les PPP ? Sans doute, dans le cadre d'une réglementation unifiée déjà évoquée.

En tout cas, il est clair qu'un avenant illégal est discriminatoire et favorise l'entreprise titulaire du contrat (ce qui peut d'ailleurs être sanctionné par le délit de favoritisme, en droit pénal français).

Concernant les PPP, le plus difficile sera de trouver un équilibre entre l'interdiction des avenants illégaux et la nécessaire adaptation des contrats dans le temps, s'agissant en l'espèce de contrats de longue -ou très longue- durée (exemple bail emphytéotique hospitalier) et des nécessités liées au service public.

11 - NOTRE EXPERIENCE AU REGARD DES CONDITIONS D'EXECUTION ET DE LEURS EVENTUELLES INCIDENCES DISCRIMINATOIRES OU ENTRAVES A LA LIBRE PRESTATION DE SERVICES OU LIBERTE D'ETABLISSEMENT

Nous n'avons pas d'expérience en la matière dès lors qu'en cas de modifications des conditions d'exécution, il est toujours procédé par avenant (voir question 10).

12 - EXISTE-T-IL DES PRATIQUES OU DES MECANISMES D'EVALUATION D'OFFRES AYANT DES INCIDENCES DISCRIMINATOIRES ?

Il existe toujours en pratique des mécanismes d'évaluation discriminatoires, et ce, alors même que les textes l'interdisent.

Il appartient à la jurisprudence d'établir au cas par cas les conditions dans lesquelles la discrimination, qu'elle soit positive ou négative, peut être retenue et ce, en application des textes en vigueur.

13 - CERTAINS MONTAGES DU TYPE « STEP-IN » PEUVENT-ILS POSER DES PROBLEMES EN TERME DE TRANSPARENCE ET D'EGALITE DE TRAITEMENT ? EXISTE-T-IL D'AUTRES CLAUSES TYPES DONT LA MISE EN ŒUVRE EST SUSCEPTIBLE DE POSER DES PROBLEMES SIMILAIRES ?

14 - EST-IL NECESSAIRE DE CLARIFIER AU NIVEAU COMMUNAUTAIRE CERTAINS ASPECTS RELEVANT DU CADRE CONTRACTUEL DES PPP ?

Au regard, de ce qui vient d'être exposé ci-dessus, il nous apparaît nécessaire de clarifier les aspects contractuels des PPP, tout en laissant un minimum de liberté contractuelle aux acteurs concernés.

15 - EXISTE-T-IL UN PROBLEME PARTICULIER DANS LE CADRE DES PPP EN MATIERE DE SOUS-TRAITANCE ?

Il existe un éternel problème de sous-traitance dans les METP et, globalement, dans les PPP.

Mais, il est difficile d'imposer le recours à la sous-traitance (ce serait contraire à la liberté d'accès à la commande publique), sachant de plus que la sous-traitance relève de contrats de droit privé.

Une des solutions serait d'inciter le recours à la sous-traitance (exemple : cela pourrait être un des critères de choix des entreprises – cf Ordonnance du 17 juin 2004) tout en protégeant les sous-traitants (mais problème de cohérence avec le paiement forfaitaire et échelonné des PPP ? Sinon, mise en œuvre d'un système de caution bancaire ?).

16 – 17 - LE MONTAGE DU PPP DE TYPE CONTRACTUEL NECESSITE-T-IL DES REGLES PLUS DETAILLEES EN MATIERE DE SOUS-TRAITANCE ?

Il faudrait une réglementation communautaire reprenant les règles du Code des marchés publics français et celles de la loi sur la sous-traitance du 31 décembre 1975 dans le but de remplir les deux objectifs ci-dessus : incitation et protection.

18 – 19 – LES PPP INSTITUTIONNALISÉS ET LE DROIT COMMUNAUTAIRE

La forme institutionnalisée de PPP (ou qui s'apparente à cela), en France, est la Société d'Economie Mixte.

Depuis dix ans, elle est très encadrée par les textes (loi SAPIN du 29 décembre 1993) et par la jurisprudence (pas de favoritisme des Sociétés d'Economie Mixte par rapport aux autres candidats dans les marchés publics et concessions).

Il y a d'autres formes institutionnalisées de PPP, comme les Groupements d'Intérêt Public ou les Groupements d'Intérêt Economique.

Sur ce point, et concernant ces organismes, il faudrait que les textes communautaires réaffirment que, dès lors que ces structures sont majoritairement composées de personnes publiques, elles doivent respecter, pour la passation de leurs contrats, le droit de la concurrence applicable aux contrats publics.

Il ne faut pas que ces structures soient un moyen de coopération public-privé dérogeant aux règles des contrats publics, et ce, le cas échéant, à celles des PPP.

20 - QUELLES SONT LES MESURES OU LES PRATIQUES CONSTITUTIVES D'ENTRAVES A LA MISE EN PLACE DES PPP AU SEIN DE L'UNION EUROPEENNE ?

Il y a, localement, comme dans tous les contrats publics, des pratiques allant à l'encontre du développement des PPP et quelquefois des textes qui l'interdisent.

Une réflexion comparative, animée par la commission, est indispensable à ce niveau. Il faut savoir ce qui se passe ailleurs (et même hors Europe) et profiter des expériences des autres.

D'autant que, selon nous, le développement des PPP est inévitable et ce pour les raisons suivantes :

(i) Conception juridique

La contractualisation de l'action publique, ainsi que de la mise en place de services publics et/ou d'équipements collectifs met en avant un équilibre liberté-responsabilité : le pouvoir adjudicateur est libre de son choix mais doit pouvoir l'assumer ; quant à l'attributaire, celui-ci sera responsabilisé par l'existence du contrat.

(ii) Conception financière

Les PPP font peser tout ou partie du risque financier, et donc économique, sur l'attributaire.

En effet, celui-ci pré-finance un projet, ce qui le contraint à mettre en œuvre des solutions optimales non seulement au regard des aspects techniques mais également concernant les aspects financiers.

Il y a là encore une responsabilisation du titulaire qui dispose d'une certaine liberté dans la réalisation du projet dès lors qu'il en est le maître d'ouvrage.

(iii) Conception technique

Ainsi que cela a été indiqué ci-dessus, les PPP permettent aux pouvoirs adjudicateurs de se procurer le savoir faire d'entreprises spécialisées dont ils ne pourraient bénéficier autrement.

En outre, le PPP permet aux personnes publiques de disposer de garanties techniques plus importantes au regard également de la durée de ces contrats publics, dans lesquels est généralement introduite une obligation de maintenance.

(iv) Conception politique

La mise en place des PPP comprend également un volet politique en ce que ces derniers favorisent un rapprochement entre les différents acteurs de la commande publique tout en les responsabilisant en fonction de leurs compétences.

En effet, il s'agit davantage d'une coopération entre les acteurs publics-privés, dans l'intérêt général, que d'une simple « commande ».

L'Etat devient davantage un régulateur qu'un opérateur.

Il est probable que la notion d'obligation de conseil très fréquente en droit privé des contrats s'applique progressivement aux PPP.

Cette conception politique est d'ailleurs également très marquée dans le livre vert sur les PPP de la Commission Européenne du 30 avril 2004.

C'est pour toutes ces raisons que la mise en place des PPP est devenue inéluctable.

En outre, les PPP ont pour vocation de garantir une meilleure exécution du service public, et ce, pour la satisfaction de l'ensemble des usagers.

21 - LES AUTRES FORMES DE PPP DEVELOPPEES DANS LES PAYS EN DEHORS DE L'UNION

De nombreux articles ont été publiés sur ce sujet, et nous ne prétendons pas les reprendre ici.

22 - SUR LA NECESSITE D'UNE REFLEXION COLLECTIVE SUR LES PPP, EN VUE D'UN ECHANGE DE MEILLEURES PRATIQUES

Il nous semble tout à fait opportun de poursuivre une réflexion collective en matière de PPP, et ce, pour les raisons suivantes :

(i) Tout d'abord parce que cela fait appel à une notion importante : la coopération entre les acteurs publics-privés dans le cadre d'une mission d'intérêt général ; ce qui suppose une diminution de la prédominance de l'initiative publique, notamment au regard du fait que la maîtrise d'ouvrage est transférée à la personne privée.

(ii) La réflexion collective devra également mener à analyser l'ensemble des questions rencontrées dans la pratique, notamment concernant le respect des principes de transparence, de non discrimination et d'égalité.

(iii) Enfin, une réflexion collective permettra de profiter des avantages et des inconvénients des différentes pratiques en fonction des différentes cultures de la commande publique dans chaque pays et ce, afin d'aboutir à une certaine uniformisation des pratiques.

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Telles sont donc les précisions et rédactions que nous souhaitions vous apporter après la lecture de Livre vert établi par la Commission Européenne le 30 avril 2004 sur les partenariats publics-privés et le droit communautaire des marchés publics et des concessions.

Le 16 juillet 2004

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Question 1

Quels types de montages de PPP purement contractuel connaissez-vous? Ces montages font-ils l'objet d'un encadrement spécifique (législatif ou autre) dans votre pays ?

La Commission Européenne regroupe dans le Livre Vert PPP des montages très différents les uns des autres sur les plans juridiques, économiques, techniques ou temporels. Il en résulte des caractéristiques difficilement comparables, aussi bien pour la répartition des responsabilités entre les parties, le volume des investissements, les charges et recettes d'exploitation, que pour la durée des contrats en jeu. Pour ne prendre qu'un exemple, les marchés publics et les concessions présentent peu de caractères communs. A cet égard, la distinction entre partenariats contractuels et partenariats institutionnels est intéressante en théorie mais elle ne rend pas compte de cette grande diversité des liens contractuels entre collectivités publiques et entreprises, qui correspond à des logiques différentes.

A titre d'illustration, le droit français en matière de coopération public-privé offre un large éventail d'outils juridiques éprouvés permettant de répondre aux besoins d'efficacité et de sécurité juridique dans le respect des principes rappelés par la Commission européenne, à savoir transparence, non discrimination, égalité d'accès…

1. Les différents types de montages juridiques offerts par la réglementation française.

Le réglementation française présente actuellement deux modes classiques de partenariat public-privé : le marché public et la délégation de service public.

Le marché public permet à la personne morale de droit public de contractualiser avec un prestataire privé pour répondre à des besoins ponctuels au bénéfice des services publics qu'elle gère: la personne morale de droit public, en fonction de seuils financiers, lance un appel d'offres afin de choisir le prestataire le plus à même de lui fournir un bien, un service ou des travaux de qualité et au meilleur coût.
Le choix du prestataire privé s'effectue dans le respect d'une réglementation précise (le nouveau code des marchés publics paru début 2004, consécutif aux directives marchés publics 2004/17et 18 du 31/03/2004) visant à promouvoir la mise en concurrence. Une fois le prestataire choisi, en fonction de la prestation et du mode de marché, « l'adjudicateur public » paie un prix en échange du bien ou du service, pour une durée déterminée et généralement courte (1 à 4 ans le plus souvent).
Au sein de toutes les procédures de passation décrites dans le code, il faut distinguer la procédure dite de ***dialogue compétitif*** qui permet aux différents candidats sollicités de participer, au moyen d'auditions, à l'élaboration du projet de la collectivité sur la base duquel ils devront par la suite présenter leur offre.

La délégation de service public permet à une personne morale de droit public de contractualiser avec un délégataire public ou privé pour confier à ce dernier la gestion d'un service public sur le moyen ou long terme dans le respect des principes de transparence et non discrimination. La principale distinction avec le marché public est que le délégataire exploite le service public à ses risques et périls en se rémunérant sur les résultats de l'exploitation. Cette définition légale de la délégation de service public a été consacrée par la loi n°2001-1168 du 11 décembre 2001.
Les trois principales catégories de conventions susceptibles d'être qualifiées de délégations de service public sont les suivantes : la régie intéressée, l'affermage et la concession.

La régie intéressée s'appuie sur le concours extérieur d'un professionnel privé contractuellement chargé de faire fonctionner un service public. Ce professionnel est rémunéré par la collectivité au moyen d'une rétribution qui comprend une redevance fixe et un pourcentage sur les résultats de l'exploitation.

L'affermage consiste, pour la collectivité, à remettre à la personne privée (le fermier), les équipements nécessaires à l'exploitation du service public qui lui est confié. Le fermier doit assurer l'exploitation du service (maintenance des ouvrages et éventuellement modernisation ou extension). La rémunération du fermier repose sur les redevances payées par les usagers. Le fermier reste tenu de verser à la collectivité une contribution destinée à couvrir l'amortissement des frais initiaux engagés par la collectivité lors de la mise en place des équipements.

La concession est un mode de gestion déléguée par lequel la collectivité charge son cocontractant de réaliser les travaux de premier établissement et d'exploiter à ses frais le service pendant une durée déterminée en prélevant le plus souvent directement auprès des usagers du service des redevances qui lui restent acquises. La rémunération du concessionnaire est donc assurée par les usagers et la gestion du service s'effectue aux risques et périls du concessionnaire. La convention de concession, accompagnée d'un cahier des charges précis des droits et obligations du concessionnaire, doit tenir compte pour la détermination de sa durée de la nature des prestations demandées au délégataire et ne doit pas dépasser la durée d'amortissement des installations. La durée des concessions est normalement la durée la plus longue de tous les modes de coopération public-privé.

Ces trois catégories de convention constituent les principaux modes de coopération et de partenariat entre la sphère publique et la sphère privée.

Conscient de la baisse sensible des investissements publics sur ces vingt dernières années, le gouvernement français est à l'origine de nouvelles lois visant à promouvoir le **Partenariat Public Privé**[1]**.** Cette formule vise à pallier l'insuffisance des ressources publiques pour la réalisation d'infrastructures dédiées à des secteurs non marchands, telles que routes, écoles, prisons, etc. n'appelant pas de contribution directe de la part des destinataires. Trois lois ont déjà été adoptées, les lois du 29 août 2002, du 9 septembre 2002 et du 2 juillet 2003. Ces nouveaux contrats PPP constituent une catégorie distincte, à la fois des marchés publics et des délégations de service public.

Les PPP font l'objet d'une ordonnance qui prévoit qu'un même contrat pourra être attribué à une seule et même personne pour la construction et l'exploitation des ouvrages, le projet pouvant être initié par le secteur privé. Il ne peut être utilisé que dans un contexte bien précis, sur une longue durée et suppose le paiement régulier d'une somme par la personne morale de droit public au titulaire du contrat qui assure le financement complet de l'opération. Les modalités de passation de ce partenariat sont celles du dialogue compétitif énoncées dans le nouveau Code des Marchés Publics.

2. Les procédures de passation organisées par la réglementation visent à garantir la sécurité juridique des différents partenariats.

Chaque mode de coopération public-privé pour la gestion des services publics décrit ci-dessus est inscrit dans un dispositif législatif et réglementaire qui encadre sa passation et comprend un mécanisme d'attribution respectueux des principes de libre accès et de transparence.

Les ***marchés publics*** font l'objet d'une réglementation spécifique décrite dans le nouveau Code des marchés publics publié début 2004. Ce Code prévoit notamment des mécanismes d'attribution et de contrôle très précis en conformité avec les dernières prescriptions de la Commission dans ce domaine (directives marchés publics).

La ***délégation de service public*** (DSP) comprend également des règles d'attribution strictes énoncées par la loi Sapin du 29/01/1993 avec notamment : l'appel à candidature, l'examen contradictoire des offres par une commission spécialisée et le choix du délégataire approuvé par l'assemblée délibérante dans l'hypothèse d'un marché local ou par la commission spécialisée des marchés dans l'hypothèse d'un marché de l'Etat. En outre la collectivité délégante ou concédante contrôle le bon fonctionnement du service, notamment au vu des comptes-rendus techniques et financiers annuels.

Le ***partenariat public-privé***[2]***,*** récemment mis en place, obéit à des mécanismes d'attribution et de transparence qui ne se distinguent pas des autres modalités de gestion de service public puisqu'il s'inspire directement du dialogue compétitif du Code des Marchés Publics. En outre un décret devrait instaurer un système de contrôle spécifique à ce mode de gestion.

Par ailleurs, dans le cadre d'un projet de coopération développé par une collectivité locale, rappelons que :

- ❑ le choix du mode de DSP et du candidat fait l'objet d'un contrôle au sein de l'assemblée délibérante,
- ❑ la décision définitive d'attribution est soumise au contrôle de légalité du préfet,
- ❑ les comptes sont susceptibles d'être audités par les chambres régionales des comptes,
- ❑ en toute hypothèse, le juge peut être saisi en cas d'irrégularités constatées.

En ce qui concerne spécifiquement la distribution d'électricité, qui constitue un monopole naturel selon les dispositions des directives européennes, la législation française confie à un opérateur désigné sur un territoire donné la mission de la desserte en électricité. Concrètement, le législateur a désigné EDF et les Entreprises Locales de Distribution comme partenaires des collectivités locales, lesquelles disposent du pouvoir d'organisation et de gestion des services publics dont elles ont la charge. Ce régime juridique se justifie notamment par la péréquation tarifaire appliquée à l'acheminement du courant (transport et distribution) sur tout le territoire national, conforme aux dispositions de la directive 2003/54/CE.

[1] Cette expression est utilisée en France pour des formes de coopérations qui ne recouvrent qu'une partie de celles désignées sous ces mots dans le Livre Vert.

[2] Idem.

Question 2

De l'avis de la Commission, la transposition en droit national de la procédure de dialogue compétitif permettra aux parties concernées de disposer d'une procédure particulièrement adaptée à la passation des contrats qualifiés de marchés publics lors de la mise en place d'un PPP de type purement contractuel, tout en préservant les droits fondamentaux des opérateurs économiques. Partagez-vous ce point de vue? Si non, pourquoi ?

La procédure de dialogue compétitif est d'ores et déjà opérationnelle en droit français, puisqu'elle est décrite notamment à l'article 36 du nouveau code des marchés publics paru au début de l'année 2004, qui a intégralement transposé les principes des directives européennes 2004/17 et 2004/18.

Par ailleurs l'ordonnance portant création des partenariats publics-privés[3] prévoit de s'appuyer sur la procédure de dialogue compétitif afin de choisir le titulaire du contrat de partenariat.

Il est dans l'immédiat difficile de déterminer si la procédure de dialogue compétitif est "particulièrement" adaptée, dans la mesure où elle n'a pas encore fait l'objet d'une pratique suffisante.

En ce qui concerne spécifiquement les concessions de distribution d'électricité, la procédure de dialogue compétitif poserait deux problèmes d'application :

- L'adjudicataire demeurerait dans l'impossibilité de fixer un prix pour des travaux dont le volume ne peut a priori être déterminé pendant la durée de la concession, compte tenu de leur nature (investissements liés à de nouveaux raccordements, augmentation ou maîtrise de la demande) et des aléas (investissements de renouvellement liés en partie à des phénomènes climatiques non prévisibles). Ces travaux ne sont en outre pas toujours limités au périmètre d'une concession, mais visent souvent plusieurs concessions, voire concernent le niveau national.
- La définition des engagements et donc des moyens relève du contrat de concession signé avec les collectivités locales. Le tarif d'acheminement qui rémunère les distributeurs est, de son côté, déterminé par la Commission de Régulation de l'Energie (CRE) pour l'ensemble du territoire national (ce qui n'autorise pas de négociation à l'échelle d'une concession) et avec un horizon de visibilité plus réduit que celui des concessions. Le niveau de qualité requis est enfin encadré par l'Etat, dans les contrats de service public signés avec les opérateurs.

Le dialogue compétitif peut donc difficilement s'instaurer entre les acteurs, sauf à revoir complètement l'édifice des concessions de distribution en France, et à renoncer au principe de péréquation tarifaire.

Le caractère récent des textes en vigueur, aussi bien au plan horizontal (directives 2004/17 et 2004/18) ***qu'au plan sectoriel*** (directive 2003/54/CE) ***plaide pour une période d'observation suffisante avant une éventuelle nouvelle étape législative***. S'agissant du secteur de l'électricité, rappelons que la directive visée ci-dessus prévoit le libre choix du fournisseur d'électricité par l'ensemble des professionnels depuis le 1er juillet 2004 et la liberté de choix de l'ensemble des consommateurs au 1er juillet 2007. Pour mettre en application l'ensemble des changements introduits au plan légal, les opérateurs ont maintenant besoin de stabilité, ce qui implique une certaine pérennité du cadre juridique actuel.

[3] Cette expression est utilisée en France pour des formes de coopérations qui ne recouvrent qu'une partie de celles désignées sous ces mots dans le Livre Vert.

Question 3

En ce qui concerne ces contrats, existe-t-il selon vous des points autres que ceux relatifs au choix de la procédure d'adjudication, susceptibles de poser problème au regard du droit communautaire des marchés publics? Si oui, lesquels et pour quelles raisons ?

EDF n'a pas connaissance de problèmes de ce type.

Question 4

Avez-vous déjà organisé, participé, ou souhaité organiser ou participer à une procédure d'attribution de concession au sein de l'Union? Quelle expérience en avez-vous?

EDF ne possède pas d'expérience de ce type.

Question 5

Estimez vous que le cadre juridique communautaire actuel est suffisamment précis pour assurer la participation concrète et effective de sociétés ou groupements non-nationaux aux procédures de passation de concessions? Une concurrence réelle est-elle, selon vous, habituellement assurée dans ce cadre ?

Les principes fondateurs de transparence et de mise en concurrence contenus dans le Traité s'appliquent à toute activité par laquelle une entité publique confie une prestation économique à un tiers. Cette activité peut consister à offrir des services, des biens ou des travaux sur un marché, même si ces services ou travaux visent à assurer un "service d'intérêt général" tel que défini par un Etat membre.

Par ailleurs les deux nouvelles directives marchés publics 2004/17 et 2004/18 du 31 Mars 04, qui visent à promouvoir la mise en concurrence, soumettent les contrats qualifiés de marché public de travaux ou de services et définis comme étant "prioritaires" à des règles précises en matière de passation de contrats.

En France, juridiquement les collectivités publiques disposent d'un cadre précis et sécurisé en matière de gestion de **délégation de service public dont la concession est un des modes de gestion.** A cet égard, la concession est un outil efficace de coopération entre la sphère publique et la sphère **privée dont le mode de passation est prévu par** la loi du 29/01/1993 dite loi "Sapin", qui organise une mise en concurrence réelle et contrôlée. Ce cadre juridique complète le dispositif communautaire existant.

Enfin, pour ce qui concerne spécifiquement le secteur de l'électricité, rappelons que les modalités d'ouverture à la concurrence ont été définies successivement par deux directives européennes dont la seconde a été adoptée en juin 2003 (directive 2003/54/CE). Ce texte poursuit le processus d'ouverture à la concurrence initié par la première directive "électricité", tout en assurant la protection de l'ensemble des consommateurs, notamment les plus vulnérables.

Question 6

Pensez-vous qu'une initiative législative communautaire, visant à encadrer la procédure de passation de concessions, est souhaitable ?

Compte tenu de la grande diversité de modèles de PPP qui existent dans les pays de l'Union européenne (PPP issus du droit anglo-saxon, délégations de service public de droit français…), il paraît très difficile de soumettre l'ensemble de ces conventions à un régime uniformisé inspiré des règles communautaires relatives aux marchés publics. Dans le respect du principe de subsidiarité, il est par conséquent souhaitable de préserver la liberté des Etats membres pour les modalités d'organisation de leurs services publics ou de création d'infrastructures.

Le cadre législatif et réglementaire actuel ne comporte pas d'insuffisances particulières, et les derniers ajustements qui lui ont été apportés n'ont à ce jour révélé aucune lacune. Ce cadre fournit aux autorités publiques les instruments nécessaires pour agir en pleine transparence et effectuer l'ensemble des contrôles et vérifications utiles.

Dans la période actuelle, **si une initiative communautaire devait être prise, il serait judicieux qu'elle porte sur le renforcement de la sécurité juridique des entreprises dotées de mission d'intérêt général, comme EDF l'a souligné l'an passé dans le cadre du débat sur le Livre vert « services d'intérêt général ».**

Les entreprises de service public pâtissent en effet des incertitudes qui entourent l'application des règles de concurrence, tout particulièrement pour la compensation des charges de service public. Cette insécurité a été reconnue par la Commission elle-même à plusieurs reprises. Le Conseil européen, à son tour, a mis en avant la nécessité de renforcer la sécurité juridique, tout particulièrement au regard des règles relatives aux aides d'Etat. La Cour de justice a apporté des éléments de clarification dans l'arrêt Altmark de juillet 2003. L'adoption du Livre blanc « services d'intérêt général » par la Commission européenne constitue une réponse à cette préoccupation. EDF nourrit donc l'espoir que les initiatives visant à améliorer la sécurité juridique, programmées dans ce Livre blanc, seront mises en œuvre rapidement.

Question 7

De manière plus générale, si vous estimez qu’il est nécessaire que la Commission propose une nouvelle action législative, existerait-il à votre avis des raisons objectives de viser dans cet acte tous les PPP de type contractuel, qu’ils soient qualifiés de marchés publics ou de concessions, pour les soumettre à des régimes de passation identique ?

Il paraît nécessaire de rappeler l’existence, dans les différents pays européens, d’une législation diversifiée adoptée à l’issue d’une pratique qui a cherché très tôt à imaginer des mécanismes d’ajustement permettant de concilier les impératifs de l’intérêt général et les exigences de l’économie de marché et visant à produire des services publics performants aux meilleurs coûts et dans la meilleure transparence. .

Ces différentes conventions ne sont pas examinées dans le Livre Vert qui se borne à évoquer les marchés publics et les concessions.

La volonté de la Commission Européenne d’améliorer le cadre juridique communautaire est louable, mais il faut prendre garde au risque d’engendrer complexité et incertitudes dans la mesure où il existe déjà des modalités diverses de coopération entre le privé et le public, qui ont le mérite de fonctionner et d’avoir fait leurs preuves, notamment le mécanisme de la concession qui existe depuis plus d’un siècle sous sa forme actuelle et qui ne peut pas être entièrement assimilé à un PPP au sens où l’entend la Commission.

La réponse à la question 1 donne un aperçu de la variété des dispositifs en place dans le cadre d'un seul pays et souligne que ***la forte hétérogénéité des opérations entrant sous le vocable PPP rend inopportun un texte à vocation générale.***

Question 8

Selon votre expérience, l'accès des opérateurs non-nationaux aux formules de PPP d'initiative privé est-il assuré? En particulier, lorsqu'il existe une invitation des pouvoirs adjudicateurs à présenter une initiative, cette invitation fait-elle généralement l'objet d'une publicité adéquate permettant l'information de tous les opérateurs intéressés ? Une procédure de sélection véritablement concurrentielle est-elle organisée pour assurer la mise en oeuvre du projet retenu?

EDF ne dispose pas d'éléments d'information spécifiques sur ce point.

Question 9

Quelle serait selon vous la meilleure formule pour assurer le développement des PPP d'initiative privée dans l'Union européenne tout en assurant le respect des principes de transparence, de non discrimination et d'égalité de traitement ?

EDF ne se prononce pas sur cette question.

Question 10

Quelle expérience avez-vous de la phase postérieure à la sélection du partenaire privé dans les opérations de PPP contractuels ?

A la diversité des formes prises par les PPP en France correspond une grande variété de situations dans les phases postérieures à la sélection.

A titre d'exemple, les concessions de distribution de l'électricité sont régies par un cahier des charges. Un compte-rendu sur l'exécution de ses clauses est effectué à intervalle périodique (généralement un an) auprès du pouvoir concédant (commune ou regroupement de communes).

Limitée par le principe de spécialité des établissements publics, EDF n'a pas d'expérience avec les collectivités territoriales dans des secteurs autres que l'électricité. C'est par ailleurs seulement depuis le 1er juillet 2004 qu'elle est susceptible d'être appelée à participer à des appels d'offres pour la fourniture d'électricité aux collectivités locales et autres personnes publiques soumises au Code des marchés publics.

Question 11

Avez-vous connaissance de cas dans lesquels les conditions d'exécution – y compris les clauses d'adaptation dans le temps - ont pu avoir une incidence discriminatoire ou ont pu constituer une entrave injustifiée à la libre prestation de services ou à la liberté d'établissement ? Si oui, pouvez-vous décrire le type de problèmes rencontrés ?

EDF n’a pas connaissance de tels cas.

Question 12

Avez-vous connaissance de pratiques ou de mécanismes d'évaluation d'offres ayant des incidences discriminatoires ?

EDF n’a pas connaissance d’entraves de cette nature.

Question 13

Partagez-vous le constat de la Commission selon lequel certains montages du type "step-in" peuvent poser problème en termes de transparence et d'égalité de traitement ? Connaissez vous d'autres "clauses types" dont la mise en oeuvre est susceptible de poser des problèmes similaires ?

Indépendamment des problème de transparence et d'égalité de traitement, les clauses de "step-in" semblent inadaptées aux opérations prévoyant un tarif unique pour tous les clients d'une zone nationale.

En France, ce cas se présente dans l'électricité, où la loi garantit la péréquation tarifaire pour l'acheminement du courant (transport et distribution) sur tout le territoire national. Ce dispositif est fondé d'une part sur un souci de cohésion sociale, afin de ne pas défavoriser les résidents de zones difficiles à desservir. Il répond d'autre part à l'objectif de faciliter l'accès au marché pour tous les fournisseurs, qui peuvent ainsi déterminer aisément les coûts d'alimentation de tous leurs clients.

Ainsi que l'a rappelé le Livre Vert sur les Services d'Intérêt Général[4], la péréquation tarifaire correspond à l'une des solutions laissées à l'initiative des Etats Membres afin de rendre un service public accessible à tous, à un prix abordable.

[4] COM (2003) 270 du 21 Mai 2003.

Question 14

Estimez-vous qu'il est nécessaire de clarifier au niveau communautaire certains aspects relevant du cadre contractuel des PPP ? Si oui, sur quel(s) aspect(s) devrait porter cette clarification?

L'Union Européenne s'est déjà dotée d'une législation détaillée, aussi bien sur le plan horizontal, comme le rappelle le Livre Vert, que sur le plan sectoriel, tout particulièrement dans la plupart des secteurs propices à des partenariats public – privé. Certains éléments de cette législation communautaire ont été très récemment mis en œuvre, et demeurent parfois en cours de transposition.

On observe par ailleurs une grande diversité de situations entre secteurs, une large variété de contextes nationaux et l'existence dans plusieurs Etats Membres, notamment en France, de législations sectorielles encadrant déjà les multiples formes de coopération entre secteur public et secteur privé. Certaines dispositions législatives ont été modifiées, de manière trop récente pour que l'on puisse déjà en tirer des enseignements.

Ce double constat ne milite pas en faveur d'une nouvelle initiative législative communautaire en la matière.

Question 15

Dans le contexte des opérations de PPP, avez-vous connaissance de problèmes particuliers rencontrés en matière de sous-traitance ? Lesquels?

EDF n’a pas connaissance de problèmes spécifiques en la matière.

Question 16

Le phénomène des PPP de type contractuel, impliquant le transfert d'un ensemble de tâches à un unique partenaire privé, justifie-t-il selon vous que des règles plus détaillées et/ou d'un champ d'application plus large soient mise en place en ce qui concerne le phénomène de sous-traitance?

EDF ne se prononce pas sur ce point.

Question 17

De manière plus générale, estimez-vous qu'une initiative complémentaire devrait être prise au niveau communautaire en vue de clarifier, ou d'aménager, les règles relatives à la sous-traitance?

EDF ne se prononce pas sur ce point.

Question 18

Quelle expérience avez-vous de la mise en place d'opérations de PPP de type institutionnalisé ? En particulier, votre expérience vous conduit-elle à penser que le droit communautaire des marchés publics et des concessions est respecté dans le cas de montages de PPP institutionnalisé? Si non, pourquoi ?

Au sens du présent Livre vert, le PPP de type institutionnalisé (PPPI) est susceptible de revêtir deux formes différentes qui sont d'une part, la création ad hoc d'une structure juridique réunissant des capitaux publics et des capitaux privés et d'autre part la prise de contrôle capitalistique d'une entité publique par une entité privée.

La mise en place des PPPI est juridiquement encadrée par le droit français en raison d'une pratique déjà ancienne consistant à associer capitaux privés et capitaux publics, notamment au travers de structures juridiques intitulées sociétés d'économie mixte.

Que ce soit au niveau national ou au niveau local, la création et le fonctionnement des sociétés d'économie mixte sont juridiquement encadrées en droit français.

Au niveau local, les sociétés d'économie mixte locale (SEML), tant dans leur création que dans les missions qui sont susceptibles de leur être confiées, font l'objet d'un encadrement législatif, du contrôle de légalité du Préfet et en dernier lieu du contrôle du juge. Rappelons également que les SEML sont des sociétés anonymes dont les actionnaires majoritaires sont des collectivités locales.

La France s'est dotée d'un cadre juridique consolidé assurant mise en concurrence et transparence dans les missions et prestations qui sont confiées aux SEML, dans le cadre de leurs relations avec les entités adjudicatrices. En outre, en tant qu'elles sont elles-mêmes entités adjudicatrices, les SEML sont également soumises aux règles de publicité et de mise en concurrence prévues par le droit communautaire et le droit national.

La structure juridique de la SEML a été retenue pour certaines entités assurant la distribution et la fourniture de l'électricité sur le territoire français. ***Les dispositions résumées ci-dessus, qui garantissent l'application du droit communautaire, leur sont applicables.***

Par ailleurs, les prises de participation pouvant conduire jusqu'à la prise de contrôle capitalistique de l'entreprise par des capitaux privés, opérations de privatisation, sont encadrées par les lois dites de privatisation qui font intervenir, pour les opérations les plus importantes, la Commission des participations et des transferts, dont les avis sont publiés. Des audits et vérifications sont menés ensuite à intervalles réguliers par la Cour des Comptes et par l'Agence des Participations de l'Etat.

Question 19

Estimez-vous qu'une initiative doit être prise au niveau communautaire en vue de clarifier ou de préciser les obligations des organismes adjudicateurs quant aux conditions dans lesquelles doivent être mis en concurrence les opérateurs potentiellement intéressés par un projet de type institutionnalisé? Si oui, sur quels points particuliers et sous quelle forme ? Si non, pourquoi?

Ainsi qu'il a été mentionné dans la réponse à la question 18, les projets de type institutionnalisé revêtent des formes juridiques variées au sein d'un même Etat comme la France et cette diversité est bien sûr accrue si l'on passe aux 25 Etats Membres de l'Union. Les dispositions législatives qui les encadrent subissent de constantes améliorations au niveau de chaque Etat, certains des ajustements ayant été introduits en France depuis moins de deux ans.

Une initiative législative communautaire dans ce domaine visant à englober l'ensemble des situations prendrait donc une forme nécessairement complexe. Ne pouvant s'appuyer sur un retour d'expérience solide, compte tenu de la brièveté des mises en œuvre nationales, elle serait susceptible d'approximations et pourrait engendrer un sentiment d'instabilité juridique préjudiciable aux entreprises.

Mieux vaut partager les enseignements à tirer de l’application des dispositions communautaires et nationales en vigueur, comparer les résultats obtenus et analyser les causes des réussites ou des échecs. Ce n’est qu’au terme de cette évaluation, présentée plus en détails dans la réponse à la question n°22, qu’il sera possible de se prononcer sur l’opportunité d’une initiative au niveau communautaire.

Dans l’immédiat, la priorité est de renforcer la sécurité juridique que sont en droit d’attendre les entreprises dotées de missions d’intérêt général (cf. réponse à la question n°6). La levée des incertitudes est particulièrement souhaitable pour le secteur de l'électricité, dont l'activité s’inscrit dans une perspective de long terme (programmation et financement des investissements…), pour laquelle la stabilité du cadre juridique est essentielle, dans l’intérêt des populations et des industries européennes.

Question 20

Quelles sont les mesures ou les pratiques que vous estimez constitutives d'entraves à la mise en place des PPP au sein de l'Union européenne ?

EDF ne se prononce pas sur ce point.

Question 21

Connaissez-vous d'autres formes de PPP développées dans les pays en dehors de l'Union? Connaissez-vous des exemples de 'bonnes pratiques' développées dans ce cadre, dont l'Union pourrait s'inspirer ? Si oui, lesquelles ?

EDF ne se prononce pas sur ce point.

Question 22

De façon plus générale, et compte tenu des besoins importants d'investissements nécessaires dans certains Etats membres, afin de poursuivre un développement économique social et durable, estimez-vous utile une réflexion collective sur ces questions qui se poursuivrait à des intervalles réguliers entre les acteurs concernés, et qui permettrait un échange des meilleures pratiques? Est-ce que vous considérez que la Commission devrait animer un tel réseau ?

L'ensemble des réponses aux questions du Livre Vert figurant ci-dessus soulignent l'extrême diversité des opérations couvertes par le concept de "partenariat public privé", et des législations qui l'encadrent dans l'UE.

Une réflexion collective orientée vers la comparaison des bases juridiques en vigueur dans les Etats Membres et l'analyse des résultats obtenus au regard des objectifs serait particulièrement bienvenue. L'organisation de rencontres périodiques entre les acteurs concernés, dévolues aux échanges de bonnes pratiques, semble tout à fait opportune.

D'une manière plus générale, comme EDF l'a souligné dans sa réponse au Livre vert sur les « services d'intérêt général », l'évaluation régulière des performances des services d'intérêt général est une préoccupation légitime et permet de vérifier l'adéquation entre la législation et les effets de sa mise en œuvre. D'une part, elle fournit des indicateurs indispensables pour la prise de décision politique, notamment l'adaptation des services d'intérêt économique général aux besoins de la population et aux objectifs sociaux et économiques de l'Union. D'autre part, elle permet de s'assurer de la bonne application des textes relatifs à la concurrence et à la compétitivité, en apportant des éléments d'appréciation sur d'éventuelles situations anticoncurrentielles ou des obstacles aux échanges.

Il convient en tout état de cause que les éléments d'évaluation établis par la Commission européenne soient complétés par les apports d'organismes détenant l'expertise nécessaire et indépendants vis-à-vis des instances chargées de l'élaboration ou de la mise en œuvre des textes communautaires.

france telecom

Direction Internationale des Relations Extérieures

Juillet 2004

Réponse du Groupe France Télécom sur la consultation de la Commission européenne sur les Partenariats Public-Privé.

Le Groupe France Télécom souhaite saluer l'initiative de la Commission européenne d'amorcer un débat sur la meilleure façon d'assurer que les Partenariats Public-Privé (PPP) puissent se développer dans un contexte de concurrence efficace et de clarté juridique. En répondant à la consultation ouverte par le Livre vert sur les Partenariats Public-Privé et le droit communautaire des marchés publics et des concessions[1], France Télécom souligne que le secteur des réseaux et services de communications électroniques s'inscrit dans un cadre réglementaire dont la mise en œuvre a donné lieu à des dispositions qui affectent les conditions d'utilisation de financements publics.

Introduction

Le Livre vert sur les Partenariats Public-Privé, en procédant à une consultation horizontale des acteurs impliqués, vise à promouvoir la croissance en Europe en proposant un cadre contractuel novateur définissant au niveau communautaire des bases communes. Cette initiative a le mérite de clarifier certains points. Elle rappelle opportunément le **principe fondamental selon lequel, que l'infrastructure subventionnée appartienne à une autorité publique, à une entité privée apportant un cofinancement, ou à une entité mixte public-privé, les principes généraux comme l'égalité et la transparence doivent s'appliquer**.

France Télécom, par la présente réponse au Livre vert, souhaite appeler particulièrement l'attention de la Commission sur la situation des PPP dans le secteur des communications électroniques.

Données du problème

Les PPP sont un moyen à la disposition des autorités publiques pour la mise en place d'ouvrages ou de services relevant de leurs missions, mais en recourant à la compétence, voire aux ressources financières, d'entreprises privées.

Dès lors que l'Union européenne a fait le choix, il y a une dizaine d'années, de libéraliser entièrement le secteur des communications électroniques et de faire confiance aux forces du marché pour développer ce secteur clé de l'économie, la construction et l'exploitation des réseaux de télécommunications ne sont plus des missions relevant des administrations, qu'elles soient nationales ou locales, sauf éventuellement pour la satisfaction de leurs propres besoins.

[1] COM(2004) 327 du 30.04.2004

On pourrait donc penser, en première analyse, que le secteur des communications électroniques n'est pas concerné par les PPP. Mais ceci n'est pas tout à fait vrai.
Il existe certains cas où l'initiative privée fait défaut et où les Pouvoirs publics peuvent légitimement estimer qu'ils doivent y remédier en prenant eux-mêmes l'initiative de construire et d'exploiter des réseaux ou de soutenir les acteurs privés à travers un financement public . Tel est le cas notamment dans certaines zones rurales ou peu peuplées dans lesquelles aucun opérateur privé ne peut raisonnablement espérer amortir les investissements nécessaires par exemple à la fourniture de services haut débit ou de services de télécommunications mobiles. En pareille circonstance, l'autorité publique concernée peut décider d'agir seule mais elle peut aussi décider de recourir à un PPP.

Cette addition de forces s'inscrit d'ailleurs dans le plan *e*-Europe 2005 qui souligne que l'Europe a besoin, pour se doter d'une infrastructure large bande à grande échelle, de mobiliser des investissements importants du privé et du public. Les Etats membres ont à ce titre affiché au niveau communautaire leur stratégie et plan d'action pour le large bande en veillant généralement à la dévolution particulière de chacun des secteurs dans leur contribution respective à cet effort.

Le Groupe France Télécom[2], comme d'autres opérateurs, a toujours répondu aux sollicitations des autorités publiques désireuses de faire bénéficier leur territoire de nouvelles technologies quand elles ne désiraient pas l'équiper elles-mêmes.

Il souhaite que les PPP conclus dans ce cadre le soient sur des bases claires, et que l'intervention économique des autorités publiques ne crée aucune distorsion de concurrence entre les opérateurs. Ceci suppose :

- que les modalités de choix du partenaire privé assurent une égalité de chances aux différents candidats potentiels ;
- que, notamment dans ses aspects financiers, le contrat conclu entre l'acteur public et son partenaire privé ne confère pas à ce dernier des avantages indus par rapport à ses concurrents (surcompensation des missions d'intérêt général par exemple, s'écartant de la jurisprudence de la CJCE précisée récemment dans l'arrêt Altmark) ; en particulier, toute aide financière devrait être proscrite lorsque le projet vise à fournir des services qu'un ou plusieurs autres opérateurs fournissent déjà sur le même territoire sans financement public.

A ce titre, la Commission a déjà soumis l'attribution de fonds publics pour des projets d'infrastructure de télécommunications **à des contraintes juridiques.** En particulier, un document de travail[3] récent a rappelé le cadre réglementaire d'attribution de fonds communautaires à la construction d'infrastructures de communications électroniques. **Ce cadre juridique est un gage de transparence et de compétitivité accrue**.

[2] Au 30 juin 2004, le Groupe France Télécom sert un total de 119,6 millions de clients dans le monde ; dans les télécommunications fixes, mobiles et accès Internet, il opère principalement dans plusieurs Etats membres de l'UE parmi lesquels les plus significatifs sont la France, le Royaume-Uni, la Pologne, la Belgique, l'Espagne, les Pays-Bas, la Slovaquie, le Danemark, auxquels il convient d'ajouter la Roumanie et la Suisse.

[3] Document de travail des services de la Commission « lignes directrices relatives aux critères et modalités de mise en œuvre des fonds structurels en faveur des communications électroniques ». SEC (2003) 895.

Conclusion : orientations souhaitées pour le débat sur les PPP

A l'occasion du débat sur les PPP, France Télécom voudrait que soient préservés et encouragés certains principes qui jusque là ont permis le développement de la société de l'information.

Les lignes directrices relatives aux critères et modalités de mise en œuvre des fonds structurels en faveur des communications électroniques constituent une garantie suffisante de transparence et de non discrimination. Ces principes devraient s'appliquer de la même manière à tous les types de contrats.

Le recours à un contrat de partenariat **et l'attribution de fonds structurels** pour la construction d'infrastructures de communications électroniques ne devraient se faire **qu'au terme d'une évaluation rigoureuse des besoins à satisfaire et des capacités du marché à y pourvoir**. A l'issue de cette évaluation le contrat de partenariat ne pourra être retenu que si ses avantages apparaissent clairement. **L'évaluation doit notamment mettre en évidence l'intérêt financier du recours au contrat de partenariat mais aussi sa pertinence économique**.

GAZ DE FRANCE
DIRECTION DE L'INFORMATION ET DES AFFAIRES PUBLIQUES

REPONSE AU LIVRE VERT « *SUR LES PARTENARIATS PUBLIC-PRIVE ET LE DROIT COMMUNAUTAIRE DES MARCHES PUBLICS ET DES CONCESSIONS* »

Position de fond du groupe Gaz de France :

***Gaz de France considère qu'il est nécessaire de conserver une nette distinction entre marchés publics et concessions, compte tenu des caractéristiques spécifiques de ces deux catégories de contrats**. En France, la diversité des types de contrat est essentielle et vient de conduire à la création d'une troisième catégorie de contrat, le contrat de partenariat, à côté de la délégation de service public et du marché public.*

Notre réponse au présent Livre Vert s'attache donc à faire la distinction entre ces divers modes de gestion. Elle est de plus articulée avec les réflexions en cours portant sur les règles communes pour le marché intérieur de l'énergie. Elle porte essentiellement sur les questions 1 à 7.

LE PPP PUREMENT CONTRACTUEL

1. Quels types de montages de PPP purement contractuel connaissez-vous ? Ces montages font-ils l'objet d'un encadrement spécifique (législatif ou autre) dans votre pays ?

Trois grandes catégories de contrats en France peuvent correspondre au concept communautaire de PPP. Toutes les formes de PPP au sens communautaire sont couvertes.

- *Les délégations de service public*

Les délégations de service public existent depuis longtemps en France. Ce sont des contrats par lesquels une personne morale de droit public (Etat, collectivité locale) confie la gestion d'un service public dont elle a la responsabilité à un délégataire public ou privé, dont la rémunération est substantiellement liée aux résultats de l'exploitation du service, ce dernier supportant donc les risques d'exploitation. Le délégataire peut être chargé de construire, entretenir et exploiter des ouvrages. Cette délégation du service par la collectivité s'accompagne d'un véritable transfert de la responsabilité de l'exécution d'un service ou d'une fonction.

La loi n° 93-122 du 29 janvier 1993 (dite loi Sapin) a mis en place un encadrement des procédures de passation de ces contrats. Elle exige des mesures de publicité afin de susciter la présentation de plusieurs offres, l'autorité organisatrice conservant la liberté du choix du délégataire.

- *Les marchés publics*

Les marchés publics sont des contrats conclus par des personnes publiques avec des personnes publiques ou privées. Ils ont pour objet la réalisation de travaux, de fourniture ou de services. La contrepartie de cette prestation réside dans un prix et dès lors la rémunération du cocontractant de la personne publique ne dépend pas substantiellement des résultats de l'exploitation du service.

Ces contrats sont soumis, en France, aux procédures de passation et aux règles d'exécution édictées par le Code des marchés publics.

- *Les contrats de partenariat public-privé*

« Les contrats de partenariat sont des contrats administratifs par lesquels la personne publique confie à un tiers, pour une période déterminée en fonction de la durée d'amortissement des investissements ou des modalités de financement retenues, une mission globale relative au financement d'investissements immatériels, d'ouvrages ou d'équipements nécessaires au service public, à la construction ou à la transformation des ouvrages ou équipements, ainsi qu'à leur entretien, leur maintenance, leur exploitation ou leur gestion, et, le cas échéant, à d'autres prestations de services concourant à l'exercice, par la personne publique, de la mission de service public dont elle est chargée. »[1] Ils se caractérisent par un partage des risques. La rémunération du cocontractant ne peut être liée substantiellement aux résultats de l'exploitation du service. Elle dépend d'objectifs de performance et est répartie sur l'ensemble de la durée du contrat.

Il convient en complément, de signaler une procédure administrative, appliquée notamment dans le domaine des infrastructures dont les réseaux d'énergie en Europe : la procédure d'autorisation ou de licence. Cette procédure est juridiquement très différente d'un PPP. Mais certaines activités gazières peuvent être exercées dans certains pays membres sous un régime de PPP et dans d'autres sous un régime d'autorisation, sans que les différences autres que purement juridiques entre ces situations soient toujours significatives.

La phase de sélection du partenaire privé

Partenariat de type purement contractuel : acte attributif qualifié de marché public

2. De l'avis de la Commission, la transposition en droit national de la procédure de dialogue compétitif permettra aux parties concernées de disposer d'une procédure particulièrement adaptée à la passation des contrats qualifiés de marchés publics lors de la mise en place d'un PPP de type purement contractuel, tout en préservant les droits fondamentaux des opérateurs économiques. Partagez-vous ce point de vue ? Si non, pourquoi ?

La procédure de dialogue compétitif, utilisée dans le cadre de la passation des marchés publics, n'est pas adaptée à toutes les formes de PPP contractuels, et notamment pas aux concessions qui ne sont pas des marchés publics.

[1] Ordonnance n° 2004-559 du 17 juin 2004

Tout d'abord, dans une concession, le titulaire du contrat se voit conférer une responsabilité associée à des risques et aléas de gestion importants, impliquant que la liberté d'organisation du service public par l'autorité concédante ne soit pas restreinte par des règles de passation trop contraignantes.

Par ailleurs, le formalisme du dialogue compétitif pourrait, selon nous, constituer un frein à l'innovation :

- *lors de l'élaboration des offres : la mise en commun des idées et propositions des entreprises risque de freiner le développement des idées innovantes, par crainte de les voir exposées à l'ensemble des candidats,*
- *lors de la vie du contrat : une rédaction du cahier des charges ou du contrat final issu du dialogue compétitif, trop précise, notamment sur les moyens à mettre en œuvre, risque d'empêcher toute adaptation par l'exploitant de gestion dans le temps, au fur et à mesure de la vie de l'exploitation, adaptation nécessaire à ce type de contrat complexe conclu sur une longue durée.*

3. En ce qui concerne ces contrats, existe-t-il selon vous des points autres que ceux relatifs au choix de la procédure d'adjudication, susceptibles de poser problème au regard du droit communautaire des marchés publics ? Si oui, lesquels et pour quelles raisons ?

Gaz de France ne connaît pas de points susceptibles de poser problème au regard du droit communautaire des marchés publics.

Partenariat de type purement contractuel : acte attributif qualifié de concession

4. Avez-vous déjà organisé, participé, ou souhaité organiser ou participer à une procédure d'attribution de concession au sein de l'Union ? Quelle expérience en avez-vous ?

Gaz de France a déjà participé en France à des procédures d'attribution de concessions.

Notre expérience française montre notamment l'intérêt d'une procédure établie par la loi[2] *permettant, après présentation de l'offre initiale sur la base d'un dossier de consultation établi par l'autorité publique, une phase de libre discussion entre le candidat et l'autorité publique.*
L'esprit général de la concession est en effet de s'engager sur des obligations de résultats (et non des obligations de moyens).
Or, cette phase de libre négociation favorise la conclusion d'un contrat équilibré pour les deux parties, collectivité et entreprise.

5. Estimez-vous que le cadre juridique communautaire actuel est suffisamment précis pour assurer la participation concrète et effective de sociétés ou groupements non-nationaux aux procédures de passation de concessions ? Une concurrence réelle est-elle, selon vous, habituellement assurée dans ce cadre ?

[2] Loi n°93-122 du 29 janvier 1993 relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques, dite « Loi Sapin »

Le cadre communautaire actuel est constitué par les principes, issus du Traité, de transparence, d'égalité de traitement, et de libre prestation de services. Ces principes et l'application pratique qui doit en découler permettent d'assurer une concurrence réelle.

C'est notamment le cas en France dans le secteur gazier. L'application du Traité et sa mise en œuvre sur le plan des délégations de service public permettent d'organiser la mise en concurrence sur les communes qui ne sont pas encore desservies en gaz. C'est donc le mode d'attribution des concessions qui s'applique pour les 27 300 communes où le gaz n'est pas encore présent. Depuis 2003[3]*, plusieurs appels d'offres de distribution de gaz se sont ainsi déroulés et ont abouti, pour certains, à l'attribution de contrats de concessions à d'autres opérateurs que Gaz de France.*

Le cadre juridique communautaire actuel nous semble donc suffisamment précis pour assurer la participation concrète et effective de sociétés ou groupements non-nationaux aux procédures de passation des concessions.

A noter pour les communes déjà desservies par Gaz de France ou par des distributeurs communaux existants en 1946 : la procédure d'attribution du contrat de concession se fait conformément à la loi d'avril 1946 qui leur attribue le monopole de la distribution publique du gaz. Cette loi est conforme aux principes du Traité et à la législation sectorielle applicable au domaine gazier.

Un cadre législatif communautaire supplémentaire ne nous semble donc pas nécessaire.

6. Pensez-vous qu'une initiative législative communautaire, visant à encadrer la procédure de passation de concessions, est souhaitable ?

Gaz de France estime que la législation française applicable aux délégations de service public remplit les exigences communautaires, mises en lumière notamment par la Communication Interprétative du 29 avril 2000 sur les concessions. Une initiative législative communautaire supplémentaire n'est donc pas nécessaire.

Si la Commission européenne faisait toutefois le choix de fixer des grands principes relatifs aux procédures de passation des concessions, une telle initiative devrait en tout état de cause :

- *respecter le principe de subsidiarité et permettre la prise en compte des particularités nationales et sectorielles qui caractérisent certains montages,*
- *exclure certains domaines comme l'énergie qui dispose déjà d'une réglementation communautaire sectorielle qui contribue à améliorer la qualité des services et à renforcer la transparence et la concurrence loyale au bénéfice du contribuable européen.*

Ainsi, la directive gaz n°2003-55 fixe des règles particulières claires pour l'organisation générale du secteur gazier secteur où la gestion des réseaux et autres installations relève de partenariats public-privé :

[3] Loi n°2003-8 du 3 janvier 2003, reprenant et codifiant les principes énoncés par la loi n° 98-546 du 2 juillet 1998, article 50

- *obligations de service public et de protection des consommateurs,*
- *procédures d'autorisation pour la construction ou l'exploitation d'installations,*
- *règles de gestion des infrastructures et de relations entre tous les gestionnaires de réseaux et d'installations (séparation juridique, confidentialité des informations),*
- *transparence de la comptabilité,*
- *règles d'accès aux réseaux et autres installations.*

Dans le prolongement de la remarque contenue dans la réponse à la question 1, nous souhaitons souligner que les particularités du domaine de l'énergie énoncées ci-dessus illustrent que, selon nous, toute nouvelle initiative législative communautaire dans le domaine des concessions ne pourrait se faire sans réfléchir également aux éventuelles retombées sur les procédures d'autorisation.

7. De manière plus générale, si vous estimez qu'il est nécessaire que la Commission propose une nouvelle action législative, existerait-il à votre avis des raisons objectives de viser dans cet acte tous les PPP de type contractuel, qu'ils soient qualifiés de marchés publics ou de concessions, pour les soumettre à des régimes de passation identique ?

Pour les mêmes raisons que celles qui concernent une éventuelle directive concessions (voir réponse à la question 6) ***Gaz de France ne juge pas nécessaire une nouvelle action législative de la Commission dans le domaine des PPP.***

En tout état de cause, ***si la Commission proposait une telle action, il conviendrait d'appliquer aux procédures de passation des PPP contractuels institués par un acte attributif qualifié de concession un régime distinct de celui qui s'applique aux PPP contractuels institués par un acte attributif qualifié de marché public.***

La catégorie des concessions présente une homogénéité telle qu'il serait cohérent de lui appliquer un régime spécifique. *En effet, le mode de passation d'une procédure doit être directement induit par la nature du contrat et des relations contractuelles qu'elle engendre : le fait que le concessionnaire supporte notamment les aléas économiques, contrairement au titulaire d'un marché public, justifie que la procédure de choix dans le cadre d'un contrat de concession soit moins contraignante pour la personne publique, qui doit conserver sa liberté d'organisation du service public.*
Tous les PPP contractuels ne sauraient en aucun cas être soumis aux mêmes règles*.*

Questions spécifiques à la sélection d'un opérateur économique dans le cadre d'un PPP d'initiative privée

8. Selon votre expérience, l'accès des opérateurs non-nationaux aux formules de PPP d'initiative privé est-il assuré ? En particulier, lorsqu'il existe une invitation des pouvoirs adjudicateurs à présenter une initiative, cette invitation fait-elle généralement l'objet d'une publicité adéquate permettant l'information de tous les opérateurs intéressés ? Une procédure de sélection véritablement concurrentielle est-elle organisée pour assurer la mise en oeuvre du projet retenu ?

Gaz de France est peu concerné par les projets d'initiative privée.

9. Quelle serait selon vous la meilleure formule pour assurer le développement des PPP d'initiative privée dans l'Union européenne tout en assurant le respect des principes de transparence, de non discrimination et d'égalité de traitement ?

Gaz de France est peu concerné par les projets d'initiative privée.

La phase postérieure à la sélection du partenaire privé

L'encadrement contractuel du projet

10. Quelle expérience avez-vous de la phase postérieure à la sélection du partenaire privé dans les opérations de PPP contractuels ?

De manière générale, la phase postérieure à la sélection du partenaire se déroule dans de bonnes conditions, en particulier lorsque le cadre réglementaire présente une relative stabilité et une certaine prévisibilité, et que le contrat est suffisamment flexible pour s'adapter aux évolutions du partenariat.

11. Avez-vous connaissance de cas dans lesquels les conditions d'exécution – y compris les clauses d'adaptation dans le temps - ont pu avoir une incidence discriminatoire ou ont pu constituer une entrave injustifiée à la libre prestation de services ou à la liberté d'établissement ? Si oui, pouvez-vous décrire le type de problèmes rencontrés ?

Gaz de France n'a pas connaissance de telles incidences.

12. Avez-vous connaissance de pratiques ou de mécanismes d'évaluation d'offres ayant des incidences discriminatoires ?

Gaz de France n'a pas connaissance de telles pratiques.

13. Partagez-vous le constat de la Commission selon lequel certains montages du type "step-in" peuvent poser problème en termes de transparence et d'égalité de traitement ? Connaissez-vous d'autres "clauses types" dont la mise en oeuvre est susceptible de poser des problèmes similaires ?

Gaz de France n'a pas connaissance de tels problèmes.

> *Cependant, nous souhaitons souligner par réaction aux commentaires du paragraphe 48 et 49 du présent Livre Vert sur les PPP, que certains changements dans l'organisation de l'entreprise attributaire du contrat de partenariat n'impliquent pas qu'un nouveau contrat doive être signé. En effet, un changement de forme juridique et/ou de l'actionnariat de l'entreprise n'a pas pour objet de remettre en cause les conditions d'exécution du contrat (personnel et moyens matériels dédiés au contrat, etc.….).*

14. Estimez-vous qu'il est nécessaire de clarifier au niveau communautaire certains aspects relevant du cadre contractuel des PPP ? Si oui, sur quel(s) aspect(s) devrait porter cette clarification ?

Gaz de France ne juge pas une telle clarification nécessaire (voir éléments de justification à la Question 10)

La sous-traitance de certaines tâches

15. Dans le contexte des opérations de PPP, avez-vous connaissance de problèmes particuliers rencontrés en matière de sous-traitance ? Lesquels?

Gaz de France n'a pas connaissance de problèmes particuliers en matière de sous-traitance.

16. Le phénomène des PPP de type contractuel, impliquant le transfert d'un ensemble de tâches à un unique partenaire privé, justifie-t-il selon vous que des règles plus détaillées et/ou d'un champ d'application plus large soient mises en place en ce qui concerne le phénomène de sous-traitance?

Ne rencontrant aucune difficulté en la matière, Gaz de France considère que l'élaboration de nouvelles règles communautaires ne se justifie pas.

17. De manière plus générale, estimez-vous qu'une initiative complémentaire devrait être prise au niveau communautaire en vue de clarifier, ou d'aménager, les règles relatives à la sous-traitance?

Gaz de France ne juge donc pas nécessaire une initiative communautaire relative à la sous-traitance.

LE PPP PUREMENT INSTITUTIONNALISE

Si, la Commission jugeait souhaitable une nouvelle initiative dans le domaine des PPP, Gaz de France juge nécessaire de distinguer clairement les PPP contractuels et les PPP institutionnalisés, qui ne relèvent pas de la même logique. Ces deux formes distinctes de PPP ne doivent donc pas relever de la même réglementation.

18. Quelle expérience avez-vous de la mise en place d'opérations de PPP de type institutionnalisé ? En particulier, votre expérience vous conduit-elle à penser que le droit communautaire des marchés publics et des concessions est respecté dans le cas de montages de PPP institutionnalisé? Si non, pourquoi ?

L'expérience de Gaz de France dans le domaine des PPP de type institutionnalisé n'est ni suffisamment significative ni suffisamment homogène pour lui permettre de prendre position sur le respect du droit communautaire des marchés publics et des concessions. De l'expérience internationale de Gaz de France, il ressort en tout état de cause que ces PPP institutionnalisés font en général l'objet d'appels d'offres bénéficiant d'une large publicité.

19. Estimez-vous qu'une initiative doit être prise au niveau communautaire en vu de clarifier ou de préciser les obligations des organismes adjudicateurs quant aux conditions dans lesquelles doivent être mis en concurrence les opérateurs potentiellement intéressés par un projet de type institutionnalisé ? Si oui, sur quels points particuliers et sous quelle forme? Si non, pourquoi ?

Gaz de France ne juge pas nécessaire de clarifier ce point, mais tient, dans ce cadre, à souligner l'importance de la liberté des entreprises quant à la répartition de leur actionnariat.

De façon générale et indépendamment des questions soulevées dans ce document:

20. Quelles sont les mesures ou les pratiques que vous estimez constitutives d'entraves à la mise en place des PPP au sein de l'Union européenne ?

Gaz de France n'a pas connaissance de mesures ou pratiques qui pourraient être qualifiées d'entraves à la mise en place des PPP.

21. Connaissez-vous d'autres formes de PPP développées dans les pays en dehors de l'Union ? Connaissez-vous des exemples de 'bonnes pratiques' développées dans ce cadre, dont l'Union pourrait s'inspirer ? Si oui, lesquelles ?

Gaz de France n'a pas d'expérience suffisamment significative d'autres formes de PPP dans les pays en dehors de l'Union.

22. De façon plus générale, et compte tenu des besoins importants d'investissements nécessaires dans certains Etats membres, afin de poursuivre un développement économique social et durable, estimez-vous utile une réflexion collective sur ces questions qui se poursuivrait à des intervalles réguliers entre les acteurs concernés, et qui permettrait un échange des meilleures pratiques ? Est-ce que vous considérez que la Commission devrait animer un tel réseau ?

Gaz de France est prêt à répondre aux nouveaux besoins d'investissement de certains Etats membres pour les accompagner dans leur développement économique social et durable, et tout particulièrement dans le domaine énergétique.

Un échange des meilleures pratiques entre les Etats membres peut, à ce titre, être source de progrès. Si une telle réflexion collective était menée, elle devrait l'être dans le respect de la diversité et du principe de subsidiarité.

26 juillet 2004

Livre vert de la Commission européenne sur les partenariats public-privé et le droit communautaire des marchés publics et des concessions.

CONTRIBUTION DE SUEZ

Le Livre vert publié par la Commission européenne le 30 avril dernier consulte les opérateurs et toutes parties intéressées sur les partenariats public-privé et le droit communautaire des marchés publics et des concessions. Suez salue cette initiative de la Commission. Ainsi que le relève le Livre vert, le terme « partenariat public-privé » n'est en effet pas défini au niveau communautaire. Aussi, Suez appuie la Commission dans son souci d'analyser si le cadre communautaire existant est approprié aux enjeux et aux caractéristiques spécifiques des partenariats public-privé[1].

Suez, entreprise européenne, d'origine franco-belge, partenaire du développement durable, exerce ses activités dans l'énergie, dans les métiers du gaz et de l'électricité (avec notamment les sociétés Electrabel, Distrigaz, Fluxys, Elyo) ainsi que dans l'environnement, dans les métiers de l'eau, de l'assainissement et dans ceux du traitement, du recyclage, du tri et de la valorisation des déchets (avec les sociétés Suez Environnement, Degrémont et Sita). Forte de ses 172 000 collaborateurs, Suez travaille dans plus de 100 pays. Elle a réalisé un chiffre d'affaires de 39,6 milliards d'euros en 2003. 80% de ce chiffre d'affaires est réalisé dans l'Europe des 25, où Suez emploie plus de 130 000 personnes.

Suez dispose d'une forte légitimité à exprimer sa position sur le sujet posé par le Livre vert. Suez possède en effet une expérience séculaire des PPP dont elle pratique les différentes formes depuis 150 ans. Les entreprises du groupe sont, historiquement, nées du développement des PPP. Ces partenariats ont imprégné l'expérience, le savoir-faire et la culture de Suez :

- Suez a été créé pour réaliser le canal de Suez, projet d'aménagement à vocation universelle, dans une logique de PPP puisqu'il s'agissait d'une concession. La Compagnie universelle du Canal de Suez a géré ce canal pendant près d'un siècle,
- la Société Générale de Belgique a été créée en 1822 pour favoriser l'industrie nationale et développer des projets en France et en Chine,
- dans la seconde moitié du XIXème siècle, la société Lyonnaise des Eaux et de l'Eclairage a été créée pour répondre aux besoins de collectivités locales dans les grandes infrastructures de réseaux d'énergie et d'eau. Elle a géré des contrats de concessions de gaz et d'électricité en France jusqu'aux nationalisations de 1945 ; 80% de son chiffre d'affaires était ainsi réalisé dans les domaines de l'électricité et du gaz dans des projets de PPP,
- Sita a été créée en 1919 pour l'enlèvement des déchets à Paris à la demande de la Ville.

[1] cf. point 18 du Livre vert.

Suez soutient également la démarche de la Commission visant à amorcer un débat sur la meilleure façon d'assurer que les PPP « puissent se développer dans un contexte de concurrence efficace et de clarté juridique »[2]. Un tel contexte est nécessaire au développement et à la réalisation de PPP dans l'Union européenne. Les PPP constituent en effet des formules permettant d'engager les investissements d'infrastructures et de services qui sont jugés prioritaires par la puissance publique. Ils facilitent le développement rapide et de bonne qualité des infrastructures et des services d'intérêt général dans les Etats membres. En effet, les PPP conjuguent l'expertise opérationnelle (savoir-faire technique, expérience du terrain, capacité d'innovation, efficacité de gestion, réactivité, adaptabilité, souci du consommateur) et la capacité de financement des entreprises, avec les missions d'organisation, de conception, de régulation et de contrôle que peut assumer la puissance publique, grâce à une claire répartition des rôles.

Les différentes formules de PPP peuvent, en outre, apporter une contribution significative à l'attractivité ainsi qu'à la compétitivité de l'Union européenne. Les besoins en investissements sont considérables : ils concernent à la fois les infrastructures, dont les besoins en investissements de l'UE 15 ont été évalués à 600 milliards d'euros par la Commission[3] pour les grands réseaux de transport et les infrastructures nécessaires à la protection de l'environnement ; les besoins sont également substantiels dans le domaine des services et d'accès aux réseaux. Ceux-ci vont en outre être fortement accrus suite à l'élargissement.
Parallèlement, par sa stabilité politique et économique, et depuis la création de l'euro, l'Union européenne constitue un pôle fortement attractif pour l'épargne mondiale et, de ce fait, une zone d'investissements potentiels importante.

La Commission souligne, à juste titre, que la problématique des PPP se situe en aval du choix économique et organisationnel effectué par une autorité locale ou nationale. En effet, la mise en œuvre d'un PPP constitue une prérogative de l'autorité publique, seule à même de décider du mode d'organisation d'un service ou de gestion d'une infrastructure. Suez souligne qu'il est également essentiel de distinguer les PPP de la notion de privatisation. A la différence des PPP, la privatisation entraîne un transfert définitif de la propriété des actifs alors que les PPP permettent à l'autorité publique d'en demeurer propriétaire et d'assurer ainsi l'orientation stratégique, la régulation et le contrôle du service.

Avant de répondre aux questions posées dans le Livre vert, Suez souhaite appeler l'attention de la Commission sur les principaux éléments suivants.

Afin de garantir le développement des PPP dans un contexte de concurrence efficace et de clarté juridique, il serait souhaitable, dans le respect de la liberté de choix des autorités publiques quant au mode d'organisation des services et dans le respect des principes du traité, que la Commission précise dans une directive, qui serait commune à tous les PPP - contractuels et institutionnels - les principes et éléments suivants :

- la définition des PPP,
- le principe de publicité préalable et de mise en concurrence sur l'attribution du contrat,
- une définition du terme « tiers » qui limite les dérogations au principe de mise en concurrence,
- l'égalité d'accès aux subventions publiques.

[2] cf. point 16 du Livre vert.
[3] cf. Communication de la Commission européenne « une initiative européenne pour la croissance ». Novembre 2003.

1. La définition des PPP

La distinction faite par la Commission entre PPP contractuels et PPP institutionnels est justifiée.

A cet égard, il serait opportun de sécuriser la définition communautaire de la concession, afin d'éviter les problèmes d'interprétation soulevés par la Communication interprétative de la Commission sur les concessions en droit communautaire, qui sont source d'insécurité juridique et peuvent limiter l'attractivité[4] et le financement des projets. Au-delà du critère du mode de rémunération (paiement par le consommateur ou par l'autorité publique), il serait économiquement plus pertinent d'adopter une définition des concessions qui prenne en compte à la fois les critères du risque et de l'objet du PPP. Ainsi, par exemple, une concession pourrait être définie comme le contrat par lequel une collectivité locale confie à une entreprise la gestion d'un service d'intérêt général, et dont la rémunération comporte un risque significatif lié aux résultats de l'exploitation.

Aussi, un contrat de construction et d'exploitation (BOT[5]) d'une usine de traitement d'eau, où l'opérateur supporte un risque significatif lié aux évolutions du volume d'eau vendue, serait-il logiquement qualifié de concession au sens communautaire. Il en serait de même pour un contrat de construction et d'exploitation d'usine d'incinération, dans le cas où les recettes de l'opérateur dépendent de façon significative de ventes à un prix non garanti sur le marché de production d'électricité.

Ces cas sont en situation d'insécurité juridique, puisque, par exemple, ils relèvent en droit français de la procédure de délégation de service public (proche de la notion de « concession de services » européenne) alors qu'ils sont soumis aux directives marchés publics en droit communautaire.

2. Le principe de publicité préalable et de mise en concurrence sur l'attribution du contrat

Lorsqu'un organisme public décide de faire intervenir un tiers dans le cadre d'un PPP, que ce soit sous forme contractuelle ou institutionnelle, il est essentiel de respecter les principes de publicité préalable et de mise en concurrence sur le contrat.

La législation communautaire en vigueur concernant les obligations de publicité préalable n'est pas suffisante et est parfois source d'insécurité juridique : par exemple, dans le domaine des concessions, l'obligation explicite de publicité ne concerne que les concessions de travaux dans les secteurs dits classiques, et aucun modèle d'avis communautaire n'est adapté au cas de la concession de service. Les contrats de concessions de service et de travaux étant généralement mixtes, un principe d'obligation de publicité commun à tous les PPP, et notamment aux concessions, permettrait d'éviter toute incertitude d'application.

Le principe de mise en concurrence sur le service implique notamment, lors de la mise en place d'un PPP institutionnel (c'est à dire une société dans laquelle l'entreprise privée détient des parts du capital et participe à la gestion du service en tant qu'opérateur) que la mise en concurrence porte sur l'attribution du contrat. Au moyen d'objectifs de performance, elle permet en effet d'améliorer le service aux consommateurs.

3. La définition du terme « tiers »

Lorsqu'un organisme public confie une mission de service public à un tiers, le principe de mise en concurrence s'applique. La définition juridique du terme « tiers » est donc essentielle car elle délimite les cas d'exonération aux règles de mise en concurrence. La dérogation au principe de concurrence doit être strictement limitée aux deux conditions cumulatives suivantes :

- l'entité qui se voit octroyer le contrat réalise l'intégralité de son chiffre d'affaires avec l'organisme adjudicateur,
- l'entité qui se voit octroyer le contrat ne dispose pas d'autonomie décisionnelle et est soumise aux mêmes procédures de contrôle que celles qui s'appliquent aux propres services de l'organisme adjudicateur.

[4] C'est notamment le cas dans les nouveaux Etats membres, dont l'expérience en matière de concession est parfois assez récente et nécessite un encadrement juridique.

[5] Voir infra. les définitions fournies en réponse à la question1.

4. L'égalité d'accès aux subventions publiques

Les actuelles inégalités d'accès aux subventions publiques constatées constituent une des principales discriminations dont souffrent les opérateurs privés (cf. exemples dans la réponse à la question 12).

REPONSES AUX QUESTIONS POSEES PAR LA COMMISSION DANS LE LIVRE VERT.

1) Quels types de montages de PPP purement contractuels connaissez-vous ? Ces montages font-ils l'objet d'un encadrement spécifique (législatif ou autre) dans votre pays ?

La terminologie liée aux PPP est confuse. Le terme « PPP » lui-même, recouvre différentes réalités selon le pays ou le contexte dans lequel il est employé.

Les métiers de Suez consistent principalement à gérer des services publics sous une forme contractuelle ou institutionnelle avec des autorités publiques. Au sein de l'Union européenne, dans le secteur de l'eau et de l'assainissement, environ un tiers des habitants sont desservis par un opérateur privé via une forme de PPP et, pour ces mêmes métiers, environ 6% des européens sont desservis par une société du groupe Suez.

En fonction de la volonté de l'organisme adjudicateur, Suez intervient sous différentes formes de PPP comme les marchés de gérance ou O&M[6], les régies intéressées, les contrats de délégation de service public (affermages, concessions), les BOT ou bien encore les PFI britanniques, qui regroupent des contrats très variés. Selon le type de PPP choisi, le degré de participation de l'opérateur dans le financement des investissements ainsi que la nature de la relation entre l'opérateur et le consommateur final varient.
Il est fréquent que pour mieux s'adapter aux besoins de l'organisme adjudicateur, le PPP choisi soit hybride entre deux des modèles cités ci-dessus.

Les définitions précises d'un O&M, d'un contrat de délégation de service public, et d'un contrat « d'infrastructures », principales formes contractuelles mises en œuvre par les sociétés de Suez sont les suivantes :

- **Opération et Maintenance (O&M)**

- L'opérateur privé prend en charge le fonctionnement opérationnel du service, sur un secteur géographique précis, et avec un niveau de responsabilité déterminé. A ce titre, l'opérateur privé peut se voir conférer une autorité sur le personnel sous statut public, en charge du service et assure la gestion quotidienne et la maintenance des installations.
- L'autorité publique rétribue l'opérateur privé pour les prestations effectuées. Cette rétribution peut être modulée en fonction de critères de performance identifiés et mesurés.

- **Construction et gestion d'infrastructures, type Build Operate and Transfer (BOT)**

- L'opérateur privé se voit confier la responsabilité de la conception, du financement, de la construction (ou de la réhabilitation) et de la gestion, sur une durée déterminée, d'un équipement majeur. En contrepartie, il est rémunéré par l'autorité publique, en lui facturant le service rendu pour ce nouvel équipement.
- Ce type de contrat est particulièrement bien adapté[7] lorsque les projets de développement de la collectivité portent seulement sur la réalisation d'une infrastructure bien déterminée, par exemple : usine de traitement d'eau, usine d'incinération.

[6] O&M = Operation and Maintenance

[7] Comme rappelé dans l'introduction, il arrive que les catégories de PPP ne soient pas semblables dans les droits nationaux et le droit communautaire. Par exemple, certains schémas de BOT sont classés dans les délégations des service public dans le droit français.

- **Délégation de Service Public (DSP)**

- L'opérateur privé se voit confier par l'autorité publique la responsabilité opérationnelle de la gestion du service pendant une durée déterminée. L'opérateur, qui se rémunère en principe directement auprès des consommateurs, finance tout ou une partie du renouvellement (affermage) et des infrastructures nouvelles (concession). Dans la pratique peu de contrats répondent à une stricte distinction entre affermage et concession[8].
- Dans tous les cas la collectivité publique prend les décisions essentielles, notamment en ce qui concerne les tarifs et les objectifs à atteindre, et conserve un contrôle étroit sur les conditions d'exécution du service public.

Lorsque le PPP contractuel est qualifié de marché public, les règles nationales, qui comprennent au moins la transposition des directives marchés publics, s'appliquent. C'est le cas par exemple pour les contrats d'O&M.

Dans le cas de montages PPP qui ne relèvent pas des directives marchés publics (par exemple les concessions ou les affermages), trois pays de l'Union européenne ont, à notre connaissance, mis en place un encadrement législatif :

- la loi Sapin en France (1993) : cette loi, avec ses décrets d'application, impose la procédure de mise en concurrence des contrats de délégation d'un service public après publicité. Cette procédure n'est pas différenciée entre les contrats d'affermage, de concessions et autres montages complexes.
- la législation espagnole : le décret royal 2/2000 qui encadre les contrats administratifs, complété par la loi 13/2003 qui s'applique aux concessions de travaux publics, donnent les principes relatifs à la passation des contrats, et garantissent la concurrence. De plus, les services locaux comme l'eau et l'assainissement, font l'objet d'une réglementation locale spécifique, qui détaille les procédures applicables pour l'attribution de contrats.
- la législation italienne (loi Merloni de 1994, loi des finances de 2002 et paquet législatif sur les services publics locaux de 2003) : suite à la modernisation du secteur de l'eau initiée par la loi Galli de 1994, sur chacun des 91 territoires recouvrant le pays, un opérateur doit[9] être sélectionné : soit l'appel d'offres porte sur le contrat, soit il porte sur le choix du partenaire privé qui rentre dans le capital de la société exploitante. Des cas d'exonérations sont prévus, notamment pour les cas dits de « in-house » ainsi que pour les sociétés cotées avant le 10 octobre.2003.

Comme il est souligné en introduction du présent document, il serait souhaitable de préciser et d'améliorer la définition communautaire de la concession en retenant (au-delà du critère du mode de rémunération) à la fois les critères du risque et de l'objet du PPP. Ainsi, une concession pourrait être définie comme le contrat par lequel une collectivité locale confie à une entreprise la gestion d'un service d'intérêt général, et dont la rémunération comporte un risque significatif lié aux résultats de l'exploitation.

[8] En effet, il est fréquent qu'un contrat d'affermage prévoit des travaux à la charge du délégataire et réciproquement, il est exceptionnel qu'une concession mette tous les travaux à la charge du concessionnaire.

[9] Quelques cas d'exonération sont prévus, où plusieurs opérateurs pourront co-exister sur le même territoire.

2) De l'avis de la Commission, la transposition en droit national de la procédure de dialogue compétitif permettra aux parties concernées de disposer d'une procédure particulièrement adaptée à la passation des contrats qualifiés de marchés publics lors de la mise en place d'un PPP de type purement contractuel, tout en préservant les droits fondamentaux des opérateurs économiques. Partagez-vous ce point de vue ? Si non, pourquoi ?

Suez accueille favorablement la mise en place de la procédure de dialogue compétitif dans le cadre des marchés publics. En effet, même si sa mise en œuvre peut s'avérer complexe, cette procédure devrait permettre de promouvoir l'innovation technologique au sein de l'Union.
Il conviendra cependant de veiller à ce que la mise en œuvre de cette procédure respecte la propriété intellectuelle des concurrents. En effet, celle ci est menacée si l'organisme adjudicateur remet en concurrence l'ensemble des candidats sur la solution qu'il aura jugée bonne suite à la mise en commun des idées des différents soumissionnaires. Aussi, devrait-il être envisagé qu'à la suite de la première étape - qui consiste à la sélection par l'organisme adjudicataire d'un nombre restreint de concurrents sur la base de pré-projets – l'organisme adjudicateur poursuive avec les concurrents un dialogue parallèle, sur la base des solutions de chacun des candidats retenus, sans faire pression sur un candidat pour qu'il accepte que sa solution soit divulguée aux autres candidats.

En tout état de cause, la procédure de dialogue compétitif n'a de sens que dans les cas pour lesquels l'organisme adjudicateur n'est pas en mesure de définir a priori les choix technologiques liés à la prestation à réaliser.
Cette procédure, limitée à juste titre à certains marchés publics, présente une certaine flexibilité adaptée à des marchés complexes et au degré d'indétermination technique forte, mais elle ne propose pas la souplesse nécessaire aux négociations des contrats de concessions de services (cf. réponse à la question 7). En d'autres termes, la procédure de dialogue compétitif a pour but de définir le projet technique avant appel d'offres, alors que la phase de négociation dans le cadre de l'attribution d'un contrat de concession a pour but de définir le contrat qui liera les parties pendant une durée longue. En effet, la procédure de dialogue compétitif est inopérante pour définir avec précision la répartition des risques et des responsabilités entre les parties. Pas plus ne l'est-elle pour arrêter la répartition des responsabilités financières des parties. Aussi, cette procédure ne peut-elle remplacer la nécessaire phase de négociation entre les parties à un PPP.
Pour prendre un exemple concret, la procédure de dialogue compétitif pourrait être utilisée pour la réalisation d'une unité de traitement des boues de station d'épuration par exemple, car l'essentiel du projet dépend d'un choix technologique. Elle n'est en revanche pas pertinente le cas d'une délégation globale de la gestion du service d'assainissement.

3) En ce qui concerne ces contrats, existe-t-il selon vous des points autres que ceux relatifs au choix de la procédure d'adjudication, susceptibles de poser problème au regard du droit communautaire des marchés publics ? Si oui, lesquels et pour quelles raisons ?

Bien qu'elle ne relève pas directement du droit communautaire, une certaine dérive liée aux marchés dits « à reconduction », utilisés en France, notamment dans le domaine de la collecte des déchets est constatée.
Dans ces contrats, lorsque la collectivité locale décide de ne pas actionner la reconduction, le prestataire doit arrêter les prestations. En revanche, si au contraire, la collectivité locale décide de reconduire le contrat, le prestataire qui ne le souhaiterait plus n'a aucun droit de refus. Une telle situation n'est pas satisfaisante dans la mesure où elle a pour effet de rendre très malaisée la cotation des marchés par les candidats lors de la remise initiale des offres, tout en les forçant à intégrer ce risque dans leur prix. Une telle dérive ne répond pas à l'objectif de rationalisation des deniers publics.
Il serait donc tout à fait souhaitable de pallier les dérives de ce type de marchés, notamment en permettant au prestataire de refuser leur reconduction.

4) Avez-vous déjà organisé, participé, ou souhaité participer, à une procédure d'attribution d'une concession au sein de l'Union? Quelle expérience en avez-vous ?

Suez, avec ses différentes filiales, répond en moyenne à plus de 500 appels d'offres par an dans l'UE, essentiellement en France et en Espagne, pour des concessions de service (au sens communautaire).

Cette expérience a permis de constater que :

- les règles et pratiques des différents Etats Membres sont très hétérogènes ;
- il arrive que l'attention des collectivités locales soit parfois focalisée sur les aspects financiers ou tarifaires au détriment du niveau de qualité de service proposé. Ce fut par exemple le cas lors de l'appel d'offres pour le choix du gestionnaire des services d'eau et d'assainissement de Prague en 2001, où le choix de l'adjudicataire fut effectué sur le seul critère financier (prix d'achat des actions de la société titulaire du contrat) ;
- pour qu'une procédure d'attribution de concession soit réussie et qu'elle conduise à un PPP adapté, jouissant d'une sécurité juridique et d'une solidité économique suffisantes, il est nécessaire de passer par une étape de négociation significative entre l'autorité publique et l'opérateur (cf. réponse question 7) ;
- les règles de passation de contrats de concession, comme la loi Sapin[10] en France, donnent parfois lieu à des excès au contentieux. En effet, la complexité des procédures permet un grand nombre de recours purement formels, sans que l'infraction invoquée porte grief à celui qui la met en avant. Pour assurer une plus grande sécurité juridique, les directives recours devraient limiter la recevabilité des recours aux seuls moyens faisant grief au requérant.

5) Estimez vous que le cadre juridique communautaire actuel est suffisamment précis pour assurer la participation concrète et effective de sociétés ou groupements non-nationaux aux procédures de passation de concessions? Une concurrence réelle est-elle, selon vous, habituellement assurée dans ce cadre ?

En pratique et malgré le manque d'homogénéité des règles nationales quand elles existent, la publicité réalisée dans le cadre de passation de concessions suffit à signaler le lancement de la procédure aux opérateurs potentiellement intéressés. Dans certains pays, comme la France, la législation nationale en vigueur impose des règles de publicité précises.

En France, Lyonnaise des Eaux, filiale de Suez Environnement, est à l'origine de l'arrêt du Conseil d'Etat « Communauté de communes du Piémont de Barr ». Comme demandé, le Conseil d'Etat a considéré qu'une collectivité ne pouvait pas confier à un syndicat départemental la gestion d'une station d'épuration sans procéder à une publicité préalable. Malgré cette jurisprudence, il existe encore des cas en France où une collectivité locale attribue un contrat de concession de services d'eau à une régie voisine sans mise en concurrence.
D'une façon générale, afin d'échapper à la jurisprudence « Piémont de Barr », il arrive que les syndicats départementaux dans le domaine de l'eau et de l'assainissement incitent les communes à transférer leurs compétences afin de ne pas avoir à se soumettre à une procédure de mise en concurrence.

Ainsi, l'adoption d'une directive sur les PPP, qui préciserait les quatre points détaillés dans la première partie de ce document (cf. p. 3 et 4) et rappelés à la question suivante, permettrait de sécuriser la législation communautaire grâce à une clarification dans le droit positif de l'obligation de publicité préalable pour tous les PPP et de la définition de la notion de « tiers ».

[10] La loi Sapin comporte 8 étapes principales, qui peuvent chacune donner lieu à de nombreux recours.

6) Pensez-vous qu'une initiative législative communautaire, visant à encadrer la procédure de passation de concessions, est souhaitable ?

La question d'une éventuelle initiative législative communautaire dans le domaine des PPP se décline en trois points :

- quels PPP seraient concernés ?
- quel serait le contenu de l'outil législatif ?
- quel outil législatif serait utilisé ?

Suez estime qu'une initiative législative commune à tous les PPP, et non pas limitée aux seuls contrats de concessions, est souhaitable. Cet outil législatif, qui serait vraisemblablement une directive, devrait comporter les principes et éléments suivants :

1. la définition des PPP,
2. le principe de publicité préalable et de mise en concurrence sur l'attribution du contrat,
3. la définition du terme « tiers », qui limite les cas dérogatoires au principe de mise en concurrence,
4. l'égalité d'accès aux subventions publiques.

Chacun des ces points est développé dans la première partie du présent document (cf. p. 3 et 4).

Si un tel outil juridique devait être adopté, il devrait :

- respecter les caractéristiques des contrats de concession et ne pas condamner leur viabilité économique. Par exemple (cf. réponse à la question 7), les contrats de concession ne devraient pas être soumis aux règles d'attribution des marchés publics ;
- préserver l'équilibre économique des contrats en cours, sans les remettre en cause avant leur terme, afin de respecter les engagements pris par les parties ainsi que l'intérêt des usagers.

7) De manière plus générale, si vous estimez qu'il est nécessaire que la Commission propose une nouvelle action législative, existerait-il à votre avis des raisons objectives de viser dans cet acte tous les PPP de type contractuel, qu'ils soient qualifiés de marchés publics ou de concessions, pour les soumettre à des régimes de passation identiques ?

Si un outil législatif visant à encadrer les procédures de passation de concessions devait être adopté, il ne devrait en aucun cas être semblable à la réglementation européenne en vigueur pour les marchés publics.

Les concessions se caractérisent notamment par une prise de risques par le concessionnaire en matière d'investissements et de risques commerciaux sur une durée longue. De plus, le concessionnaire, en contact direct avec les consommateurs, assume une mission d'intérêt général, qu'il doit réaliser en respectant les règles et les objectifs fixés par la collectivité tout en bénéficiant d'une certaine autonomie.

Ainsi, la mise au point d'un contrat de concession nécessite une phase de négociation plus longue et plus complexe que dans le cas d'un marché public afin d'ajuster la répartition des risques, le contenu des missions et le financement de l'opération. L'appréciation par la collectivité publique de la relation de confiance qui peut s'instaurer avec l'opérateur est encore plus essentielle qu'en matière de marchés publics.

De plus, et contrairement aux marchés publics, il doit être possible de réviser périodiquement les contrats de concession, qui sont à juste titre d'une durée relativement longue, en fonction d'événements extérieurs ou d'ajustement des besoins de l'organisme adjudicateur (cf. question 14).

8) Selon votre expérience, l'accès des opérateurs non-nationaux aux formules de PPP d'initiative privé est-il assuré? En particulier, lorsqu'il existe une invitation des pouvoirs adjudicateurs à présenter une initiative, cette invitation fait-elle généralement l'objet d'une publicité adéquate permettant l'information de tous les opérateurs intéressés ? Une procédure de sélection véritablement concurrentielle est-elle organisée pour assurer la mise en œuvre du projet retenu ?

9) Quelle serait selon vous la meilleure formule pour assurer le développement des PPP d'initiative privée dans l'Union européenne tout en assurant le respect des principes de transparence, de non discrimination et d'égalité de traitement ?

Suez ne dispose pas de la pratique de projets d'initiative privée.

10) Quelle expérience avez-vous de la phase postérieure à la sélection du partenaire privé dans les opérations de PPP contractuels ?

L'expérience montre que la vie d'un contrat est toujours affectée par un certain nombre de changements ou bouleversements exogènes. Il est alors nécessaire pour les deux parties de convenir des modifications à apporter au contrat d'origine, dans le respect de certains principes (par exemple de l'équilibre économique initialement défini). Dans le cas de concessions, la durée du contrat (cf. question 14) implique des clauses de rendez-vous réguliers (par exemple quinquennaux) entre l'organisme adjudicataire et le titulaire du contrat.

11) Avez-vous connaissance de cas dans lesquels les conditions d'exécution – y compris les clauses d'adaptation dans le temps - ont pu avoir une incidence discriminatoire ou ont pu constituer une entrave injustifiée à la libre prestation de services ou à la liberté d'établissement ? Si oui, pouvez-vous décrire le type de problèmes rencontrés ?

Suez n'a pas connaissance de telles discriminations ou entraves.

12) Avez-vous connaissance de pratiques ou de mécanismes d'évaluation d'offres ayant des incidences discriminatoires ?

La plupart des discriminations dont souffrent les opérateurs privés sont moins liées aux mécanismes d'évaluation des offres qu'aux désavantages structurels qui pénalisent les offres du secteur privé.

Dans le domaine fiscal par exemple, les régies d'assainissement allemandes sont exemptées de TVA alors que les opérateurs privés se voient imposer une facturation avec une TVA de 16%. En France, la plupart des régies d'eau, d'assainissement et de gestion des déchets ne sont pas assujetties à l'impôt sur les sociétés ou à la taxe professionnelle ni à certaines redevances d'occupation du domaine public et ont des charges moindres pour les cotisations des retraites de leurs employés que les opérateurs privés. De plus, les régies de gestion des déchets sont exemptées de TVA.

Il est par ailleurs essentiel de veiller, au moyen du contrôle communautaire des aides d'Etat, à ce que l'octroi de subventions soit non discriminatoire entre les opérateurs, quel que soit leur statut.
En France, par exemple, il est pratiquement impossible de bénéficier d'aides des départements et des régions pour des travaux financés par les délégataires et non par des régies[11].
De plus, même lorsque le financement des infrastructures est à la charge de la collectivité publique, des discriminations sont parfois constatées en fonction du mode de gestion du service : le Conseil d'Etat français a

[11] En effet, la loi réserve le bénéfice de certaines subventions aux régies et les concessionnaires ne peuvent pas y prétendre.

validé en décembre 2003 la décision du Conseil Général des Landes d'accorder aux communes en régie un taux de subvention supérieur à celui accordé aux communes ayant délégué leurs services d'eau potable et d'assainissement.
Ces mesures discriminatoires sont un frein évident au développement des PPP. Aussi Suez promeut un outil législatif reposant sur quatre principes dont celui de l'égalité d'accès aux subventions publiques (cf. introduction p.4).

13) Partagez-vous le constat de la Commission selon lequel certains montages financiers, en particulier les montages de type "step-in" peuvent poser problème en termes de transparence et d'égalité de traitement ? Connaissez vous d'autres "clauses types" dont la mise en œuvre est susceptible de poser des problèmes similaires ?

Du fait même qu'un candidat est évalué sur ses compétences et sa capacité financière à assumer une opération, une substitution, après attribution du projet à un candidat, pourrait à priori être considérée comme contraire aux règles de concurrence.

Toutefois, la réalité est autre. Tant la personne publique que les opérateurs souhaitent, dans la mesure du possible, procéder à des opérations déconsolidantes. Or, dans une telle situation, seul un établissement financier peut admettre dans ses comptes une opération à caractère consolidant, ce qui paraît devoir, dans ces conditions, justifier la présence d'établissements financiers « aux côtés » du gestionnaire du service d'intérêt général.
Les clauses de step-in sont ainsi devenues nécessaires à la mise en œuvre de beaucoup de PPP et permettent d'obtenir des financements à meilleur coût.

Il est par ailleurs important de rappeler que les clauses de step-in ont un caractère essentiellement dissuasif : à notre connaissance aucune clause de ce type n'a été activée dans le domaine de l'eau et des déchets à ce jour.

Pour répondre aux inquiétudes légitimes de la Commission, Suez considère souhaitable qu'un changement significatif au niveau de l'opérateur (comme l'activation d'une clause de step-in) dans le cadre d'un contrat soit soumis à l'autorisation de la collectivité locale, laquelle ne peut faire valoir, pour s'y opposer, que des motifs mettant en cause la gestion du service ou les garanties présentées par l'opérateur.
Ce raisonnement doit également s'appliquer en cas de changement majeur dans l'actionnariat de l'opérateur. En effet, s'il est souhaitable qu'une autorité publique puisse s'opposer à une modification du capital de l'opérateur, les motifs du refus, comme l'a souligné le Conseil d'Etat en France, ne doivent pas être discrétionnaires.

14) Estimez-vous qu'il serait nécessaire de clarifier au niveau communautaire certains aspects relevant du cadre contractuel des PPP ? Si oui, sur quel(s) aspect(s) devrait porter cette clarification ?

Forte de son expérience séculaire des PPP, Suez tient à souligner les deux points suivants, relatifs à la durée des contrats et à leurs éventuels avenants.

La durée des contrats.

La mesure qui consisterait à limiter la durée des concessions de services ou de ne prendre comme seul critère la durée d'amortissement des investissements, est souvent considérée comme une mesure simple et efficace visant à dynamiser la concurrence. Cette question mérite un examen plus approfondi.

En effet, la détermination de la durée des contrats ne saurait s'appuyer uniquement sur des conditions d'amortissement et de rentabilité raisonnable. Par exemple, des contrats trop courts dans le secteur de l'eau ou de l'assainissement menaceraient l'optimisation du couple entretien/renouvellement des infrastructures. Une conséquence serait l'augmentation des coûts d'exploitation et un probable sous-investissement[12].

De plus, et indépendamment des investissements effectués, l'achèvement des objectifs de performance sur lesquels l'opérateur s'est engagé dans le contrat suppose une durée suffisamment longue. C'est par exemple le cas lorsqu'un contrat de concession prévoit des objectifs de réduction des pertes en eau. Dans certains nouveaux Etats membres, la seule réalisation d'un diagnostic précis de la situation des réseaux (dans le secteur de l'eau et de l'assainissement les réseaux sont en effet enterrés) nécessite une analyse de plusieurs années. De plus, la réalisation des objectifs de performance nécessite la formation du personnel, laquelle n'est efficace que dans la durée.

En outre, une courte durée des contrats nécessiterait de fréquentes mises en concurrence sur le service (dont l'objet réduit limiterait les possibilités d'innovation) dont le coût élevé pénaliserait les consommateurs. La concurrence ne serait ainsi pas stimulée. Au contraire, l'opérateur sortant disposerait dans ce cas d'un avantage significatif. En France, le Conseil de la Concurrence a confirmé ce raisonnement, en considérant, dans un avis rendu en 2001, que pour créer les conditions d'une saine concurrence, les contrats devaient avoir une durée suffisamment longue pour être attractifs.

Pour finir, l'expérience montre que la vie d'un contrat est souvent affectée par un certain nombre de changements ou de bouleversements exogènes. La durée est nécessaire pour que l'opérateur puisse anticiper et s'adapter à ces situations puis introduire, pour y faire face, les innovations techniques et de gestion pertinentes pour continuer à assurer la bonne qualité du service.

Les avenants éventuels aux contrats.
Comme souligné en réponse à la question 7, l'une des caractéristiques des contrats de concession est de pouvoir être adaptés dans le temps, sans toutefois remettre en cause l'égalité des candidats lors de l'appel d'offres. Une limitation excessive des possibilités d'avenants conduirait à limiter l'intérêt, pour une collectivité, de conclure un contrat de gestion de service si celui-ci devait être remis en cause ou résilié suite à chaque changement dans l'environnement du contrat. En obligeant à la résiliation des contrats avant terme, l'absence de possibilités d'avenants entraînerait également le risque de coûts supplémentaires pour les collectivités ainsi que pour les consommateurs.

15) Dans le contexte des opérations de PPP, avez-vous connaissance de problèmes particuliers rencontrés en matière de sous-traitance ? Lesquels ?
16) Le phénomène des PPP de type contractuel, impliquant le transfert d'un ensemble de tâches à un unique partenaire privé, justifie-t-il selon vous que des règles plus détaillées et/ou d'un champ d'application plus large soient mise en place en ce qui concerne le phénomène de sous-traitance ?
17) De manière plus générale, estimez-vous qu'une initiative complémentaire devrait être prise au niveau communautaire en vue de clarifier, ou d'aménager, les règles relatives à la sous-traitance ?

En application des directives marchés publics, les règles applicables en matière de sous-traitance sont différentes pour un concessionnaire selon que les dispositions de la directive « secteurs spéciaux » lui sont ou non applicables. Or de grandes incertitudes subsistent sur la notion de droits exclusifs et spéciaux que ne lève pas la nouvelle directive 2004-17. En effet, l'interprétation à donner à la nouvelle définition de ces droits par cette directive est délicate s'agissant d'entreprises dont tous les contrats n'ont pas été attribués selon une même procédure (cas des activités eau et assainissement en France). Par ailleurs, les règles applicables au secteur de l'assainissement sont confuses : la notion d'activité liée à l'eau potable est imprécise. Il ne peut être satisfaisant de prétendre assujettir ou non à une procédure formalisée les achats d'un concessionnaire dans le domaine de l'assainissement selon l'étendue des compétences de la collectivité publique, organisatrice du service[13].
En conséquence, une clarification des textes sur ces différents points serait bienvenue afin de lever ces incertitudes, sources d'insécurité juridique et donc frein au développement des partenariats concernés.

[12] Cas rencontrés par exemple dans des contrats de traitement des eaux usées en Espagne

[13] Critère défini par la Communication interprétative sur les concessions pour déterminer si un contrat de concession de travaux est soumis à publicité communautaire.

18) Quelle expérience avez-vous de la mise en place d'opérations de PPP de type institutionnalisé ? En particulier, votre expérience vous conduit-elle à penser que le droit communautaire des marchés publics et des concessions est respecté dans le cas de montages de PPP institutionnalisé? Si non, pourquoi ?

Pour une plus grande exhaustivité, et compte tenu des régimes législatifs différents dans les métiers de l'énergie et de l'environnement, Suez a jugé pertinent d'apporter une réponse d'une part en ce qui concerne les métiers de l'énergie et, d'autre part, en ce qui concerne l'environnement.

Dans le domaine de l'énergie

En Belgique, depuis la fin des années 1950, environ 80 % de la distribution publique d'électricité et 90 % de la distribution publique de gaz sont assurées par des PPP de type institutionnalisé. Ces montages font l'objet d'un encadrement législatif spécifique dans les trois régions du pays, en dehors du droit des marchés publics.

Cet encadrement législatif soumet les contrats de PPP de type institutionnalisé à une tutelle administrative :

- les décisions des communes, préalables à la constitution d'un PPP et, ultérieurement , celles relatives à son fonctionnement ou à sa liquidation, sont soit susceptibles de suspension et d'annulation, soit soumises à l'approbation de l'autorité de tutelle ;
- les actes des organes de gestion et de contrôle des PPP sont également soumis à une tutelle administrative générale (suspension ou annulation) ou spéciale (approbation) ainsi qu'à des règles de publicité ;
- les communes disposent toujours de la majorité des voix et des mandats, de façon à assurer la maîtrise des pouvoirs publics. L'associé privé se voit reconnaître un droit de veto limité à la protection de ses intérêts financiers d'actionnaire ;
- les travaux qui ne sont pas exécutés par du personnel de la structure, de même que les fournitures et les services donnent lieu à l'application de la législation des marchés publics.

L'ouverture du marché de l'énergie va de pair avec la création d'autorités de régulation auxquelles les PPP sont soumis :

- une autorité fédérale de régulation (la CREG) est chargée essentiellement d'approuver les tarifs d'accès aux réseaux d'électricité et de gaz ;
- trois autorités régionales de régulation sont chargées d'approuver les plans de développement, de vérifier l'exécution des obligations de service public applicables aux gestionnaires de réseau de distribution.

Les éléments qui précèdent, la durée des PPP institutionnels (de 18 à 30 ans maximum, selon les régions) ainsi que leurs spécificités, expliquent qu'ait été créée une législation spécifique aux PPP.

Dans le domaine de l'environnement

Un certain nombre de contrats ou de marchés sont attribués sans mise en concurrence à des établissements publics ou à des sociétés d'économie mixte, ce qui parait contraire aux principes dégagés par la jurisprudence en matière de phénomènes dits de « in-house ». Par exemple, l'attribution de marchés à la société Aquafin (société en charge de l'assainissement dans la région des Flandres en Belgique, dont l'actionnariat est composé à 80% par une holding détenue par la région des Flandres et à 20% par une société privée) s'est faite sans mise en concurrence.

Il paraît ainsi nécessaire de créer un droit positif clair sur ce thème. Ainsi qu'il est souligné en introduction de ce document, lorsqu'un organisme public confie une mission de service public à un tiers, le principe de mise en concurrence s'applique. La définition du terme « tiers » est donc essentielle car elle délimite les cas d'exonération aux règles de mise en concurrence. La dérogation au principe de concurrence doit être *strictement* limitée aux deux conditions cumulatives suivantes :

- l'entité qui se voit octroyer le contrat réalise l'intégralité de son chiffre d'affaires avec l'organisme adjudicateur,
- l'entité qui se voit octroyer le contrat ne dispose pas d'autonomie décisionnelle et est soumise aux mêmes procédures de contrôle que celles qui s'appliquent aux propres services de l'organisme adjudicateur.

Par ailleurs, la mise en place de PPP institutionnalisés présente dans certains pays une insécurité juridique qui nuit à l'attractivité des projets et à leur financement. C'est le cas par exemple dans le secteur de l'eau en Italie.
En effet, la modernisation de ce secteur s'appuie sur la mise en place de PPP institutionnels, dont la compatibilité avec les principes du traité est incertaine : souvent, une société à capitaux publics se voit attribuer un contrat de concession sans mise en concurrence et ensuite la vente d'une partie du capital de cette société fait l'objet d'un appel d'offres.
De plus, la multiplication des textes réglementaires sur la procédure de passation et l'absence d'une véritable coordination entre eux, crée une incertitude chez les opérateurs notamment quant à la durée des concessions. Cette imprécision du cadre juridique peut être démontrée d'une part, par l'insertion, dans les contrats signés entre opérateurs et organismes adjudicateurs, de clauses spécifiques relatives à la résiliation anticipée due à une éventuelle réduction de la durée de la concession (méthode de valorisation des actions et modalités de participation de l'actionnaire privé dans un nouvel appel d'offres) et, d'autre part, par la déclaration récente d'une autorité publique locale (l'AATO de Torinese) sur l'inexistence de règles juridiques claires sur le sujet.

19) Estimez-vous qu'une initiative devrait être prise au niveau communautaire en vue de clarifier ou de préciser les obligations des organismes adjudicateurs quant aux conditions dans lesquelles doivent être mis en concurrence les opérateurs potentiellement intéressés par un projet de type institutionnalisé? Si oui, sur quels points particuliers et sous quelle forme? Si non, pourquoi ?

Les PPP institutionnels ne sont pas directement visés par la Communication interprétative de la Commission sur les concessions en droit communautaire publiée en 2000. Or la mise en place de PPP institutionnels, dont le développement s'accélère en Europe, est parfois fragilisée par un manque de sécurité juridique.

Plutôt qu'une initiative en vue de clarifier les modalités de mise en concurrence dans le cadre de PPP institutionnels, il semble souhaitable en revanche que la Commission réaffirme et précise, dans une directive sur l'ensemble des PPP, un certain nombre de principes communs à tous les PPP, contractuels ou institutionnels.

L'affirmation du principe de publicité préalable et de mise en concurrence sur le contrat permettrait notamment de renforcer la sécurité juridique des montages de PPP institutionnels. En effet, si le principe de mise en concurrence dans le cadre de la mise en place d'un PPP contractuel semble généralement acquis et appliqué, il est essentiel qu'il soit également respecté dans le cadre de la mise en place d'un PPP institutionnel.
De façon concrète, lorsque l'achat de parts de la société exploitante, à capitaux jusqu'alors publics, accorde un pouvoir de gestion à l'investisseur privé, alors la mise en concurrence sur l'ouverture du capital d'une société titulaire d'un contrat, ne peut valablement se substituer à la mise en concurrence sur l'attribution du contrat. Dans ce cas, c'est donc l'attribution du contrat, qui peut être assorti de la vente de parts, qui doit faire l'objet de la mise en concurrence.
En revanche, l'entrée au capital d'investisseurs privés, sans droit particuliers liés à la gestion du service, ne doit pas être soumise à une obligation d'appel d'offres (exemple : cas d'une mise en bourse d'une partie du capital).
La mise en place du PPP institutionnel de Murcie, en Espagne, est un exemple de mise en concurrence dans le but d'améliorer le service : le prix d'achat correspondant à la part de capital de la société à capitaux publics en vente, était fixé en fonction des éléments du bilan de la société et la sélection de l'entreprise privée (attribution du contrat) portait sur l'offre technique et les engagements de qualité du service.

Par ailleurs, l'élaboration d'un droit positif pour les phénomènes dits de « in-house » (cf. troisième principe énoncé dans le propos introductif) permettra de clarifier le fait qu'une société d'économie mixte ne peut en aucun cas se voir attribuer un marché ou un contrat sans mise en concurrence.

D'autre part, une telle initiative législative, prise au niveau communautaire, devrait également tenir compte de la nécessité de préserver l'équilibre économique des contrats en cours, sans les remettre en cause avant leur terme, afin de respecter les engagements pris par les parties ainsi que l'intérêt des usagers. Elle devra également tenir compte de l'existence d'une réglementation européenne sectorielle dans le domaine de l'énergie.

20) Quelles sont les mesures ou pratiques que vous estimez constitutives d'entraves à la mise en place des PPP au sein de l'Union européenne ?

Les pratiques discriminatoires évoquées dans la réponse à la question 12 constituent des entraves à la mise en place des PPP au sein de l'Union européenne. Le projet de loi néerlandais qui vise notamment à interdire la mise en place de contrats de concession dans le domaine de l'eau, constitue potentiellement une entrave à la mise en place de PPP aux Pays-Bas ainsi qu'au principe de la libre prestation de services prévu par le traité.

Par ailleurs, la politique communautaire en matière d'utilisation de fonds communautaires n'est pas clairement en faveur du développement des PPP. Ce manque de clarté freine le développement de tels projets, notamment dans les nouveaux Etats Membres. Pour Suez, les objectifs affirmés par les Chefs d'Etat et de gouvernement à Lisbonne en mars 2000, ainsi que l'adoption d'une initiative européenne pour la croissance au Conseil européen de Bruxelles en octobre 2003, devraient conduire la Commission à adopter une attitude claire et positive sur les possibilités de réaliser des PPP et d'obtenir conjointement des fonds communautaires afin d'éviter de priver d'effets de levier importants et de gains d'efficacité reconnus pour conduire des projets d'infrastructures et assurer une gestion efficace et pérenne des projets réalisés.

A titre d'exemple, le mode de consultation sur financements européens concernant la construction d'infrastructures ne prévoit aujourd'hui pas de fonds européens pour financer des projets de PPP sous forme de BOT ou d'un DBO[14]. Le mode de consultation actuel est limité aux contrats de travaux sans opération et maintenance et sans investissement de la part des opérateurs privés. Si les PPP en BOT ou en DBO peuvent intégrer un financement communautaire portant sur le contrat de travaux, il n'existe toutefois pas de financement européen pour la globalité du PPP ; ce qui explique le faible nombre de PPP en DBO ou en BOT bénéficiant de fonds européens. Cette situation est préjudiciable au développement de l'investissement dans le domaine des infrastructures dans les nouveaux Etats membres.

En outre, ce mode de consultation pour les travaux sous fonds européens présente certaines lacunes. Il est en effet effectué aujourd'hui :

- sans vérification préalable de la conformité administrative et technique des offres au cahier des charges puisque leur ouverture est faite en un seul temps ;
- sur la base d'un prix d'opération et maintenance qui n'est que théorique et qui n'engage pas les candidats, ce qui biaise ainsi les offres de certains candidats sans que ceux-ci soient contractuellement tenus de respecter les coûts d'opération et maintenance annoncés ;
- sans pré-sélection ou examen préalable des références techniques et financières des candidats ;
- sur la base d'une conception (design) excessivement préétablie des projets et ainsi sans possibilité pour les opérateurs de travaux, possédant un savoir-faire technique spécialisé, de proposer des solutions techniques optimisées en tirant, par exemple, profit de récents développements technologiques.

Pour favoriser le développement des PPP dans l'UE dans un contexte de concurrence efficace, il serait ainsi souhaitable d'organiser des modes de consultation qui permettent de pallier ces lacunes.

Aussi, Suez suggère l'élaboration d'un guide et de procédures pratiques à destination des Etats membres, des autorités locales et des acteurs concernés afin de les aider à développer des montages de PPP qui puissent permettre de mobiliser les fonds communautaires, dans le respect des principes du traité. A cet égard, les documents publiés par la Commission « Guidelines for successful PPPs » (publié en 2003) et, plus récemment, le « PPP Resource book » (juin 2004) ne répondent pas à ces besoins.

Une réflexion, menée par la Commission avec les acteurs concernés, pourrait être lancée à cette fin (cf. infra question 22).

[14] « Design-build, operate » : PPP où l'autorité confie à l'opérateur privé la conception, la construction et l'exploitation, pour une période déterminée, d'une nouvelle installation. Celle-ci demeure propriété de l'autorité publique. Le risque lié à la conception et à la gestion est supporté par l'opérateur privé, qui est rétribué par l'autorité publique. L'opérateur privé s'engage sur un coût global de construction et d'exploitation. Le financement de l'investissement est supporté par l'autorité publique.

21) Connaissez-vous d'autres formes de PPP développées dans les pays en dehors de l'Union ? Connaissez-vous des exemples de « bonnes pratiques » développées dans ce cadre, dont l'Union pourrait s'inspirer ? Si oui, lesquelles ?

Suez n'a pas connaissance d'autres formes de PPP développées hors de l'Union.

22) De façon plus générale, et compte tenu des besoins importants d'investissements nécessaires dans certains Etats membres, afin de poursuivre un développement économique et social durable, estimez-vous utile une réflexion collective sur ces questions qui se poursuivrait à des intervalles réguliers entre les acteurs concernés, et qui permettrait un échange des meilleures pratiques ? Est-ce que vous considérez que la Commission devrait animer un tel réseau ?

Suez considère qu'une réflexion sur ces questions, qui se poursuivrait à intervalles réguliers entre les acteurs concernés par les PPP serait très utile, compte tenu, d'une part de la nécessité d'assurer le développement des PPP au sein de l'UE élargie dans un contexte de concurrence efficace et de clarté juridique et, d'autre part, compte tenu des besoins en investissements nécessaires dans certains pays de l'Union.

Une telle réflexion devrait porter sur les principaux thèmes soulevés par le Livre vert ainsi que sur les aides d'Etat. Elle devrait également aborder les questions liées aux financements des PPP au moyen de fonds communautaires afin de favoriser les effets de leviers nécessaires au développement de projets d'infrastructures et à la gestion durable et pérenne des ouvrages réalisés.

Pour Suez, la Commission européenne devrait animer un tel réseau. Celui-ci devrait, notamment, impliquer les opérateurs dotés d'une expérience concrète des PPP au sein de l'Union européenne ainsi que des représentants des autorités des Etats membres, en particulier des autorités locales. Des contacts bilatéraux sur ces sujets devraient également être organisés par la Commission sur ces questions. Suez se tient naturellement à la disposition de la Commission pour évoquer ces sujets et partager son expérience des partenariats public-privé en Europe.

T & D International

28 juin 2004

Réponses aux questions
du
LIVRE VERT

sur les Partenariats Publics-Privés
et
le droit communautaire des marchés publics et des concessions

Réf : com(2004) 327 final

1. Quels types de montages de PPP purement contractuel connaissez-vous? Ces montages font-ils l'objet d'un encadrement spécifique (législatif ou autre) dans votre pays ?

Je connais les très grosses concessions ferroviaires, en particulier le Taiwan High Speed Train. J'apporte une contribution de monteur d'affaires qui sollicite toutes le compétences pour présenter un projet qui inspire confiance. Je conçois mon rôle comme celui d'un chef d'orchestre qui met à sa juste valeur toutes les compétences indispensables pour pérenniser la crédibilité des engagements.

Un contrat ou un plan de financement offre une ligne d'actions. Mais, aussi bons soient-ils, ils ne transformeront jamais un mauvais montage en un projet réussi. Certaines petites équipes peuvent réussir sous la direction d'un de ses experts. Mais donner trop de pouvoir aux constructeur, financier ou juriste dans un projet ferroviaire hypothèque la pérennité pour des raisons telles que :

- des visions à des termes trop courts,
- Incapacité de réagir aux aléas de la vie des affaires lorsque ces réactions relèvent de compétences sous-représentées,
- Les tempêtes emportent trop souvent les barrières seulement juridiques.

Deux précautions doivent être garanties :

- l'équilibre des respects des compétences en fonction de leur capacité de construire et d'entretenir la confiance dans le projet,
- des montages financier ou juridique respectant les exigences du marché du transport et le métier de celui qui sait l'exploiter.

Il en résulte que chacun doit s'engager dans son domaine de compétence. En particulier, la puissance publique doit laisser les concurrents s'engager sur leurs propres prévisions de trafic dont elle ne peut faire qu’un critère d’appréciation de l’offre par rapport à l’idée qu’elle s’en fait bien entendu.

La grille d’évaluation des offres doit être en partie partagée. C’est le cadre transparent du dialogue compétitif. Elle comprend trois parties :

a- Une partie confidentielle aussi réduite que possible,

b- Un deuxième partie publique (voir question 21),

c- Une troisième partie consacrée aux risques, elle-même découpée en deux parties :
   - Une liste de risques par rapport auxquels la puissance publique demande au concurrents de se positionner
   - Une liste complémentaire à créer par chaque concurrent en fonction des spécificités de son approche.

2. De l'avis de la Commission, la transposition en droit national de la procédure de dialogue compétitif permettra aux parties concernées de disposer d'une procédure particulièrement adaptée à la passation des contrats qualifiés de marchés publics lors de la mise en place d'un PPP de type purement contractuel, tout en préservant les droits fondamentaux des opérateurs économiques. Partagez-vous ce point de vue? Si non, pourquoi ?

A travers le monde, on s’aperçoit que tous les projets un peu novateurs font l’objet de plusieurs appels d’offres. Chaque relance prend en compte les enseignements des appels précédents. Formalisée ou pas, c’est la seule façon pour une autorité d’adapter sa demande aux offres qu’elles découvrent. Le marché du transport ferroviaire est plus grand que ne peut appréhender une autorité normale. L’innovation est véhiculée par les concurrents. Appel d’offres après appel d’offres, pour les projets complexes, la seule façon équitable et efficace de mettre en œuvre l’état de l’art du moment est ce dialogue compétitif. (voir question 21)

C’est aussi la meilleure façon d’organiser la transparence indispensable. En effet :

a. Plus la complexité est grande, moins la transparence aura d’impact sur l’acuité de la compétition. En effet, le savoir-faire dépasse largement les informations qui auront été mises sur la place publique.

b. Dans une telle complexité encore, la transparence est la vraie protection des décideurs publics. (voir question 21)

c. Le niveau de transparence est très variable d’un pays à l’autre.

3. En ce qui concerne ces contrats, existe-t-il selon vous des points autres que ceux relatifs au choix de la procédure d'adjudication, susceptibles de poser problème au regard du droit communautaire des marchés publics? Si oui, lesquels et pour quelles raisons ?

Sur 451 PFI en Angleterre, on trouve 239 écoles nouvelles ou rénovées et seulement 23 projets de transport. Les projets de transport se caractérisent par leur faible nombre et leur taille importante. Cela a plusieurs conséquences :

a- L'innovation ne se situe pas à l'échelle d'un pays, mais sur la totalité du marché mondial. (voir question 21)

b- Par voie de conséquence, les décideurs publiques locaux ont du mal à suivre les progrès des candidats.

c- Le ferroviaire, en Europe, est à un tournant qui verra les métiers et la distribution du pouvoir complètement modifiés.

d- Des partenariats de toutes sortes se substitueront progressivement à la traditionnelle puissance publique dans ces activités de transport.

Pour ces 4 raisons, le dialogue compétitif doit être organisé. Le partage des grilles de sélection en deviendra un outil très utile. Et le nouveau droit des marchés devra permettre des regroupements d'offres dans des conditions équitables et tirant profit de travail accompli, sans avoir à repartir de zéro.

4. Avez-vous déjà organisé, participé, ou souhaité organiser ou participer à une procédure d'attribution de concession au sein de l'Union? Quelle expérience en avez-vous?

Non. Mais à Taiwan, j'ai participé à la procédure d'attribution et de mise en place de la concession de train à grande vitesse.

5. Estimez vous que le cadre juridique communautaire actuel est suffisamment précis pour assurer la participation concrète et effective de sociétés ou groupements non-nationaux aux procédures de passation de concessions? Une concurrence réelle est-elle, selon vous, habituellement assurée dans ce cadre ?

Sans avis sur le cadre communautaire. Mais la pratique de l'international montre que la concurrence n'est réelle que si les concurrents ont intégré le contexte local. L'institution du dialogue compétitif permettra une meilleure mise en concurrence.

6. Pensez-vous qu'une initiative législative communautaire, visant à encadrer la procédure de passation de concessions, est souhaitable?

Le marché ferroviaire de chaque nation est trop faible pour pouvoir disposer rapidement d'un retour d'expérience significatif. Si l'Europe pouvait faire quelque chose dans cette perspective, ce serait intéressant.
Quant à encadrer la procédure de passation de concessions, si on s'adresse aux experts d'un domaine, leur souci de perfection pourrait aller jusqu'à rendre les PPP impraticables, en particulier dans le ferroviaire, si on ne prend pas en considération les retours d'expériences spécifiques de ferroviaire. Il ne faut pas écrire dans le marbre trop tôt, ni de façon trop générale. Ces précautions seront d'autant plus facile à respecter que l'expérience internationale montre qu'un candidat concessionnaire est capable de beaucoup de flexibilité tout en gagnant quand même sa vie.

7. De manière plus générale, si vous estimez qu'il est nécessaire que la Commission propose une nouvelle action législative, existerait-il à votre avis des raisons objectives de viser dans cet acte tous les PPP de type contractuel, qu'ils soient qualifiés de marchés publics ou de concessions, pour les soumettre à des régimes de passation identique ?

Les soumettre à un régime juridique homogène pour avoir des expérience comparables permettrait de constituer cette base de retour d'expérience plus rapidement. Mais si les projets d'école ou de prisons sont suffisamment nombreux pour commencer à tirer des leçons exploitables, les projets de transport public sont moins nombreux et généralement plus gros et plus spécifiques. Cela milite en faveur de l'organisation, au niveau de l'Europe, d'un retour d'expérience ferroviaire pour voir si quelques progrès ne pourraient pas en sortir un peu plus rapidement.

8. Selon votre expérience, l'accès des opérateurs non-nationaux aux formules de PPP d'initiative privé est-il assuré? En particulier, lorsqu'il existe une invitation des pouvoirs adjudicateurs à présenter une initiative, cette invitation fait-elle généralement l'objet d'une publicité adéquate permettant l'information de tous les opérateurs intéressés ? Une procédure de sélection véritablement concurrentielle est-elle organisée pour assurer la mise en oeuvre du projet retenu?

Vue la spécificité des projets ferroviaires de **construction et d'exploitation**, il peut paraître hasardeux de présenter une offre étrangère aussi grosse, même si les exploitants de transport réussissent des délégations de services publics hors de leurs frontières nationales.

9. Quelle serait selon vous la meilleure formule pour assurer le développement des PPP d'initiative privée dans l'Union européenne tout en assurant le respect des principes de transparence, de non discrimination et d'égalité de traitement ?

Monteur de projet, je me limiterai à la structure d'un projet ferroviaire de construction et d'exploitation. Optimiser l'utilisation de ressources financières et garantir les recettes d'exploitation est la seule façon de bâtir une confiance pérenne. Par exemple :

- Si les constructeurs mènent le jeu pendant la construction, ils ne doivent pas construire ce qu'ils veulent. L'exploitant doit être présent dès les premiers jours avec un pouvoir respecté parce que les 20 premiers pour cent des décisions prises engagent 80 % du coût de possession.
- Que le constructeur actionnaire se passe un commande à lui-même n'a de sens que si il a vraiment l'intention d'assurer l'exploitation. Mais trop souvent, abusant du manque d'expérience de l'organisme adjudicateur, il se passe une commande confortable et se prépare une sortie dès la fin de la construction.

Voilà parmi d'autres, deux mécanismes destructeurs de la confiance des investisseurs privés. Utilisant les cadres élaborés par les législateurs et juristes, **les monteurs d'affaires** trouveront des voies et moyens pour prévenir ces faiblesses.

10. Quelle expérience avez-vous de la phase postérieure à la sélection du partenaire privé dans les opérations de PPP contractuels ?

A Taiwan, pendant 6 ans j'ai mené les actions préparatoires du Taiwan TGV groupe comme salarié d'ALSTOM. Puis pendant 3 ans et demi, j'étais auprès du gouvernement Taiwanais depuis le dépouillement des offres auquel j'ai participé, jusqu'au choix du système SHINKANSEN.

11. Avez-vous connaissance de cas dans lesquels les conditions d'exécution – y compris les clauses d'adaptation dans le temps - ont pu avoir une incidence discriminatoire ou ont pu constituer une entrave injustifiée à la libre prestation de services ou à la liberté d'établissement? Si oui, pouvez-vous décrire le type de problèmes rencontrés ?

Non. Ce ne sont pas les clauses qui ont eu une incidence discriminatoire à Taiwan. C'est la pratique des affaires. Les garanties financières de l'Etat sont venues très tard. Et, de façon surprennante, la crédibilité financière de l'offre n'était pas un critère de choix (100 % de financement privé pour un projet de 15 milliards € !).

12. Avez-vous connaissance de pratiques ou de mécanismes d'évaluation d'offres ayant des incidences discriminatoires?

Oui : Tout comité d'évaluation qui n'analyserait une offre qu'en fonction des pratiques traditionnelles dans son pays, ne pourrait que rejeter les offres adaptées au renouveau actuel du ferroviaire. C'est un biais d'autant plus fréquent du ferroviaire que l'analyse de l'expérience étrangère est souvent obscurcie par le sentiment d'un risque lié aux spécificités nationales et un refus consécutif de considérer tout retour d'expérience qui ne soit pas nationale.

13. Partagez-vous le constat de la Commission selon lequel certains montages du type "step-in" peuvent poser problème en termes de transparence et d'égalité de traitement ? Connaissez vous d'autres "clauses types" dont la mise en oeuvre est susceptible de poser des problèmes similaires?

Pour un service public, le conflit d'intérêt qui consiste à voir un actionnaire se passer commande à lui-même est d'autant moins admissible si dans le même temps il n'a pas l'intention d'aller au bout de l'engagement d'exploiter ce qu'il aura construit. Si le constructeur actionnaire se retire de l'exploitation, une garantie de bonne fin devrait mettre à sa charge le coût des modifications que fera son successeur quelques soient les présomptions de tords de l'organisme adjudicateur.

14. Estimez-vous qu'il est nécessaire de clarifier au niveau communautaire certains aspects relevant du cadre contractuel des PPP ? Si oui, sur quel(s) aspect(s) devrait porter cette clarification?

Voir ci-dessus :

1. La disponibilité et l'équilibre des pouvoirs des compétences indispensables,
2. Si l'actionnaire constructeur se passe une commande à lui même, il abandonne le droit de se retirer avant la fin du contrat quelques soient les tords de l'organisme adjudicateur (caution de bonne fin de la question 13).
3. Publication de grilles de sélection telles que définies (voir question 1).

15. Dans le contexte des opérations de PPP, avez-vous connaissance de problèmes particuliers rencontrés en matière de sous-traitance ? Lesquels?

Un actionnaire constructeur qui se passe une commande confortable à lui-même. Il va jusqu'à prendre en charge des travaux que des PME pourraient réussir mieux que lui et moins cher. C'est préjudiciable au tissus industriel du pays. Et, dans une certaine mesure, c'est un abus de bien social par rapport aux autres actionnaires de la concession. Enfin, c'est faire prendre un risque à la communauté par rapport à la pérennité de la société concessionnaire.

16. Le phénomène des PPP de type contractuel, impliquant le transfert d'un ensemble de tâches à un unique partenaire privé, justifie-t-il selon vous que des règles plus détaillées et/ou d'un champ d'application plus large soient mise en place en ce qui concerne le phénomène de sous-traitance?

Oui : Une concession reste un service public dont la pérennité dépend du montant des amortissements. L'actionnaire devrait justifier des préférences qu'il s'attribue à lui-même.

17. De manière plus générale, estimez-vous qu'une initiative complémentaire devrait être prise au niveau communautaire en vue de clarifier, ou d'aménager, les règles relatives à la sous-traitance?

Non : C'est spécifique du tissus industriel de chaque pays.

18. Quelle expérience avez-vous de la mise en place d'opérations de PPP de type institutionnalisé ? En particulier, votre expérience vous conduit-elle à penser que le droit communautaire des marchés publics et des concessions est respecté dans le cas de montages de PPP institutionnalisé? Si non, pourquoi ?

Aucune

19. Estimez-vous qu'une initiative doit être prise au niveau communautaire en vu de clarifier ou de préciser les obligations des organismes adjudicateurs quant aux conditions dans lesquelles doivent être mis en concurrence les opérateurs potentiellement intéressés par un projet de type institutionnalisé? Si oui, sur quels points particuliers et sous quelle forme? Si non, pourquoi?

Sans avis

De façon générale et indépendamment des questions soulevées dans ce document:

20. Quelles sont les mesures ou les pratiques que vous estimez constitutives d'entraves à la mise en place des PPP au sein de l'Union européenne?

Sans avis

21. Connaissez-vous d'autres formes de PPP développées dans les pays en dehors de l'Union? Connaissez-vous des exemples de 'bonnes pratiques' développées dans ce cadre, dont l'Union pourrait s'inspirer? Si oui, lesquelles?

Voir les 3 questions/ réponses 1-b), 2 , 3-a)

22. De façon plus générale, et compte tenu des besoins importants d'investissements
nécessaires dans certains Etats membres, afin de poursuivre un développement économique social et durable, estimez-vous utile une réflexion collective sur ces questions qui se poursuivrait à des intervalles réguliers entre les acteurs concernés, et qui permettrait un échange des meilleures pratiques? Est-ce que vous considérez que la Commission devrait animer un tel réseau ?

Comme je l'ai dit plus haut : OUI !
Le marché ferroviaire est trop petit. Il faut avoir rapidement un retour d'expérience significatif. Pour ce faire, il faut le faire au niveau de l'Europe. Chacun saura faire la part des spécificités nationales. Peut-être cela sera-t-il plus facile que pour l'accidentologie ferroviaire?

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July 30th 2004

REPLY BY THE VEOLIA ENVIRONNEMENT GROUP TO THE GREEN PAPER PRESENTED BY THE COMMISSION ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS

As Europe's leading private operator of public services (Services of General Economic Interest SGEI) in the domain of the environment, in the domains of potable water treatment and distribution and wastewater collection and treatment, waste collection and treatment, energy services including collective heating and public passenger transportation, and being active in all of the 25 European countries, with the exception of Malta, our Group has studied the Commission's Green Paper on Public-Private Partnerships (PPP) with great interest. With regard to this subject, which is at the very core of our activity as a public services provider on behalf of public authorities, our involvement in these domains has led us to develop strong convictions and a keen awareness of the improvements that could be implemented in the general interest, in each of the Member States. We will express these convictions in an overview presentation, prior to detailing them by way of our replies to the set questions..

OVERVIEW PRESENTATION

Overview introducing and summarising the main points of VE's reply to the Commission's Green Paper on PPP's.

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1) As the leading private operator of public services in the domain of the environment in Europe and being active in all of the 25 European countries, with the exception of Malta, our Group has studied the Commission's Green Paper on Public-Private Partnerships (PPP) with great interest. We feel that the significance of the initiative undertaken by the Commission should be emphasised, just as the quality of thought underpinning the entire document.

Veolia Environnement's experience is based on 150 years of partnership with public authorities, in a multitude of frameworks, but all having the common element of delegation by a responsible body ("Autorité Organisatrice")[1] to a private operator of the overall provision of a complex service, and its associated responsibilities in the domains of potable water treatment and distribution and wastewater collection and treatment, waste collection and treatment, energy services including urban heating and public passenger transportation.

It appears to us that the Commission's approach has been inspired by the desire to develop these partnerships in Europe and the increasing diversity of their forms, as well as the need to provide them with a realistic legal base, understood by citizens and users and adapted to their specific characteristics and their diverse nature.

We feel that the method adopted by the Green Paper, by building on the basic principles of the Treaty of Rome and by seeking to adapt them to the complex subject of PPPs, without dogmatism or hasty categorisation of the latter, is quite appropriate for the current situation prevailing throughout the Union..

In particular, we feel that this method is such as to avoid two future pitfalls regarding the Commission's initiative. The first pitfall would be the maintenance of a *status quo* that would allow a vagueness regarding the guiding principles of PPPs to persist and that would be prejudicial to the clarity of public decision-making, fair competition and information to the end user. The second would be in the form of too rigid or inadequate legislation which would misjudge the specific nature of these partnerships, their specific characteristic of the requirement for continuous adaptation, the very extensive diversity of the economic activities covered and the pragmatism that must prevail in their creation by way of calls for competition, as well as their implementation and their execution by the parties.

This latter risk would be particularly evident in the event of attempts being made to extend the rules governing public contracts to cover the delegated management PPPs. Abundant and convergent experience exists within member States, where forms of PPP have been developed, to demonstrate clearly that they obey a different logic. The Commission itself has asked this question quite clearly in the context of the Green Paper and we shall be covering it in greater depth.

Before replying to each of the questions on which the Commission has kindly requested the Group's opinion, we wish to shed light on a few fundamental points of our understanding of the initiative undertaken and its challenges.

2) While the Green Paper is seeking the conditions for fair examination of partnership propositions from private enterprises, it leaves open the question of unfair or non-existent

[1] "Autorité Organisatrice" is translated by *responsible body* and sometimes *organising authority*. It transfers to the operator the responsibility of running the service. The responsible body is qualified (skills, rights…) to define the service policy, the characteristics of the rendered service (scope, quality, end-user, tariff…), operating conditions (in-house or outsourcing). It also sets the results to be achieved, calls for competitions and supervises the service.

examination of the comparative merits of solutions having recourse to such a partnership as well as solutions only having recourse to the public sector to fulfil identical missions.

In our mind, in order to guarantee the best possible quality for public services in Europe for the long term, it is necessary to guarantee genuine, fair and transparent examination of those services which could be provided by private enterprises having genuine and acknowledged experience in this sector.

When these services are entrusted directly to public entities, it would also be desirable to ensure that their quality is controlled and that the reality of their performances is measured under conditions comparable to those governing the exercise of identical missions by private enterprises, and that information to end users is provided with regard to the actual performance of these services compared with other services of the same type.

Finally, it appears to us that the current state of European law, as interpreted by jurisprudence, does not offer sufficient encouragement for transparent calls for competition when a public authority entrusts a management assignment to a body that is itself public and connected to it in one way or another.

Even if it fails to meet completely and immediately these aims which, in certain member States, clash with political constraints, in any event adapted legislation should ensure fair competition between public and private organisations when they aim to provide the same service.

There are many ways of distorting this competition and we will provide examples in reply to the questions raised by the Commission. However, it should be noted that in our company's domain of activity, and particularly in terms of water, wastewater treatment and public transportation, currently the main difficulties encountered do not arise from the way in which private enterprises are put in competition by a public authority having so decided, but from a large number of instances where the service is entrusted to a public body distinct from the responsible body without any genuine call for competition being conducted and sometimes even without a proper contract or obligations of measurable results.

If, for the future, this aspect were to be neglected, there would be a risk – as we are already witnessing in certain member States – that the conditions of the partnership with the private sector become increasingly codified and more and more regulated, both with regard to the legal instrument entrusting the service to the operator and with regard to the proper execution by the latter; whilst the execution of identical services by public operators would remain broadly free of these rules and this control and free of the requirements of results that must be a characteristic of the public-private partnership.

3) In fact, we feel that one of the fundamental characteristics of these partnerships, and the source of their merits for the European public service end user, must reside in obligations of measurable and controllable results, and in the economic incentives they comprise, and which constitute one of the basic differences – but not the only difference – existing between these partnerships and certain simple service provision contracts.

It appears to us that the Green Paper takes less account of this point than of others and we would like to stress its importance for several reasons.

From the moment when a certain length of time is required to ensure complete optimisation of a service, obligations of results – that may cover all aspects of the service concerned – make it possible to combine effective and transparent control by the public authority whilst allowing the operator the autonomy of management required to achieve the improvements in terms of quality and productivity that are expected from its involvement. These obligations can serve as the objective basis for regular reviews of the partnership's situation as well as the operator's performance. This aspect is the logical corollary of awarding long-term contracts. For certain activities, the contract duration has to be a long period of time in order to enable the operator to optimise the service effectively.

On this latter point, we feel that it is vital to take into account the specific characteristics of certain services likely to be entrusted via a PPP to an operator, in order to have a proper appreciation of the timescale required in certain cases for achieving service optimisation for the end user.

In this regard, even within Veolia Environnement's own activities, the situation is very varied. The clearest case of optimal long contract periods is that of water and wastewater services, and this has already been the subject of constructive dialogue with certain Commission departments. It is covered in depth in a contribution appended to the present reply.

For reasons analysed in this contribution, we feel that the optimal duration for a major water and wastewater services management contract should not be less than fifteen years if the aims are for the operator to achieve productivity gains over the entire scope of the managed service, to guarantee high service quality and to implement an appropriate policy concerning the renewal and the management of the assets entrusted to it. Naturally, the duration is longer when it encompasses, in the concession framework, the amortisation term of the assets operated, or when a volume of investments spread over the duration of the contract in the context of the management of a complex service, requires a noticeably longer timescale. However, our reflection has been more generally focused on service management contracts not involving major modernisation investments, and not falling into this special category.

Nevertheless, we think that a contract period of seven or eight years, for example, would limit the optimisation of the service to a very small portion of achievable productivity gains, and therefore would considerably reduce the benefits of partnership for the consumer. We also believe that it would give rise to unavoidable pernicious effects in the long-term management of the service's environmental performance, and to major hidden costs for the public authority and the taxpayer. Finally, it would distort competition by giving the operator in place a decisive advantage during possible contract renewal procedures. In our contribution, we believe that we have addressed and clearly established all these points. We look forward to discussing them in greater depth with the Commission at a future date. The result is that, compared with a fifteen-year contract which is well managed on both sides, a succession of three five-year PPP contracts deprives the public authority and the end user of the bulk of the benefits and of the operator's know-how, and imposes major additional costs on the latter.

From this point of view, we believe it is necessary to take into account the diversity of the aims of the activities concerned by PPPs, and to avoid freezing aspects in a manner than would misjudge the economic, human and industrial specificities of certain services. Such an error of appreciation would certainly rebound against the enterprises concerned as well as, eventually, against the end users themselves as they would be robbed of the planned possibility of benefiting from the private operators' know-how due to the inappropriate nature of the partnership conditions.

4) The corollary of the sometimes long contract period required for an efficient partnership with a private operator must be found, it has been said, not only in the transparency and the legibility of the contract's objectives but also in the periodic review of the contract in the relation to the achievement of these objectives. The formative character of the obligation for results is expressed here by the objective basis it creates for this periodic review, often on a five-year basis. This review serves several purposes. The main purposes must be:

- Enabling the control and sanction, both positive and negative, of the operator's performances by the public authority, in accordance with rules laid down in the original contract.

- Enabling the organising public authority to request the operator to integrate certain service adaptation objectives linked to new operating conditions.

- Organising the review of both parties' good faith, in accordance with principles fixed in the original contract, and of the contract's economic balance in the light of any new events having occurred since the tender procedure.

We cannot stress too heavily the importance of these various points, as they are the cornerstones for a major share of the benefits of PPPs for the end user. In this respect, it should not be considered that a long-term contract is in any way a blanket approval given to the operator. In fact, the original competitive bidding procedure can and must provide objective rules throughout the life of the contract that will provide maximum efficiency for the end user, necessary adaptation to changing circumstances and competitive transparency.

5) From this concrete and pragmatic approach to the issues, we can see that tenders relating to complex public-private partnerships can in no way be assimilated with those governing the award of public contracts or more straightforward service provision contracts.

Complex PPP contracts entrust the management of a public service to an operator. They comprise a set of incentives, sanctions and rules not to be found in public contract tenders and that provide for the partnership to adapt to changes in the end user's needs and to changes in the contract's economic context.

The Interpretative Communication on concessions of 24 February 2000 has helpfully sought to confirm the relevance and the limits of adapting certain rules applicable to contracts to public service concessions. Nevertheless, the Commission itself revealed in point 5 of this Communication, that many complex PPPs do not correspond to the specific characteristics of the concession and thus could not be included in the scope of the initiative.

In the same spirit, the Commission quite rightly reveals in the Green Paper, that certain "institutional" PPPs, i.e. composed of mutual financial participations from the public sector and the private sector within a joint entity, also comprise a delegated managementy from the public partner to the private partner which is assigned with a special mission, and that, in this case, the substance of the partnership is comparable to that of a "contractual "PPP. The result of the development of these set-ups, specially adapted to the legal traditions and the organisation of local authorities in certain member States, is that in order to grasp the issue of PPPs properly and to promote competition around the core element, i.e. the operator mission entrusted to the private partner, the European Union must equip itself with a body of rules that are clearly distinct from those governing public contracts.

6) In this regard, particular attention should be paid to adapting the notion of competitive dialogue to the domain of PPPs. Whilst no contradiction whatsoever exists between these two notions, it is imperative that the actual form of the calls for competition retains the specific characteristics of complex PPPs and encourages a realistic review by the organising public authority of all the benefits in both economic and qualitative terms that it may derive from the service.

In our mind, three essential points should be taken into consideration.

a) A large portion of this benefit is linked directly to the originality of private operators' propositions. These propositions, which are often the combined fruit of specific experience and certain technological advantages, have required major upstream investments in research and innovation on the part of these operators. The development of such innovation, intended to meet the local authority's particular set of problems in terms of water and wastewater, waste management or energy services or public transport organisation, represents a major direct cost. It is unrealistic to think that the companies involved would share the fruit of such investments upstream of the tender *per se*. Such a system would directly penalise the most innovative and the most demanding companies in their sector and would discourage, *de facto*, any investment in innovation and any conceptualisation activity for the benefit of the responsible body.

While it is both conceivable and desirable that the responsible body, in advance of the call for competition, sounds out prospective operators about the broad outlines of a possible partnership and about the advantages and disadvantages of the various possible solutions, it is necessary to reserve for the bidding procedure itself, with all related guarantees, any original and underpinning propositions that the operators, placed in competition, are capable of providing. Such propositions are not only sources of benefits for the end user but are also indissociable from each operator's know-how.

We also feel that is necessary, in the case of complex PPPs, for the competitors' original propositions, expressed as variants to the overall outline of the tender, to be welcomed and appreciated when they provide for objectively measurable significant savings for the authority. On this point, we consider that the Commission's current doctrine, particularly as it is expressed in the Interpretative Communication on concessions, does not pay sufficient attention to the benefits derived by the end user from "competing ideas"; benefits that can only appear if enterprises are encouraged to propose original solutions in relation to the tender data, rather than being discouraged to do so.

b) Secondly, all our experience tells us that the choice of a public services operator by a responsible body involves, besides considerations of a purely economic nature, an assessment of the other benefits offered to the authority including the quality of the project, the credibility of the proposing enterprise and the quality of the personnel who are destined to take long-term responsibility for a mission that is often critical for both the authority and the end users.

We are well aware that this assessment, sometimes described under the general title of *intuitu personae* (relating to the nature of person or entity) raises certain difficulties with regard to the general principles of competition as they result from the Treaty of Rome. For all that, we do not believe that there exists any incompatibility between the Treaty and such assessments, nor that the ambition of enabling European public service end users to benefit for clear and appropriate selection procedures can be achieved without consideration of these points which are consubstantial with the issue of PPPs, inasmuch as their purpose is to entrust, for the long term, a complex public service to the most capable operator.

In many cases, it is possible to quantify certain qualitative benefits - of particular importance in the domain of the environment – and to apply parameters them in the context of an overall assessment. In all events, it is desirable to leave to the public authority, whilst respecting the confidentiality of each party's bids and in the context of a negotiation integrated in the tender procedure itself, the possibility of proceeding further with its understanding of the specific merits of these bids as well as the real significance of certain propositions.

c) Finally, we must stress in the light of our ongoing experience, that the information supplied in tenders relating to complex PPPs in our activities almost always comprises uncertainties, with major economic consequences, concerning certain data that the operator has to integrate when drawing up its proposition. Naturally, the level of uncertainty varies from case to case. For example, if it is a matter of constructing and operating an entirely new wastewater treatment plant or a new incinerator as part of a concession set-up, the uncertainties are limited to future parameters such as pollution levels or future volumes to be treated. These uncertainties may be taken into account explicitly in the context of the tender (provided that, once again, the operator is not shackled by a reasoning similar to that governing public contracts).

In contrast, when it is a matter of taking over the management of a major municipal water or heating network, pre-existing data (subscriber files, age and location of pipes and connections, actual network returns) are often incomplete. To give substance to the obligations of results on the part of the operator in an equitable manner, it is always necessary to provide, after the tender award *per se*, a transitional period during which more in-depth due diligence than that conducted during the tender procedure may be performed. This review results in factual adjustments to the parties' obligations. Obviously, such adjustments must not call into question the basis of the competitive bidding procedure, but in many cases, such a procedure is necessary.

These three points are particularly crucial and sensitive in our domain as a provider of environmental services where the risk of lowest cost management of certain tasks and the sacrifice of long term considerations to the sole imperative of profitability is ever present, and where it is therefore necessary to call upon operators capable of deploying extensive know-how, including a dimension of risk management and environmental protection. If we are not careful, such deployments of expertise may be put at risk by recourse to competitive bidding procedures that are too rudimentary.

7) Accordingly, whatever the legal form that the next stage of European legislation may take, it appears to us that it should favour the purpose and content of complex PPPs rather than their form and that, whilst respecting their singularities, it should enhance the legal security that they need, whilst taking proper account of incentives for efficiency as well as the contract periods and flexibility required to make them worthwhile for the end user.

This supposes that the norms concentrate on the substance of the mission entrusted to the private operator and, whilst respecting the spirit of the Treaty of Rome, guarantee compliance with a few major principles, in particular those of transparency, competition and equality of treatment. To achieve this, it is necessary both to establish once and for all the autonomy of these contracts in relation to other forms of public contracts, and not to freeze their forms by multiplying specific legislations that are sources of confusion and, over time, of legal insecurity. We shall cover the form that the legislation could take in our replies to the Green Paper's questions 3, 7 and 14.

Such changes will only really advance the efficiency of the services concerned if they are accompanied by a more realistic approach to equality of treatment. This approach must prevail amongst the various modes of service management, and it must not just reserve for PPPs alone the imperatives of transparency, concretely sanctioned obligations of results and incentives for good management and innovation which form part of their characteristics.

Question 1 ***: What types of purely contractual PPP set-ups do you know of ? Are these set-ups subject to specific supervision (legislative or other) in your country?***

It would be regrettable if there were to be a misunderstanding regarding the meaning given to the terms PPP, Contractual PPP or Institutional PPP. At the outset, and in order to avoid any ambiguity, VE states below the meanings used in the present contribution:

- The term PPP covers any form of cooperation between a Public Authority and an enterprise, be it private or public, having as its effect the attribution to it of the right to exercise an activity of general economic interest with the exercise of this activity including, or otherwise, the obligation to carry out and to finance investments.
- The PPP may be of a contractual or institutional nature. However, it must be distinct from public contracts (subject to the directives 2004/17 and 2004/18). This category includes "concessions" as defined by the Community that may be public services or public works[1], but is of a broader nature.

1) Types of set-ups

The varying levels of involvement on the part of the enterprise are translated by different types of contracts with varying content. Moreover, they may be modular in nature. Any typology of these contracts is somewhat artificial as it depends on the distinctive criteria retained and also on a *continuum* existing in practice.

The traditional typology distinguishes between contracts which confer missions relating to carrying out investments and operating a service, and contracts which only relate to service missions:

Operation and maintenance contract (O&M)

A service contract by which the private operator operates the infrastructures placed at its disposal by the public authority and ensures day-to-day maintenance.

The service mission may be limited to that of operating the facility. However, such a contract type may also correspond to the complete management of a major SGEI including transfer of risk to the operator and high performance commitments.
Two examples:

- The public service contract between Veolia Water and the Syndicat des Eaux d'Ile de France – Greater Paris Region Water Board – that enables the 114 communities covered by the water board and its 4 million inhabitants to benefit from a complete, integrated service (water production plant, distribution and wastewater services management, day-to-day maintenance, billing, collections and customer service, asset planning and asset modernisation) is of this type,

[1] Current community legislation contained in the Directive 2004-18 only covers public works concessions

- Operating contracts for the light metro and tramway lines in Stockholm: see appendix 3.

Management lease contract with modernisation investment

In addition to its operating mission, and over and above day-to-day servicing, the private contracting party takes charge of heavy infrastructure maintenance and at least partial charge of their renewal. The public authorities retain ownership of the assets and take the initiative for capital investments. This is the most common form of contract in France for water distribution and urban passenger transportation activities.

Concession

In addition to service operation, the private contracting party takes charge of renewing and extending the investments required for the service. At the end of the concession, the ownership of all the installations reverts to the conceding authority.
Veolia Water is managing major services by way of concessions: Water in Toulouse in France, in Valongo in Portugal; numerous urban heating concessions; power station operation in Nouméa …).

Design Build Operate contract (DBO)

In this contractual context adapted to the completion and operation of specific, and often technical infrastructures (e.g. a wastewater treatment plant or a household waste treatment plant), the private operator is charged with the design and the construction of the planned infrastructure, prior to operating it. At the end of the operating period, the installations revert to the public entity. The contract may be remunerated by the local authority and/or by revenues derived from the production obtained from the installations.

Build Operate Transfer contract (BOT)

As a variant of the DBO, the BOT is used for major international installations construction projects such as the wastewater treatment plant in the Hague awarded to us in 2003. The private operator takes charge of the design, construction and financing of one or several production or treatment plants, prior to obtaining their operation over a long period. At the end of the operating period, the installations revert to the public entity.

Mixed public private entities ("Société d'Economie Mixte")[1] with operator contracts

The private operator's service operation mission is backed by a participation in the capital of the public company. This provides for closer cooperation, in particular for capital-related issues (planning, financing and carrying out investments).

[1] Mixed public private entities are not a management system. They are external entities bound by a contract with the public authorities.

Our partnership in MIDEWA, the potable water distribution and wastewater services operator located in Saxe-Anhalt, won by us in 1999 further to an international tender, is a good example of this type of PPP where Veolia Water exercises a service operation mandate linked to a 25% participation in the public company's capital.
A further example is that of the operating contract for the household waste incineration plant at Bourgoin Jallieu, entrusted by a local authority to a mixed public private entity known as Nitraval, in which Ronaval, an Onyx subsidiary, is a shareholder. The mixed public private entity company has entrusted the plant's operating contract to Ronaval.

Perhaps the typology does not place sufficient emphasis on the reality of PPPs which are concluded primarily and necessarily so that, in the main, the enterprise provides a general interest service on behalf of the public authority.
Either this service activity just relates to the service for which the investment is the support (e.g. operating a wastewater treatment plant or an urban heating power station) and, in this event it will generally be a BOT contract, or it covers the entire operation of a SGEI on behalf of the public authority with, in the main (but not necessarily), the management of the relationship with the final beneficiary of the service, with any possible investments being just an accessory. In this event, it is more likely to be a concession (or a lease if the initial investments are made available to the operator).

2) Legal framework of PPPs

a) In France, Veolia Environnement's country of origin, all authorised forms of contract are currently subject to laws and regulations defining, in particular, the procedures for awarding contracts and for maintaining open and transparent competition.

These contracts may fall into three different legal categories. Each category is subject to a different corpus, particularly with regard to contract award procedures. They are differentiated by the criterion of the nature of the missions entrusted (varying degrees of complexity and/or global missions, in direct relation or otherwise with the end user of the service) and also by the extent of the commitments or risks undertaken and by the method of remuneration (in function or otherwise of the marketing of the service). Therefore, there is a distinction between the delegated public service management contract[1] subject to the Sapin law (29/01/1993), the partnership contract subject to the Ordinance of 17 June 2004 and the public contract as defined by the French public contracts code (that may be applicable to certain PPPs as defined by the European Community). A fourth category can be added. This relates to contracts known as "unnamed" which are drafted around common law contract types (lease, deed of sale, leasing agreement…) and which, in the main, relate to public property occupation contracts, but this residual category will be broadly amalgamated in the new partnership contracts category, specifically intended for this purpose.

[1] A delegated public service management contract ("Contrat de delegation de Service Public") grants the operator with the executive power within the framework of the responsible body's duties. The operator is self-sufficient and is solely responsible of its acts.

Further details with illustrations are provided in appendix 2.

b) In other European States, there is not necessarily any theoretical typology governing PPPs at the national level, but that does not prevent the award of contracts adapted to specific situations at the local level.. The contracts are awarded further to competitive bidding, translating the principles of the Treaty into a precise formalism and incorporating within it the requirements of certain institutional financial backers (World Bank, EBRD, European Commission…). Therefore, and just as in France**,** the real problem does not lie in the mechanisms of competitive bidding but, as we have argued in our overview, in the rarity of contracts due to the privileged positions of public bodies.

Question 2: In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

The competitive dialogue procedure defined by the Directive 2004/18 which remains focused on tender procedures and for which the use is moreover subordinated to too strict conditions (not all PPPs are complex) cannot be used in its current form for concluding PPPs as it does not take into account the fundamental differences between the domain of public-private partnerships and that of public contracts.

In the first case, the organising public authority transfers global responsibility for an activity to a third party operator, whilst in the second case its assumes this activity itself while calling upon enterprises, as needs be, just for allotted execution tasks.
Therefore, for a PPP, the procedure must be:

- To maintain, during the bid preparation phase, the possibility for each competitor to present original propositions, without running the risk of transfer of the substance of this originality to other less creative competitors.
- During the negotiation phase, to maintain the possibility for the public authority to state its demands in relation to the opportunities presented and to obtain from the candidates:
    - i) The maximum that they can contribute in terms of optimisation and solutions improvements and therefore in terms of global savings. This enrichment would be the result of exchanges and debate on points of view and aspirations compared to realities, within the framework of constructive dialogue by a way of a series of options.
    - ii) Clarification of the specific advantages of their bids.
- To foresee, even after the choice of the best bid, a phase for fine-tuning and resetting those initially envisaged parameters that might not be relevant to the realities observed for the reasons stated in the reply to question 12.

These points have been clearly argued in detail in our overview.

Moreover, due to the nature of the markets on which we intervene, i.e. SGEI, there is cause to be prudent when taking account of just a minimum number of candidates or bids for judging the reality of competition.

On these markets, the actors are either the public authority operating the service itself or a third party to whom it entrusts the execution of this activity (e.g. the water and wastewater services markets). Doctrine (S. Bishop and M. Walker) and jurisprudence qualify them as bidding markets on which competition comes into play when the responsible body launches a call for competition with a view to awarding a contract. Therefore, competition is not exercised on the market but for the ma rket. This specific type of market does not require a large number of competitors to be effectively competitive. On several occasions, the Community competition authorities have been called upon to confirm that, for example, the presence of three competitors is sufficient to guarantee effective competition on a bidding market (as examples, please refer to the Commission's decisions ABB/Daimler Benz N° IV/M.586 of 18 October 1995 and SNECMA/TI n° IV/M.368 of 9 December 1993)

Furthermore, the effectiveness of the competition should not be judged solely in terms of the number of candidates, but in relation to the real nature of such competition. In practice, as soon as the service to be managed is heavy and complex, or the service expected requires a high level of technical expertise, in reality there are few enterprises capable of meeting the expectations or likely to be interested by such calls for competition. This may be a regrettable state of affairs but it should not be misjudged: experience proves that, when there is competition for a contract, it only requires two candidates for this competition to be real.

***Question 3*: In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate?**

***Question 7*: More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?**

***Question 14*: Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level. If so, which aspects should be clarified?**

In these questions, the Commission is wondering about the form of the legal instruments which could be used to improve competition and transparency in PPPs.

In essence, the overview introducing our contribution broadly answers the questions raised by the Green Paper, in particular by way of its points 4 to 7. Therefore, we kindly refer you to those points for the basic reply and here we are limiting our comments to one or two points in reply to the commission's more detailed questions concerning the possible form of its intervention.

1) In the first instance, it appears to us that legislation on contractual PPPs grouping together public contracts and contracts delegating the management of a complex service, envisaged as a possible avenue of action in question 7, would be in opposition to the objective that it is advisable to seek. On the contrary, and as we indicate in our overview, in particular in its points 5, 6 and 7, we need to be aware that:

- it is the very substance of the delegated mission which has to be defined, and that it is around this notion that the future of appropriate legislation can and must be defined;
- as it concerns public services management PPPs, the distinction between contractual PPPs and institutional PPPs is often absolute, and thereby secondary. In contrast, for its part, the distinction between contracts and complex services management contractual PPPs seems to us to be fundamental, as we have explained and analysed throughout this entire contribution.

Therefore, grouping together "contractual" PPPs and contracts based on the reasoning that in both cases they are created and governed by a contract would lead to a simplistic vision focused on the form of the contracts rather than on their substance and would certainly lead European law down the wrong track.

2) More generally, we believe, and have stated, that the Commission should strive to unify the rules governing public services management PPPs by taking proper account of the diverse nature and the specific characteristics of these activities. The already embarked-upon multiplication of categories and special texts is leading to a growing problem. In fact, this multiplication is chasing after the increasing diversity of the subject without managing to embrace its complexity and because of this, is running the risk of either overlooking a major part of the subject, or of having contracts fall into the scope of texts which are not adapted to them. In both cases, we run the risk of allowing a feeling of legal insecurity to take root.

Therefore, in our mind, and in line with the spirit of our overview, the aim of European norms must be to combine compliance with the principles of the Treaty of Rome with the fundamental requirements of PPPs in terms of organisation of the award procedure and the implementation of the contract by the parties. On this issue, we refer again to the fundamental points contained in the other sections of this contribution, and in particular in points 3 to 6 of our overview and we again stress the importance of taking care not to "over-legislate" and to leave open points such as the duration of contracts which may correspond to very different industrial logics depending on the profile of the PPP.

Finally, it is probable that the legal basis of the Commission's intervention may differ depending on the aspects of the issue covered by its intervention. Its powers in terms of initial calls for competition seems to us to be derived more directly from the principles of the Treaty of Rome rather than from issues of contract life for example, even if links do exist between these two aspects.

3) From this perspective, and without it being our responsibility to define the legal instruments that might be used, we feel that we are able to suggest the following approach to the Commission.

An overall text – which could doubtless be in the form of a directive - should be limited to the requirement of equitable and transparent competition, respecting the existing fundamental differences, in particular in relation to the competitive dialogue, between PPPs and contracts (c.f. point 6 of our overview and our reply to question 2 of the Green Paper).

Moreover, the Commission could express, in a more flexible manner, by way of recommendations or guidelines for example, a certain number of coherence principles with regard to the architecture of PPPs, their adaptation over time, the importance of stipulating obligations of results, performance targets and clear incentives/sanctions associated with these targets. The Commission should refrain from categorising PPPs in a manner that stifles contractual innovation and, in all events, the duration of contracts should remain open with this in mind, inasmuch as the underpinning industrial logic and the benefits which the end user can expect from it vary from one activity to another (c.f. comments on water and wastewater services in point 3 of our overview and the presentation appended to the present contribution).

These points of reference could:

- enlighten authorities in their quest for appropriate solutions,
- serve as a user doctrine for European subsidies in this domain, in particular Cohesion Fund subsidies,
- enable the Commission, without it exceeding its powers, to prompt more coherence in the way in which the services are inspected, assessed and encouraged to achieve performance targets, irrespective of the chosen management mode –public or private.

Question 4: ***Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?***

Since the end of the 1980's, VE has participated in numerous competitive bidding procedures throughout Europe. Some examples:

- in water and wastewater services, via its division Veolia Water, VE has been awarded a significant number of PPP contracts. By way of example, we mention Berlin, Görlitz, Döbeln, Gera, Midewa (Germany); Latina, Sicilacque (Italy); Budapest (Hungary); Prague (Czech Republic); The Hague (Netherlands); Brussels (Belgium); Norrtälje (Sweden). In France, we

have obtained several hundred contracts further to open and transparent competitive bidding procedures.
In these cases, there has been a call for competition by way of an international tender. In the main, the tenders have included a dialogue procedure with one (or two) preferred bidders until the time of signing the contract. Despite the existence of appeal possibilities, not one of these awards has been called into question for possible breaches of procedure.

- in passenger transportation, its Connex division regularly participates in competitive bidding procedures for the award of concessions such as, for example, in Germany where it has won the operating contract covering about ten regional railway lines (see appendix 3).
- in waste management services, via its Onyx division, it has participated in PFI tenders. We can mention the household refuse treatment plant for the City of Brighton and the County of East Sussex. This contract is described in appendix 3.

In the light of this experience, VE considers that whilst certain competitive procedures between enterprises could be improved, the real problems are linked to the unequal conditions of competition existing between public or mixed public private entities and enterprises. We develop this issue in greater depth in our reply to question 20 on the barriers to setting up PPPs.

***Question 5*: Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective contribution of non-national companies or groups in the procedures for the award of concessions, In your opinion is genuine competition normally guaranteed in this framework?**

***Question 6*: In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?**

For public works concessions, the Directive 2004/18 states in a very appropriate manner, the rules for advertising tenders and submitting bids. The selection procedure may thereafter be conducted without excessive constraints, thus enabling contracts to be fine-tuned during an iterative discussion process. These rules appear to be sufficient to guarantee compliance with the principles of the Treaty. Their terseness has the immense advantage of encouraging legal security. In fact, unfortunately we observe all too often that pernickety regulations governing procedures paradoxically lead to legal insecurity, with judges cancelling concluded contracts on the basis of insignificant errors.

For other types of PPPs, contractual or otherwise, there are no Community rules detailing the procedure to be implemented to comply with the said principles. Nevertheless, the ECJ has restated their requirements. It is now common knowledge that prior advertising of the tender and an impartial bidding procedure are required. It would be reassuring for all concerned if the precise conditions were known, but there does not appear to be a need for a Community legislative instrument.

In any event, as indicated in our overview, any possible community rules should respect the specificity of PPPs, cover all types of PPPs and, in particular:

- as opposed to public contracts subject to the Directives 2004/17 and 2004/18, regulate their conditions of award by authorising a discussion with the candidates, and then with the chosen candidate up to the final phase of contract drafting, to achieve optimal fine-tuning of the chosen options and the mutual commitments,
- encompass all forms of PPP including institutional PPPs. This implies that the chosen rules are sufficiently flexible so as not to hold back the development of these forms of PPP under conditions in compliance with the principles of the Treaty, as we explain in our reply to question 18.

Question 7: Please refer to our reply grouped with our reply to question 3.

Question 8:* *In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?

Question 9:* *In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?

In Europe, our experience shows that, at the stage of invitation to tender by the authority, there is adequate advertising and dissemination of information, allowing for sufficient international competition.

The problem of the private initiative seems more to be related to promoting initiatives on the part of operators, i.e. upstream of the official advertising and competitive tendering phase. We believe that such stimulation has to pass necessarily by a form of recognition in the award contract of the contribution of the initial private initiator (c.f. reply to question 9). Therefore, the private initiative must be stimulated by recognising its contribution whilst still maintaining a situation of constructive competition.

Firstly, it should be noted that, in the context of the private initiative, competition already exists *de facto* as each operator is free to have relevant ideas for the service in question and to propose them to the public authority. It is just a matter of encouraging them not to wait for an official advertisement to arouse this worthwhile reflection on the public service.

Recognition of the contribution provided by the private initiative may take several forms which may be cumulative. We believe that the two latter forms are the most effective:

- remuneration for the work carried out before exposing it to open competition,
- as a corollary, protection of certain elements of the bid (not remunerated therefore by the previous award) when their innovative and exclusive character could justify confidentiality,
- an advantage in terms of bid development time: the adjudicating authority officially opens the competition but with a response time that is going to allow for the innovation contributed by the first bid to be tested.

In practice, these elements could form part of a standard two-stage approach:

- Stage 1: the responsible body accepts access by the potential operator to its sites and to its documents to build up a private initiative, in the form of a preliminary, feasibility or opportunity study …,
- Stage 2: the study report is the subject of an acceptance in principle and the responsible body launches, within an agreed timescale, a consultation or a tender in accordance with applicable law.

This approach should in no way be obligatory, but it could be the subject of a description, or a normalisation, which would serve, by its simple existence, as an encouragement.
Moreover, the rules governing the award of subsidies from Community Cohesion and Structural funds must be prevented from constituting a barrier to setting up PPPs. Please refer to the arguments advanced on this point in appendix 4. On the contrary, the PPP approach should be encouraged to facilitate obtaining private funds as a complement to public funds and to guarantee better overall economic efficiency.

Question 10: In contractual PPPs, what is your experience of the phase which follows the selection of the private partner?

Question 11: Are you aware of cases in which the conditions of execution –including the clause on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?

If, by this question, the Commission means the fine-tuning phase immediately after the selection of the partner, we refer to point 6 c) in the overview and to our reply to question 2 on competitive dialogue.

If however, by this question, the Commission means more generally the overall execution of the contract, then we feel it is worthwhile to present a few of the conclusions drawn by VE from its experience of the life of such contracts.

Firstly, it takes two to ensure the proper execution of a management contract for a service rendered to inhabitants: the public authority and the operator, with each playing its role.

- On the one hand, during the contract award phase, the public authority must define precisely its objectives and its expectations, and during the execution phase, it must carry out controls and decide on possible modifications to the service characteristics.
- On the other hand, the operator must execute the contract and be a force of proposition for improvements.

This joint action is even more necessary as such a partnership must be forged for the long term (as indicated in the overview, point 3). This long term period that is altogether consubstantial with the reality of the PPP. The period must be of sufficient length to allow for the deployment, in an optimal manner, of the enterprise's experience and motivation and then the implementation of the best overall solutions. Moreover, the savings likely to be made from the right solutions can only be achieved over time. In this aspect, the PPP logic differs from that of the public contract which implies that the responsibility for finding the best solutions (including the conditions of their overall implementation) resides with the public authority (and with its consultants) who *ex ante* draft a tender and the specifications with which the enterprise has to comply without any real freedom of action. The PPP logic calls upon the enterprise's capabilities to a far greater extent as a force of proposition, both during the award process and afterwards, as it benefits from autonomy in the means to be implemented and is subject to obligations of results.

This joint management of the contract must allow for it to be adapted, either in relation to changing needs, or in relation to changes in economic reality, and also sometimes quite simply because it appears indispensable to readjust the agreements in relation to the reality of the situation which may have been initially misjudged by both parties. In fact, all too often, the information serving as the basis of tenders relative to complex PPPs is incomplete, even patchy. After a certain operating period, the responsible body and the operator have the mutual responsibility of resetting certain theoretical parameters or quality or performance indicators by comparing them to reality. The readjustment of an agreement concluded on the basis of erroneous data to observed realities cannot be considered as a calling into question of the conditions of the call for competition.

While some abuses have been committed at the time of these indispensable contractual revisions, such practices remain marginal and can in no way justify further rules intended to eliminate them, particularly as other means already exist for sanctioning such practices.

***Question 12**: Are you aware of any practices or mechanisms for evaluating tenders which have a discriminatory effect?*

The significance of this question is capital. The principal discrimination is the one resulting from the comparison on an identical basis, of propositions with profoundly differing underlying features; a question already raised in the overview. Two practical examples provide an illustration of this statement:

- an analysis of bids without taking account of the differences that may exist in the propositions in terms of the quality of the service to be rendered, of performance requirements and of their associated penalties,
- a comparison of bids by misjudging the inevitable distortion of competition between a bid formulated by a private enterprise and one formulated by a public-funded enterprise or even more so by an public entity. Thus, for example, in Germany a private company seeking to manage a wastewater service is automatically 17 % more expensive than its public competitors as it has to pay Value Added Tax, from which the latter are exempt. In France, those taxes and welfare contributions entering into the cost base of a service managed by a public entity are globally lower than those of a service managed by a private enterprise.

Obviously, there is no question of calling into question the principle of neutrality of the legal nature of entities, but the Commission should take concrete initiatives to limit, as far as possible, this phenomenon of distortions which constitutes an obvious barrier to entry, and it should firmly invite public authorities to address this issue.

The scope of application of the modified directive 80/723 relative to financial transparency between member States and public enterprises could be broadened. Concrete measures should be taken to prevent even further public aid, exclusive rights and other advantages allocated to fulfil a mission being used in practice to submit the lowest price on a competitive bid.

But, above all, this issue's indisputable difficulty and the obvious fact that competition conditions cannot be strictly identical according to the legal status of the entities involved, must not serve as a pretext for those entities benefiting from these rights and advantages or special treatment to be dispensed from being placed in competition for the exercise of new activities entrusted by a public authority. This remark is even more crucial as many invoke this difficulty in order to obtain exemptions from competitive tendering procedures for the profit of more or less close entities or connected or complementary activities. VE presents its position on this point in its reply to 20.

***Question 13**: Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other "standard clauses" which are likely to present similar problems?*

"Step-in" clauses must seek a balance between legitimate guarantees expected by lenders in the context of "project financing" and the rights of the authority which may not ratify the choice of an operator if it deems that it does not possess the technical or financial capabilities to fulfil this mission properly. There is nothing shocking in allowing the bodies which have financed the investments to avoid suffering the sanctions of cancellation, without being able to react and without being able to substitute another body for the failed contract holder in order to continue contract execution. Therefore, VE has no concerns if these rules are respected.

More generally, the hesitations that may be encountered with this type of clause are allied to the issue of contract assignment which is crucial for enterprises in terms of maintaining their economic value. The notion of contract assignment must be admitted. However, as with "step-in" clauses, in the event of assignment of a contract, the public entity must be able to oppose it if the proposed assignee is not capable of executing the entrusted mission. Nonetheless, the legitimate rights of control and veto do not justify an attack on the principle of free assignment of contracts (which often constitute the principal assets of companies) or of participations giving direct or indirect control of a project company.

Question 14: Please refer to our reply grouped with our reply to question 3.

Question 15: In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.

Question 16: In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

Question 17: In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

Special rules are provided by the directive 2004/108 for contracts concluded by public works concessionaires. They are proving to be satisfactory, as indicated in our reply to questions 5 and 6.

Moreover, certain sectors, including those concerning VE, i.e. water, passenger transportation and energy, are special sectors covered by the directive 2004/17 which governs the conditions of award of contracts concluded by the holder of a PPP considered as the adjudicating entity. These rules are globally satisfactory, in particular as they do not prevent the intervention of associated enterprises. However, they do require clarification on their scope of application in terms of wastewater services (it is not normal that this activity is, or is not, subject to the directive depending on whether it is, or is not, operated by the same entity as the one operating the potable water service).

On the other hand, it does not appear necessary to extend these rules to other sectors. The important feature is the upstream competitive bidding procedure which is sufficient to guarantee compliance with the rules of the Treaty. Nothing would be more regrettable than legal rules which would misjudge the effects and the economic interest of the combination of a global mission and its partial subcontracting, i.e. a set-up that characterises PPPs. The choice of such a set-up implies that the senior partner who has been chosen against a bid to which it is committed, including at the financial level, retains full liability for its subcontractors and their actions, implying that it has full freedom in their selection. Imposing downstream competition creates ambiguity: the set-up is no longer quite that of a PPP and resembles more that of several public contracts co-ordinated by the public entity. Upstream competition is also distorted, as the candidates, being faced with the unknown quantity of their subcontractors' future competitive bidding procedures, cannot submit their best prices. Certainly, in some cases, public authorities may legitimately[1] wish that one or another part of the task to be fulfilled is subcontracted after a transparently managed bidding procedure, but there is no need to impose the generalisation of such special cases and by doing so undermine contractual freedom.

***Question 18:* What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases? If not, why not?**

***Question 19:* Do you think that an initiative needs to be taken at Community level to clarify or define the obligations of the contracting bodies regarding the conditions requiring a call for competition between operators potentially interested in an institutionalised project? If so, on what particular points and in what form? If not, why not?**

1) VE's position

The development of the institutional PPP is both an opportunity and a risk: an opportunity as it is by way of opening up the capital of public entities that the management of certain formerly self-produced SGEIs is opened up to competition; a risk also, as to reinforce the position of institutional PPPs without calls for competition can result in permanently closed markets.

In any institutional PPP, the attribution to a third party of the right to execute an economic activity is established, even if this third party is not contractually identified as it only appears as a shareholder within the mixed capital entity.

There are two possibilities:

[1] For example, in the event of the building of a subsidised installation required for the delegated service, and in particular if the decision to build the installation is taken after the PPP agreement: between the solution of entrusting the building to a third party selected after a bidding procedure and that, more in line with the PPP logic, of entrusting the responsibility for its construction to the PPP holder (by way of a contract amendment as required), it can be considered normal to require the PPP holder to subcontract this construction to an enterprise selected in the context of a bidding procedure conducted in complete transparency.

- either the entity displays all the characteristics of an "in-house" entity as defined by the Teckal jurisprudence and therefore the activity remains managed within the administrative sphere and there are obviously no grounds for calls for competition;
- or the entity is not in-house, and this would be the *a priori* case when a third party has a share in the capital: in this case it is a third party and therefore there are grounds for calls for competition.

With regard to the notion of in-house, VE is insistent that only those bodies over which the public entity exercises control truly identical to that exercised over its own services should be considered as being in-house bodies. Moreover, the ongoing nature of this characteristic should be subject to regular control over time.
Furthermore, we would like the Commission to reflect in further depth on what actually constitutes an entity being, or not being, "autonomous at the decision-making level"[1] in relation to a public authority. Notions of identical control criteria and the extent of the activity with the said entity are of interest but they should be examined in greater depth and added to, in order to eliminate the currently observed abuses that allow certain entities to exercise an activity whilst avoiding any calls for competition.

While the alternative is clear, the practical methods of putting it into application are not evident.

Ideally, we should consider that the mixed capital entity is the third party which receives the authorisation to execute the economic activity. Therefore, it is the award of this activity to the entity that should be the subject of a call for competition. But things are not always so straightforward.

More often than not, the entity pre-exists, was in-house when it was awarded the activity, and then it opens up its capital and therefore is no longer in-house. Nevertheless, VE thinks that we should remain pragmatic and above all not attempt to block such changes: it would not be realistic to require that the activity it exercises, and which doubtless constitutes its only asset, should be put up for competition at the time of this opening up of the entity's capital. Therefore, VE requests that it be stated that the entity opening up its capital must be considered as the holder of an explicit or implicit contract, the execution of which may continue, but only for a certain period. Moreover, this period must be declared to the partner entering in the capital, as it represents an asset forming part of the company's worth.

In the absence of an upstream call for competition relating to the activity, focus should be placed on the downstream activity and the role of the partner entering in the capital. Admittedly, no text can provide for a call for competition relating to a participation in the capital of a company. But, in reality, the acquisition of a participation in such a company is not motivated by dividends but by the desire to be able to contribute to the company's activity, in the context of hoped-for support and assistance contracts.

[1] As defined by the Teckal judgment, case C-107/98, paragraph 51

While we cannot be satisfied by the opening up to competition of just a few *ad hoc* downstream services to the detriment of the opening up to competition of the management of a complete SGEI, VE does however request that, as a mininum, it is stated that:

- in the absence of an initial call for competition for the global activity, *ad hoc* missions shall necessarily be subject to calls for competition,
- the public authority shall be bound to advertise when it intends calling upon a private partner to take a participation in an entity previously defined as in-house.

It seems that the principles of the Treaty, reaffirmed by the Télaustria judgment, enable the Commission to promote best practice on this aspect, without it appearing necessary to create a new derivative law.

2) VE's experiences

Veolia Environnement, in its capacity as an operator, does not have any experience of having been approached to be involved in an institutionalised PPP without being able to exercise operational responsibility. Those institutional PPPs in which VE participates, bringing together the public entity and the private company within a mixed public private entity c, also comprise a delegation of operational responsibility to the private partner which, via a contractual PPP, constitutes the substance of the partnership.

Besides, these PPPs are the fruit of tenders where the contractual part of the PPP governing the private party's operational contributions is going to be the deciding factor in the assessment and the selection of the private company. Therefore, in these PPPs we find the same possibility of being able to vary the enterprise's responsibility in contractual PPPs, with however a more important role for the enterprise in terms of investments, given the inclusion of a private company in the capital of the mixed public private entity which, in the majority of cases, is the owner of the assets.

VE presents two of its characteristic experiences of institutionalised PPPs as illustrations of the above statements:

a) MIDEWA, an institutionalised PPP serving the German model of cooperation for the complete management of a service. Example of an institutionalised PPP created for the occasion

MIDEWA is a potable water distribution and wastewater service operation company located in Saxe-Anhalt. It comprises 281 community partners and a private shareholder appointed further to an international call for competition for taking a participation in the capital, linked to an operating contract. In 1999, Veolia Water was awarded this tender.

The company serves 102,000 clients covering 390,000 inhabitants and operates a 3,000 km network. The company has a workforce of 400 and, in 2003, produced revenues of 43 M€. Average annual investment for installations renewal is 8 M€.

Veolia Water controls 25.1% of the capital, is represented on the supervisory board with a right of veto and manages the enterprise. Veolia Water has an incentive to increase productivity by a mechanism of preferential dividends linked to tariff reductions.

At the end of two years, a 9% reduction in tariffs, at a constant euro rate, has been achieved.

b) FCsM Rt, Budapest Wastewater Services Company, or an institutionalised PPP for the complete management of a service. Example of an institutionalised PPP by modification of the shareholder structure in a public entity (partial privatisation)

FCsM Rt is a company with a majority public shareholding. It ensures the operation of the wastewater services for the City of Budapest. In 1997, the City of Budapest assigned, for 25 years, 25% of its 100% holding in the company to a strategic partner, selected by way of an international tender for taking a participation in the capital, linked to an operating contract and a shareholders' agreement regulating the rights of management, control, and the method of shareholders' remuneration. It was won in 1997 by the Veolia Water-Berliner Wasser Betriebe consortium.

The company serves 200,000 clients covering 1,700,000 inhabitants, operates a 3,600 km network and treats 250 Mm^3 of wastewater per annum. The company has a workforce of 1,150 and, in 2003, produced revenues of 80 M€. Average annual investment for installations renewal is 18 M€.

The City of Budapest is responsible for new service investments. Veolia Water/Berliner Wasser Betriebe controls 25.1% of the capital, exercises day-to-day management tasks and receives a preferential dividend as an incentive to increase operational cash flow in relation to a contractually-defined benchmark.

Since 1997, economic performance and service quality have continually increased, while the average bill for users of the FCsM Rt service has not risen by more than the rate of inflation. The partnership operates in compliance with objectives fixed during the partial privatisation.

Generally, its has appeared to us that the award process for the institutionalised PPPs in which VE has participated, and that have had the special feature of calling on our competences as an operator as well as an investor and thereby including both aspects in a contractual PPP (in other words, in the event, the institutionalised PPP was only a method of execution of a contractual PPP), has been conducted in compliance with Community law.

Question 20*: In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?

1) Measures or practices considered as barriers by VE

In reply to this crucial question, we have already provided elements in our overview and in our reply to question 12.

The real barrier to PPPs in Europe are not the conditions, however clumsy and imperfect they may be, of awarding concessions or even those of institutional PPPs that are placed on the market and which are the subject of calls for competition.

The real problem lies with contractual or institutional PPPs that are "camouflaged" under the aegis of self-production, or of being in-house activities, or of being the so-called monopoly of certain public entities to fulfil certain activities.

We see too many public entities deciding to render services of a purely competitive nature to other public entities, with their justification for doing so being based on apparently lower costs (even on their apparent free of charge provision in order to claim that they are not chargeable contracts). These apparent lower costs are explained by their incapacity to take into consideration the totality of the costs attributable to a given service in their price calculations.

What is more, the principle of neutrality of the legal nature of entities is used as a reason for certain public entities to enter into head-to-head competition with private enterprises. And yet nothing is being done in practice to guard against situations where these direct or indirect advantages which have been awarded to a public entity to exercise a given mission, are hijacked and used *de facto* to achieve more competitive prices for a competitive activity.

Admittedly, all the principles already exist for preventing such abuses and there is no need to create a derivative law in the matter: cross-subsidies are forbidden, in their accounts public enterprises are bound to distinguish between assisted and non-assisted activities. But, in practice, it is very difficult to have these principles applied.

VE expects the Commission to provide teaching tools which should contribute to the clarification and the effective equality of treatment of candidates, irrespective of their legal status or of the advantages from which they may benefit[1]. But we also remind the Commission that it is obvious that these difficulties must not serve as a pretext to reduce the scope of application of the obligations of calls for competition.

2) Illustrations

[1] In particular, see the BIPE survey in December 2003 on comparisons between systems and delegations, entitled "Elements for a benchmark for water and wastewater services".

In order to help the Commission with this action, VE is illustrating its statements with actual examples of difficulties encountered.

a) Problems specific to institutional PPPs

In Italy, we can report several restraints on free competition, with direct contract awards without calls for competition. The foremost examples of such practice have been the Tuscan Publiacque public companies in Florence, Acque in Pisa, and Acquedotto del Fiora in Grosseto. These companies have received from the corresponding ATOs[?] (Optimal Territorial Units), the direct award of the service management contract without a prior call for competition, and for a long period (25 or 30 years), on the basis of a Regional Law allowing such an award insofar as that thereafter and within a period of two years, the company would proceed with a call for competition for its partial privatisation.

At the time, the transactions were conducted contrary to provisions decided by the national Parliament – and they have been the subject of an appeal by the Italian Government through the courts – in the context of the 2002 Finance Law (in its article 35) which laid down that provisions of this nature could only last for a transition period of 3 years, beyond which it would be obligatory to proceed with a call for competition for the service concession.

Moreover, the numerous possibilities of extensions to the transition period have caused the Commission to react and to serve notice on the Italian State to correct these provisions. The latest changes (Decree law 269 2003 and the 2004 Finance law) have created the possibility of making "affidamenti" known as "in-house" for long periods insofar as the beneficiary company is subject to control by the public entity shareholder similar to the control on its own services and insofar as the largest portion of its activity takes place on the territory of this same local authority. As such, the Tuscan concession awards were thus ratified by National Law and numerous others have followed (Milan, Turin, Genoa, etc…).

b) More generally, poorly regulated interaction between the public sphere and the competitive market

We have already highlighted the risks of closed markets created by a too lax application of the concept of in-house or the eclipse of the awarding of the right to exercise an economic activity to a third party (and of the implicit contract) by the setting up of a mixed public private entity.

Here, we will highlight abuses observed based on the principle of free organisation of administrations. Obviously, relations between public authorities which do not constitute the provision of economic activities remain outside the scope of application of the principles of the Treaty. Such would be the case if two public authorities A and B decide to render the same service together to inhabitants by grouping themselves within an intermunicipal body C to do so (moreover, irrespective of the nature of the tasks entrusted, if this body is in-house). Such will also be the case if two public authorities A and B decide that, henceforth, the service to the inhabitants of A and B will no longer be rendered by A but by B who takes over sole jurisdiction.

On the other hand, we believe that the provision of economic activities exists between A and B when each party continues to be responsible for the service in question but when the local authorities agree to provide reciprocal, for payment or even free of charge, *ad hoc* services amongst themselves (in fact, on a *quid pro quo* basis). When the assigned "jurisdiction" is very fragmentary, it in no way enables autonomous management of their competences by either one or the other of the public entities: each party requires, and almost on a constant basis, instructions or work from the other in order to do what it has to do. Therefore, there is an exchange of services.

Admittedly, certain legislative provisions in France (e.g. article 113 of the draft law on local responsibilities) appear to seek to authorise exchanges of services without calls for competition between communities forming part of intermunicipal public entities and between intermunicipal utility consortium[1] and their constituent communities. In this event, it would be sufficient for just one of the public entities to set itself up as a service provider and to equip itself with the appropriate means for there to be no longer any possibility for an enterprise to supply the services for any one of the other group members. Furthermore, it is planned that a State-controlled "expert body" may study the setting up of new partnership contracts on behalf of local authorities. Something that raises questions of competition even if the provision of such services should *a priori* remain free of charge.

Question 21: Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of "good practice" in this framework which could serve as a model for the Union? If so, please elaborate.

In exercising its activity outside Europe, VE has signed numerous PPP type contracts. It does not appear worthwhile to VE to seek other benchmarks elsewhere in the world as there are already many innovations in the European Union which have given rise to a whole body of good practices.

Question 22: More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practices, would be useful? Do you consider that the Commission should establish such a network?

[1] Cooperative arrangements may result from an intermunicipal utility consortium or the setting of a new responsible body acting as a substitute for the latter.

The PPP is a major development tool for the different counties in the Union. It allows access to enterprises' know-how, it is a guarantee that every effort will be made to obtain the best global cost by optimisation of all the elements, investments and operating procedures required to implement a service. Thereafter, it permits access to private capital and therefore the multiplication of the effects of public funds.

We need to work towards erasing the still too frequent mistrust that exists with regard to the intervention of enterprises in the framework of a PPP; mistrust doubtless based on a misunderstanding of its economic mechanisms.

Therefore, VE is absolutely in favour of creating a network and is ready to take an active part in such a venture. But VE is also in favour of benchmarking between the various practices in this domain. In particular, it would be worthwhile to provide tools for assisting with assessments of the real quality and performance levels offered and to place them in context with the costs of the services provided.

Appendix 1

Local authorities water services:
market and forms of calls for competition - presentation

Please refer to the text in PowerPoint format provided as an addition to the present contribution.

Appendix 2

Appendix to the reply to 1

FRENCH FORMS OF PPPs

1) Delegated public service management ("Délégation de Service Public")

a) A contract basically characterised by its purpose of delegation of the management of a public service, with the French notion of "public service" referring to the functional global nature of an activity[1] Its system has been defined by the law of 29 January 1993 (Sapin Law) and its definition given by the Law of 11 December 2000: *"A delegated public service management contract ("Contrat de Délégation de Service Public") is a contract by which a public entity entrusts the management of a public service for which it has the responsibility to a public or private operator whose remuneration is substantially linked to the service's operational result and revenuese. The operator may be tasked with constructing works or acquiring goods required for executing the service".*

b) The most common variants (which are not legal categories) are:

- the concession: this is a delegated public service management in which the responsibility for property and plant investments is covered by the concessionaire who derives its primary remuneration from sales revenues (example of concession: urban heating),
- the lease: the public authority retains the contracting authority role and responsibility for investments, with the lessee ensuring maintenance and, generally, installations renewal as well as service operation in return for a type of remuneration similar to that of a concessionaire (example: water distribution service),
- the public service management contract ("Régie Intéressée") : the operator ensures the operation of the service and the maintenance of the works associated with this service. Remuneration is not derived from end users but by way of a bonus linked to service revenues and performance (example: water in Ile-de-France – Greater Paris region)

2) Partnership contracts

- A contractual legal form defined by the Ordinance of 17 June 2004:
    i) *"Partnership contracts are administrative contracts by which a public entity entrusts to a third party, for a period determined in relation to the investment amortization period or to the chosen financing methods, a global mission relative to the financing of intangible investments, works and facilities required for the public service, for the construction or transformation of works or facilities, as well as their servicing, maintenance or their management and, as required, other service provisions involved*

[1] For example, a wastewater service includes the network and treatment functions. The management of a wastewater treatment plant is not the management of a public wastewater service.

in the exercise by the public entity of the public service mission for which it is responsible."

ii) the public entity's contracting partner ensures the contracting authority role for the works to be completed,

iii) the contracting partner may be entrusted, in part or in whole, with the design of the works,

iv) the contracting partner's remuneration is the subject of a payment from the public entity throughout the entire duration of the contract. This remuneration may be linked to performance objectives assigned to the contracting partner.

- Example: household waste treatment plants with substantial revenues from recycling, so as not to be qualified as a PSD.

3) Complex set-ups

- Structure: These set-ups, based on common law contracts (deed of sale, rental contract, leasing agreement) and public property occupation contracts (long administrative lease, temporary authorisation to occupy public property), allow a private partner to be entrusted with carrying out an investment, with its financing and with operating the service for which the works are the support.
- Example: these set-ups are used for services very directly associated with major and often technical installations, insofar as the bulk of the price has to be paid by the local authority as the rules applicable to French public contracts do not allow for contracts associating different functions. Nowadays, the trend is to replace them with partnership contracts.

4) Public contracts

Definition (given by article 1 of the Public Contracts Code): *"Public contracts are contracts concluded against payment with public or private entities by public law legal entities as mentioned in article 2, to meet their needs in terms of works, supplies or services".*

APPENDIX 3

Appendix to questions 1 and 4

EXAMPLES OF PPPs AWARDED TO THE VE GROUP IN EUROPE

1) Operating contracts for light metro and tramway lines in Stockholm

These transportation services are operated by a subsidiary of the VE transportation division, Connex, within the framework of several contracts concluded for a period of ten years.
The contracts were initially concluded with a company entirely owned by the public authority. VE group's entry into the capital was conducted in two stages: firstly up to 60%, then 100%.
The VE group was selected further to a call for competition procedure. VE is not obliged to take charge of new investments which are provided by the responsible body.
The operator's remuneration is provided entirely by public contribution but varies significantly in relation to service quality, punctuality and continuity.

2) Operating contract for a railway network in the Land of Schleswig-Holstein (Germany)

This ten-year contract has been awarded to a Connex subsidiary further to a call for competition procedure. Connex has contributed an initial investment to finance rolling stock.
Contract remuneration is split between 20% from ticket sales and the remaining 80% from public contributions. It varies upwards or downwards in relation to the quality of the service rendered.

3) Household waste treatment contract for the City of Brighton and the County of East Sussex awarded to Southdowns Waste Service Limited (an SPV[1] owned 100% by ONYX Environmental Group Plc, a VE group division)

This contract, derived from the PFI model, has been concluded in compliance with rules laid down by the Office of Government and Commerce and relates to the award of the household waste collection service for the county of East Sussex and for the City of Brighton for a period of 25 years starting on 1st April 2003. Here are its main points.

a) Contract award

The project was the subject of a call for competition in accordance with British and Community rules for awarding public contracts, and after having been advertised. After an "invitation to tender" to which four enterprises replied, and then two stages of "best and final offer" reviews resulting in the designation of a "preferred bidder", the contact was signed between, on the one

[1] Special Purpose Vehicle

hand the City of Brighton and Hove and the County of East Sussex and, on the other hand, Southdowns Waste Service Limited, an *ad hoc* entity (SPV), being a VE subsidiary specially formed for this transaction.

b) Contractual set-up

The contractual provisions have been approved by the Department of the Environment and by the OGC. As indicated above, the contract period is 25 years. The main terms of the contract are as follows:

- The SPV has been formed to design and build a certain number of household waste management and collection installations comprising: the supply of three transfer stations, a compacting centre for vegetal waste, materials recycling installations and a waste-to-energy recovery installation. Furthermore, the structure has also been entrusted with the management of 15 waste recycling centres throughout the County of East Sussex. The subsidiary was responsible for the construction, the maintenance and management of the waste treatment plants in the city and the county in question.
- The enterprise (which is going to subcontract the construction of these installations) is liable for risks associated with design and construction, as well as project scheduling risks for the minor installations (this excludes the waste-to-energy recovery installation). However, the enterprise is not liable for risks associated with property or scheduling, or risks relative to obtaining the necessary authorisations for the waste-to-energy recovery plant. Nevertheless, if, despite several attempts, the appropriate authorisations and the corresponding plots of land were not to be obtained, a procedure is provided for the parties to reach agreement on a revised project. In the absence of an agreement, execution of the contract shall terminate over a three-year rundown period.
- The enterprise has exclusive rights to household waste treatment (apart from 75,000 tonnes which have been awarded to another operator).
- The payment mechanism has been designed to maintain a certain level of revenues for the company, to protect its equity capital and to cover the costs committed.
- The company is liable for recycling and electrical risks.
- The risk on the residual value of the main assets is borne by the County and special rules provide guarantees that all the assets will be properly transferred in a suitable condition to the County at the end of the contract period. Therefore, the entity is not liable for the residual value risk.

4) Contract for the supply of water and wastewater services to the City of Berlin

In 1999, in partnership with RWE, Veolia Water won the international tender for the management, for a 28-year period, of all the water and wastewater services in Berlin. Veolia Water and RWE acquired 49.9% of the entity in which the Land of Berlin retains the majority holding (50.1%). In particular, the management mandate entrusted to the two private partners has force by way of the majority of voting rights they hold within the board of management. Therefore, this is a case where the "institutional" PPP encompasses quite extensive delegation of responsibility, in the framework of a structure managed jointly by the public partner and the private partners. Since this partial privatisation, within the framework of an agreement signed with the trade unions which provides for a fifteen-year period of no redundancies and despite the extent of the major post-reunification investment programmes, significant productivity gains have been achieved that have resulted in prices, which used to rise at a very rapid rate, being held to a rate just in line with inflation (on average, 2.4% per annum since privatisation). In parallel with the partnership, Veolia Water has developed an ambitious research policy in the domain of sustainable development of water resources, in partnership with Berliner Wasser Betriebe and the Berlin universities. In addition to the productivity gains which have reduced the rate of price rises, this operation has already enabled greater effort to be invested in research and more focus to be placed on long-term environmental issues.

5) PFI contract for wastewater treatment plants in the Hague region

The contract signed on 5 December 2003 between Hoogheemraadshap van Delfland, the local public authority in charge of storm water and wastewater management and the project company Delfluent B.V., covers the design, financing, construction and operation, over a 30-year period, of the wastewater treatment plants in the Hague region, serving a population equivalent to about 1.7 million inhabitants. The wastewater treatment system, which will enter into service in 2008, will be one of the most modern in existence, capable of meeting the most stringent European norms in terms of nitrogen and phosphorus elimination.

This represents the first major public-private partnership in a country where, until this contract was awarded, water management was entrusted entirely to public bodies. Based on the PFI model, this contract enables the Delegating Authority to implement about 300 Million euros of investments, financed entirely by the private sector. The consortium led by Veolia Water has been selected for the quality of its technical proposition which anticipates achieving savings of 17% in relation to the forecast project cost as implemented by the Delegating Authority (measured in accordance with the Public Sector Comparator method).

The Project Company is controlled jointly by Veolia Water and Evides, the Rotterdam region potable water distribution board. These two shareholders, each owning 40% of the Company's capital, also have equal shares in the capital of the operating company. The other partners are Rabobank which holds 10% of the capital and which is also participating in financing the project, and two Dutch civil engineering companies, Heijmans and Strukton, each holding 5% of the capital and participating, along with Veolia Water Systems, in the construction phase.

The contractual set-up provides for a clear and strict separation of risks. In particular, technical risks are entirely transferred by the Project Company to two specialised entities, one for the design and execution of the works (representing an amount of 258 Million euros), the other for installations operation, maintenance and renewal for a 30-year period (representing an annual cost of about 20 Million euros). This contractual structure has enabled a limited recourse project financing package to be put in place, in particular comprising a syndicated loan of 298.8 Million euros, of which about half has been granted by the EIB. The particularly favourable conditions of this loan, with a 27.5-year maturity, reflects the Banks' level of confidence in the PPP economic model in the water sector.

6) Contract for the Greater Lyons heating network

Further to a call for competition, the contract for the management of the Greater Lyons heating network has been awarded to Dalkia France. A dedicated entity will ensure network operations.

The contract is for a 25-year period and investments will be implemented by the assignee. Remuneration is by way of revenues from heating network subscribers.

APPENDIX 4

Appendix to question 9

AWARDING OF COMMUNITY FUNDS AND PPPs

Community funds are essential for developing the infrastructures necessary for improving the operation of Services of General Economic Interest.

Nevertheless, the currently observed distribution conditions are not satisfactory. The malfunctions are due to the fact that the rules and procedures implemented place too much focus on investment issues without sufficiently integrating service and operating issues.

Investment decisions are prepared with insufficient account taken of the new works' operation and integration conditions, all too often leading to technical shortcomings (poor needs analysis, poor project sizing, inappropriate design …). Moreover, reinforcing the review of the project's viability and global efficiency would encourage contributions from private funds alongside public funds.

Therefore, we have to find the way of associating with the decision and implementation process, those people best placed to appreciate in a concrete manner the needs, expectations and constraints and, especially the way of associating the incumbent operator in the process, irrespective of the legal status of this entity (empowered public authority directly operating the service or public or private entity bound by contract).

Whilst nobody disputes the practical worth of such an association of operators, the procedures recommended by the Community authorities and by the relevant guidelines have misjudged this question and do not propose mechanisms adapted to the combination of this requirement with that of complying with the rules of transparency and competition which must obviously govern all allocations of European funds.

This situation is aggravated by the fact that certain parties have believed and stated that the requirements of transparency and fair competition, just as the requirements relating to the proper allocation of the funds for their intended purpose, would require private enterprises to be kept out of the process, as they are deemed to be likely to distort the decisions for their own interest, or even to find themselves in conflict of interest situations. It should also be understood that the aid is not awarded to an operator, but *in rem*, to a service and indirectly to the inhabitants who benefit from it via the price reductions made possible and that all the mechanisms, and contractual ones in particular, only exist to ensure that there are effective repercussions from the aid in terms of the price of the service.

In more concrete terms, and beyond what is written in the texts and guidelines governing the award of European funds, we have been able to observe truly regrettable situations where PPP solutions have been discounted *a priori* for the reason that they are suspected of placing the partner in a conflict of interest situation.

We detail below the most frequently encountered regrettable situations. They are even more regrettable as, in practically every case, proven solutions exist which would, with appropriate safeguards, prevent the involvement of an enterprise whose activity was to operate a public service from invalidating or distorting the competition process.

1) Integration of a new facility into an operation delegated to a private enterprise

This integration has been considered as a source of problems if the operations are already managed by a private enterprise, for fear that the latter would gain an unjustified benefit. Up to the point that it has been considered advisable to complete the construction of the facilities likely to be supported by aid prior to envisaging the award of the service operation contract to a private enterprise.

Be that as it may:

- It is possible for a public authority to agree and negotiate the conditions under which the partner takes into account the operation of a new facility and to do so under conditions which allow compliance with the initial financial balance.
- The contract amendment to be concluded, must not only take into account the extra operating costs created by the new equipment but also any possible additional operating revenues, and must stipulate adjustments to the initial financial conditions by taking accurate account of the impact of these variations, in such a way that the end user benefits from the advantages derived from the aid obtained for creating the facility.

2) Conditions of intervention of an operating enterprise operating the service in the framework of a PPP at the procedures definition stage and then at the new aided facility's construction stage.

The general rules of competition require that any candidate for a contract shall be provided with all necessary or simply useful information and that there should not be inequality of information between candidates. This requires the operator of the service for which the facility is intended to produce all relevant information in its possession.

Insofar as the specification is complete, nothing justifies, in fact or in law, that a company "linked" to the enterprise holding a PPP (i.e. within the same group) should be prohibited from submitting a bid in response to a call for competition launched for the design/construction of the new facility:

- In fact: there is no question of distortion of competition and to refuse this participation would lead to prohibiting the public authority from benefiting from the technology developed by the group of the entity selected for the PPP (this would be paradoxical and, in any event, regrettable),

- In law: improper exclusion of such a candidate would constitute a breach of everyone's rights to submit bids and would invalidate the procedure as it is only in the event of a clear and established conflict of interest, without any possible remedy, that a candidate may be *a priori* legally excluded.

However, in the framework of a PPP, the operating enterprise may only legitimately intervene at the stage of the procedure where its contribution is useful, i.e. during the stage of defining the facility and drafting the consultation, then at the time of acceptance of the completed facilities as it is natural for the incumbent operator to express its views on the suitability of the facility for its stated purpose. Obviously, the operating enterprise should not intervene at the candidate selection stage. This rule is even more important when a company close to the operator has submitted its bid for the construction contract.

The proposed guidelines on ISPA funds have been excessive in qualifying as conflict of interest situations, those situations that are at the most sensitive and that simply call for precautions to be taken to ensure compliance with the principles of competition.

Competition law only recognises conflict of interest situations justifying the exclusion of certain candidates if it is not possible to find other solutions for preserving equality of candidates and for avoiding distortions of competition. Exclusion would be quite an exceptional solution as it would be contrary to the principle of free access to all public contracts. Moreover, such solutions do exist and are widely practised. They enable situations of links between participants to be managed in a transparent manner and for unjustified or discriminatory advantages to be avoided.

It is a matter to be treated on a case-by-case basis, and it is accepted that the existence of legal links between the enterprise participating in the design/construction and the one tasked with operations does not justify *per se* any limitations whatsoever on the right to submit a bid.

In reality, true conflict of interest situations are rare and the requirement of avoiding them must not result in depriving public authorities of a global economic analysis of the planned project and/or in depriving the service of access to the technologies proposed by a company being part of a group, for the reason that a company within the same group is the operator of this public service within the framework of a PPP.

In brief:

1) To obtain efficient use of European aid funds intended for constructing facilities, the investment must not be dissociated from the operation, as this association results in:
- proper adaptation of the investment to the needs,
- subsequent service improvements,
- leverage effect for obtaining private capital,

and therefore it can only be enhanced even further by PPP set-ups.

2) This requires building on the competences of those enterprises developing service operator activities, whether they are already operators within the framework of a PPP, or whether they are capable of being such.

3) Be that as it may, the opposite is currently the case. Not due to the fair reason of required compliance with competition rules and the proper allocation of funds in the general interest, but due to reasons arising from ignorance of proven mechanisms designed to guarantee compliance with these principles, enterprises holding PPPs are all too often excluded from the process:

- either from operations, upstream of the facility construction, for fear of conferring an unjustified advantage on the operator,
- or from the facility construction procedure, downstream of an operating contract, for fear of distorting competition.

4) However, in most cases fears of non-compliance with legal rules are unjustified, as proven practices exist which enable cooperation situations between entities having diverging interests to be managed. They should be studied by the Community departments, in consultation with the relevant public entities and with both public and private operating enterprises. Then they could be usefully proposed to all actors concerned.

- **Water services to local authorities: market and forms of calls for competition - presentation**

Appendix to Veolia Environnement’s reply to the PPP consultation

VEOLIA
Water

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1. Water and wastewater sector characteristics

1. Water and wastewater sector characteristics

a) A Service of General Economic Interest

- **A service meeting a vital need for everyone: private individuals, tertiary activities, industries;**

- **which must,**

  i. guarantee them compliance with stringent public health and environmental standards.

  ii. offer them a high quality of service.

- **and this, without interruption, irrespective of the vagaries to which the service may be subjected (heat waves, flooding, pollution…).**

1. Water and wastewater sector characteristics

b) A traditional responsibility experiencing development:

- functional responsibility for service continuity and adaptability exercised over extensive networks connecting consumers to potable water production and wastewater collection installations.

- increasingly exposed to all sorts of vagaries (climate extremes, pollution, terrorism,..).

1. Water and wastewater sector characteristics

c) An increased Public Health responsibility

- **Questions of quality, continuity, safety are crucial for Public Health.**

- **These questions are becoming more complex and are increasing actors’ responsibilites in the water sector:**

  i. in the short term, the growth in vulnerable populations (including the elderly…), the appearence of new biological risks (Legionnaires disease, guardia, cryptosporidium..) place extra responsibilites on the service.

  ii. for the longer term, risks linked to pesticides, to endocrine disruptors, to antibiotics and to all hard to identify pollutants pose increasingly complex quality problems.

1. Water and wastewater sector characteristics

d) New domains of responsibility:

i. a responsibility for providing proactive and transaprent information and communication vis-à-vis consumers.

ii. an environmental responsibility for controlling the impacts on the environment of all the infrastructures, of their operation and of the residues from this operation (sludge).

Example 1: Integration of our treatment plants into the Côte d’Azur environment in France

Construction of wastewater treatment plants in compliance with European norms and in response the strict environmental, land occupation and noise/odour pollution constraints:

Toulon, Cap Sicié

- **Marseilles: plant constructed under a stadium.**
- **Monaco: plant in the city centre.**
- **Toulon, Cap Sicié: cliff excavated to accomodate plant.**
- **Antibes, plant under a green area, 100m from the beaches.**

1. Water and wastewater sector characteristics

e) Insufficently informed consumers

- about the price of water
  - according to the latest surveys conducted in France, it is estimated that only 20 % of French consumers are aware of the approximate price of 1,000 litres of water.
- about its components
  - very marked ignorance of wastewater treatment, a service that is not very visible to the end user, but that does however currently represent investment costs that are 50 % to 60 % higher than those for potable water.

1. Water and wastewater sector characteristics

In brief

- an unstable raw material.
- destined to become a vital food product.
- dependent on external conditions subject to high variability.
- destined for demanding consumers.

illustrating

- the demanding nature of this profession.
- the responsibility placed on its managers.
- the possibility of exercising real competition on the product, the service and the price.

Conditions of competition must enable water service operators to exercise their responsibilities in full and enable consumers and their representatives to question and assess the quality of the service.

2. Desirable forms of competition

2. Desirable forms of competition

a) An operational geographic area framed by the nature of the activity

- **Taking into account:**

  i. the physical impact of investments ⇨ non duplication of assets.
  ii. high level of Public Health responsibility.
  ⇒ no competition for the final consumer.

  iii. high costs of operating the investment.
  iv. prohibitive costs of transport (long distances).
  ⇒ local monopoly.

⇨ **Competition is exercised "for" a territory and a complete population within which there is an exclusivity of operation.**

2. Desirable forms of competition

- **The size and the geographic perimeter of the operating unit depends on an arbitrage between:**

  i. the largest possible volume of population which will enable to the assigned public investments to be amortized.

  ii. the proximity/density of this operating unit as a limiting factor on water investments and transport costs.

  iii. other non-economic phenomena such as politico-administrative units and the geographic features of the territory (location of the resource,..).

- **Depending on the case, we observe a resulting geographic scale varying fromregion 500 to 10,000 km².**

2. Desirable forms of competition

b) An integrated service over a sufficient timescale

The two basic conditions for the end user to benefit from the optimisation of a water service are:

- the respect of the integrated character of the service.
- a contract timescale of sufficient length for optimisation to be acheived.

2. Desirable forms of competition

➢ **To satisfy the obligations of results:**

- **water contracts increasingly incorporate precise and quantified obligations of results (network outputs, water quality, customer service) each with its own variable timescale.**

- **these obligations of results are the fruit of a collection of interdependent organisational, management and investment decisions.**

2. Desirable forms of competition

➢ To encourage productivity gains:

- **the service manager of a water service renews and operates assets with varying service lives, in an interdependent manner:**

  i. operating equipment: 2 to 8 years.
  ii. meters: 6-12 years; electromechanical machinery: 12-20 years.
  iii. networks: 30 years and more.

- **operating tasks and renewal choices are interdependent (e.g. renewal / maintenance):**

  i. their optimisation is at the heart of the operator's know-how.
  ii. short contracts necessarily give rise to perverse effects of under-investment and extra operating costs.

VEOLIA Water

2. Desirable forms of competition

➢ **The operator's action must integrate three distinct cycles**

- **Short-term cycle for variable costs optimisation (in particular maintenance and purchases).**

3-5 years

- **Medium-term cycle for operational organisation (restructuring, gradual workforce reductions, "insourcing"…).**

6-10 years

- **Long-term cycle for investment scheduling (both renewal and modernisation investments).**

8-15 years

2. Desirable forms of competition

Thus, the operator has focus constantly play on all three timescales to make the best possible decisions while taking account of all aspects of the service.

For example: rationalisation of subcontracting costs falling within the short-term cycle must be coupled with:

- decisions about the organisation of the controls on this subcontracting and, more globally with the insourcing / subcontracting balance which governs changes in the workforce. (medium-term cycle).
- Investment scheduling decisions (long-term cycle), in particular in relation to the maintenance costs / renewal costs arbitrage.

2. Desirable forms of competition

- **To guarantee overall responsibility, long-term and integrated contracts enable**

  - **long-term changes to be integrated:**

    i. anticipation and integration of changes that are often over a ten-year timescale, such as the implementation of a European Directive.

    ii. integration of technical innovation; the contract manager has an incentive to propose and to integrate innovation, for which concrete benefits for the end user could be far into the future.

    iii. forward-looking management of environmental and Public Health risks.

  - **and reactions to emergencies:**

    i. responsibility in the light of vagaries: e.g. flooding (recent examples in Central Europe and, to a lesser extent in France) or droughts (e.g. in 1976 in France).

2. Desirable forms of competition

➢ To limit transition costs

- **The alternative would be the frequent renewal (e.g. every five to seven years) of contracts which could only be based on an obligation of means. The perverse effects of this system are obvious:**

  i. the local authority is obliged to take charge *in abstracto* and *ex ante* of the bulk of the work related to organisation and allocation of ressources. By doing so, it loses the benefits of optimisation whilst increasing many of its own costs.

  ii. the obligation of results disappears and system assessment becomes more difficult.

  iii. the tender renewal programme rate occupies the bulk of the assigning authority 's resources, increases costs and limits the benefits it derives from the delegation of the service.

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2. Desirable forms of competition

➢ To avoid competitive distortions.

- **Calls for competition for short-term contracts :**

  i. accentuate the barrier to entry for new competitors who are less inclined to take risks for a short period of activity.

  ii. deprive the local authority of the possibilities of differentiated bids for which a longer contract term would offer broader scope for propositions (on long-term investments,..).

  iii. therefore, favour conservatism and grant a *de facto* "home advantage" to the incumbent operator.

2. Desirable forms of competition

c) An activity perimeter encompassing water and wastewater?

- **Integrated management of the totality of the water cycle presents advantages in terms of costs:**

  i. operating cost savings on common competences (e.g. servicing, maintenance and renewal costs of electromechanical machinery).

  ii. customer management cost savings are guaranteed on the basis of joint meter reading and billing activities.

  iii. overhead cost savings on the structure required for ensuring the link, on a same terriory, between the two services.

2. Desirable forms of competition

- **Inegrated management of the complete water cycle:**

  i. allows for joint action for protecting the natural environment.

  ii. is necessary when the natural environment is the same for both services, i.e. when the potable water distribution service takes water from the environment where the waste treatment service pumps out treated waste.

  iii. even more vital when the resource in question is rare and/or under threat. The following example of Berlin is interesting in this aspect;

  iv. moreover, enables a united environmental approach to be adopted vis-à-vis the populations served.

2. Desirable forms of competition

The example of Berlin

For 70% of its supplies, the city relies on increasingly solicited, shallow groundwater tables. Therefore, in our role as water manager we must:

i. regulate the drawing of potable water so as to maintain the balance of the groundwater tables whilst avoiding any overflowing;
ii. manage re-injections into natural surroundings (in particular by riverbank filtering) in the context of our responsibility for wastewater;
iii. perfect our understanding of the water table replenishment mechansims and the possible recycling within them of new pollutants (endocrine disruptors);
iv. Thus, over a10 year period Veolia Water, in partnership with universities, is investing 50 M€ into research to maintain the city's environmental future.

2. Desirable forms of competition

In brief:

- **Water is a natural monopoly, but contrary to popular belief, the service is improving greatly, due to competition for the market.**

- **Calls for competition on long-term, integrated contracts, if they are properly regulated:**

  - **can produce significant gains in productivity and in the quality of the service.**

  - **satisfy end users' needs and expectations in an overall and integrated manner.**

- **Absence of open competition produces the opposite effects.**

VEOLIA Water

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Europäische Kommission
„Konsultation Grünbuch zu öffentlich-privaten Partnerschaften
und den Gemeinschaftlichen Rechtsvorschriften für
Öffentliche Aufträge und Konzessionen“

B-1049 Brüssel

„Konsultation Grünbuch zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften für öffentliche Aufträge und Konzessionen – C 100 2/005“

Sehr geehrte Damen und Herren,

gern beantworten wir die im Grünbuch gestellten Fragen. Dabei beschränken wir uns auf Teilaspekte, die wir auf Grundlage unserer Erfahrungen beurteilen können.

Wir sind von der Notwendigkeit überzeugt, öffentliche Vorhaben durch ÖPP-Modelle zu organisieren, da diese eine effizientere Verwendung der öffentlichen Mittel – unter Einschluss privaten Kapitals und Engagements – erwarten lassen, um so auch bei der derzeitigen desolaten öffentlichen Haushaltslage Infrastrukturvorhaben in Europa verwirklichen zu können.

Insbesondere gilt dies für die verkehrliche Infrastruktur, deren Bedeutung von der Europäischen Union durch die Definition der Transeuropäischen Netze (TEN) bestätigt worden ist. Der Situation in Deutschland als größtem Transitland im Zentrum Europas kommt im Kontext mit der jüngsten EU-Erweiterung und den stark wachsenden Verkehrsmengen hinsichtlich des Ausbaus der Verkehrsinfrastruktur eine herausragende Bedeutung zu.

Unser Ingenieurunternehmen IMS (www.ims-ing.de) ist seit über 30 Jahren an zahlreichen Infrastrukturgroßprojekten in Norddeutschland planerisch und beratend beteiligt. Die nachfolgenden Ausführungen beziehen sich daher schwerpunktmäßig auf große und komplexe Projekte der verkehrlichen Infrastruktur.

Zu Frage 1: kein Kommentar

Zu Frage 2:
Das Verfahren des wettbewerblichen Dialogs kann die in den Punkten 26 und 27 angestrebten Grundsätze wie:

- Transparenz und Gleichbehandlung
- Objektivität und Integrität

- * Rechtssicherheit
- * Vorgabe technischer Spezifikationen in Form von Leistungs- oder Funktionsanforderungen
- * Innovative Lösungen
- * Verantwortungsvolle Nutzung der Steuergelder

nur dann erfüllen, wenn der Wettbewerb um Bau-, Finanzierungs-, und Betreiberdienstleistungen auf der Grundlage einer präzisen detaillierten technischen Planung und Kostenberechung durchgeführt wird. Die Wettbewerbsunterlagen sowohl für die Bau-, Finanzierungs- und Betreiberdienstleistungen sollten von liefer- und leistungs-unhängigen Adressen erarbeitet werden. Bei Einreichung der Angebote sollten innovative Lösungen zugelassen sein. Sie sollten an dem vom Auftraggeber (Öffentliche Hand) vorgegebenen Lösungskonzept gemessen werden. Eine solche Vorgehensweise stellt sicher, dass:

- * vergleichbare Angebote eingehen,
- * der Wettbewerb durch Beteiligung des Mittelstandes nicht eingeschränkt wird
- * der Leistungsumfang klar beschrieben ist und damit Rechtssicherheit weitestgehend besteht
- * und last not least durch konsequenten Wettbewerb eine größere Wirtschaftlichkeit, d.h. verantwortungsvolle Nutzung der Steuergelder erreicht wird.

Bau-, Finanzierungs- und Betreiberdienstleistungen können durchaus in einem Paket an ein Konsortium vergeben werden, jedoch nur auf Grundlage einer wie o.e. präzisen Leistungsbeschreibung für diese Dienstleistungen.

Zu Frage 3: kein Kommentar

Zu Frage 4:
Die IMS Ingenieurgesellschaft hat bei einem ÖPP-Projekt (Warnowquerung, Rostock) die Konzessionsgeberin beraten. Dabei konnte sie die Phasen

- * Ausschreibung und Vergabe der Konzession,
- * Verhandlungen bis zum Abschluss des Konzessionsvertrags und
- * Durchführung der Phasen Planung, Bauausführung sowie Betriebsaufnahme

begleiten.

Die Konzession wurde ohne einen für alle Bieter gleichermaßen geltenden Vertragsentwurf ausgeschrieben. Die nach Zuschlagserteilung erfolgten Vertragsverhandlungen erbrachten für die Konzessionsgeberin tendenziell nachteiligere Vertragsbedingungen, als wenn diese Verhandlung vor Zuschlagerteilung erfolgt wären.

Die Ausschreibung der Konzession erfolgte auf der Basis eines Ideenwettbewerbs mit Funktionsbeschreibung. Das Fehlen einer detaillierten Leistungsbeschreibung auf der Grundlage eines genehmigten Entwurfs führte dazu, dass die Konzessionsgeberin nicht beurteilen konnte, welches der Angebote nach Qualität und Leistung wirklich das günstigste war. Es fehlte ferner die Sicherheit, ob die angebotene Idee genehmigungsfähig war, bzw. mit welchen Kosten eine Genehmigungsfähigkeit zu erreichen sein würde. Weiterhin fehlten Kenntnisse über die Baurisiken, wodurch diese den Vertragspartnern nicht eindeutig zugeordnet werden konnten. Die Übernahme dieser unbekannten Risiken durch den Konzessionsnehmer verteuerten sein Angebot durch unnötig hohe Risikozuschläge.

Zu Frage 5:
Das Gemeinschaftsrecht ist sicher präzise genug, um eine effektive Teilnahme von Gesellschaften oder Gruppierungen aus anderen Staaten an den Konzessionsvergabeverfahren sicher zu stellen. Praktisch sind allerdings die projekt-/auftraggebernahen Unternehmen (Bieter) gegenüber anderen im Vorteil, weil sie in der Regel wirtschaftlicher anbieten können. Durch Einbindung des Mittelstandes sollte daher auch erreicht werden, dass mehrere projekt-/auftraggebernahe Unternehmen am Wettbewerb beteiligt werden.

Zu Frage 6: kein Kommentar

Zu Frage 7:
Ein neues Gesetzgebungsvorhaben der Kommission sollte, wenn überhaupt, nur allgemeine Grundsätze enthalten, jedoch mit der sehr konkreten Vorgabe, Wettbewerb um Bau-, Finanzierungs- und Betreiberdienstleistungen nur auf der Basis sehr präziser Leistungsbeschreibungen, die von liefer- und leistungsunabhängigen Unternehmen erbracht werden, durchzuführen (siehe auch Antwort auf Frage 2).

Zu Frage 8: kein Kommentar

Zu Frage 9: kein Kommentar

Zu Frage 10:
Die von uns in der Phase im Anschluss an die Auswahl des privaten Partners von ÖPP auf Vertragsbasis gemachten Erfahrungen weisen erhebliche Defizite in der Projektdurchführung auf, die ihre Ursache in einer mangelhaften Beschreibung der vereinbarten Leistungen hatten (Funktionalausschreibung).

Zu Frage 11: kein Kommentar

Zu Frage 12:
Die von uns beobachteten Praktiken oder Mechanismen zur Bewertung von Angeboten zeigen, dass ohne vergleichbare Angebote auf der Grundlage sehr präziser Leistungsbeschreibungen die Vergabe von den nicht erfolgreichen Wettbewerbern als häufig diskriminierend empfunden werden.

Zu Frage 13: kein Kommentar

Zu Frage 14: kein Kommentar

Zu Fragen 15, 16, 17:
Es besteht bei den wenigen bisher in Deutschland durchgeführten oder geplanten ÖPP-Verkehrsinfrastrukturprojekten die Praxis/Absicht, den privaten Auftragnehmer (Konzessionär) auch die Überwachung und damit die Qualitätssicherung des zu errichtenden Bauwerks mit zu übertragen. Da in der Regel zwischen Konzessionär und bauausführendem Unternehmen gesellschaftliche Abhängigkeiten bestehen, sollte grundsätzlich durch entsprechende Regelungen sichergestellt werden, dass alle bauüberwachenden und qualitätssichernden Funktionen von liefer- und leistungsunabhängigen Unternehmen erbracht werden.

Zu Fragen 18 und 19:
Diese Fragen können nur aus der Sicht eines „normalen“ EU-Bürgers beantwortet werden:
Bei der Einrichtung institutionalisierter ÖPP erscheint besonders problematisch, echten Wettbewerb zu realisieren und auch transparent zu machen, weil in der Regel die öffentliche Hand als Auftraggeber auch an der institutionalisierten ÖPP beteiligt ist.

Zu Frage 20:
Diese Frage kann nur für Deutschland beantwortet werden:
Die Einrichtung für ÖPP für große Verkehrsinfrastrukturvorhaben in Deutschland behindern im Wesentlichen:

- Der Widerstand in den fachlich zuständigen Verwaltungen mit dem ordnungspolitisch durchaus richtigen Argument, es findet keine Trennung von Planung und Ausführung statt und somit kann kein präziser Wettbewerb mit der Entgegennahme vergleichbarer Angebote organisiert werden und damit werden wirtschaftliche Lösungen nicht erreicht.

- Die Finanzlage der öffentlichen Hände in Deutschland ist so desolat, dass in Bund und Ländern Planungsbudgets zur detaillierten Vorbereitung von echtem Wettbewerb um Bau-, Finanzierungs- und Betreiberdienstleistungen in nur sehr geringem Maße zur Verfügung gestellt werden. Dieses hat zur Folge, dass in der gesamten Öffentlichkeit (Verwaltungen, Politik und Bürger) bisher nur geringe Akzeptanz für ÖPP-Projekte vorhanden ist, weil bei den bisherigen ÖPP-Modellkonzepten auf eine unabhängige projektvorbereitende und vor dem Wettbewerb laufende Planung verzichtet wird, auch auf die nachweisbare Gefahr hin, dass die Kosten für die Planung nur ein vernachlässigbarer Teil der vermeidbaren Mehrkosten für Bauinvestitionen, Finanzierungskosten und Betreiberkosten sind.

Schlussbemerkung:

1. Die Leistungsfähigkeit der Verkehrsinfrastruktur in Europa, insbesondere im Transitland Deutschland, ist für die globale Wettbewerbsfähigkeit der Europäischen Gemeinschaft von zentraler Bedeutung.

2. ÖPP-Projekte können einen signifikanten Beitrag zum Bau und zur Unterhaltung dieser Verkehrsinfrastur leisten.

3. Eine wirtschaftliche und von öffentlicher Akzeptanz getragene Durchführung von ÖPP-Projekten setzt notwendigerweise voraus, dass die Projektvorbereitung in den Händen liefer- und leistungsunabhängiger Unternehmen liegt und Wettbewerb um Bau-, Finanzierungs- und Betreiberdienstleistungen nach strengen Wettbewerbsregeln organisiert wird.

4. Die konsequente Einhaltung der vorgenannten Grundsätze liegt letztlich auch im Interesse der Bau-, Finanzierungs- und Betreiberdienstleistungserbringer, da nur so eine höhere Akzeptanz und damit eine größere Nachfrage (Marktvolumen) für ÖPP-Vorhaben entsteht.

5. Der Schlüssel für das Ingangbringen von ÖPP-Projekten in erforderlicher Zahl liegt daher allein in der Zurverfügungstellung von relativ geringen Planungsbudgets zur ordnungsgemäßen Vorbereitung komplexer Verkehrsinfrastrukturprojekte nach dem ÖPP-Modell.

Mit freundlichen Grüßen
IMS Ingenieurgesellschaft mbH

gez. Salzmann gez. Ruland

Die Privatisierung von Aufgaben der öffentlichen Daseinsvorsorge durch Gründung einer gemischt-wirtschaftlichen Gesellschaft des Handelsrechts (Public-Private-Partnership) und das Vergaberecht.

I. Formen der Gemeindetätigkeit im Bereich Daseinsvorsorge

Körperschaften des öffentlichen Rechts, insbesondere Gemeinden und Gemeindeverbände, haben schon immer Aufgaben der Daseinsvorsorge in Eigenleistung erbracht. Insbesondere trifft dies für die Abfallentsorgung sowie die Reinigung und Unterhaltung städtischer Anlagen zu. Die entsorgungspflichtigen Selbstverwaltungskörper sind jedoch nicht auf Erbringung dieser Leistungen auf eigenes Personal beschränkt, sondern ihnen stehen auch Privatisierungsmöglichkeiten zur Verfügung. Deren Ziele sind vielfältiger Natur und reichen von ordnungspolitischen Erwägungen über Gesichtspunkte der Flexibilitäts- und Effektivitätssteigerung bis zu steuerlichen Aspekten und zum Hauptziel der Kostenersparnis. Soweit hierfür das Kreislaufwirtschafts- und Abfallgesetz vom 07. Okt. 1996 die Rechtsgrundlage bietet, können die Gemeinden mit der Ausführung ihrer Pflichten Dritte als ihre Erfüllungsgehilfen beauftragen (vielfach genannt formelle Privatisierung) oder an sach- und fachkundige sowie zuverlässige Dritte die Pflichten selbst ganz oder teilweise übertragen (vielfach genannt materielle Privatisierung). Darüber hinaus steht es den Körperschaften des öffentlichen Rechts zu, in einer selbstgewählten Gesellschaftsform des Handelsrechts oder Privatrechts mit anderen Körperschaften des öffentlichen Rechts oder mit privaten Entsorgungsfirmen ihren öffentlich-rechtlichen Pflichten nachzukommen (PPP) oder ihren eigenen Entsorgungsdienst im Gewande einer Gesellschaft des Privatrechtes auszugliedern (In-house-Geschäft).

Weder haben sich bislang im öffentlichen Verwaltungswesen verbindliche Privatisierungsmethoden oder –Vorgänge herausgebildet, noch gehören die Bezeichnungen „Public-Private-Partnership“ und „In-house-Geschäft“ zur vergaberechtlichen oder anderweitigen gesetzlichen Terminologie. Die letzten beiden

Begriffe warten immer noch auf eine Inhaltsbestimmung derjenigen, die diese Termini technici benutzen. Der EuGH hat sie bisher nicht verwendet und die EG-Kommission sucht seit Jahren nach einer allgemeingültigen Definition.

Die Darstellungsform der Schaffung einer gemischt-wirtschaftlichen juristischen Person des Privatrechts wurde in der Bundesrepublik bereits vor Veröffentlichung der Europäischen Richtlinien am Ende der 70iger Jahre und vor deren Umsetzung in das bundesdeutsche GWB beschrieben und diese Rechtslage besteht auch heute noch bei öffentlichen Aufträgen unterhalb der Schwellenwerte.

II. Privatisierung und öffentliches Auftragswesen

1. Verdingungsordnungen, PreisVO Nr. 30/53 (altes Recht)

Sedes materiae sind § 2 (1) der Verordnung PR Nr. 30/53 über die Preise bei öffentlichen Aufträgen (Definition „öffentlicher Auftrag") sowie die förmlichen und materiellen Vergabebedingungen der VOL, VOB und VOF. Öffentliche Aufträge im Sinne der Preisverordnung sind Austauschverträge vor allen Dingen in der Form von Kauf-, Miet-, Werk-, Lieferungs- und Dienstleistungsaufträgen als „Bedarfsdeckungsgeschäfte" der öffentlichen Hand. Unstreitig fallen unter derartige Geschäfte nicht Gründungen von Gesellschaften. Weder findet die Preisverordnung Anwendung noch das Vergaberecht. Außerdem kann nach der Preisverordnung nur eine Körperschaft des öffentlichen Rechts ein „öffentlicher Auftraggeber" sein, nicht z.B. eine gemischt-wirtschaftliche Gesellschaft bestehend aus einer Behörde und einem privatrechtlichen Unternehmen. Ist der Vertragspartner eines öffentlichen Auftraggebers aber eine Privatperson, die zur Erfüllung ihres öffentlichen Auftrages einen Unterauftrag abschließen muss und besitzt der öffentliche Auftraggeber ein Interesse daran, den erststufigen Unterauftragnehmer der Preisverordnung zu unterwerfen, besteht die Möglichkeit einer solchen Einbeziehung dieser Unterauftragnehmerleistung in den öffentlichen Auftrag durch das Verfahren nach § 2 (4) VO PR 30/53.

> *vgl. Ebisch-Gottschalk, Kommentar Preise und Preisprüfungen bei öffentlichen Aufträgen, 7. Aufl. 2001 zu § 1 RdNr. 10; zu § 2 RdNrn. 7,11, 42 ff.*

Durch diese mittelbare Einordnung in das öffentliche Auftragsverhältnis wird der erststufige Unterauftragnehmer zur Duldung der Preisprüfung seiner Leistung verpflichtet (§§ 8, 9 VO PR 30/53). Sein Unterauftrag wandelt sich nicht in einen öffentlichen Auftrag um. Verpflichtungen aus dem Vergaberecht werden hierdurch nicht begründet. Das Verfahren nach § 2 (4) VO PR 30/53 gilt nicht für öffentliche Bauaufträge. Denn die Baupreis-Verordnung VO PR 1/72 wurde mit Wirkung vom 16. Juni 1999 aufgehoben, ohne dass Bauleistungen der weitergeltenden VO PR

30/53 zugeordnet wurden. Dieses „alte Recht“ gilt auch heute noch für öffentliche Aufträge im Sinne der Preisverordnung unterhalb der Schwellenwerte.

2. Richtlinien der EU, Verdingungsordnungen, GWB

Gegenstand des Vergaberechts ist der öffentliche Auftrag als Bedarfsdeckungsgeschäft der öffentlichen Hand.

Das in der Entwicklung begriffene Vergabegemeinschaftsrecht in der Europäischen Union ließ nicht erkennen, dass der öffentliche Auftrag seiner Qualifikation nach eine andere Funktion erhalten solle als ein „Bedarfsdeckungsgeschäft der öffentlichen Hand“ gemäß der jahrzehntelang in Deutschland praktizierten Art. Auch die in der Folgezeit veröffentlichten Richtlinien des Rates der Europäischen Gemeinschaften und deren Umsetzung durch das Vergaberechtsänderungsgesetz/GWB 4. Teil 1998 hatte zu dieser Frage keine anderslautende Regelung geschaffen. § 99 (1) GWB erhielt zwar eine etwas präzisere Ausgestaltung als § 2 (1) VO PR 30/53; sein materieller Sinngehalt unterscheidet sich jedoch nicht von dieser preisrechtlichen Bestimmung. In ständiger Rechtsprechung stellt der EuGH einen konkreten und nachweisbaren öffentlichen Auftrag als Voraussetzung der Anwendung des Vergaberechts heraus.

Umso weniger verständlich mussten daher erste Verlautbarungen von Vergabekammern außerhalb ihrer entscheidungsrelevanten Beschlussbegründungen sowie Besprechungen in der juristischen Literatur und einzelne Beurteilungen aus dem Kartellbereich wirken, als die Meinung vertreten wurde, gemischt-wirtschaftliche gesellschaftsrechtliche Kooperationen im gemeindlichen Entsorgungswesen seien europaweit ausschreibungspflichtig.

Angesichts eines europäisch beeinflussten „Vergaberechtsänderungsgesetzes“, welches offenbar als völlig neues Rechtsgebiet empfunden wurde, vergaß man plötzlich, zur Frage der Ausschreibungspflicht als erstes Tatbestandsmerkmal das Vorliegen eines „öffentlichen Auftrages“ zu ermitteln.

Die Vergabekammer Düsseldorf z.B. nimmt in einem Beschluss aus dem Jahre 2001 zu Beginn ihrer Entscheidungsgründe in einem Nachprüfungsverfahren ein diesbezügliches Untersuchungsergebnis vorweg und führt aus, das Rechtsgeschäft zwischen der Gemeinde als Gründungsmitglied und der zu errichtenden gemischt-wirtschaftlichen Entsorgungsgesellschaft sei als öffentlicher Auftrag zu qualifizieren,

> *„... da ansonsten durch die Kombination einer Gesellschaftsgründung und Aufgabenübertragung die ... Leistungsbeschaffung im Wettbewerb beliebig unterlaufen werden könnte ... Eine Regelungslücke, die derartige kombinierte Verträge bewußt dem Vergaberecht entziehen wollte, ist nicht erkennbar ...“*
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> Land NRW, Beschluss Vergabekammer Düsseldorf – VK 12/2000 – L vom 07. Juli 2000; NZ Bau 2001. 46

Ähnlich ist Jaeger in seinem Beitrag zum Düsseldorfer Beschluss vorgegangen, in dem er dessen Meinung verteidigte. Er meint, bereits die Gesellschaftsgründung sei zwangsläufig dem Vergabeprimat zu unterwerfen, weil mit dieser Maßnahme

> *„... gesellschaftsrechtliche Konstruktionen gewählt werden, die darauf hinauslaufen, die Anwendung des Vergaberechts im Verhältnis zwischen Gemeinde und der gemischten Gesellschaft auszuhebeln“...*Die vergaberechtliche Prüfung müsse auch auf die Kooperationsgründung erstreckt werden *„... wenn die Gesellschafter versuchen, dieses Ergebnis durch eine geschickte Vertragskonstruktion zu vermeiden – und dieses Bestreben wird wohl immer vorhanden sein, weil die Public-Private-Partnership ihren Sinn sonst verfehlt.“*
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> Aufsatz: Vorsitzender Richter am OLG Wolfgang Jaeger, Düsseldorf *„Public-Private-Partnership und Vergaberecht“* in NZBau 2001, 7 ff.

Wir fragen uns, auf welchem Boden wohl die Meinung der Vergabekammer Düsseldorf sowie die Auffassung von Jaeger gewachsen sein mag, die Gründung einer gemischt-wirtschaftlichen Kooperation müsse dem Wettbewerb unterstellt werden, damit das Vergaberecht nicht „unterlaufen“ bzw. „ausgehebelt“ werden könne und welche Überlegungen es wohl rechtfertigen, die Gründung einer gemischt-wirtschaftlichen Gesellschaft als Privatisierungsmodell und als vergaberechtsfeindlich zu diskreditieren. Ein derartiges Verdikt ist unangebracht. Die Gründung einer Gesellschaft im öffentlich-rechtlichen Bereich ist vergaberechtlich neutral. Dem Vergaberecht unterliegen nur „öffentliche Aufträge“. Versieht die Gründergemeinde die neue gemischt-wirtschaftliche Gesellschaft nach deren Errichtung mit einem öffentlichen Auftrag, bleibt dieser öffentliche Auftrag dem Vergaberecht unterworfen (vgl. unten III. 1.).

Das Vergaberecht ist kein „Regime“

Kaum waren die ersten Nachprüfungsverfahren eingeleitet, las man in Beschlüssen einiger Vergabekammern vom neuen Vergaberecht als einem „Vergaberechtsregime“.

> Land Niedersachsen, Vergabekammer Lüneburg – 203 VgK – 06/1999 vom 10. Aug. 1999; NZBau 2001, 51; Überschrift der Leitsätze: „Vergaberechtsregime bei Kooperationsmodellen und Diskriminierungsverbot“.
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> Land NRW, Vergabekammer Düsseldorf, Beschluss VK 12/2000 vom 07. Juli 2000; NZBau 2001/46; Überschrift der Leitsätze: „Vergaberechtsregime bei kommunalen Kooperationsmodellen“.
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> Freistaat Sachsen, Vergabekammer Leipzig - 1/SVK/109-01
> vom 29. Nov. 2001 „Vergaberegime“
> - 1/SVK/074-03
> vom 01. Apr. 2003 „Vergaberechtsregime“.

Die Vergabekammer Düsseldorf hat am ehesten den Begriff „Regime“ interpretiert, indem sie damit eine gesetzgeberisch verfügte Dominanz der vergaberechtlichen Ausschreibungspflicht bei der Bildung einer gemischt-wirtschaftlichen Gesellschaft anlässlich eines gemeindlichen Privatisierungsvorhabens herausstellt. Sie will bei der Inangriffnahme einer solchen Kooperation eine „im Grundsatz vom europäischen Richtliniengeber wie vom nationalen Gesetzgeber gewollte umfassende Leistungsbeschreibung im Wettbewerb“ erkannt haben. Indessen geben weder die gesetzten Normen eine solche notwendige Gewissheit, noch versucht die Vergabekammer einen derartigen angeblichen gesetzgeberischen Willen zu erklären.

Den Begriff „....Regime“ findet man auch im Beschluss eines OLG’s sowie in einem in der juristischen Literatur veröffentlichten Aufsatz.

> Land NRW, Beschwerdesenat OLG Düsseldorf, Verg. 45/01 vom 21. Januar 2002 Bl. 4 („Vergaberechtsregime“)
>
> Jaeger, Aufsatz NZBau 2001, 46 unter III. 1. a. („Vergaberegime“).

Die Bezeichnung „Nachprüfungsregime“ war bereits in den Materialien zum Vergaberechtsänderungsgesetz zu lesen.

> Bundestags-Drucksache 9340 S. 12 zum Entwurf eines Gesetzes zur Änderung der Rechtsgrundlage des VgRÄG.

Sie lässt sich jedoch aus einem in Deutschland historisch begründeten Umstand damit erklären, dass nach dem I. Weltkrieg die Bestimmungen der VOL/A und VOB/A als interne Dienstanweisungen an die Beschaffungsstellen galten und daher die Bieter nicht in der Lage waren, ein klagbares Recht auf Anwendung dieser Bestimmungen zu ihrem Schutz in Anspruch zu nehmen.

> Nr. 3 Vorl.VV gem. § 56 Bundeshaushaltsordnung

Dieser Rechtsschutz wurde endlich den Bietern und Bewerbern durch die §§ 97 (7), 107 – 115 GWB sowie das Beschwerdeverfahren (§§ 116 – 124 GWB) gewährt. Ein Nachprüfungs-„Regime“ entstand jedoch für die antragsberechtigten Personen nicht. Denn der Gesetzgeber hat durch das GWB keinen uneingeschränkten Bieterschutz verwirklicht, sondern nur diejenigen Vorschriften des Vergaberechts subjektiv-rechtlich aufgewertet, die den Schutz des potentiellen Auftragnehmers bezwecken.

> Boesen, Vergaberecht Kommentar zum 4. Teil des GWB, 1. Aufl. 2000, Bundesanzeigerverlag, zu § 97 RdNr. 187 ff-

Im übrigen ist der Ausdruck „Regime“ bereits durch Bezeichnung einer diktatorischen totalitären Gewaltherrschaft belegt, wie z.B. „Naziregime“ oder „Talibanregime“. Für eine Gesetzgebung innerhalb einer freiheitlich-demokratischen Gesellschaftsform und Staatsverfassung sollte die Anlehnung an eine solche Wortbildung ausgeschlossen sein.

Der „öffentliche Auftrag“ des GWB ist nicht im „funktionellen Sinne“ denaturiert worden

Als weiteren Versuch, die Europäischen Richtlinien außerhalb dogmatischer Gesetzmäßigkeiten zu interpretieren, werten wir die Auffassung von Jaeger, für die Zuordnung des Begriffes „öffentlicher Auftrag“ komme es nicht auf die äußere Rechtsform an, sondern auf die „wirtschaftliche Funktion“ des Geschäftes. Der EuGH habe den Begriff des „öffentlichen Auftraggebers“ zur Zweckerreichung der EG-Vergaberichtlinien schon seit langem im funktionellen Sinne angewendet, so dass der Gedanke nicht fern läge, diese Deutung auch auf den Begriff „öffentlicher Auftrag“ anzuwenden. Ein solches funktionelles Verständnis des Auftragsbegriffes müsse mit Blick auf das Gebot der richtlinienkonformen Auslegung der §§ 97 ff GWB, die der Umsetzung der EG-Richtlinien zum Vergaberecht dienen, auch bei der Auslegung der §§ 99 100 GWB beachtet werden.

Jaeger „Public-Private-Partnership und Vergaberecht“; NZBau 2001, 8

Mit dieser Formel versucht Jaeger, bereits die Gründung einer gemischt-wirtschaftlichen Gesellschaft unter das Vergaberecht vorzuverschieben, ein Rechtsakt, der kein „Geschäft“ darstellt, erst Recht kein Bedarfsdeckungsgeschäft der öffentlichen Hand.

vgl. Byok/Jaeger, Kommentar zum Vergaberecht, Verlag Recht und Wirtschaft Heidelberg, 1. Aufl. 2000, § 99 RdNr. 336.

Vor allem aber liegen die beiden Bezeichnungen „funktionaler Auftraggeberbegriff“ und „funktionaler Auftragsbegriff“ rechtssystematisch nicht auf derselben Ebene. Vielmehr weist der EuGH darauf hin, dass sich der Europäische Richtliniengeber vom klassischen „öffentlichen Auftraggeber“ als den Behörden der öffentlichen Verwaltung getrennt und dessen Kreis erweitert habe auf enumerativ im Anhang I der Richtlinie 71/315/EWG aufgelistete „Einrichtungen“ sowie auf „natürliche und juristische Personen des öffentlichen und privaten Rechts“ und auf „Verbände“. Diese Personen „gelten“ nunmehr gem. Art. 1 b) Richtlinie 92/50/EWG als öffentlicher Auftraggeber; der Begriff „öffentlicher Auftraggeber“ sei daher im „funktionellen Sinne zu verstehen“.

> Urteil EuGH i.d. Rechtssache C-360/96 in dem Rechtsstreit Gemeente Arnheim/Gemeente Rheden ./. BFI Holding BV vom 10. Nov. 1988, Leitsatz Nr. 62 (mit Verweisungen).
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> Boesen, Vergaberecht Kommentar zum 4. Teil des GWB, 1. Aufl., § 98 RdNr. 28 ff.

Der EuGH hat unseres Wissens die Bezeichnung „funktionaler Auftragsbegriff“ bislang nicht verwendet und spricht nicht einmal von einem funktionalen öffentlichen Auftrag, wenn die in Art. 1 b) der Richtlinie 92/50/EWG genannten nichtbehördlichen „Stellen“ einen Auftrag gemäß Art. 1 a) Richtlinie 92/50/EWG abschließen.

Jaeger setzt sich offenbar für einen völlig neuen Auftragsbegriff außerhalb des § 99 GWB ein abweichend vom tatbestandsmäßigen Typ eines Bau-, Liefer- oder Dienstvertrages hin zu einer Maßnahme, die geeignet ist, dem äußeren Zweck eines derartigen Rechtsgeschäftes zu genügen.

Anlässlich des Düsseldorfer Vergaberechtstages 2003 fand Jaeger Gelegenheit, innerhalb eines Vortrages über die Privatisierung von Leistungen der öffentlichen Hand auf dem Gebiet der Daseinsvorsorge ein EuGH-Urteil aus 2001 zu besprechen, in dem er meinte, feststellen zu können, dass der EuGH den Schritt vom „funktionalen Auftraggeber“ zum „funktionalen Auftrag“ vollzogen habe.

Nachdem der EuGH festgestellt habe, dass nach den Richtlinien der Betriff des öffentlichen Auftraggebers im funktionellen Sinne zu verstehen sei, habe der Gerichtshof seines Erachtens in diesem Urteil auch die Entwicklung des Begriffs des öffentlichen Auftrages im funktionellen Sinne vollzogen.

In einem in Italien anhängig gewesenen Rechtsstreit im Zusammenhang mit einem Großbauvorhaben sei es streitig geworden, ob die unmittelbare Erstellung einer Erschließungsanlage hätte ausgeschrieben werden müssen. Die Bauherren und deren Architekten hätten den Standpunkt vertreten, die Errichtung dieser Anlage sei nach italienischem Recht kein Bauvertrag gewesen und der angerufene EuGH hätte eine Vorabentscheidung treffen müssen, ob diesbezüglich ein öffentlicher Bauauftrag im Sinne des Art. 1 a) der Baukoordinierungsrichtlinie 97/52/EG abgeschlossen worden sei. In diesem Zusammenhang laute die maßgebliche Erwägung des Gerichtshofes im Erwägungsgrund Nr. 52, dass der Art. 1 a), der den Begriff des öffentlichen Bauauftrages definiere, so auszulegen sei, dass die praktische Wirksamkeit der Richtlinie gewährleistet sei.

> Düsseldorfer Vergaberechtstag Sept. 2003. Vortrag: „Die vergaberechtliche Beurteilung von Public-Private-Partnership in der Entsorgungsinfrastruktur“ von Wolfgang Jaeger, Vorsitzender Richter am OLG (Kartell- und Vergabesenat) a.D.; Skriptum S. 136, bezogen auf:
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> Urteil EuGH-Rs C-399/98 „Teatro alla Bicocca” (Mailand) vom 12. Juli 2001, Erwägungsgrund 52; NZ Bau 2001 512, 514.

Randnummer 52 hat in voller Länge folgenden Wortlaut:

> *„52. Da das Vorliegen eines öffentlichen Auftrages eine Voraussetzung für die Anwendung der Richtlinie 93/37/EWG darstellt, ist Art. 1 lit. a) so auszulegen, dass die praktische Wirksamkeit der Richtlinie gewährleistet ist. Wie aus ihren Begründungserwägungen, insbesondere der zweiten und dritten hervorgeht, soll die Richtlinie Beschränkungen der Niederlassungsfreiheit und des freien Dienstleistungsverkehrs auf dem Gebiet der öffentlichen Bauaufträge beseitigen, um diese Märkte einem echten Wettbewerb zu öffnen. Damit ein solcher Wettbewerb entstehen kann, ist es laut der zehnten Begründungserwägung erforderlich, dass*

> *beabsichtigte Auftragsvergaben in der gesamten Gemeinschaft bekannt gemacht werden.“*

Die Richtlinie 93/37/EWG beginnt mit 14 „Erwägungsgründen“. Aus ihnen hat der EuGH in seinem Urteil 3 herausgegriffen. Im 2. Erwägungsgrund erklärt der Rat der Europäischen Gemeinschaften, dass die Verwirklichung der Niederlassungsfreiheit und des freien Dienstleistungsverkehrs auf dem Gebiet der öffentlichen Bauaufträge neben der Aufhebung der Beschränkungen eine Koordinierung der einzelstaatlichen Verfahren zur Vergabe öffentlicher Bauaufträge erfordern. Der 3. Erwägungsgrund fordert bei dieser Koordinierung, dass die in den einzelnen Mitgliedsstaaten geltenden Verfahren und Verwaltungspraktiken soweit wie möglich zu berücksichtigen sind. Der 10. Erwägungsgrund hält für das Entstehen eines echten Wettbewerbes in den Mitgliedsstaaten die Bekanntmachung der beabsichtigten Auftragsvergaben in der gesamten Gemeinschaft für erforderlich, damit die an öffentlichen Bauleistungen interessierten Unternehmen entsprechende Angebote einreichen können.

Wir vermögen weder aus den 14 noch aus den 3 vom EuGH hervorgehobenen Erwägungsgründen der Baurichtlinie die geänderte Deutung eines öffentlichen Auftrages im funktionellen Sinne zu erkennen, außer das Erfordernis, dass ein solcher vom Gesetzgeber fest umrissener öffentlichen Auftrag auch seinen Zweck erreicht und in der Praxis „funktioniert“. Wir beziehen uns dabei auf die RdNr. 55 des Urteils, in dem der EuGH ausführt, dass die in der Baurichtlinie festgelegten Grundsätze über die Tatbestandsmerkmale „öffentlicher Auftraggeber“, „Bauvorhaben“, „Bauwerk“ und „öffentlicher Bauauftrag“ so zu beurteilen sind, „dass die praktische Wirksamkeit der Richtlinie nicht beeinträchtigt wird und zwar insbesondere dann, wenn diese Fälle Besonderheiten aufweisen, die sich aus den auf sie anwendbaren nationalen Rechtsvorschriften ergeben“.

Sollten tatsächlich Zweifel über die rechtstheoretische Lösung des Streitfalles durch den EuGH angebracht sein, werden diese durch den Urteilsaufbau behoben. Denn in den Urteilsgründen untersucht der EuGH besonders sorgfältig die gesetzlich vorgegebenen Tatbestandsmerkmale der Richtlinie „öffentlicher Auftraggeber“ (57 – 75), „entgeltlicher Vertrag“ (76 – 86), „schriftlicher Vertrag“ (87) und „Unternehmereigenschaft“ (88 – 96). Unter dem Abschnitt „Zum Tatbestandsmerkmal eines entgeltlichen Vertrages“ kommt der EuGH in Nr. 85 wieder auf die Ausführungen in der Nr. 52 mit den Worten zurück:

> *„85. Diese Auslegung der nationalen Rechtsvorschriften entspricht dem oben in Rdnr. 52 genannte Zweck der Richtlinie und ist deshalb geeignet, deren praktische Wirksamkeit zu gewährleisten.“*

Mit diesen Worten will der Gerichtshof resümierend feststellen, dass nach allem auch der Zweck der Richtlinie erfüllt sei und schließt bestätigend in Nr. 97

> *„97. Demnach bildet die unmittelbare Erstellung einer Erschließungsanlage unter den im italienischen Städtebaurecht festgelegten Voraussetzungen einen öffentlichen Bauauftrag i.S. von Art. 1 lit. a) Richtlinie 93/37/EWG.“*

Das Urteil des EuGH „Teatro alla Bicocca (Mailand)“ vom 12. Juli 2001 ist daher nicht als Beispiel dafür geeignet, dass der EuGH nunmehr auch den Schritt vom „öffentlichen Auftraggeber im funktionalen Sinn“ zum „öffentlichen Auftrag im funktionalen Sinn“ vollzogen habe.

Geschütztes Rechtsgut der Vergaberichtlinien ist nicht der „Wettbewerb“

Als weiteres Mittel der Interpretation der §§ 97 ff. GWB findet man die Aussage, ebenso wie das Kartellrecht wolle auch das neue Vergaberecht den Wettbewerb als Institution schützen.

> Marx in: Jestaedt, Kemper, Marx, Drieß „Das Recht der Auftragsvergabe“, 1999, S. 7
>
> Dreher in: Immenga/Mestmäcker, GWB, 3. Aufl. 2001 vor § 97 RdNr. 60
>
> Jaeger, Aufsatz NZBau 2001, 6

Das führt bei Marx und Dreher zur Bezeichnung der §§ 97 GWB als „Kartellvergaberecht“. Der „Wettbewerb“ als solcher solle geschütztes Rechtsgut der einschlägigen Europäischen Richtlinien und des GWB sein. Jaeger formuliert es so: „Die Vorschriften der EG über die Vergabe öffentlicher Aufträge beruhen auf dem Grundgedanken des Schutzes des Wettbewerbs. Das Gebot der richtlinienkonformen Auslegung der §§ 97 ff. GWB, die der Umsetzung der EG-Richtlinien zum Vergaberecht dienen, müsse auch bei der Auslegung der §§ 99, 100 GWB beachtet werden.“

Jaeger, a.a.O. zu III. 1. am Ende, S. 8 oben.

Aufgrund welchen Artikels welcher Richtlinie welche Bestimmung des GWB in welcher Weise auszulegen sei, sagt der Autor nicht.

Weder das primäre Gemeinschaftsrecht (vornehmlich EG-Vertrag) noch das sekundäre Gemeinschaftsrecht (Europäische Richtlinien), welches im Anwendungsgebiet des öffentlichen Auftragswesens die Bestimmungen des EG-Vertrages konkretisiert, bezeichnen den „gemeinschaftsweiten Wettbewerb“ als „geschütztes Rechtsgut“ der neuen Normen. Gegenstand und Ziel dieser Gesetzgebung ist vielmehr die Durchsetzung und Gewährleistung der Öffnung der Europäischen Gemeinschaft für das öffentliche Auftragswesen. Soweit hierbei „Wettbewerb“ erscheint, wird er nur als eines der vielfältigen Mittel zur Zielerreichung aufgeführt und als eine der gesetzlichen Verpflichtungen herausgestellt.

Der EG-Vertrag ist die rechtliche Grundordnung der Gemeinschaften. In den Grundfreiheiten des gemeinsamen Marktes, soweit sie Bezüge zum öffentlichen Auftragswesen aufweisen, zählen insbesondere der freie Warenverkehr (Art. 28 ff. EGV), der freie Dienstleistungs- und Personenverkehr (Art. 39 ff., 43 ff., 49 ff., EGV), das allgemeine Diskriminierungsverbot (Art. 12 EGV) und die Wettbewerbsregeln (Art. 81 EGV).

Zum spezifischen sekundären Gemeinschaftsrecht gehören vor allem die Baukoordinierungsrichtlinie 83/37 EWG, die Lieferkoordinierungsrichtlinie 93/36 EWG, die Sektorenkoordinierungsrichtlinie 93/38 EWG, die Dienstleistungskoordinierungsrichtlinie 92/50 EWG und die Rechtsmittelrichtlinie 89/665 EWG.

Ein Blick in diese Richtlinien lässt erkennen, dass in ihnen nur die jeweiligen Zielvorstellungen und Anordnungen des Richtliniengebers herausgearbeitet sind:

Im Vorwort zur Baurichtlinie 93/37 EWG: Die gleichzeitige Verwirklichung der Niederlassungsfreiheit und des freien Dienstleistungsverkehrs, Aufhebung von Beschränkungen, Koordinierung der einzelstaatlichen Bauverfahren und Einführung einer gemeinschaftlichen Normungs- und Standardisierungspolitik.

Im Vorwort zur Lieferungsrichtlinie 93/36: Wie 93/37 und zusätzlich Anordnung verschiedener Maßnahmen der Transparenz und Dokumentation.

Im Vorwort zu den Ziffern 1., 2., 11., 12. und 45. der Sektorenrichtlinien 93/38: Darlegung Europäischer Gemeinschaftsziele, Vollendung des Binnenmarktes, Gewährleistung eines freien Verkehrs von Waren, Personen, Dienstleistungen, Kapital, flexible Geschäftspraxis sowie Verhinderung einer Abschottung bestimmter Märkte.

Im Vorwort und in Art. 3 der Dienstleistungsrichtlinie 92/50: Notwendigkeit der Verwirklichung des Binnenmarktes, Vermeidung von Hemmnissen des freien Dienstleistungsverkehrs, Nichtdiskriminierung von Dienstleistungserbringern, Koordinierung von Dienstleistungsaufträgen, Unterbindung von Praktiken zur Einschränkung des Wettbewerbs.

Im Vorwort und in Art. 1 (2) der Rechtsmittelrichtlinie 89/665: Verstärkung der Transparenz und der Nichtdiskriminierung sowie Schaffung einer wirksamen und raschen Nachprüfung von Vergabeverstößen.

Danach fehlt es an jeder Bestätigung im neuen Vergaberecht selbst, der Europäische Gesetzgeber und Europäische Richtliniengeber habe durch die fraglichen Normen den „Wettbewerb“ als deren Rechtsgut ausgewiesen.

Prof. Dr. Bunte führt zu diesem Thema aus, sicher gehe es auch beim Vergaberecht darum, den rechtlichen Rahmen für „Wettbewerb“ festzulegen und den Wettbewerb durch spezielle Instanzen zu schützen. Allerdings seien die Gemeinsamkeiten im Wettbewerbsgedanken schon so unterschiedlich, dass es verfehlt erscheine, davon zu sprechen, Kartellrecht und Vergaberecht wollten den Wettbewerb als Institution schützen, und die §§ 97 ff. GWB als „Kartellvergaberecht“ zu bezeichnen. Wohl stelle sich aber die Frage der Bedeutung des allgemeinen materiellen Kartellrechts für das Vergaberecht.

> Bunte, Aufsatz: „Der Grundsatz der dezentralen Beschaffung der öffentlichen Hand“, Ziff. I. 2. „§§ 97 ff. GWB als Kartellrecht?“, BB 2001, 2121.

Zusammenfassend gelangen wir zu dem Ergebnis, dass das Vergaberecht weder als ein „Regime“ anzusehen ist, welches ohne Rücksichtnahme auf seine tatbestandsmäßigen Voraussetzungen nicht nur Rechtsgeschäfte sondern auch Rechtshandlungen (Gesellschaftsgründungen) umfasst, dass weiterhin die Gesetzgeber die drei Arten vom Vergaberecht eingeschlossenen Bedarfsdeckungsgeschäfte: Bau-, Liefer-, und Dienstleistungen nicht funktional geradezu nach Beliebigkeit aufgelöst haben und dass schließlich allenfalls der zu öffnende und zu vollendende Europäische Binnenmarkt im Rahmen öffentlicher Aufträge das durch das Vergaberecht geschützte Rechtsgut darstellen könnte, aber nicht „der Wettbewerb“. Die von uns angegriffenen Erwägungen sind daher ungeeignet für die von Jaeger ausgesprochene Empfehlung (Aufsatz NZBau 2001, S. 8), mittels richtlinienkonformer Auslegung der §§ 97 ff. GWB eine gemischt-wirtschaftliche Gesellschaftsgründung mit einer Gemeinde als Partner europaweit auszuschreiben.

Im übrigen würde bei Unterstellung des „Wettbewerbes“ als geschütztes Rechtsgut dieser Wettbewerb bei freier Gesellschaftsgründung nicht umgangen oder verletzt sein. Denn bei einer Planung, der frei gegründeten gemischt-wirtschaftlichen Gesellschaft nach dessen Gründung einen öffentlichen Auftrag zu erteilen, unterliegt dieser öffentliche Auftrag dem Vergaberecht (vgl. unten III. 1.).

Im übrigen halten wir einen Beschluss des Beschwerdesenates OLG Brandenburg für äußerst beachtenswert, der erklärt hat, das Vergaberechtsänderungsgesetz verfolge nicht den Zweck, das Vergaberecht auf Bereiche auszudehnen, die bislang von ihm ausgenommen waren; allein die EG-Richtlinien sollten umgesetzt werden. Eine Erweiterung der vergaberechtlichen Regelungsbereiche könne nur durch den Gesetzgeber, nicht aber durch den Verordnungsgeber erfolgen.

> Land Brandenburg, Beschwerdesenat OLG Brandenburg-Verg. W 3/03 und 5/03 vom 2. September 2003.

Ausgenommen vom Preisrecht für öffentliche Aufträge/Vergaberecht waren – und sind unterhalb der Schwellenwerte – die Gründung einer Gesellschaft des Handelsrechts mit einer Körperschaft des öffentlichen Rechts als Partner, weil eine solche Gesellschaftsgründung kein „Geschäft“ ist, insbesondere kein „Bedarfsdeckungsgeschäft“ darstellt. Wer mittels Unterstellungen, Analogien, Auslegungen oder Deutungen den klaren gesetzgeberischen Willen zu ändern trachtet, befindet sich contra legem. Sobald eine zuständige Behörde mit der neu entstandenen Kooperation ein Rechtsgeschäft im Bereich der Daseinsvorsorge abzuschließen beabsichtigt und ein öffentlicher Auftrag entsteht, greift das Vergaberecht ein. Die Partnerschaftssuche und Gesellschaftsbildung bleibt der freiheitlich geschaffenen Rechtsordnung vorbehalten.

Angeblich ständige Spruchpraxis der Nachprüfungsinstanzen

In der Bundesrepublik Deutschland hat bis heute noch keine Vergabeinstanz eine Entscheidung – geschweige denn eine rechtsbeständige oder rechtskräftige Entscheidung – über die Frage getroffen, ob die Gründung einer Gesellschaft des Privatrechts mit mehreren Körperschaften des öffentlichen Rechts oder mit einer gemischt-wirtschaftlichen Partnerschaft europaweit auszuschreiben ist. Zwar sind in einer Reihe von Vergabekammerbeschlüssen spontane Meinungen geäußert worden, die eine Ausschreibungspflicht favorisiert haben, aber keiner der gefassten Beschlüsse hatte die Rechtsfrage der Ausschreibungspflicht zum Gegenstand des Nachprüfungsverfahrens.

Die Art und Weise, in der sich die betreffenden Vergabekammern gegenseitig zitieren, sowie die Berichterstattung im Schrifttum über diese formal fehlerhaften Titel, sind geeignet, bei dem Leser den Eindruck zu erwecken, es handele sich bei diesem bislang in Wahrheit ungelösten Komplex um eine ständige für die Zukunft zu beachtende Rechtsprechung. Zu diesen Beschlüssen gehören:

Land Niedersachsen, Vergabekammer Lüneburg – 2003–VgK–6/1999 vom 10. August 1999

Land NRW, Vergabekammer Düsseldorf VK 12/2000-L vom 7. Juli 2000; NZBau 2001, 46

Freistaat Sachsen, 1. Vergabekammer Leipzig – 1/SV-K/71-00 vom 14. August 2000

Freistaat Sachsen, 1. Vergabekammer Leipzig – 1/SV-K/73-00 vom 14. August 2000

Land Baden-Württemberg, Vergabekammer Stuttgart – 1 VK 35/00 und – 1 VK 1/01 vom 24 Januar 2001; NZBau 2001, 340

Land Brandenburg, Beschwerdesenat Brandenburg – Verg. 3/001 vom 3. August 2001; NZBau 2001, 645 ff.

Anders verhält es sich bei der Ausgliederung der Aktivitäten der Daseinsvorsorge aus einer öffentlich-rechtlichen Körperschaft durch diese Behörde unter Umwandlung in eine Gesellschaft des Privatrechts bei Fortführung ihrer Kontrolle über die organisatorisch verselbständigte Einheit wie über ihre Dienststelle („In-house-Geschäft“).

> Urteil EuGH, in der Rechtssache C-107/98 Teckal SrL ./. Gemeinde Viano u.a. vom 18. November 1999
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> BGH Beschluss – XZB 10/01, Divergenzentscheidung, OLG Jena ./. Thüringer Landesverwaltungsamt, Vergabekammer vom 12. Juni 2001.

III. Gründung einer „Public-Private-Partnership“.

Die Richtlinien des Rates der Europäischen Gemeinschaften sowie das Deutsche Vergaberechtsänderungsgesetz/GWB haben sich gesetzestechnisch mit der Gründung von Gesellschaften spezifisch nicht befasst. Es gelten daher die Eingangsparagraphen des GBW, wonach das Vergaberecht auf einen „öffentlichen Auftrag“ anzuwenden ist.

Der Entschluss einer oder mehrerer Körperschaften des öffentlichen Rechts, mit einem oder mehreren privaten Entsorgungsunternehmen eine Kooperation im Mantel einer Handelsfirma zur gemeinsamen Teilnahme am Markt einzugehen, bedingt gleichzeitig eine Entscheidung der Beteiligten, ob der Gegenstand der Gesellschaft in der Annahme und Ausführung von öffentlichen Aufträgen der Gründergemeinde bestehen soll, oder ob die Gesellschaft Aufgaben der Daseinsvorsorge in gemeinschaftlicher, partnerschaftlicher, gleichberechtigter und gleichverpflichteter sowie unabhängiger Eigenleistung ihrer Partner erbringen soll. Der Gegenstand der Gesellschaft ist in der Satzung unverwechselbar zu beschreiben.

Diese Entscheidung zieht nach der Gesellschaftsgründung eine wichtige Folgewirkung nach sich: Im ersteren Falle hat die Gründergemeinde zu diesem Zeitpunkt das Vergaberecht zu beachten und der Gesellschaft öffentliche Aufträge im Wettbewerb anzudienen und die Gesellschaft hat sie anzunehmen und zu erfüllen, im zweiten Falle führt die Gesellschaft die in Gesellschaftsvertrag/Satzung niedergelegten Aufgaben unabhängig und in eigener Regie aus.

Die Bildung einer gemischt-wirtschaftlichen Privatisierungs-Kooperation der hier genannten Art wird „Public-Private-Partnership“ genannt. Am Versuch einer rechtstheoretischen Erfassung und Beschreibung arbeiten sowohl der Rat der Europäischen Gemeinschaften als auch Gremien der Europäischen Mitgliedsstaaten. Übereinstimmung besteht jedenfalls darin, dass das Innenverhältnis der Partner dem Gesellschaftsrecht des betreffenden Mitgliedsstaates unterliegt. Bei mehrseitigem Staatsbezug gilt das Recht am Sitz der Gesellschaft.

1. Die Gründung einer gemischt-wirtschaftlichen Gesellschaft mit der satzungsmäßigen Verpflichtung zur Annahme und Ausführung öffentlicher Aufträge, die die Gründergemeinde jeweils bei deren Anfall an die Gesellschaft erteilt

Die Gründung einer Gesellschaft des Privatrechts unter Beteiligung einer Körperschaft des öffentlichen Rechts mit dem Ziel der Marktteilnahme ist kein „Bedarfsdeckungsgeschäft" der öffentlichen Hand. Gesellschaftsrecht und Vergaberecht gehören zu unterschiedlichen und selbständigen Rechtssystemen. Die freie Auswahl eines Geschäftspartners zur gemeinschaftlichen Berufsausübung im Rahmen einer Gesellschaft des Privatrechts ist grundgesetzlich geschützt (Art. 9 GG). Der freiheitliche demokratische Rechtsstaat kennt keine Zwangseingriffe in Entscheidungen Privater, in welcher Gestalt und Rechtsform sie ihre berufliche oder gewerbliche Betätigung einzurichten haben. Der in die Gesellschaft aufgenommene Partner aus der Privatwirtschaft wird weder vor, noch während der Gesellschaftsgründung, noch durch einen öffentlichen Auftrag nach der Gründung ein „öffentlicher Auftragnehmer", sondern ist zunächst ein Partnerbewerber, alsdann ein Partner in der Gesellschaft und bei Auftragserteilung wird die Gesellschaft Auftragnehmer, nicht die Person des ausgesuchten Gesellschafters.

Die Folgerung Jaegers, durch eine wettbewerbsfreie Gründung einer mit öffentlichen Aufträgen zu versehenden gemischt-wirtschaftlichen Gesellschaft würde „die Anwendung des Vergaberechts im Verhältnis zwischen der Gründergemeinde und der gemischten Gesellschaft ausgehebelt", muss auf einem Missverständnis beruhen. Die erste Phase der Eingehung einer solchen Kooperation, nämlich die Gesellschaftsgründung, bleibt vom Vergaberecht unberührt. Sobald die neue Gesellschaft jedoch ins Leben gerufen ist, muss die Gründergesellschaft öffentliche Aufträge vergeben. Sie besitzt keine auf Vergaberecht oder sonstigen Normen beruhende Präferenz, „ihre Gesellschaft" nach deren Entstehung vergabefrei mit öffentlichen Aufträgen auszustatten. Vielmehr ist sie verpflichtet, nach den Regeln des Vergaberechts den öffentlichen Auftragnehmer zu ermitteln und zwar in der Reihenfolge: öffentliche

Ausschreibung (offenes Verfahren), beschränkte Ausschreibung (nicht offenes Verfahren), freihändige Vergabe (Verhandlungsverfahren). Um einen öffentlichen Auftrag zu erlangen, muss sich die neue Gesellschaft an diesen Veranstaltungen beteiligen. In dieser zweiten Phase des Werdegangs der Kooperation erweist sich die Verurteilung einer Public-Private-Partnership als willkommenes Instrument einer rechtswidrigen Umgehung des Vergaberechts durch Jaeger (II. 2.) als vorschnell und nicht haltbar. Erst zu diesem Zeitpunkt tritt ein öffentlicher Auftrag konkret in Erscheinung. Erst jetzt löst er tatbestandsmäßig Verpflichtungen aus dem Vergaberecht aus.

Durch diesen Nachweis der Aufrechterhaltung des vollen Rechtsschutzes durch das Vergaberecht im Zusammenhang mit einer kooperativen Bindung gemischt-wirtschaftlicher Partner in einer Public-Private-Partnership wird auch den Hilfserwägungen Jaeger's für eine notwendige künstliche Ausweitung des Vergaberechts der Boden entzogen, nämlich der Behauptung einer Funktionalität des Begriffes „öffentlicher Auftrag", der angeblich gebotenen „richtlinienkonformen Auslegung der §§ 97 ff. GWB", der Herausstellung eines „Vergaberechtsregimes" durch die Richtlinien des Rates der Europäischen Gemeinschaft, sowie der Qualifikation des Begriffes „Wettbewerb" als geschütztes Rechtsgut der Europäischen Vergaberechtsnormung sowie des GWB.

2. Die Gründung einer gemischt-wirtschaftlichen Gesellschaft unter Verpflichtung der Partner zu einer satzungsmäßig festgesetzten gemeinschaftlichen, unabhängigen und selbstverantwortlichen Eigenleistung, also bei Entfallen eines öffentlichen Auftrages der Gründergemeinde an die neue Gesellschaft

a) Bis heute hat weder der EuGH noch der BGH noch eine Deutsche Vergabeinstanz eine Entscheidung über die Rechtsfrage getroffen, ob die Gründung einer Gesellschaft des Privatrechts bestehend aus mehreren Körperschaften des öffentlichen Rechts oder die Gründung einer gemischt-wirtschaftlichen Gesellschaft des Privatrechtes bestehend aus einer oder mehreren Körperschaften des öffentlichen Rechts und einer oder mehrerer Firmen des Privatrechts dem Vergaberecht unterliegt und daher von der

Gründergemeinde europaweit auszuschreiben ist, wenn die fragliche Neugründung nicht aufgrund öffentlicher Aufträge der Gründergemeinde sondern in Eigenleistung wie ein Anbieter tätig werden soll.

Vielleicht müssen wir geduldig die oben beschriebene emotionale Welle der bisherigen Besprechungen dieses Themas in Deutschland vorübergehen lassen, bis eine Phase der Besonnenheit einkehren kann.

b) Dreher hat hiermit begonnen. In seinem beachtlichen Aufsatz hat er die hierfür maßgeblichen Modelle der „Privatisierungen“ aufgezeigt und unterschieden zwischen den Rechtsgeschäften „mit öffentlichen Aufträgen“ und „ohne öffentliche Aufträge“. Er bezeichnet sie auch als Rechtsgeschäfte „mit“ oder „ohne Beschaffungsbezug“ bzw. „mit“ oder „ohne eingekapseltem Beschaffungsverhältnis“.

> Dreher Aufsatz „Public-Private-Partnerships und Kartellvergaberecht, – gemischt wirtschaftliche Gesellschaften, In-House-Vergabe, Betriebsmodell und Beleihung Privater“; NZBau 2002, 245 ff.

Soweit er „eingekapselte öffentliche Aufträge“ beschreibt, kommt nicht der Eindruck auf, als solle der gesuchte öffentliche Auftrag hineininterpretiert werden, um zu einer Lösung zugunsten einer europaweiten Ausschreibung zu gelangen.

Als Beispiel für ein „nicht eingekapseltes Beschaffungsverhältnis“ – wie in unserem Fall – begnügte er sich mit dem oben zitierten Beschluss des OLG Brandenburg. Dieses Gericht gelangte aber zu einer Entscheidung zu Ungunsten der Ausschreibungspflicht, weil es das zugrunde liegende Rechtsgeschäft als Dienstleistungskonzession definierte, also nicht als öffentlichen Auftrag.

Unseren hier vorgestellten Fall einer gemischt-wirtschaftlichen Gesellschaftsgründung „ohne Beschaffungsbezug“ aus dem Grund der Eigenleistung durch die neu geschaffene Gesellschaft hätte Dreher hier für gegeben erachten können. Aber an anderer Stelle meint er, unsere Auffassung enthalte „rein formelle Erwägungen“ und es fehle die „Differenzierung zwischen den einzelnen Privatisierungsvorgängen“.

> Dreher a.a.O. Seite 248 zu II b) Fußnote 27 und 28

Das Vergaberecht richtet sich jedoch nicht nach Strukturmodellen eines bislang weder in Lehre und Rechtsprechung entwickelten noch allgemein anerkannten Privatisierungskatalogs, sondern die Vergaberegeln hat der Gesetzgeber festgelegt und definiert, indem er bestimmt hat, dass nur öffentliche Aufträge vom Vergaberecht erfasst sind. Bei einer Eigenleistung fehlt jedoch diese gesetzliche Tatbestandsvoraussetzung. In dem bislang in seiner Art einzig gebliebenen Urteil des EuGH auf dem Gebiet der Einschaltung privater Elemente bei der Daseinsvorsorge der öffentlichen Hand (Teckal-Entscheidung/In-house-Geschäft) hat sich der Oberste Europäische Gerichtshof weder mit den Begriffen „Public-Private-Partnership“ oder „In-house-Geschäft“ befasst, noch hat er sich auf Untersuchungen zulässiger oder unzulässiger, anerkannter oder nicht anerkannter Methoden der Privatisierungsvorgänge eingelassen. Vielmehr hat er schlicht und eindringlich die Notwendigkeit der Feststellung eines „öffentlichen Auftrages“ hervorgehoben als einzige Voraussetzung für die Anwendung der einschlägigen Richtlinien des Rates der Europäischen Gemeinschaften und damit des GWB im Vergaberecht.

> Urteil EuGH in der Rechtssache C-107/98 Teckal SrL ./. Gemeinde Viano vom 18. November 1989; NZBau 2000, 90 ff.

Dagegen hat der BGH anlässlich der Erörterung des Teckal-Urteils in seinem Beschluss in einem Divergenzverfahren die Bezeichnung „sog. In-house-Geschäft“ verwendet aber ebenfalls nicht das Thema „Privatisierung“ angeschnitten.

> BGH-Beschluss-XZB 10/01 – OLG Jena – vom 12. Juni 2001; Vergaberecht 2001, 286 ff.

c) „Privatisierungen“ werden aber von Arnold Boesen in seinem Vergaberechts-Kommentar behandelt, indem er sich unter anderem auch mit Fragen der Anwendung des Vergaberechts auf den Privatisierungsvorgang befasst.

> Boesen, Vergaberecht, Kommentar zum 4. Teil des GWB, 1 Aufl. 2000, Bundesanzeiger Verlag, § 100 RdNrn. 105 ff.

Zuzustimmen ist seiner Eingangsfeststellung, dass grundsätzlich die Umwandlung einer Körperschaft des öffentlichen Rechts oder die Veräußerung öffentlichen Vermögens oder die Gründung einer gemischt-wirtschaftlichen Gesellschaft in private Rechtsform, auch wenn Dritte beteiligt sind, kein Bedarfsdeckungsgeschäft der öffentlichen Hand darstellt und damit das Vergaberecht nicht berührt ist (RdNr. 105). Indessen meint er, dennoch dränge sich bei folgenden Sachverhalten im Einzelfall die Frage nach einer analogen Anwendung des Vergaberechts auf (RdNrn. 106, 107):

- Sofern ein Dritter an einer neu zu gründenden oder bestehenden Gesellschaft beteiligt werden solle, würden sich bei dem Auswahlprozess – ähnlich wie bei der Vergabe öffentlicher Aufträge – Fragen nach der Transparenz des Verfahrens, der Gleichbehandlung der „Kandidaten“ und erfolgreicher Haushaltsführung der öffentlichen Hand stellen.

- Vielfach würde der Vorgang der Drittbeteiligung bei einer Gesamtbetrachtung wie die Erteilung eines Auftrages erscheinen, wenn mit der Gründung zugleich eine Aufgabe übertragen würde, die ebenso gut in Trägerschaft der öffentlichen Hand unter Vergabe von öffentlichen Aufträgen erledigt werden könnte, oder wenn der Dritte durch die Privatisierung eine Rolle erhält, die mit der eines

Auftragnehmers vergleichbar ist, es sei denn, dass der Dritte wirtschaftliche Risiken übernimmt.

- Wenn die Gemeinde für die Aufgabenerfüllung verantwortlich bleibt und sie mit eigenen Mitteln garantiert und die Körperschaft lediglich die tatsächliche Erbringung der Arbeit „einkauft".

Hierzu sei ausgeführt:

Unter Analogie versteht man die Übertragung der für einen bestimmten Tatbestand im Gesetz vorgesehene Regel auf einen anderen rechtsähnlichen Tatbestand.

Die Gebote der Transparenz (§ 97 (1) GWB), der Gleichbehandlung (§ 97 (2) GWB) sowie die Grundsätze der Wirtschaftlichkeit und Sparsamkeit bei der Ausführung des Haushaltsplanes der Behörden (z.B. § 7 Bundeshaushaltsordnung) sind Qualitätsmerkmale für das gesamte behördliche Handeln. Die gesetzliche Regel der Ausschreibungspflicht knüpft das Vergaberecht nicht an diese Merkmale, sondern an den Tatbestand des Vorliegens eines öffentlichen Auftrages. Es fehlt also beim ersten Beispiel der rechtsähnliche Tatbestand für eine Analogie zum Vergaberecht.

Ebenfalls schließen die im zweiten Abschnitt gebildeten theoretischen Beispiele die Möglichkeit einer Analogie aus, weil die genannten Gesellschaftsgründer keinen klaren Sachverhalt formuliert haben. Gemäß der Schilderung des ersten Falles „erscheint" die Drittbeteiligung „wie die Erteilung eines Auftrages" und im zweiten Falle erhält die dritte Person eine „Rolle", die mit der eines Auftragnehmers „vergleichbar" ist. Danach stellt sich nicht die Frage nach einer Analogie, sondern nach einem zweifelsfreien Vertragsinhalt. Ggf. ist eine richterliche Feststellung herbeizuführen, ob die Gemeinden und Privatpersonen einen Vertrag schließen wollten und geschlossen haben, der auf die Erreichung eines gemeinschaftsrechtlichen Zweckes gerichtet ist und die Beteiligten gegenseitig zur Förderung dieses Zweckes verpflichtet sind (Gründung einer Gesellschaft), oder ob sie einen Austausch von Leistungen gegen Entgelt vereinbaren wollten und vereinbart haben (Abschluss eines öffentlichen Auftrages). Der wahre Wille der Vertragschließenden ist erst noch zu erforschen und ggf. eine ergänzende Vertragsauslegung vonnöten (§§ 133, 157 BGB). Ferner gilt die Regel, solange nicht die Parteien sich über alle Punkte eines Vertrages tatsächlich geeinigt haben, ist der Vertrag nicht geschlossen (§ 154 BGB).

Jedenfalls vermag keine Analogie einem ungeklärten Sachverhalt Rechtsklarheit und –Wirksamkeit zu verleihen. Vor allen Dingen verbieten weder die Richtlinien des Rates der Europäischen Gemeinschaften noch das GBW die Privatisierung gemeindlicher Aufgaben durch Gründung einer gemischt-wirtschaftlichen Gesellschaft, wenn die betreffende Leistung „ebenso gut unter Vergabe von öffentlichen Aufträgen erledigt werden könnte“.

Schließlich gestattet auch der Sachverhalt im dritten Abschnitt keine Möglichkeit der Umwandlung in einen öffentlichen Auftrag durch Analogie, weil die geschaffene gesellschaftsrechtliche Kooperation als In-house-Gesellschaft zu deuten wäre unter Einstellung einer von der Gemeinde abhängigen Arbeitskraft. Der öffentliche Auftragnehmer wäre im übrigen keinesfalls die „eingekaufte“ Arbeitskraft, sondern allenfalls die In-house-Gesellschaft.

Erkennend, welch vergeblicher und verfehlter Argumentationsaufwand getrieben wird, die Gründung einer gemischt-wirtschaftlichen Gesellschaft in ein „Vergaberechtsregime“ zu zwingen, wird beim Leser unwillkürlich der Wunsch geweckt, dass doch um die Jahrhundertwende der Mut aufgebracht worden wäre, ein solides, faires, freiheitliches, umfassendes Vergaberecht neu zu schaffen. Stattdessen wurden die in Deutsches Recht umgesetzten

Europäischen Richtlinien dem Kartellgesetz als 4. Teil als Fremdkörper zugeordnet.

d) Es ist das Verdienst von Boesen, auf die beiläufige Erwähnung von „Eigenleistungen“ der öffentlichen Hand in Art. 43 Satz 2 der Dienstleistungs-Koordinierungs-Richtlinie 92/50 EWG hingewiesen zu haben.

Boesen, Kommentar Vergaberecht a.a.O. § 99 RdNr. 9, § 10 RdNr. 86

Nach diesem Artikel soll die Europäische Kommission 3 Jahre nach Einführung dieser Richtlinie die Auswirkungen staatlicher Eigenleistungen auf die Liberalisierung des Auftragswesens untersuchen und erforderlichenfalls Anpassungsvorschläge vorlegen. Es wäre wünschenswert, wenn in diese Erörterungen auch die Eigenleistungen gemischt-wirtschaftlicher Gesellschaften des Privatrechtes im Rahmen der Privatisierungen von Aufgaben der Daseinsvorsorge einbezogen würden und zumindest deren Unabhängigkeit von der vergaberechtlichen Ausschreibungspflicht bestätigt werden würde.

e) Die Gründung einer in Eigenleistung tätigen gemischt-wirtschaftlichen Gesellschaft des Handelsrechts muss den gesetzlichen Regeln des betreffenden Gesellschaftstyps entsprechen und der Gesellschaftsvertrag einer nach bürgerlichem Recht zu schaffenden gemischt-wirtschaftlichen Kooperation muss die gegenseitige Verpflichtung der Gesellschafter zur Errichtung und Förderung eines gemeinsamen Zweckes zum Gegenstand haben, die Gesellschafter müssen gesamthänderisch verbunden und mit gleichen Rechten und Pflichten ausgestattet sein und müssen der gesamtschuldnerischen Haftung unterliegen. Weder die Gesellschaftsgründung noch der Abschluss eines Gesellschaftsvertrages sind vom Vergaberecht betroffen. Die Gründergemeinde erteilt der Handelsgesellschaft bzw. der BGB-Gesellschaft keinen öffentlichen Auftrag; sie werden in unabhängiger Eigenleistung tätig. Dies muss die Satzung bzw. der Gesellschaftsvertrag deutlich zum Ausdruck bringen, etwa wie folgt:

> „*Gegenstand der Gesellschaft ist die eigenverantwortliche und in eigener Zuständigkeit sowie im gesetzlichen Rahmen vorzunehmende turnusmäßige Reinigung der städtischen Grundstücke... sowie die Sammlung, Beförderung und Entsorgung von Hausmüll in der Müllverbrennungsanlage ... Die Gesellschaft zieht die entsprechenden Benutzungsgebühren von den Gemeindemitgliedern ein...“*

Erfahrungen aus der Praxis lassen uns die Empfehlung aussprechen, bereits bei Beginn der Verhandlungen über die Gesellschaftsgründung bzw. den Gesellschaftsvertrag darauf hinzuwirken, dass Gegenteiliges in Verlautbarungen, Berichten in der Presse und in sonstigen für die Öffentlichkeit zugängigen Erklärungen nicht zu lesen ist.

Im Innenverhältnis der Gesellschaft gilt Gesellschaftsrecht.

Object Publication

This is paper presents Bombardier’s comments on specific questions raised in the context of a paper (the “Green Paper”) prepared by the Commission of the European Communities on Public-Private Partnership and Community Law on Public Contract and Concessions. The content of this paper has been revised by Structured Finance and TTS (Contract.)

General comments:

Public-Private Partnerships (“PPPs”) are any type of association that brings the public and the private sector together for their mutual benefit.

Public sector entities can be found at different levels of the government structure (i.e. Central/Federal, State/provincial, Regional and or Municipal). These entities can be ministries, departments or special agencies (already existing or created for specifically advising the “host governments”, structuring, negotiating and/or implementing PPPs type projects.

These projects are characterized by a long development period from identification of a “concept” to a successful commercial/financial closing.

Their successful implementation in any given sector depends on the level of regulation in the “host” country, project complexity and envisaged risks sharing between private and public parties.

The public and private sectors typically partner to achieve two main objectives:
(1) provide for a solution that brings value for money; and
(2) share risks providing a fair risk profile and commensurate yield for private equity.

Public authorities generally assess “value for money” using “public sector comparator”.

Railway projects differ from many other PPPs in a number of ways from projects developed in other industrial sectors, for example

Railway projects compete with exiting modes of transportation such as cars, taxis and buses which benefit from a subsidized infrastructure. The ongoing benefit of rail systems over cars, taxis and buses include inter alia (1) reduced congestion and travel time, (2) reduced pollution, (3) reduced traffic accidents, (4) more efficient use of available public land. Most of these benefits accrue to both the surrounding population and the users of rail systems. It is therefore, unreasonable to expect the users of rail transportation systems to pay for benefits accruing to others through “full” fares.

Those rail transportation projects:

- Tend to be much larger and as such require substantially larger capital investment by private and public parties than most other PPPs. In these circumstances the capital requirements make it difficult for the private sector to solely bear the project risks.
- Can be fragmented in different ways - differentiating between different categories of infrastructure - Civil, Electrical & Mechanical/maintenance, Rolling Stock operations and maintenance, etc. Railway PPP projects can involve all or specific asset categories within an overall system.
- Tend to incorporate assets especially the fixed assets, with long term economic life.
- Increasingly tend to be integrated with other transport systems and consequently have complex third party interface agreements.
- Tend to be economically vulnerable to competition or other forms of discrimination (e.g. fuel taxation levels, restricted tariff levels, requirements to provide discounted tariffs, etc.).
- Tend to present limitations in terms of tariffs (use of shadow fares/operating subsidies)
- Tend to have barriers to system expansion other than with the same technology from the same providers. In many instances it may be technically impractical to consider expansion with an alternative concessionaire or providers of systems.
- Tend to require a significant portion of Public Sector funding for capital expenditure and often require some form of revenue support that is not reliant on volume risk or end user tariffs (e.g. Performance Payment Regimes, Availability Payments, Minimum Revenue Guarantees)

The form of railway PPP projects varies significantly from project to project and there is no “generic” model that applies, which is not necessarily the case in others sectors (e.g. toll roads, power projects, etc.).

An element of the rationale or justification for PPP projects may be influenced by factors that are not easily quantified (e.g. socio economic development, technology transfer, economic multiplier affects, etc.).
EU Treaty legislation for the award of PPP contracts should focus primarily on key principles including - Transparency, Equality of treatment, Proportionality, Mutual Recognition. Any legislation should not attempt to prescribe or limit the basis of the contractual arrangements.

Question 1

What type of purely contractual PPP sets-ups do you know of? Are these sets-ups subject to specific supervision (legislative or other) in your country?

Bombardier Transportation has been involved in several rail projects over the recent years involving some form of private participation. Such list includes:[1]:

Croydon, UK
Star, Malaysia
Las Vegas, USA
LUL, UK
Nottingham, UK

These arrangements included contractual arrangements entered with Special Purpose Corporations (SPCs) as contractors to deliver specific goods and services and shareholders agreement as investors in such SPC or through specialized financing vehicles to support part of the SPC's funding requirements.

Each project had its own terms of reference and evaluation criteria. Some were considered as greenfield projects (design, build, finance, operate and maintain new systems) others fell under the category of brownfield (refurbish, expand, operate and maintain). Some included a certain degree of ridership risks for the project company and its shareholders while others were structured around performance/availability payment and/or a mix of both.

Concessionaire revenues included a combination of; end user charges; Performance Payment Regimes; Availability Payments and Minimum Revenue Guarantees.

[1] Only those projects which have reached Financial Close are listed. Bombardier Transportation is or has been involved in a number of other projects (at various stages) in Canada, US, Mexico, UK, Spain, Portugal, Greece, Turkey, Israel, UAE, South Africa, Korea, Taiwan and Thailand.

Given the high level of patronage risk in passenger-rail projects and the little degree of control the private sector has over risk, Bombardier has been a strong advocate of solutions where the private sector partner is rewarded for performance irrespective of how many passengers use the system.

In most cases, the arrangements were subject to specific supervision (legal framework, PPP law or decree) although in certain instances (e.g. Las Vegas), no such supervision was provided or in fact required.

Question 2

In the Commission's view, in the context of a purely contractual PPP, the transposition of the competing dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economics operators. Do you share this point of you? If not, why not?

Yes we share this point of view. A competitive dialogue is a useful process in the development of PPP projects, but needs to be carefully managed to maintain transparency and equality of treatment.

Question 3

In the case of such contracts, do you considered that there are other points, apart from those concerning the selection of the tendering procedure, which pose a problem in terms of Community law on public contracts ? if so, what are these? Please elaborate.

One point that should be clarified is whether any Community law impedes commitments that may be required from the contracting authorities. For example budget constraint rules that would prevent a public authority to make long-term commitments on performance payments for instance. Another is linked to laws restricting the capacity of authorities to make commitments related to foreign currencies.

Question 4

Have you already organized, participated in, or wished to organize or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

Bombardier has participated in a number of European concession tenders and has been successfully awarded contracts - Croydon Tramway, Nottingham Express, London Underground, etc.
In general, our experience has been very positive. However some projects have not yielded the expected benefits for a number of reasons.

In the UK more recent projects have been ‘influenced’ by PFI Treasury Task Force Guidelines. While these have been helpful in many ways, their lack of flexibility has been a handicap in areas where railway projects differ substantially from project in ‘typical’ sectors. For example, the UK requirement that project revenues exceed operating revenues is often not practical in the rail sector, where the benefits of rail transportation accrue to the overall community and not just to the users. In the rail sector, the benefits of reduced congestion and pollution accrue to the overall community and should be compensated by government through operating subsidies as the users are unlikely to pay for benefits accruing to others.

Other criticism is related to the non-disclosure of affordability constraints at the early stage. If private sector partners are to engage and commit resources to the development of such projects, they need to understand and make their own evaluation of whether or not a project has a possibility of being affordable.

Question 5

Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?

Our understanding of such framework is limited so we are unable to provide meaningful comments.

Question 6

In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concession, desirable?

Yes, provided it is restricted to procedures, maintains flexibility for projects to evolve into different structures (e.g. concession to turnkey procurement or vice versa) and provides flexibility to accommodate fundamental differences between projects in different industry sectors including in terms of public support.

Question 7

More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make subject to identical award arrangements?

The establishment of identical award arrangements for contracts or concessions is not considered ideal as award for conventional contracts and concessions in the rail sector differ substantially in terms of contractual arrangements & obligations and risks profile for public and private parties. Such differences are also amplified if such arrangements cover construction as well as services over extended periods of time. As mentioned earlier there are fundamental differences between rail and other industrial sectors making standardization of award arrangements a difficult task.

Only to the extent it is limited to broad principles of the tendering process. Such legislation should not try to prescribe a set of formula for the award criteria.

Question 8

In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all interested operators? Is the selection procedure organized to implement the selected project genuinely competitive?

In our experience, non-nationals operators are not ***guaranteed*** access even though nothing prevents them access. In terms of advertising, this is not systematic and some interested operators may not be informed. The selection procedure is generally competitive.

As we are not an active “operator” we can only assume that there is little or no discrimination against non-national operators in the railway sector, largely due to the relatively limited number of competitors.

Question 9

In your view, what would be the best formula to ensure the development of private initiatives PPP in the European Union, while guaranteeing compliance with the principle of transparency, non-discrimination and equality treatment?

In the railway sector there have been few private finance initiatives (PFI)/ PPPs and those that have taken place have been largely restricted to certain market specially the UK and for the expansion of existing concessions.

Some form of incentive must remain to encourage private sector initiatives. This does not obviate the need for a transparent process, but under certain conditions necessarily require a relaxation of the principle for equality.

For example: concession length in terms of the period required to repay the investment. This concept is problematic in the railway industry. Economic lives assets vary considerably. One of the problems with the efficient financing of Rolling Stock in the UK has been the mismatch between ROSCO contract periods (franchise terms) and the asset economic lives.

§ 48/9 These clauses seem to imply that 'step in' arrangements may present a problem in terms of transparency and equality of treatment.

These clauses are essential in securing the financing of railway PPP projects and their requirement are often recognized at the tender stage. It would be unhelpful to future PPPs if restrictions were introduced in respect of step in provisions.

As mentioned earlier developing PPP type project represent substantial investment on the part of the private sector. Fair compensation of development costs should be seriously evaluated as standard features of award arrangements.

Question 10

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

§ 43 makes the observation that considerable time elapses between the Preferred Bidder selection and Financial Close of a project. In the railway sector this period is often calculated in terms of years.

The granting authority is under pressure to close the transaction quickly and the Preferred Bidder could be tempted to negotiate substantial changes to original proposal used as the basis for the award. But in some instances, changes could be required that cannot be reasonably anticipated and are necessary prerequisites for reaching Financial Close. However, in some instances the changes result from tactical positions adopted by the tenderer to become the Preferred Bidder and have 'discriminatory and equality' implications.

Mechanisms to prevent the award of concessions on the basis of flawed proposals should be encouraged. This might be achieved by awarding costs/damages to a disadvantaged tenderer, or allowing tenderers to challenge certain aspects of competitor's proposals.

Question 11

Are you aware of cases in which conditions of execution – including the clauses on adjustment over time – may have had a discriminatory effect or may represented an unjustified barrier to freedom to provide services or freedom of establishment ? if so, can you describe the type of problems encountered?

No.

Question 12

Are you aware of any practices or mechanism for evaluating tenders which have a discriminatory effect?
Technological transfer, localization/local content requirements. Insistence on Tender & Contract being drafted in non-Official EU language.

Question 13

Do you share the Commission's view that certain step-in type arrangements may present a problem in terms of transparency and equality treatment? Do you know of other standard clauses which are likely to present similar problems?

No, these clauses are essential in securing the financing of railway PPP projects and their requirement are often recognized at the tender stage. It would be unhelpful for future PPPs if restrictions were introduced in respect of step-in provisions.

Question 14

Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?

The complex nature of a railway PPPs and participants is that flexibility is required in the structures adopted by Sponsors forming a concession company, application of sub-contracting rules to contract awarded to shareholders of the concessionaire and in the classification of necessary public support as "State Aid".

Clarification, of the supporting role and responsibilities of the governmental bodies (e.g. national government, etc.), senior to the awarding authority, would be helpful. In some instances the responsibility of senior governmental bodies is ambiguous to tenderers.

Question 15

In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.

Not aware.

Question 16

In your opinion does the phenomenon of contractual PPPs involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

This seems to be a reference for the need to tender sub-contracts to a concession. The nature of a railway PPP is that it would be inappropriate to require mandatory tenders for sub-contract work, particularly when revenues are dependant upon performance criteria being met (guaranteed performance quality may override cost considerations).

The only instance this might be justified in is in the award of a contract to a 'master developer' who is not taking full construction cost/integration risk.

Question 17

In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

No.

Question 18

What experience do you have of arranging institutionalized PPPs in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases? If not, why not?

No specific comments given no experience in "institutionalized" PPPs.

Question 19

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

[No specific comments given lack of experience in “institutionalized” PPPs.

Question 20

In your view which measures or practices act as barriers to the introduction of PPPs within the Europeans Union?

Some countries have policies towards maintaining nationalized industries and the provision of certain services (e.g. utilities) which can be a challenge for the development of PPPs involving foreign operators.

Question 21

Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of “good practice” in this framework which could serve as a model for the Union? If so, please elaborate.

The procurement model for the Gautrain Rapid Rail Link project in South Africa is an interesting one where the public authority adopted a phased Request for Proposals approach combined with an appropriate bid cost compensation regime. This ensured a consultative and interactive spirit throughout the bidding process (still underway).

Mechanisms to prevent the award of concessions on the basis of flawed proposals should also be encouraged. This might be achieved by awarding costs/damages to a disadvantaged tenderer, or allowing tenderers to challenge certain aspects of their competitor’s proposals.

Question 22

More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful ? Do you consider that the Commission should establish such a network?

Given the evolving nature of PPPs, worldwide, a forum for discussing PPP issues would be useful provided it can attract the active participation of the key private and public sector actors.

We would welcome such forum.

Object Publication

DEXIA
Crédit Local

European Commission
Consultation « Green Paper on PPPs and the Community law on public contracts and concessions »
C 100 2/2005
B-1049 Brussels

July 28th, 2004

Dear Sirs:

Ref: Consultation « Green Paper on PPPs and the Community law on public contracts and concessions »

We would like to thank you for having sought comments on your « Green Paper on PPPs and the Community law on public contracts and concessions ».

Dexia Crédit Local is a leading European bank with a proven financial advisory, debt arranging and long-term lending expertise in PPP projects across Europe:

- In France, Dexia Crédit Local has a long tradition of financing concessions in many sectors including energy, transportation, water, waste as well as public contracts (under BEA/AOT[1] schemes) in the health and accommodation sectors.

- In the UK, Dexia Public Finance Bank is one of the top five banks in the PFI market, having been actively involved in a large number of projects (health, education, government buildings, street lighting, waste, transport, etc.).

- In Italy, Dexia Crediop is one of the main players in the PPP market, especially in sectors such as transport and health.

- In Spain, Dexia Sabadell Banco Local has also financed a number of transactions in these sectors.

- In Portugal, Dexia Crédit Local acted as adviser and lender in the transportation SCUT PPP program and is currently involved in the bidding process for the first PPP project in the health sector.

[1] Bail Emphytéotique Administratif / Autorisation d'Occupation Temporaire

- In Holland, Dexia Crédit Local was the only non-Dutch bank to finance, as mandated lead arranger, both the two main PPP projects (the HSL Zuid high speed line and The Hague's waste water project).

- Furthermore, Dexia Crédit Local has financed PPP projects, or is currently involved in the bidding process, in other EU countries in sectors such as transportation (Belgium, Greece, Hungary, Poland), water (Belgium, the Czech Republic, Poland, Slovakia), and education (Germany).

Based on this extensive experience, we have tried to answer the queries of the European Commission in the attached document and hope that our participation in the above mentioned consultation would be useful to the Commission.

Should you need any further information on the attached, please do not hesitate to contact me (Tel: 331 43 92 76 44 , email : patrice.vabre@clf-dexia.com) or Patrick Blanchard, Global Head, Project & Sectorial Finance (Tel: 331 43 92 77 56 , email : patrick.blanchard@clf-dexia.com).

Yours Sincerely,

…………….
Patrice Vabre
Global Head of Structured Finance

GREEN PAPER

OF THE COMMISSION OF THE EUROPEAN COMMUNITIES

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

PURELY CONTRACTUAL PPPs AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS

1. What types of purely contractual PPP set-ups do you know of ? Are these set-ups subject to specific supervision (legislative or other) in your country ?

As one of the main players in the European PPP market, Dexia Credit Local has been involved in several types of purely contractual PPP's in Europe.

In *Italy* for instance, we have been involved in both the "concessive models" and the PFI-type transactions. Both types are regulated by law 109/94 – the so-called "Merloni Law" – as amended several times and largely overhauled in 2002 by Law 166/02. The Merloni Law outlines two main procedures to award concession contracts under a PPP framework:

- Under Article 19, a public authority leads the PPP initiative; technical, economic and financial feasibility studies are conducted and preliminary designs of the project are developed by the awarding authority; a regulated procedure for the bidding process is established and a preferred bidder is selected by public tender;
- Under Article 37bis, by contrast, a developer leads the PPP initiative; feasibility analysis, preliminary design and guidelines for the concession contract are prepared by the developer; there is then a streamlined negotiated bidding process with the main players; once the awarding authority deems the project to be in the public interest, a preferred bidder is then chosen through public tender.

In UK Dexia Public Finance Bank has been involved in several transactions in a large range of sectors such as health, education, transport and environment. In the UK, PFI transactions are under the supervision of public authorities and need to comply with law generally, including specific regulations in defined sectors (e.g., in elderly care projects, the Commission for Social Care Inspection, although not a party to the concession agreement, imposes certain rules, and in particular issues a registration certificate before the care provider may provide services).

In *France*, the "Ordonnance sur les contrats de partenariats"[2] has recently been issued and no projects have been financed under this scheme yet. Dexia Credit Local has therefore been involved almost exclusively in concessive models in many sectors. These models ("Délégations de Service Public" or "DSP") have been regulated since 1993 by the so-called "Loi Sapin"[3]. Dexia has also financed projects in the health and the "gendarmeries"[4] sectors using schemes such as the BEA ("Bail Emphytéotique Administratif") and the AOT ("Autorisation d'Occupation Temporaire") where the revenues are not sourced from end users but from public authorities. Although these schemes have been relatively rare in France compared to concessive models, it is anticipated that, following the recent adoption of legal frameworks in relation to specific sectors[5], these schemes will be more frequently used.

Phase of selection of the private partner

Purely contractual partnership : act of award designated as a "public contract"

2. In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view ? If not, why not ?

Based on our extensive PFI/PPP experience in the UK, Portugal and Holland where the competitive dialogue has been implemented successfully for the benefit of both the public and the private sectors, we believe that the transposition of the competitive dialogue procedure into national law adapted to contractual PPP could constitute, for countries where this procedure does not exist yet, an opportunity to introduce a higher level of flexibility in public procurement procedures, safeguarding the fundamental rights of economic operators as well as competition.

It should be noted, however, that the effectiveness of this new procedure would depend on both the way in which the national law will include the new procedure and the capability of public administrations to disclose their needs and negotiate with the private sector in a fair and efficient way. It is indeed critical that clear and transparent procedures are implemented to avoid uncertainty surrounding the evaluation of the bids by the awarding authority and the risk of discontented parties lodging a recourse against the preferred bidder or the awarding authority before an administrative tribunal.

[2] Ordonnance N°2004-559 dated 17/06/2004, which allows DBFO contracts where revenue is received from a public authority

[3] Loi Sapin, 1993, ruling the « Délégations de Service Public »

[4] Accommodation of police officers under the authority of the Ministry of Defense

[5] Internal Security and Justice : « Loi N°2002-1094 du 29 août 2002 d'orientation et de programmation pour la sécurité interieure (LOPSI) » et « Loi N°2002-1138 du 9 septembre 2002 d'orientation et de programmation pour la justice (LOPJ) ». Health : « Ordonnance N°2003-850 du 4 septembre 2003 portant simplification de l'organisation et du fonctionnement su système de santé ». Defense : « Loi N° 2003-73 du 27 janvier 2003 relative à la programmation militaire pour les années 2003 à 2008 »

In addition, we view the potential bid costs associated with this procedure as an important issue that could be an obstacle to a fair competition if only a small number of players can afford to compete due to these costs. A mechanism of compensation for bidders who made it to the last stage of negotiations but were not selected as preferred bidder could probably help.

3. In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these ? Please elaborate.

We do not see any other specific points.

Phase of selection of the private partner

Purely contractual partnership : act of award designated as a "concession"

4. Have you already organized, participated in, or wished to organize or participate in, a procedure for the award of a concession within the Union. What was your experience of this ?

We have been involved, as financial adviser and debt arranger / underwriter / provider, in the financing of many concessions / PPPs in Europe. On a few occasions, Dexia has joined a bidding consortium as financial investor, e.g. in the UK and Italy. Our experience is diverse, depending both on countries and sectors involved.

5. **Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions ? In your opinion is genuine competition normally guaranteed in this framework ?**

Yes. We believe that the competitive advantage of national companies is not necessarily coming from a deficiency in national legal frameworks but, often, from a better understanding of the needs of the local public sector.

6. In your view, is a Community legislative initiative, designed to regulate procedure for the award of concessions, desirable ?

So far, Dexia Credit Local has been successful in financing concessions in different countries based on local procedures for the award of concessions.

We would regard a Community legislative initiative as positive only if this allows countries where no concession law exists (such as the Czech Republic for instance), or where the legal framework remains complicated and uncertain (such as Italy, see answer

8 for more details), to adopt clear and efficient procedures, while insuring that mature markets having already clear awarding procedures can keep their good practices.

7. More generally, if you consider that the commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions to make them subject to identical award arrangements ?

Where the borderline between concessive models and public contracts is not totally clear (as in France for instance), we believe that a common award procedure would be useful to eliminate the risk of a dispute post contract award on the basis that the bidding procedure was not the right one, i.e. not in accordance with the defined scheme.

It should be noted however that, in mature markets such as the UK, awarding procedures seem to be efficient and well accepted by market players (very few disputes actually result from bidding procedures); such markets should not suffer from the introduction of Europe-wide rules aiming at solving legal uncertainties of other countries.

Specific questions relating to the selection of an economic operator in the framework of a private initiative PPP

8. In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organized to implement the selected project genuinely competitive ?

Through its Italian subsidiary Dexia Crediop, Dexia Credit Local has gained an extensive experience in projects where the contracting authority issues an invitation to present an initiative.

This experience leads us to think that a few further improvements to the legislative framework and to the procedures used could relatively easily unleash the full potential of private sector involvement in the Italian market. In particular, the regulatory framework, despite recent improvements, remains very complex, mainly in relation to the procedures that need to be followed before the adjudication of a project.

1) The first element of complexity is the Italian peculiarity constituted by the "*Promotore*" procedure, which is the appointment of a private consortium to develop the project together with the public sector with a view to defining it sufficiently to launch a tender. In return for such development work, the *Promotore* is awarded a right of first refusal (right to match) for the project, and the right to have its costs repaid in case of award to a competitor. The initial proposal of a private consortium can be either solicited or unsolicited. In case of an unsolicited offer, the main issue is: how can a private consortium formulate a

very detailed proposal (preliminary design, draft project agreement, financial model…) that meets the needs of the public sector without having a detailed ex ante understanding of what they may be.

2) The appointment of the *Promotore* occurs only if the proposal made by the private consortium is deemed to be of "public interest" by the public authority. Unfortunately, an official definition of such concept does not exist, which leaves the appointment at the entire discretion of the public sector and offers little certainty to the private sector. The main issue faced by private consortia bidding for a project at the tender stage, and obviously by their financial advisors, is the lack of clarity on criteria to be used in the valuation of their offer, since they are not defined by law and often only qualitatively outlined in the meager documentation provided by the awarding authority.

Such a complex process and the uncertainties surrounding the valuation of projects make their award a very long and difficult affair and increase substantially the risk of discontented parties lodging a recourse against their competitor or the awarding authority before an administrative tribunal.

This absence of clear rules might lead to additional difficulties and increase the costs of project organisation for non-national companies. This situation could result in a less competitive selection process.

This said, although we believe that the Italian legal framework could be further improved, we regard the adoption of the Merloni Law together with its recent amendments as a very useful initiative which made possible the development of PPP projects in sectors such as health, transportation and renewable energy.

9. In your view, what would be the best formula to ensure the development of private initiative PPP's in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment ?

We regard Community legislative initiatives seeking to establish a common framework in the European Union, standardise rules and provide less complex procedures as a positive element to reduce shortcomings arising from legal uncertainties.

This said, we believe that these initiatives should not jeopardise the continued development of PPPs in mature markets such as the UK by introducing constraints which are not necessary. Community legislative initiatives addressed to solve legal uncertainties in certain countries should not create hurdles for others who have a legal framework which has proved to be efficient and appropriate.

We believe that the creation of national PPP taskforces is very important to give guidance on best practice. We believe that the English Treasury Taskforce has been of great assistance in the development of PPP in the UK and we regard the creation of PPP taskforces in countries such as Holland, Italy, Belgium, the Czech Republic, Hungary and Germany as very positive initiatives. We think that a pan European network of national taskforces would be useful in terms of sharing best practice feedback.

The phase following the selection of the private partner

The contractual framework of the project

10. In contractual PPP's, what is your experience of the phase which follows the selection of the private partner ?

In the UK, the standardization of PFI contracts and the sharing of best practice have shown that the period of negotiation from the selection of the private partner through financial close can be substantially reduced.

11. Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered ?

We would make a distinction between three kinds of adjustment clauses : benchmarking clauses, variation/change to services clause, and "re-equilibrium" clauses.

- We regard benchmarking clauses as non-discriminatory in general. The only issue we see with this type of mechanism is in relation with niches or new sectors. The requirement to benchmark in order to achieve best value for money is predicated on the existence of a comparator group. It may be difficult to identify comparators in new sectors. Also, market testing can be an issue for projects where operators are not easily interchangeable (e.g. whilst cleaners may be interchangeable in a PFI hospital, care providers are less so).

- Variation/change to the services clauses are necessary to allow the public sector to adapt the contract to public needs, which can change over time. The issue is to ensure that both the allocation of risk and the remuneration of the risk borne by the private sector remain unchanged (as measured by debt cover ratios and shareholders' returns) and that the procedure of change, especially with regards to adjusting payments made by the public sector, is clearly defined at contract signing so that public and private sectors are neither advantaged nor disadvantaged after the change when compared to the initial contract. The difficulty is then to have a detailed procedure to ensure this is achieved while keeping a flexible adjustment mechanism that does not generate high adviser fees and other costs for each change.

- "Re-equilibrium" clauses ("clauses de revoyure" in French concession contracts) can be more problematic and can have discriminatory effects if not properly addressed in the contract. In a shadow toll project for instance, a bidder may win the concession by requesting smaller grants from the government while making more aggressive traffic forecasts. If at a later stage forecasts are not reached, the concessionaire may (if it has negotiated this in the project agreement) request for "re-equilibrium", and as a consequence its bid might become more expensive for the public sector than those of other initial bidders who were more conservative in terms of traffic forecasts. It is therefore very important to have in the contract a clear allocation of risk when selecting the preferred partner.

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

We are not aware of such practices.

13. Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment? Do you know other "standard clauses" which are likely to present similar problems ?

No. In countries where the legal framework provides for "step-in" rights for the benefit of financial institutions (like in the UK, Italy, Holland, Portugal), "Direct Agreements" lay down clear procedures. In particular, any suitable alternate operator has to be approved by the awarding authority. Lenders should have the first call to choose the suitable alternate operator at the time of financial difficulty as they must ensure their debt is repaid. It is to be noted that this applies only in case of termination due to concessionaire's default under the PPP agreement, which is a very extreme situation. Step-in rights can therefore not be considered as a mechanism that could potentially skew fair competition.

14. Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level. If so, which aspects should be clarified ?

Standardization of the contractual framework with some uniform scheme/wording for the main contractual types and clauses, could be, in our opinion, very useful to improve clarity and competition. We believe however that this can only be organized at national level to ensure that PPPs continue to be as a valuable and accurate answer to public needs in each EU country.

Sub-contracting of certain tasks

15. In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting ? Please explain.

No.

16. In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting ?

No, because each bidder will have already submitted their best price based on their assessment of the risks they will take, which are normally passed to the subcontractor who, more often than not, is one of the sponsors.

We believe that there is a danger to be overly prescriptive. Ultimately, the risks are borne by the private partner signing the contract, who must therefore be given sufficient flexibility to change material subcontract terms in particular. It is only when material terms are affected that the awarding authority should be consulted.

17. In general do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules of subcontracting ?

No.

INSTITUTIONALISED PPPs AND THE COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS

18. What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not?

Dexia Credit Local has an extensive experience of arranging institutionalized PPPs, especially in France but also in other countries such as Italy. A potential conflict of interest may exist when the awarding authority is also a stakeholder in the entity jointly held by the public and the private sector parties.

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

We do not consider this as a priority.

IN GENERAL

20. In your view which measures or practices act as barriers to the introduction of PPPs within the European Union ?

The main barriers to the development of PPPs we have identified are as follows:

- Absence of strong political will to implement these schemes
- Absence of a national PPP taskforce to give guidance
- Inappropriate legal framework
- Need for significant training of civil servants and private sector players, which have to deal with novel, rather complex schemes both during contract negotiations and during subsequent contract monitoring
- Need for a cultural shift on the part of the public sector to allow the private sector into areas that had hitherto been uniquely their preserve
- Resistance of the trade unions regarding transfers of staff
- Need for managing complex interfaces (e.g. with clinical / educational staff in hospitals / schools)

21. Do you know of the other forms of PPPs which have been developed in countries outside the Union ? Do you have examples of "good practice" in this framework which could serve as a model for the Union ? If so please elaborate.

For instance, Dexia Credit Local has a positive view on waste management PPP projects in Switzerland : the company in charge of the waste treatment is owned by both the municipality and private partners, it is controlled by the municipality but with private status; contracts are under private law.

Australia is another country which has established interesting PPP programs at state levels, which are actually quite similar to the UK PFI model.

22. More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful ? Do you consider that the Commission should establish such a network ?

Yes, we think that exchange of best practice would be useful at a European level. We believe that the Commission is best placed to encourage the national PPP taskforces to set up a pan European network.

NORTON ROSE

RESPONSE TO THE GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS PUBLISHED BY THE COMMISSION OF THE EUROPEAN COMMUNITIES ON 30 APRIL 2004 (THE "GREEN PAPER")

This is the response of Norton Rose to the Green Paper.

Norton Rose is a leading international law firm which operates through a network of offices in Europe, the Middle East and Asia. The firm has over 200 partners, over 1000 fee earners and 2000 staff worldwide. Norton Rose focuses research, know-how and expertise on five strategically important areas where the firm and its clients have particular interests: international corporate finance, financial institutions, transportation, energy and infrastructure and technology. More detailed information on Norton Rose is available on the firm's website at: www.nortonrose.com.

In this paper, Norton Rose respond to questions 1, 2, 6, 7, 13, 15, 16, 17 and 20 of the 22 questions posed by the Commission of the European Communities in its Green Paper. These questions have been chosen on the basis of their relevance to our clients and the PPP markets in which they operate.

References in this paper to:

"Directives" means one or both of the New Directive and the Utilities Directive as the context requires;

"New Directive" means Directive 2004/18/EC;

"procurement rules" means the rules relating to the procurement and award of public works contracts, public services contracts and/or public supply contracts contained in the relevant Directive, as the case may be; and

"Utilities Directive" means Directive 2004/17/EC.

1. *What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?*

   PPP projects procured under the UK Government's Private Finance Initiative ("PFI") are subject to specific supervision. The Treasury published version 3 of "Standardisation of PFI Contracts" in April 2004 ("SoPC"). The aim of SoPC is to provide guidance on the key issues that arise in PFI projects in order to promote the achievement of commercially balanced contracts and enable public sector procurers to meet their requirements and deliver best value for money.

The three main objectives of SoPC are:

1. to promote a common understanding of the main risks which are encountered in a standard PFI project;

2. to allow consistency of approach and pricing across a range of similar projects; and

3. to reduce the time and costs of negotiation by enabling all parties concerned to agree a range of areas that can follow a standard approach without extended negotiations.

The Treasury has policy responsibility for PFI and for SoPC. In addition, many of the sectors which procure projects on the basis of public private partnerships (for example, health, education, criminal justice and social housing) have their own standard form project agreement which is based on SoPC but is tailored to the specific requirements of the sector in question.

In terms of procuring PPP contracts, contracting authorities and contracting entities clearly have to comply with national legislation giving effect to the Directives. In addition in the UK, there are requirements on local authorities and the National Health Service to make and comply with their own standing orders, promoting competition in procurement and various other legislation and case law- governing aspects of local authority procurement.

Norton Rose has advised a range of participants in relation to PPP projects of a purely contractual nature in a number of European jurisdictions and in a variety of different sectors. These include health, education, criminal justice, roads, rail, ports/airports, telecommunications, water, waste, defence, accommodation projects and social housing.

The contractual PPP structures include:

(a) traditional PPP structures, for example, design, build, finance, operate/maintain (DBFO/DBFM) and build, operate, transfer (BOT) in various sectors such as road, rail, health, education and the criminal justice system, where the private sector operates or maintains, as the case may be, the relevant asset for typically a 25-30 year period and is paid a unitary charge for doing so by the public sector party; and

(b) other structures more akin to the “concessive model” referred to in paragraph 22 of the Green Paper in other sectors, for example, social housing projects. In social housing projects in the UK, the private sector party will be obliged to collect rental payments from the tenants and pay a guaranteed rental amount to the public sector party in return for payment by the public sector party of the unitary charge.

Very few of these structures comprise "concessions" within the meaning that is given to this term by the Commission Interpretative Communication on Concessions under Community Law[1] ("Communication on Concessions"). In our experience, the type of concession is less common than the more traditional PPP structures.

PPP structures other than purely contractual ones are becoming increasingly common; for example, joint ventures between the public and private sectors (which often take the form of limited partnerships) for the purpose of the development of land for housing, recreational or industrial purposes in The Netherlands, and long term partnering contracts between the public and private sectors in the health and education sectors in the UK.

2. *In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?*

Major infrastructure projects, such as PPPs, are large, complex projects and it is widely acknowledged that the award procedure for such projects needs to be flexible and needs to facilitate dialogue between the public and private sectors.

However, Norton Rose does not consider that the competitive dialogue procedure is an appropriate award procedure for PPP projects because it is not sufficiently flexible and it does not facilitate dialogue/negotiation after the contract award. Other concerns with the appropriateness of the competitive dialogue procedure for PPP projects are set out in more detail below.

Existing public procurement award procedures

The existing competitive form of the negotiated procedure has generally been regarded as the most suitable procedure for the award of PPP contracts because it is a far more flexible procedure than either the open or the restricted procedures.

One of the fundamental features of public private partnerships is the utilisation of the private sector's expertise and experience in terms of proposing innovative solutions to meet certain requirements and objectives specified by the public sector. The public sector is generally not able to state in advance the technical solution best suited to the project. Specifically, the public sector does not define in precise detail how its requirements and objectives are to be achieved. This is one of the perceived benefits of public private partnerships. The open and restricted

[1] 2000/C 121/02

procedures are not appropriate because they pre-suppose that the public sector can and does specify precisely what its requirements are and how they are to be achieved.

In addition, neither the open nor the restricted procedures permit any form of negotiation with the potential bidders following submission of their tenders on any fundamental aspect of the contract or variations in the contracts. It is usual, in projects of this nature, for negotiations between the public sector party and the preferred bidder to take place after the appointment of the preferred bidder. The reason for this is entirely commercial. Funders to a project will not commit resources or incur the costs of carrying out their due diligence unless and until the bidder that they are supporting has been appointed as preferred bidder. In addition, the negotiation stage allows the parties to draw up full designs, fine-tune technical specifications, carry out due diligence exercises and agree final risk allocations, as well as finalising (often contentious) staff transfer issues at an exclusive stage of the bidding process. This is essential in keeping bid costs to a minimum, which is of fundamental importance for economic operators.

In recent decisions, the European Commission has itself concluded that changes negotiated with a preferred bidder in a negotiated procedure relating to the timing and scope of work to be done, risk allocation, the performance regime and also provisions of the contract relating to funding did not amount to a breach of the procurement rules, because they did not change the scope of the project beyond that advertised in the Official Journal. The Commission recognised that, in complex and innovative infrastructure contracts, negotiations with the preferred bidder are an unavoidable part of the process of finalising a market price for the contracts.

Further advantages of the competitive form of negotiated procedure are:

(a) the public sector party is able to negotiate with different firms on the basis of different proposals and different contract conditions. The restricted and open procedures envisage a single specification and although variant bids may be permitted, this does not offer the same flexibility as the negotiated procedure; and

(b) the public sector party may solicit proposals from a number of firms and later reduce the number for the submission of final offers based on the quality of the original proposals as part of an iterative tendering process which is not possible under the restricted procedure.

The negotiated procedure may only be used by public authorities on certain limited grounds[2] but the nature of PPP projects is such that it is simply not practical to award PPP projects on the basis of the open or restricted procedures. Accordingly, contracting authorities seeking to award a

[2] Two of these grounds are: (i) “in exceptional cases, when the nature of the works, supplies, or services or the risks attaching thereto do not permit prior overall pricing” (Article 30.1(b) of the new Directive); (ii) “in the case of services … the nature of the

PFI/PPP contract will choose a procedure which has sufficient flexibility for it to structure the stages of the process to suit the needs of the project in question. The only flexible form of procedure allowed under the existing procurement rules is the competitive form of the negotiated procedure.

Suitability of the competitive dialogue procedure for the award of PPP contracts

The competitive dialogue procedure has been described as a flexible procedure particularly well adapted to the award of public contracts. We have three main concerns with this procedure:

(a) it is not clear when the competitive dialogue procedure can be used;

(b) the ability to conduct post contract award negotiations is severely limited; and

(c) the grounds for using the competitive dialogue procedure are similar to the limited grounds which justify use of the negotiated procedure and therefore there is little incentive to use the new competitive dialogue procedure.

Each of these concerns is addressed in more detail below:

(a) The competitive dialogue is stated to be available for “particularly complex contracts”. A public contract is considered to be “particularly complex” where the contracting authority (a) is not objectively able to define the technical means (in accordance with the relevant provisions of the New Directive) capable of satisfying their needs or objectives and/or (b) it is not objectively able to specify the legal and/or financial make-up of a project.

However, it is not clear what the definitions are intended to cover. The term “technical means” is not defined, although it appears, from the wording of the New Directive, that it is not limited to difficulties in defining the technology required to achieve the relevant project. Similarly, the term “legal and/or financial make-up” is not defined and is potentially very wide.

Under both limbs of the definition, it is also unclear precisely what the term “not objectively able” means. It suggests that some standard form of reasonableness may be applied to the contracting authority’s inability to define in advance the technical, financial or legal matters in question, although there is no indication whether the actual level of experience or expertise of a particular authority is relevant in this regard. In addition, it is not consistent with the exercise of discretion which the New Directive expressly confers on contracting authorities in deciding whether to use the competitive dialogue procedure. Article 29(1) states that a competitive dialogue is permitted “*where contracting authorities*

services to be provided is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selection of the best tender according to the rules governing open or restricted procedures” (Article30.1(c) of the *consider that the use of the open or restricted procedure will not allow the award of the contract*".

(b) The main problem with the competitive dialogue procedure is that the ability for the public sector and private sector parties to negotiate post contract award is severely restricted: the only discussion that can take place between the parties is on grounds of "clarification".

It seems that the scope for negotiation following the award of the contract in the competitive dialogue procedure may be little different from that available in the restricted procedure. If this is correct the competitive dialogue procedure is not able to accommodate the funders' requirements in terms of carrying out due diligence post contract award and ignores commercial reality.

If exclusive dialogue is to take place at an earlier stage in the procurement process with at least three bidders discussing detailed technical solutions, bid costs will increase substantially. Higher bid costs are a real concern for economic operators and are likely to result in less competition making public contracts even more difficult to procure. Notwithstanding that the competitive dialogue procedure expressly allows member states to introduce discretionary levels of compensation for unsuccessful bidders, there is no guidance as to how this will be calculated, whether it will be a capped amount and whether awarding authorities will underwrite some of the bid costs. This is the greatest barrier to the introduction of PPPs within the European Union.

(c) There is considerable overlap between the stated grounds justifying use of the competitive dialogue procedure and those justifying use of the negotiated procedure. Two of the limited grounds justifying use of the competitive form of the negotiated procedure referred to above are not dissimilar to the definition of "particularly complex contracts", namely an authority's inability to pre-determine technical means or difficulties in specifying the "financial make-up" of a project.

The award of many PPP contracts is likely to fall within the definition of a "particularly complex contract" and one or more of the grounds justifying use of the negotiated procedure. The distinction between the two procedures is blurred as a result of the uncertainties that currently exist as to when the competitive form of the negotiated procedure may be followed, the lack of clarity in respect of the definition of "particularly complex contracts" and the absence of any relevant case law.

The introduction of the competitive dialogue procedure appears to contradict the Commission's stated aims of clarification, simplification, openness and transparency. Under the New Directive, two parallel procedures now exist that appear to be available in similar circumstances and to involve similar yet distinct processes, and between which the dividing lines are blurred. On the other hand, the competitive dialogue procedure is not available to contracting entities seeking to award PPP contracts under the Utilities Directive and accordingly, they are still free to choose between the open, restricted and negotiated award procedures.

6. *In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?*

We do not consider that a Community legislative initiative to regulate the procedure for the award of concessions is desirable. Concessions are normally associated with major infrastructure projects which are by their nature very complex. We believe that further regulation in this area would mean:

- greater costs for both the public sector parties and the private sector parties; and
- the loss of the flexibility in awarding concessions which is so important for the negotiation and ultimate award of such contracts on a competitive basis.

The Treaty imposes positive obligations in respect of the award of public contracts (including concessions) and so, despite the fact that that concessions are not subject to the full procurement regime, we consider that, provided awarding authorities respect the Treaty principles of equality of treatment, transparency, proportionality and mutual recognition, this should be sufficient to ensure a just and effective framework for the award of concessions.

However, we believe that it would be desirable for the Commission to update its Communication on Concessions in order to clarify further certain existing grey areas. For example, it would be helpful to have more precise guidance on how, short of formally advertising the contract in the Official Journal of the European Union, awarding authorities are able to meet the obligations which arise from the Treaty principles of equality of treatment and transparency.

In addition, we consider that the current interpretation of what comprises a concession should be clarified. The New Directive defines “public works concessions” as contracts of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment. Service concessions are similarly defined in the New Directive. Public works and services concessions therefore differ from public works and services contracts by virtue of the fact that the risks inherent in exploitation of the works are transferred to the concessionaire. In the event that there are financial or technical problems relating to the construction or provision of the services, the concessionaire is wholly responsible for any losses.

However, a complete transfer of risk to the private sector is commercially unrealistic and there will be situations where the contracting authority does retain some risks or bears part of the costs but the contract still remains a concession contract. For example, if the contract is of a significant duration, the contracting authority may bear risks arising from changes in legislation during the term of the contract or the contracting authority may bear part of the costs of operating the concession in order to keep prices down. The Communication on Concessions indicates that such contracts also constitute concessions provided that this does not eliminate a significant element of the risk inherent in exploitation.

Accordingly, it is clear that whether a contract can be correctly classified as a concession contract will involve a case by case analysis and a general definition based upon a transfer of "risks inherent in exploitation" can lead to uncertainties as to whether a contract is or is not a concession contract.

7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

Please refer to our response to question 6 above.

13. *Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other "standard clauses" which are likely to present similar problems?*

We do not share the Commission's view. Competition for publicly procured contracts takes place at the time when the contract is advertised in the Official Journal of the European Union. All interested parties are aware, when bids are submitted, that any party providing finance for the project in question will require an ability to step-in to the project in certain defined circumstances.

The need for "step-in" arrangements

"Step-in" arrangements are an essential requirement of funders for all limited and/or non-recourse financed projects, including PPP projects. They form an important part of the security package because they allow funders to try and protect their investment by providing a mechanism by which funders can attempt to "save" the project in circumstances where the public sector party would otherwise be entitled to terminate the project agreement. If funders do exercise their step-in rights, this can result in a novation of the project agreement to a new project company which will take over the rights and obligations of the original project company.

If the ability to replace a defaulting project company in this way is restricted and funders are required to retender in accordance with the Directives, they may be unwilling to lend to projects of this nature because the requirement to retender would have an adverse impact on the bankability of the project. In our view this would act as a barrier to the further use of PPPs in the UK and to the introduction of PPPs in other member states.

Even if a funder did agree to lend to a project on this basis, any requirement to retender is likely to make the project unaffordable in the long term because:

(a) the project is likely to suffer delay during the retendering process. It is not clear, under Article 31 of the New Directive whether such a retender may be conducted by using the negotiated procedure without prior notification;

(b) additional costs will be incurred as a result of the retendering process and as a result of any delay to the project; and

(c) the funder will need to re-structure the financing package to take account of such delays and increases in costs.

General structure of "step-in" arrangements

Step-in rights are aimed at ensuring the continuity of a project following a default on the part of the private sector party. The main areas of concern for the Commission in relation to "step-in" arrangements appear to relate to the public sector's ability in certain circumstances to object to the replacement project company and the form of contract that the replacement project company may enter into. In UK PFI deals step-in arrangements are structured so that:

(a) the public sector party may object to the appointment of the substitute project company only on the grounds that it does not have:

(i) the legal capacity, power or authority, or

(ii) the appropriate qualifications, experience, technical competence or available resource (including committed financial resource),

to perform the obligations of the original project company under the original project agreement; and

(b) the original project agreement is novated to the substitute project company i.e. there are no changes to the terms of the original project agreement.

The public sector's party's right to object to the replacement project company is limited to objective grounds contemplated by the Directives as permitted qualification conditions for the selection of the original project company and the original project agreement must continue to be performed in accordance with the original terms and the originally agreed economic position of the parties.

On this basis, we do not consider that step-in arrangements contravene the principles of transparency and equality of treatment and we consider that funders should be permitted to replace the original project company as a result of the exercise of step-in rights without any requirement to retender.

“New” contracts

There may be circumstances where the terms of the original project agreement are re-negotiated in favour of the new project company to the extent that the re-negotiated contract might be considered to be a “new” contract for the purpose of the Directives. We acknowledge that, in these circumstances, a new award procedure may need to be followed.

Subcontracts

If the original project company is in default and the step-in rights are triggered, the funder may exercise the rights it has under the financing documents to replace the relevant subcontractor whose actions have caused the project company to be in default, rather than replace the project company itself. If the award of the original sub-contract was not subject to the public procurement procedures of the Directives, then the selection of a replacement subcontractor should not need to be made in accordance with these procedures. We refer you to our response to questions 15, 16 and 17 for our comments on sub-contracting generally.

15. *In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.*

Problems arise in relation to subcontracting because of uncertainties as to whether, and if so, how the procurement rules apply to the award of subcontracts in respect of different PPP structures, whether the PPP contract is classified as a public contract, a concession or whether the Utilities Directive applies.

The award of subcontracts by a private sector party

In the normal course, the project agreement will have been awarded to a private sector party following a competition which complies with the procurement rules. In these circumstances there should be no additional requirement on the project company to comply with the procurement rules in awarding the subcontracts. In many cases the private sector party will be a consortium that will have bid for the project on the basis that it will be able to award subcontracts for the construction and operation work to its individual members. Any requirement to award such subcontracts through a competition which complies with the procurement rules will restrict this ability and may lead to a reluctance on the part of the firms comprising such consortia to bid for these projects.

In addition, the private sector party is not a contracting authority for the purposes of the Directives and accordingly the award of the subcontracts should not be subject to the procurement rules.

Although it is accepted, in principle, that private sector parties should be free to conclude contracts with third parties, in terms of public works concessions which exceed the relevant threshold, private sector concessionaires are subject to certain obligations when awarding works subcontracts even though they are not contracting authorities. Private sector concessionaires generally have to advertise their intention to award a subcontract and have to follow the general principles of transparency and equality of treatment in their award procedures. This does not apply to subcontracts awarded to persons related to the concessionaire provided that an exhaustive list of such related persons is included in the application for the concession[3].

In addition, in the case of the award of public contracts the awarding authority may ask the tenderer to indicate in his tender any share of the contract he intends to subcontract to third parties and any proposed subcontractors[4] . In the case of public works concessions, contracting authorities may either (a) require the concessionaire to award contracts representing a minimum of 30% of the total value of the work for which the concession contract is to be awarded to third parties or (b) request the candidates for concession contracts to specify in their tenders the percentage, if any, of the total value of the work for which the concession contract is to be awarded which they intend to assign to third parties[5].

If the private sector party is a utility, the Utilities Directive may apply to the award of subcontracts depending on various factors, including whether the private sector party operates on the basis of special or exclusive rights granted by a competent authority of a member state.

Economic operators have previously voiced legitimate concerns in relation to the inability of a chosen consortium to award contracts to its partners and there is now an express exemption from the provisions of the Utilities Directive for works, services and supply contracts awarded to an affiliate in certain circumstances.

Private sector parties should be free to conclude contracts with third parties without being required to comply with the procurement rules and, although this is accepted in principle, there

[3] Article 63(2) of Directive 2004/18/EC

[4] Article 25 of Directive 2004/18/EC and Article 37 of Directive 2004/17/EC

[5] Article 60 of Directive 2004/18/EC

are various derogations to this rule which apply in different circumstances. This has caused undesirable uncertainty and confusion in the award of subcontracts which is not sustainable on a commercial basis.

The award of subcontracts by public sector parties

There may be circumstances where the project company is in fact a public sector party and the project agreement was not tendered in accordance with the procurement rules (because there was no need to do so). In these circumstances, if the value of the works, services or supplies exceeds the relevant threshold, we acknowledge that the project company should be obliged to award the subcontracts in accordance with the procurement rules.

In respect of works concessions, public sector concessionaires are expressly required to comply with the procurement rules in awarding subcontracts to third parties[6].

However, the Utilities Directive expressly provides that it does not apply in certain circumstances where contracts are awarded by contracting entities to affiliated undertakings or to joint ventures of which it forms part if the joint venture meets certain requirements of the Utilities Directive[7].

Institutional PPPs

Institutional PPPs (as such term is defined in the Green Paper) are more complex in that a joint venture is set up between the public sector and the private sector and it is the joint venture company which will award the subcontracts. The award of the subcontracts should not be subject to the procurement rules if the joint venture company is not a contracting authority.

Whether a joint venture company is a contracting authority for the purposes of the New Directive depends primarily on whether it is regarded as a body governed by public law or an association formed by one or more contracting authorities. A body governed by public law means any body:

(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

(b) having legal personality, and

(c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members

[6] Article 62 of Directive 2004/18/EC
[7] Article 23 of Directive 2004/17/EC

are appointed by the State, regional or local authorities or by other bodies governed by public law.

There have been numerous cases in which the European Court of Justice has had to consider the definition of a body governed by public law and it has laid down certain principles regarding the interpretation of this definition. However, there still appear to be areas of uncertainty and these relate mainly to:

(i) the meaning of “management supervision”;

(ii) how the legal framework and factual situation applicable in different member states may affect whether a specific activity meets “needs in the general interest”; and

(iii) what factors are relevant in determining whether an activity has “an industrial or commercial character”.

In terms of an association formed by one or more contracting authorities, in one case[8] the Advocate General indicated in his Opinion that the procurement rules are only applicable to such associations to the extent that the association does not have a distinct legal personality. However, this is also an area where clarity is required.

Even in circumstances where the joint venture company is a contracting authority, the award of the subcontracts should not be subject to the procurement rules where the choice of the private sector partner has been made in accordance with the procurement rules and it is seeking to award subcontracts to affiliated companies. As with the contractual PPP structure, the private sector partner in an institutionalised structure is likely to be a consortium that will have been incentivised to bid for the project on the basis that it will be able to award subcontracts for the construction and operation work to its individual members.

16. *In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?*

No, for the reasons stated in our response to question 15 above.

Public private partnerships have facilitated the development of many projects which might not otherwise have been developed because of the lack of funding and budgetary constraints of many member states. In our view increased regulation of the award of subcontracts would act as a barrier to the introduction of PPPs within the European Union.

17. *In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?*

Our response to question 15 highlights various uncertainties in relation to the award of subcontracts by both public and private sector parties and areas where clarification would be helpful.

In addition, we consider that it would be beneficial to clarify and confirm that the award of subcontracts by private sector parties to their affiliates or to members of the consortium comprising the private sector party are not subject to the procurement rules in any of the cases outlined in the first part of our response to question 15, where the appointment of the private sector party has been made in accordance with the procurement rules or where the appointment of the private sector party has not been made in accordance with the procurement rules because the Directives do not require it to be so made.

20. *In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?*

(1) The limited scope of the negotiated procedure which is not addressed by the introduction of the competitive dialogue (see response to question 2 above);

(2) The imposition of any requirement for PPP projects to be procured only by way of the competitive dialogue procedure;

(3) Lack of a sufficient legislative framework for unsolicited proposals in many member states. It would be preferable for general principles or guidelines for dealing with such proposals to be developed. For example, recommendations 30 - 35 of the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects sets out a procedure to be followed in respect of unsolicited proposals involving proprietary concepts or technology;

(4) Lack of standardisation of documentation within member states, although this has largely been addressed in respect of PFI projects in the UK (see response to question 1 above);

(5) Use of the national language in project agreements;

(6) Lack of cooperation between public authorities within member states although, again, this has largely been addressed in the UK as a result of the establishment of Partnerships

[8] Case C-360/96, *Gemeente Arnhem v BFI Holding BV* [1998] ECR I-6821

UK, a successor to the Treasury Taskforce, which advises the public sector and helps them to meet the challenges of public private partnerships;

(7) Very high transaction costs, in particular where there is a requirement to have a fully underwritten proposal at BAFO stage;

(8) Deviation from the concept of non-recourse/limited recourse financing (hybrid financing structures) which result in sponsors being required to issue additional guarantees which are “on” balance sheet and which is not sustainable in the long term;

(9) Insufficient knowledge or experience of some public sector parties;

(10) The introduction of a large number of changes during the tender process;

(11) The unavailability of the public sector comparator and public private comparator at a certain stage in the tender process;

(12) The imposition on third party lenders of any requirement to retender the appointment of any step-in entity (see our response to question 13 above);

(13) The introduction of increased regulation in respect of the award of subcontracts; and

(14) Any reduction in the length of the service/operating period in respect of PPP projects.

In addition, long term strategic partnering contracts between the public and private sectors are becoming increasingly common in realising PPP projects in certain sectors in the UK, with the private sector partner being procured to deliver the entire investment programme over a number of years in that particular sector. The primary benefit of such long term arrangements and the prospect of repeat business is that it creates strong incentives for continuous improvement in design, cost and timescales which in turn provides value for money. This is an innovative approach to procuring PPP projects in these sectors: the appointment of the private sector party is/will be made in accordance with the procurement rules and the procedure is designed to encourage competition and respect the Treaty principles of equality of treatment, openness and transparency. Any discussion on the application of Community law to the procurement of PPP projects must therefore take account of the development of specific PPP structures in different member states as well as the relative maturity of the PPP market in these member states - the procurement rules must be sufficiently flexible so as to encourage innovation and the introduction of different PPP structures. A failure to do so is likely to lead to even greater uncertainties in procuring PPP projects which will ultimately act as a barrier to their introduction.

Norton Rose confirms that this response may be posted on the website of the Commission of the European Communities.

Norton Rose

30 July 2004

Point 2

Even PPP competitive dialogue procedures may prove to be inadequate in cases where the participation of a large number of economic operators is made impossible due to the technological or technical complexity of the project. At times, those technological solutions that would best be suited to address innovative high-tech problems do not fully emerge because of the need to protect intellectual property since not every component is covered by some sort of guarantee (copyrights, patents etc.). Despite significant incentives, optimal combinations of different contributions (technical, infotech, financial, organizational, etc.) will seldom surface since some participants will be reluctant to disclose non-protected technical and/or organizational solutions.

Greater cooperation might result from converting incentives and payments payable to proponents of innovative project contributions (as per SS 29(8) of EC Directive 2004/18/04) into scores that would give them an advantage over other competitors in the contract award procedure. Due to balance sheet constraints and the practice of disbursing financings only when significant progress has been made at the design stage, in Italy it is difficult to obtain appreciable funds at the early stages of a project. As a result, this sort of non-pecuniary remuneration might not only be well received but also help disseminate the procedure and a project quality culture of some sort.

Evidently, for this to happen, access to the dialogue procedure should be as wide as possible and the procedures for appraising the value added inherent in project contributions (savings for the public authorities, greater public benefits and/or lower expenses) will have to be transparent and predetermined.

Point 3

Another obstacle to effective competition which is inherent in applicable Community legislation and will be difficult to sidestep is the objective disparity (mostly territorial) of the situations from which economic operators start off. Let us mention just one example: when assisting a municipality draft a public PFI proposal for a convention centre (under SS 19(2) of Italian law 109/94), we surmised that economic and financial equilibrium would only be achieved provided the convention centre acted as an agency entering into ad hoc agreements with most of the players of the local hotel industry.

Paradoxically, even a one hundred per cent open procedure will prove inadequate to vouchsafe fair and effective competition since those economic operators (specifically the building industry and agencies that organize conventions) who enter into agreements with the local hotel business at the project development stage will clearly have a competitive edge over the rest.

A greater degree of genuine competition might come from a two-step procedure. In particular, in objective and closely controlled situations de facto incompatible with the abstract principle of free competition, the first step might be a negotiated procedure between public authorities and "indispensable" economic operators such as the hotel industry (possibly calling into play institutional representatives such as Chambers of Commerce or trade/industrial associations), while the second step would envisage the enlargement of the private sector component i.e. the inclusion of more easily interchangeable economic operators (e.g. the building industry and agencies that organize conventions).

Point 7

There is no doubt that a homogeneous public procurement and concession legislation would favour public works and services contracts which make for high quality public services as well as an optimal use of public resources.

Point 9

Specific Community initiatives aimed to help, if not indeed oblige, public authorities to exchange experiences are doubtlessly useful (see also **Point 22**) as is the use of incentives for private sector initiators of a PPP project.

Experience in Italy has highlighted the need to provide guarantees and financial and other incentives to operators who submit valid innovative projects. In this connection, it is perhaps appropriate to set up independent entities called upon to certify the validity of the proposals and protect the private partner's innovation from the risk of being copied. In general terms this need is closely related to the comments under point 2 concerning the opportunity to grant intellectual property rights of some sort and have due regard both to the innovative content of a project and the related private investments.

The provisions of article 37 bis of the Italian PFI regulations (law 109/94) whereby only design expenses borne by the project initiator are reimbursed by the contract awardee discourage operators from initiating projects, while the possibility for the initiator to present an offer in line with the best economic proposal submitted in respect of the tender (article 37 quarter) is a limitation to genuine competition in the tender procedure.

It follows that rules should be put in place to determine the value added of projects submitted by private sector initiators.

Point 13

A major problem for the Italian business community is the banking industry's request for guarantees whenever a loan application is filed. The various forms of personal and collateral (mortgages) security still required in connection with most medium/long-term loans today are incompatible with the very concepts of PPP and PFI and irreconcilable with the very long term timeframes they involve.

Consequently, we deem it indispensable that "step-in" type clauses continue being envisaged as also other mechanisms that guarantee the financing entity in terms of budgeted cash flows and, generally, compliance with the terms of the concession. Suitable standard contract clauses should be drafted to guarantee service quality and the qualifications of the substitute concessionaire that would "step in" (without a new involvement of public authorities which the financing entity might view as an additional risk).

In our opinion, if PPPs are looked upon as an important engine of growth, competition must be made compatible with the requirements and protection of the financing bodies.

There can hardly be any doubt that standard terms and conditions and/or procedures "extending competition to step-in contract clauses themselves" might help prevent distortions and misuses of the current legislative framework.

These standard terms and conditions should clearly distinguish between economic operators and financing entities. Step-in clauses should be applied only to initiatives with an adequate equity/debt ratio and provided that business risks be mainly incurred by the economic operators while the financing entities' return should be in the form of financial interest.

By “extending competition to contract clauses” we mean that during the contract awarding procedure, the procuring public authority may include amongst its appraisal parameters its greater/lesser involvement in the event a substitute concessionaire steps in.

Dear Sirs,

1. In my opinion always the fundamental matter is to establish right definitions and the definition of “Public works concession” in the Directive 2004/18/EC is logically misleading.

2. “Public works concession” does not concern the concession of any rights to construct, but rather rights to exploit the outcome of the construction.

3. Consequently, I propose to define the “concession”, as the right to provide services to the public, and to exclude all the matters related to the concession from the Directive 2004/18/EC.

4. “Concession contract”, not connected necessarily with construction of works, would be in this case the subject of a separate legal act.

5. Works contracts resulting from a “concession contract” would come under the Directive 2004/18/EC, if the concessionaire is a “contracting authority” as defined in the Directive.

Sincerely Yours

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ALLEN & OVERY

ALLEN & OVERY LLP

Response to the European Commission Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions from the UK Perspective

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30TH JULY 2004

A&O Response to the European Commission Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions from the UK (London office) Perspective

1 What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?

By "purely contractual" it is assumed the Commission means that the relationship between the parties is not governed by a legislative framework specific to a particular project or type of project. General legal frameworks governing for example, ultra vires, will apply in all cases.

In the UK all PPPs are contractual (although made possible by government policy). The contractual relationships may, nevertheless, be subject to Treasury or other governmental department guidelines or policies.

There are several types of such arrangements:

(a) Services contracts with a government department: where the government department pays a fee for a particular service or a number of services which the private sector party provides;

(b) Concessions: where the concessionaire charges tariffs to consumers for the use of the facility in question;

(c) Joint ventures for the development of property;

(d) Long-term co-operation agreements which give a private sector party pre-emptive or exclusive negotiating or other rights in relation to future projects. These may be in the form of agreements such as Local Improvement Finance Trust (LIFT) projects (discussed further below).

Particular projects may contain combinations of these elements.

2 In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

Currently the negotiated procedure is the preferred procedure used in the UK for PFI/PPP projects. The negotiated procedure is used for UK PFI projects because it has the ability to allow the contracting authority both to negotiate with a number of bidders and to continue negotiations on key terms of the contract following the appointment of a preferred bidder. Both the open and restricted procedures require the contracting authority to select the preferred bidder solely on the basis of written tenders without conducting any negotiations either before or after the submission of tenders. The advantage of the negotiated procedure is that it allows a decision to be made as to the preferred supplier when there is, in the judgment of the public sector, sufficient certainty as to the key elements of the winning bid, even if it leaves certain elements of the scope or terms of contract still to be determined. Losing bidders are therefore not subjected to the full expense of employing advisers to negotiate almost fully the terms of a complicated contract to the stage at which it can be signed and the public sector can focus its scarce resource on a single preferred supplier, rather than negotiate with more than one person over the phase to financial close.

The new directive restricts the use of the negotiated procedure to specific exceptions, which are likely to apply to PPP's only in a limited number of cases.

The competitive dialogue procedure should allow the contracting authority considerable flexibility, in that it may engage in detailed discussions and negotiations with a number of bidders before a choice of contractor is made. This would allow a number of bids and rebids and additional information to be given to bidders during this process. The contracting authority would need to maintain equal treatment between bidders and transparency during the process, and this stage of the competitive dialogue reflects current practice in the UK.

Following these discussions and negotiations the final tender documents will be issued by the contracting authority. The new directive says that these documents may be based on proposed solutions that have come to light during the discussions. This could allow the contracting authority to pass proprietary design information belonging to one bidder to other bidders and is likely to be controversial and unattractive to many potential bidders.

A key issue for contracting authorities and bidders alike is what, if any, further negotiations or changes to the documentation can be made after the choice of the contractor. Article 29.7 of the new directive suggests some clarifications may be possible but the effect of the use of the procedure could be to restrict significantly the scope of any changes to the commercial deal and contract documentation after the choice of a contractor.

A number of bidders may therefore be asked to enter into long and expensive negotiations with the contracting authority so as to enable the contracting authority to decide on a final commercial and contractual deal to put to all bidders before the final selections. Compared with the existing procedures bidders may have to invest even more in bid costs (which in most cases will be irrecoverable) without knowing whether their bids are successful. This may discourage prospective bidders from participating in the procurement procedure which will impact on costs to the public sector of procuring PPP's.

We assume that by introducing the competitive dialogue procedure the Commission and the European Parliament intended to bring more flexibility to the procurement process. However, in practice the restriction of the use of the negotiated procedure and the application of the competitive dialogue procedure may make the process more difficult and/or costly.

3 In the case of such contracts do you consider that there are other points, apart from that concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.

The new directive also allows for framework agreements.

A "framework agreement", as defined by the directive, is an agreement between one or more contracting authorities and one or more contractors which establishes the terms that will govern one or more subsequent contracts during a given period.

The directive provides that the award of a framework agreement must follow all the procedures in the new directive for the award of public contracts. The term of the framework agreement may not exceed four years except in exceptional circumstances.

Subsequent contracts under the framework agreement can only be awarded to those who are party to the framework agreement. The contracting authority may have chosen either (1) a single party or (2) several parties, to become party to the framework agreement.

(1) A single party

Where all the terms of a subsequent contract can be determined from the operation of the framework agreement, a framework agreement may be entered into by a contracting authority with one party and subsequent contracts may be entered into without further competition. The contracting authority may consult the chosen party in writing to request it to supplement its original tender, but no negotiations are permitted on the terms of the subsequent contract.

(2) Several parties

Where all the terms of a subsequent contract cannot be determined from the operation of the framework agreement, there must normally be at least three parties to the framework agreement.

Before awarding the subsequent contract, the contracting authority will hold a mini competition between the parties to the framework agreement but the rules of the competition may be considerably more flexible (for instance in relation to timing) than the procedure for the award of a framework agreement or other main contract and the award criteria will need to be consistent with the framework agreement. However, negotiations on the terms of the subsequent contract are not allowed.

The current structure in the UK for projects procured under the LIFT and Building Schools for the Future (BSF) programmes includes a first agreement with subsequent contracts. The requirements for framework agreements in the new directive may not be entirely consistent with these structures. In effect, the first LIFT agreements grant exclusive negotiating rights to one party but are not capable of determining the terms of the subsequent contracts which are settled by negotiation within the parameters of the framework agreement. Similar considerations are likely to apply to the proposals for the BSF programme.

Although the requirements for framework agreements under the directive may not be entirely consistent with the LIFT and BSF structures, it may be argued that, providing the first agreement is competitively tendered, subsequent contracts entered into under it do not have to be competed under the procurement rules.

In addition to issues in relation to framework agreements, any proposals to harmonise commercial laws of the EU may cause uncertainty and have the effect of discouraging private sector parties from pursuing PPP projects.

4 Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

Yes. We have advised clients about the procedures involved. Our experience is that the UK government's current use of the negotiated procedure has preserved flexibility in the procurement process.

We would comment that the mandatory time periods required by the procurement rules are often longer than required by commercial expediency particularly where the number of known tenderers is known from the outset to be limited in number.

5 **Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?**

Competition can be constrained by factors that cannot be remedied through the procurement procedure, e.g. cultural matters, but as mentioned in paragraph 14 below, there are examples in the UK of overseas companies bidding successfully and establishing PPP businesses.

6 **In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?**

There is no reason in principle why competitive tendering rules should not apply to concessions in the same way which they apply to other PPP's.

Indeed, there may even be an argument that the tendering of concessions should be more regulated than other PPP's since the private sector party receives money direct from the public, rather than the government which may be in a better position to protects its interests.

7 **More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?**

EU Law should be consistent with best government and commercial practice in the PPP area and further legislation in relation to procurement rules may be necessary or helpful to ensure efficient procurement of PPP's. However, we do not believe that legislation in relation to areas other than procurement would be helpful for the development of PPP's. As mentioned above, we see no reason why different rules should apply to contractual PPP's and to concessions.

8 **In your experience, are non-national operations guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?**

The OJEC procedure and the presence of numerous bodies who report on up-coming projects mean that there are adequate provisions in place regarding advertising.

It would be helpful to private sector parties if there were more information readily available regarding details and time of future projects from governments e.g. a 2-5 year plan. This information could be published in a similar way to the OJEC notices. Detailed government announcements or policies regarding projects over the next few years that may be launched should be widely available. This would allow private sector parties to evaluate the potential for setting up or expanding their businesses into particular regions, taking on or developing particular expertise, or expanding into particular industry sectors or types of work.

9 **In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and quality of treatment?**

The European Union should ensure that the tendering procedures for public projects does not inhibit competition. The European Union should seek not to regulate other areas of national law which could impact adversely upon the use and encouragement of PPP's.

The European Union institutions should strongly encourage governments to disseminate information about their current and future policy plans in relevant areas. The European Union could bring this about in a number of ways and legislation is not necessarily the best form of encouragement.

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

It can be difficult for the public sector to ensure competitive tension after the appointment of a preferred bidder if significant commercial issues remain outstanding. It is essential therefore that while the principal commercial terms are clearly agreed when the bidder is selected, the process for resolving other issues (such as detailed design and development which may involve variations to the scope of the scheme) is clearly agreed in writing when the bidder is selected.

11 Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time - may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?

Many PPP contracts for the provision of services include the use of buildings and other related services. This has the effect that the facility as a whole is run by the private sector party. The provision of construction or other services by parties other than the appointed private sector party is therefore difficult to achieve without prejudicing the contractual integrity of the signed contract, for instance, in relation to the allocation of risk. While it may be necessary to give the private sector party a degree of exclusivity in relation to further work, the contract documents should ensure that the public sector party achieves value for money. Although some might regard the exclusivity as discriminating against other providers, this is to a large extent an inevitable consequence of the nature of the original contract under which one party provides services on an exclusive basis for a long time period.

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

Contracting in any country will require familiarisation with the relevant local laws and customs, and to this extent it might appear that national contractors are favoured. However, in the UK there are many examples of overseas companies bidding successfully and establishing businesses in the PPP sector.

13 Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other "standard clauses" which are likely to prevent similar problems?

The purpose of a step-in is to provide another party that will perform the contract on exactly the same terms as the original contracting party. Had the original contract been awarded to another bidder it would have been awarded on different and probably worse terms. It is, therefore, difficult to see that an original losing bidder could have cause for complaint that it has not been awarded the contract since it failed to provide the best terms when bidding for the contract.

From the public sector's point of view, where a party steps in, the same contract as originally agreed is preserved and so it is in no worse position.

In any event, the operation of the step-in arrangements do not breach the competition rules since they result from the operation of the original contractual arrangements which were competitively tendered.

14 **Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?**

Each country could be encouraged to produce its own guidelines on the contractual frameworks and processes which are tailored to their own governmental and business needs. Different sectors also require different risk allocation and contractual terms. European legislation should not provide any mandatory framework since it could in practice restrict the development of PPP's.

15 **In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.**

The project company and its financiers may wish to pass all of the risk taken by the project company to its subcontractors. This can have the effect of reducing the incentive of the project company to manage effectively issues that may arise. In addition, not all subcontractors may be substantial enough to bear the financial risks involved in assuming all the risks taken by the project company. It may be beneficial to the project in some cases for the project company to retain some risk of non-performance by a sub-contractor.

16 **In your opinion does the phenomenon of contractual PPP's, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?**

Inevitably a PPP contract is considerably more complex than a contract or sub-contract for construction or for services. By way of example, reference may be had to the guidance issued by the UK Office of Government Commerce (OGC) which set out extremely detailed considerations which need to be taken into account in contracts for UK PPPs.

17 **In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?**

No. See the response to question 14 above.

18 **What experience do you have of arranging institutionalised PPP's and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not?**

The UK experience of PPP is generally based upon a contractual model rather than an institutional model.

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

As mentioned in paragraph 6 above we see no reason in principle why the competition rules should not apply to institutionalised concessions in the same way that they apply to contractual arrangements, although those who are familiar with this model of PPP may wish to introduce specific modifications to ensure those processes are practicable.

20 In your view which measures or practices act as barriers to the introduction of PPP's within the European Union?

It is recognised that there is a need for procurement rules which ensure competition and equal treatment of bidders. However, EU rules should allow public authorities flexibility in achieving these aims. As mentioned in paragraphs 2 and 3 above, a number of difficulties are foreseen in relation to the restriction of the use of the negotiated procedure, the introduction of the competitive dialogue procedure and the provisions for framework agreements set out in the new directive.

21 Do you know of other forms of PPP's which have been developed in countries outside the Union? Do you have examples of "good practice" in this framework which could serve as a model for the Union? If so, please elaborate.

There are various forms of PPP's in different countries. However, most of the significant issues have been addressed in the UK in the OGC guidance.

22 More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

Yes, providing it does not lead to prescriptive legislation.

Further Information

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

SUBMISSION BY BEACHCROFT WANSBROUGHS, SOLICITORS

1. Beachcroft Wansbroughs is a leading commercial law practice with offices in eight locations in the United Kingdom and in Brussels. The firm provides legal services through more than 1250 lawyers and support staff. Our PPP team has completed more than 70 PPP projects. We act for public bodies and for private sector contractors, promoters and funders.

2. We welcome the opportunity for debate which the Commission's Green Paper provides. Our response is determined by the need for a framework within which it is realistic to expect our public and private sector clients to be able to conclude transactions of a PPP type. However, the views expressed are expressed on behalf of the firm in its own right and should not necessarily be attributed to its clients.

3. We do have reservations about whether the competitive dialogue procedure will in all cases provide a sufficiently flexible framework for complex PPPs **(Question 2**). Our concerns relate to the legislative requirement for an absolute cut-off point for the dialogue, after which only limited categories of clarification, specification or fine-tuning are permissible.

4. The writers have been involved in organising both works and services concessions. **(Question 4).** We agree that there is uncertainty around the precise scope of a concession. What is "exploitation" and how much of the consideration must consist of such a right (consider for instance third party income proposals within a PPP for a public facility), among others, are difficult questions, at the borderline of whether to categorise a PPP as a contract or a concession.

5. We would question whether the line needs to be drawn part way across the gamut of PPPs in this way. Rather, consideration should be given to treating all PPPs, as, in effect, concessions, and subjecting them to an appropriate regime similar to that which currently applies to concessions, albeit perhaps modernised (see para 6 below). While we recognise that in civil law countries the concept of concessions originally developed where the concessionaire derived a return from end users rather than from the public body awarding the concession, we do not see why, with the subsequent advent of the PFI and similar techniques to provide the public infrastructure, many of the arguments justifying a special treatment for concessions (see criteria used by the Commission in its Interpretative Communication on Concessions to distinguish concessions from public contracts) could not equally be applied to other situations where the contractor accepts a complex mix of risks and in reality has a long-term involvement alongside the public sector in the delivery of services to the public (an example would be a PFI hospital) . It follows that we consider that the answer to **Question 7** should be "Yes, provided that the award arrangements are set at a level appropriate to concessions."

6. The rules currently regarding concessions could benefit from codification **(Question 6). It** is preferable to have a self contained set of rules on which e.g. procurement officers within public bodies can rely, rather than for them to have to look to a mix of Treaty obligations, caselaw and the Interpretative Communication. We do not think it would be unreasonable to require concessions over a certain size (whether works or services) to be advertised in the OJEU. Many contractors are already geared up to search this on a regular basis and it would overcome any concerns there might be as to whether advertisement in a particular journal other than the OJEU is sufficient to fulfil obligations of transparency and non-discrimination. **(Question 5)** However, we emphasise that in our view little should be required over and above this : the competitive dialogue procedure is considered to have at least the same potential shortcomings for concessions as for other forms of PPP and in view of the

Commission's views as to the negotiated procedure for contracts, a lesser degree of regulation is needed – the level required in respect of service concessions by existing caselaw and the Interpretative Communication should suffice.

7. The Commission raises the question of step-in arrangements **(Question 13).** By the time a funder steps in however, control of the procurement should be viewed as having has effectively passed from public sector to private sector driven by the private sector's need to recover its investment. The public sector can tolerate this, of course, as there is often a community of interest with the funder. This degree of cession of control is inherent in the very nature of PFI/PPP. As it is the private sector who is determining what should happen, in order to protect its investment, there is no reason why the procurement regime, whose rationale is the opening up of **public** markets, should seek to regulate such relationships. Those whose work concerns the raising of finance may well have a view as to whether an attempt to regulate this would be liable to restrict, or make more expensive, the availability of funds to PPP schemes.

8. We would not favour regulation of subcontracting **(Questions 16 and 17).** A further level of regulated tendering, within the context of a PPP, could only extend project timetables and add to bidding costs. In any event, contractors are often closely linked to promoters (e.g. by way of being part of the same corporate group) and substantial carve-outs would be needed for the award of contracts to consortium members (as with works concessions currently, albeit the rules are hard to operate in practice **– Question 15**). The extent of the carve out would minimise the extent of any possible perceived benefit in terms of opening up markets to be gained through such regulation.

9. We would support the idea of collective consideration of such issues **(Question 22)** and if invited, would be pleased to participate.

Beachcroft Wansbroughs
23 July 2004

EVERSHEDS

GREEN PAPER

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

RESPONSE BY EVERSHEDS

JULY 2004

Introduction

1. The Green Paper has been issued by the Commission for consultation, inviting comments to the various questions posed. This document sets out the response of Eversheds LLP, an experienced legal advisor in the UK PFI/PPP market.

2. Information regarding Eversheds' PPP experience is set out in an Annex to this response paper.

A brief summary of the Green Paper

3. The Green Paper acknowledges that the concept of PPP is not adequately covered within existing EU legislation, but is an increasingly important tool in the procurement of infrastructure projects in many of the Member States. The use of PPP procurement techniques has been widespread in certain jurisdictions and has been seen to offer benefits in terms of innovation, value for money and risk allocation.

4. Whilst acknowledging the potential benefits of the PPP phenomenon, the Green Paper is mainly focussed on whether existing EU legislation effectively deals with the principles of transparency, equality of treatment, proportionality and mutual recognition. In other words, whether the procedures for the award of public contracts are sufficiently tailored to the emerging PPP market.

5. The aim of the Green Paper is to launch a debate on the application of Community Law on public contracts and concessions to the PPP phenomenon. A distinction is drawn between PPPs of a purely contractual nature and PPPs of an institutional nature. It is supposed that each model merits separate study (and potentially separate legal treatment).

Finally, although the Green Paper focuses on the laws relating to the award of PPP contracts, it is noted that the Commission has also adopted measures which are designed to remove barriers to PPPs. It is to be hoped that the "debate" prompted by the Green Paper will be driven by an equal determination to encourage the wider development and application of PPPs.

Our response to the Green Paper

6. Eversheds is a member of IPFA (the International Project Finance Association) and has seen a draft of the response and Members' Recommendations. We broadly support these comments and recommendations.

7. We set out below each of the questions contained within the Green Paper and indicate our response (where appropriate):-

1. **What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?**

Our response: Purely contractual PPPs are commonplace in the UK across many different sectors (both economic and social infrastructure). They are a particular feature of investment programmes in health, education, transport and (increasingly) social housing. Other areas covered include defence, law and order and waste disposal.

Supervision takes broadly two forms. First, supervision by relevant agencies of government, such as the funding government department or Partnerships UK or the Treasury. This supervision relates to the approval of business cases and the ultimate decision to award funding support to a project (in the nature of additional revenue support to local authorities for example).

Second, supervision includes guidance and assistance from various entities (including dedicated PPP units within government departments) which have resulted in standardised contractual documentation, guidance on procurement process and documentation and general management of the market place through dialogue and consultation (with contractors, funders, advisors etc).

In addition, the UK government has taken steps to legislate in order to remove barriers to PPPs. This includes, by way of example, the Local Government (Contracts) Act 1997 and the National Health Service (Residual Liabilities) Act 1996; with both of which were designed to remove legal uncertainty as to the enforceability of public sector payment obligations. Moreover, ad hoc legislation has been enacted to facilitate PPPs to remove uncertainty as to the legality of the intended commercial arrangements being entered into.

2. **In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?**

Concerns have been expressed about the introduction of the "competitive dialogue" procedure. We reiterate those concerns and highlight the following:

- how a proposed PPP project should be defined and in particular how a "very complex" contract is to be interpretated;
- the likely additional costs to be incurred by bidders in being asked to follow a competitive dialogue procedure;
- the additional burdens to be placed on the public sector in following the competitive dialogue procedure - and serious concerns as to whether they will have the necessary resources to negotiate with potential bidders;
- whether the competitive dialogue procedure tackles a real or merely perceived problem - there being no substantial evidence of collusion/corruption in the UK PPP market;

- the management of intellectual property rights under a competitive dialogue procedure;

- how bid costs are to be paid for by the public sector under the competitive dialogue procedure - particularly in the context of a project which, for legitimate reasons, does not reach financial close.

Fundamentally, the "competitive dialogue" procedure may add substantial additional cost and time to the contract award procedure - diluting market interest in projects and slowing down the pace of investment in new infrastructure.

3. **In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.**

The majority of PPP contracts on which we have advised have been procured using the negotiated procedure (most commonly under the Services Directive). This has proved to be, in general, an effective means of both ensuring competition and the most value for money/affordable solution to the public sector entity. We have advised on the interpretation of community law in relation to post-contract variations - but generally speaking have not encountered particular difficulty in terms of the application of existing community law in such circumstances.

4. **Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?**

No comment.

5. **Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?**

Yes.

6. **In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?**

We believe the Commission should identify what, if any, true barriers to competition currently exist and whether additional regulation of the procedures is necessary. There is a need for more clarity and guidance and dialogue in relation to any existing concerns and future intentions - all designed to encourage development of the PPP market.

In relation to "concessions", this term of art tends to have no clear meaning within the PPP context - and it may be timely to review whether any meaningful distinction is being achieved in this context.

7. **More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?**

We reiterate the need for guidance on the scope and application of the revised Directive 2004/18. Specifically, how a proposed PPP project should be defined for the purpose of the rules (works, services or works concession contracts) and what procedure the authority is permitted to follow (the new competitive dialogue procedure and the circumstances in which the negotiated procedure can be used)? A new draft Directive is likely to create confusion and cause delay to programmes of infrastructure investment. The existing models of PPP contract (including what may be classified as "concessions") are all catered for in the Directive.

8. **In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?**

In our experience - yes.

9. **In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?**

The Commission should set-up an EU PPP Taskforce as suggested. This will collate and disseminate best practice, provide guidance on procurement laws and best procurement practice and offer training to less experienced Member States. The Taskforce should also act as a bridge between governments and the private sector/funders. The best way to encourage and foster competition (including transparency, non-discrimination and equality of treatment) is to encourage the development of a dynamic PPP market in which the private sector (and investors) see genuine opportunity.

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

Following selection of the private partner (under a negotiated procedure) further negotiation has taken place, including lender due diligence. Under current UK procurement practice this has not involved change to the scope of the procurement, financial arrangements or commercial terms - but has enabled both parties to resolve any outstanding project - specific issues and undertake necessary due diligence in relation to the detail of the project.

11. **Are you aware of cases in which the conditions of execution - including the clauses on adjustments over time - may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?**

No.

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

No.

13. **Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other "standard clauses" which are likely to present similar problems?**

Many PPP deals are structured on a DBFO basis. As such, external funders will require step-in rights as a fundamental term of lending to the project. Any steps which may remove or undermine the rights of funders in this regard will damage the PPP market. We are not aware of any problems in terms of transparency and equality of treatment - the initial procurement will govern the precise terms under which the step-in rights may be exercised and step-in rights will not change the scope of the project or financial terms.

14. **Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?**

Again, we reiterate the dangers of over-regulating the PPP market at community level. Instead, we believe the Commission has an important role to play in offering guidance and support to the PPP market.

15. **In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.**

In our experience sub-contracting arrangements are carefully evaluated at the time of selection of the private sector partner. This may include evaluation of the "supply chain". We do not believe that this is an area which requires any further specific treatment in terms of additional legislation.

16. **In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?**

Again - no additional rules are required.

17. **In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?**

No - on the basis that the initial procurement will ordinarily take full account of the proposed arrangements for sub-contracting (including, in large measure, identification of the proposed sub-contractors). Unnecessary constraints in relation to sub-contracting will potentially impact on value for money and risk transfer.

18. **What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not?**

Eversheds has substantial experience of arranging institutionalised PPPs, particularly in the areas of education and health. In our experience these institutionalised PPP arrangements generally involve the award of a contract of some description. As such, the existing public procurement laws satisfactorily cater for the situation. Accordingly, we do not foresee any immediate necessity for additional legislation in this area.

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

It may be necessary for some additional guidance to be offered in this regard - taking into account the various types of institutionalised PPP arrangements. This may be something for the proposed Taskforce to look into having regard to the benefits of flexible commercial arrangements.

20. **In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?**

Most PPP projects are complex and intellectually challenging. One of the main barriers to the introduction and development of the PPP market is the negative attitude of the private sector towards abortive bid costs. Despite the maturity of the PPP market in the UK bid costs remain high and are a major factor in how private sector contractors regard individual projects in the market. A balance must be struck between the legitimate concerns of the Commission in respect of transparency etc and the fostering of participation in the market.

The public sector will be concerned to deliver projects on time and within budget. Measures which unnecessarily prolong the procurement timetable or which add additional cost to the procurement process, will be seen as barriers to the delivery of much needed new infrastructure. Accordingly, the procurement rules must strike a balance - between transparency, fairness and equality of treatment on the one hand and cost-efficient procurement on the other.

Additional barriers include:

- a continuing lack of standard form contractual documentation across Europe;
- insufficient sharing of know-how between jurisdictions;
- insufficient programme support at government department level - particularly in Countries where PPP is not yet fully developed.

21. **Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of "good practice" in this framework which could serve as a model for the Union? If so, please elaborate.**

We are aware of the excellent work being undertaken by Partnerships UK in other countries - including South Africa, for example.

22. **More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?**

We would strongly support the creation of such a network and would be eager to participate.

Conclusion

8. In conclusion, we emphasise the following points:

- we broadly endorse the recommendations of the IPFA members.
- we support the creation of an EU PPP Taskforce and a network for encouraging the collective consideration of these and other questions;
- there should be focus on offering guidance and support around the application of the existing procurement regime (and, in particular, Directive 2004/18);

- any further additional rules/legislation should address real problems which limit competition or otherwise distort the market;

- no additional rules should be put in place which may have the unintended consequence of inhibiting the development of the PPP market - particularly where these add additional costs or time to the procurement process, without any commensurate benefits.

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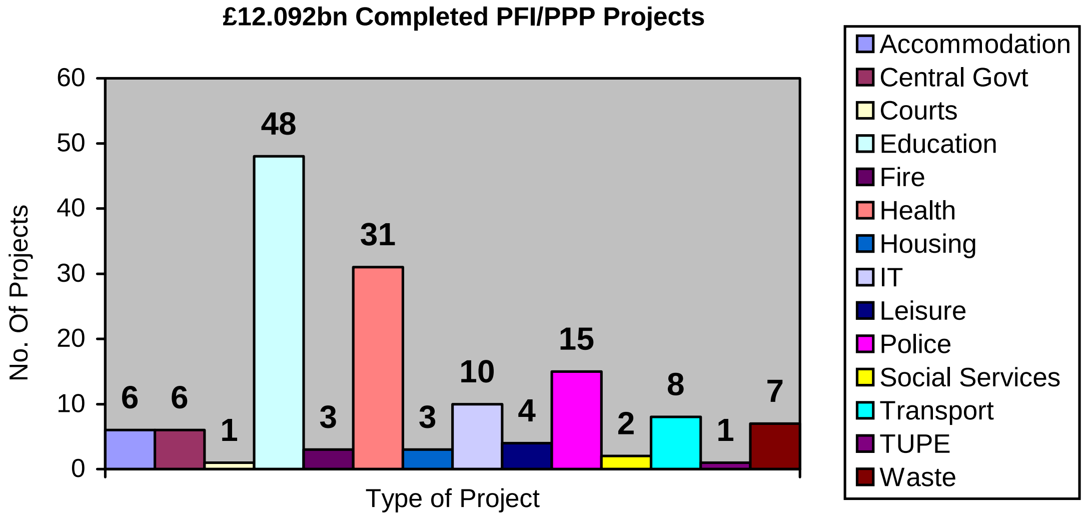
ANNEX - OUR EXPERIENCE

Eversheds LLP's multidisciplinary projects group is a leading player in the UK projects field and has an increasing reputation in international markets. We advise a huge range of public and private sector bodies (including funders) on projects worth billions.

Within the PFI/PPP market alone we have closed more projects than any other UK law firm.



Main Services

The main services which Eversheds LLP projects team can deliver include:

✓ Project finance concessions and other similar arrangements (including transport concession arrangements, major infrastructure projects and energy projects)

✓ PFI/PPP projects including strategic partnerships, NHS LIFT, Local Education Partnerships and DTCs

✓ Major outsourcings – these involve both public and private sector transactions as well as private to private sector transactions

✓ Production of guidance - Eversheds LLP were involved in the production of guidance for local authorities developing and procuring schools schemes through PFI. The purpose of this Procurement Pack is to streamline the process for Authorities by providing guidance on the process and reference for specific issues.

✓ Refinancing - we have extensive experience of acting for lenders and institutional investors on refinancing projects.

✓ Secondments - we regularly second lawyers to bodies such as the Department of Health, Private Finance Unit and the Defence Procurement Agency (MOD).

Grant Thornton UK LLP consultation response to EU Commission Green Paper: ON PUBLIC-PRIVATE PARTNERSHIPS AND EUROPEAN UNION LAW ON PUBLIC CONTRACTS AND CONCESSIONS

General Comments on Green Paper

The Green Paper appears to have as its main concern that there is not specific legislation to deal with all possible elements of PPP where market abuse may potentially occur. The questions seem to focus on obtaining evidence for this rather than on seeking views on how best to develop PPP as a vehicle for delivering infrastructure and services across the European Union.

Experience in the UK which has been used as a model elsewhere is that a co-ordinating body (PUK) along with other institutions across various sectors (4Ps, OGC, Partnerships for Health) developing best practice in the context of the roll out of real projects provides the basis for developing workable rules. Grant Thornton consider that a pan-European approach along these lines co-ordinating the experiences of national bodies is preferable to legislation which if required at all should only follow tested practices in the market which have provided value for money and affordable solutions to the public sector.

Further legislation is likely to increase bid costs, constrain innovation and prolong procurement times and should be resisted.

1. What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?

There are a whole host of differing PPP arrangements in the UK and elsewhere. Private Finance Initiative ("PFI") contracts for the provision of services to a government body which takes some or all of the demand risk are the most common, however, there are also concession arrangements where by the operator exploits the opportunity to carry out an operation (eg leisure, waste).

There are also "hybrid" arrangements combining institutionalised PPPs such as LIFT (Local Infrastructure Finance Trust) in the health sector and the proposed LEPs (Local Education Partnerships) under BSF (Building Schools for the Future) in the education sector). These comprise "partnership" elements perhaps formalised though an equity participation by the public sector in a project company with a concession to carry out works (subject to periodic tests of competitiveness) including under both contractual PPP arrangements (PFI contracts) and conventionally funded arrangements .

Such set-ups generally fall under the supervision of the National Audit Office which ensures that terms are reasonable for the public body involved. Partnerships UK, 4Ps, OGC and other departmental bodies provide backup before signing a contract to ensure that terms are reasonable.

2. In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

The competitive dialogue procedure is likely to increase bid costs and lead to longer procurement periods when compared to the negotiated procedure as implemented in the UK. For any form of the competitive dialogue procedure to work issues such as the following must be effectively addressed:

- economic advantage not being interpreted simply as price (an output specification is a hurdle rather than an absolute - if innovation encouraged in the Green Paper is to be realised then the benefits of the innovation of a solution must be given economic weight along with price);
- the protection of initial bidder's intellectual property;
- the public authority must be able to assess the affordability of projects prior to final pricing by allowing indications of price from tenderers as part of the competitive dialogue; and,
- there must be a capacity to deal with details reflecting improved information or changed circumstances post appointment of preferred partner and prior to contract signature with up to date information (eg TUPE).

Competitive dialogue cannot fully remove opportunities for corruption: that possibility would still exist as by selecting options that one bidder can deliver more/better/cheaper than others bidding can still be skewed. Similarly by sharing the good ideas from one party with all the others the incentive to come up with innovative structures is removed as there is no point spending the time if that then gets offered to everybody else for free.

This question appears to assume that the negotiated procedure does not work which is not the case. It works well in the UK (so far the most advanced market) without real complaint so the Commission would be better to focus on how to ensure it was implemented and worked similarly well across the EU.

3. In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.

Uncertainty in terms of
1) potential future EU Directives
2) any suggestion of reopening transactions already agreed

will be a negative factor for any investor. Much legislation amy have unintended consequences but the fear that legislation is proposed which may not take account of the needs of the different parties to ensure the best terms, and ignores experience in the EU country with most experience in this area can make many investors decide that the risk of participating is too high.

Interference with step in rights makes it likely that
a) banks will be much more unlikely to invest (and then on less attractive terms); or
b) public authorities have to provide alternative termination compensation mechanisms that are costly and bring project on-balance sheet.
In either case the aim of achieving low cost long term funding is defeated.

4. Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

The firm has bid for tenders, organised and supervised tenders on behalf of the public authority and acted for private sector bidders on tenders. The experience is that the negotiated procedure is already too slow (but becoming faster through adopting best practice innovation and standardisation) but it works.

5. Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?

The current framework is not a positive bar to effective competition but is open to being frustrated should a government body not wish to seek competition or pursue openness in awarding a contract. The desire for a level playing field should not be such that the incentives to research, identify and develop concepts for voluntary concession arrangements is removed. (See Q6 below).

Even EU legislation can be implemented and enforced in different ways still leading to a potentially uneven playing field - the way to deal with this is not by more legislation but by EU wide expertise and overview.

6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

Legislation is only desirable if the benefits of the formal non-discrimination outweigh the drawback of the more informal pressure of budgetary constraints. This is unlikely to be the case.

7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

Providing clarity by defining the treatment of concessions may be useful. However, legislation may not be the best route for this and guidance (using a central body such as PUK in the UK) is likely to be most effective. It would be better to omit provisions for concessions that unnecessarily restrict such activity.

8. In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?

It would be reasonable to expect such opportunities when advertised by an authority to appear in the Official Journal. The selection procedure should be competitive but to prescribe the means by new legislation is likely to increase bid costs and reduce the scope for innovation.

In practice, at least in the UK, non-national operators are guaranteed access, exemplified by the success of such companies as Bouygues and Bilfinger Berger in winning contracts. However, there are suggestions that this is not the case in all countries, with some clients avoiding particular countries due to perceived lack of objectivity in awards.

9. In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?

In particular, the following need to be considered where the private sector initiates a PPP:

- initiator to recover development costs (preferably from within the project);
- how the fact that the public sector will not specify the outputs can be dealt with in the context on non-discrimination provisions; and,
- whether limitations on the concession length may balance reward for initiative and first mover risk with long run competition.
- rewards for innovative and improved solutions
- ability to source long term low cost funding

The Commission and national authorities would probably achieve more by adopting programmes to develop best practice (and there will be a degree of trial and error in this) than to adopt a legislative route. It has to be remembered that the easiest way to ensure absolute transparency and equality is to have nothing done at all under PPP. The proposals risk creating such equality. Recognition of the role of PPPs, ongoing EIB support for them and promotion of the concept among member countries are likely to do more to ensure the development of PPPs.

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

In the pre-contract signing post selection phase the efficiency and success of this process depends on the quality of the original ITN, the effectiveness of the clarification process prior to appointment and the completeness of the terms of preferred bidder appointment document. It is important that it is clear that all members of a preferred partner consortium are committed to the terms of the appointment.

Most PPP contracts are still as yet in a relatively early phase, but appear to be operating effectively. The provisions incentivising delivery of construction projects on time whereby payment only commences where construction is complete and services commence does appear to be delivering positive results.

11. Are you aware of cases in which the conditions of execution - including the clauses on adjustments over time - may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?

We are not aware of any such cases. The provisions for variation and benchmarking and market testing were agreed as part of the competitive appointment on contract award.

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

In Grant Thornton's experience the competitive process is effective in the UK. Advice is taken by procuring authorities during the process to ensure that actions are not discriminatory. The process of adopting standard documentation has been effective in providing certainty to and equality between bidders.

13. Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment.? Do you know of other "standard clauses" which are likely to present similar problems?

Step in arrangements provide protection to both the public sector and the lenders to a project ensuring continuity of service and failure to service debt. These form part of the provisions negotiated prior to contract signature and include objective tests and consequently it is difficult to argue that there is a problem with the transparency and equality of treatment in the arrangements. It would be extremely damaging to the Bankability of projects to adopt legislation requiring contracts (or elements thereof) to be re-let using a full public procurement type tendering mechanism - particularly if this applied to existing contracts.

Step-in rights have existed in project finance contracts for many years without being abused. It is important to remember that such step-in rights only operate in limited circumstances where otherwise there might be immediate termination of the contracts. Banks are loathe to use them but the fact that they exist as a "last line of defence" mean that the cost of lending remains low without the need for public sector compensation methods. Removing step-in rights is likely as a minimum to significantly increase debt costs (direct and indirect) but runs a significant risk of killing off the PPP market completely. As an example we note that one major international bank in particular has indicated that one reason that relatively little real project finance has been carried out in France is the lack of availability of the requisite step-in rights and that if this approach were implemented Europe wide it would be likely to lead to banks no longer being willing to finance most projects.

The alternative of easier termination could lead to less transparency overall rather than more as it makes it easier for public authorities for political or personal reasons as well as genuine ones to terminate contracts and pursue other alternatives or retender.

14. Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?

The principles set out in the current Directives should be sufficient. Whilst guidance on preferred practice has been of assistance in the UK there is a danger that unbankable provisions may be enacted in legislation without the flexibility to obtain derogations to reflect project specific issues. We would advise against legislative provisions on contractual details. It should be up to member states to deal (on a non-discriminatory basis) with the contractual framework as a whole.

15. In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.

In the case of UK PFI the competitive process has generally left subcontractors holding the risks they are best able to manage. There appears to be a competitive market with competitive pricing. Contractual provisions for operating phase subcontractors include benchmarking and market testing provisions as well as best value obligations which both protect the sub-contractor from unsustainable prices where market conditions change whilst ensuring that the public sector can benefit from efficiencies. The market testing process implies that a non-discriminatory competition is held and the public sector will be able to monitor this.

16. In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

As long as the overall procurement process does not fetter the main contractor in a way that discriminates as between sub-contractors (ie the procuring authority requiring the inclusion of a particular (eg local) subcontractor) then there is no need for such rules. Any rules limiting the freedom of the main contractor to organise a consortium should be resisted. Unless consortium leaders are allowed to fully evaluate for subcontractors not just price but subjective criteria such as ability to deliver on time, quality of workmanship, the extent of cooperative working practices with other subcontractors then consortium leaders would be forced to increase pricing significantly to allow for the risks of having to deal with a subcontractor causing such problems. If they are allowed to take such factors into account then the current system enables that and any inflated costs from a subcontractor simply serve to make a contractor less competitive overall.

17. In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

No. Such an initiative runs the risk of making the whole construction market (not just PPPs) practically unworkable. At a time when rapid investment in infrastructure is required and projects such as TENs are behind schedule, an initiative with no likely gain but significant likely delay as a minimum is to be avoided.

18. What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not ?

The LIFT arrangements in the UK are a form of institutionalised PPP. The LEPs envisaged under the Building Schools for the Future Programme are another example. Both envisage that the private sector investor in the LIFT company or LEP would also (probably) be involved in the provision of services either through investment in a limited recourse vehicle or directly. In either case the initial award of the opportunity to invest in the institutionalised PPP would be made in conjunction with a competition for the provision of the initial tranche of services. Any element of services not to be commenced immediately would be subject to arrangements which would form part of the appointment to ensure competitive prices were applicable to such services. This constitutes a competitive process whilst ensuring that a disproportionate resource is not consumed in the bidding process itself.

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19. Do you think that an initiative needs to be taken at Community level to clarify or define the obligations of the contracting bodies regarding the conditions requiring a call for competition between operators potentially interested in an institutionalised project? If so, on what particular points and in what form ? If not, why not?
In general and independently of the questions raised in this document:

In general this would not be helpful if it were to restrict the scope to develop institutional PPPs. The process of developing a new institutional PPP will often be unique and require an investment from the private sector that would not take place in the context of additional procurement risk. The public sector should nevertheless not offer guarantees of exclusivity to any private sector partner to the extent that the relevant services were not substantially defined at the time of appointment. Where underlying activities would be the subject otherwise of contracts falling within the existing procurement rules then this should provide sufficient protection.

20. In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?

As compared to the negotiated procedures competitive dialogue may hinder the growth of PPPs unless flexibly applied. Further legislation as opposed to the development and sharing across the European Union of best practice is likely to hinder the introduction of PPPs. In particular in the accession countries the skills and resources to follow complex and time consuming procedures may make PPPs an unfeasible option.

21. Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of "good practice" in this framework which could serve as a model for the Union? If so, please elaborate.

We note with interest that the approach to PPPs adopted in the UK has been adopted in South Africa as a robust model and that countries as far afield as for example Canada (including Quebec), Mexico, Poland, the Czech Republic, Singapore and Taiwan, with a variety of legal frameworks and backgrounds are looking to the experiences of the UK in shaping their own PPP programmes

22. More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

Clearly the sharing of best practice would be of benefit. Whether this should be under the auspices of the Commission or simply promoted by the Commission should be considered further.

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RESPONSE TO GREEN PAPER ON PUBLIC - PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS, COM (2004) 327 FINAL

Pinsents is within the top 30 of European law firms by size and has extensive experience in acting for the various types of stakeholder in public-private partnerships. We act for banks, sponsors, sub-contractors and contracting authorities in a wide range of projects in various sectors.

In 2002 we acted for the contracting authority on the largest UK PFI deal to achieve financial close in that year (Coventry New Hospitals Project which was recognised as project of the year by Project Finance International and has achieved other industry awards) and the largest UK healthcare project to close in 2003 (Derbyshire Hospitals).

We acted for the contracting authority on the first social housing PFI project to achieve financial close (Islington Social Housing) and have been involved in numerous transactions in the education (schools), healthcare, waste management, defence accommodation, roads, street scene, secure accommodation and local authority strategic partnering sectors. The majority of these transactions have been contractual PPPs but this year we have closed 4 LIFT (local improvement finance trust) projects acting for funders or specialists. LIFTs are primarily institutionalised PPPs.

We have closed PPP deals with an aggregate capital value in excess of €7bn.

In the strategic context we have drafted or assisted in the drafting of guidance / standard contracts for PPP projects in the healthcare, social housing, waste management and LIFT sectors and one of our partners is a member of the Office of the Deputy Prime Minister's Strategic Partnering Taskforce.

We set out below our comments by way of responses to the specific questions raised in the green paper COM (2004) 327.

1. What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?

   In the UK the most notable contractual PPP has been created under the Private Finance Initiative ("PFI"). This was introduced in the early 1990's with the aim of introducing private sector skills and finance into the provision of public services. The basic structure of a PFI project is that the private sector obtains finance (whether from banks or the capital markets), and uses that money to design, build and operate a facility for the public benefit. In return the public sector grants the private sector partner a long term contract to run the facility (usually for around 25 to 30 years) and, once the facility has been built, pays the private sector partner a periodic fee over the life of the project.

   In most of these structures the project is project financed. This means that a special purpose vehicle (Project Co) is established by a consortium of bidders which usually comprise the principal sub-contractors (typically a construction company, services providers, sometimes equipment providers and also an additional, or 'third party', equity provider. This limited liability company then burrows typically 90% of the project's required funding from banks or by a bond issue in the capital markets.

   This is an oft-tested and proven structure and requires careful analysis, allocation and pass-through of risks.

These projects insofar as they relate to the construction and/or refurbishment of facilities or other infrastructure tend either to provide for:

- the private sector partner to be entirely responsible for the services provided at the facility (for example prisons, other secure accommodation, roads, independent sector-treatment centres (IS-TCs))

- the private sector partner to be responsible for all or most of the accommodation services which accommodation is occupied and used by the public sector e.g. acute hospitals, schools.

Another type of contractual PPP in the UK is the strategic partnership. Over the last few years an increasing number of UK local authorities have entered into long-term outsourcing arrangements with private companies to provide a broad range of their services.

There is no overall PPP legislation in the UK or in its constituent parts (PPP operates in some fields which have been devolved to the Scottish Parliament or the Welsh Assembly). The legal framework is therefore a mix of:

- common law: the duties of public bodies to act only within their powers and in a manner which is prudent and reasonable

- in sector specific legislation conferring power to enter into PPPs and/or regulating how this is done, for example:

  - The Local Authorities (Capital Finance) Regulations 1997

  - The National Health Service (Private Finance) Act 1997

  - The Local Government Act 1999

  - The Local Government Act 2000

- procurement law: the application of the EU procurement rules in the UK and the general law of procurement arising under common law and the specific requirements applicable to a particular type of public body.

There are various supervisory bodies in the UK that assist the development of PPPs and issue guidance. The principal organisations involved in overseeing PPPs include:

- HM Treasury

- Office of Government Commerce

- 4Ps (local authorities)

- Department of Health Private Finance Unit

(In the local authority and national health service the contracting authorities are not central government departments and so there is contract guidance and oversight).

There have been considerable steps forward in standardising the documentation required in a PFI procurement. This is evidenced by the issue of the third Standardisation of PFI

Contracts, which includes a large amount of drafting which is now mandatory for many PFI contracts, thus reducing the time spent negotiating such contract clauses.

The Department of Health has published a range of standard procurement and contract documentation. "Gateway Reviews" are available to examine a project at critical stages in its lifecycle to provide assurance that it can progress successfully to the next stage. New procurement projects in Civil Central Government have been subject to Gateway Reviews since 2002 and they have also subsequently been introduced into the National Health Service and local government. Additionally sector specific packs have been compiled by the 4ps, the UK's local government procurement agency, which outline issues to be taken into consideration by the parties concerned and are also aimed at reducing the time spent negotiating by the parties and reliance on external advisers.

2. **In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?**

The award of PFI contracts in the UK has generally been conducted under the negotiated procedure. Paragraph 24 of the Green Paper indicates that the negotiated procedure is designed for exceptional situations and in particular does not cover situations in which uncertainties arise from the "complexity of the legal and financial package". It would appear that the Commission is encouraging PFIs down the route of the competitive dialogue as set out in Article 29 of Directive 2004/18/EC on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts ("the Directive").

The competitive dialogue procedure arguably codifies current UK PFI practice under the negotiated procedure. It permits a contracting authority to open a "technical dialogue" with bidders as to proposed solutions, gradually reduce the number of participants, invite final bids and eventually enter into exclusive dialogue with one bidder prior to contract close.

So a preferred bidder stage is accommodated, as is an iterative process. In as much as this reflects current PFI practice under the negotiated procedure, this is to be welcomed. However, some of the detail of Article 29 of the Directive causes us more concern. Some of the wording used in the competitive dialogue provisions could be restrictively interpreted by a national court or by the Commission. A worst case scenario interpretation is that it provides no scope at all for post tender negotiation. Several problems are apparent:-

- The iterative process is presented as a tool for developing specifications and solutions. It could be interpreted as only allowing a series of rounds of competition on technical grounds, followed by a final bidding round where price comes into play. This contrasts with the PFI practice of having one largely technical competition followed by more than one bidding round where price is an issue. On the other hand, it is stated that contracting authorities may discuss all aspects of the contract with the chosen candidates during this dialogue. The argument in favour of this reflecting PFI practice is that "all aspects" of the contract surely includes price too.

- After the final bidding round it is then stipulated that the tenders can only be:-

    - clarified;

- specified; and

- fine tuned.

We understand that the late insertion of the concept of "fine tuning" into the directive will preserve the current ability of the parties to engage in some negotiation at the BAFO stage of a PFI award process. Without this some of the current flexibility in a PFI award would be lost.

- The new directive is unclear, but arguably there is less scope for preferred bidder negotiations under the competitive dialogue procedure than under the negotiated procedure. Indeed it is stated that the preferred bidder can only "clarify aspects" of its tender and "confirm commitments" contained in its tender. However, under the negotiated procedure it has always been unlawful to conduct negotiations with a preferred bidder that lead to the essential terms of the contract being changed after the final bidding round. We believe that the law is not becoming any stricter in this regard. However, it would be helpful if the Commission were to issue guidance on the competitive dialogue procedure that confirms that preferred bidder negotiations can take place under the competitive dialogue procedure just as extensively as they could under the negotiated procedure, i.e. as long as the preceding competition is not impugned. In particular, on the limitations of the parties to conduct detailed preferred bidder negotiations under the negotiated procedure see Commission Decision N264/2002, *London Underground Public Private Partnership.*

On the one hand it is to be welcomed that "particularly complex" projects are to have the benefit of this new procedure. On the other hand it is particularly unhelpful that some PPPs may not be considered sufficiently complex to merit use of the competitive dialogue procedure. PPPs that aren't "particularly complex" apparently will not warrant use of competitive dialogue procedure. Letting a PFI under the restricted procedure would be unworkable and so this may act as a disincentive to the standardisation of PFIs.

The danger to successful and beneficial public procurement arising from too restrictive an interpretation of what negotiations can take place between a contracting authority and a preferred bidder is considerable. The resource requirements implicit in these transactions is considerable and detailed discussion and the completion of design can identify different solutions to aspects of the project to the benefit of all parties.

3. **In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.**

- As with any other public contract that is tendered under the OJEU regime, bidders are reluctant to bring challenges when they suspect that the public procurement rules are being infringed. The biggest hurdle to challenging breaches in PPP award processes appears to be the cost of bringing actions in national courts.

- Frequently bidding consortia undergo changes to their membership prior to contract award. The law on the extent to which changes to consortium membership may occur is not clear and so guidance from the Commission would be welcome. It is submitted that a practical test should be applied. This would look at the extent to which the newly constituted consortium would have reached the same stage in the competition as the original consortium on the basis of an evaluation by reference to the same criteria used in earlier stages of the project.

- There is uncertainty in the law as to how to classify mixed contracts involving, e.g. works and services, or land and works. The *Gestion Hotelera*[1] case is difficult to interpret and so more guidance from the Commission would be welcome. For example, it would be useful to have guidance on how to apply the test for what constitutes the "main object" of a transaction.

- The private sector is particularly concerned to reduce its bid costs and to be able to arrive at a position of preferred bidder as soon as possible. Even now the rules do not facilitate this and the complex contracts procedure will likely exacerbate the problem by requiring the process to remain "competitive" (i.e. with at least 2 bidders) even longer.

4. **Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?**

Leisure services PFIs in the UK may fall within the definition of a "services concession" set out in the European Commission's Interpretative Communication of 2000. We understand that often the risk of operating the leisure facility rests with the private sector contractor. The contractor's primary revenue stream is also often earned principally from charging public users of the leisure facility.

Leisure services PFIs in the UK are subject to standardised contracts and guidance. The guidance from the 4Ps as to their award assumes that they will be tendered through the OJEU.

Our experience is that leisure services PFIs are subject to the same competitive rigours as non-concessive PFIs. Classification as a concession has not compromised opportunities for tenderers throughout the EU in any way.

We are also aware of the circumstances in which Luton Borough Council let a 30 year concession for the finance, expansion and operation of Luton airport. A full OJEU advertised tendering process was adopted for this procurement exercise even though the relevant directive did not require this. Four out of seven of the shortlisted candidates on this project were non-UK entities: (being German, Danish, Irish and American respectively). Therefore classification of this project as a concession did not compromise opportunities for tenderers throughout the EU in any way.

It is our general experience that even where there is not a legal obligations to do so contracting authorities frequently procure on the basis of issuing an OJEU notice in order transparently to comply with their internal and external obligations to demonstrate prudence and value for money.

5. **Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?**

As mentioned in the above response to Question 4, our experience is that concessions in the UK are subject to the same rigours as other public contracts.

[1] Case C-331/92 Gestion Hotelera v Communidad Autonoma de Canarias

6. **In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?**

We believe that attempts to extend the public procurement rules beyond the directives - to e.g. services concessions – via an expansive interpretation of the *Telaustria*[2] case is unhelpful. Service concessions should not be brought formally within the scope of the public procurement directives.

In our view the public procurement rules should be regulating the spending of public money. Where the user pays in large part for a service this justification for regulating the choice of concessionaire is absent. Often the contracting authority is able to make money from letting service concessions rather than having to pay money out.

If the Commission insists on catching service concessions by reference to general Treaty principles, the very furthest it should go is to regulate services meeting needs in the general interest. The policy justification for this could possibly be that there is a public character to the services and the state is therefore in some way responsible for their correct provision.

There seems to be no justification for concessions for services that are not in the general interest (e.g. retail outlets, catering outlets) to have to be let by open tender. Guidance from the Commission that such concessions do not fall within any controls (whether the public procurement rules or the EC Treaty) would be welcome.

The issue of getting best value for money from concessions is one for national law and administrative requirements.

7. **More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements.**

We do not consider new legislation is necessary or desirable. In our view, if any levelling out of the rules applicable to contracts and concessions is to happen, it is the rules governing non-concessive contracts which should be relaxed.

8. **In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?**

We are not aware of any competition for a PPP being compromised because of it having been privately initiated. Contracting authorities are aware of the need to maintain a level playing field in the competition that follows pre-advert contact with the market. It is our understanding that contracting authorities will generally ensure that a fair competition ensues. This is not only because of the public procurement rules, but also because of internal rules. For example, standing orders exist within local authorities to ensure that value for money is achieved through a competitive process and decision makers in all public bodies are required by law to behave prudently. Audit requirements give rise to the need for transparency.

[2] Case 324/98 Telaustria Verlags v Telekom Austria

We are however aware that sometimes the private sector initiator of the scheme can be aggrieved when its idea is adopted by a contracting authority and it receives no benefit from having given the idea to the contracting authority. It is natural that the private sector party itself will wish to derive some benefit from having proposed a scheme. The tendency for public bodies in the UK to take ideas from the private sector without giving them anything in return is indeed acting as a disincentive to investment by the private sector in developing PPP schemes in the UK. We have known a number of clients in the private sector decline to invest for this reason.

9. **In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?**

Privately initiated PPPs could save the public purse money. Once a private sector partner comes up with an idea for a project, it currently has to rank as equal to all its competitors in subsequently bidding for that project. As mentioned in the answer to question 8 above this acts as a disincentive to innovative ideas from the private sector. In order to strike a balance between incentivising innovation and maintaining a level playing field, we believe that a contracting authority should be free to adopt a certain *de minimis* proportion of its contracts via direct award to a private initiator. Obligations could be imposed on the private sector initiative to let sub-contracts (or a certain proportion of them) in a transparent and competitive manner.

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

We have extensive experience in the negotiations which follow selection of the preferred partner.

11. **Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?**

It is inevitable with contracts lasting as long as 25 years that some variations will be necessary. In particular there are significant risks that a bank is not prepared to accept over such a long contract duration, for example the risks arising from changes to the law.

In our experience the contractual parties only make contractual variations within the scope of what was initially agreed in the contractual framework. Such changes are often dealt with by reference to an external mechanism (e.g. a schedule of rates, a system of benchmarking, market testing or the retail prices index). Alternatively they may be dealt with by reference to the original financial model (e.g. a certain profit margin will be retained by the operator in the event of a change in the law). Therefore the operation of such clauses does not infringe the principle of equality of treatment. The contractor is not being given any advantage over the other bidders which tendered for the contract. It should be for the parties to agree on the best way of addressing price and risk issues over the duration of the contract. They have the best understanding of those issues and the interface issues which arise through change.

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

In our experience, contracting authorities in the UK are generally well disciplined in putting together objective bid evaluation criteria. They are often scrupulous in putting together an audit trail that sets out the criteria in advance of bids being opened. This is often accompanied by a bid evaluation methodology that details how the criteria are to be applied and how scores are to be awarded.

The problem that arises in practice is that scores are allocated by human beings. No amount of preparation of the ground can avoid the subjective application of seemingly objective criteria. This can make it difficult to challenge the way in which the criteria have been applied. It is a high burden for the aggrieved bidder to show that there was a "serious and manifest error" in the application of the criteria in order to succeed with a challenge. It is however important that proper judgment is exercised by skilled evaluators and it will be inappropriate for judicial or administrative authorities to second guess property decision making.

13. **Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other "standard clauses" which are likely to present similar problems?**

We do not share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment. Nor are we aware of any other standard clauses which could present problems in terms of transparency and quality of treatment.

At least as far as the UK PFI is concerned, the way "step-in" rights operate is as follows:-

- The senior debt provider has no security over assets. It therefore relies on the income stream flowing from the contracting authority to the project company vehicle.

- In order to protect the senior debt provider from the eventuality that the project company vehicle fails adequately to perform, the senior debt provider can "step in" to the project company vehicle's shoes to ensure that the subcontracted arrangements (e.g. for construction and facilities management) keep on flowing through to the contracting authority.

- From a contracting authority's perspective senior creditors should be encouraged to step in to projects and to manage out issues. This is considerably more advantageous to the public sector than termination which could impose substantial organisational and financial burdens.

- Imposing regulatory rigidity in this area would disincentivise the senior creditors from exercising this right and add to the risks to the project since step in is likely to occur in circumstances where speedy action is required to protect the project.

14. **Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?**

- Land development arrangements can, depending on their structure, seem to be caught by the public procurement rules. This can often be because of the wide ambit of the definition of "public works contracts". This seems wrong where the contracting authority is selling land and has little interest in the use to which that kind is put. As with service concessions, the contracting authority is often making financial gains from private development of its land rather than paying out money. Guidance from the Commission on these arrangements would be welcome, particularly on where the line is to be drawn between cases where there is procurement activity and cases where the contracting authority is merely carrying out a land transaction. For example, a contracting authority may include minor development covenants in a property agreement in order to protect its investment. However, it would be stretching the ambit of the public procurement rules to consider that the contracting authority is procuring works in this context.

- The new rules contain a general 4-year restriction (except in exceptional cases) on the duration of frameworks. The directive does not specify what will constitute exceptional cases, but it provides that they must be "duly justified, in particular by the subject of the framework agreement". The Office of Government Commerce in the UK has suggested that a longer duration would be justified for a maintenance contract for the London Underground, in view of the significant capital expenditure this would entail. It would be very useful to have guidance from the Commission on the exceptional situations in which longer term frameworks are justified. Otherwise the future of some PPP models in the UK may be in jeopardy.

15. **In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.**

We are not aware of any problems with subcontracting. Indeed many private sector companies have longstanding relationships with their subcontractors that help the prime contracts to run smoothly. It would do considerable damage to the PPP market to deprive private sector companies of the right to use the subcontractors that will offer them the best terms and service levels so long as the proposed PPP contract has been appropriately procured.

16. **In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?**

We do not believe that the private partner should have to apply the public procurement rules to its selection of subcontractors. This would run counter to the fundamental rule that only bodies governed by public law have to apply the public procurement rules.

Furthermore, in the PFI context this would be wholly inappropriate. Under the PFI in the UK, the private partner (known as a Special Purpose Vehicle ("SPV")) is generally merely an umbrella company adopted for the purposes of a clean contract. The "subcontractors" that sit beneath that SPV/umbrella company will generally have been the members of the consortium that bid for the project and so they will have already been selected by the contracting authority under the public procurement rules. To introduce rigidity into the sub-contract level would decrease the ability of the SPV and its principal sub-contractors to manage their risks, potentially increase costs or reduce the level of risk transfer to the private sector and add to the cost and duration of the procurement process.

17. **In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?**

We do not consider it necessary or desirable for the subcontracting rules to be increased. If anything, they should be reduced.

The rules on subcontracting of works concessions are at odds with the general lack of regulation of subcontracting pursuant to the award of public contracts. It would be helpful if this additional layer of regulation were removed, as it is not clear what purpose it serves. Whilst a contracting authority can require the concessionaire to award a minimum of 30% of the total value of the work to subcontractors, there is no obligation to do so if the concessionaire is simply requested to state what proportion it would subcontract. It is not clear as to what purpose is served by the concessionaire telling the contracting authority what proportion of the contract it will subcontract. This does not alert the subcontracting market to opportunities.

18. **What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not?**

We would estimate that around 95% of all PPPs involving the creation of a public-private institution are not purely institutional PPPs. Rather they are a hybrid of a contractual PPP and an institutional PPP. Hence they will usually involve the procurement of works, services or supplies. Therefore the selection of the private sector party will be regulated by the public procurement rules. This is certainly the case with the "Building Schools for the Future" and "NHS LIFT" models in the UK.

Building Schools for the Future is a new programme designed to transform strategic capital investment in all secondary schools in England. The programme will be delivered locally through a Local Education Partnership ("LEP"). The LEP will take the form of a joint venture between the Local Education Authority, a government body called Partnerships for Schools and a private sector partner appointed following a competitive tendering procedure carried out in accordance with the public procurement rules. The LEP will enter into a strategic partnering agreement with the LEA which will give the LEP the first right to deliver identified strategic projects over a 10 year period. Amongst the LEP's tasks will be to enable the delivery of projects funded through a variety of procurement routes e.g. PFI.

NHS LIFT (or Local Improvement Finance Trust) is a Government-sponsored programme designed to stimulate investment in local primary healthcare and social care facilities. The corporate and contractual structure of LIFT is similar in many ways to PFI projects but has certain special features. For example LiftCo, the LIFT procurement vehicle, will be owned 60% by the private sector and the balance of 40% by the public sector. It also involves a long-term partnering arrangement rather than a one-off procurement of buildings/services. LIFT also provides a framework of all primary health and social care facilities within the applicable LIFT area throughout a 20 or 25 year "exclusivity" period.

Local authorities in the UK have recently acquired powers to set up trading joint ventures. These may be purely institutional PPPs. For example, if the local authority makes windows for its housing stock it may wish to sell these windows on the open market. It is likely to do this through a company set up in conjunction with the private sector. In this sort of arrangement the local authority is unlikely to be procuring anything. However it is very common for local authorities to go out to tender to select private sector partners, even where this is not required by the public procurement rules. This is because their internal rules require them to hold some sort of competition in most circumstances where there could be interest in the market for involvement in local authority activity.

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

We do not consider that any initiative needs to be taken in relation to institutionalised projects. We do not believe that the public procurement rules apply to bona fide joint ventures where there are no contracts for services, works or supplies between the parties. Where public contracts are involved, the public procurement rules will bite in any event.

It could be envisaged that the private sector across Europe might want an opportunity to invest in purely institutional public-private joint ventures. However, such arrangements could only be made subject to a call for competition if there were to be a wholesale revision of the rules on public procurement. These would need to extend beyond contracts for works, services and supplies to also catch opportunities for capital investment. The criteria for selection of the co-venturer would present significant difficulties given the risk sharing inherent in these arrangements.

If such a wholesale revision to the public procurement rules were to be considered, *de minimis* thresholds would be important. It would be unacceptably onerous for contracting authorities to have to advertise such opportunities below capital investments of, say, EUR 5 million.

Paragraphs 67 and 68 of the Commission's Green Paper suggest that pure capital transactions might already require advertising if they give the private sector some "definite influence" over state economic services. As we read it, the *Baars* case (Case C-251/98) found that Article 43 EC Treaty on the freedom of establishment of individuals was infringed by discriminatory tax legislation, which gave a tax break to company shareholders having "definite influence" over companies, only where such companies were established in the Netherlands and not elsewhere.

It is not clear to us why the Commission considers that Article 43 and the *Baars* case translates into a positive obligation to advertise capital transactions. As we understand it, the free movement provisions of the EC Treaty do not contain positive obligations. These have to be introduced by legislation. It would be helpful if the Commission could provide more guidance on this issue.

In general and independently of the questions raised in this document:

20. **In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?**

The at first sight general rule under the revised public sector procurement directive that frameworks may not last beyond four years poses a considerable problem for many PPP models that have been developed in the UK. A fairly recent model involves the establishment of an institutional PPP, which is contracted to various public sector bodies to provide services/works over a long duration e.g. 25 years. The private sector partner is selected through an OJEU-advertised tendering procedure. However, since the services/works are provided under what could be construed as a framework agreement, the legitimacy of such PPPs now seems to be in question.

21. **Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of "good practice" in this framework which could serve as a model for the Union? If so, please elaborate.**

We do not have detailed knowledge of other forms of PPPs developed outside Europe. Anecdotally we understand that Australia is at the forefront of PPP advancement worldwide. The Australian PPP programme involves a competitive procurement process. However, it is not as regimented as in Europe and the process does not take so much time as a consequence. Private sector operators in the UK would be happier with quick procurement processes that cut down their bid costs and enabled a preferred bidder to be selected at an earlier stage.

22. **More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?**

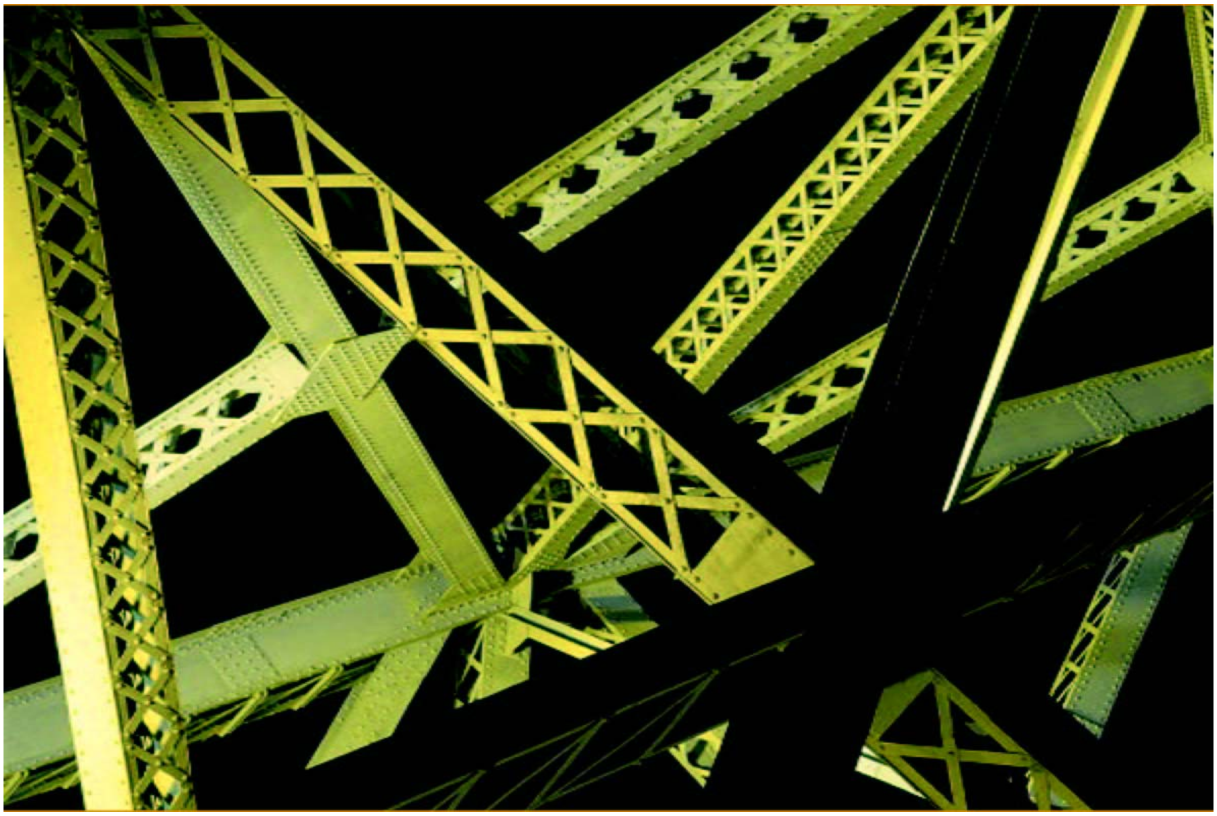
We believe that there should be less regulation on PPPs, not more. In our view, there is no case for adding additional burdens on top of the already very onerous public procurement rules. Representatives of the Commission indicate that the Commission is in favour of PPPs in order to stimulate growth and create jobs in Europe[3], so it should be simplifying their award. Adequate EU-wide competition can be had for such projects by applying the current rules. Indeed, simplification of the current rules to a set of basic principles would be preferable. Information exchange between the Member States on the ways to achieve maximum competition with minimum regulation would be a good idea.

Pinsents
26 July 2004

[3] For example, see SPEECH/04/253 of M. Frits Bolkestein

PRICEWATERHOUSECOOPERS

Response of PricewaterhouseCoopers to the Green Paper on PPPs and Community Law on Public Contracts and Concessions



July 2004

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On 30 April 2004 the Commission of the European Communities (the "Commission") issued a Green Paper on Public-Private Partnerships ("PPPs") and Community Law in Public Contracts and Concessions (the "Green Paper") and invited interested parties to send their comments on the questions set out in the Green Paper. The following is PricewaterhouseCoopers' response to the Commission's invitation.

Introduction

1 PricewaterhouseCoopers has advised on 246 **closed** projects globally, valued at US 43.9 billion. As such we are the leading adviser on PPP projects having advised on more projects which have reached contractual and financial closure than any other adviser. We have experience of advising both public sector and private sector clients and therefore bring the perspective of both sides of such contracts in our response to the Green Paper.

2 PricewaterhouseCoopers refers to the network of member firms of PricewaterhouseCoopers International Limited, each of which is a separate and independent legal entity. We have submitted a single consolidated response to the Green Paper drawing on the experience of these firms. Given the wide experience that we have it has not been practical to list all of our experiences of PPPs or of the issues raised in the Green Paper. Therefore our responses are general in nature and we do not list our experiences from each of the countries where we have experience.

3 Where we have made reference to specific experience in many cases the examples used are UK based. This is not because we believe that the UK should be seen as the only significant, or the best, PPP market but because, with more than 10 years experience and more than 650 closed PPP projects, it has the greatest wealth of examples and the most in-depth experience.

4 We are not lawyers (or experts in EU procurement law) and therefore highlight that our response to the Green Paper is not from a legal perspective but from that of a financial and commercial adviser and is based on our practical experience advising both the public and private sectors on a large number of PPP projects in a wide variety of countries and sectors.

5 Many of the questions in the Green Paper raise complex issues for which there are not short or simple responses. We believe that there are other questions and issues which it might be relevant for the Commission to consider when analysing the PPP market which are not covered in the Green Paper. These relate both to the procurement field and wider areas of EU involvement and activities which impact the development of the European PPP market. We would be happy to discuss these further with the Commission.

6 PricewaterhouseCoopers has recently published its views on PPPs in Europe in , *Developing PPPs in New Europe*, which addresses some of the issues raised in the

Green Paper as well as wider issues which relate to the interaction of the EU with the development of the European PPP market (such as State Aid and accounting issues and the interaction between EU grants and PPPs). This paper was developed prior to the release of the Green Paper. It is available from:

Http://www.pwc.com/Extweb/service.nsf/docid/A2F9309C016FAADD80256EA6004F516C

Some general observations

7 The Green Paper's scope (except for the last three questions) is focused largely on a narrow procurement perspective. While procurement is an important part of the overall PPP process we believe that it is crucial for the future development of the PPP market in Europe that any EU approach to PPPs is holistic. We therefore believe that what is really required is for the Commission (encompassing both a variety or relevant Directorate Generals and other EU institutions) to undertake a more wide-ranging review of the development of PPPs and the impact which these organisations have, or potentially could have, on the market.

8 As noted in the Green Paper it is difficult to define PPPs and the term is not defined at Community level. While the Green Paper's distinction between contractual and institutional PPPs is one way to sub-classify PPPs it does not help in setting the boundaries of what is, and what is not, a PPP. We believe that unless the EU is able to adequately define PPPs, and to achieve a broad consensus in the market that this definition is appropriate, it would not be right for the Commission to proceed with a legislative approach.

9 Given this we believe that it is best to require governments and procurement agencies to ensure that they observe the general principles enshrined in the Treaty (as set out in Paragraph 8 of the Green Paper, in particular the principles of transparency, equality of treatment, proportionality and mutual recognition) in the procurement of PPPs. This can be achieved by providing guidance, rather than for the Commission to try and develop detailed rules and regulations.

10 Experience to date, both in the PPP sector and in the wider public sector procurement market, is that EU legislation has often caused uncertainty as to which rules apply in what circumstances and how rules and directives should be interpreted in particular situations. There are also a number of anomalies where contracts which may be very similar in commercial or economic terms can be treated very differently depending on how they are classified under EU law.

11 While one of the aims of the Green Paper may be to seek to address some of these anomalies, many in the PPP market believe that increased regulation and legislation (such as bringing service concessions within the scope of EU legislation) is more likely to increase the degree of confusion and uncertainly rather than reduce it. A widening of the scope will also increase the burden of

compliance. The PPP market is very sensitive to uncertainty and any increase in uncertainty is likely to increase risk and hence the cost of procurements and contracts.

12 There are a number of countries which have successfully undertaken PPP projects and programmes which do not have detailed rules and regulations but have adapted or interpreted general country specific and EU requirements to the procurement of PPPs. In our experience guidance and oversight from the national treasury is needed as a catalyst to develop projects. We acknowledge that any national treasury's role may be less significant for projects undertaken at, and funded by, local or city authorities.

13 PPP markets, being public sector driven, are by structure largely "national" geographical markets. There are a very small number of "international" PPPs (Galileo would be an example) or "cross border" PPPs (cross border TEN-T projects for example) but the vast majority of PPPs operate within country borders. While the EU itself has some specific interests in such multi-Member State projects it should be aware that these are the exception. The Commission needs to be wary that it does not seek to develop legislation or structures which are designed to aid the development of such projects (which fit the EU's own agenda) to the possible detriment of the wider market.

Specific responses and observations

The following outline our specific responses to the various questions set out in the Green Paper.

2 Purely contractual PPPs and community law on public contracts and concessions

Q. 1 What types of purely contractual PPP set-ups do you know of? Are there set-ups subject to specific supervision (legislative or other) in your country?

14 There are a very large number of types of PPP set-ups. These vary both between countries and within countries, with sector specific models and different procurement agencies following different models and approaches (individual ministries, municipalities or regions may follow different set-ups and different legislation or rules may apply for specific sectors or levels of government).

15 Answering this question is further complicated by the lack of a definition for PPPs (within specific countries or generally across Europe). It is not practical to list all of the various forms of contractual or non-contractual structures which are considered to be types of PPP; to do so would be a research project in itself. It should also be noted that this is a dynamic area where there is constant evolution and new structures and approaches are being developed as circumstances change and the boundaries of PPPs are expanded (for example the development in the UK

of multiple project contracts such as Local Improvement Finance Trusts ("LIFT") in the health sector and Partnerships For Schools in the education sector).

16 In some cases there are classes of contract type, for example the UK Private Finance Initiative ("PFI"), where there are specific rules, procedures and standard contract terms which apply to most contracts of this nature. In other cases PPP structures may be set-up on an individual project specific basis.

17 Similarly with legislation, the situation varies between countries. For example Poland has a motorway law (twice amended to enable a specific PPP project to go ahead) and is also in the process of developing a general PPP law. Similarly France is in the process of developing a legislative approach to PPPs which includes sector specific legislation.

18 Regarding general enabling legislation, some countries have decided to develop specific generic PPP legislation, or are in the process of doing so (for example France and Poland), others (such as the UK or the Czech Republic) have decided not to. In most countries there will be some need to pass pieces of specific legislation to remedy specific issues. Examples include where existing laws do not allow for something which it is proposed be included in a PPP project or where there is some uncertainty which specific legislation can remedy (such as the powers of a National Health Trust to enter into long term binding contracts).

19 Similarly supervision models vary considerably. In come cases there are requirements for the sign off or approval of projects by third parties (independent of the public sector sponsoring department) at various stages of the procurement process (for example the "Gateway process" in the UK, which is not specifically devised for PPPs but applies to all significant public sector procurement projects). In other cases there may be no external supervision of the procurement process.

20 There are many different approaches to the supervision of the contract operations. In many cases the supervision is enshrined in the terms of the contract with agreed performance criteria, monitoring and penalty/performance regimes set out in detail. In other cases there may be an external supervision approach for a single contract (for example the PPP Arbiter for the London Underground PPP contracts) or there may be sector specific regulatory bodies (such as in the water sector) which oversee PPP contracts. However, in the majority of cases PPP contracts are "supervised" under the terms of the contract with monitoring and performance regimes agreed between, and carried out by, the various parties to the contract.

2.1 *Phase of selection of the private partner*

Q.2 In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the *fundamental rights of economic operators. Do you share this point of view? If not, why not?*

21 Given that competitive dialogue is a new procedure (unlike the negotiated procedure where there is a significant body of evidence), and is therefore to date untested, it is difficult to give a definitive answer at this stage. The following is therefore based on our experience of a variety of procurement approaches and procedures for PPPs, our knowledge of the requirements of both public and private sector parties and discussions with these entities regarding competitive dialogue.

22 Our belief is that competitive dialogue is not particularly well adapted to the procurement of PPPs. While there may be some instances in which it is appropriate, in many cases the use of competitive dialogue would not satisfy the needs of the public procurement authority to undertake an efficient and effective procurement. Reasons include:

- there is a real danger that the competitive dialogue approach to the procurement of PPPs will result in increased transaction costs (mainly for bidders but also for the procuring agency) as:

  - bidders may be required to give very full submissions at an early stage of the procurement, when there are potentially a large number of bidders still in the competition (so their percentage chance of eventually winning is proportionally small). They will therefore incur significant costs. These may be further increased if there are several rounds of "dialogue" and at each stage of which they are required to rework their proposition as well as attend "dialogue" meetings;

  - public sector costs will also increase as they will be involved in all of the "dialogues" and will have to assess (potentially a large number) of detailed submissions;

- competitive dialogue could result in the perception that the public sector does not know what it wants or how to procure it, which could deter bidders. It is the responsibility of the public sector to decide on the appropriate project structure based on an analysis of its own needs and its objectives. Competitive dialogue could be seen as an abdication of that responsibility;

- in addition to conducting a complex round of "dialogues" with a number of parties, ensuring that each bidder is treated equally and that the details of all submissions are kept confidential from each party will require a high level of public sector inputs, both in terms of skills and resources. Our experience is that public sector procurement agencies are often pressed to supply the capability or resources to conduct negotiations with one or two short-listed bidders;

- under this approach bidders are effectively being asked to improve the quality of the project using their own intellectual capital on an unpaid basis. This may seem to be a good idea from the public sector's perspective but this will not be the case if the best bidders decide that they do not want to bid or are unwilling to incur further costs in developing their proposals;

- bidders are likely to be concerned that they will be surrendering their intellectual capital (which is one of the main differentiating factors in PPP bids, where bids are assessed on the quality of proposals as well as the price) either to the public sector, who will use it for its own benefit and against the bidder which provided it in the first place, or to other bidders who will be asked to bid against the revised project specification incorporating the original bidders ideas;

- there are other (lower cost) ways in which the public sector can seek to consult with the market whether a proposed project's scope, structure and risk allocation is appropriate, these include road shows and industry days (potentially at various stages of the procurement), the use of appropriately experienced advisors (who understand what is, and is not, acceptable to the market, both technically and financially) and a revision of the project requirements at a Best And Final Offer ("BAFO") stage when full bids have been received but only a small number of bidders are asked to go to the expense of revising a full bid (at this stage it is a more practical proposition for the loosing bidder to have some, or all, of his costs for this final stage reimbursed);

- if project structures change significantly during the "dialogue" stage it is possible that the revised project will be sufficiently different from that originally envisaged, that additional planning and approvals will need to be undertaken to enable the procurement of the revised project to go ahead. There will be delays while such processes are undertaken or revised (such as planning and permitting, environmental impact assessments etc.). Given that the public sector expect the project to change during the "dialogue" stage this may also result in them being less diligent in ensuring that an appropriate level of project preparation is undertaken in the early stages of procurement;

- it is worth noting that the changes required to project structures at the later stages of the procurement process are often required by the project funders. Funders are often reluctant to become involved in the detail of bids until BAFO or a bidder has achieved preferred bidder stage. Certain markets require significant funder involvement in projects at initial bid stage (e.g. Greece and Ireland), with a view to minimising funder changes at a later stage. The consequence is that bidders have incurred significant bidding costs which may have reduced the number of interested bidders. Therefore even under a competitive dialogue approach it is almost inevitable that there will be a need for some degree of negotiation at a later stage;

- unless the “dialogue” stage is very well managed such an approach could result in drawn out procurements.

23 We have no objection to competitive dialogue being an additional tool in the procurement armoury, although there is concern that the process could lead to bidder fatigue. However, we believe that, if the intention of the Commission is that the availability of the new competitive dialogue procedure should result in it being made more difficult for the negotiated procedure to be used for PPP procurements, then this would have a very negative effect on both existing and developing PPP markets.

24 There is a perception in the market that the Commission has an anti-negotiated procedure bias and that the introduction of competitive dialogue is a further attempt to restrict the use of the negotiated procedure. This seems to be based on the belief that such procurements can result in less competitive processes than under other procurement procedures. We do not agree with this premise. Genuine attempts were made to use the restricted procedure in early PFI projects in the UK (for example the first two PFI prison projects at Fazakerley and Bridgend). However such an approach was found to be impractical and, after considerable expense and significant delays, such procurements were re-launched under a negotiated procedure. From our involvement in many PPP procurements which have followed the negotiated procedure (from both the public and private sector sides) we find that these can be highly competitive. As with other procurements there is a need for the public sector to have the necessary resources, capabilities and support to be able to run a proper competitive procurement, but these requirements are the same for any procurement, PPP or not.

25 In markets such as Canada and Australia, it is common for the procuring authority to appoint a “probity auditor” whose responsibilities include ensuring a fair process is followed through the procurement. Should the EU be concerned about transparency issues or inequality between bidders then the use of a probity auditor in conjunction with a negotiated procedure is preferable to the implementation of competitive dialogue.

26 We note that there appears to be an inconsistency in the availability of the competitive dialogue in that it is an alternative procurement method under the “Classical” Directive but not under the “Utilities” Directive. PPPs are common in the utilities sectors.

27 The following comments relate to our current experience of “transposing” the concept of competitive dialogue in the context of the French PPP market (where competitive dialogue has been introduced in the "Code des Marchés Publics" and more or less in all of the new PPP procedures). In general we have found that the competitive dialogue concept has generated considerable misunderstandings and uncertainty. Article 29 of the EU March 2004 directive is quite unclear on the practical way the procedure should be conducted. Queries include:

- is it possible to limit the number of candidates allowed to take part in the dialogue and on what basis? If it is not, then the procedure is likely to be unmanageable. (e.g. how can the public sector conduct a large number of dialogues in parallel?);

- on which criteria do you eliminate solutions? Will a candidate, whose solution has been eliminated, be permitted to submit a final offer on a different basis? There is a general apprehension that this elimination process will be a source of conflicts and litigations;

- what level of detail is to be provided by the bidders during the dialogue phase (e.g. financial)? Are formal proposals expected at this stage or simply conceptual documents? There is an understanding that the dialogue is mostly about refining technical solutions. Are financial options expected to be part of the dialogue as well?

- is the public sector expected to issue new terms of reference at the end of the dialogue to serve as a common basis to all bidders for the BAFO? If not, and many legal experts in France believe it to be the case, (i.e. each candidate should submit a BAFO on the basis of its latest proposal when the dialogue is closed), how do you ensure equality among bidders as they will bid on potentially very different proposals?

- how does the public sector enforce the confidentiality of information submitted during the dialogue? There is a real danger that many candidates, having supplied similar ideas, will be able to claim their paternity and challenge the procedure. There is a lack of clarity as to what is confidential information and what is common knowledge arising from the normal learning process during the dialogue;

- there is uncertainty as to how to interpret the "...clarified, specified and fine-tuned" of paragraph 6 of art 29. What level of negotiation will be permitted at each stage? For example, will the financial proposals be able to be firmed up at this stage? Is so, it is likely that this stage could last several months, which would be contrary to current public sector expectations that this phase will be very short (a few weeks).

28 On the basis of this current and relevant experience, we would suggest that competitive dialogue should be (i) clarified by the Commission as a matter of urgency, (ii) tested in practice before being it is allowed to be generalised and transposed into all Member States domestic legislation.

Q3. In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.

29 We are not in a position to give a legal response to this question, but there is a need to ensure that under Community law the general approaches developed to date for PPP contracts will continue to be open to procuring authorities. These would include ensuring that:

- a whole life costing approach is allowed;
- an outputs specification approach is allowed;
- it is possible to evaluate on qualitative as well as quantitative criteria ("value" not just "cost")
- that negotiation, so long as it is competitive, continues to be allowed.

Q4. Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

30 The response is dependent on whether a narrow or wider definition of concession is intended, which reflects the confusion currently existing from EU legislation. We have considerable experience of undertaking contracts involving the private sector in the long-term service provision of "public" services, which are defined by many as long term concessions. As advisers to the public sector we have been involved in the organisation of such procurements. We have also participated (as advisers to private sector bidders and consortia) in such procurements.

31 It is not practical to document our experience of this considerable involvement.

32 However, we would stress from our experience that the complexity and flexibility required to procure a complex concession (or a complex PPP) call for the use of the negotiated procedure. We do not believe that the use of the negotiated procedure creates inequality among bidders, reduces competition or leads to disputed outcomes or litigation (there has been very little litigation in relation to the UK PFI market).

Q5. Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?

33 We are not in a position to speak from a legal standpoint in terms of the Community legal framework; however our experience is that Member States are undertaking PPP procurement processes (which presumably are compliant with the current framework) which do allow for the effective participation of non-national companies. Barriers to entry for non-national companies are not normally as a result of the legal framework but rather a lack of local presence and experience. Changes in procurement law will not solve this challenge.

34 The UK PPP market is arguably the most open and competitive PPP market in the EU. There are a variety of reasons for this but a significant contributor to the openers of the PPP market is the level of PPP dealflow which has attracted non-UK bidders. We are aware of some 66 non-domestic bidders being involved in UK PPP projects completed to date.

35 Developing PPP markets are likely to attract non-national bidders who will work with local parties to mutual benefit, with the international elements providing PPP specific expertise (which domestic players, by definition, do not have) and domestic elements providing the inputs which it would be impractical, or uneconomic, for international elements to provide. However, non-national bidders are less likely to bid if they cannot find a suitable local partner.

36 We have seen a number of international bidders invest in domestic companies to improve their chance of bidding successfully in both developed and developing PPP markets.

37 While there is a predominance of domestic players in some markets we do not consider this to be specifically associated with PPPs and their procurement. This predominance is due to wider market/procurement factors and this position is mirrored in the make up of successful bidders for traditionally procured public sector contracts.

Q6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

and

Q7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

38 Although there is an obvious distinction in terms of EU legislation, in market terms there is less distinction between concessions and other forms of contractual PPP. Therefore we have answered these two questions together.

39 We would not be in favour of additional regulation in this area at an EU level. Market experience shows that, if well procured under a clear national framework, it is already possible for PPPs to be procured in an effective way which ensures competition and satisfies other EU general requirements.

40 There are existing problems in that there are anomalies in the current legislative framework which deals with contracts which are economically or commercially similar but which fall (or do not fall) under different parts of EU legislation. We believe that the approach to take is to require procurement authorities to observe the fundamental principles set out in the Treaty. This can be done in two different ways:

- require procuring authorities to undertake this within the framework of national laws; or

- impose specific laws at the EU level.

41 We favour the first option, given that:

- as there is difficulty in defining the subject matter (we do not believe that it is possible to define PPPs) it seems to be impractical to define a legislative framework for them;

- it is difficult to develop a comprehensive EU legislative framework when existing national frameworks vary greatly;

- there is considerable uncertainty in the market as to how current EU legislation should be interpreted and where it does, and does not, apply;

- there is concern in the market that additional legislation will not achieve the aim of providing a more consistent approach and hence be effective in reducing uncertainly, risk and costs but that more legislation and regulation will result in increased uncertainty and costs of compliance and the additional risks will result in higher transaction and finance costs.

42 In short that the actual costs of additional legislation is likely to outweigh the intended cost reductions from intended greater consistency.

43 A practical approach would be to adopt the first approach but to combine this with a concerted and comprehensive approach to provide more guidance as to what the

fundamental principles mean within the context of PPPs and how current legislation impacts on PPPs. In addition to doing this within a procurement setting (the subject matter of the Green Paper), the Commission should also provide guidance on other areas where the EU impacts on the PPP market (see discussion of this in our thought leadership paper).

2.2 *Specific questions relating to the selection of an economic operator in the framework of a private initiative PPP*

44 We do not understand why the EU has felt it necessary to give such prominence to the issue of private initiative PPPs in its consultation document.

45 Unsolicited bids or sole-source procurement (or private initiative PPPs), no matter what the legal and regulatory environment in which they are allowed, are not and can never be a substitute for public sector prioritisation of service needs and procurement through a transparently competitive process.

46 Our experience across Europe and in other international markets is that private initiative projects (PPPs or otherwise) are not value for money for the state or the taxpayer. Such initiatives are often viewed with suspicion by other market participants as transparency is impossible to ensure and consequently proper competition is seldom ensured.

Q8. In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?

47 A good procurement agency will seek to maximise the market interest and response to a project and therefore will seek to inform, and not discriminate against non-national operators. There may be an increased danger that such projects are not so widely advertised as publicly sponsored projects. This may have an adverse effect on non-national operators who will not have such good information sources outside their home markets.

48 However in practice the quality of the procurement and the degree of competition depends more on the competence of the procuring entity, and its advisers, and the absence of political or other influences than on the type of procurement or the way that the project is initiated.

49 A requirement to advertise in the OJEU is a prime safeguard. Most good procurement agencies will also advertise in other ways and in addition contact likely interested parties. We do not see why there should be any difference in these requirements for private initiative or public initiative schemes.

See also comments on 2.2 above.

Q9. In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?

See also comments on 2.2 above.

2.3 ***The phase following the selection of the private partner***

Q10. *In contractual PPPs, what is your experience of the phase which follows the selection of the private partner?*

50 In most PPP procurements a negotiated procedure is used. In some cases procurements may allow for a BAFO stage. By the time a preferred bidder is appointed there is normally a fully developed project scope, agreed prime contract arrangements and strong funder support. Nevertheless, the degree of certainty at the time of selection of the winning bidder, is dependent on the procuring authorities requirements which vary across countries, sectors and over time.

51 Where there is no BAFO stage, or variant bids may have been allowed, there may be a greater need for clarification and negotiation after the preferred bidder has been selected.

52 Practice will depend on whether there is simultaneous or sequential commercial and financial close, the degree to which funders have been involved prior to the appointment of a preferred bidder and the time scale between these two events.

53 In some cases a reserve bidder may be retained to help to maintain competitive pressure during any negotiations post preferred bidder, although consideration has to be given to reimbursing the costs incurred by such a reserve bidder during this period.

Q11. Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?

We are not aware of any.

54 However, we would note that PPPs are often very long term contracts and there must be mechanisms which allow for flexibility to adjust to changing circumstances over time. It is simply not practical to have to re-tender the entire PPP every time that there is a material change. Questions to consider are:

- up to which point should it be possible to amend the PPP contract by simple negotiated variation (for example up to a percentage of the original contract?) and how do you ensure that you get value for money at this point (by the use of benchmarking?). The Commission needs to consider what its views are on the use of re-basing clauses, or scheduled reviews designed to adjust the original contract at regular intervals;

- how to ensure that there are mechanisms that deal with larger changes (for example those due to unforeseen additional needs or major regulatory change) other than by creating a new PPP for the modified part when the change is an addition (often not a practical solution where the result will be that there are two different operators on the same facility), or re-tendering the entire scope (hardly an attractive proposition for the public sector which will have bear the re-tendering costs and delays and will be required to pay compensations to the original operator).

Q12. Are you aware of any practices or mechanisms for evaluating tenders which have a discriminatory effect?

55 We have interpreted this question to relate to the PPP subject matter rather than traditional procurement. In our experience PPP procurement is less liable to be discriminatory than traditional procurement although this is market perception rather than based on research. This may be due to the level of scrutiny of PPP procurement, including the number of specialist legal, technical, financial advisers and funders participating in the PPP process.

56 The quality of the evaluation of tenders and the degree to which they have a discriminatory effect depends on the quality and independence of the evaluation body. Our experience is that this varies from procurement to procurement and from country to country.

57 Therefore the quality of the procurement and the degree of competition depends more on the competence of the procuring entity, and its advisers, and the absence of political or other influences, than on the type of procurement (PPP or traditional).

Q13. Do you share the Commission’s view that certain “step-in” type arrangements may present a problem in terms of transparency and equality of treatment.? Do you know of other “standard clauses” which are likely to present similar problems?

58 We fail to see how step-in rights affect transparency and equality of treatment.

59 We do not share the Commission’s views regarding step-in arrangements. Step-in arrangements are the norm in developed PPP markets. All bidders will be aware

that such clauses will be incorporated into the final contract and therefore there are no issues of transparency or equality of treatment, as all are in the same position. If there are material failings or problems with the contract then these clauses can be invoked.

60 Step-in arrangements are seen by the financiers of these projects as a vital requirement. If there is no ability for the financiers to seek to remedy a failure of the project company (whether due to insolvency, non-performance or any other specified reason) then the risks which they face rise substantially. They will either seek a higher compensation for taking these risks or seek to mitigate these risks in other contract terms (such as requiring full compensation on termination). This will result in higher overall project costs for the public sector and are likely to diminish value for money.

61 The option of step-in is also generally seen to be a benefit by the public sector, who may not have the capability or the inclination to take over a project/service/asset using internal resources and, due to time pressure, would probably not be able to undertake an effective and competitive procurement to find a new private sector party to take over the contract in any case. Given the situation which is likely to exist at the time that a step-in clause is invoked, it is highly unlikely that there would be enough market interest (to step-into the contract at a time of difficulty) to ensure that there could be an effective and competitive competition even if any of the parties wanted it or it was required under procurement legislation.

62 The public sector will normally have the right to approve the step-in agent, so is protected from the contract being taken over by an unsatisfactory agent.

Q14. Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?

63 The contract for an individual PPP should be the outcome of the procuring entity achieving the aims and requirements of the public sector within the practical constraints imposed on it by competitive market forces. If the resulting contract is beneficial for the public sector then it should go ahead with the PPP, if not then it should seek to procure the service in an alternative manner, or not at all. Given the almost infinite variety of projects and the many different structures and contractual terms which are needed to deliver such projects, it is difficult to envisage how a contractual framework which fits all PPPs can be devised at Community level.

64 This view is reinforced by the practical experience of countries which have sought to develop and implement standard contract terms for specific types of PPP contracts (UK PFI contracts for example). Consistent enforcement has proved to be very difficult with considerable exceptions where non-standard contract terms have been used or where procurements have not used the standard form at all. It should be noted that the main driver for standardisation has been a desire to reduce

procurement costs (for both the private and public sector) and not an intention to standardise for procurement and compliance reasons.

Q15. In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.

and

Q16. In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

and

Q17. In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

65 Our experience is that most PPP contracts are concluded with a consortium, which already has all its substantial subcontractors in place. This is because if a bidder is to provide a firm price and specification for its bid then it needs to know what the individual costs of the elements of its bid are that it is going to subcontract. It therefore needs to have certainly as to these costs prior to bidding.

66 As a common method of bidding is to use a Special Purpose Vehicle ("SPV") as the bidding entity (which is not usually capable of directly delivering construction or operational services), it is not unusual for close to 100 per cent of the scope of the contract to be subcontracted.

67 Therefore any requirement that subcontracted services are to be competitively bid, after the bidding entity has been awarded the contract, will make the SPV approach to PPP contracting redundant. Such an approach would have a very substantial negative effect on both existing and developing PPP markets.

68 We have not encountered any specific problems in relation to subcontracting and do not see any justification for more detailed rules in this area or a supplementary initiative at Community level.

3 *Institutionalised PPPs and the community law on public contracts and concessions*

Q18. What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not ?

69 We have limited experience of such PPPs. We have been involved in a number of local authority joint venture companies and housing regeneration joint ventures.

There have also been some PPPs of an institutional nature in the UK (including National Air Traffic Services, Qinetiq and some Wider Markets Initiative projects) at central government level. There are also a number of new PPP initiatives including LIFT in the UK health sector and Partnerships For Schools in the education sector which have elements of institutional PPPs in their arrangements.

70 We are not aware that Community law on public contracts and concessions are not complied with in such cases. We would note that the bundling of projects, or the more complex, flexible partnering and alliancing deals could not take place if each contract had to be competed separately.

Q19. Do you think that an initiative needs to be taken at Community level to clarify or define the obligations of the contracting bodies regarding the conditions requiring a call for competition between operators potentially interested in an institutionalised project? If so, on what particular points and in what form ? If not, why not?

71 We would see no fundamental difference between the approach regarding a call for competition which should be taken for institutional PPPs as being different than that for contractual PPPs.

72 In both cases the requirement is for some clarification and guidance as to which existing EU legislation and rules affect PPPs rather than new initiatives or regulations (see answers to Questions 6 and 7 above).

In general and independently of the questions raised in this document:

Q20. In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?

73 There are many which vary from country to country and from time to time (as political landscapes change). We outline some of these in our *Developing PPPs in New Europe* paper; however, for PPPs to be undertaken, and for programmes of PPPs to develop in an efficient and effective way, a number of conditions need to be present:

- a demonstrable, strong, clear, long-term political will;

- a good understanding at a political, and policy level, of what PPPs are, where they are appropriate and how to use them;

- an understanding, at all relevant levels of government (national, regional and local) and at the EU, of how PPPs should be structured and procured;

- an appropriate level of public sector institutional capability and capacity to be able to develop and undertake complex projects and procurements;

- a suitable ‘enabling environment’ or ‘framework’ in the following areas:

  - legislative;

  - regulatory;

  - commercial; and

  - financial.

74 To the extent that these are not present the development of PPPs will be restricted.

75 PPPs will not happen on their own. It is up to the governments of the Member States to decide what use they wish to make of PPPs, to identify appropriate PPP projects and to ensure that they have the capabilities to procure them in an efficient and effective way. We believe that it is important that the EU provides support to Member States who wish to develop PPP programmes and does not provide obstacles to their development (in procurement or other areas). We provide further commentary on this in our thought leadership paper.

Q21. Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of “good practice” in this framework which could serve as a model for the Union? If so, please elaborate.

76 PPPs have been developed in a number of other countries outside the Union including Australia, Canada, Japan, Mexico and South Africa. Many other countries are currently in the process of investigating or developing PPPs.

77 In most cases the approaches taken are either not substantially different from those which have been used in the Union (in many cases they are based on the approaches and experience of PPP development in the UK and other European countries) or they are country specific and as such are unlikely to provide examples of best practice or act as a model for the Union.

78 An exception to this might be the Alliancing experience in Australia.

79 Importantly, the Union can draw on the wealth of publicly available guidance and research on PPPs in many markets in formulating its own guidance.

Q22. More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a *collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?*

80 If properly constructed this could be useful, but such a network should focus on practical issues and should involve those actors who have an in-depth, practical understanding and experience of PPPs and the relevant markets within the Union. It should combine representatives of both the public and private sides of the market and include advisers and multinationals which have in-depth practical experience of developing PPP projects. It should not be limited to discussing theoretical and policy issues.

81 We have outlined in our thought leadership paper some of the issues which we think need to be addressed. The following is a summary of our main recommendations.

Developing PPPs in New Europe – our recommendations

82 Given the actual, and potential, impact which the actions and regulations of the EU can have on the development of PPPs in the New Europe, serious consideration needs to be given as to how the EU should coordinate its activities in this area. Our recommendations are as follows:

Improving knowledge and understanding of PPPs at the EU level

83 The Commission should set up a cross-EU PPP Group whose role would be to coordinate EU activities which affect the PPP market and assess the impacts which EU actions, or inactions, have on the development of PPPs. This should be supported by a small Central Unit which would act as a knowledge unit and centre of excellence for PPPs within the EU.

Institutional capacity, information and training

84 The EU should address the poor level of information, public sector institutional capacity and knowledge about PPPs which exists within many Member States, and the EU itself. It should fund a number of initiatives, including comparative studies on the actual benefits which PPPs can deliver and the development and provision of practical training and encourage the secondment of civil servants (and advisers) to and between PPP units of Member States.

EU approach to PPP development

85 PPPs are hard to define and vary greatly in nature. It is therefore unlikely that developing a legislative approach to PPPs will be either practical or desirable. The approach taken by the EU should be one of interpreting and clarifying the way that

existing (and future) rules and regulations interact with PPP procurements and their development. Additional legislation should be resisted.

Co-financing using private finance and PPPs

86 Combining PPP approaches with grant funding provides a considerable challenge. The EU should assist Member States to address the issues involved in combining EU funding and grant requirements with private sector finance and PPP approaches. A taskforce should be set up to identify and address the issues involved and the EU should assist Member States to select and implement pilot projects. The experience gained in doing so should be disseminated and practical guidelines produced so that maximum benefits are gained from the lessons learned.

RWE Thames Water

GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS COM(2004) 327 final

Position RWE Thames Water

Introduction:

RWE Thames Water welcomes the Commission's Green Paper, which has raised some important issues that deserve to be debated at EU level.

RWE Thames Water is the world's third largest private water service provider and part of the energy and water group RWE. In its Europe region, RWE Thames Water operates water and waste water service for 28 million customers in 6 countries (on global level: over 70 million customers in 20 countries).
RWE Thames Water is in the unique position to be the owner and operator of the water and waste water services for the one of the biggest cities in the world - London. This background provides us with a thorough understanding of the importance of Public Private Partnerships for the water sector in Europe and in the world. The provision of safe and affordable water and waste water services to people is one of the key concerns of public authorities and private operators. Water has also been high on the political agenda of the European Union over the past years.

Water and sanitation are vital to human life and to the environment. One of the key elements about the water sector is its local character with production, distribution and treatment of the services planned and provided on municipal level. This led to a high degree of diversity in the organization and management of the water and wastewater sector according to local customs and needs. Subsidiarity is therefore crucial when aiming at establishing legal clarity as to how the public and the private sector can work together in Public-Private Partnerships. In doing so, the focus must be on ensuring that key obligations such as high-quality service, affordability, security and safety of supply are fulfilled.

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In our view, the Green Paper does not provide sufficient clarity about the Commission's understanding of PPPs and why and how it distinguishes between contractual and institutional PPPs. Contractual PPP's seem to include an extremely wide variety of partnerships such as:

- Operational management contracts with no capital investment ("O&M Contracts")
- Operational management contracts with ongoing maintenance investments ("Concession Contracts")
- Operational management contracts with large upfront investment followed by steady maintenance investments (PFI's or DBFO's)

In addition to the variable capital investment element above, other important factors include the size of the contract (in financial or geographical terms), the duration of the contract (1 year – 40 years) and the risk transfer expected within the contract.

In contrast, the institutionalized PPP appears to be one specific from of PPP where the public and private sector jointly invest in a company vehicle to deliver the "service contract on behalf of the public sector".

In RWE Thames Water's opinion, the key term of "concessions" is not clearly defined and can have different meanings in the member states according to local historical evolution of the sector and the ownership of assets.

We suggest that the Commission clarify its understanding of the concession model with regards to water services and provide more information on what role concessions play in PPPs. Central aspects of a differentiation between public procurement contracts and PPPs should be the distribution of risks and responsibilities between the private and the public partner; the ownership of assets and the complexity, length and scope of the partnership etc.

Considering that there is still a lack of level playing field and competition in the water sector in Europe, RWE Thames Water urges the European Commission to focus on the implementation, enforcement and evaluation of existing rules and regulations with regards to public services provision, in addition to any potential new proposals in the context of PPPs.

RWE Thames Water input on specific questions asked by the Commission

1. What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?

The organization of water services provision is very local and different concepts have evolved across Europe. Whereas in some member states public-private partnership in the water sector has a long-standing tradition it is inexistent in other member states.

In England and Wales, private companies and institutions own the assets and provide water and wastewater services. The operators have a legal obligation to provide these services to all citizens, which is enshrined in a 25-year license awarded and renewed by the relevant public authority. The UK situation is quite unique as the private operators fulfill a role typically given to the public authority. Service provision can be carried out by the owner operator itself or is outsourced to a third party to operate (as in the case of Dwr Cymru, previously known as Welsh Water). In both cases the asset ownership and operation is in private hands.

In Scotland and Northern Ireland, water supply and wastewater treatment are still effectively under direct Government control with asset ownership and management being carried out by government appointed authorities (Scottish Water and Northern Ireland Water Services respectively).

Subsequently there are two different forms of PPPs in the UK:

- In Scotland and Northern Ireland, a concession is typically understood as a long-term contract (20-30 years) between a public authority and a private undertaker. The authority awards the right not only to operate the water supply or wastewater treatment service on its behalf to the private undertaker (OPEX) but also the obligation to carry out required capital expenditure (CAPEX) over the length of the contract. The ultimate obligation for ensuring sufficient and high-quality water supply and wastewater treatment standards, however, still lies with the authority and is not transferred to the undertaker. The undertaker does not necessarily have a direct relationship with the customer but is generally rewarded by the authority. No concessions involving direct cash collection from the end consumer have yet been let in Scotland or Northern Ireland.

- Another type of PPP is the outsourcing of service provision and capital investment in the form of “Private Financing Initiatives” PFIs (DBFO’s), which previously have been awarded in Scotland and two are currently planned in Northern Ireland. They are typically set up to bridge a financial gap in public infrastructure investments with private resources. In these cases the private partner invests in the design and building of the assets and operates them over a 25-40 year term. It recovers the costs in the form of a service payment from the water undertaker appointed by the Government, rather than from the end consumer. The risks are shared between the public sector/private partner and financial institutions.

2. In the Commission’s view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?

This form of dialogue has occurred on a number of projects both in the UK and Holland as part of the procurement process following advertising in the Official Journal of the EU and pre-qualification. In this instance, all pre-qualified candidates are invited to consult on a range of issues from technical solution, contractual conditions and funding proposals. The Competitive Dialogue would be a sensible approach providing that the Municipality or awarding body do not adopt suggestions (technical and commercial) which by their nature favour one party over another thus discouraging effective competition.

3. In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.

No.

4. Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?

RWE Thames Water has participated or tried to participate in procedures for the award of a concession within the European Union. The transposition process of EU regulation into national law can lead to differences in the award procedures across the member states. This is partly due to the historically diverse development of the sector but also due to a lack of enforcement of existing EU regulations.
In our experience the national rules and regulations are generally clear to the interested parties bidding for a concession contract.

5. Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?

RWE Thames Water considers that the current Community legal framework is sufficient to ensure effective participation of European operators in the UK in tender procedures of services contracts and concessions. Competition for industrial clients exists and is enforced. For domestic clients, the UK regulator creates a competitive environment through so-called ‘comparative competition’ and effective benchmarking of the operators.

6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

Before considering any legislative initiatives, RWE Thames Water encourages the European Commission to clarify the term ‘concessions’. As it stands, some concession contracts could be discussed in the context of public procurement whereas others fit better in the context of PPP.
The water sector in Europe is diverse and locally organized. Based on the principle of subsidiarity, the relevant public authority should maintain its right to choose how it organizes water supply and waste water treatment (either by itself or through a third party). By choosing a concession model with a third party a municipality chooses to enter into a long-term and complex partnership with the concessionaire to supply water and/or waste water treatment. This requires flexibility for embedding the social and environmental obligations, the technical needs and financial and managerial possibilities of the task into the concession arrangement.

The principles of transparency, fairness, equality of treatment, non-discrimination etc. are laid down in the Treaty of the European Union. The Directives on public procurement (2004/17/EC and 2004/18/EC) were adopted in 2004 and are now being transposed into national law and implemented. Additional legislation for concessions would not add value at the current stage.

7. More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?

See answer to question 6.

8. In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?

We do not see the need to treat privately initiated PPPs separately from publicly initiated PPPs. Due to the specific character of the water sector, the initiative to set up PPPs generally derives from the public authority.

9. In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?

See answer to question 8.

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

This depends on the conditions of the specific contract agreed and on the local requirements.

11. Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or freedom of establishment? If so, can you describe the type of problems encountered?

N/A

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

N/A

13. Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other "standard clauses" which are likely to present similar problems?

N/A

14. Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?

The Green Paper does not provide sufficient clarity about the Commission's understanding of PPPs and why and how it distinguishes between contractual and institutional PPPs. The Commission should also clarify its understanding of the concession model with regards to water services and which role it plays in PPPs.
Central aspects should be the distribution of risks and responsibilities between the private and the public partner; the ownership of assets; and the complexity, time and scope of the partnership.

On the basis of this clarification and existing EU rules and regulations, RWE Thames Water does not consider further legislation on PPP to be needed.

15. In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.

In his role as an entrepreneur and long-term partner, the private operator is interested to fulfill its contractual obligations with the public authorities in the most efficient way. The rules and regulations for sub-contracting and the obligations to be met by the operator are laid down in the contract thus setting the necessary framework.

RWE Thames Water believes, in order to ensure a maximum of flexibility and cost-efficiency in response to contractual and local requirements, that the operator of a water and waste water service is free to choose on the modalities of sub-contracting specific tasks to other companies.

16. In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?

See answer to question 15.

17. In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?

See answer to question 15.

18. What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not ?

A recent and novel example of an institutionalized PPP has occurred in Scotland. Scottish Water, the government appointed authority, sought partners from the private sector to join with it to deliver its 4 year capital investment programme.

The partners were selected from a fully assessed EU compliant tender process based upon technical capability, price and partnering approach. Having selected two consortia, these were then invited with Scottish Water to set up a jointly owned company to deliver their 4-year investment programme.

Clearly, this process is in contrast to occasions where jointly owned companies are created first and operating concessions are awarded later.

RWE Thames Water is of the opinion that it should be in the discretion of the public authority to decide through which route it chooses to select a private partner for a long-term institutionalized PPP. RWE Thames Water is not in favour of further EU regulation with regards to private investments in companies. Investment decisions are made on the basis of strategic or commercial considerations. Investors (private and public) do need the assurance that European Union respects the principle of free movement of capital.

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

The Scottish Water example quoted in question 17 is one potential way in which competition could be utilized to select potential operators for institutionalized projects.

The Green Paper further suggests that there are some cases of institutionalized PPP where the public-private undertaking awards services contracts to its private partner without a tendering procedure.

RWE Thames Water maintains its position that a public entity should be free to choose whether to tender concession contracts or not. We believe, however, that the Commission should provide more clarity on the rules and procedures applicable to this type of situations, in order to ensure a level playing field and maximum transparency.

We believe there needs to be clarity in what influence the new jointly owned company and in particular the private shareholder as part of that jointly owned company should have in the assessment process for selection of the new concessionaire, i.e. the risk of undue influence needs to be eradicated.

20. In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?

One obstacle for Public-Private Partnerships in the European water sector are public monopolies; i.e. in Germany, where the public sector has an exclusive right to provide waste water treatment.

21. Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of “good practice” in this framework which could serve as a model for the Union? If so, please elaborate.

N/A.

22. More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

The European Commission has communicated its interest to enable evaluation and benchmarking in its White Paper for Service of General interest. This would be particularly valuable for the water sector.
Regular benchmarking would include environmental, social and economic aspects of the sector and unveil best practices.
The question of a network of appropriate actors should be raised in this context.

Library > Public consultations/Public Procurement/Public Pri...artnership/Other orga...ndividuals

Abstract:

Contents: 8 Subsection(s) - 0 document(s)

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	☑	Lithuania	1				
	☑	Poland	2				
	☑	Portugal	1				
	☑	United Kingdom	3				

Language: finnish

Kommentti vihreän kirjan: Julkisen ja yksityisen sektorin yhteishankintasopimuksista sekä julkisia hankintoja ja käytöoikeussopimuksia koskevasta yhteisöjen oikeudesta:

Kysymys 9:

Kumppanuusrakenne valtaa alaa myös paikallishallinnon toimialoilla, kuten kultuuri-, liikunta- ja nuorisotoimessa. Toiminnassa ja palveluhankinnassa immateriaalisen innovaatioiden merkitys on yhä keskeisempi. Nykyinen hankintalainsäädäntö ei motivoi uusien ratkaisujen kehittämiseen ja niiden tarjoamiseen, kun toteutus joudutaan kilpailuttamaan tasapuolisesti huomioimatta innovaation kehittäjää. Innovaation luoja ei siten saa toiminnastaan mitään lisäarvoa. Uuden toiminnan tai aloitteen tekijällä tulisi olla systemaattinen oikeus neuvottelumenettelyn kaltaiseen prosessiin innovaation tarjoamisen yhteydessä.

Hankintalainsäädäntöön tulisi luoda selkeä menettelytapa, jossa voidaan huomioida myös muut immateriaalioikeudelliset arvot kuin patentit tai selkeä tekijänoikeudenalaisuus. Kulttuuri-, liikunta- ja nuorisotoimen palveujen kilpailuttamisen osalta keskeisessä osassa on sosiaalisiin-, kouluttaviin- ja toiminnallisiinprosesseihin liittyvä innovointi, jota ei voi todentaa tekijänoikeuksien mukaan.

Kumppanuusjärjestelmien ja tuottajien taitojen kasvaessa näiden hankintojen arvo voi kasvaa merkittäväksi. Vastuuta kulttuurisidonnaisista ja vaikeasti kilpailutettavista sosiaalisperusteisista hankinnoista tulisi siirtää enemmän päätöksentekijöille ja lisätä joustavuutta, joka motivoi innovaatioiden kehittämiseen ja tarjoamiseen.

Erno Säisänen
Kulttuurihallinnon asiantuntija
Tmi Erno Säisänen
Kumppanuusjärjestelmät kehittämisvaihtoehtona -hanke
Joensuun seudun JYTY -kunnat/aluekeskusohjelma

The Commission received the following **standard letter** from around 3.000 individuals, in vast majority originating from Germany:

-----Original Message-----

Sent: Saturday, September 18, 2004 1:37 PM
To: MARKT D1 PPP
Subject: <no subject>

< xxx > schrieb am 12.09.04 00:32:33:

An die
Europäische Kommission
Konsultation „Grünbuch zu
öffentlich-privaten Partnerschaften"
C 100 2/005

B-1049 Bruxelles

Grünbuch zu öffentlich-privaten Partnerschaften und den gemeinschaftlichen Rechtsvorschriften
für öffentliche Aufträge und Konzessionen (Grünbuch PPP) vom 30.04.2004
und Weißbuch zu Dienstleistungen von allgemeinem Interesse
Hier: Stellungnahme und Anregungen

Juli 2004

Sehr geehrte Damen und Herren,

zu dem vorliegenden Grünbuch der EU-Kommission zu öffentlich-privaten Partnerschaften vom 30.04.2004 (Grünbuch PPP) und zum vorliegenden Weißbuch „Dienstleistungen von allgemeinem Interesse" nehme ich gerne Stellung und gebe dazu folgende Anregungen aus der Sicht eines Bürgers:

1. Das Europäische Parlament hat ausdrücklich bekräftigt, dass Wasser keine übliche Handelsware ist. Deshalb besteht keinerlei Grund, wirtschaftliche Rahmenbedingungen für die Daseinsvorsorge auf dem Wassersektor auf europäischer Ebene zu schaffen und Wasser als Wirtschaftsgut zu deklarieren.

2. Das vorhandene Ausschreibungsrecht ist völlig ausreichend. Neue Vorgaben im Ausschreibungsrecht würden nur die marktbeherrschende Stellung großer Konzerne beschleunigen und die Existenz öffentlicher Unternehmen, die noch immer unter demokratischer Kontrolle stehen, außerordentlich gefährden.

3. Der bestehende Ordnungsrahmen, d.h. die bestehenden Gesetze und Verordnungen sind völlig ausreichend. Sie ermöglichen einen sinnvollen Querverbund, z.B. innerhalb der verschiedenen Sparten von Stadtwerken und sind Grundlage für sichere, nachhaltige und preisgünstige Leistungen auf dem Wassersektor.

4. Durch eine Privatisierung und Liberalisierung der Wasserversorgung sehe ich, wie viele andere Bürger auch, keine Vorteile für Bürger bzw. Verbraucher.
Einen Eingriff in funktionierende Strukturen, wie sie jetzt mit der Einführung von Ausschreibungspflichten angedacht sind, halte ich für nachteilig und überflüssig.

5. Die Liberalisierung des Energiesektors in Europa kann keinesfalls als gelungenes Beispiel für einen besseren Wettbewerb angeführt werden. Vier Stromkonzerne teilen sich zum Beispiel in Deutschland den Markt (Oligopol!), die Strompreise gehen rasant nach oben, die Investitionen werden zurückgefahren auf Kosten höherer Gewinnmargen.

6. Bislang ist durch kein Beispiel ernsthaft nachgewiesen, dass durch Privatisierung von Dienstleistungen der Daseinsvorsorge mehr Effizienz erzielt worden wäre.
Die Privatisierungsbeispiele, die hier oft als gelungen bezeichnet worden sind, sind in Wahrheit und erwiesenermaßen misslungen. Zum Beispiel die Wasserversorgung in England und Wales oder der Energiesektor in den USA.
Eine österreichische Studie zum internationalen Vergleich der Wasserwirtschaft vom 15.10.2003 kommt zum Ergebniss, dass privatwirtschaftlich geführte Unternehmen ebenso wie Großbetriebe nicht a priori effizienter sind als öffentliche Unternehmen.

7. Das Recht auf kommunale Selbstverwaltung garantiert in Deutschland, dass die Kommunen frei entscheiden dürfen, ob sie die Leistungen der öffentlichen Daseinsvorsorge durch eigene Unternehmen oder durch Dritte erledigen lassen. Diese Regelung hat sich bewährt. Sie ist ein wichtiger Bestandteil im Rahmen des in der EU geltenden Subsidiaritätsprinzips und darf nicht durch eine Regelung zu verpflichtenden Ausschreibungen ersetzt werden.

8. Die Beteiligung eines privaten Kapitalgebers oder eine Vollprivatisierung hat also nicht zwangsläufig eine positive Auswirkung auf die Qualität der Dienstleistungen.
Den Städten und Gemeinden bzw. den öffentlichen Unternehmen muss es daher meines Erachtens auch ohne Ausschreibungspflichten völlig frei bleiben, die horizontale Kooperation mit anderen öffentlichen Unternehmen oder durch Bildung von Zweckverbänden oder Anstalten des öffentlichen Rechts frei zu wählen.
Hier dürfen die Zuständigkeiten nicht von der lokalen bzw. nationalen Ebene auf die europäische Ebene verlagert werden. Hier ist vor allen Dingen die in Deutschland verfassungsrechtlich garantierte kommunale Selbstverwaltung zu respektieren.

Gerne darf ich mich bedanken für die Gelegenheit zur Stellungnahme. Ich bin Ihnen sehr dankbar, wenn Sie meine Anregungen und Bedenken in die Gesamtbewertung einbringen.
Ich bin mir sicher, dass weit über zwei Drittel der Bevölkerung die Wasserversorgung (und auch Abwasserentsorgung) nicht privatisieren lassen wollen.

Mit freundlichen Grüßen

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The Commission also received around 300 short notes protesting against any attempt to privatise the water sector (not published for technical reasons). The Commission received similar notes from the municipalities of Aichhalden and Steinach im Kinzigtal, the Gesellschaft des Bürgerlichen Rechts Schwarzwaldwasser, the Stadtwerke Bühl Gmbh and the city of Fürth.

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30 July 2004

Re: Green Paper on Public/Private Partnerships

The EC Directives and the interpretations given by the European Court make up a body of law which is aimed, among other things, at strengthening the single market and creating an open transparent competitive environment in which procurement by public bodies takes place. The objectives pursued involve certain constraints on public bodies compared to commercial concerns which prevent them enjoying the flexibility and responsiveness possessed by the latter. Public bodies cannot operate in the same way as commercial entities to take advantage of value for money options or to correct mistakes and errors made in fixing the requirements for a particular project or purchase. Public bodies must set out their requirements in detail and may not alter substantive requirements during a procurement process. In addition the legal framework creates considerable administrative costs for a public body and also creates an environment in which litigation can flourish and where fear of litigation may be a significant factor operating on the practices of the public body. Value for money principles can often become secondary to the need to get the process right and to avoid the possibility of expensive and lengthy litigation which can delay or prejudice a project. From a policy perspective at EC level there is a need to ensure a uniform system of rules but this may involve a cost in terms of flexibility, the balance between the two is a matter which should be kept under review. If commercial practices are worth replicating for the public sector sufficient flexibility should be built in to allow State bodies to operate in a more commercial fashion subject to basic requirements such as non discrimination and transparency. I would suggest that it is important in any structure for PPP's that the regime is not unduly restrictive especially for large complex projects which may have a very long life and require adjustment over time due to unforeseen circumstances and changing environmental conditions. Substance rather than form needs to be emphasised in any regulatory regime so that procedural rules are not too detailed and do not operate as obstacles, as for example where minor non-material breaches could create serous threats to major projects.

The Green Paper points out that under the current Directives a public authority must use the open or restrictive procedure and can only opt for the negotiated procedure, or indeed the new competitive dialogue process, in certain exceptional circumstances and the provisions allowing the exceptions must be interpreted strictly. The point is also made that a difficulty in establishing prior pricing arising from the complexity of the legal and financial package is not sufficient to justify invoking the negotiated procedure. A similar constraint presumably applies to the competitive dialogue procedure, if the parameters of the legal and financial package required can be specified in advance by the contracting authority it should invite offers under the usual procedures from the market and can not assume that it can invoke the competitive dialogue for any PPP. There may also be uncertainty about the scope of the competitive dialogue and it may be difficult to distinguish clearly where it should be used rather than invoke the negotiated procedure and what are the distinctions between the two types of procurement process.   What is a "particularly complex contract" is not defined and there are no objective criteria specified.   The competitive dialogue process is unclear and contracting authorities will differ considerably in size and sophistication; no common standard for what is a particularly complex project is laid down resulting in uncertainty whether the process can be used in a particular case. Clearly the competitive dialogue cannot apply to all PPP's and over time fewer PPPs may be capable of invoking the procedure if the requirements of contracting bodies become more standardised

The degree of flexibility for projects may also create problems. For example how feasible is it to allow participants to change the makeup of a particular consortium between the discussion stage and the final bid stage?   Can contracting authorities allow parties to swap partners or to amalgamate or to bring in new partners in the process? Difficulties arise because of the need to protect solutions suggested by particular parties but it would not necessarily be possible for the contracting authority in dealing with the consortium to know that an idea belonged to one of the partners which might wish to change to a different group or to even to make a separate bid on its own. The problems in providing protection for an idea or concept could be extremely difficult and the problem arises if the best idea overall concept can not win the competition and can not be utilised by the contracting authority.

Further problems arise for a contracting authority in assessing a PPP and selecting parts of the package on offer or comparing the bid to a traditional design and build procurement. In other words a full comparison for value for money purposes across a spectrum of possibilities may create considerable legal difficulties. The prospect of going through a full PPP assessment and then having to scrap the process and return to the market for traditional procurement would impose considerable costs on both the contracting authority and commercial concerns as well as causing delay to the project with a consequent price escalation and possible prejudice to the provision of infrastructure services. In relation to the Commission's second question the competitive dialogue procedure in theory offers an attractive option but it may be important to allow flexibility so that there can be a price testing exercise with a more traditional contractual arrangement and the option to revert to a more standard contractual solution in a competitive dialogue competition. Economic operators should not be required to engage in multiple tendering exercises for the one project. Provided a sufficient number of parties engage in the competitive dialogue procedure and provided it is transparent and safeguards the interests of those participating, it should be allowed maximum scope to develop a market solution which offers genuine economic advantages and value for money to the contracting authority including deciding not to adopt the complex legal and financial provisions which originally justified the competitive dialogue itself but perhaps revealed that the transfer of risk was not an economic option for the contracting authority.

The terms of the competitive dialogue are so open that there is a risk that litigation will arise and "legislation" by way of judgments from Court of Justice is undesirable. The legislative framework should contain sufficient to guidelines for all parties in the use of PPPs and limit uncertainty not in terms of detailed rules but by way of defining the principles to be applied. Emphasis should be on the principles involved not technical rules. The framework should be regularly reviewed and up-dated.

In relation to the third question put by the Commission dealing with problems other than the selection of the tendering procedure I would suggest that there are issues arising in terms of the protection of the strategies suggested by particular parties in the competitive dialogue process and the extent of those rights is unclear as is the extent to which compensation might be given to a party for the use of a solution by other parties. In addition public private partnerships can have a considerable life time and there are downstream considerations which will apply. While a contract may provide for a number of possibilities into the future it is not possible to provide for every eventuality. Contractual adjustments may be needed to accommodate technical innovation or market conditions and the changing the needs of a society may require alterations to the arrangements entered into.

In relation to the comment on avoiding excessive duration for PPP contracts in the Green Paper I would suggest that some of these projects must inevitably have a very long life. The Procurement Directives did not favour long term contracts but by their nature some PPP's must have a lifespan of twenty or thirty years. In some instances this is why a legislative framework is needed to control the exploitation of the concession. Step in arrangements are essential given the life span of certain projects and their importance and cost. Private partners subject to commercial pressures may experience severe financial difficulties or could even cease to operate. In this context it may necessary to re-negotiate the contractual arrangements in a variety of circumstances, even on a short term basis to allow time for the possibility of a new competitive procedure for a new concessionaire. Infrastructure cannot be allowed to stand unused for a period and continuity for services is essential. A State will always exist but a commercial partner can not provide that level of certainty into the future. A commercial entity may decide that a particular contract is no longer viable and wish to change the terms of a contract, terminate its involvement or even to refuse to fulfil its contractual obligations. Suing to enforce observance may not be a viable option for the contracting authority and while step in rights may allow it to operate the service itself this is not always practical or desirable. It may be essential to re-negotiate or to seek to transfer the operation of the particular scheme to a new operator. It is not possible in advance to provide for every eventuality. The contracting authority itself may also wish to terminate the arrangement where it is no longer required or where alternative provision is desirable. This may require a compensation package to be provided which is not covered by the initial contract and this could create legal difficulties but some flexibility in terminating or restructuring the PPPs may be necessary on policy grounds or even to enhance or improve services and limitations on such adjustment should not be unduly restrictive. In the same way the existing provisions in the directives to allow extensions to contracts are very restrictive and do not permit the expansion of a particular PPPs which may have become necessary or highly desirable but was unforeseen. The same model for extensions should not be applicable to PPPs

In relation to question 13 I do not believe that contractual step in provisions present a problem for transparency or equality but there are potential problems in invoking such rights and these options to provide for necessary changes to a project are desirable and should not be unduly restrictive.

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Christopher Tobin

LIBRO VERDE SUL PPP

CONTRIBUTO DELL'ISTITUO GRANDI INFRASTRUTTURE

OSSERVAZIONI PRELIMINARI

La complessità del "fenomeno del partenariato pubblico-privato" impone un preliminare sforzo chiarificatorio dei concetti-base su cui si fondano le argomentazioni del Libro Verde ed i relativi quesiti.

Innanzitutto, si osserva che, come affermato nelle prime righe di apertura del Libro Verde, il termine PPP non è definito a livello comunitario, per cui, con tale sigla, si fa riferimento in generale a "forme di cooperazione tra le autorità pubbliche ed il mondo delle imprese" (punto 1.1.1). Tuttavia, al punto seguente (punto 1.1.2), si elencano gli "elementi caratterizzanti normalmente le operazioni di PPP", riassunti in 4 aspetti base: (1) la lunga durata, 2) il finanziamento garantito dal privato, 3) il ruolo importante del privato in tutte le varie fasi dell'intervento – dalla progettazione alla gestione –, 4) "la ripartizione dei rischi, con trasferimento di rischi al privato, normalmente a carico della parte pubblica".

Ora, non si può non rilevare che gli elementi sopra richiamati risultano essere propri della concessione di lavori come definita dalle Direttive (sia in vigore – 93/37/CE – che di nuova approvazione – 2004/18/CE) e come esplicitati nella Comunicazione interpretativa del 2000, ove, ai punti 2.1.1 e 2.1.2, ne sono delineati gli elementi di differenziazione rispetto all'appalto, individuati, in sintesi, nell'elemento del "rischio di gestione", legato "all'investimento effettuato o ai capitali investiti, in particolare se l'autorità concedente paga un prezzo". Pertanto, il "rischio economico", cioè l'alea legata all'aspetto finanziario, è elemento proprio e distintivo delle concessioni. Di conseguenza, il Libro Verde, che dichiara di fondare la propria analisi del PPP non su categorie giuridiche de iure condendo, bensì "alla luce del diritto comunitario degli appalti pubblici e delle concessioni" – punto 1.2.8, 1^a e 2^a riga –, dovrebbe giungere coerentemente alla conclusione che il PPP contrattuale va inquadrato nel vasto fenomeno concessorio.

Ma, le premesse sopra ricordate sono presto smentite dal riferimento agli appalti particolarmente complessi da affidarsi con la nuova procedura, introdotta dalla Direttiva 2004/18/CE, del dialogo competitivo, ritenuta "particolarmente adatta all'aggiudicazione dei contratti qualificati come appalti pubblici in occasione dell'attuazione di un PPP di tipo puramente contrattuale" (punti 2.1.1 – 24-25-26-27 e quesito 2).

Da qui un certo disorientamento, essendo l'appalto così come definito e disciplinato nel diritto comunitario, fenomeno sostanzialmente diverso rispetto agli elementi indicati come propri del PPP nel Libro Verde e, come evidenziato, riconducibili invece alla concessione, sia nella forma classica di concessione a remunerazione dell'utente sia di concessione a favore esclusivamente dell'Ente, con remunerazione a carico di quest'ultimo.

Ma anche ipotizzando per un momento di superare tale contradditoria impostazione del Libro Verde, ammettendo che nel fenomeno PPP contrattuale siano ricompresi anche gli appalti complessi, non si comprende quale ulteriore disciplina si possa immaginare per il PPP contrattuale in forme di appalto, dal momento che la Direttiva Unificata ha introdotto la procedura specifica del dialogo competitivo proprio per gli appalti particolarmente complessi.

In via conclusiva, a parere dell'IGI occorre preliminarmente un chiarimento di fondo circa la definizione stessa del PPP contrattuale come indicata nelle premesse citate, che appare corretta se riferita al solo fenomeno concessorio.

A questo riguardo, si ribadisce che contratti di lunga durata che assommano ai compiti progettuali, esecutivi, di manutenzione e di gestione, anche il fondamentale elemento del rischio dei ricavi, non sono altro, ai sensi del vigente diritto comunitario, che concessioni e come tali da sottoporre ai soli obblighi di pubblicità e termini, ribaditi da ultimo dalla Direttiva 2004/18/CE.

RISPOSTE AI QUESITI

1. Quali tipi di operazioni di PPP puramente contrattuali conoscete? Tali operazioni sono oggetto di una regolamentazione specifica (legislativa o di altro tipo) nel vostro Paese?

1. In Italia, il fenomeno di PPP puramente contrattuali è molto diffuso. L'esperienza più importante è certamente quella autostradale, ma, negli ultimi anni, soprattutto sotto la spinta delle innovazioni introdotte dalla legge n. 109 dell'11 febbraio 1994, come successivamente modificata, il PPP si è andato molto sviluppando, grazie al fatto che i privati possono non solo suggerire all'amministrazione concedente le opere di PPP da inserire in programma, ma anche rendersi promotori di iniziative per le quali presentano il progetto preliminare e il piano economico-finanziario. In questo modo, si solleva l'amministrazione da una serie di adempimenti senza perciò compromettere la concorrenzialità dell'operazione, dal momento che il concedente, dopo aver riconosciuto il pubblico interesse dell'iniziativa, deve scegliere con gara le imprese che, nella successiva fase negoziata, concorreranno con il promotore per l'affidamento della concessione.
2. Si tratta, tuttavia, di una procedura non certo snella perché i momenti concorsuali rischiano di moltiplicarsi se già nel momento programmatorio le proposte da inserire in programma riguardanti la stessa opera fossero più di una, anche se con caratteristiche diverse, oppure se si dovessero candidare due o più promotori sulla stessa opera. La proposta dell'IGI è nel senso di mantenere fermo il meccanismo delineato negli articoli 37 bis e seguenti, soltanto, però, per il caso che l'iniziativa della promozione sia unica, se cioè non vi è una pluralità di promotori.
3. Meno diffuso è, invece, il PFI. Soltanto recentemente, con la modifica introdotta nella citata legge 109 dalla legge n. 166 del 2002 è stata legislativamente sancita la possibilità di una concessione bilaterale, senza cioè la presenza dell'utente (art. 19, 2-ter). Questa forma di concessione non è facilmente distinguibile dall'appalto

misto di costruzione e di gestione. Nel Libro Verde, par. 23, si ipotizza che i pagamenti del partner pubblico possano essere fissi.

4. Come si è già accennato, la legge n. 109 disciplina la concessione ad iniziativa del promotore negli articoli 37-bis e seguenti. Per quanto riguarda la concessione ad iniziativa dell'amministrazione, la procedura di aggiudicazione è modellata sullo schema della licitazione privata. Contrariamente alla Direttiva comunitaria, nel nostro ordinamento la scelta del concessionario è dunque procedimentalizzata, e ciò, diversamente dall'art. 3 della Direttiva 93/37, per il quale l'unico obbligo è quello della pubblicità. Gli articoli della 109 ai quali fare riferimento sono soprattutto il 19 e il 21.
5. Quanto ai settori ex esclusi, oggi speciali, la situazione italiana è analoga a quella europea, nel senso cioè che non è disciplinato il modo in cui viene scelto il concessionario. Nella Comunicazione interpretativa del 2000 (par. 3.3), è prospettata una soluzione che presenta molteplici aspetti problematici.
6. Innanzitutto, non è sempre agevole stabilire quando un ente possa considerarsi "operante specificamente in uno dei quattro settori".
7. In secondo luogo, non si capisce quale sia l'aggancio normativo in base al quale si afferma essere applicabile la Direttiva 93/37 nel caso di ente non operante specificamente nei quattro settori.
8. Infine, andrebbe chiarito un aspetto di non secondaria importanza, quello cioè degli appalti che il concessionario dei settori esclusi affida "a valle". Dai paragrafi 3.2.1.1 e 3.3 della richiamata Comunicazione interpretativa, sembra emergere che il concessionario dei settori esclusi sia tenuto soltanto a rispettare la pubblicità quando appalta la quota-lavori che è tenuto ad affidare a terzi. In sostanza, nei settori ex esclusi si verificherebbe la medesima situazione che si incontra nei settori classici.
9. Se la soluzione è in questi termini, appare necessario un chiarimento della Commissione, anche perché questa conclusione sembra contrastare con quanto

stabilisce l'art. 2, comma 1 lett. b) della Direttiva 93/38 laddove considera enti aggiudicatori a tutti gli effetti i concessionari di diritti speciali o esclusivi.

10. L'occasione sarà anche propizia per dirimere in termini chiari il contrasto che sembra esservi tra la Commissione e la Corte di Giustizia, a proposito dei servizi pubblici di interesse generale, per i quali la Corte non sembra imporre particolari procedure al di fuori del rispetto della non discriminazione in base alla nazionalità, mentre la Commissione è orientata a sostenere l'obbligo della gara per la scelta del concessionario.

2. Secondo la Commissione, il recepimento nel diritto nazionale della procedura del dialogo competitivo permetterà alle parti interessate di disporre di una procedura particolarmente adeguata all'aggiudicazione dei contratti qualificati come appalti pubblici in occasione dell'attuazione di un PPP di tipo puramente contrattuale, pur preservando i diritti fondamentali degli operatori economici. Condividete questo punto di vista? Se no, perché?

Il quesito rimanda all'interrogativo di fondo evidenziato nelle premesse a queste OSSERVAZIONI ed all'affermazione per cui il PPP contrattuale non può che identificarsi nella concessione, nelle sue diverse forme: ciò che si può comunque rilevare è che la procedura del dialogo competitivo appare, per l'ordinamento italiano caratterizzato da forte livello di procedimentalizzazione anche nell'affidamento delle concessioni, non inidonea in sé a disciplinare le concessioni di iniziativa pubblica, almeno di quelle particolarmente complesse.

Tuttavia, sul piano giuridico, non si capisce come il dialogo competitivo possa applicarsi alle concessioni, visto che la Direttiva 2004/18/CE lo prevede soltanto per gli appalti. Si può semmai immaginare di poterlo applicare per gli appalti affidati dal concessionario, ma occorre che la Commissione chiarisca questo aspetto, come i punti precedenti che ne sono il presupposto.

3. Per quanto riguarda questi contratti, esistono secondo voi altri punti, oltre a quelli relativi alla scelta della procedura di aggiudicazione, che potrebbero causare problemi riguardo al diritto comunitario degli appalti pubblici? Se sì, quali e per quali ragioni?

Come nella domanda 2, non è possibile rispondere se non viene chiarito che cosa significhi l'espressione "aggiudicazione dei contratti qualificati come appalti pubblici in occasione dell'attuazione di un PPP di tipo puramente contrattuale".

4. Avete già organizzato, partecipato, o avuto l'intenzione di organizzare o partecipare ad una procedura di attribuzione di una concessione nell'Unione? Che esperienza ne avete ricavato?

Come già evidenziato precedentemente, il ricorso alla concessione è assai frequente in Italia e non presenta aspetti di particolare difficoltà, salvo un eccesso di proceduralizzazione che sarà evidenziato più avanti, soprattutto per la concessione ad iniziativa privata.

5. Ritenete che l'attuale quadro giuridico comunitario sia sufficientemente preciso per garantire la partecipazione concreta ed effettiva di società o gruppi non nazionali alle procedure di aggiudicazione di concessioni? Secondo voi, in questo contesto è attualmente garantita una concorrenza reale?

La legislazione italiana in materia di concessioni è particolarmente dettagliata, le procedure articolate e tali da garantire sicuramente un elevato livello di trasparenza. Purtroppo, ciò comporta che le procedure non sono rapidissime: questo dipende appunto, dal fatto, che l'affidamento della concessione è completamente procedimentalizzato allorché l'iniziativa è presa dalla pubblica amministrazione.

Se poi si tratta della concessione ad iniziativa del promotore, i passaggi procedurali sono almeno tre, con eventualità di altri sub-procedimenti concorsuali. Infatti, gli artt. da 37 bis a 37 nonies della legge 109/90 come modificata dalla 166/2002, prevedono una dettagliata disciplina, che può essere sintetizzata per sommi capi, come segue:

1) obbligo dell'Amministrazione di pubblicare un programma triennale con indicazione degli interventi passibili di iniziativa da parte privata o di entità pubbliche;

2) ricevimento delle proposte, di norma, entro il 30 giugno, con tutti gli elaborati richiesti: verifica di completezza entro 15 giorni ed in caso di accettazione, messa in gara entro i 4 mesi successivi;

3) espletamento della gara in 2 fasi: A) procedura ristretta basata sulla proposta del promotore, eventualmente modificata dall'Amministrazione, per la scelta delle imprese che concorreranno con il promotore nella fase successiva; B) aggiudicazione della concessione a procedura negoziata tra il promotore e le due migliori offerte della fase A);

4) diritto del promotore di adeguare la propria offerta a quella meglio classificata, risultando di conseguenza aggiudicatario.

6. Pensate che un'iniziativa legislativa comunitaria mirante a regolamentare la procedura di aggiudicazione di concessioni sia auspicabile?

La concessione è fenomeno specifico che vede, tra l'altro, l'apporto di capitali di rischio da parte del concessionario privato: sarebbe quindi assolutamente negativo e controproducente regolamentare la procedura della concessione, sul modello dell'appalto. Non a caso in Italia, dove la disciplina della concessione era perfettamente equiparata a quella dell'appalto, la finanza di progetto è rimasta bloccata fino a quando non è stato introdotto l'istituto del promotore, che, quale concessionario ad iniziativa privata, consente, pur con notevoli pesantezza procedurali, di by-passare l'inerzia dell'Amministrazione pubblica.

Tuttavia, un'iniziativa legislativa, almeno relativa alla concessione di lavori pubblici, sarebbe auspicabile, per chiarire taluni aspetti rilevanti. Infatti, la

Comunicazione interpretativa del 2000 ha creato non pochi problemi laddove afferma che il concessionario-amministrazione aggiudicatrice debba essere scelto previa pubblicità. L'allineamento di questa concessione a quella a favore dei privati pone, a proposito degli appalti "a valle", l'interrogativo se il concessionario-amministrazione aggiudicatrice, prescelto attraverso un confronto concorrenziale, implicito nell'obbligo di pubblicità, debba avvalersi di imprese terze soltanto per la quota che è tenuto ad affidare all'esterno o per tutto il 100% dei lavori.

Un altro punto oscuro della Comunicazione interpretativa riguarda la scelta del concessionario nei settori speciali.

In linea generale, va ricordato che il concessionario ha necessità di poter contare su procedure certe per essere sicuro dei tempi preventivati. Sarebbe opportuno stabilire un meccanismo di indennizzo per tutte le amministrazioni coinvolte nell'operazione, anche a titolo di pareri, di nullaosta. Così come sarebbe utile ed incentivante, se fossero previsti indennizzi automatici e immediati nel caso di ripensamenti da parte del concedente. In sostanza, si pensa ad un sistema di controgaranzie reciproche.

7. In maniera più generale, se ritenete che sia necessario che la Commissione proponga una nuova azione legislativa, esistono a vostro parere ragioni oggettive per regolamentare tramite un tale atto tutti i PPP di tipo contrattuale, siano essi qualificabili come appalti pubblici o come concessioni, per sottoporle a identici regimi di aggiudicazione?

Con riferimento ai PPP di tipo contrattuale, si ribadisce quanto più sopra evidenziato: se si tratta, come affermato nel quesito, di appalti pubblici, le procedure sono previste in dettaglio e sono state recentemente ridefinite anche con riferimento specifico agli appalti complessi. Se, invece, si tratta di concessioni, vale quanto affermato al punto precedente. Il fatto che si tratti di PPP contrattuali – cioè secondo il Libro Verde appalti e concessioni – non è ragione di per sé sufficiente per creare una specifica regolamentazione, che per di più vedrebbe la sottoposizione di appalti e concessioni ad "identici regimi d'aggiudicazione".

8. In base alla vostra esperienza, l'accesso degli operatori non nazionali alle formule di PPP di iniziativa privata è garantito? In particolare, nei casi in cui le amministrazioni aggiudicatrici invitano a presentare un'iniziativa, tale invito è generalmente oggetto di pubblicità adeguata ad assicurare l'informazione di tutti gli operatori interessati? Viene organizzata una procedura di selezione realmente concorrenziale per garantire l'attuazione del progetto stesso?

Non vi è dubbio che l'accesso degli operatori non nazionali è sostanzialmente garantita dalla pubblicità, che è assicurata in Italia da un sistema normativo articolato a livello centrale e periferico e che è fin troppo pesante e dettagliato.

9. Quale sarebbe secondo voi la migliore formula per assicurare lo sviluppo di PPP di iniziativa privata nell'Unione europea pur garantendo il rispetto dei principi di trasparenza, di non discriminazione e di parità di trattamento?

Il migliore sistema è quello di lasciare l'iniziativa ai privati. Come già accennato, il balzo in avanti della finanza di progetto in Italia ha coinciso con il promotore. La ragione di ciò è che le pubbliche amministrazioni sono, anche culturalmente, legate all'appalto ed hanno, in generale, poca dimestichezza con un'operazione complessa come il PPP.

10. Che esperienza avete riguardo alla fase successiva alla selezione del partner privato nelle operazioni di PPP contrattuali?

Se la domanda si riferisce alla fase successiva alla selezione ed anteriore al contratto, l'esperienza indica un'attività rallentata a causa della presenza di molte amministrazioni che debbono rilasciare permessi, autorizzazioni, nullaosta ecc.

11. Siete a conoscenza di casi nei quali le condizioni di esecuzione – comprese le clausole d'aggiornamento – hanno potuto avere un'incidenza discriminatoria o hanno potuto costituire un ostacolo ingiustificato alla libera prestazione di servizi o alla libertà di stabilimento? Se sì, potete descrivere l tipo di problemi incontrati?

Non siamo a conoscenza di condizioni d'esecuzione con effetto discriminatorio. In tutti i contratti, ed ancor più che in quelli di lunga durata, le clausole di aggiornamento sono fondamentali, altrimenti queste iniziative risultano disincentivate. Ovviamente, è necessario che si tratti di clausole chiare e che non siano rimesse alla discrezione del concedente, ma basate su criteri oggettivi e predefiniti, tenendo a riferimento il principio generale dell'equilibrio economico-finanziario del contratto.

12. Siete al corrente di pratiche o di meccanismi di valutazione di offerte con conseguenze discriminatorie?

No, non siamo a conoscenza di pratiche o di meccanismi di valutazione delle offerte aventi effetti discriminatori, tanto più che nel nostro ordinamento i meccanismi di valutazione delle offerte sono normati ed è quindi difficile che si producano discriminazioni. Ciò non esclude, tuttavia che nella pratica vi possano essere delle anomalie.

13. Condividete la constatazione della Commissione secondo la quale alcune operazioni del tipo "step-in" possono porre problemi in termini di trasparenza e di parità di trattamento? Conoscete altre "clausole tipo" la cui attuazione potrebbe causare problemi simili?

Le clausole di adeguamento/aggiornamento sia dei prezzi che delle altre condizioni contrattuali, tanto in forma automatica che consensuale, sono, come già rilevato, fondamentali nei contratti di lunga durata, per i quali i concorrenti non possono scontare in sede di offerta eventi che dipendono da circostanze risalenti agli assetti economici generali.

14. Ritenete che sia necessario chiarire a livello comunitario alcuni aspetti attinenti al quadro contrattuale dei PPP? Se sì, su quale(i) aspetto(i) dovrebbe incentrarsi tale chiarificazione?

Più che agli aspetti contrattuali, sarebbero necessario chiarimenti sulle Direttive ed in particolare specificare: 1) se la scelta del concessionario-amministrazione aggiudicatrice esige la previa pubblicità con un bando; 2) se è concepibile, in questo caso, un confronto concorrenziale tra soggetti diversi, sia per quanto riguarda i requisiti sia per ciò che concerne la capacità di finanziamento; 3) se il concessionario-amministrazione aggiudicatrice possa eseguire in proprio la quota dei lavori che non è tenuto ad affidare a terzi; 4) se in tale ultimo caso, il concessionario-amministrazione aggiudicatrice possa avvalersi di imprese collegate; 5) se l’amministrazione possa affidare a società interamente da essa posseduta la funzione di concedente; 6) se l’amministrazione possa affidare a società interamente da essa posseduta la funzione di concessionaria; 7) se le azioni di questa società sono liberamente negoziabili oppure c’è bisogno di una gara per poterle vendere ai privati; 8) se il socio privato possa eseguire con la propria organizzazione i lavori che non devono essere affidati a terzi; 9) se l’impresa collegata di un concessionario privato, incaricata di eseguire la quota non riservata a terzi, possa a sua volta subappaltare i lavori; 10) se i concessionari dei settori esclusi sono scelti secondo la procedura di cui alla Direttiva lavori, vuol dire che essi non sono tenuti ad appaltare a terzi tutti i lavori ricompresi nella concessione, ma possono eseguire direttamente una quota del totale; 11) se la Direttiva sulle transazioni commerciali si applichi ai Lavori Pubblici.

15. Nel contesto delle operazioni di PPP, siete al corrente di problemi particolari incontrati in materia di subappalto? Quali?

Non risultano problemi particolari in materia di contratti derivati, riferentesi cioè agli affidamenti a terzi da parte del concessionario privato, che è fenomeno di natura prettamente contrattuale e come tale deve restare a carattere privatistico.

16. Il fenomeno dei PPP di tipo contrattuale, che implica il trasferimento di un insieme di compiti ad un unico partner privato, giustifica secondo voi l'introduzione, riguardo al fenomeno dei subappalti, di norme più dettagliate e dal campo d'applicazione più vasto?

L'introduzione di ulteriori norme disciplinanti i contratti derivati è da considerare negativamente, in quanto imporrebbe vincoli non necessari, che rischiano di disincentivare il concessionario chiamato spesso ad un investimento importante e che, per ciò stesso, deve essere gravato solo di vincoli assolutamente indispensabili.

17. In maniera più generale, ritenete che si dovrebbe prendere un'iniziativa complementare a livello comunitario al fine di chiarire, o sistemare, le norme relative ai subappalti?

No, nell'ambito delle concessioni occorre preservare ai rapporti derivati il livello propriamente contrattuale e la natura di rapporti privatistici, salvo gli obblighi di pubblicità imposti dalle norme vigenti.

18. Quale esperienza avete del lancio di operazioni PPP di tipo istituzionalizzato? In particolare, la vostra esperienza vi porta a pensare che il diritto comunitario degli appalti pubblici e delle concessioni sia rispettato nel caso di operazioni PPP istituzionalizzate? Se no, perché?

In Italia sono frequenti le "operazioni di PPP di tipo istituzionalizzato" ed il diritto nazionale ha creato una disciplina abbastanza organica della materia che fa ritenere, in generale, che il nostro paese sia tra quelli in ambito UE che rispettano ampiamente in questi interventi i principi del diritto comunitario in tema di appalti pubblici e di concessioni.

19. Ritenete che debba essere presa un'iniziativa a livello comunitario per chiarire o precisare gli obblighi degli organismi aggiudicatori riguardo alle condizioni che devono regolamentare la concorrenza tra operatori potenzialmente interessati da un progetto di tipo istituzionalizzato? Se sì, su quali punti particolari e sotto quale forma? Se no, perché?

Mentre il nostro ordinamento già prevede l'obbligo di scelta con procedura concorsuale del socio privato nonché di messa in gara dell'attribuzione di appalti allo stesso, non vi sono disposizioni specifiche nel diritto comunitario sulla materia e pure la Comunicazione interpretativa del 2000, nella sua versione finale, ha stralciato ogni riferimento alle società miste. E' quindi evidente che tale vuoto normativo non agevola la corretta costituzione di PPP istituzionalizzati, anche perché il puro richiamo ai Trattati si palesa, nella pratica, troppo debole. Da qui, la necessità di un intervento sia interpretativo – a breve termine – che legislativo – a medio termine –, per sopperire ad una carenza di disciplina comunitaria che agevola l'affermarsi di situazioni distorsive della corretta concorrenza. Così, ad esempio, andrebbe specificato in quali condizioni sia ammessa la costituzione di società pubbliche o miste per costituire un intervento coerente con la concorrenza: il presupposto dovrebbe essere la carenza di presenza e di capacità di imprese private in quel settore o in quell'area territoriale specifica.

Inoltre, alle società pubbliche o miste titolari di concessioni attribuite senza gara, ovvero con scelta del partner privato senza gara pubblica, dovrebbe essere impedito di ampliare l'oggetto statutario della propria attività a nuovi campi ovvero partecipare a gare in concorrenza con imprese private sia all'interno sia al di fuori del proprio ambito territoriale di origine.

Più in generale, dovrebbero essere disciplinati tutti quei molteplici aspetti che violano la parità di trattamento e ne rendono discriminatoria, per effetto dei vantaggi di cui godono società pubbliche o miste, la presenza nel mercato a scapito delle imprese private o che si traducono in distorsioni del mercato stesso, con conseguenti ostacoli evidenti all’apertura del Mercato Unico.

In maniera generale, ed indipendentemente dai problemi sollevati in questo documento:
20. Quali sono le misure o le pratiche che ritenete di ostacolo alla creazione di PPP nell’Unione europea?
21. Conoscete altre forme di PPP sviluppate nei paesi al di fuori dell’Unione? Conoscete esempi di ‘buone pratiche’ sviluppate in questo contesto, cui l’Unione potrebbe ispirarsi? Se sì, quali?
22. In termini più generali, e tenuto conto dei considerevoli investimenti necessari in alcuni Stati membri, al fine di realizzare uno sviluppo economico-sociale durevole, pensate che sia utile una riflessione collettiva su tali questioni che prosegua ad intervalli regolari tra gli attori interessati e che permetta uno scambio di ‘buone pratiche’? Ritenete che la Commissione dovrebbe dare impulso ad una tale rete?

Quanto al quesito 20, si rimanda alle note del precedente punto 19.

Quanto al quesito 21, si ritiene che la legislazione italiana sul promotore e sulle società miste rappresenti un esempio, cui la disciplina comunitaria potrebbe ispirarsi per il PPP contrattuale di iniziativa privata e di quello istituzionalizzato.

Infine, quanto al quesito 22, si ritiene certamente utile una riflessione collettiva sul PPP che contribuisca a chiarire i molteplici interrogativi sollevati dall’IGI e consenta, su impulso della Commissione, uno scambio di “buone pratiche”.

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Commenti e Risposte Al Libro Verde Della Commissione UE Sui PPP e Sul Diritto Comunitario Degli Appalti e Delle Concessioni

L' l'Istituto Studi Sviluppo Aziende Non Profit (ISSAN) è un'Associazione non riconosciuta, di studi e di ricerca sulle organizzazioni *non profit* e di formazione per gli operatori di queste organizzazioni, con sede presso l'Università di Trento.

É composto da circa 40 soci pubblici e privati, tra cui varie Università (*Innsbruck, Bologna, Cergas-Bocconi Milano, Udine*), organizzazioni di categoria (*Federsolidarietà, Con.Solida, Consorzio Nazionale della Cooperazione Sociale "Gino Mattarelli", Federazione Trentina delle Cooperative, FIBA CISL)* e enti pubblici locali (*Comune di Trento e di Rovereto, Provincia di Trento e Regione Trentino Alto Adige*). Dal 1994 svolge numerose ricerche, pubblica diversi volumi e working papers ed organizza convegni e seminari a carattere nazionale ed internazionale approfondendo aspetti rilevanti relativamente al settore *nonprofit*, (per es. tra le ricerche condotte dall'Istituto vi è l'analisi di modelli per la formazione continua per le imprese sociali, monitoraggio diffusione ed incremento dell'imprenditoria sociale; L'inserimento lavorativo dei soggetti con problematiche psichiatriche: buone pratiche dei servizi offerti dall'impresa sociale).

In quest'ambito negli ultimi due anni, l'Istituto si è impegnato nella realizzazione di una ricerca sulla esternalizzazione dei servizi alla persona e sui rapporti pubblico-privato nella gestione ed erogazione di tali servizi.

Con questo documento ISSAN si propone di rispondere ai quesiti posti nel Libro Verde sulle operazioni Partenariato Pubblico-Privato (di seguito Libro Verde) con cui la Commissione ha avviato una consultazione in merito all'applicazione del diritto comunitario degli appalti e delle concessioni al fenomeno dei PPP. I quesiti posti nel libro verde saranno trattati nell'ottica delle problematiche relative ai servizi sociali ed in particolare ai servizi alla persona, quindi, di quelle attività che ai sensi libro Bianco sui servizi d'interesse generale sono "*basati sul principio di solidarietà, si concentrano sulla persona e garantiscono che i cittadini possano beneficiare in maniera concreta dei propri diritti fondamentali e contare su un livello elevato di protezione sociale*"[1].

[1] Libro Bianco sui servizi d'interesse generale, Bruxelles, 12.5.2004, COM (2004) 374, def., p.to 4.4.

Domanda 1

Quali tipi di operazioni di PPP puramente contrattuali conoscete? Tali operazioni sono oggetto di una regolamentazione specifica (legislativa o di altro tipo) nel vostro paese?

Come è stato specificato in apertura del documento, tutte le riflessioni di seguito proposte saranno riferite ai servizi alla persona, caratterizzati da una forte differenziazione dei bisogni, la cui domanda negli ultimi anni ha visto una crescita rilevante, creando notevoli tensioni nell'offerta degli stessi e un aumento dei costi rispetto alle risorse disponibili. Tutto ciò ha determinato l'esigenza da parte degli enti locali di ricorrere a procedure di esternalizzazione di tali servizi mediante il coinvolgimento del settore privato, ed in particolare del settore *non profit*.

Con riferimento a quest'ultimo aspetto, nell'ordinamento italiano è stata approvata nel 2000 la legge quadro n. 328[2], con l'obiettivo esplicito di creare un sistema integrato di interventi e di servizi sociali.

Uno degli aspetti caratterizzanti la legge è la previsione di un **attivo** coinvolgimento delle organizzazioni del Terzo settore[3], non solo nell'erogazione dei servizi, ma anche nella progettazione e realizzazione concreta degli interventi e dei servizi, in forza della legittimazione loro conferita dalla capacità di cogliere i bisogni sociali e le problematiche che emergono in un determinato territorio e darvi risposte adeguate.

Le modalità di rapporto pubblico-privato previste dalla legge in questo settore, sono l'istituto dell'autorizzazione e dell'accreditamento, che nel nostro ordinamento erano già previste per i servizi sanitari.

Nel *sistema di accreditamento*, il partner privato partecipa alle varie fasi della progettazione e realizzazione (talvolta anche del finanziamento, sia pur in minima parte) mentre l'ente pubblico si concentra principalmente sulla definizione degli obiettivi, della qualità dei servizi offerti e della politica dei prezzi, facendosi garante del monitoraggio/controllo dei soggetti erogatori del servizio.

Per effetto di questo sistema **la fase della selezione del soggetto privato** si concreta nell'accertamento, in capo allo stesso, del possesso di determinati requisiti, quali ad es. le capacità logistiche (ambienti, strutture e attrezzature), le competenze professionali, le interrelazioni (maturate con il sistema istituzionale e sociale locale), che lo "accreditano" presso l'ente pubblico come soggetto idoneo a garantire adeguati standard di servizio.

Nella fase successiva il soggetto accreditato dialoga con l'ente pubblico predisponendo un progetto/proposta di intervento ([4]) e giunge alla stipula di un contratto per lo svolgimento del servizio sulla base degli elementi concordati.

Tale procedura costituisce ormai una prassi consolidata ([5]) e, in alcuni casi, è stata anche formalizzata dal legislatore nazionale ([6]), ad esempio:

- nel settore della formazione (vedi esempio della provincia BZ)([7])

[2] Legge 8 novembre 2000, n. 328, "LEGGE QUADRO PER LA REALIZZAZIONE DEL SISTEMA INTEGRATO DI INTERVENTI E SERVIZI SOCIALI", pubblicata su G.U. n. 265 del 13 novembre 2000 – S.O. n. 186.

[3] Con questo termine ai sensi della legge italiana si intende fare riferimento alle seguenti tipologie organizzative: organismi non lucrativi di utilità sociale, organizzazioni di volontariato, associazioni ed enti di promozione sociale, organismi della cooperazione, cooperative sociali, fondazioni, enti di patronato.

[4] Spesso, tuttavia, l'elemento progettuale non è presente ed anzi, talvolta, non è neppure richiesto e/o previsto.

[5] A questo riguardo non va disconosciuto il ruolo rivestito dalla Comunità europea che proprio nella gestione dei finanziamenti del Fondo Sociale Europeo ha imposto il modello dell'accreditamento. Il risultato di queste spinte comunitarie è stato quello di obbligare i soggetti erogatori ad essere accreditati dal giugno 2003.

[6] Ad esempio secondo il modello di accreditamento previsto dal legislatore italiano per i soggetti che intendono realizzare attività formative, settore disciplinato con Decreto Ministeriale 166/2001.

➢ nel settore dei servizi socio assistenziali (vedi esempio della Regione Veneto ([8]) e Lombardia ([9])

Quali vantaggi comporta questo modello di PPP?

L'analisi di alcune esperienze in corso a livello nazionale permette di rilevare che **il modello dell'*accreditamento* realizza un forte PPP,** che risponde alla necessità di assicurare vuoi maggiori finanziamenti, vuoi soprattutto *know-how*, metodi ed esperienze di cui il privato è portatore.

Attraverso la definizione dei criteri per l'*accreditamento*, inoltre, l'ente pubblico dispone di uno strumento estremamente flessibile in grado di adattarsi alle esigenze del territorio ([10]). Non va

[7] A partire dal 1999, il Servizio del Fondo Sociale Europeo della Provincia autonoma di Bolzano ha cominciato ad elaborare un modello di accreditamento dei fornitori di servizi formativi. É interessante rilevare che il modello sviluppato, da un lato, si pone in linea con le direttive impartite a livello nazionale (DM 166/2001) e, dall'altro lato, risponde appieno alle specificità del mercato d'offerta altoatesino e riesce dunque a soddisfare le esigenze del territorio e della realtà locale.In tal senso, fra i criteri previsti dalla Giunta regionale per l'accreditamento si segnala: la disponibilità di una sede stabile dislocata sul territorio provinciale, nonché la possibilità riconosciuta anche agli enti di formazione ed in particolare alle università che non hanno una sede stabile in provincia, di presentare progetti in partnership con altri purché chi presenta il progetto sia accreditato e garantisca la qualità dell'intervento formativo.

[8] Ci si riferisce, in particolare, alla legge della Regione Veneto del 16 agosto 2002, n. 22 recante la disciplina sull'*Autorizzazione e accreditamento delle strutture sanitarie, socio-sanitarie e sociali*, laddove l'autorizzazione rappresenta la soglia rigorosa di garanzia al di sotto della quale non è consentito esercitare attività socio-sanitarie e, l'accreditamento, costituisce invece "*un livello superiore di impegno richiesto affinché il cittadino possa considerare il soggetto erogatore, oltre che di buon livello qualitativo, anche allineato con le scelte della programmazione regionale*".

Invero, il sistema dell'accreditamento e dell'autorizzazione, come prefigurato dal legislatore, non è stato, ad oggi, ancora attuato. Più in generale va osservato che gli orientamenti della legge riflettono una profonda evoluzione della politica e degli strumenti operativi previsti a livello regionale e, più in generale, a livello nazionale per la gestione di determinati servizi.

Alla base di quest'evoluzione possiamo trovare:

- la progressiva attuazione del federalismo regionale, ad opera della legge cost. 18 ottobre 2001;
- la revisione del sistema di programmazione, secondo il modello previsto ad es. dalla legge 8 novembre 2000, n. 328 recante "*Legge quadro per la realizzazione del sistema integrato di interventi e servizi sociali*";
- l'equiparazione dei soggetti pubblici e privati nell'erogazione dei servizi (nel caso dei servizi sanitari e socio-sanitari prevista a livello nazionale dal d.lgs. 229/99), per cui appare definitivamente abbandonata la prospettiva dell'intervento del privato soltanto con funzione sussidiaria rispetto al pubblico.

Il sistema dell'accreditamento richiede, comunque, un'attenta valutazione dei requisiti in capo alle strutture erogatrici, a salvaguardia dell'interesse dei cittadini utenti e della qualità dei servizi.

[9] Ci si riferisce in particolare alla l.r. 11 luglio 1997 n.31 recante le *Norme per il riordino del servizio sanitario regionale e la sua integrazione con le attività dei servizi sociali* laddove è stabilito (art. 4) che l'erogazione delle prestazioni specialistiche avviene attraverso rapporti fondati sull'accreditamento, in modo da definire un livello di sicurezza e tutela del cittadino.

Come per la Regione Veneto si può ritenere che gli standard di accreditamento costituiscano un secondo livello di impegno, richiesto alle strutture sanitarie, affinché il cittadino possa considerare il soggetto erogatore coerente con le scelte ed i vincoli regionali, mentre il primo livello è rappresentato dall'autorizzazione all'esercizio rilasciata dalla Regione o dalla ASL

La stessa l.r. 31/97, che ha previsto il processo dell'accreditamento delle strutture socio sanitarie, pubbliche e private, ha sancito anche l'introduzione nelle stesse di sistemi di verifica e controllo della qualità delle prestazioni e dell'efficienza delle risorse finanziarie. In particolare si è stabilito che le aziende sanitarie devono assicurare lo svolgimento di tutte le attività necessarie per la produzione, l'erogazione ed il controllo di prestazioni e di servizi secondo le norme ISO 9000.

[10] Con riferimento al modello nazionale per l'accreditamento delle sedi formative si rileva che il modello appare costruito e pensato per favorire un innalzamento dei livelli della qualità dei servizi formativi ed orientativi e per consentire la creazione di sistemi regionali con una base comune di confronto e dialogo.

dimenticato, infatti, che nell'organizzare la gestione dei servizi l'ente pubblico non può prescindere dallo *scenario di riferimento* e, in particolare, dal contesto territoriale rappresentato di volta in volta dalla conformazione del territorio, dal numero di abitanti, dal modello di sviluppo locale ecc.([11]).

Infine, va evidenziato che il modello dell'accreditamento se integrato dalla previsione dell'elemento progettuale, laddove il finanziamento pubblico è rilasciato al soggetto accreditato previa presentazione di un programma/progetto conforme alle linee guida predefinite, risulta doppiamente vantaggioso: sia perchè favorisce la crescita di una cultura della progettazione, sia perché facilita l'ente pubblico nella programmazione a lungo termine degli obiettivi da perseguire.

I progetti presentati, infatti, dovranno porsi in linea con gli obiettivi e le priorità di carattere generale previsti dall'ente pubblico.

Quali svantaggi comporta questo modello di PPP?

Il sistema dell'accreditamento pur non ponendosi in contrasto con i principi generali del Trattato CE, *in primis* gli articoli 43 e 49, rischia di creare situazioni provvisorie di oligopolio.

Ciò si verifica, ad esempio, quando per l'accreditamento è previsto un bacino di utenza minimo da parte del soggetto accreditando; ne discende allora che non vi potranno essere più di un certo numero di soggetti accreditati. Tale circostanza non sembra contrastare con la disciplina comunitaria della concorrenza, posto che *a priori* non si pongono limitazioni all'accreditamento di soggetti provenienti dagli altri Stati membri.

Sotto il profilo funzionale va osservato che in alcuni settori questa situazione (oligopolio) si presenta addirittura vantaggiosa se non necessaria per una migliore erogazione dell'attività.

Valga per tutti il caso dei servizi di assistenza a persone con problemi mentali e/o portatrici di handicap: i progetti assistenziali si basano, infatti, su "terapie" di 3-5 anni (almeno), per cui risulterebbe devastante interrompere un progetto in corso di terapia per riattivarne un altro con altri prestatori, laddove è evidente che ogni prestatore utilizza proprie metodologie e technicalities.

Analoghe argomentazioni possono essere riproposte anche per i settori degli asili nido e in molti altri comparti.

Va altresì osservato che l'affermarsi di situazioni di provvisorio oligopolio richiedono un'attenta gestione sul piano economico, al fine di evitare che i soggetti erogatori si allineino in una fase di acquiescenza dello *status quo*.

É corretto ritenere, infatti, che anche l'esercizio di attività per la soddisfazione di bisogni di interesse generale con una forte connotazione sociale e culturale non sia necessariamente svincolato dall'applicazione di metodi gestionali finalizzati alla logica, se non del profitto, quanto meno della miglior performance economica. Lo impongono, oggi più, che mai esigenze di contenimento della spesa pubblica.

Da un punto di vista operativo ciò si traduce nella necessità da parte dell'ente pubblico di predisporre un corretto sistema di monitoraggio e controllo (*ex ante*, *in itinere*, *ex post*) sull'attività.

Proprio per soddisfare queste due esigenze, il modello, da una parte giunge a definire un set di requisiti discriminanti per poter realizzare una selezione qualitativa dei soggetti che richiedono l'accreditamento e, dall'altro, individua un set minimo di indici di valori e condizioni minime, rispetto alle quali le autorità pubbliche competenti (Regioni e Province) possono operare integrazioni ed ampliamenti.

[11] Tale orientamento si pone in linea con le osservazioni proposte nel Libro Verde dei *Servizi di interesse generale* dal COMITATO ECONOMICO E SOCIALE, laddove si esplicita che "*gli Stati membri devono essere autorizzati e incoraggiati ad adottare speciali provvedimenti di deroga, anche di tipo fiscale, volti a creare condizioni giuridiche o economiche di discriminazione positiva che consentano di mantenere in vita tali servizi nelle zone difficilmente accessibili*".

Passando ora alle procedure diverse dall'accreditamento, nel 2001, in attuazione della legge 328/2000, è stato emanato un atto[12] di indirizzo e di coordinamento sui sistemi di affidamento dei servizi alla persona che prevede, tra le modalità di rapporto pubblico-privato, (enti locali e terzo settore), il ricorso alle procedure ristrette e negoziate **dell'appalto concorso** e **della trattativa privata.**

Entrambi gli strumenti rientrano nella tipologia delle operazioni PPP di tipo contrattuale, ed in particolare:

- l'appalto concorso (è previsto in generale dall'art. 91 del R.D. n. 827/1924; in maniera più completa, relativamente al settore dei lavori pubblici, dall'art. 21 della L. 11 febbraio 1994, n. 109, come modificata dall'art. 7 del D.L. n. 101/1995 convertito in Legge n. 216/1995): prevede che l'aggiudicazione avvenga sulla base del criterio *dell'offerta economicamente più vantaggiosa* e ciò è possibile facendo riferimento ad **indicatori organizzativi** (es. contenimento del turn-over, qualificazione organizzativa del lavoro); ed **indicatori di processo** (es. conoscenza dei problemi sociali del territorio e delle risorse sociali della comunità). In questa procedura i potenziali affidatari compilano, almeno in parte il progetto di servizio, indicando le condizioni ed i prezzi a cui sono disposti ad eseguire la prestazione. Infatti nel bando di gara vengono indicati solo gli elementi essenziali della prestazione, spetta ai concorrenti progettarla in modo da raggiungere il miglior risultato utilizzando le risorse disponibili.
- la trattativa privata, ovvero procedura negoziata, si ha quando le amministrazioni consultano le imprese di loro scelta e negoziano i termini del contratto con una o più di esse. Essa è attuata in genere tramite **convenzione** intesa, in questo ambito, come contratto tra ente locale (comune) ed enti non *profit.* Con tale strumento il soggetto pubblico riconosce all'affidatario del servizio, i requisiti necessari per perseguire gli obiettivi d'interesse pubblico; stabilisce di mettere a disposizione proprie risorse finanziarie o strumentali al fine del raggiungimento di tali obiettivi; sancisce il proprio diritto a controllare e verificare l'operato del soggetto privato nell'ambito e nei termini della convenzione stessa.

Si possono citare anche altri esempi di operazioni di PPP puramente contrattuali.

Ci si riferisce, in primo luogo, ai casi di *sperimentazione gestionale* previsti nel settore socio – sanitario (d all'art. 4 l. 30 dicembre 1991 n. 421 e dell'art. 9bis del d.lgs. 30 dicembre 1992 n. 502). Più precisamente le norme in questione stabiliscono la possibilità di adottare *programmi di sperimentazione*, autorizzati dalle Regioni e dalle Province autonome di Trento e Bolzano "*aventi ad oggetto nuovi modelli gestionali che prevedono forme di collaborazione tra strutture del Servizio Sanitario nazionale e soggetti privati*".

Tali programmi, secondo la previsione normativa, devono essere motivati da **ragioni di convenienza economica,** di **miglioramento della qualità dell'assistenza e di coerenza con le previsioni della programmazione territoriale**; devono inoltre **privilegiare, nell'area del settore privato, il coinvolgimento con le organizzazioni non lucrative di utilità sociale.**

Ci si riferisce, in secondo luogo, al settore della programmazione e del coordinamento dello spettacolo dal vivo nella provincia di Trento.

Lo strumento adottato è quello di un *Protocollo di intesa* fra Amministrazione e i principali interlocutori sul territorio (associazioni e società cooperative) nel quale sono fissati alcuni importanti presupposti per la definizione di quello che vuol essere "*uno stretto e continuativo rapporto di confronto e di partenariato*". Gli obiettivi del PPP mirano a:

- elevare la qualità artistica della proposta culturale per qualificare i consumi culturali;

[12] DECRETO DEL PRESIDENTE DEL CONSIGLIO DEI MINISTRI, 30-03-2001, Atto di indirizzo e coordinamento sui sistemi di affidamento dei servizi alla persona ai sensi dell'art. 5 della l. 328/2000 (GU n. 188 del 14.08.2001).

- attuare l'attività di programmazione, coordinamento delle attività al fine di rendere coerente la proposta culturale nel suo complesso;
- sviluppare le collaborazioni con i vari soggetti sia per quanto riguarda la produzione, sia per quanto riguarda le attività collaterali;
- favorire i processi di innovazione sia sotto il profilo dell'ideazione delle iniziative sia sotto l'aspetto degli assetti organizzativi;
- elaborare un'attività di valutazione dei progetti e delle iniziative al fine di definire indicatori coerenti con l'attività di valutazione stessa in rapporto con le esigenze del pubblico e la ricaduta economico sociale sul territorio;
- incrementare la stabilità e la solidità dei soggetti, sotto il profilo organizzativo, finanziario e patrimoniale, ecc…

Infine va rilevato che attraverso l'istituzione di PPP 'intelligenti' la Pubblica Amministrazione può orientare l'operato dei privati a perseguire obiettivi ad. es. di sviluppo economico e sociale.
In tal senso si riportano alcuni esempi che riguardano protocolli di intesa stipulato tra la Provincia autonoma di Trento (sia direttamente mediante articolazioni interne – es. Servizi e Dipartimenti – e i propri enti funzionali/Agenzie – es. Agenzia Provinciale per l'Ambiente, Comprensori, ecc… -) e la Federazione Trentina delle Cooperative, aventi ad oggetto :
- per la promozione nelle scuole dei principi, dei valori e delle caratteristiche dell'agire sociale ed economico della cooperazione trentina ([13]);
- per la partecipazione istituzionale e la collaborazione nel campo dell'educazione sanitaria alimentare;
- per favorire lo sviluppo di iniziative comuni in materia di risparmio energetico e di incentivazione all'utilizzo di fonti alternative di energia;
- per la promozione e diffusione di sistemi di gestione ambientale, l'utilizzo e la produzione di merci e servizi ecocompatibili, l'applicazione di una Agenda 21 Locale e la sperimentazione nell'ambito di valle di buone pratiche di ecogestione.

In conclusione, l'importanza dei PPP nell'ambito dei processi virtuosi di sviluppo socio economico è circostanza che si sta vieppiù affermando.
Sempre più spesso nelle premesse agli accordi di PPP gli stessi partner rafforzano questa convinzione riconoscendo espressamente che "*la stipulazione di accordi che vedano come protagonisti da una parte i soggetti istituzionali e gli enti pubblici e dall'altra il variegato mondo delle imprese private e delle associazioni sia con finalità lucrative che sociali e solidaristiche, al fine di perseguire obiettivi condivisi che rientrano all'interno delle strategie di interesse pubblico, è ormai considerato un approccio efficace e centrale per la cosiddetta programmazione negoziata di sviluppo di un territorio*" ([14]).
Con riferimento al settore dei servizi alla persona e al settore delle attività culturali il PPP si rivela formula vantaggiosa sotto molteplici punti di vista.
Innanzitutto, consente all'ente pubblico di coinvolgere in maniera crescente la società civile nello svolgimento di azioni di interesse generale, *in un'ottica di sussidiarietà orizzontale.*

[13] In questo caso la Federazione Trentina delle Cooperative in *partnership* con la Sovrintendenza Scolastica, l'Agenzia provinciale per l'Istruzione e l'Assessorato regionale per la Cooperazione si è impegnata tramite i propri associati a sviluppare modalità didattico educative rivolte alle scuole sui temi dello sviluppo sostenibile con particolare riguardo al rapporto tra consumi, alimentazione, comunicazione, ambiente e mondialità.

[14] Tratto dalla premessa all'Accordo volontario rivolto a favorire lo sviluppo di iniziative comuni in materia di risparmio energetico e di incentivazione all'utilizzo di fonti alternative di energia, stipulato tra la Provincia Autonoma di Trento e la Federazione Trentina delle Cooperative.

In secondo luogo tale formula attribuisce una posizione di primo piano alle associazioni del territorio nel perseguimento (condiviso) di obiettivi generali di coesione sociale e sviluppo economico, contribuendo a colmare il divario tra istituzioni e società civile.

Infine, permette di organizzare la gestione dei servizi con modalità che meglio rispondono (rispetto allo strumento degli appalti) alle esigenze dei singoli settori.

Domanda 2

Secondo la Commissione, il recepimento nel diritto nazionale della procedura di dialogo competitivo permetterà alle parti interessate di disporre di una procedura particolarmente adeguata all'aggiudicazione dei contratti qualificati come appalti pubblici in occasione dell'attuazione di un PPP di tipo puramente contrattuale, pur preservando i diritti fondamentali degli operatori economici. Condividete questo punto di vista? Se no, perché?

La procedura del *dialogo competitivo* ([15]) formalizza la facoltà per le amministrazioni aggiudicatici di attivare, previa idonea selezione (mediante pubblica evidenza), un dialogo con alcuni soggetti potenziali fornitori di beni/servizi ecc… finalizzato all'individuazione della/e soluzione/i più soddisfacente sulla quale le parti saranno, infine, chiamate a presentare le proprie offerte.

Questa modalità è stata formalizzata per la prima volta dall'art. 29 della Direttiva 2004/18/CE del 31 marzo 2004, relativa al *coordinamento delle procedure di aggiudicazione degli appalti pubblici di lavori, di forniture e di servizi*, con riferimento specifico al caso di appalti particolarmente complessi, laddove le amministrazioni si trovino nell'impossibilità oggettiva, non per carenze loro imputabili, "*di definire i mezzi atti a soddisfare le loro esigenze o di valutare ciò che il mercato può offrire in termini di soluzioni tecniche e/o di soluzioni giuridico/finanziarie*" ([16]). Di conseguenza, nella misura in cui il

[15] Questa modalità procedurale è oggi prevista dall'art. 29 della Direttiva 2004/18/CE del 31 marzo 2004, nel caso di appalti particolarmente complessi. Gli Stati membri, infatti, possono prevedere che l'amministrazione aggiudicatrice, qualora ritenga che il ricorso alla procedura aperta o ristretta non permetta l'aggiudicazione dell'appalto, possa avvalersi del dialogo competitivo conformemente al presente articolo, nel quale l'unico criterio per l'aggiudicazione dell'appalto pubblico è quello dell'offerta economicamente più vantaggiosa.

La procedura è cosi strutturata: le amministrazioni aggiudicatrici pubblicano un bando di gara in cui rendono noti le loro necessità e le loro esigenze, che definiscono nel bando stesso e/o in un documento descrittivo e successivamente avviano con i candidati selezionati un dialogo finalizzato all'individuazione e alla definizione dei mezzi più idonei a soddisfare le proprie necessità. Nella fase del dialogo esse possono discutere con i candidati selezionati tutti gli aspetti dell'appalto. Durante il dialogo le amministrazioni aggiudicatrici garantiscono la parità di trattamento di tutti gli offerenti.

L'amministrazione aggiudicatrice prosegue il dialogo finché non è in grado di individuare, se del caso dopo averle confrontate, la o le soluzioni che possano soddisfare le sue necessità.

Infine, dopo aver dichiarato concluso il dialogo e averne informato i partecipanti, le amministrazioni aggiudicatrici li invitano a presentare le loro offerte finali in base alla o alle soluzioni presentate e specificate nella fase del dialogo. Tali offerte devono contenere tutti gli elementi richiesti e necessari per l'esecuzione del progetto.

Su richiesta dell'amministrazione aggiudicatrice le offerte possono essere chiarite, precisate e perfezionate. Tuttavia tali precisazioni, chiarimenti, perfezionamenti o complementi non possono avere l'effetto di modificare gli elementi fondamentali dell'offerta o dell'appalto quale posto in gara la cui variazione rischi di falsare la concorrenza o di avere un effetto discriminatorio.

Le amministrazione aggiudicatrici valutano le offerte ricevute sulla base dei criteri di aggiudicazione fissati nel bando di gara o nel documento descrittivo e scelgono l'offerta economicamente più vantaggiosa conformemente all'articolo 53.

A richiesta dell'amministrazione aggiudicatrice, l'offerente che risulta aver presentato l'offerta economicamente più vantaggiosa può essere indotto a precisare gli aspetti della sua offerta o a confermare gli impegni in essa figuranti, a condizione che ciò non abbia l'effetto di modificare elementi fondamentali dell'offerta o dell'appalto quale posto in gara, falsare la concorrenza o comportare discriminazioni.

[16] Cfr. 31esimo considerando Direttiva 2004/18/CE, nel quale si riportano gli esempi dell'esecuzione di importanti progetti di infrastruttura di trasporti integrati, di grandi reti informatiche, di progetti che

ricorso a procedure aperte o ristrette non consente di aggiudicare gli appalti, il dialogo competitivo si presenta come una procedura flessibile che salvaguarda sia la concorrenza tra operatori economici sia la necessità delle amministrazioni aggiudicatici di discutere con ciascun candidato gli aspetti dell'appalto.

Il dialogo competitivo è rivolto, per espressa previsione del legislatore comunitario, alle ipotesi di *appalti particolarmente complessi* e si presenta come una procedura nuova, a cavallo fra il modello tradizionale dell'*appalto concorso* (che, secondo la terminologia comunitaria, rientra fra le procedure aperte) e il modello del *project financing* ([17]).

Trattandosi di un istituto recente mancano allo stato attuale forme di applicazione del *dialogo competitivo* dalle quali si possano trarre conclusioni in ordine al quesito *de qua*.

Il sistema del PPP permette, per la sua stessa natura di accordo convenzionale, un intenso dialogo fra le parti, circostanza che si rivela strategica soprattutto nei settori dei servizi alla persona e di natura culturale laddove le complessità e la delicatezza delle attività poste in essere ha (quasi) sempre 'imposto' una fase di negoziazione dell'attività che il soggetto erogatore va a svolgere.

Formalizzare questa negoziazione attraverso la soluzione del *dialogo competitivo* non appare la soluzione migliore, dal momento che introdurrebbe degli elementi di rigidità all'interno di uno schema (quello del PPP) che vede nella spontaneità e flessibilità (spesso, infatti, è il privato che propone al pubblico di erogare servizi/attività altrimenti mancanti, secondo una logica di piena sussidiarietà orizzontale) il proprio elemento di forza.

Va da sé che l'amministrazione, allorchè lo ritenga opportuno, potrà comunque applicare, anche nei settori oggi organizzati secondo modelli di PPP, la soluzione del dialogo competitivo mutuandola dalla disciplina comunitaria degli appalti pubblici.

Domanda 9

Quale sarebbe secondo voi la migliore formula per assicurare lo sviluppo di PPP di iniziativa privata nell'Unione europea pur garantendo il rispetto dei principi di trasparenza, di non discriminazione e di parità di trattamento?

Il modello del PPP non è uno strumento per eludere le problematiche legate al rispetto dei principi del Trattato CE. Inoltre, quando attraverso PPP si giustificano delle 'fugh dalla disciplina comunitaria (soprattutto in materia di diritto della concorrenza e degli appalti pubblici), queste vengono arrestate dalle decisioni della Corte di Giustizia e degli stessi giudici nazionali.

Ciò che gli operatori richiedono, come è emerso dalla *Relazione sulla consultazione pubblica in merito al Libro Verde sui Servizi di interesse generale*, ([18]) è maggior chiarezza sulla disciplina applicabile, partendo dal presupposto che determinati settori/servizi/attività giustificano/rendono necessario e opportuno un trattamento diverso, derogatorio rispetto alla normativa in materia di concorrenza.

Si pone innanzitutto la questione di definire quali servizi/attività hanno natura economica e quali non, poiché dalla qualificazione discende l'applicazione di regole diverse.

Sul punto la Commissione europea nel Libro Verde sui *Servizi di interesse generale* ([19]) ha riconosciuto che "*non sarebbe nè auspicabile, nè fattibile fissare a priori un elenco definitivo di tutti i servizi di interesse generale che non sono da considerarsi di natura economica*". La consultazione avviata dal Libro Verde ha fatto rilevare opinioni divergenti su questo argomento ([20]).

comportano un finanziamento complesso e strutturato, per cui non è possibile stabilire in anticipo l'impostazione finanziaria e giuridica.

[17] Disciplinato nell'ordinamento italiano dagli artt. 37*bis* - 37*nonies della legge 11 febbraio 1994 n. 109 (Legge Merloni) e s.m.*

[18] Documento di lavoro predisposto dai servizi della Commissione il 29 marzo 2004 (SEC/2004/326).

[19] Documento della Commissione (COM/2003/270def) del 21 maggio 2003.

[20] Cfr. Pt. 4.4., *Relazione sulla consultazione pubblica in merito al Libro Verde sui Servizi di interesse generale* del29 marzo 2004 (SEC/2004/326).

In attesa di ulteriori sviluppi ([21]) una prima provvisoria soluzione potrebbe essere quella di stabilire per quali attività e servizi e in quali circostanze nel settore dei servizi alla persona e di natura culturale il modello dei PPP può derogare alla disciplina comunitaria (in materia di diritto della concorrenza e degli appalti pubblici).

Domanda 14

Ritenete che sia necessario chiarire a livello comunitario alcuni aspetti attinenti al quadro contrattuale dei PPP? Se sì, su quale(i) aspetto (i) dovrebbe incentrarsi tale chiarificazione?

Sì.

Nell'ambito delle operazioni di PPP relativo all'affidamento dei servizi alla persona occorre tener conto della natura di tali servizi. Infatti, la maggior parte di essi ha carattere relazionale cioè basato sulla relazione tra fornitore-utente (si pensi ai servizi di assistenza ai disabili, ai malati terminali, agli anziani ecc.).

In questo contesto la procedura selettiva dovrebbe essere volta ad individuare il fornitore migliore sia dal punto di vista tecnico-economico che qualitativo. Ciò significa che l'organismo aggiudicatore deve disporre di informazione il più possibile completa per valutare le prestazioni del fornitore. Quest'ultima valutazione diventa più complessa con riferimento ai servizi alla persona trattandosi di servizi non standardizzabili. Una soluzione potrebbe essere quella di specificare meglio il criterio dell'offerta economicamente vantaggiosa, dando maggiore enfasi agli elementi qualitativi e professionali che il partner privato deve possedere.

In particolare, maggiore risalto dovrebbe essere dato al "rapporto con il territorio" inteso non come elemento di discriminazione per gli operatori che non appartengono all'area in questione, bensì come reale capacità di rispondere, in maniera efficiente, ai bisogni sociali presenti nell'ambito locale di riferimento. É necessario perciò fare riferimento alla capacità del fornitore di creare rapporti sinergici con le risorse di un dato contesto locale e alle modalità con cui lo stesso si coordina con i servizi esistenti nel territorio ed interagisce con gli altri attori locali.

Dal contratto di PPP dovrebbe perciò emergere con maggiore chiarezza la valorizzazione degli aspetti qualitativi del soggetto fornitore, intesa non solo come competenza tecnica nel settore e come affidabilità economico-finanziaria, ma come capacità dello stesso di dare risposte apprezzabili ai bisogni che è incaricato di soddisfare.

In particolare, con riferimento ai soggetti de Terzo settore, andrebbe considerato il valore aggiunto che tali organizzazioni hanno rispetto alle imprese lucrative, che è dato dalla loro natura **distributiva** che si estrinseca nella produzione di beni "meritori" che vengono offerti sul mercato a prezzi inferiori rispetto ai costi.

Inoltre occorre sottolineare che per i servizi alla persona risulta particolarmente rilevante l'inclusione di norme che regolino il controllo che l'amministrazione può svolgere sul merito qualitativo e quantitativo della fornitura di un servizio già durante l'erogazione e non solo al termine del periodo dell'affidamento.

La previsione di *reports* (rendiconti periodici di controllo) potrebbe essere utile in tal senso, in quanto darebbe la possibilità all'ente locale di controllare l'andamento della gestione e di valutare la *performance* del fornitore in termini di obiettivi/risultati, costo/qualità ecc. Inoltre, bisognerebbe prevedere nel contratto delle penalità per il mancato o imperfetto raggiungimento degli obiettivi previsti (per esempio nel caso del servizio di pasti a domicilio per anziani, la scarsa qualità del cibo può essere intesa quale raggiungimento imperfetto dell'obiettivo) al fine di evitare comportamenti che possano ostacolare il perseguimento dell'interesse pubblico al

[21] Per il 2005 è attesa una Comunicazione sui servizi sociali di interesse generale nella quale dovrebbe essere elaborato un approccio sistematico al fine di individuare e riconoscere le caratteristiche specifiche dei servizi sociali e sanitari di interesse generale e fornire una migliore definizione del quadro in cui tali servizi operano.

soddisfacimento dei bisogni sociali. Ovviamente questo sistema non deve essere tale da tradursi in maggiori costi per l'ente locale e perciò nella vanificazione dell'obiettivo insito nell'esternalizzazione del servizio ossia la riduzione dei costi di gestione e il perseguimento dell'interesse pubblico.

Domanda 19

Ritenete che debba essere presa un'iniziativa a livello comunitario per chiarire o precisare gli obblighi degli organismi aggiudicatori riguardo alle condizioni che devono regolamentare la concorrenza tra operatori potenzialmente interessati da un progetto di tipo istituzionalizzato? Se sì, su quali punti fondamentali e sotto quale forma? Se no, perché?

Sì.

Come si è già più volte sottolineato, con riferimento ai servizi alla persona, la legge 328/2000 prevede un maggior coinvolgimento delle organizzazioni del Terzo settore nelle attività di progettazione e realizzazione delle politiche del territorio, il che presuppone l'attivazione di collaborazioni tra i partner pubblici e privati, per sperimentare forme gestionali innovative, anche mediante società miste. Un esempio può essere quello di una società mista composta da una cooperativa sociale[22] di tipo a) e da un comune, per la gestione di un servizio di assistenza agli anziani (es. la gestione di una casa di riposo). In questa tipologia di organizzazione mista il ruolo del socio pubblico è quello di controllare l'attività svolta; mentre il socio privato ha un ruolo di gestione ed erogazione del servizio.

In tale tipo di operazioni di PPP il punto critico è rappresentato dai criteri utilizzati nella scelta del partner privato, per cui si rende necessaria l'attivazione di meccanismi di trasparenza e pubblicità .

La prima considerazione che il soggetto pubblico dovrebbe fare è quella relativa al ruolo del partner privato e al tipo di attività da svolgere. Nel campo dei servizi socio-assistenziali al partner privato viene richiesta una particolare attitudine ad instaurare rapporti fiduciari con gli utenti del servizio, quindi, nella scelta del soggetto in questione si deve porre un'attenzione particolare alle risorse umane più che a quelle tecnologiche e finanziarie.

Da questo punto di vista è necessario che il soggetto pubblico, nella scelta del partner privato, preveda criteri e procedure che tengano conto delle peculiarità delle organizzazioni non lucrative. Occorre, cioè, che valorizzi le specificità di queste organizzazioni, non nel senso di attribuirgli vantaggi ingiustificati, ma di riconoscerne la propria, naturale contiguità di fini rispetto all'ente pubblico stesso. Quindi, a monte deve esserci una condivisione che valorizzi gli aspetti culturali e professionali delle organizzazioni del terzo settore.

La valorizzazione di relazioni di tipo fiduciario con organizzazioni *non profit* che si mostrano più vicine all'amministrazione non dovrebbe contrastare con la realizzazione di una corretta competizione tra partner potenziali, giacché per accedere alla categoria in questione sono già previste forme di controllo.

In questo contesto l'utilizzo delle procedure di selezione competitive ma differenziate serve ad assicurare che agli utenti del servizio venga garantito un elevato livello di qualità e tutela.

L'intervento comunitario si rende necessario per chiarire in quali casi e secondo quali criteri, la specificità delle organizzazioni del terzo settore, giustifichi le deroghe alle norme concorrenziali previste dall'art. 86.2 del Trattato, secondo il quale " (…) *Le imprese incaricate della gestione di servizi di interesse economico generale o aventi carattere di monopolio fiscale sono sottoposte alle norme del presente trattato, e in particolare alle regole di concorrenza,* ***nei limiti in cui l'applicazione di tali norme non osti all'adempimento, in linea di diritto e di fatto, della specifica missione loro affidata.*** *Lo sviluppo degli scambi non deve essere compromesso in misura contraria agli interessi della Comunità*".

[22] In virtù dell'art. 11 della Legge 381 del 1991 che detta la disciplina delle cooperative sociali.

Occorre, quindi, un'iniziativa comunitaria che chiarisca in che modo deve avvenire il bilanciamento tra la specifica missione d'interesse generale, attribuita ai soggetti del terzo settore nella gestione ed erogazione dei servizi alla persona e il rispetto delle regole concorrenziali.

Domanda 20

Quali sono le misure o le pratiche che ritenete di ostacolo alla creazione di PPP nell'Unione Europea?

Alla luce delle argomentazioni proposte all'interno del documento, ciò che emerge, con riferimento ai rapporti di partenariato pubblico-privato relativamente all'accezione ente locale/terzo settore, è la mancanza di un quadro complessivo di riferimento a livello nazionale oltre che a livello comunitario.

In particolare, si nota poca chiarezza in merito alle regole da applicare nelle procedure di selezione dei soggetti affidatari dei servizi alla persona, nonché degli elementi di cui tener conto ai fini della scelta di un'organizzazione rispetto ad un'altra.

L'ostacolo principale risulta, quindi, essere l'incertezza della normativa comunitaria sul punto specifico con conseguenti rischi di mancata trasparenza in cui di fatto lo svolgimento di tali procedura rischia di realizzarsi.

Si è parlato in precedenza dell'atto di indirizzo del 2001 (vedi domanda 1) che individua tra le modalità di affidamento dei servizi alla persona le procedure ristrette e negoziate non fornendo alcun criterio per scegliere tra l'una o l'altra procedura; né il diritto comunitario fornisce chiarimenti in tal senso, giacché la Commissione europea, si è limitata a specificare varie volte che ai servizi sociali non si applica la disciplina degli appalti con riferimento alla selezione dei candidati e in materia di aggiudicazione[23], lasciando agli Stati membri la libertà di scegliere quale procedura utilizzare.

Quindi, sulla base di quanto sopra detto, se un comune volesse esternalizzare una servizio socio-assistenziale (es. gestione di un asilo nido) ad un soggetto del Terzo settore, potrebbe stipulare legittimamente un contratto (convenzione) sulla base di una procedura individuata dallo Stato membro, priva di riferimenti alla qualità del partner privato e avente come unici riferimenti comunitari, oltre ai principi comunitari generali del Trattato CE, l'obbligo dell'avviso dell'aggiudicazione del servizio ed il possesso da parte dell'affidatario delle competenze comprovate nel settore in questione.

Si tratta di un punto critico perché crea il rischio di una forte incertezza nella valutazione delle specificità dei soggetti non profit e di una disomogeneità nella valutazione degli stessi a seconda dello Stato membro in cui la procedura ha luogo. La procedura seguita dunque potrebbe rivelarsi poco potenziali soggetti fornitori, rendendo difficile non solo valutare se gli obiettivi che hanno spinto all'esternalizzazione del servizio siano stati raggiunti (abbattimento dei costi per l'ente locale e perseguimento dell'interesse pubblico) ma anche vigilare sulla qualità del servizio erogato.

Inoltre, con riferimento alle operazioni di PPP contrattuali tramite gara, occorre specificare meglio i criteri di scelta dell'offerta economicamente più vantaggiosa, tenendo conto del fatto che nel contesto dei servizi alla persona il senso della collaborazione pubblico-privata dovrebbe essere quello di una reale integrazione volta ad un comune pensare, progettare e agire per la stessa finalità, ossia, il benessere della persona e della comunità.

Occorre, infine ricordare che l'esternalizzazione dei servizi richiede la raccolta di informazioni da parte dell'organismo aggiudicatore relativamente al potenziale fornitore del servizio al fine di valutarne le prestazioni.

[23] COMUNICAZIONE INTERPRETATIVA DELLA COMMISSIONE sul diritto comunitario degli appalti pubblici e le possibilità di integrare aspetti sociali negli appalti pubblici, Bruxelles, 15.10.2001, COM(2001) 566 def., p. 19.

Tale difficoltà si traduce in costi di transazione più alti in quanto comprensivi anche dei costi di raccolta delle informazioni. Questo rappresenta un ostacolo per il lancio di operazioni di PPP soprattutto quando il rapporto ha per oggetto l'affidamento dei servizi alla persona.
Quindi è necessario un quadro più chiaro e trasparente possibile per dare l'opportunità alle organizzazioni con fini sociali di contribuire ancora di più allo sviluppo del modello europeo di società.

Dear Sir,

The European Commision has launched a draft of a Green Paper regarding the
PPPs . Unfortunately we only have it in French (see Attach.) and ask you
for assistance
sending me that paper in English.
I am very interesting in PPPs possibilities and therefore sending to you
letter concerning
information about EC countries expierence of PPPs system implementation.
Sincerely Your
Vytautas karlavicius

Dear Sir,
After the end of privatization of the most great objects in the Lithuania it
is necessary to solve
the problem of the new investment indraft. The Public Private Partnerships {
PPP} may become the nice implementation
for that and therefore I am looking for the information
about the European expierence concerning PPP
There is nothing happening in Lithuania in this area up till now and that is
why I am trying to reach you and to learn some information on the PPP-s.
My sphere of interest is as follows:
- what should be the assumptions for the legal basis of the country which is going to start implementation process of the PPP;
- are there any specific EU legal requirements for the PPP-s;
- specimen of the manual for preparation of the implementation of the PPP-s;
- specimen of the contract agreements;
- specimen of bylaws of the institution which is going to start to implement PPP-s;
- types of the projects most suitable for the PPP-s;
- what are the main differences of provisions related to the law on Concessions and the PPP-s;
-relation between EC Structural Funds and PPP-s in the municipal and region development projects.

Your explanations and comments of the European expierience will greatly
contribute to the PPP-s implementation in Lithuania.
Sincerely yours
Vytautas Karlavicius

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Szanowni Państwo

Myślę, że z powodu bardzo dużej liczby formalności bardzo długo potrawają w Polsce przygotowania do pierwszych projektów realizowanych zgodnie z nową ustawą o partnerstwie publiczno-prawnym, która jest przygotowana przez Rząd Polski.

Myślę, że konieczność przygotowania licznych analiz, programów i planów opóźni realizację wspólnych projektów. Moim zdaniem małe prywatne firmy w ogóle będą nimi zainteresowane i jak widać w Europejskim i Polskim systemach zamówień publicznych przetargi wygrywają najwięksi. Znowu pieniądze europodatników popłyną szerokim strumieniem do najbogatszych.
Nie mówiąc o tym, że
przy zmianach czy to w KE czy w Rządzie danego kraju niektóre projekty mogą stracić dofinansowanie.
Uważam również, że władze Unii powinny przyjrzeć się systemom zamówień publicznych, ponieważ w wielu krajach są korupcjogenne. Praktycznie w każdym kraju Unii można ustawiać przetargi, nie mówiąc o arbitrażu.

Robert Przespolewski
02-792 Warszawa
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Opinion to the GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS

provided by
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1. *What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?*

Whatever the type: contractual or institutional, PPPs are still a rare novelty in Poland. There is no direct legal foundation for the PPPs in the form of an Act. There is no single and legally authorised body for such control, hence it is not clear, who would conduct supervision over PPP set-ups in Poland. There are no sound standards or a record of “best practices”, thus making a track of PPP set-ups difficult. The partner-selection process is generally governed by the Public Tender Act. However, this is just a part of a PPP process.

2. *In the Commission’s view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?*

Public Authorities have, generally, limited knowledge of the marketplace and operators’ point of view, and often seem not to be fully able to clearly state *what they want* in this specific area of PPPs, and further, to transfer such knowledge into clear best-partner acquisition procedures. Procedures, provided by the Commission, translating “competitive dialogue” into clear and fair clauses will be of much help. On the other hand, regulations should contain a degree of flexibility and openness, in order not to loose the meaning of the competitive dialogue, specifically when complex PPPs are concerned.

3. *In the case of such contracts, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts?*

Effort should be put when designing regulations and procedures so that possible corruption in eliminated, or at least narrowed to a minimum.

8. *In your experience, are non-national operators guaranteed access to private initiative schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested*

operators? Is the selection procedure organised to implement the selected project genuinely competitive?

Firstly, the proposed Bill on PPP in Poland suggests that only public contracting body takes the initiative towards a PPP. Secondly, depending on the scope of contracts, dissemination of information is to be done according to Public Tender Act. Thirdly, private initiators have no gain in securing genuine competitiveness – it is chiefly the interest of the public. Fourthly, the public need to have the right tools to evaluate the genuine market value of proposals from the private. And this remains clearly a weak spot of the public in Poland. Additionally, the public seem not to fully know how to secure genuine competitiveness of bids in untypical, or large-scope projects. Proposals and procedures put forward by public bodies tend to be too rigid for the private to find sufficient space for their interest, or too loose, what may result in imbalanced gain, in favour of the private at the cost of the public.

9. *In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?*

In more complex, multi-faceted PPPs, open competitions could be organised for conceptual solutions to problems, considered a separate stage of a PPP process. Competitions would be the pre-tender part of the process, where problems are spotted and evaluated, so that results could be used as a benchmarking tool when constructing further tenders aiming at selection of a best partner. Private initiative PPPs should be explicitly marked as possible and welcome.

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

No such experience in record.

11. *(-)*

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

At the stage of defining the project and translating it into requirements for the public tender there is often space for misunderstanding and impartiality – resulting in discrimination.

13. *(-)*

14. *Do you think there is a need to clarify certain aspects of the contractual framework of PPs at Community level? If so, which aspects should be clarified?*

At Community level:

- General indications should be provided, chiefly encouraging public authorities to take more active approach to solving their problems through a partnership, together with private partners.

- A clear message should be sent to the public authorities, that it is not exclusively for the public to take initiative towards PPP, but also reception of proposals from the private, through proper evaluation and public process, can be a good way to a successful PPP.
- At lower and more detailed level:

standards of analyses should be set, that will help the public find answers to crucial questions: what they actually want, what they need in terms of information, analyses, goals, terms of cooperation, so that public interest is secured in the best possible manner, and simultaneously sufficient space is left for the interest of the private – that meaning the design and use of the evaluative tools that will best suit the intention.

15. (-)

16. (-)

17. (-)

18. (-)

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

There is a vast space, within which concepts for a complex subject-matter projects are formulated. Depending on definition of such concepts, genuine competition is – or is not-possible. On the one hand, public bodies should be able to precisely describe their problem, expected result, formulate measures of control and be able to check if the need is properly satisfied. This itself, in more complex ventures is not easy. It requires a set of analyses and considerations, which probably are being done in very different manners, depending on Member State, experience gained, legal requirements (or lack of these in particular areas), nature of a project, leading to results difficult of comparison with other projects. On the other hand, such statements and expectations make a foundation of a project and a call for competition, possibly lacking in clarity, objectivity in further evaluation or containing gaps in problem-considerations. This may lead to confusions and misunderstanding among interested operators, raising the issue of compliance with primary Community regulations on public tenders.
The phase of evaluating their own position by public bodies, using right tools to do so, objective and comparable definition of a project within the Community should be a matter of the Community legislation, or a clear, official guidance.

20. In general and independently of the questions raised in this document: In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?

Within UE – differences in regulations governing PPPs processes in particular Member States.
In Poland – PPPs are still a novelty. Firstly, approaches to PPPs by public bodies are feeble and in most cases refer to the single-facet projects, leaving apart urgent, yet more complex problems. Secondly, there is a problem of providing sufficient bridging financing for local authorities, having financial difficulties in providing proper input on their part.

Furthermore: difficulty in proper defining and analysing the problem and creating the right, often sophisticated selection and implementation procedures; lack of guidance or clear legal rules (unsteadiness of law, lack of an Act on PPP); fear of the private market combined with insufficient understanding of it, or – on the other hand – corruptive approach. Lastly, passiveness, “tidal”, short-sighted thinking, lack of strategic approach. This all may lead to imbalances between public and private in the process of the PPP. In consequence, building a negative picture of the PPP phenomenon.

21. (-)

22. More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?

A network for the regular exchange of practice established and co-ordinated by the Commission would be of much help, especially to the New Member States.

LIVRO VERDE SOBRE AS PARCERIAS PÚBLICO-PRIVADAS E O DIREITO COMUNITÁRIO EM MATÉRIA DE CONTRATOS PÚBLICOS E CONCESSÕES

Ponto 1

Permitimo-nos sugerir a seguinte noção de Parceria Público-Privada:

DEFINIÇÃO DE PARCERIA PÚBLICO-PRIVADA

Formas de cooperação reguladas por contrato oneroso, celebrado na sequência de procedimento concorrencial, entre as autoridades públicas e as empresas privadas ou instituições do terceiro sector, tendo por objectivo assegurar, por um período de tempo adequado à plena realização dos fins contratados, a construção e exploração de uma infraestrutura pública ou a montagem e, ou exploração de um serviço ou bem público, por parte de um parceiro privado, bem como o seu financiamento, ou a gestão e participação em entidades empresariais, ou outras, de origem pública ou que prossigam um objecto de interesse público.

Ponto 2

Compreendendo que não é possível definir de forma fixa a duração da relação contratual, julgamos, no entanto, que se lhe deveria fixar um período máximo.

Período esse que considerasse não só o prazo inicialmente contratado como a prorrogação, ou prorrogações, desse prazo.

É uma medida essencial para que não estejamos a eliminar a concorrência por prazos superiores ao razoável e, por outro lado, que não estejamos a criar projectos de fraca viabilidade e que só a conseguirão graças a prorrogações sucessivas de prazo.

A cooperação entre os parceiros ocorrerá verdadeiramente, mediata ou imediatamente, sobre todos os aspectos do projecto a realizar.

Sendo o financiamento dos projectos a sua pedra angular, achamos que a UE, para os projectos desenvolvidos pelos seus Estados membros, deveria/poderia criar ou mecanismos de garantia, ou mecanismos de crédito, especialmente agressivos para os projectos desenvolvidos em áreas consideradas prioritárias.

Estamos a falar, naturalmente, de instrumentos que vão para além dos actualmente existentes no âmbito do Banco Europeu de Investimentos.

Quanto ao papel do sector público, se é verdade que ele se centra nas preocupações enunciadas, não o é menos que também o deve preocupar a saúde da empresa que suporta o projecto, já que uma qualquer dificuldade desta se poderá traduzir na debacle do projecto. Ou seja, o acompanhamento público, tendo em conta a natureza dos projectos deve ser constante, profundo e tecnicamente muito sólido.

A distribuição precisa de riscos deve ser avaliada não só no momento da adjudicação e celebração do contrato ,mas ao longo de toda a vida do contrato. Por outro lado, dada a longevidade dos contratos, deve considerar-se ab initio as formas de alteração dessa distribuição dos riscos, nomeadamente quando ela decorre de factores exógenos imprevistos ou imprevisíveis (p. ex. mudanças tecnológicas ou demográficas).

Ponto 3

Sendo verdade que o fenómeno PPP teve na sua origem as restrições orçamentais, entendemos que as suas virtualidades e o seu futuro deverão fundar-se noutras preocupações.

De facto, o desenvolvimento das parcerias com a consequente incorporação de novas e equilibradas empresas deve ser também utilizado como forma de estruturar o tecido económico e de estimular a actividade empresarial. Por outro lado, e porventura mais importante, permite aos Estados incorporar todas as vantagens da gestão privada em serviços públicos essenciais, sem que estes percam as características de universalidade e de igualdade de acesso que lhe são imanentes.

Desta forma, a par das imposições genéricas que decorrem da lei, os Estados dispõem também de instrumentos contratuais que permitem melhorar a caracterização dos direitos e obrigações das partes bem como as sanções pelo incumprimento.

Ponto 4

A experiência vem demonstrando que as PPP são dotadas de uma enorme plasticidade e que este sua característica lhes tem permitido a adaptação a múltiplos sectores e, dentro de cada um deles, a projectos muito diferentes.

O que deve conduzir a UE, a nosso ver, a fixar um conceito de PPP em que, pela sua latitude, possa incluir-se todo o tipo de contratação pública com essas características, independentemente do sector. Ou seja, as PPP não são, a nosso ver, uma solução marginal e residual para sectores limitados, como o dos transportes, mas antes um instrumento que, pela plasticidade já referida, tenderá a ser usado cada vez mais e em sectores diversificados.

Testada a aptidão das PPP para o sector dos transportes, julgamos que faz sentido que a UE promova medidas específicas, legislativas e de politica, quanto à sua utilização nas redes transeuropeias de transportes.

Ponto 5

O recurso às PPP não só não é a solução milagrosa para as restrições orçamentais como não pode constituir um factor de incerteza quer para as empresas quer para o sistema financeiro, nem um compromisso desproporcionado para as gerações seguintes.

Assim, o lançamento e a contratação de PPP devem implicar, para ambas as partes, um planeamento rigoroso e estudos prospectivos detalhados. Ao mesmo tempo, e após a comunicação do Eurostat, importa acautelar que a assunção integral, pelas empresas do risco de construção e de disponibilidade não redunda na assunção a prazo, de riscos fatais para os projectos.

Julgamos que assumem, neste caso especial necessidade de ponderação os seguintes aspectos:

- o reflexo da evolução cientifica e tecnológica na execução dos contratos
- o reflexo da evolução demográfica, nomeadamente quando esta se traduz numa diminuição da população, com, pelo menos, as seguintes potenciais consequências:

- incapacidade do projecto para pagar o investimento
- desnecessidade da infraestrutura a curto prazo

Ponto 6

A criação de estruturas próprias para enquadrar, gerir e acompanhar a execução das PPP, por parte dos Estados membros, apesar de não ser ainda generalizada é de extrema importância.

No entanto, julgamos que essas estruturas, independentemente do seu formato e organização, deveriam contar com a participação dos operadores económicos que operam no sector quer como contratantes quer como financiadores.

Por outro lado a própria União Europeia deverá começar, desde já, a pensar na criação de uma estrutura que acompanhe este tipo de projectos e possa desenvolver alguma actividade de enquadramento e de planeamento prospectivo.

Ponto 7

É válido, a este propósito, o que se disse acima sobre a plasticidade das PPP's, sendo que ao nível municipal, por se tratarem de projectos de menor dimensão, é possível uma maior inovação com menor risco.

Ponto 8

O crescimento do fenómeno PPP não permite que ele continue a desenvolver-se sem um regime jurídico específico.

É verdade que as entidades públicas estarão obrigadas a respeitar os princípios constantes dos Tratados mas tal não nos parece suficiente.

A criação de um verdadeiro mercado único a nível europeu é claramente potenciada com a criação de um regime jurídico comunitário específico para as PPP.

Importa, no entanto, dizer que não se trata, nem pouco mais ou menos, de produzir uma versão adaptada das Directivas de mercados públicos, nomeadamente da Directiva das Empreitadas de Obras Públicas.

Não sendo esta a sede para desenvolver esse regime, julgo que, para além das preocupações já conhecidas, nomeadamente quanto à fase de adjudicação dos contratos, o regime jurídico das PPP deve dar uma especial atenção, entre outras, às seguintes questões:

- Execução dos contratos
- Modificação dos Contratos e seus limites
- Prorrogação do Prazo do contrato e seus limites
- Obrigações das partes no termo do contrato
- Intervenção das Instituições financeiras nos projectos contratados em PPP.
- Consequências da inviabilidade financeira dos projectos, tendo os investimentos realizados.

Pontos 9 a 16

As dúvidas e incertezas esplanadas ao longo destes pontos evidenciam a necessidade de fixar um regime jurídico próprio para as PPP's. Essencial, aliás, para estimular um verdadeiro mercado europeu de operadores comunitários que, com certeza e segurança, possam operar em toda a Europa.

O procedimento de diálogo concorrencial parece especialmente vocacionado para as operações de PPP, dado que permitirá ao parceiro público centrar-se mais na definição da necessidade a prover (definição funcional),deixando para o parceiro privado a tarefa de saber/conceber como prover a essa necessidade. Desta forma, potencia-se a inovação e permite-se que o parceiro público possa, desde logo, contratar com os inerentes ganhos de eficácia.

Em Portugal tem vindo a ser utilizada, julgamos que com sucesso, uma fórmula semelhante à agora proposta pela Comissão que consiste na organização de concursos públicos em várias fases, onde os próprios concorrentes vão apresentando propostas e desenvolvimentos ao projecto inicialmente sujeito a concurso.

Urge, contudo, impor algumas cautelas. Na verdade, o facto de a solução ser desenhada com a ajuda daqueles que, posteriormente, irão apresentar as propostas finais permite que estes possuam um conhecimento dos projectos e soluções que é ,sem dúvida, mais alargado do que o daqueles concorrentes que não participaram nessa fase do processo concursal. Por outro lado, será de configurar a possibilidade de o parceiro público se apegar demasiado a uma solução proposta por um parceiro privado que, na prática, poderá excluir todos os outros candidatos (dado que apenas o parceiro que propôs tal solução a poderá concretizar tecnicamente).

Neste caso a segunda parte do denominado diálogo concorrencial – o convite à apresentação de propostas – ainda que potencialmente abstracto poderá, na prática, ter apenas um concorrente como destinatário.

Refira-se que o diálogo concorrencial tem que ser, ele próprio, detalhadamente regulado e balizado. Desde logo para não permitir que entre a apresentação das propostas e a celebração do contrato o objecto do concurso seja desvirtuado ou modificado.

Por outro lado não há contrato de Concessão, ou contrato de outra qualquer forma de PPP, que não seja, para este efeito, “particularmente complexo”.

A nossa experiência tem-nos ensinado que as especificidades de cada país, podendo ser compreensíveis, evoluem com demasiada facilidade para regras que:ou limitam a concorrência na fase de escolha dos candidatos ;ou permitem decisões com escassa e difusa fundamentação ,comunicadas aos concorrentes não porque lhes assista esse direito mas como uma *"graça"* da Administração.

Merece aqui um especial cuidado o recurso frequente a fases de pré-qualificação não reguladas, mas nas quais se tomam decisões fundamentais em matérias que cabem no âmbito da concorrência.

A fixação de uma regulamentação europeia homogénea mínima é essencial à criação de um verdadeiro mercado de operadores comunitários do sector, com vantagens para as Administrações que, desta forma, podem ter nos concursos entidades melhor preparadas e com competências específicas que lhe permitem apresentar propostas mais vantajosas.

Pontos 17 e 18

Salvo melhor opinião o direito comunitário em matéria de contratos públicos e concessões pode ser inspirador e, porventura, regime subsidiário relativamente às PPP mas não pode ser o direito regulador das PPP.

Afigura-se-nos mais correcto construir, a partir dos princípios vertidos nos Tratados, um regime jurídico autónomo para as PPP que fixe um regime geral e subregimes específicos para cada um dos tipos de PPP, como p. ex. as Concessões.

Tendo em conta a importância económica crescente das PPP, a sua integral abertura à concorrência tem que ser fixada a través de instrumentos legislativos imperativos. A não ser assim poderemos estar a desvirtuar gravemente a construção de um mercado interno forte e concorrencial.

Ponto 19

Achamos que, a propósito do Direito das Sociedades Europeias, deve/pode ser feita uma reflexão sobre a questão de saber se as empresas que desenvolvem actividades tituladas por contratos de Parceria Pública-Privada devem ter na sua criação e gestão alguma especificidade. Desde logo se devem ser exclusivamente dominadas, como todas as outras, apenas pelo princípio da autonomia da vontade, ou deverão incorporar algumas normas ou princípios imperativos, decorrentes da natureza pública dos bens que gerem.

Ponto 20

Deve ponderar-se se deve deixar-se fora do âmbito deste trabalho a consideração das parcerias em que intervém o hoje chamado terceiro sector ou sector social. Ou seja, deve ponderar-se se quando as entidades públicas estabelecem Parcerias com entidades do terceiro sector estão obrigadas, ou não ,ao cumprimento dos mesmos procedimentos concursais.

Ponto 25

Para além do que já se disse acima sobre o "diálogo concorrencial" merece a pena enfatizar que não deve confundir-se a possibilidade/vantagem dos privados participarem na definição dos projectos passíveis de adjudicação com recurso a uma PPP com a possibilidade de os privados interessados em concreto num projecto participarem na definição do próprio objecto do concurso.

Ou seja, quando as empresas são chamadas a participar num procedimento concursal, seja qual for a modalidade escolhida, o objecto do contrato a celebrar a final deve estar definido com clareza e rigor desde o início. O que pode mudar durante o procedimento concursal são as formas, os instrumentos ou as técnicas utilizadas para a concretização do objecto.

Ponto 28

Compreende-se que até agora o regime jurídico das concessões de obras públicas se tenha desenvolvido com grande proximidade e dependência do das empreitadas de obras públicas.

Com a criação de um regime próprio para as PPP's o regime das concessões tem que passar a integrar-se como um sub-regime daquele ou, eventualmente, a ser adoptado como o regime geral e regime regra das PPP.

Em qualquer caso tal implicará um muito maior detalhe e desenvolvimento, desde logo ao nível comunitário, dos vários aspectos desse novo regime jurídico.

Pontos 29 a 33

Pela dimensão económica que assumem hoje as Concessões e genericamente as PPP é inaceitável a fixação de regras para cada caso concreto.

Parecendo-nos bem os princípios gerais fixados no Ponto 30 importa tirar-lhe as adequadas consequências de que destacamos:

- obrigatoriedade de abertura universal dos procedimentos de concurso;
- criação de regras homogéneas e comuns a todo o espaço comunitário;
- criação de um verdadeiro mercado europeu de concessões /PPP's

- Regulação rigorosa e pormenorizada de todo o procedimento, desde o início do procedimento concursal até à adjudicação;
- Regulação das relações entre concedente e concessionária ao longo da vida do contrato, nomeadamente tendo em vista evitar que eventuais alterações ao contrato o transformem noutro contrato.
- Ponderação das vantagens em criar um regime específico, mais estimulante, para as PPP's que incidam nas redes transeuropeias.

Pontos 34 a 36

A afirmação de que "nem sempre é fácil determinar, na origem, se o contrato objecto do processo é um contrato público ou uma concessão" é a evidência das preocupações que já manifestámos.

Em primeiro lugar entendemos que é inaceitável que as modificações decorrentes da fase de negociações dos contratos possam conduzir à modificação da natureza do contrato.

Em segundo lugar demonstra-se que é necessário fixar com rigor os conceitos e os regimes jurídicos correspondentes.

De facto, não é aceitável que o procedimento relativo aos concursos para atribuição de concessões possa assumir maior ligeireza ou menor clareza para os concorrentes do que os relativos aos concursos para atribuição de empreitadas.

Com efeito, a forma de adjudicação de concessões, excepto as de obras públicas, não se encontra regulada, pelo que, por um lado, existem diferenças substanciais entre as várias regulamentações nacionais e, por outro, os critérios que presidem à adjudicação são fixados casuisticamente por cada entidade adjudicante.

Parece impor-se um especial critério às adjudicações feitas a empresas públicas, pois, são as mais das vezes realizadas sem a precedência de qualquer concurso.

Quanto a nós, os problemas que emergem das parcerias público-privadas são idênticos quer sejam qualificadas como contratos públicos quer como concessões, pelo que se exige uma regulamentação unitária. Não nos parece que o facto de nas concessões o parceiro privado assumir todos ou parte dos riscos do projecto seja razão suficiente para que não se estabeleça um regime pormenorizado relativo à escolha do parceiro.

Deste modo, parece-nos ser de concluir que as PPP colocam problemas específicos que devem ser tratados unitariamente, muito embora, relativamente à escolha do parceiro privado, se possa colher a experiência obtida com a regulamentação dos contratos públicos.

Julgamos que é da natureza destes procedimentos (concessões) que eles possam conter um menor grau de automatismo na apreciação conducente à adjudicação. Tal facto, no entanto, não pode decorrer de obscuridades ou lacunas na regulamentação. Antes é a contrapartida da sua especial complexidade.

Assim, e tal como já dissemos, somos claramente a favor de uma acção legislativa forte que crie um regime jurídico para as PPP's e, dentro deste, um para as Concessões. E, tal como já dissemos, tal acção legislativa não deve ater-se exclusivamente à face concursal e adjudicatória, mas antes, começar antes daquela e debruçar-se também sobre a execução e extinção dos contratos.

Pontos 37 a 41

A possibilidade de os privados tomarem a iniciativa de operações PPP não pode conduzir à eliminação da concorrência ou à subtracção desses contratos ao mercado.

Entendemos sobre esta matéria o seguinte:

1 – Aos operadores económicos deve ser permitido proporem operações de PPP

2 – Apresentadas as propostas, junto das autoridades públicas, e se estas entenderem que a Parceria proposta é do seu interesse, assumem com o proponente dois compromissos: o de lhe pagar, no final do procedimento concursal, os custos incorridos e o de lhe assegurar, enquanto concorrente, a presença na fase de negociações que venha a ocorrer antes da apresentação da proposta final.

3 – A adjudicação é sempre precedida de um procedimento concorrencial universal.

Ponto 42 e 43

As preocupações manifestadas nestes dois pontos reconduzem-nos à questão que já referimos da necessidade de regulamentação ir muito para além da escolha do parceiro privado.

Ponto 44 a 51

Sendo certo que as Parcerias Público-Privadas assumem a cada dia que passa uma importância crescente e que tal crescimento é feito, em grande medida, à custa da diminuição dos mercados clássicos de empreitadas julgamos que o direito comunitário deverá ir muito além da mera imposição dos princípios gerais.

Impõe-se, nomeadamente, uma detalhada formulação das especificações técnicas, o que permitirá:

1. uma correcta apreciação de interesse por parte dos potenciais concorrentes a uma adjudicação;

2. aumentar a comparabilidade entre as Propostas apresentadas e, consequentemente, reduzir a subjectividade associada à avaliação dessas Propostas; e
3. estabilidade nas relações contratuais durante a vida da PPP.

De acordo com a experiência portuguesa em Concessões Rodoviárias, refira-se a título exemplificativo, algumas características técnicas que importará fazer constar dos Objectos das operações de PPP por forma a maximizar o valor utilidade das mesmas:

1. identificação prévia de corredores ambientalmente aprovados;
2. identificação detalhada do Objecto e Limites da Concessão, com identificação exaustiva – em texto e em planta – de todos os Sublanços, Nós, Ligações, Praças de Portagem, Áreas de Serviço, etc. que integram o Objecto da PPP.

Existindo vantagem em desenvolver o mercado interno e em dar às empresas europeias a possibilidade de actuarem livremente na totalidade desse mercado, tal será fortemente potenciado se estas puderem operar com base em regras idênticas desenvolvidas a partir de uma matriz comum.

Julgamos adequadas as preocupações expressas de que os documentos fornecidos aos concorrentes no início do procedimento concorrencial, tenham um grau de desenvolvimento tal que obstem a que no final se contrate coisa diversa do que foi submetido ao mercado.

Questão essencial e raramente abordada tem a ver com a avaliação das consequências para a concorrência do prazo longo de vigência deste contratos.

Entendemos, por isso, que os próprios contratos devem prever, obrigatoriamente, os mecanismos da sua revisão quando esta se torna necessária por motivos exógenos ao projecto,a saber : as mudanças tecnológicas referidas mas também as variações demográficas ou outras.

Por outro lado, sendo cada um dos projectos concebido no pressuposto de que o seu equilíbrio se obtém num determinado período de tempo – o da vigência do contrato- deve limitar-se a possibilidade de prorrogação desse prazo, a qualquer título, para além de um limite razoável. Admitimos que tal possibilidade não deve ir além, no total, de 20% do prazo inicial, ressalvadas situações especiais devidamente caracterizadas.

Ponto 51 e 52

A questão da subcontratação, tal como é referida, é a demonstração da necessidade de assegurar todas as regras da concorrência na adjudicação das PPP's, sob pena de podermos estar a comprometer a viabilidade das empresas construtoras, nomeadamente de pequena e média dimensão.

Por outro lado pode ser razoável admitir que em contratos de PPP em que o valor dos contratos de construção ultrapassem determinados montantes (200 ME?) uma parte desses trabalhos (25%?) seja objecto de concursos públicos. No entanto, a assumir-se este caminho, deve ter-se presente que tal implicará uma menor atractividade do negócio para as empresas de construção e, ao mesmo tempo, uma maior incerteza nos preços.

Ponto 53 a 56

No caso das PPP institucionalizadas a principal preocupação é a de que a escolha do parceiro privado seja feita de forma transparente e através de procedimentos concorrenciais de participação universal.

Por outro lado, as entidades assim criadas, e por via da sua participação pública, não podem ter qualquer tipo de vantagens competitivas. O que nos leva a pensar que as entidades desta natureza apenas podem desenvolver as actividades que já desenvolviam no momento da sua criação, ou da sua transformação por entrada do parceiro privado.

Importa também ter presente que deve acautelar-se, nestes casos, que não estejamos perante meras operações de privatização parcial ou de tomadas de participação de capital. Pelo que tal implicará a definição de regras quanto a prazos, natureza e competências do parceiro privado e participação na gestão.

Ponto 57 a 64

Afigura-se-nos inaceitável que os Estados promovam a criação de entidades de capital misto com o objectivo de estas irem disputar concursos para atribuição de contratos públicos.

Parece-nos que é razoável admitir que os Estados entendam que determinadas actividades que devem ser desenvolvidas sob forma empresarial o sejam por empresas com participação pública maioritária, ou não. É uma decisão soberana dos Estados aplicável quer a actividades e empresas já existentes quer a empresas e actividades a criar.

A questão essencial é a decisão, necessariamente subsequente, de entender que os operadores económicos devem participar nessa empresa. É a concretização dessa decisão que deve ser feita, tal como se disse nos comentários aos Pontos 53 a 56, através de um procedimento concorrencial.

Ou seja, quando a PPP institucionalizada é criada, a entidade empresarial objecto da PPP é já titular do contrato que vai executar.

Ponto 65 a 69

O que parece aqui estar em causa é a realização de operações de privatização.

A ser assim nada têm a ver com PPP’s.

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Green Paper

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

[ref. Brussels, 30.4.2004: COM(2004) 327 final]

A Review

Introduction:

I have designed, structured and implemented private sector energy and infrastructure projects, both in the U.K. and most parts of the world, since 1975. I have also worked for extended periods for: (a) an investment bank; (b) a commercial lender; and (c) a development bank. Hence, I am well versed in the underlying features and project characteristics which lead to successful PPP's, as well as those that can lead to failure!! I now operate as an independent consultant in this field.

Commentary:

In general, I am concerned at the direction and focus of this Paper. My basic concerns are:-

1. The prime driver for governments to adopt Public-Private Partnerships ("PPP"'s) and generically similar structures is budget expenditure constraint. The desire to introduce competition into the provision of public services, greater efficiency in the delivery of such services, and innovation are, in reality, secondary objectives.

   All governments have an underlying responsibility to provide a range of public services. If funding is not an issue, then governments will provide such services themselves. This is the case in most rich countries. On the other hand, PPP offers those governments who are less well off to achieve the same objectives,.................................... but at a cost.

   One exception that could be cited is the USA, where many public services are provided by public-interest (i.e. not-for-profit) entities. However, those service providers in effect enjoy indirect governmental financial support and are highly regulated, so that from a financial perspective they represent government risk in the finality. Default has been rare indeed!

2. A second driver for governments to adopt PPP's is the possibility that the funding commitments that arise thereunder can be classified as 'off balance sheet'. Given that debt usually represents 80-90% of the PPP funding, this can be an attractive feature.

   In February 2004, the EU, under a Eurostat Decision, directed that those PPP's where:-

   (a) the private sector bears the construction risks; AND
   (b) the private sector bears at least one of either availability or demand risk,

   could be deemed to be 'off balance sheet' for the host government.

It is my considered view that these criteria do not go far enough. This view was also partly reflected by the IMF Paper on PPP's published in March 2004. Detailed analysis of many PPP's show that, when a PPP fails to perform, the public sector, i.e. government, invariably has to buy out the financiers, particularly lenders. This represents a significant contingent liability on the host government's balance sheet, which under the current Eurostat criteria would pass unnoticed. Similar circumstances as this arose in the collapse of Enron, World.com, etc.. A more detailed assessment as to the risks posed by PPP's is required for government accounting purposes.

3. The Green Paper focuses only on one aspect of PPP's, the pre-contractual phase, when issues of structure and procurement are being faced. However, PPP's are contractual arrangements which span 15-30 years, and the conduct after contract signing and financial close is ignored at one's peril. There is little point in laying down rules (viz. the Green Paper) for the architecture and purchase of the edifice, if all hell can be let loose inside the edifice once built!! Hence, the Green Paper is only a part response to an issue, and the Commission should recognise that.

4. The Green Paper particularly focuses on PPP procurement. However, there is growing confusion and lack of clarity as to what constitutes works/services contracts and public/private services. This Paper does little to clarify the position. Much of this is due to the use of the term "partnership" to represent a contractual relationship, which put to the test and in reality is adversarial. The concept of sharing gains and losses is alien to most PPP's. Secondly, there are many different interpretations and definitions within Member States as to what "PPP" represents. There are even differences of opinion within governments, e.g. the U.K.!!

   I would commend the EU to address and endorse the Procurement Guidelines prepared by the EBRD and World Bank, which express simply and clearly the procurement expectations of public and private sector projects funded by these institutions.

5. The fundamental rules of the EU Treaty include the need for PPP's to demonstrate:-

   - Equality of treatment;
   - Transparency
   - Proportionality
   - Mutual recognition.

   However, the very nature of PPP's are that they are less transparent than conventional procurement:-

   - The PPP concessionaire will be a 'Special Purpose Vehicle' (SPV), which has minimal equity capital and limited liability, i.e. the pure equity input will represent only 1-5% of the project costs, the balance of equity being made up from subordinated equity and shareholder loans;

   - The SPV will not be a 'high street name', and its annual report and accounts not readily accessible to the public, if at all. The SPV shareholders might even be located offshore for tax reasons;

   - The shareholders of the SPV will, most probably, not have to consolidate their investment in the SPV into their accounts. Hence, the costs and returns of the SPV, i.e. the PPP concession, will not be visible through parent company accounts;

- The government or government agency, who awarded the PPP and who will be contractually obliged to pay unitary payments, e.g. availability, through the life of the PPP concession, will have moved, via the PPP structure, the obligation to pay from the Capital to Current Account. Under many regimes, therefore, the expenditure on servicing the PPP becomes a current expenditure and effectively removed from sight.

- Finally, the incentive for both PPP shareholders and participants and for governments to be transparent is removed by PPP's!! SPV shareholders will not wish the public/taxpayer to know, or be able to assess, how much money they are making from investing in PPP's, and the governments will not wish to be open to criticism by the public and taxpayers for unwise investments. PPP's largely remove this possibility.

Conventional public asset procurement is much more transparent in comparison.

Unless the issue of transparency through all PPP project phases is tackled, PPP's will be open to hidden abuse and manipulation.

6. The Treaty also promotes the internal market and competition. However, in many ways PPP's have retarded progress towards competition.

   Experience over the last 10-15 years of PFI/PPP's in many sectors have shown the number of serious bidders are low, - sometimes lower than what many IFIs' would deem "competitive" under their procurement rules. Furthermore, in many instances the number of bidders is decreasing with time, as companies are reluctant to commit to the inherent, high up-front costs of the process.

   An additional negative impact of PPP's is that the adoption of PPP's has in some sectors, e.g. water, created private sector monopolies, which have to be heavily regulated if the public interest is to be protected.

   The inherent complexity of PPP's dictates against significant changes to this scenario in the future. The high up-front costs of PPP's determine for many companies and financiers a minimum PPP project value below which they will not express interest. Furthermore, there is a fixed up-front cost element applying for all PPP's, which is unavoidable. The result is that many companies, who are less well resourced, experienced and informed as to what are their rights and obligations under PPP projects, are tempted to enter the market, but are found wanting in the event, to the ultimate disadvantage of the public. Finally, experience has shown that when a new, small entrant to the PPP market is seen to be successful, it is often later swallowed up by one of its larger, PPP competitors!

7. There are significant differences in EU Member countries as to the underlying legal framework and practice relating to public/private sector projects and the normal conduct of companies. In the UK, Anglo-Saxon law allows for termination, bankruptcy, etc. of PFI/PPP concessionaires. The same does not necessarily apply in other EU Member States, who have different legal procedures in such circumstances.

   A good example, cited in the Green Paper, are the circumstances surrounding "step-in" rights. In any normal off-balance sheet project financing conducted by the private sector, lenders will insist on "step-in" rights in the event of failure to perform by the project owners. As lenders may be providing 50-90% of the funding, is this not reasonable, irrespective of anybody's procurement rules??

For the EU to place any limitations on such a procedure will be against all fundamental private sector project financing principles and deter the main private sector financiers (i.e. lenders).

It has been noted, however, that in some EU Member jurisdictions such "step-in" rights under PPP's may be constrained. This implies that some risk (and, therefore, contingent liability) is retained by the host government, limiting the "off balance sheet" nature of the transaction.

In the short-term, any prospect of convergence on these matters seems remote, if ever. Hence, the prospect of any meaningful EU-driven framework initiative for PPP's in this area is unlikely to succeed. Moreover it may confuse!!

8. The Green Paper fails to address issues of conflict of interest, both within bidding groups, concessionaires, PPP participants and advisers. Again, the EBRD and World Bank criteria on such issues have much to commend, in the absence of an EU alternative.

9. Another issue, upon which the Green Paper remains silent, is the topic of innovation, i.e. when a promoter presents a PPP scheme, which has not been the subject of a public bidding process, for adoption by the host government. The EU would be well advised to adopt the "Swiss Challenge"-type of procurement procedures in such circumstances, as have the IADB and ADB, so that PPP innovation can flourish.

10. The Green Paper has also not given consideration to the possible transfer or sale of PPP SPV shareholdings, which experience has shown often arises after a few years' PPP operations. In the same context, no consideration has been given to the potential desirability and impact of the development of a secondary equity market in PPP SPV shares.

    Such sales and transfers have both beneficial and negative impacts. On the one hand, the sale or transfer of SPV shares to third parties will broaden the investor interest and involvement in the financial markets for PPP ventures, increasing the overall availability of PPP equity. However, the withdrawal of a key PPP SPV partner at an early stage in a PPP project could weaken the operational strength of the PPP itself, reducing the possibility and opportunity for future operational innovation and efficiencies. Furthermore, the consumers, i.e. the public, will wish to know that the owner of any PPP, of whose services they avail themselves, has interests and aspirations in line with the public services provided, e.g. they are not casino owners!!.

    In some instances, host governments impose constraints on such transfers or sales, but the rules are not consistent. Some guidelines are preferable to none, if the public interest is to be protected.

Conclusion:

The consultation process for this Green Paper is in many ways admirable. However, it is a pity that the Commission has not felt bold enough to produce a draft Directive, to which one might comment or respond, rather than raise through a Green Paper some questions, whose relevance and inherent understanding of the topic of PPP many might question.

On reflection what is called for are:-

(a) A set of EU Procurement Guidelines, which are clear, readable, comprehensive, unambiguous and unequivocal, and which address the issues of public/private PPP-type structures, transparency, competition, and conflicts of interest; and

(b) Guidelines for the Good Governance of PPP's, covering transparency, accountability, the conduct of on-going PPP operations, and the inherent contingent liabilities of PPP's.

I fear that the Green Paper misses the target on both accounts.

T.M.Blaiklock
13/07/04

The Highland Council
Comhairle na Gaidhealtachd
SERVING The Highland Community

European Commission
C100 2/005
B-1049 BRUSSELS
Belgium

Your Ref:
Our Ref:
Date: 30 July 2004

Dear Sirs

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

I should be obliged if you would note, at the outset, that the views expressed in this letter are my personal views, as an experienced PFI / PPP practitioner, and may not necessarily represent the views of the Highland Council.

I welcome the current initiative which attempts to clarify and extend community law relating to Public-Private Partnerships.

I also welcome the recognition that it may be necessary to utilise a **competitive dialogue procedure** at the conceptual stage in order to formulate proposals that can be encapsulated within Output Specifications, and the like, at a later stage in the procurement process.

I particularly welcome the development of the concept of the **Institutional PPP** that will set out the legal framework for the establishment of an entity held jointly by both public and private sector parties. This will overcome the current difficulty that a public body has if it wishes to provide services to its private sector partner. The proposed arrangement would appear to make it possible for the public sector to provide services to the private sector should it be value for money to do so. This is important for local authorities such as the Highland Council as we provide a range of services to the general public, over a 26,500 sq. km. area, and where there may be a shortage of private sector organisations capable of delivering an efficient service in a cost-effective manner.

The new arrangement will ensure that the European Union's rules on **Public Procurement** for **Public-Private Partnerships** will apply to **Joint Ventures** thereby ensuring consistency of approach and transparency of procurement and operation. The proposals will also give greater flexibility to the procurement approaches adopted by the Highland Council.

I hope these comments are of some assistance.

Yours faithfully

Alister W. Coutts

Dr Alister W Coutts
Director of Property & Architectural Services
& PPP Projects Director

Dear Sir,

May I make some observations on your Green Paper on PPP? They are at quite a high level, and there are in addition many other detailed points which can be made but would be appropriate for a document covering best practice.

- The primary objective of a PPP should be VFM - getting the best value for public money. Objectives such as effective competition and legal clarity should have subsidiary roles - they both exist to help achieve the best course of public action. [paragraph 7 & others]

- The public sector should determine its best strategy according to its business case for each of the options it faces. Within its political constraints, each PPP decision it makes should have a financial basis for selecting an option. [paragraph 7 & others]

- The emphasis should be on deals, not rules. In arriving at the best deal, public sector negotiators should have maximum flexibility and minimum constraints, and be supported by guidelines and best practise. [paragraph 31]

- Before the concession is contractually agreed, public sector control is exercised by the procurement process, including the type and degree of competition needed in the public interest. After the concession is contractually agreed, public sector control is defined by the concession contract itself. [paragraph 22]

- In the UK, we tend to mix the definitions of PPP and PFI. Many contracts provide both a direct service to the public as well as an infrastructure service to a public authority. [paragraphs 22 & 23]

I hope these points are useful.

With best regards,

David Iron
PPP/PFI Adviser
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UK
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ANNEX 2: LIST OF AFG MEMBERS AND MEMBERS OF THE BOARD OF DIRECTORS

(AFG members belonging to the board of directors are indicated in bold)

123 VENTURE
A PLUS FINANCE
A2 GESTION
AAZ FINANCES
ABC ARBITRAGE ASSET MANAGEMENT
ABN AMRO CAPITAL France
ACER FINANCE
ACOFI GESTION
ACTIGEP SA
ADDAX ASSET MANAGEMENT
ADEQUATION FINANCE
ADI - ALTERNATIVE INVESTMENTS
AESOPE GESTION DE PORTEFEUILLES
AFORGE GESTION
AGF ALTERNATIVE ASSET MANAGEMENT
AGF ASSET MANAGEMENT
AGF PRIVATE EQUITY
AGICAM
AGILIS GESTION S.A
AGRICA EPARGNE
ALBION ASSET MANAGEMENT SAS
ALCIS GESTION
ALCYONE FINANCE
ALIS CAPITAL MANAGEMENT
ALTERAM
ALTERNATIVE LEADERS France SA
ALTIGEFI
ALTIVIE ASSET MANAGEMENT France
ALTO INVEST
AMIRAL GESTION
ANTELMA ASSET MANAGERS
AQTIS - Advanced Quantitative Technical Investment Services
ASSET ALLOCATION ADVISORS
ATHENA GESTION
ATLAS GESTION
AUREL LEVEN GESTION
AUREUS CAPITAL
AVENIR FINANCE INVESTMENT MANAGERS
AVIVA GESTION D'ACTIFS
AXA GESTION FCP
AXA INVESTMENT MANAGERS PARIS
AXA INVESTMENT MANAGERS PRIVATE EQUITY EUROPE
BANQUE D'ESCOMPTE ASSET MANAGEMENT
BARCLAYS ASSET MANAGEMENT FRANCE - B.A.M.F.
BAREP ASSET MANAGEMENT
BARING ASSET MANAGEMENT France
BBR ROGIER
BBS FINANCE
BDF-GESTION
BDL CAPITAL MANAGEMENT
BFT GESTION
BFT GESTION 2
BLC GESTION
BMG ASSET MANAGEMENT
BNP PARIBAS ASSET MANAGEMENT
BOISSY GESTION
BOOMERANG ASSET MANAGEMENT
BORDIER GESTION PRIVEE
BOUSSARD & GAVAUDAN GESTION
BOUVIER GESTION
BPSD GESTION
BRYAN GARNIER ASSET MANAGEMENT
CAIXA GESTION SNC
CAP WEST EQUITIES
CAPITAL FUND MANAGEMENT
CARDIF ASSET MANAGEMENT
CARDIF GESTION D’ACTIFS
CARMIGNAC GESTION
CAVA GESTION
CCR ACTIONS
CCR CHEVRILLON PHILIPPE
CCR GESTION
CDC ENTREPRISES VALEURS MOYENNES
CEDEFONDS
CEREA GESTION
CFD CAPITAL MANAGEMENT
CFM : CORTAL CONSORS FUND MANAGEMENT
CHAMPEIL ASSET MANAGEMENT
CHAUSSIER GESTION
CIC NORD OUEST GESTION
CIC OUEST GESTION
CITCO FUND ADVISORS
CLARESCO FINANCE
CLARESCO GESTION
CM - CIC ASSET MANAGEMENT
COGEFI GESTION
COMGEST SA
CONSEIL PLUS GESTION -CPG
COPAGEST FINANCE
COSMOS GESTION PRIVEE
CPR ASSET MANAGEMENT
CRAIGSTON FINANCE
CREDIT AGRICOLE ALTERNATIVE INVESTMENT
PRODUCTS GROUP - CA AIPG
CREDIT AGRICOLE ASSET MANAGEMENT (CAAM)
CREDIT AGRICOLE PRIVATE EQUITY
CREDIT AGRICOLE STRUCTURED ASSET MANAGEMENT (CASAM)
CREDIT LYONNAIS EUROPEAN FUNDS - C.L.E.F
CREDIT MUTUEL OCEAN GESTION
CREDIT SUISSE (France) GESTION PRIVEE
CREDIT SUISSE ASSET MANAGEMENT (France) SA
CREDIT SUISSE ASSET MANAGEMENT GESTION
CYRIL FINANCE AM
DELUBAC ASSET MANAGEMENT
DEXIA ASSET MANAGEMENT
DNCA FINANCE
DOLFI FINANCE
DORVAL FINANCE
DTAM
DUBLY DOUILHET GESTION
DWS INVESTMENTS
E.F.A.E.
ECOFI INVESTISSEMENTS

ECUREUIL GESTION
ECUREUIL GESTION FCP
EDELWEISS GESTION
EDMOND DE ROTHSCHILD ASSET MANAGEMENT
EDMOND DE ROTHSCHILD MULTI MANAGEMENT
EFIPOSTE GESTION
EGP FONDS ET GESTION
EIM (France) SA
ELIGEST SA
EQUIGEST
EST GESTION
ETOILE GESTION SNC
EULER HERMES SFAC ASSET MANAGEMENT
EUROPANEL RESEARCH AND ALTERNATIVE ASSET MANAGEMENT
EUROPEENNE DE GESTION PRIVEE
EXANE STRUCTURED ASSET MANAGEMENT
FEDERAL FINANCE GESTION
FEDERIS GESTION D'ACTIFS
FI SELECT MULTIGESTION
FIDELITY GESTION
FINADOU - Financière de l'Adou
FINALTIS
FINAMA PRIVATE EQUITY SA
FINANCE SA
FINANCE SA GESTION PRIVEE
FINANCIERE ARBEVEL
FINANCIERE CENTURIA
FINANCIERE CENTURIA ASSET MANAGEMENT
FINANCIERE DE CHAMPLAIN
FINANCIERE DE L'ECHIQUIER
FINANCIERE GALILEE
FINANCIERE LAMARTINE
FINANCIERE VAN EYCK
FINCAPITAL
FININFOR & ASSOCIES MULTIGESTION
FINOGEST
FIVAL SA
FLINVEST
FONDS D'INVESTISSEMENT DE BRETAGNE
FONGEPAR GESTION FINANCIERE
FONTENAY GESTION
FORTIS INVESTMENT MANAGEMENT FRANCE
FRANCHE-COMTE PME GESTION
FRANKLIN TEMPLETON ASSET MANAGEMENT
GEA - GESTION EQUILIBREE ALTERNATIVE
GEFOLOR
GENERALI FINANCES
GENERALI GESTION
GEORGE V ASSET MANAGEMENT
GERER CONSEIL
GESMOB SA
GESTEPARGNE
GESTION BTP
GESTION FINANCIERE PRIVEE
GESTION PRIVEE INDOSUEZ
GESTION SA
GESTION VALOR
GESTOR FINANCE GESTION
GESTYS
GIFAO INVESTISSEMENT
GLOBAL GESTION
Go .Fx² ASSET MANAGEMENT
GPK FINANCE
GRIGNAN CAPITAL GESTION
GROUPAMA ALTERNATIVE ASSET MANAGEMENT
GROUPAMA ASSET MANAGEMENT
GROUPAMA GESTION
GSD GESTION
GSO FINANCE
GT FINANCE
HAAS GAIGNAULT ET ASSOCIES
HAREWOOD ASSET MANAGEMENT
HDF FINANCE
HF ALTERNATIVE INVESTMENTS
HGL GESTION
HMG FINANCE SA
HOGEP
HOSTA.FI
HR GESTION
HSBC FCP (France)
HSBC INVESTMENTS (France)
HSBC MULTIMANAGER EUROPE
I.DE.A.M
ING INVESTMENT MANAGEMENT (France)
INNOVEN PARTENAIRES SA
INTER EXPANSION
INTERNATIONAL CAPITAL GESTION
INVESCO ASSET MANAGEMENT
INVEST ASIA ASSET MANAGEMENT
INVEST IN EUROPE
INVESTISSEURS DANS L'ENTREPRISE
IRIS FINANCE
ISKANDER
IT ASSET MANAGEMENT
IXIS ASSET MANAGEMENT
IXIS PRIVATE CAPITAL MANAGEMENT
J. de DEMANDOLX GESTION SA
JCL FINANCE
JOHN LOCKE INVESTMENTS
JOUSSE MORILLON INVESTISSEMENT
JP KLEIN INVESTISSEMENT S.A.
JP MORGAN STRUCTURED FUND MANAGEMENT
KBL FRANCE GESTION
KEREN FINANCE
KMS GESTION
L2S CAPITAL
LA FRANCAISE DES PLACEMENTS GESTION PRIVEE
LA FRANCAISE DES PLACEMENTS INVESTISSEMENTS
LA MONDIALE GESTION D'ACTIFS
LAZARD FRERES GESTION
LEGAL AND GENERAL ASSET MANAGEMENT France
LILLE GESTION
LMBO
LOMBARD ODIER DARIER HENTSCH GESTION
LOUVRE GESTION
LYON GESTION PRIVEE
LYXOR ASSET MANAGEMENT
LYXOR INTERNATIONAL ASSET MANAGEMENT
MAAF GESTION SA
MACIF GESTION
MAGENTA PATRIMOINE SA
MALMY GESTION
MARIGNAN GESTION
MARTIN MAUREL GESTION
MARTIN MAUREL GESTION INSTITUTIONNELLE
MASSENA FINANCE GESTION
MATIGNON FINANCES
MCA FINANCE
MEESCHAERT ASSET MANAGEMENT
MEESPIERSON FORTIS PATRIMOINE
METROPOLE GESTION
MICHAUX GESTION
MIRABAUD GESTION
MMA FINANCE
MODELES ET STRATEGIES

MONAM
MONETA ASSET MANAGEMENT
MONTE PASCHI INVEST (France)
MONTPENSIER FINANCE
MONTSEGUR FINANCE
MULTIFONDS
MW GESTION
NATEXIS ASSET MANAGEMENT
NATEXIS ASSET SQUARE
NATEXIS EQUITY MANAGEMENT
NCI GESTION
NEUFLIZE ARBITRAGE
NEUFLIZE GESTION
NEUFLIZE PRIVATE ASSETS
NEVILLE GESTION
OBC GESTION
ODDO ASSET MANAGEMENT
ODYSSEE VENTURE
OFIVALMO CAPITAL
OFIVALMO GESTION
OFIVALMO PALMARES
OFIVALMO PATRIMOINE
OLYMPIA CAPITAL GESTION
OLYMPIA CAPITAL MANAGEMENT
OPPORTUNITE S.A.
OPTIGESTION
OPTIMUM GESTION FINANCIERE
ORSAY ASSET MANAGEMENT
ORSAY GESTION
OUDART GESTION
OVERLAY ASSET MANAGEMENT
PAI PARTNERS
PALATINE ASSET MANAGEMENT
PARIS LYON GESTION
PARUS FINANCE
PASTEL & ASSOCIES
PATRIMOINES & SELECTIONS
PATRIVAL
PERGAM FINANCE SA
PHILIPPE GESTION
PHILIPPE PATRIMOINE
PHITRUST FINANCE
PIM GESTION FRANCE
PLATINIUM GESTION
PORTZAMPARC GESTION
PRADO EPARGNE GESTION
PRAGMA CAPITAL
PRIGEST
PRIM' ALTERNATIVE INVESTMENT
PRIME CAPITAL
PROMEPAR GESTION
PROTIS GESTION
PROVALOR
PYTHAGORE INVESTISSEMENT BP
QUARTUS GESTION
QUILVEST & ASSOCIES GESTION PRIVEE
QUILVEST GESTION PRIVEE
RAYMOND JAMES ASSET MANAGEMENT INTERNATIONAL
RENE ABALLEA FINANCE SA
REYL et COMPAGNIE (France) SAS
RFS GESTION
RHONE ALPES PME GESTION
RHONE GESTION
RHONE LOIRE + X GESTION
RICHELIEU FNANCE GESTION PRIVEE
RIVOLI FUND MANAGEMENT
ROBECO A.M.
ROBECO GESTIONS
ROCHE-BRUNE SAS
ROTHSCHILD ET CIE GESTION
ROTHSCHILD GESTION
ROUVIER ASSOCIES
SAGARD SAS
SAINT OLIVE et CIE
SAINT OLIVE GESTION
SAPHIR CONCEPT SA
SARASIN EXPERTISE AM
SCHELCHER PRINCE GESTION
SEDEC FINANCE
SEI INVESTMENTS (France)
SERVEPAR
SGAM INDEX
SGI MANAGEMENT
SHANTI GESTION
SIGEFI NORD GESTION
SIGEFI PRIVATE EQUITY
SIGEFI VENTURES GESTION
SINOPIA ASSET MANAGEMENT
SINOPIA SOCIETE DE GESTION
SMA GESTION
SOCIETE D'ANALYSES ECONOMIQUES ET FINANCIERES (SAEF)
SOCIETE D'ETUDES ET D'ASSISTANCE - S.E.A.
SOCIETE GENERALE ASSET MANAGEMENT - S.G.A.M.
SOCIETE GENERALE ASSET MANAGEMENT ALTERNATIVE INVESTMENTS
SOCIETE PARISIENNE DE GESTION
SOCIETE PRIVEE DE GESTION DE PATRIMOINE
SOCIETE PRIVEE DE GESTION ET DE CONSEIL
SOGEPOSTE
SOMANGEST-VESIGEST
SORIA FINANCE
STATE STREET GLOBAL ADVISORS France
STELPHIA ASSET MANAGEMENT
STRATEGE FINANCE SA
SUD EST GESTION
SWAN CAPITAL MANAGEMENT
SWISS LIFE ASSET MANAGEMENT (France)
SYCOMORE ASSET MANAGEMENT
SYCOMORE GESTION PRVEE
SYSTEIA CAPITAL MANAGEMENT
TANGUY ACTIONS BOURSE
THIRIET GESTION
TOCQUEVILLE FINANCE
TRANSATLANTIQUE FINANCE
TRINOVA GESTION
TRUSTEAM FINANCE
TURENNE CAPITAL PARTENAIRES
UBS GLOBAL ASSET MANAGEMENT (France) SA
UI GESTION SA
ULYSSE PATRIMOINE
UNIGESTION ASSET MANAGEMENT (FRANCE) SA
UNION BANCAIRE GESTION INSTITUTIONNELLE (FRANCE)
VERMEER ASSET MANAGEMENT
VIVERIS MANAGEMENT SAS
VP FINANCE GESTION
YVES LEVEN CAPITAL
ZARIFI GESTION

ANSWERS

TO THE CONSULTATION ON

EUROPEAN COMMISSION

GREEN PAPER ON THE ENHANCEMENT OF THE EU FRAMEWORK

FOR INVESTMENT FUNDS

15 November 2005

General assessment

The Italian Banking Association (ABI), with over 800 member banks, represents the entire Italian banking industry. Generally speaking, we agree with the analysis set out in the Commission Green Paper on the Enhancement of the EU Framework for Investment Funds. In particular, Italian banks concur on the need to devise a series of measures to foster the development of the European investment fund industry based on the legislation currently in place.

Directives 2001/107/EC ("UCITS II") and 2001/108/EC ("UCITS III"), supplementing Directive 1985/611/EC ("UCITS I") have only been in force for just over a year, so their impact on the state of the investment fund industry cannot yet be adequately gauged.

Moreover, the supervisory approach of national authorities in interpreting and implementing UCITS directives is very different, so that it is premature to adopt a new directive as provided by the Lamfalussy procedure, a principle-driven one, until we have to achieved real convergence in supervisory approaches between EU Member countries.

Rather than a full legislative revisitation of asset management, which would be lengthy, complicated, and hence of dubious cost/benefit value, what is needed, in our view, is a series of initiatives to overcome, in the short term, the main problems in implementing the amended UCITS directive, which largely coincide with those indicated in the Green Paper, and -- in the medium to long term -- to foster a common regulatory approach on some key general matters, including products that substitute for investment funds (unit-linked insurance policies and structured products), hedge funds and private equity funds.

Changes to existing legislation -- Priority actions

Q1: Will the above initiatives bring sufficient legal certainty to the implementation of the Directive?

The initiatives designated as priority actions in the Green Paper -- i) eliminating the uncertainty surrounding the recognition of funds launched during the transition from UCITS I to UCITS III; ii) simplifying the notification procedure for passporting funds; iii) implementing the Commission's Recommendations on the use of derivatives and the simplified prospectus to improve risk management standards and fee transparency; iv) further clarifying the definition of eligible assets -- certainly reduce the areas of uncertainty that now exist, due to the differing ways in which national authorities have interpreted and implemented the UCITS directive in national law and regulations.

We therefore agree on the need for the swiftest possible completion of the work that the Commission and the CESR have begun on these issues, so as to hasten the transition from mere recommendations to legally binding provisions.

However, these initiatives are not sufficient to guarantee legal certainty to the implementation of the directive. Further initiatives are also needed (see answer to the Q2 below).

Q2: Are there additional concerns relating to day-to-day implementation of the Directive which need to be tackled as a priority?

In our view there are at least three problems in implementation that require priority action and that the Green Paper must accordingly mention.

1. First, we urgently need solutions, and pragmatic ones, to spur convergence among the supervisory approaches of different national authorities. These are particularly distant today, among other things because in some Member States UCITS are traditionally designed almost exclusively for marketing abroad, and those States are thus less interested than others in providing adequate investor protection. Typical here is Luxembourg, which despite its limited pool of resident investors sells units of a large number of UCITS in other EU Member States.

In our view, the CESR should adopt procedures for:

- sufficiently frequent periodic verification of the persistent gap in supervisory approaches within the EU;
- publicizing the outcome of the verifications;
- devising appropriate case by case solutions to narrow the gap.

Where solutions appear most urgently needed is on the prospectus, which even in the simplified form of Directive 2001/107/EC has differing content in different States.

2. Second, there is an aspect concerning the funds rules, which are mentioned in Articles 28 and 29 of the UCITS directive but left entirely up to national law. This state of affairs, together with the fact that under the directive the issuer can leave out of the complete prospectus information that is given in the fund rule and not attach the rule to the prospectus, means that in practice the information and contractual documentation of UCITS is anything but uniform.

The areas in which uniformity of information on fund rules are most necessary are:

- the way in which investment limits are set out;
- the thresholds of tolerance/irrelevancy of error in calculating unit values, which are sometimes envisaged in the regulations of individual Member States but for the most part are not specified.

In this regard, an initiative (e.g. a Recommendation) is needed to harmonize the modes for setting out both investment limits and any threshold of irrelevancy of error in calculating the value of the unit adopted by funds rules in conformity with national regulations.

3. Finally, in line with actions on eligible assets, let us stress the need for a Recommendation to harmonize the rules on securities lending by UCITS in order to foster convergence on ceilings for such operations and on the use of the proceeds.

Making better use of the current legislative framework

Q3: Would an effective management company passport deliver significant additional economic advantages as opposed to delegation arrangements? Please indicate sources and likely scale of the expected benefit.

In our view an effective management company passport may be more effective than delegation arrangements, given that it would eliminate or at least reduce resort to delegation, which implies that some activities performed by third parties also in other Member States are controlled, at least, by the management company.

The advantages, however, depend on the solutions adopted to ensure that the management company interacts with the supervisory authorities in the States where the funds are instituted.

Thus we agree on the desirability of an effective management company passport, but we should like to emphasize that rules are needed for the appropriate subdivision of supervisory tasks on management companies between the competent authorities of the different Member States.

The Commission, with the CESR's support, should therefore draft an initial proposal, highlighting the advantages and disadvantages of the main features in connection with the effective management company passport.

Q4: Would the splitting of responsibility for the supervision of the management company and the fund across jurisdictions give rise to additional operational risks or supervisory concerns? Please describe sources of problem and steps that would have to be taken to manage such risks effectively.

We do not think that the splitting of responsibility raises any special problems, even for operational risks, provided that the rules for the division of competence and the operational procedures for their implementation are clearly defined.

The fact remains that the purpose of the management company passport is to foster efficiency in the European investment fund industry without jeopardizing investor protection, which is one of the distinctive features of UCITS, and that this point must be taken into account in defining the above-mentioned rules.

Q5: Will greater transparency, comparability and attention to investor needs in fund distribution materially enhance the functioning of European investment fund markets and the level of investor protection? Should this be a priority?

Distribution is certainly essential to the investment fund industry. The distribution network is responsible for relations with investors both in initial subscription and subsequently, when investors may want to switch or redeem their units. Depending on the sales policy of the distribution intermediaries themselves, this activity may involve group or third-party UCITS, both Italian and foreign, and may be remunerated by remission of management fees by management companies.

The idea of fostering transparency in the costs of distribution and clarifying the applicable conduct of business rules is a good one, considering that it is in line with recent choices on the part of the Italian supervisory authorities.

Nevertheless, in our view a number of aspects relevant to framing future EU initiatives properly, need to be cleared up at the outset:

- the indication of information on distribution network costs must be: i) readily comprehensible to investors and consistent with the criteria used in remitting management fees to distributors, which generally have incentive mechanisms, with differentiated rates depending on the number of units sold in a given period (often, quarterly); ii) regulated in order to avoid distortions, which would be the risk if the cost of each single distributor had to be indicated: iia) when management companies use the distribution network of a third party this could result in moving to the maximum remitting rate, once it is clear what the limit is; iib) when distribution networks market many asset management products, that they may offer them without indicating the distribution cost. As a consequence concise, synthetic ways of showing these costs must be found. In Italy, considering the technical and commercial problems with such indication, the new rules require that the simplified prospectus specify the average management fee remitted to salesmen;

- the best forum for displaying this "synthetic" information would appear to be the simplified prospectus, which should be supplemented accordingly, especially for UCITS marketed in more than one Member State, considering that every State will have a different distribution network and hence a different cost;

- rules of conduct for salesmen must be consistent with the provisions of the MiFID on investment services. The distribution of investment fund units, in fact, can be classed as part of the service of placement of financial instruments, and as such is subject to MiFID and the implementing measures now being issued on placement services. From this standpoint, the rules applying to the sale of UCITS need to be specified as regards:

  a. suitability*,* considering that orders to buy and to redeem UCITS units (as non-complex instruments) could be deemed eligible for execution without assessment of suitability (*execution only*);

  b. the information that the salesman must give to the investor;

  c. advice, specifying in particular that this is not part of the marketing service but is to be considered as the investment service of "providing investment advice".

Q6: Will clarification of "conduct of business" rules applying to firms which retail funds to investors contribute significantly to this objective? Should other steps (enhanced disclosure) be considered?

Certainly clarification of the conduct of business rules applying to firms selling funds to investors is needed, in order to bring about convergence of supervisors' approaches in different countries and thus foster a level playing field. See, therefore, the answer to Question 5.

Q7: Are there particular fund-specific issues that are not covered by ongoing work on detailed implementation of MiFID conduct of business rules?

The specificity of investment funds is the lack of a clear perception in all Member States, today, of:

- the fact that distribution is an investment service;
- the role of distributors in the interval between sale and subsequent orders by investors (redeem, buy new units or new segments, switch to other funds).

Accordingly, we think that once the MiFID implementing measures are passed the CESR must clarify the specific modes of application to distribution of UCITS.

Long-term actions

For industry efficiency

Q8: Is there a commercial or economic logic (net benefits) for cross-border fund mergers? Could those benefits be largely achieved by rationalisation within national borders?

Cross-border fund mergers need to be favoured, because they can generate specific scale economies, as the resulting product will be marketed in various States. Isolated instances of mergers have occurred, but they turn out to be highly complex and not even always possible, because of the constraints of national laws (in particular, fiscal treatment).

From this perspective, Italian banks consider that the Commission should undertake specific surveys to identify the present impediments to cross-border mergers and on this basis, within the CESR as well, conduct a discussion on possible solutions.

The industry attaches great importance to such an initiative.

Q9: Could the desired benefits be achieved through pooling?

Theoretically, fund pooling could produce economies of scale in management. In our view, however, the risks (of which the background document to the Green Paper gives examples) -- circumvention of the investment ceilings on individual pooled funds and, especially when funds are governed by different national laws, of problems in division of responsibility for investment decisions -- substantially outweigh the benefits and do undermine the level of investor protection of the funds.

Q10: Is competition at the level of fund management and/or distribution sufficient to ensure that investors will benefit from greater efficiency?

The investment fund industry architecture is already open in terms of competition between management and distribution companies, as is shown especially in some countries by:

- the increasing sales of foreign fund units. In Italy, for instance, the number of domestic funds (1623) is much lower than that of foreign funds whose units are marketed (3183);
- banks' offer of third-party investment funds.

Achieving benefits in terms of efficiency for investors implies the adoption of all the measures described in our answers to the preceding questions.

Q11: Which are the advantages and disadvantages (supervisory or commercial risks) stemming from the possibility to choose a depositary in another Member State? To what extent does delegation or other arrangements obviate the need for legislative action on these issues?

Passport for depositaries are a long-run objective, and in any event one that can be pursued only on condition that roles, responsibilities and requirements are strictly harmonized. To introduce the passport without harmonization of the rules governing depositaries would introduce market-distorting arbitrage between national rules.

Harmonization is thus a prerequisite to a depositary passport in order to ensure cost reductions, a level playing field for depositary banks and an equal level of investor protection.

Today, focusing on the costs of depositaries is misleading, insofar as these costs are different and proportional, in each Member State, to the activities depositaries are required to perform under national law.

1. Let us recall that there are major differences in the approaches of the various Member States in this field, some of which are mentioned by the Comunication from the Commission on "Regulation of UCITS depositaries in the member States: review and possible developments" (30 march 2004). They may have different provisions concerning:

- who is allowed to act as depositary;
- the level of responsibility in calculating the value of units and the conduct of controls, the custody of financial instruments and of funds' liquidity, as well as checks on the legitimacy of instructions from management companies.

Moreover, the idea that instituting a European passport for depositary banks is a way of achieving economies of scale and thus reducing costs for investment funds needs careful analysis. The passport would allow depositary banks to centralize a number of operations in a single State, and thus reduce costs. But it would not remove the need for the depositary to comply with the regulations of the various States in which it performs its activity. The complexity of the organization that the bank would have to create to meet the specific requirements of national regulations could perceptibly diminish scale economies.

2. The existing differences between national regulations on depositaries reflect the divergent approaches on investor protection, and they mean that the service offered by the depositary differs from one country to another, and so therefore does the cost.

3. Soon the extension of the categories of financial instrument in which UCITS can invest under Directive 2001/108/EC, such as OTC derivatives and non-harmonized investment funds, such as closed-end and hedge funds, will make UCITS business more complicated, which implies a greater involvement of the depositary bank in investor protection.

4. From another standpoint, future rules changes will have to redefine the role of depositary banks as regards verification of legitimacy in executing asset management companies' instructions, which must be separate from the liquidation of the instructions in the regulated market. This necessity follows from the growing complexity of investment techniques and from the evolution of settlement systems.

Q12: Do you think that on-going industry-driven standardisation will deliver fruit within reasonable time-frames? Is there any need for public sector involvement?

As long as the directive is differently interpreted and differently implemented depending on country, standardization will be hard to achieve. To make industry-driven standardization possible, we must eliminate those interpretative and implementing differences by increasing convergence in supervisory approaches and where possible legally binding provisions.

Q13: Does heavy reliance on formal investment limits represent a sustainable approach to delivering high levels of investor protection?

Formal investment limits certainly represent an effective way to guarantee high levels of protection for retail investors. For institutional and professional investors as defined in MiFID, however, multiple limits constitute an unwarranted rigidity. Therefore, in order to favour the growth and innovation of UCITS, it might be helpful to differentiate the investment limit regime depending on whether the funds' are designed for the general run of investors or for special categories.

Q14: Do you think that safeguards -- at the level of the management company and depositary -- are sufficiently robust to address emerging risks in UCITS management and administration? What other measures for maintaining a high level of investor protection would you consider appropriate?

The safeguards envisaged in the UCITS directive are sufficient to deal with the new risks stemming from innovation in investment techniques, on condition that there is convergence on the way the various safeguards are interpreted and implemented: eligible assets, depositary bank, internal control systems with special reference to techniques for monitoring financial and operational risks.

Competition from substitute products

Q15: Are there instances resulting in a distortion of investor's choice that call for particular attention from European and/or national policy-makers?

Investment funds face competition from some substitutes that enjoy less strict rules on information transparency for investors, such as certain structured products and unit-linked insurance policies. This distorts competition and lowers the level of investor protection.

In our view, therefore, there is a need to begin a process, which may well be medium term, to overcome this regulatory disparity.

The European market in alternative investments

Q16: To what extent to problems of regulatory fragmentation give rise to market access problems which might call for a common EU approach to a) private equity funds; b) hedge funds and funds of hedge funds?

Some Member States have passed specific rules for hedge funds, including those structured as funds of funds, but taking totally different approaches depending on the priority assigned to investor protection. The result is fragmented regulation and national barriers that prevent an enhancement of the European industry in these alternative investment products.

We accordingly consider it necessary to begin a process of convergence in regulatory approach, but limited to a few especially important issues for investors (such as the minimum subscription threshold and information requirements).

Q17: Are there particular risks (from an investor protection or a market stability perspective) associated with the activities of either private equity or hedge funds which might warrant particular attention?

The Italian banking industry believes that in any Community regulatory initiatives the main focus must be on informational transparency on the risks associated with private equity and hedge funds (typically, volatility and liquidity risk).

Q18: To what extent could a common private placement regime help to overcome barriers to cross-border offer of alternative investments to qualified investors? Can this clarification of marketing and sales process be implemented independently of flanking measures at the level of fund manager, etc.?

A common placement regime could certainly help to reduce the fragmentation currently characterizing the European private equity and hedge fund industry. However, action in this sphere must be undertaken jointly with action on the other issues of specific relevance for these types of fund (see answer to Q16).

Modernizing UCITS law?

Q19: Does the current product-based prescriptive UCITS law represent a viable long-term basis for a well-supervised and integrated European investment fund market? Under what conditions, or at what stage, should a move toward principle-drive, risk-based regulation be contemplated?

As matters now stand, in our view it is premature to try to assess the effective ability of UCITS law to sustain the development of European investment funds in the long run. To be able to institute principle-driven legislation we would first have to achieve real convergence in supervisory approaches between EU Member countries and complete the priority short-term actions of CESR and Commission.

ASSOGESTIONI
associazione del risparmio gestito

Milan, 15 th November 2005

Mr. Alexander Shaub
Director General
DG Internal Market and
Service
European Commission
Markt-consult-
investmentfund@cec.eu.int

Prot. N. 829/05

Dear Mr Shaub,

Assogestioni, the Italian Association of the Investment Management Industry, appreciates the Commission's initiative and is glad to participate in the consultation on the Green Paper concerning the strengthening of the legal framework relating to investment funds in the European Union.

Assogestioni represents one of the largest investment management industries in Europe and its members include Italian investment management companies of both banking and insurance affiliation as well as independent companies, the main foreign management companies operating in Italy, investment firms and banks offering portfolio management services and pension funds.

At the end of August 2005 its 226 members managed, as segregated portfolios and collective investment schemes, around 1,016 billion euro.

Assogestioni is a member of EFAMA (European Fund and Asset Management Association) and EFRP (European Federation of Retirement Provision).

Assogestioni has worked in close collaboration with EFAMA, and broadly supports EFAMA’s position, with particular regard to the short-term priorities. Therefore, in our considerations we will keep to the matters that are more specifically of interest to members of Assogestioni.

We are at your disposal for any further information and we look forward to contributing to the future regulatory work of the Commission.

With kindest regards,

Director General

Fabio Galli

A. GENERAL ASSESSMENT

Our preliminary considerations will cover 4 main topics:

1) the future leading role of the Commission;
2) the broader landscape of investment products regulation;
3) the case for further harmonisation;
4) the long term view.

A.1 The leading role of the Commission

The aim of the Green Paper is to analyse the structure of the investment management industry, with particular regard to UCITS, and to assess the regulatory changes needed to improve its efficiency and competitiveness, to the benefit of both investors and management companies.

We believe that an open and extensive consultation by means of a Green Paper, while representing an excellent first step, must necessarily lead to a conclusive assessment under the Commission's leadership. Indeed, we advocate that, in a complex and fragmented environment, where a vast number of issues and stakeholders might have divergent views, the Commission should take it upon itself to steer the legislative process in accordance with well identified guidelines.

A.2 The broader landscape of investment products regulation

While sharing most of the premises evoked by the Commission, we wish to emphasize that the elements of inefficiency identified are in many cases attributable to the market structure and to the regulation of related sectors, particularly the banking and insurance sectors, whose role in distributing investment funds and/or producing substitute investment instruments is also decisive for the level of competition in the investment management industry. Thus the inefficiencies that the Green Paper intends to analyse should be assessed in the wider framework of the regulation of financial, banking and insurance intermediaries, comparing the regulatory framework of investment management companies to that of other players involved in the distribution and production of substitute investment products.

Should that not be the case, there would be a significant risk of introducing costly and complex regulatory changes that would be of little effect or, even worse, that might lead to a worsening of the competitive landscape.

By way of example, investment flows in the cross-border retail market are in many cases determined by the distribution policies of banks and other authorised intermediaries; in a number of cases distribution policies are more important than the individual client’s decision-making process. In this sense, flows of investment fund subscriptions are often determined by the practices of distributors, hence regulation of distributors could be more relevant than the regulatory system governing investment management companies.

A.3 The case for further harmonisation

Assogestioni believes that harmonisation of new types of funds should be assessed with the aim of allowing retail access to techniques and types of investment which could provide for better diversification, better risk spreading and return improvement. Such investment classes would otherwise remain the reserve of high market segments, such as private banking or institutional investors, to the detriment of the smaller investor.

In addition, there is no evidence that harmonisation pre-empts or affects the development of non-harmonised products. In fact, harmonisation can be conducive of a higher level of trust and protection among both retail and institutional investors. Should harmonisation crowd out non-harmonised products, that would be a market response to the benefit of regulation.

Harmonisation has already proven to be a strengthening factor for the whole European investment industry, which has remained largely unaffected by frauds and malpractices and has consequently been able to market the UCITS label worldwide. Such an approach could be extended to other types of funds to the benefit of the competitiveness of the European industry.

A.4 The long term view as the way forward

There is ample evidence of the fact that resolution of the majority of the so called priority matters, as identified by the Green Paper in the chapter “Making existing legislation deliver”, is already underway with the assistance of the CESR in the ordinary revision procedure and will only need the next 12 to 18 months for a satisfactory resolution.

It is therefore vital that the Commission commits itself on the matters referred to under chapter 3 (“Beyond the existing legislative framework”). The Green Paper will only be able to be an effective guide to the Commission’s action if the in-depth analysis leads to a review of the overall legal framework, which requires particular effort with regard to consistency and linking with the legislation of the related sectors referred to previously. Without such an effort, the Green Paper would otherwise remain an exercise of limited significance, that disregards the asset management industry’s development requirements in the medium and long term.

With these general considerations in mind and in addition to the detailed EFAMA response to the Green Paper, we wish to focus our considerations on some issues both as regards priority actions, and long term challenges.

B. PRIORITY ACTIONS

B.1 Management company passport

We consider it useful for the European Commission to intervene to clarify whether "an open ended investment company" may designate management companies having their registered offices in another Member State.

As indicated in the CESR consultation document on the Guidelines for the implementation of the transitory measures contained in directives 107/2001/EC and 108/2001/EC on this matter, there is no convergence of all Member States. For instance, the Italian Consolidated Finance Law (Legislative Decree 58/98) was amended to provide open ended investment companies with the possibility to designate harmonised management companies authorised in other EU States. This choice, which we feel is in line with the objectives for the creation of a European passport.

Along this line the Commission should provide the possibility for a management company to set up mutual investment funds in another member state. Although the Directive introduced the possibility of delegating certain company functions to third parties in order to provide the industry with greater flexibility, the instrument under discussion does not appear to be the most suitable mean for achieving its intended purpose. The delegation of functions, by its very nature, requires the delegating party to be always responsible for the activities carried out by the delegated party. Evidently, such requirement pre-empts a wide use of delegation. This problem is ever more evident whenever the delegator and delegated company are not in the same member state and the possibility of control by the former over the operations of the latter may be reduced. In such a framework, it is felt that a valid alternative to delegation, of some or of all company functions, could be provided if, *ab origine*, the roles of fund management and of promotion are split between two different investment management companies, along the lines of the applicable Italian regulations on the subject.

The fact that the management companies would consequently be subject to monitoring by Supervisory Authorities belonging to different Member States does not seem to be an obstacle to the aforesaid approach. It is in fact felt that with regard to the duties of the CESR, the latter may carry out a role of coordination between the Supervisory Authorities, possibly also through the creation of "harmonised" control procedures.

B.2 Distribution, sales and promotion of funds

B.2.1 Transparency

It could be argued that, with regard to the standards of information to the public currently in force for fund subscribers, there is already an overload of information. There is no apparent need for further requirements, which could actually prove detrimental to the ability of the investor to select the appropriate fund. More effectively, the standardisation process, which is being applied in the context of the simplified prospectus, should be extended to all investment instruments that are not currently covered by any regulation in this regard.

Moreover, the level playing field with other financial and insurance players would greatly benefit if standard requirements were applicable not only to *ex ante* transparency (information from prospectus) but also to ex post information. It is indeed of the utmost urgency to implement legislation on the subject of continuous information (periodic ex-post reporting) for substitute investment products. There is ample evidence that league tables of insurance and structured products are not currently possible due to lack of comparable information of net returns.

B.2.2 Conduct of business rules

On the matter of conduct of business rules, it is of the utmost urgency to extend the MIFID regulations on conflicts of interest and on client suitability also to insurance intermediaries. Again, while emphasis placed on the transparency of offer conditions is essential, the lack of a uniform regime for conduct of business rules of all players undermines the level playing field of their business operations.

C. LONG-TERM CHALLENGES

Need they be long term ?

The matters requiring a more systematic and detailed evaluation are not necessarily long term. New pieces of regulation may be required in order to create a coherent level playing field, but the UCITS regulatory system already possesses solid regulatory principles which only need to be clarified, sometimes detailed, and coordinated with those of other directives that already exist.

In general our members feel that an overall review of the architecture of the investment management regulation is necessary, with the aim of removing the current regulatory asymmetries regarding offer of services and products of a banking, financial and insurance nature having similar features and characteristics. The progress achieved by means of the Lamfalussy procedure in the matter of securities regulation leads us to suggest its further application to investment management regulation.

More in particular we deem that the revision of the regulatory framework should pay specific attention to a number of matters, namely:

1) fund governance and fund oversight;
2) distribution of funds and related products;
3) harmonisation of other types of funds.

C.1 Fund governance and oversight

C.1.1 Two levels of oversight

It would appear to be necessary to define the European fund governance model more precisely, i.e. to specify the duties and responsibilities of the depositary bank. Although the industry can claim an impeccable track record, cases of crises or fraud must be prevented through harmonised mechanisms of control and responsibility.

The European regulatory framework attributes a pivotal role to the depositary bank. Such approach should be further developed and promoted as the key feature of investor protection. In order to do so, a two tier governance system would allow an important degree of flexibility while preserving the key role of the depositary.

The two levels of harmonised fund governance may be envisaged as follows:

1) a minimal and compulsory oversight level, revolving around the depositary bank;
2) an additional optional level, which can be freely turned down by the individual jurisdictions or even by individual management companies, that could see the role of other parties, such as auditors or independent directors.

C.1.2 Passport of the depositary bank

We believe it necessary to proceed with a precise harmonisation of the functions of the depositary, at least with regard to the following topics: core functions of the depositary, conflicts of interest in case of affiliation, the respective liability to the shareholder of the management company and the depositary.

In this context, however, we believe that the most relevant issue is represented by the responsibilities of the depositary bank. In fact, although the minimum responsibilities of the depositary are, in theory, harmonised by the Directive, differences in the national legal systems in the Member States create a plurality of approaches, or worse, an area of uncertainty.

Once the respective responsibilities are clearly defined, a passport for the depositary would be more acceptable from the regulators' point of view and easier to implement.

C.1.3 NAV calculation, errors and materiality thresholds

It would seem opportune to tackle the question of the incorrect valuation of fund shares, if necessary through intervention by the CESR. Given the current situation of different thresholds in each member state, it would be particularly desirable to establish a Europe-wide "harmonised" error materiality threshold.

Each jurisdiction currently follows an individual approach, whereas it is clear that the fund shareholder, who should be able to rely on a harmonised system of NAV adjustment for UCITS funds, must be equally protected regardless the origin of the product. Different systems imply that fund subscribers may be significantly penalised or favoured during the subscription or repayment phase depending on the fund's jurisdiction of origin.

C.1.4 A revision of risk control regulation

With regard to the extension of the limits of fund investments, it is widely felt that a detailed examination on the matter of risk control should be addressed. A clear definition of the function of the risk compliance and of alternative applicable risk monitoring techniques would seem urgent in this context.

C.2 – Distribution

In order to enhance the cross-border competitiveness of the investment funds industry, there need to be a separate framework of responsibilities applicable to the distributor. The contractual relationship between the mutual fund and the client could be distinguished from the contractual relationship between the distributor and the client. This latter contract could regulate, among other provisions, a specific fee for the advisory service.

Finally, as regards the question of a private placement regime, we believe that it would be in the best interest of investors and of the investment industry to harmonise the definition of qualified investor.

C.3 Alternative investments: new types of funds

A high degree of investor protection is not so much guaranteed by the kind of assets that can be included in the UCITS portfolio but rather by the degree of transparency of the instruments which allows the manager to identify the risks connected to the investment product and to adequately diversify them. It is significant that the initial resistance to include derivatives among eligible assets may be considered as fully overcome. Instead a particular emphasis has been put on the risk management process.

C.3.1 Funds of hedge funds

It would be desirable to proceed to an overall harmonisation of investment products intended for retail investors. To this end, the conditions already exist for an amendment of certain specific provisions of the Directive in order to encompass various kinds of non-harmonised funds for retail investors. Such amendment would not even require the broader revision that we advocate.

A similar conclusion, moreover, is reached by a survey carried out by EFAMA and Assogestioni with reference to hedge funds. This survey, soon to be published, highlights the existence of a partial “de facto harmonisation” of the regulations on hedge funds in nine European member states. All these member states qualify hedge funds as collective investment schemes; they prescribe the same structural options as the UCITS directive; they impose the presence of both an authorised investment management company and of a depositary bank; they call for specific professional requirements for company directors that set up a hedge fund; they prescribe standards of transparency of information regarding the risks associated with the hedge fund.

On the other hand, the above-mentioned survey shows elements of divergence in the regulatory approaches of each Member State, for instance: a minimum subscription amount for the purchase of hedge fund shares is not always prescribed nor a maximum number of participants in the fund imposed; moreover, for those hedge funds where “retailisation” is allowed, regulation does not mandate identical restrictions on investments (in terms, for example, of limits on the use of leverage or, for the fund of funds, of hedge fund targets in which to invest).

In this context, Assogestioni considers it appropriate to undertake initiatives for the harmonisation of funds of hedge funds which may be offered to retail investors. This could be done within the context of the UCITS Directive by taking at least the following aspects into account: 1) the recognition of the possibility for a UCITS to invest its assets in hedge fund shares; 2) the provision of less prescriptive risk spreading limits on investment with respect to those envisaged by the current types regulated by the UCITS Directive, and ample possibility of recourse to financial leverage; 3) the provision of specific standards of transparency of the risks associated with hedge funds; 4) regulation of the role of the prime broker; 5) the so-called “insolvency” of the hedge fund, where the fund’s assets are not able to cover the obligations assumed in its name by the manager towards third parties.

C.3.2 Venture capital and real estate closed-end funds

Up to now only open-ended funds have benefited from harmonisation. There is widespread agreement in a number of jurisdictions that closed-end funds are a suitable investment vehicle for the retail market. Furthermore, harmonisation is often perceived by institutional investors as robust guarantee of investibility.

Harmonisation of closed-end funds should define the following structural aspects, inter alia:

1. constraints and conditions of subscription and redemptions of shares;
2. eligible assets, risk spreading rules and other limits to investments;
3. fund governance rules which are specific to closed-end types of funds;
4. listing requirements.

Comments of the
Federal Association of the German Cooperative Banks/
Bundesverband der Deutschen Volksbanken und Raiffeisenbanken
(BVR)
on the European Commission's
Green Paper on the Enhancement of the EU Framework
for Investment Funds (SEC(2005)947)
of 12 July 2005

Berlin, 14 November 2005

I. Introduction

We thank the European Commission for the opportunity to comment on its Green Paper on the enhancement of the EU framework for investment funds. Before replying to the specific questions posed in the paper, we should like to begin by making the following general points:

May we introduce our association: As the central organization of the cooperative banking group Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR) functions as promotor, representative and strategy partner of its members. 1300 German Volksbanken and Raiffeisenbanken with over 15 million members and some 30 million customers are a pillar of German banking and a major force in the German economy.

We share the Commission's view that the **investment fund industry** has grown dramatically in importance in recent years, not least due to the **increasingly significant role** it plays in provisioning for retirement and building up assets.

With this in mind, it is quite correct to analyse the extent to which the existing UCITS legislative framework is able to accommodate these changes and whether some adjustments may be necessary, particularly to allow greater efficiency in cross-border investments.

At the same time, it should be remembered in this context that tougher distribution standards make the required provision of broad sections of the public with suitable longer-term investment products more difficult. The more complicated and more expensive distribution structures are, the less likely it is that the (broad) sections of the public who are not particularly interested in events on, and the workings of, the capital markets will also be able to enjoy the benefits of investing in financial products. This is the conclusion drawn particularly in the Sandler Report on the British distribution system published in 2002. A major criticism in this report was the **"deterrent effect" of a complicated, difficult-to-understand distribution network for financial products**. In response to the Report, the British government announced that it would be introducing changes to support the provision of all sections of the public with longer-term investment products.

May we specifically point out the following:

- We welcome the Commission's basic approach of focusing initially on exhausting the possibilities offered by the existing legislative framework.
- Before any concrete plans are made by the Commission, we believe it is absolutely essential to carry out a **cost-benefit analysis** examining all the implications of further measures at both European and national level. We are convinced that the findings of both the stock-taking exercise and the impact assessment will confirm that the best way to proceed is by building on the existing European legal framework.
- In view of the **acknowledged high level of protection** offered by European investment law, we see no need for the Commission to take action concerning new risks associated with managing and administering investment funds. The main **existing safeguards** are as follows: The investment firm is monitored and managed by its corporate governance and regularly examined by auditors. The compliance function ensures that market timing and late trading rules are observed. Firms follow voluntary codes of conduct. In Germany, monitoring functions are exercised by the depositary, which, as a bank, is in turn subject to strict supervision. Finally, potential civil law responsibilities also exist. With all this in mind, we are convinced that there is no need for further action at EU level to increase investor protection.
- Reference is made several times in the Green Paper and its supporting documents to possible connections between the quality of investment advice, the interests of the customer and distribution architecture (sale of in-house versus third-party products). In the Commission's background paper, for example, the question is raised in Chapter 3.2.1 as to whether advice offered by a distributor operating in an "integrated architecture" is really in the investor's interests or primarily in the interests of the financial services provider. **We firmly reject the notion that customers are only able to invest in the "best" product in an open architecture** and that there is thus a need for regulatory measures to create an environment of this kind. Instead, we support the view expressed by the Commission on page 35 of the background paper – namely that distributors of third-party funds have incomplete and/or slower access to important product information. The more funds or other investment products distributors include in their active portfolio over and above a certain amount, the less knowledge they will have about each individual product. This highlights the **advantage of the practice common in many European countries of limiting the range of products** on which distributors offer active investment advice. Distributors are able to have comprehensive, detailed and up-to-date information about these products. This enables them to supply advice which is in the interests of the investor and will assist him in making his investment decisions.
- As far as **hedge funds** are concerned, any **regulation – if considered at all – should only take place at international level** so that offshore funds can be in-

cluded. We do not believe that a go-it-alone approach by Europe would serve any useful purpose. On the contrary, it would seriously weaken the internal market for financial services because it would probably trigger a massive exodus of funds from the (then regulated) EU internal market to the (still unregulated) offshore centres. Open-end **real-estate funds** should be recognised Europe-wide as a highly secure and stable retail investment product.

- We understand the reference to the **MiFID** on page 6 of the Green Paper to mean that the marketing of UCITS falls within MiFID's scope. This makes good sense since it makes no difference whether a financial services company sells the investor a share, a fixed-income security or a unit in a fund. We see no need for action going beyond this.

II. Specific questions

Question 1: Will the above initiative bring sufficient legal certainty to the implementation of the Directive?

The **approval process and approval criteria** for cross-border distribution **should be the same throughout the EU**. Standards should be introduced (e.g. specifying a uniform list of requirements to be met, short approval processing periods and default approval times). This is the only way to prevent differences between member states at administrative level.

The **use and risk measurement of derivatives and financial instruments** should be based on a binding **harmonised standard.** Restrictions on the definition of authorised instruments which have no basis in the directive should be avoided.

In some member states – such as Germany – **high standards on cost transparency** have already become established. Such standards, like the total expense ratio (TER), for example, could be used as a **basis for a common European standard**. This would also help to create a level playing field for European suppliers. We understand that the EFAMA (European Fund and Asset Management Association) is already working on a European standard of this kind.

Question 2: Are there additional concerns relating to day-to-day implementation of the Directive that need to be tackled as a priority?

The **time to market** is in **need of improvement** compared to that for rival products. Uniform standards should be established and short approval processing times (e.g. three weeks) prescribed for plain vanilla products. **Approval processing times** of this kind, **after expiry of which approval may be deemed to have been granted**, should cover the above products.

Question 3: Would an effective management company passport deliver significant additional economic advantages as opposed to delegation arrangements? Please indicate sources and likely scale of expected benefit.

We would welcome an effective European passport for management companies. Along with the international distribution of funds, this would open up a further opportunity of establishing and marketing corporate funds in the home state or in a new market swiftly and efficiently. It must be borne in mind, however, that the cost-effectiveness of such an opportunity depends very much on harmonisation of the supervisory criteria. Only if all administrative requirements are defined unequivocally can it be assumed that fund managers will concentrate on a single location and use it as a base from which to launch their products directly in other member states. The main reasons for establishing bases in various jurisdictions were, and are, the continual changes in administrative practices and the legal environment relating to approval criteria and eligible products. Only consistent and reliable standardisation is likely to result in cost savings for fund management companies, which can then also be passed on to investors. More important than an effective European passport for management companies is, however, in our view an improvement in the viability of the European passport for investment funds by, for example, introducing uniform standards and short approval processing periods (see our reply to question 1).

Question 4: Would the splitting of responsibility for the supervision of the management company and the fund across jurisdictions give rise to additional operational risks or supervisory concerns? Please describe sources of problem and steps that would have to be taken to manage such risks effectively.

If administrative requirements and the legal framework are harmonised, the risks will be low. We believe it is possible to make a sufficiently clear distinction between rules relating to companies and those relating to products to avoid overlaps and thus unnecessary costs. A very important point will be to ensure that corporate funds are permitted to delegate totally all administrative responsibilities to a management company.

Question 5: Will greater transparency, comparability and attention to investor needs in fund distribution materially enhance the functioning of European investment fund markets and the level of investor protection? Should this be a priority?

Chapter 2.2.2 of the Green Paper states that investors are faced with increasingly complex products and thus need better and user-friendly disclosure of performance and charges. In chapter 2.3.2 of the background paper, the question is raised as to whether existing disclosure makes all the relevant charges associated with funds sufficiently visible to investors. With this in mind, we assume that the transparency referred to in question 5 relates first and foremost to cost transparency.

We can only confirm the Commission's statement in the background paper that **member states sometimes apply a differentiated approach to the issue of how much information is supplied to investors**. As far as fund distribution in Germany is concerned, we would like to stress that investors are supplied with comprehensive information irrespective of the size of the investment, so that small investors, in particular, can always be sure of having a complete picture of the characteristics of the fund and the associated costs. The **MiFID** and its planned technical implementing measures contain extensive rules which also cover fund units. These are subject to the same requirements as those applying to all other financial instruments. There is no need for any additional rules and regulations aimed specifically at funds. It would be extremely problematic if the MiFID's provisions were called into question before they have even entered into force and been implemented in practice. **We therefore firmly reject any proposals leaning in this direction such those in Chapter 2.3.3 of the background paper**.

As far as the other questions raised in Chapter 2.3.2 of the background paper are concerned, we advocate implementation on the basis of a standard European code of conduct, which could be developed by EFAMA, for example. We understand that EFAMA is already working on pan-European standards of this kind. The Commission should wait until these are finalised and can be evaluated before considering a legislative solution.

Along with such pan-European standards, which should also cover classification, nomenclature performance measurement, etc., competition and generally accessible media will also ensure that the investor, as a responsible consumer, is able to make an effective comparison of products.

Reference is made several times in the Green Paper and its supporting documents to possible connections between the quality of investment advice, the interests of the customer and distribution architecture (sale of in-house versus third-party products). In the Commission's background paper, for example, the question is raised in Chapter 3.2.1 as to whether advice offered by a distributor operating in an "integrated architecture" is really in the investor's interests or primarily in the interests of the financial services provider. **We firmly reject the notion that customers are only able to invest in the "best" product in an open architecture and that there is thus a need for regulatory measures to create an environment of this kind.** The key point is that firms have an obligation to supply customers with "suitable" advice and that this is implemented in practice. There is no indication that this obligation is not being complied with. In the absence of firm evidence of abuse, interference in distribution structures would not be compatible with the Commission's "better regulation" approach. Instead, it should be left to the market to decide which is the preferred distribution structure.

Furthermore, the preference for open architecture is based on a totally unrealistic premise. No bank or financial services provider is in possession of sufficient analyses of the past or potential future performance of all funds available on the market. There are currently 2,353 funds open to the general public operated by German investment firms alone.[1] To these must be added the foreign funds which are open to the general public in Germany as well as restricted-access funds – not to mention the large number of other financial products that would also have to be taken into account when giving appropriate investment advice. **Neither banks nor financial services providers are in a position to monitor the performance and quality of all these funds and other investment products.** Whilst it is true that information about funds is also available from data providers, these normally disclaim all liability for errors. Nor is it possible to access any reliable central and independent compilation of all product information that would allow the "best fund" or the "best investment product" to be determined. **What is more, any decision concerning the "best fund" or the "best investment product" would inevitably relate to past performance.** But there is no guarantee that today's "best fund" will also be tomorrow's. This is why, in the context of the MiFID, the Commission quite rightly requires a description of past performance to "contain a prominent warning that the figures refer to the past and that past performance does not provide a reliable indicator of future results"[2]. Finally, differences in the investment needs of different types of investors entail placing a different emphasis on the various product requirements. Such an analysis can only be

[1] BVI, Investment 2004, Daten Fakten, Entwicklungen, Übersicht, p 82.

[2] Cf. Article 3(e)(iv) of the Commission's Working Document ESC/23/2005-rev. 2 of 29 September 2005. There is even discussion as to whether a description of past performance should be permitted at all. This view is totally at odds with the notion of designating a "best fund" or "best product".

made on a case-by-case basis. So a standardisation of product evaluation, which references in the Green Paper and background appear to be leaning towards, would be neither appropriate nor feasible, in our view.

We therefore support the view expressed by the Commission in Chapter 3.2.1 of the background paper, namely that distributors of third-party funds have incomplete and/or slower access to important product information. There is a danger of giving misadvice, in our view, if the evaluation of a product fails to consider all the necessary information. The more funds or other investment products distributors include in their active portfolio over and above a certain amount, the less knowledge they will have about each individual product. It can consequently be argued that the quality of the advice will decrease in inverse proportion to the number of products included in the portfolio. **This highlights the advantage of the practice common in many European countries of limiting the range of products on which distributors offer active investment advice. Distributors are able to have comprehensive, detailed and up-to-date information about these products. This enables them to supply advice which is in the interests of the investor and will assist him in making his investment decisions.** These are not normally – as the background paper suggests – "in-house products"[3], where conflicts of interest may be assumed to be associated with their distribution as it can be shown for our group exemplarily. Our 1,300 member banks are legally, financially and operationally autonomous. With regard to the distribution of investment funds, they focus mainly on the over 100 retail funds of the "Union Investment" which is the central investment company of the German co-operative network. These funds cannot be called "in-house-products" because "Union Investment" is a separate undertaking and no co-operative banks is a major shareholder of the "Union Investment". A conflict of interests is avoided consequently. Additionally, the distribution of third party funds is organized via a separate distribution platform being part of the co-operative network with the result that the client of the Volksbank and Raiffeisenbank can get worldwide nearly any fund he is longing for.

We therefore see no basis for the background paper's criticisms, particularly on page 34, of integrated architecture. On the contrary, we believe the above arguments underline the need to confine distribution structures to familiar and reliable partners – which constantly have a name and reputation to lose in the stiff competition on the market.

[3] Commission Staff Working Paper, Annex to the Green Paper on the enhancement of the EU framework for investment funds; Background Paper (Com(2005)314 final), pp. 6, 34.

Question 6: Will clarification of "conduct of business" rules applying to firms which retail funds to investors contribute significantly to this objective? Should other steps (enhanced disclosure) be considered?

Please see our replies to questions 5 and 7.

Question 7: Are there particular fund-specific issues that are not covered by ongoing work on detailed implementation of MiFID conduct of business rules?

The **MiFID and its planned technical implementing measures contain comprehensive rules**, which also cover fund units. These are subject to the same requirements as those applying to all other financial instruments. They include the information requirements under Article 19(3) of the MiFD, the suitability test for advice and asset management under Article 19(4) of the MiFID, rules on inducements and best execution. **There is no need for any further rules or regulations aimed specifically at funds.** It would be extremely problematic if the MiFID's provisions were called into question before they have even entered into force and been implemented in practice. Any proposals leaning in this direction such as those in Chapter 2.3.3 of the background paper are therefore to be firmly rejected.

Question 8: Is there a commercial or economic logic (net benefits) for cross-border fund mergers? Could those benefits be largely achieved by rationalisation within national borders?

There are most certainly **benefits** to be gained from cross-border fund mergers. This will enable international suppliers to offer their range of products throughout Europe. A **fundamental prerequisite** for such mergers, however, is that investment units receive the **same tax and supervisory treatment** throughout Europe. The differences between national tax regimes are probably the greatest obstacle at present.

Question 9: Could the desired benefits be achieved through pooling?

We doubt whether there is any need for regulation at all on virtual pooling. Progress in this area depends on establishing appropriate technical standards and processes, in our view.

The approval of master-feeder funds, on the other hand, would require amendments to the existing UCITS Directive. We believe **master-feeder funds offer considerable potential for rationalisation** and possibly represent an alternative to cross-border fund mergers. In our opinion, neither general principles of investment law nor investor protection concerns should stand in the way of introducing master-feeder funds. However, we see **potential problems here, too, owing to the heterogeneous nature of tax and supervisory rules** in member states.

Question 10: Is competition at the level of fund management and/or distribution sufficient to ensure that investors will benefit from greater efficiency?

Competition between distributors and managers of funds which are open to the general public is extremely well developed. This is due, first, to the number of products on offer and companies offering them. A second reason is the lively rivalry to innovate existing both among fund management companies and with competing issuers of securities (e.g. certificates). This requires all involved constantly to keep abreast of new developments. Germany is currently experiencing a strong influx of large foreign funds onto the market, which is stepping up competition still further. Finally, distribution structures are changing more and more rapidly. Funds are now offered on Internet platforms, traded on exchanges, sold from fund supermarkets, etc. All this demonstrates that there is **no need, either in the area of fund production or fund distribution, for regulatory action by the Commission to increase competition.**

Question 11: Which are the advantages and disadvantages (supervisory or commercial risks) stemming from the possibility to choose a depositary in another Member State? To what extent does delegation or other arrangements obviate the need for legislative action on these issues?

The idea of being able to choose a depositary in another member state is in principle to be welcomed in the interests of greater competition. **It will only make good sense to allow such a possibility, however, when the rules governing depositaries have been harmonised at a high level** so that an equally high level of investor protection, which the depositary serves by exercising the functions assigned to it particularly under Article 7 of the UCITS Directive, can be ensured. Harmonisation must, above all, cover the depositary's monitoring function. As things stand, there are big differences in the role and responsibility of depositaries from one member state to another. **Opening up the market without prior harmonisation would lead to regulatory arbitrage, to the detriment of investor protection.** It would not be acceptable if funds were able to opt for the most inexpensive depositary service, for example, without having to ensure that high security standards, such as those existing in Germany, were in place. In our view, the depository function should be performed solely by banks in order to ensure the high level of investor protection required. To preserve the independence of the depositary function, we feel that personnel and company-law sovereignty, which does not preclude membership of a group, is sufficient.

Question 12: Do you think that on-going industry-driven standardisation will deliver fruit within reasonable time-frames? Is there any need for public sector involvement?

We see no need whatsoever for legislation at either European or national level in the area of standardisation. **Standardisation should be left to the industry itself**, in line with the principle of subsidiarity. Whilst the industry's successful ongoing efforts to standardise the clearing and settlement of share certificates should be supported, there is no need for additional European regulation.

Question 13: Does heavy reliance on formal investment limits represent a sustainable approach to delivering high levels of investor protection?

We make a distinction between investment limits due to issuer diversification and those imposed by defining eligible instruments. As far as investment instruments are concerned, the focus should be on the overall risk, not on their composition. Only a material approach can take proper account of the increasing complexity and innovation in this area. Issuer diversification should be maintained as a principle of investment law. Generally speaking, suppliers which invest in transparent and efficient risk-measurement systems should be rewarded. As soon as a supplier meets a certain (previously) defined standard, it should be allowed to manage funds with more freedom from formalised investment limits. These should be replaced with risk measures that reflect the overall risk of the fund. This will tell investors exactly how much risk is associated with the product they have acquired and will protect them more effectively than would excessively formalised investment limits.

Question 14: Do you think that the safeguards – at the level of the management company and depositary – are sufficiently robust to address emerging risks in UCITS management and administration? What other measures for maintaining a high level of investor protection would you consider appropriate?

Given the existing and acknowledged high level of protection, we see **no need for action by the Commission in this area**. To mention just a few of the safeguards already in place: the investment firm is monitored and managed by its corporate governance and regularly examined by auditors. The compliance function ensures that market timing and late trading rules are observed. Firms follow voluntary codes of conduct. In Germany, monitoring functions are exercised by the depositary, which, as a bank, is in turn subject to strict supervision. Finally, potential civil-law responsibilities also exist. With all this in mind, we are convinced that there is no need for further action at EU level to increase investor protection.

Question 15: Are there instances resulting in a distortion of investor's choice that call for particular attention from European and/or national policy-makers?

In Chapter 3.3. of the Green Paper and chapter 4.2 of the background paper the Commission discusses a possible lack of a level playing field between UCITS and other investment products. The discussion culminates in the above question and suggests there is a need for action when revising the UCITS directives. Irrespective of whether or not there is really a lack of a regulatory level playing field between UCITS and the investment certificates and unit-linked insurance products specifically mentioned by the Commission, we believe it should first be discussed whether there is a need for European regulation of these particular alternative products at all. As far as investment certificates are concerned, it is clear that specific European regulation of this product group would not reflect market realities. The Commission itself states that certificates are traded primarily in Germany, Switzerland and Hong Kong.[4] **Quite apart from the questionable need for regulation at European level, certificates – which, legally speaking, come under the category of bonds – are covered by the MiFID and the Prospectus Directive and thus already subject to extensive European regulation.**

In some member states, the fact that different investment products receive different national tax treatment has led, and continues to lead, to possible distortions of the investor's choice. Distortions based on tax treatment cannot, however, be eliminated by regulation geared towards particular products. Against this background, it is above all national policymakers in the member states who need to take action regarding the lack of harmonisation in tax law.

Question 16: To what extent do problems of regulatory fragmentation give rise to market access problems which might call for a common EU approach to a) private equity funds; b) hedge funds and funds of hedge funds?

The treatment of **private equity funds** under company law, tax law, supervisory law and investment law differs from one member state to another. This makes cross-border distribution complicated and gives rise to many uncertainties. We would wel-

[4] Commission Staff Working Paper, Annex to the Green Paper on the enhancement of the EU framework for investment funds; Background Paper (Com(2005)314 final), footnote 127 on p. 52.

come a common EU-wide solution which made it possible to sell private equity products across borders.

Hedge funds are now regulated in several member states, including Germany. European harmonisation might, at first glance, seem a logical way of creating a level playing field in Europe. It must be borne in mind, however, that, even today, most hedge funds are located in unregulated or only lightly regulated offshore centres. A purely European approach would merely heighten this effect. What is needed, therefore, is a solution at international level.

Open-end **real-estate funds** should be recognised Europe-wide as a highly secure and stable retail investment product. Now that they have been accepted well by private investors in the member states, a European framework for open-end real-estate funds would be desirable.

Question 17: Are there particular risks (from an investor protection or a market stability perspective) associated with the activities of either private equity or hedge funds which might warrant particular attention?

In the case of private investments offered on the so-called "grey" market, a well-known problem that has existed for some time now is that these are distributed under largely unregulated and uncontrolled conditions. Adequate transparency of such investments would facilitate management companies' investment decisions.

Question 18: To what extent could a common private placement regime help to overcome barriers to cross-border offer of alternative investments to qualified investors? Can this clarification of marketing and sales process be implemented independently of flanking measures at the level of fund manager etc.?

In our view, a common European private placement regime is not necessary, as private placement customer groups differ greatly in the member states and national regulation thus makes more sense.

Question 19: Does the current product-based prescriptive UCITS law represent a viable long-term basis for a well-supervised and integrated European investment fund market? Under what conditions, or at what stage, should a move toward principle-based, risk-based regulation be contemplated?

We welcome the Commission's basic approach of focusing initially on exhausting the possibilities offered by the existing legislative framework. Prior to publication of the Green Paper, the Expert Group on Asset Management discussed a thorough overhaul of EU legislation which would consolidate all areas of law relating to asset management. This project should be scheduled for the medium term at the earliest, and after a cost-benefit analysis of all the implications of such an approach has been carried out. At this stage, a move towards a more principle and risk-based – and thus more flexible – approach could be contemplated.

GLOBAL SECURITIES
SERVICES FOR INVESTORS

Mr Charlie McCreevy
Commissioner for Internal Market
and Services
European Commission
1049 Bruxelles
Belgique

Paris, November 15th, 2005

Société Générale response to the consultation of the Commission on the Green Paper on the enhancement of the EU framework for investment funds

Dear Commissioner,

The Société Générale is one of the leading financial service groups in the eurozone and one of France's largest companies by market capitalisation (EUR 33.1 billion at 31/12/04). The Group, which employs 92,000 people, realised a net banking income of EUR 16.4 billion and a net income of EUR 3.1 billion in 2004.

Present in the main European financial markets such as France, Ireland, Luxembourg, Germany and Spain, the Société Générale provides custody & trustee services to around 2,300 funds and manages 1,235 billion USD of assets under custody, and its subsidiary Euro-VL provides valuations for nearly 3,700 funds representing assets of USD 348 billion in 2005.

The firm, represented by our locations in France, Luxembourg, Ireland, Germany and Spain, thanks you for offering us the possibility to provide the European Commission services with comments regarding the Green Paper on investment funds. We hope that we can provide with helpful comments to the European Commission, based on our experience.

As being an active member of the French Association of Securities Professional (AFTI), we strongly support AFTI contribution.

We consider the role of the depository, which was introduced in the European Union as part of the legal framework of collective investment resulting from Directive 85-611, as essential. We therefore ask the Commission to take in account the function of depositary when it will write its White Paper.

The Société Générale would like to stress three specific points.

First, the Group is in favour of a harmonisation of the rules concerning asset management. It is necessary to create a stronger framework in which investment funds can continue to expand throughout Europe. In order to do so, and prior to any measure, it is necessary to define in a text the respective role and responsibilities of all market participants in Europe (distributors, management companies, transfer agents, depositaries etc.). Such definitions are essential in particular to sustain investor confidence.

Second, we think that the harmonisation can only be done in a proper way by the Commission, in a directive proposal which would be adopted according to the Lamfalussy procedure.

Having a European passport without a directive would not reduce the costs as there are currently too many differences among member countries regarding responsibilities. This would affect the level of safeguards and undermine investor confidence.

Moreover, without having a directive, fund industry participants have already started a standardisation process at the domestic and European level, aimed at defining and providing a framework for specific tasks. These initiatives of the industry are successful but they can only be limited to specific area as the differences in the provisions of domestic laws remain on the role and responsibilities of market participants.

A directive could set at a level 1 clear definitions and principles concerning the passport. The implementing measures will then be adopted at a level 2 by the Commission, after the advice of the Committee of European Securities Regulators.

Third, having regarded the two models concerning the clearing of UCITS, the Société Générale considers that the central securities depositary (CSD) model, used in France, Germany, Portugal, Norway…, is a success. In this model, the CSD operates by means of bilateral settlement and delivery agreements as is done for other securities. The alternative model, the “transfer agent” model (TA), which entails multilateral settlement and delivery agreements, appears to be most costly (because of the standardised process for settlement and delivery and for clearing) and risky (use of a limited number of regulated CSDs rather than a multitude of TAs, which are less tightly regulated).

If you wish to get more details or comments on any point of this letter, please do not hesitate to contact me (bruno.prigent@socgen.com).

Yours sincerely,

Bruno Prigent
Head of Investors Securities Services

Avis juridique important

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Communication from the Commission - Developing the trans-European transport network: Innovative funding solutions - Interoperability of electronic toll collection systems /* COM/2003/0132 final */

COMMUNICATION FROM THE COMMISSION - Developing the trans-European transport network: Innovative funding solutions - Interoperability of electronic toll collection systems

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COMMUNICATION FROM THE COMMISSION - Developing the trans-European transport network: Innovative funding solutions - Interoperability of electronic toll collection systems

Without high-performance transport networks, economies cannot be competitive. The creation and smooth operation of the trans-European transport network, which became official Community policy 10 years ago, is a key condition for the success of the internal market and to ensure sustainable mobility in an enlarged EU. However, traffic on the network is continuing to grow apace but unevenly, while at the same time there is growing insistence on sustainable development and an imminent need to incorporate the networks of the future Member States. Moreover, transport infrastructure is still under-financed, for lack of adequate funds and the absence of a framework conducive to investment.

Accordingly, in its White Paper European transport policy for 2010: time to decide [1] the Commission already drew attention to the clear mismatch between the advertised objectives and the financial means available from the Union. The fact is that the budget the Member States put aside for developing such transport infrastructure and the funds made available by the EU are insufficient. It is no small paradox to note that the Treaty makes the Community responsible for producing guidelines for the development of the trans-European transport network without granting it the financial resources to execute that task.

[1] COM(2001) 370, 12.9.2001.

There seems to be little possibility at present of seeing a significant short-term increase in the public funding allocated to these infrastructure projects, in view of the combined effects of the current economic slowdown and budgetary constraints. The Member States are setting themselves other priorities for using this public funding, even though people and businesses in the EU suffer every day the tangible consequences of increasingly pronounced modal imbalance and the failure to adapt the network to growing mobility. Use of public-private partnerships (PPPs) to supplement public financing may be envisaged for some types of project. However, there are still too many unknowns regarding the projects to be carried out - particularly railway and cross-border projects - and regarding transport policy choices. The private sector has insufficient confidence to commit to financing them. Moreover, PPPs almost always require major public financial support in the form of subsidies or guarantees.

There is no denying, however, that one of the keys to a successful enlargement will be the creation of a proper transport infrastructure network which supplies the links still missing between the Fifteen and with the new member countries and enables full benefit to be derived from the European single area. This will involve infrastructure being modernised or newly built not just in the future member countries, but also in the existing EU Member States, given that some projects have not yet been carried out, that new traffic flows will develop and that connections between the two zones are few and far between.

The question of how to fund this new infrastructure clearly appears to be one of the main issues in the context of enlargement.

In the meantime, we need to make sure that the collection of fees through the introduction of infrastructure charging does not compromise traffic fluidity. This means making sure that toll systems are interoperable.

This Communication examines the situation of infrastructure in the trans-European network and its financing and shows the need to implement, without delay, a set of complementary measures centring on a more effective use of the funding earmarked for trans-European infrastructure. These measures rest on two major pillars:

* better coordination of public and private financing of the trans-European transport network,

* together with an effective European electronic toll service.

These measures should help make the policy framework more stable in the long run and create stable conditions for financing major trans-European network projects. The presentation of a legislative instrument, through an amendment of Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures (the "Eurovignette") by June 2003, following the Brussels European Council of 20 and 21 March 2003, will enable a Community approach to be taken to the question of infrastructure charging and will define the conditions for implementing the cross-financing evoked in the Transport White Paper. The "European electronic toll service" will offer travellers on the trans-European road networks a single subscription contract as a basis for providing new services.

PART I: MORE EFFECTIVE FINANCIAL AND MANAGEMENT INSTRUMENTS FOR DEVELOPING THE TRANS-EUROPEAN TRANSPORT NETWORK

Introduction

The Maastricht Treaty, which entered into force in 1993, made the Community responsible for a policy promoting the interconnection and interoperability of networks to enable Europe to derive full benefit from an area without frontiers. In this context, the Community was given the task of establishing a series of guidelines covering the objectives, priorities and broad lines of action envisaged in the sphere of trans-European networks. [2] This led inter alia to the adoption in 1996 of Decision 1692/96 on guidelines for the transport network. [3] The main objective of this policy was - and still is - to fill in the gaps in the major infrastructure networks, gaps which hamper the free movement of goods and persons (transport), electricity and gas (energy) and ideas (telecommunications). This Communication covers only the trans-European transport network (TEN-T), however, given the significant differences with the energy and telecommunications sectors.

[2] Article 155.

[3] European Parliament and Council Decision of 23 July 1996, OJ L 228, 9 September 1996.

The gaps in the networks are due primarily to the fact that, until recently, networks were planned on a national basis. They did not always take due account of the trans-European dimension. Today, this lack of a trans-European perspective has left its mark in the form of the persisting barriers to smooth operation of the internal market [4]. In this context, the White Paper [5] pointed to the delays in completing the projects planned for the trans-European transport network as one of the chief sources of inefficiency and congestion on the main corridors which comprise it. The fast-approaching enlargement, which will inevitably generate significant growth in traffic volume [6] on the road and rail infrastructure - some of which is obsolete or offers far less capacity than required - only adds to the need to fill in the missing links in this network. Ten years after the entry into force of the Maastricht Treaty and almost as long after the Essen Summit, the development of the trans-European transport network is stagnating. There are many reasons for this, mainly as a result of:

[4] The closure of the Mont Blanc tunnel following the accident on 24 March 1999 combined with the lack of suitable alternatives, particularly rail services, is symptomatic of this situation, which had an adverse impact on the economy of the Valle d'Aoste region, and of Italy as a whole, in terms of gross domestic product. The amount of the impact between 1999 and the beginning of 2002 is estimated in a range between 3000 and 3200 million EUR, due one third, to an increase in transport costs and for the remaining to a deficit of exports towards other countries of the Union (Source: Dipartimento per lo Sviluppo delle Economie Territoriali della Presidenza del Consiglio, 2003).

[5] COM(2001) 370.

[6] The White Paper forecasts growth of 24% in passenger traffic and 38% in freight traffic over the period 1998-2010 in the fifteen current European Union countries. If nothing is done to spread the demand more evenly, heavy goods traffic is expected to increase by around 50%. The increase in traffic could easily be twice as high in the new Member States and between them and the current Union countries, bearing in mind, in particular, the relocation of highly labour-intensive industries to these countries.

- the lack of political will on the part of the decision-makers in the Member States who have taken insufficient account of the trans-European dimension of the projects;

- the inadequacy of the financial resources dedicated to the trans-European network from public (national and Community) and private sector sources, since full use has not been made of public-private partnership option;

- the fragmentation of the entities responsible for the projects, leading to serious difficulties with the coordination of resources and the management of the projects;

This document sets out to take stock of the situation regarding transport infrastructure financing, explore ways of making that financing more effective, and relaunch the debate, among the parties concerned, about the means to be deployed in future to ensure the efficiency of the transport network on which the competitiveness of the enlarged EU will depend to a large extent over the next few decades.

1. FINANCING THE TRANS-EUROPEAN TRANSPORT NETWORK: DIAGNOSIS OF THE CURRENT SITUATION

Though the Community was given new powers over the planning of trans-European networks, these were not accompanied by a large enough financial package to build such networks. At the same time, beyond intentions, the Member States are running into problems as a result of budgetary constraints in financing the infrastructure identified in the European Parliament and Council Decision on guidelines for the development of the trans-European transport network, particularly the cross-border sections. A framework better adapted to these financing problems is needed to meet the challenges of building this infrastructure. The funds available - especially public funds (including Community funds) - are often poorly coordinated, making them less effective, while private investment remains highly selective and is far from sufficient to meet the funding requirements for building the network.

1.1. An under-funded network

The difficulty facing trans-European network projects is funding. The estimated cost of the trans-European transport network alone is around EUR350 billion for all the projects to be completed by 2010, plus over EUR100 billion more for projects involving the future Member States. Although the objectives set by the EU for development of the networks are, rightly, ambitious, the results are failing to live up to expectations, with spending on the priority transport projects by the end of 2001 still no more than 25% of the total estimated cost. Only three of the 14 priority projects endorsed by the Heads of State and Government in Essen in December 1994 have been completed [7] and some of the other 11 are still at the preliminary studies stage. The longest delays are on the cross-border sections of these projects, which are less profitable and have lower priority than the national sections. This is particularly true of the projects in the Alps and the Pyrenees. [8]

[7] The Øresund fixed link between Sweden and Denmark, Milan-Malpensa airport and the upgrading of the Cork-Dublin railway line.

[8] See report by the European Parliament's Committee on Budgets on the Commission proposal to amend the Regulation on the granting of financial aid in the field of TENs (rapporteur: Mr Turchi).

The Member States, which used to invest, on average, 1.5% of their GDP on building transport infrastructure in the 1980s, now invest less than 1%. [9] Consequently, the Member States put EUR15 to EUR20 billion a year into the various trans-European transport network projects. This funding is clearly inadequate to complete all the planned projects by 2010 and, strictly speaking, takes no account of the new needs which will emerge with enlargement. This lack of commitment to funding transport infrastructure could be regarded as surprising, considering the very sharp parallel increase observed in demand for mobility and the importance of transport to the functioning of the economy.

[9] All transport infrastructure combined.

As well as funding from the Member States, the trans-European transport network also receives Community financing, as in addition to the part it plays in identifying the individual components of the trans-European network, the Community's mandate also covers the financial aspects. Accordingly, a budget has been earmarked for the trans-European networks, backed up by Council Regulation (EC) No 2236/95 laying down general rules for the granting of Community financial aid in the field of trans-European networks, as amended by Regulation No 1655/99 of the European Parliament and of the Council (the "TEN Financial Regulation"), to support projects of common interest, studies and works. This co-financing mainly takes the form of direct grants, though the TEN Financial Regulation also allows guarantees for loans or subsidies of the interest on loans. Alongside this, the Community also helps finance these networks via the Structural Funds (Cohesion Fund and ERDF). In the case of links inside the future Member States, the Pre-Accession Structural Instrument is helping to develop the networks in these countries. The total Community contribution in the European Union (all instruments combined excluding European Investment Bank loans) for the entire period from 2000 to 2006 adds up to around EUR20 billion. [10] Clearly, the Community support therefore covers only a (very) small fraction of the funding requirements and is far from sufficient to make a contribution to developing the networks.

[10] The trans-European transport network budget for 2000-2006 totals no more than EUR4.17 billion, which is nowhere near the real needs.

It is clear from these figures that the budget the Member States are allocating to investment in the trans-European network and the funds made available by the EU itself are insufficient. To put it plainly, at the current rate of investment it would take almost 20 years to implement the schemes scheduled for completion by 2010. The new priorities which have emerged since the trans-European networks policy was introduced include those relating to enlargement - which will entail the (re)construction or upgrading of networks not only in the new Member States but also in the current members of the European Union, plus interconnections between these two zones. Another new factor which must be highlighted is the need to contribute towards an effective shift to the most environmentally friendly modes of transport, as called for by the Göteborg European Council, by targeting investment on such modes. Added to this, there is the need to contribute towards building a knowledge-based society by adapting the transport networks to use new technologies, following the example set by the Galileo project.

The fact is that while demand for mobility is growing, the construction of new and, in particular, cross-border transport infrastructure seems to be at a standstill. This transport policy, with its ambitious objectives for building new infrastructure, still lacks adequate financial resources to turn them into reality. As clearly stated in the White Paper on transport policy, if this state of affairs were to persist, it could have far-reaching consequences for safety, the environment and the quality of life of local communities and for the competitiveness of the entire production system in the enlarged Europe of the future.

1.2. Public funds in need of better coordination

Apart from looking for new sources of funding, one of the most striking aspects raised by implementation of these major projects is, without doubt, the lack of coordination between the different sources of public funds. This coordination is a problem since it is necessary to establish a delicate balance between different priorities, which do not necessarily coincide, at regional, national and Community and level.

Taking the Community funding first, the Structural Funds (ERDF), the Cohesion Fund and PASI can make a significant contribution - often over 50% of the total cost - to projects, which gives the Community authorities considerable weight in the programme for implementing them , while complying with the subsidiarity principle. This situation is conducive to the development of the TENs but this possibility is limited principally to the "cohesion countries" and less-developed regions. Assistance from the trans-European transport network budget, on the other hand, is, in theory, intended to act as a catalyst for starting up such projects, by demonstrating their feasibility and economic and financial viability. It can also serve as a lever to mobilise other sources of funding, both public and private, and to provide easier access to loans. However, this option is rarely used. Given the complexity of the projects and their ever-increasing cost, the current rules on financial aid, limiting support to 10% of the total cost, do not provide sufficient incentives to start up some of these projects. Under these circumstances, it is becoming harder and harder for the trans-European transport network budget to perform these catalyst and leverage functions.

Secondly, experience also shows that, when applying for financial support, States prefer to spread Community resources among a host of projects instead of concentrating on a more limited number to enable the Community funding to act as a catalyst. This failure to choose targeted priorities is highly damaging to the general effectiveness of these funds.

This is why, in terms of managing the trans-European network budget, the Commission cannot accept a scattering of funds among many small-scale projects but wishes instead to focus on financing the priorities identified in the White Paper (bottlenecks, short sea shipping, improving links with the outlying regions).

In addition, unlike the Community support from the trans-European network budget or the Cohesion Fund, which takes the form of direct grants (donations in a way), the contribution from the European Investment Bank consists of loans at advantageous rates, [11] often guaranteed by the Member States. As a result, the European Investment Bank is one of the leading providers of funds for major trans-European infrastructure projects and its lending policy is guided by the Bank's own assessment criteria and operates under an independent management system. For example, the proportion of European Investment Bank loans allocated to rail (24% of all loans granted to transport between 1997 and 2001 [12]) is far lower than the percentage of direct grants from the trans-European transport network budget allocated to railway infrastructure (approximately two-thirds in 2000). Consequently, road continues to take the lion's share (35% between 1997 and 2001) of the European Investment Bank loans.

[11] The European Investment Bank can grant 20-year or longer term loans at advantageous rates based on its AAA rating.

[12] Part of this 24% is earmarked for purchases of transport equipment but also covers infrastructure not forming part of the TENs. This means that the share taken by TEN railway infrastructure is even smaller. In compensation, the European Investment Bank has a separate line for loans granted to major infrastructure (6% of the total) for all modes together, but of which rail takes a substantial share.

Finally, at national level, planning of trans-European transport infrastructure often involves a proliferation of uncoordinated projects [13] rather than a selection of consistent priorities responding to the growth in traffic flows within the EU and between the EU and its leading partners (and future members) outside.

[13] For which funding is not always provided.

The degree of commitment of the Member States to the development of the trans-European transport network also depends on certain factors, such as their geographical location, and in particular their degree of isolation from the centre of the EU. It also depends on their attachment to a traditional approach to infrastructure planning which tends to discourage innovative solutions, and relies almost exclusively on public funding.

1.3. Highly selective public investment

In view of the severe budgetary constraints on the Member States and of the no less severe need for new infrastructure - particularly with enlargement on the horizon - fully public funding of such infrastructure in the medium term appears increasingly Utopian. To rely solely on funding of this type would pose a risk of delays in completing these networks - with unacceptable consequences - as already pointed out in the White Paper.

1.4. Exclusively private funding

Experience shows that exclusively private funding of transport infrastructure is not the best option for bringing large-scale projects to fruition. One of the rare recent examples of any significance is the Channel tunnel which - leaving aside its undeniable technical success - is in financial terms no model for investors wishing to venture into building infrastructure of this type. Because of the nature of the constraints involved, investment in major transport infrastructure does not lend itself to funding by the private sector alone. Apart from the substantial sums involved, the operating risks plus those inherent in the construction phase, the payback period on the infrastructure, the uncertainty surrounding both the returns [14] and the long term all militate against fully private funding of such infrastructure. Consequently, the public authorities tend not to look for mixed (public-private) financing solutions. This traditional view therefore discourages private investors.

[14] Especially taking account of the running costs which are added to the construction costs.

1.5. Joint public/private funding

Though budgetary constraints thus weigh very heavily on the capacity for public funding, there are nevertheless means of strengthening the leverage exerted by public money to attract private capital, such as the concession system, [15] which has proved its worth and is continuing to do so. Throughout the 19th century the granting of concessions fuelled the boom in the railways, a sure sign that, at the time, funding of railway infrastructure predominantly by private investors appeared sufficiently attractive and profitable. Nevertheless, in the vast majority of cases, infrastructure funding remained the prerogative of the authorities, with private investors responsible only for track-laying and infrastructure management. In more recent times, motorway or airport concessions have become common practice in many countries, where they have proved their worth. [16] Starting in the 1950s, the motorway networks of France, Italy and Spain were built largely with the aid of concessions, allowing rapid development of this infrastructure without massive State debts.

[15] Or other forms of public-private partnership based on the principle of the public and private sectors sharing both risks and profits.

[16] Whether through the introduction of real or shadow tolls.

Today public private partnerships (PPPs) are still a viable option for financing transport infrastructure in Europe, but they face major economic, legal and, in some cases, political obstacles. The Commission believes that good practice needs to be spread and that, in the medium term, the existing regulatory framework needs to be updated to make PPP schemes even more attractive, particularly for private investors. In a number of Member States, a start has already been made on such revision of the classic administrative law on concessions.

It is in this context that the Commission is going to produce a Green Paper on public-private partnerships and European public contracts law. The purpose of the Green Paper will be to launch a major public consultation regarding the rapid development of various forms of PPP and the legal regulation of public contracts through Community law. To produce an informed debate, the Green Paper will examine the current situation, identify points of legal uncertainty and suggest possible options for the future. This consultation will enable the Commission to assess whether the legal framework needs to be improved and/or supplemented in order to give economic operators better access to the various PPP operations undertaken in the European Union. In the context of trans-European transport networks, PPPs need to meet a series of basic conditions:

(1) the definition of the project in question must be clear;

(2) there needs to be a clear long-term political will, so as to avoid calling into question the initial decisions;

(3) the players involved must work to ensure a high-quality partnership;

(4) perfect transparency must exist concerning the costs, the terms of the concession and the operating conditions, and the project in general. In particular, guarantees must be given that the private sector will not be forced to bear a series of additional costs beyond the forecasts which it took into consideration when it was selected;

(5) financial guarantees must be clearly specified and there must be an established, stable legal environment;

(6) the project must be on an appropriate scale, from the economic point of view;

(7) the project must be capable of generating revenue within a reasonable timescale, including from ancillary activities;

(8) the project must provide for revenue-sharing beyond a jointly agreed minimum revenue guaranteed by the State (though without such revenue being comparable to disguised aid);

(9) the project must also provide for clear, detailed risk-sharing so that each partner remains in control of the risk it is best placed to bear.

In practice, however, these conditions are not always met. What these projects offer is a (low) financial return in the long term plus a sometimes high construction and operating (traffic) risk. The complexity of PPPs also produces the situation that the abovementioned criteria for achieving success are rarely met properly for the whole of a major trans-European transport network project. Nevertheless, it is feasible for the cross-border parts of a specific project and clearly defined sections of a trans-European transport network to meet these conditions and, no doubt, interest private capital.

Alongside this, other restrictions emerging in this process must not be underestimated:

(1) reticence on the part of some Member States to encourage PPPs;

(2) the increasingly protracted negotiations, another disincentive;

(3) the amount needed in order to take part in a tendering procedure, related to the size and complexity of the project;

(4) the desire for returns in the short term, whereas most of the projects are long-term to very long-term;

(5) the political context, which is often fluctuating, generates uncertainty which has an impact on the economics of the projects and made discourage private investors.

PPPs are an attractive instrument, and are proving very popular in many sectors, but their success depends on certain factors or conditions being present: small-scale projects, projects with easily calculable returns and risks, motorways, bridges or airports. They can also be useful whenever the input from the private sector provides a means of maximising the results and keeping closer control over costs than could be achieved by a similar project managed by the public sector. By contrast, this solution is rarely neutral in terms of costs, which in many cases end up to be higher than in the case of fully public financing, because of private investors' higher transaction costs [17] and capital costs. Clearly, then, use of PPPs cannot be held up as a "miracle" solution for a public sector facing budgetary constraints. On the contrary, experience shows that a poorly prepared PPP can generate fairly high costs for the public sector.

[17] Relating particularly to the identification, sharing and cover of risk.

The technical characteristics, structural complexities and political uncertainties surrounding the conditions for operating trans-European railway network schemes make this type of project a difficult case which goes far beyond the examples of PPPs to date. However, a close watch will have to be kept on the attempt by the French and Spanish governments to award a concession for operation and construction by a private consortium of the Perpignan-Figueras international stretch of priority project No 3 (TGV Sud). Generally, the process of opening up the railway market to competition - already underway within the EU - will bring improvements in railway companies' commercial services and make it even more attractive to invest in projects of this type.

1.6. The funding requires a more appropriate framework

Specifically, experience of funding projects through PPPs has been confined mainly to infrastructure costing far less than what is forecast for the major trans-European infrastructure projects on the drawing board today. [18] The greater the private-sector participation in these projects, the greater the need to put in place guarantee mechanisms; in particular, recent PPPs have included arrangements to provide financial compensation to the operator should actual traffic levels fall short of the forecasts, a solution which, in some cases, could prove particularly costly to the State. In this context, the diversity of the projects suggests it would be difficult to come up with a single model for PPPs and that a case-by-case approach is more appropriate. However, it is worth doing more to promote PPPs at trans-European level, targeted on specific projects or parts of projects [19] of a kind which could fit in with these constraints (roads, airports, [20] terminals and ports). New ideas, innovative clauses and something going beyond a traditionally "public" approach are necessary to encourage this trend at Community level.

[18] For example, the international section of the Lyon-Turin project alone will cost over EUR6.5 billion and the Brenner section almost EUR5 billion.

[19] HSL Zuid is a prime example. The private sector is financing 20% of the project, corresponding to the superstructure, while the public funds are intended for construction of the infrastructure and cover all the associated risks.

[20] In Greece the new Athens Spata airport was built and co-financed by a consortium of private undertakings and banks and by the Structural Funds. To guarantee sufficient revenue, the concession contract stipulated that the existing airport was to be closed when the new one opened.

Coordination between the various (public or private sector) parties involved in a project is one of the most influential aspects involved in the success of a project, in particular in the case of trans-frontier infrastructure. Establishing a structure to manage the project and with responsibility for its funding is a particularly complex problem.

The transport network is characterised by the wide range of projects which need to be implemented, their service life (sometimes spanning several centuries), the major risks entailed (financial, technical, environmental and political) and the resultant highly uncertain rate of return. Consequently, there is no single answer to the question of infrastructure funding. Solutions must be sought through a variety of instruments which it must be possible to use in combination and which need to be adapted to each category of project. In this context, the creation of - single - structures for the management of projects, capable of dealing with both the financial and administrative constraints, is a priority.

In a context marked by a shortage of resources, the objective is to create a more appropriate framework for funding major transport infrastructure, drawing principally on instruments which already exist but which need to be reinforced.

In the case of the PPP framework, for example, the Commission largely responded to this demand over four years ago when it published a communication on public-private partnerships for financing trans-European transport network projects [21] which clearly defined the conditions for forming PPPs for infrastructure projects. Regulation No 1655/99 provides for contributions to venture capital (maximum 1% of the trans-European transport network budget) under the aegis of the European Investment Bank to help set up public-private partnerships on trans-European network projects.

[21] COM (97) 453: Communication from the Commission on public-private partnerships in trans-European transport network projects.

In practice, the Community has at its disposal four budget instruments actively funding major trans-European transport infrastructure: the ERDF, the Cohesion Fund, the Pre-Accession Structural Instrument (PASI) [22] and the budget line for trans-European networks, which provide funding in the form of grants. The Cohesion Fund Regulation already stipulates that "the Commission shall support beneficiary Member States' efforts to maximise the leverage of Fund resources by encouraging greater use of private sources of funding". In fact, Community co-financing from the ERDF and the Cohesion Fund can be used to support projects following a PPP format. [23] This is made possible by the high rate of support available from these Funds. In this way, after fruitful discussions with the Commission, Greece took the decision to form PPPs for some of its road projects so that the money "saved" could be put towards rail projects.

[22] Commission staff are studying forms of PPP which could qualify for funds from the PASI. DG REGIO "Guidelines for successful public-private partnerships" (March 2003).

[23] This should also be the case with the PASI.

Another important point to note is the considerable progress made, in recent years, with the economic and regulatory framework and financial instruments, making it easier, in theory, to put PPPs in place. Reference ought to be made here to the initiatives already taken by the

Commission:

- In an interpretative Communication of 29 April 2000, the Commission clarified the position of Community law regarding concessions. Concessions are not currently covered by the Directives on public contracts (except for works concessions, the award of which is subject to certain provisions of Directive 93/37). In its interpretative Communication, the Commission clarified the principles deriving from the provisions of the EC Treaty regarding fundamental freedoms, and in particular the obligations of opening to competition and equal treatment. The Court of Justice has confirmed this interpretation, notably in its judgment in the Telaustria Case. [24]

[24] Case 324/98, judgment of 7 December 2000.

- The Commission took the opportunity of the recasting of the Directives on public contracts [25] to introduce a new procedure for awarding contracts, known as "competitive dialogue". This procedure applies to complex contracts, especially where the awarding body is unable to determine which technical means might meet its requirements, or the legal and/or financial package of a project. The competitive dialogue procedure allows dialogues to be pursued with different candidates in parallel in the initial stage. Once the awarding body is able to identify the solution or solutions liable to meet its requirements, the dialogue ends. It is then followed by a phase of submission and evaluation of tenders.

[25] COM(2000) 275 final.

- In July 2000, the Commission also adopted a proposal for a regulation amending the existing Regulation on State aid (Regulation No 1107/70) authorising certain State aid to help set up PPPs.

- The introduction of the single currency offers considerable advantages for funding cross-border projects, particularly by removing the exchange risk.

2. RESOLVING THE ISSUE

A fresh approach is needed to promote a new culture of transport infrastructure funding in Europe which complies with Article 155 of the Treaty establishing the European Community ("the Community may support the financial efforts of the Member States and ... the Commission may, in close cooperation with the Member States, take any useful initiative to promote such (financial) coordination") and to facilitate synergy between the public and private sectors.

Transport infrastructure plays an essential part in the proper functioning of the economy since it enables economic growth potential to be increased through economies of scale and network economies. [26] Certain avenues need to be explored to make the management of these limited resources more efficient and to locate possible new sources of funding. This presupposes, among other things, that single management instruments will be put in place for each project. The new approach proposed is therefore based on the following range of options:

[26] What a network gains through the addition of a new node in terms of traffic generated and the scope for new links. Missing links create special network effects (e.g. the high-speed line which bypasses Paris to the south). A network must attain a critical mass to survive in competition with rivals. It therefore needs strong and coordinated funding.

1. Greater synergy in public investment: whatever the principal method of funding, whether it is public or private, the size, complexity and cross-border nature of the main trans-European transport network projects mean there is a need for better definition of priorities and coordination of funding.

2. The introduction of legal and financial management structures modelled on a European company: The introduction of structures specially created for each major project and benefiting from European company rules could provide the legal and financial transparency and coordination that are lacking in many financial packages for infrastructure projects.

3. Active promotion of the involvement of private capital requires innovative clauses and politically courageous action to overcome the conditions and restrictions set out in 1.5. The options tried out in practice include:

(a) Concession schemes under which most of the risks are borne by the private investor on the basis of active demand management.

(b) Various systems enabling private partners to be involved as early as the project design phase, e.g. the private initiative system or the organisation of opening to competition on the basis of general functional requirements (output specifications).

(c) The introduction of quality indicators and "progress clauses" enabling the private investor to realise profit on the initial investment throughout the lifetime of a project.

(d) The possibility of extending these methods to cover several interconnected projects (possibly beyond national frontiers).

It will need to be ensured that these solutions are compatible with the requirements of transparency and equal treatment. For example, experience shows that Member States often have difficulty reconciling private initiative with the obligations of transparency and equal treatment of all potential candidates. Some Member States even contend that where the initiative comes from the private sector there is no longer any need for an opening to competition, though this is of course contrary to the Treaty.

4. The definition of a stable and predictable Community framework for charging for infrastructure use. Such an approach would increase the efficiency of infrastructure use, thereby making infrastructure more profitable and attractive to investors. It would help to improve service quality by financing maintenance costs. Reflecting the generated costs of transport more accurately could in some well-defined cases enable investments to be recouped. The presentation of a legislative instrument, through an amendment of Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures (the "Eurovignette") by June 2003, following the Brussels European Council of 20 and 21 March 2003, will enable a Community approach to be taken to the question of infrastructure charging and will define the conditions for implementing the cross-financing evoked in the Transport White Paper.

5. Lastly, consideration could also be given to increasing specific funds and introducing Community loans or guarantees for other loans which are specifically dedicated to targeted trans-European transport network projects.

3. TOWARDS BETTER COORDINATION AND SYNERGY BASED ON NEW STRUCTURES

3.1. Funds

In its resolution on the White Paper on the common transport policy [27], the European Parliament favours a coordinated approach by setting up "within the Financial Perspective a new European transport fund as a financial instrument with a substantial budget allocation, which would be applied across all Member States and deal with all modes of transport". Apart from this proposal, the scope and precise content of which still have to be determined, the need for coordinated management of all public and private sector funds dedicated to the trans-European transport network remains a priority, since public funds - whether national or Community - do not appear to be used optimally. In the context of the trans-European transport network they are often scattered among a large number of projects with no real order of priority being observed. This scattering of resources sometimes has a negative effect on the development of the trans-European transport network, as witnessed by the delays in completing these projects.

[27] Resolution of 12 February 2003. Rapporteur Mr Juan de Dios Izquierdo Collado. Point 82.

The Commission's proposal to increase its maximum share of funding in trans-European transport network projects from 10% to 20% reflects its desire to focus on a limited number of priority projects with high trans-European added value. The emphasis thus placed on certain infrastructure, and its translation in a financial sense into Community public funding, would also send the markets a strong signal of public commitment to these projects and should thus make it possible to attract other resources to them.

3.2. Structures

Where the promotion and active coordination of trans-frontier trans-European network projects is concerned, the idea of creating a European structure to promote and act as a catalyst deserves consideration.

3.3. Setting up transnational legal entities to coordinate individual projects

While European Economic Interest Groups (EEIG) seem to be suitable for handling the initial project phases (studies), they often prove far less flexible during the actual works, on account of the fact that the EEIG partners are responsible without limitation, and not solely as regards their participation.

In view of the number of players involved in setting up a European project, and the financial resources and technical expertise needed, the funds allocated to the project need to be managed in a coordinated manner during the development phase and not just the initial phase. It is therefore essential to find a legal instrument which allows more effective coordination at transnational level.

The approval by the Council, on 8 October 2001, of the Statute for European companies already goes some way to providing part of the answer. When it becomes effective in 2004, the approval of such companies should make it much simpler to set up companies to manage cross-border projects and should produce substantial economies of scale. It is within this European company framework, and in accordance with Community law on public contracts, that consideration could be given to setting up project companies for every major cross-border trans-European transport network project, in line with the spirit, though not the structure, of the Galileo joint undertaking.

The introduction of a coherent legal structure is a key step towards increasing the prospects of success of cross-border projects, in particular to secure the necessary funding. A European company would have a key advantage in this respect since it will have a single legal personality enabling it to operate in several EU Member States. Eurotunnel has already indicated that this would be a benefit which would enable it, over time, to avoid the need to comply with both English and French law. In this respect, a European company will also have a psychological advantage: if, for instance, a French company is taken over by an Italian company, the resulting company will not be Italian but European.

European companies will be governed by Community legislation directly applicable in all Member States or, failing this, by the law of the place where the company is registered. It will be governed by Community legislation directly applicable in all Member States.

- In this context, the setting up of European companies to manage each major trans-European transport network project could prove a considerable advantage. The creation of a company to manage a trans-European transport network project would in particular enable companies with registered offices in more than one Member State to merge and operate throughout the European Union and especially in the two countries concerned by the project;

- From the financial point of view, the setting up of a company would enable the various players to have a clear picture of the economic and financial situation regarding the project, which is not easy if there are several companies operating under different laws;

- Having a single company would also reduce administrative and legal costs. Such savings are generally quite considerable in the case of a multinational group;

- With regard to the choice of tax regime, which is probably one of the most important aspects and which has not been satisfactorily dealt with up to now, in particular because it requires unanimity within the Council, European companies should be free to choose which law will apply once they have a subsidiary in a given country. In this way, European companies could make it more attractive for the private sector to participate in such projects [28]; in particular, if a European company is set up by merger, any value added that is still latent will not be immediately taxed, which will be an advantage compared with ordinary law;

[28] Except as regards very specific adjustments to existing tax legislation, the tax regime issue for European companies is still unresolved, as it is for any company with places of business in several different countries. Initially it is planned to allow companies to choose their tax base as soon as they have at least one subsidiary in the country in which they wish to be taxed. The longer-term objective is to achieve a single consolidated tax base at EU level for company taxation.

- Better coordination should allow economies of scale and probably make it possible to lean more heavily on the financial markets to borrow capital. The existence of a single company is likely, for example, to make it easier to sign a global funding agreement for the project through competitive tendering;

- The existence of a single entity will make it easier to identify the roles and responsibilities of the various players and the risks to be shared between them, in particular those of the public sector and those of the private sector. First of all, it is essential to ensure that the tasks of this type of company are clearly defined. The main task of the company should be to complete the development of the cross-border project by bringing in public [29] and possibly private funds. To guarantee the transparent operation of such companies, it will be necessary to put a supervisory body in place to ensure that their decisions properly reflect the thinking of the public, national or Community authorities. This means that European companies, with their flexible arrangements, will be able to employ both a single-tier system (Chairman and Board of Directors) and a two-tier system (Executive Board and Supervisory Board).

[29] See, for instance, the Øresund consortium.

It should also be remembered that European companies provide for the broad involvement of their staff in operation and control functions, whether through social negotiations or the minimum requirements already laid down in the Regulation. These aspects are particularly important in the framework of railway infrastructure, an area in which employers and employees in most Member States remain attached to the public dimension of the undertaking.

3.4. The development of new Community funding instruments

Nearly ten years after the publication of the Commission's White Paper on Growth, Competitiveness and Employment, which proposed that Community loans be issued to fund trans-European networks, existing financial and budgetary instruments have been shown to be inadequate, as witnessed by the growing delay in the completion of the trans-European transport network programme, especially the priority projects. It will be recalled that the European Council (meeting in Brussels in December 1993) agreed that "Additional funding will be provided, as far as is necessary, to ensure that priority projects do not run into financial obstacles which would jeopardise their implementation. With this in mind, the European Council called upon the ECOFIN Council to study, together with the Commission and the EIB, procedures which would enable the Community to mobilise up to an additional ECU 8 billion per annum in loans for operators involved in setting up networks. The possibility thus provided should not run counter to the efforts undertaken by the Member States to reduce public debt, nor to the stability of financial markets".

The redirection and reprogramming of financial resources decided on by the Berlin European Council, the second review of the trans-European transport network master plans now under way (for all modes) and the definition of a trans-European network for rail freight open to competition are providing fresh momentum for trans-European transport network policy in an enlarged Europe. This will need to be at the heart of the next review of the Financial Perspective.

In this context, it is hard to see how the EU will be able to avoid a debate about a substantial increase in the Community funds given over to building the trans-European transport network. This in no way prejudges the work in progress on the new Financial Perspective, but illustrates the specific nature of the trans-European network, the completion schedule for which goes well beyond the traditional financial planning framework. A future increase in funds for completing the trans-European networks would make it possible to create major arteries linking the countries of the enlarged EU.

3.5. EU guarantees for the political risks of the trans-European transport network

Guarantees provide an essential service for loan activity since they cover the associated risk, even if they are as not as publicly visible as loans. It should be emphasised that the rules for monitoring public debt do not refer to guarantees given by States and regions. Sovereign guarantees may therefore ensure the flexibility need to cope with the current budgetary constraints.

Title XV of the Treaty [30] refers to the possibility of Community action in the form of a guarantee for trans-European transport network projects. This possibility, which is formulated very clearly, has been used only rarely up to now in the trans-European network Financial Regulation to provide, as a form of support, assistance with the cost of premiums on loan guarantees granted by financial institutions where:

[30] There are also other references to guarantees in the Treaty. Article 103(1) stipulates that "A Member State shall not be liable for or assume the commitments ... of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project". The European Investment Bank may also provide guarantees, under Article 267, though it very rarely makes use of this option.

- the project is considered cost-effective;
- the project is already benefiting from the mobilisation of public and private funding;
- the project is receiving Community funding;
- the project is partly funded from revenue derived from charging.

With these four conditions, it would be possible to consider using Community guarantees or a Community loan. [31]

[31] The same concern led to the creation of the European Investment Fund (EIF) in 1994. In

2000, responsibility and expertise in this area were taken over by the European Investment Bank.

For external actions, there is a Guarantee Fund [32] which receives payments from the Community budget to cover such operations. The Guarantee Fund under the Community budget also provides guarantees for European Investment Bank loans to third countries. At the moment, these guarantees cover only political risks, namely the risks associated with the non-transfer of foreign currencies, expropriation, armed conflict and civil unrest, and commercial risks. However, the European Investment Bank has been asked by the Council to cover commercial risk through non-sovereign guarantees for 30% of its loans.

[32] Article 3 of Regulation 2728/94: "The Fund shall rise to an appropriate level, hereinafter referred to as 'the target amount'. The target amount shall be 10% of the Community's total outstanding capital liabilities". Article 4(1): "The payments provided for under the first indent of Article 2 shall be equivalent to 14% of the capital value of the operations until the Fund reaches the target amount".

Given the options which exist at EU level, the political decision not to carry out a project could be interpreted as being a political risk due to environmental, budgetary, etc. causes. This interpretation could be extended to the non-completion of related network projects which are economically crucial for a project (network risk) but not for meeting the EU's formal commitments (to open up markets). The EU could provide guarantees for projects jointly with the Member States involved and the European Investment Bank. The main function of these guarantees is demonstrate the EU's interest and confidence in a particular project. They would be joint guarantees and the biggest backers would be the Member States benefiting from the project. The EIB's involvement would lend technical credibility to these guarantees since it would be responsible for assessing the project's vulnerability to the risks covered. In particular if a member State does not fullfil its commitments in terms of transport infrastructure implementation, or if it changes its priorities, without previously consulting other member States or interested parties. For instance, this consists in assessing what would be the economic damage to the Lyon-Turin project of a new road development in the Alps (doubling the Fréjus road tunnel, Mercantour tunnel). To cover these guarantees, a fund to mutualise risk between the various trans-European transport network projects could be set up. As with all insurance systems, it would be a question of mutualising the risks of a maximum number of projects.

A reserve fund, adopting a form to be agreed with the EIB could be set up, based on premiums paid by participating enterprises and the public authorities concerned, including the EU.

The allocation of the reserve would be commensurate with the probability of materialisation of the limited risks run. The contributions from the Community budget to the reserve would come from the TEN budget line with the need for an amendment to the current Regulation, or possibly from contributions from the Structural Funds and the Cohesion Fund. The practical implications of such an approach should be examined in the context of the work on the new Financial Perspective.

CONCLUSIONS

Financing of the trans-European transport network in an enlarged European Union will in future make it necessary to:

- use innovative means to promote the involvement of private capital so as to overcome the conditions currently preventing the general use of public-private partnerships;

- ensure coherence and complementarity between the management structures for these types of project, in particular by setting up new transnational entities such as "European companies";

- review the level of Community resources in the context of the ongoing debate about the future Financial Perspective.

PART II - TOWARDS A EUROPEAN ELECTRONIC TOLL SERVICE

27 June 2003

HIGH LEVEL GROUP

ON THE TRANS-EUROPEAN TRANSPORT NETWORK

REPORT

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1. SUMMARY AND CONCLUSIONS

1. The High-Level Group on the trans-European transport network (TEN-T) was mandated by the Vice-President of the Commission in charge of Transport and Energy to identify by the summer of 2003 the priority projects of the trans-European transport network up to 2020 on the basis of proposals from the Member States and the acceding countries. This exercise is part of a broader review of the Community guidelines for the development of the trans-European transport network. The Group, which was chaired by Mr Karel Van Miert, consisted of one representative from each Member State, one observer from each acceding country and an observer from the European Investment Bank. The Group met on 10 occasions between December 2002 and June 2003.

2. The High-Level Group confirms the need to reformulate the trans-European transport network guidelines decided upon by the European Parliament and the Council in 1996. The network is characterised by a worrying increase in congestion, due to the persistence of bottlenecks and of missing links and a lack of interoperability. The prospect of enlargement to include 12 new countries accentuates the need for a new approach to preserve the competitiveness of the European economy and to guarantee a balanced and sustainable development of transport. A new impetus must therefore be given to create a real trans-European network.

3. One of the major tasks of the Group was to select a restricted number of priority projects on the transport network of the expanded Union. Such projects are essential to complete the internal market on the scale of the European continent and to reinforce economic and social cohesion. The Group also studied the obstacles of a financial, legal and administrative nature to the implementation of these priority projects.

4. The High-Level Group recommends that the Commission takes all the necessary initiatives to implement its recommendations. The Group also suggests that the other Community institutions, within the context of their respective competencies, take all measures to support the Group's recommendations. It will not be possible to put these recommendations into practice unless there is strong political and financial commitment from the Member States. The Group therefore invites all the Member States - both current and future members - to mobilise to attain, with the support of the Community institutions, the objectives formulated in the report.

1.1. Carrying out priority projects by 2020

5. In accordance with the Group's mandate, the list of priority projects includes only "*the most important infrastructure for international traffic, bearing in mind the general objectives of the cohesion of the continent of Europe, modal balance, interoperability and the reduction of bottlenecks*". In addition, an assessment was made as to "*how well each project fits the objectives of European transport policy, the added value for the Community and the sustainable nature of its funding up to 2020*".

6. The Group considers that this label of "priority project" must lead to the coordination and concentration of Community financial resources - whatever their origin or designation - and of the financial contributions of the States and local authorities allocated to the trans-European transport network. This label must also serve as a reference for the loan policy of the European Investment Bank. The Group thinks that this label, thanks to suitable legal structures, will help to attract private investors.

Finishing 5 of the Essen projects before 2010

7. Among the 14 priority projects identified by the Christophersen Group and confirmed by the European Councils of Essen and Dublin, only three have been finished and five will be completely finished before 2010. The Group nevertheless notes the significant progress made in the majority of the six remaining projects since important sections will be completed before 2010. [1] As regards the other sections, the Group agreed on new timetables and, considering the commitments taken by the Essen and Dublin European Councils, decided to integrate them, together with extensions in the territory of future Member States, in new priority projects with a time horizon of 2020.

8. The High-Level Group recommends that all measures be taken for these projects, such as they were conceived when endorsed by the European Council of Essen in 1994, to be completed and made operational between now and 2010. Sections which it will not be possible to complete by that date should in any case be fairly well advanced. This degree of advancement will be taken into consideration, moreover, when judging the appropriateness of keeping them on the list of priority projects beyond the year 2010, during future reviews of the guidelines for the development of the trans-European transport network. The Group recommends that the Commission follows the progress of these projects with the greatest attention and takes every useful initiative to ensure that the deadlines provided for in this report are met. The policies on awarding Community funding will have to depend particularly on the proper progress of the projects.

Starting new 22 priority projects in an expanded Union with a time horizon of 2020

9. The Group established its own methodology to assess and identify, amongst the candidate projects proposed by the present and future Member States the new priority projects to be carried out between now and 2020. Amongst 100 projects that the Group had to examine, 24 delegations agreed on a set of new priority projects which were grouped together synthetically in the report, depending on their belonging to a certain number of major traffic axes on the scale of the expanded Union. Belgium and Luxembourg did not approve the report because the upgrade of the rail link between Brussels and Luxembourg was not included in List 1. Greece also disagreed because it wanted to add the Ionian/Adriatic intermodal corridor in List 1 instead of List 3.

[1] The sections to be achieved by 2010 are included in "List 0" of the report. The sections to be achieved after 2010, and the extensions in the acceding countries, are included in "List 1".

10. The Group has set, as a general condition, that works must begin by 2010 at the latest on all of the sections[2] concerned. Given the absence of an agreement between the States concerned on the financing or itinerary of four of these priority[3] projects, the Group recommends to these States that they pursue their preliminary studies and negotiations in order to decide on their itinerary, completion date and funding. Given their importance for the trans-European network, the Group recommends that the Commission takes all useful steps to aid their execution, especially as concerns the high-capacity rail link across the Pyrenees.

11. Without neglecting the funding of other projects of common interest in the transport field, the Group is of the opinion that the Commission and the European Investment Bank ought to concentrate their financial efforts as far as possible on the priority projects.

12. A key priority is the Galileo project to develop a satellite radionavigation system for civil use. Galileo will help to improve efficiency and safety in all transport modes, while at the same time guaranteeing the European Union's technological independence in this area.

13. Given the prospect of an increasing demand for transport, inland infrastructure projects must complete missing links in the network or help to eradicate bottlenecks. Railway projects will also have to improve the European network's interoperability. Particularly careful attention will have to be paid among these projects to two major obstacles to the achievement of the trans-European network, namely, first of all, the crossing of natural barriers such as the Alps and the Pyrenees and, secondly, cross-border projects, which have often in the past been the victims of a blatant lack of coordination and commitment between and by national authorities.

14. The objective of sustainable development requires a shift in modal balance to be operated in favour of transport modes which are alternatives to road, namely rail, inland waterways and short-sea shipping. Accordingly, among the priority projects, the Group has selected works geared to improving navigability on several sections of the Rhine-Main-Danube route, including the Meuse, and on the Seine-Escaut route. To promote short-sea shipping, it has defined four "motorways of the sea", for which the Member States concerned will have to devise projects of common interest. The success of the motorways of the sea depends notably on improving logistics chains, the simplification and automation of administrative and customs procedures and the introduction of common traffic management systems.

15. The Group also identified, although not exhaustively, other important projects for the territorial cohesion which come under the logic of the current structural financial instruments[4].

[2] These projects are included in “List 1”.

[3] These projects are included in “List 2”.

[4] These projects are included in “List 3”.

16. The Group also identified several "horizontal" or cross-cutting priorities aimed at a better management of the European transport system, the effectiveness of which will be closely connected to the introduction of accompanying regulatory measures. The integration of traffic management systems on the basis of common techniques and standards for an optimised use of the existing networks will require incentive aid. A group of measures to manage more efficiently the allocation of capacities, particularly for freight transport, appears moreover unavoidable, with regard in particular to requirements imposed by the sustainable development of transport. In this context, the Group recommends particularly keenly the gradual introduction, with the support of all market operators, of a European rail network dedicated to freight transport.

17. The Group's mandate was to identify priority projects for the internal market. The Group did, however, identify a number of connections with third countries which are of interest for the development of the European Union's external trade and in order to improve the transit conditions of some new Member States. Consequently, the Group recommends that they be developed, particularly with the help of structural financial instruments - in the case of sections within Union territory - or in the framework of transit or association agreements between the Community and the third countries concerned (such agreements could even include a financial component), in the case of sections outside the Union.

1.2. Facilitating the creation of the trans-European network

18. The priority projects selected by the Group represent funding estimated at €235 billion between now and 2020, approximately €112 billion of which is for the Essen/Dublin projects still to be carried out[5]. What is more, these new priority projects represent only a part of the investment needed for the trans-European network of the expanded Union. The Group stresses indeed that the total cost of the network, including priority projects and other projects, is estimated at more than €600 billion, exclusive of maintenance costs.

19. The Member States are currently investing less than 1% of their gross domestic product in building transport infrastructure and devoting only one third of this investment to achieving the trans-European network. The Group considers that the latter is currently suffering from under-investment, which may prevent a fair number of the network projects, notably some priority projects, to be completed within the desired time frames, despite their positive repercussions on the entire economy of the Union. In addition, cross-border projects are often held up through the intrinsic difficulty of coordinating, at intergovernmental level, their timetable, their financial planning and the related administrative procedures for such projects.

Guaranteeing funding for priority projects

20. The Commission estimates that the Community share in funding the construction of the trans-European transport network will be about €20 billion between 2000 and 2006[6]. In the eyes of the Group, this contribution does not appear to be an adequate

[5] Including both sections in List 0 and in List 1

[6] This amount comprises contributions from the trans-European network budget, the Cohesion Fund and the Structural Funds.

inducement, particularly to carry out cross-border projects. The Group therefore welcomes with interest the Communication from the Commission - Developing the trans-European transport network: Innovative funding solutions[7].

21. Both the commitments entered into at the European Council of Essen and the recommendations of the new priorities made by the Group risk remaining a dead letter if the European Community does not release new financial resources. In particular, the Group recommends to the budgetary authorities that they should positively consider an appropriate allocation of funds, and one which truly acts as an inducement, be set aside for the trans-European transport network within the forthcoming financial perspectives, considering that the investments required in the period 2004 – 2013 for the priority projects alone stand at €208 billion.

22. Recurrent delays are jeopardising the viability of other sections on the route concerned, in particular on cross-border projects. Hence, the Group defends the idea that the Community could play a more active role in financing the cross-border projects. The Commission has already proposed an amendment to the Financial Regulation aimed at raising the share of the TEN budget for certain vital cross-border sections from 10% to 20%. The Group recommends to re-examine this initiative, as a possible first stage of a system permitting a greater modulation of the intervention rate depending on the benefits for other countries and more generally as one of the possible solutions to increase the Community role for cross-border projects .

23. The Group is keen to stress the crucial role of the European Investment Bank (EIB) through its loan policy. It suggests to develop the financing capacity of the bank through various financial engineering techniques in particular for cross-border projects. Moreover, it suggests that the EIB strengthen its links with the European Commission.

24. The coordination of projects and of financial resources, particularly for the construction of cross-border projects, must be strengthened. By their very nature, trans-European network projects benefit the whole of the Union. Consequently, Member States should go beyond a purely national logic which has led - apart from a few, all too rare exceptions - to their excluding funding for any infrastructure outside their territory.

25. The investments needed to carry out the recommended priority projects of the trans-European transport network represent, on average, 0.16% of GDP. They are, however, key productive investments that will improve the potential for economic growth, boost the dynamics of the internal market and contribute to sustainable development and territorial cohesion. In the light of what has just been said, the Group draws the attention of economic policy decision-makers to the incongruity in the long term between what is at stake in carrying out these projects and the constraints curbing public funding.

26. Finally, given the extent of the financial requirements, the Group is calling for initiatives to promote public-private partnerships. An appropriate legal framework, particularly as regards concession rights and charging for infrastructure use, must be introduced at Community level. Such partnerships must also be based on a distribution of risks which is acceptable for the private sector. New guarantee

[6] COM(2003)132 final.

mechanisms ought to be set up, such as in the context of a mutual risk fund, in order to cover, inter alia, the risks of delays or failures to complete certain sections which could jeopardise the viability of a project.

Better coordination of projects

27. The Group considers that it is necessary for coordination - not just financial, but also operational coordination - between the States concerned by projects on a single axis[8] to be strengthened and institutionalised. To that end, a coordination team under the auspices of the Community, headed by a personality recognised and accepted by all the States concerned, should be set up to spur on the achievement of projects on the major axes and to canvass private and institutional investors. In time, such teams could evolve into common management structures ensuring the coordination of the various Community interventions.

28. Superimposing national procedures relating to the assessment of the environmental and socio-economic impacts of a project has proven to be unsuitable in the case of cross-border projects. Going beyond the common assessment methods, joint procedures for trans-national enquiries ought to be developed. Consequently, the Group suggests that, for a given project, there should be the possibility of resorting to a single enquiry in the different States concerned, which could facilitate the application of recently adopted Community rules on environmental impact assessment.[9] Apart from taking better account of environmental priorities, a procedure of this kind will permit greater transparency in the choice of infrastructure and avoid the pointless and costly overlapping of procedures.

1.3. Preparing the next stages in the construction of the network

29. The priority projects selected by the Group are those which contribute most to promoting transnational traffic on the major trans-European axes. This selection procedure has made it possible to highlight a certain number of major trans-European axes. The identification of European axes characterised by major flows unavoidable for geographical or economic reasons facilitates the ordering of priorities and the establishment of consistency between the national plans. Consequently, the Group asks for this initial identification to be completed in the context of the revision of the guidelines by more detailed analyses of traffic flows in a Union of 27 countries.

30. The definition of a core network comprising these axes will constitute an indispensable working tool for further revisions of the list of priority projects. Recourse to a group of high-level experts appointed by the transport ministers has, moreover, permitted the identification of broad guidelines for the trans-European network and the incentives needed for its development. Given the strong territorial dimension and financial implications of the network, the work of a group of this kind constitutes an important prerequisite of any substantial revision of the Community guidelines.

[8] The wording “axis” is used in order to avoid confusion with the pan-European Corridors identified by the Crete and Helsinki Conference under the auspice of ECMT.

[9] Directive 2001/42/EC on the environmental assessment of certain plans and programmes.

31. For this reason, a similar group ought to be set up regularly, taking care to synchronise this exercise with the periodic revision of the Community's financial perspectives, in order to assess the progress made with the priority projects and to consider the inclusion of new projects on the list or, where necessary, the removal from the list of some projects which have been held up for too long.

32. The Group suggests that this exercise could be launched in 2010.

2. THE POLICY OF THE TRANS-EUROPEAN NETWORK SINCE MAASTRICHT

2.1. THE FIRST ACHIEVEMENTS

1. A fully integrated transport network is a prerequisite for a real freedom of movement of goods and people and for bringing together the peripheral, island or isolated areas with the central regions. A modern, interconnected and interoperable network allow, through a better use of transport, to enhance trade and the competitiveness of the European economy as a whole. Without implementing the necessary infrastructure and an appropriate regulatory framework for an efficient network management, the concepts of the internal market and the territorial cohesion of the Union will remain unfinished.

2. The inclusion in the Treaty of Maastricht of a Title for a policy on the trans-European networks gave the European Community competencies and the instruments for their development. In accordance with Article 154 of the Treaty establishing the European Community, the Community contributes to the establishment and development of trans-European networks in the sectors of transport, telecommunications and energy infrastructures. This is with a view to contributing to both the establishment of the internal market, and to economic and social cohesion. To do this it must firstly develop the interconnection and the interoperability of the national networks.

3. Under these conditions, the trans-European transport network will support the development of the economy of the European Union. People, goods and services should be able to circulate throughout the market in an effective way and at the least cost. However, in the last decades, the transport infrastructure of the Member States was still excessively oriented inwards, with the national capitals representing the nerve centres towards which the major transport routes converged. In the early 90’s, the development of the trans-European network became a political priority as it was rightly considered as a supporting tool for the single market, which, with the opening of the internal borders, became a tangible reality on 1st January 1993.

4. Establishing such a network would have become an instrument of economic integration, facilitating communication, reducing distances and making contacts easier between the peripheral and the central regions. As it is of crucial importance for the orderly functioning of the single market, the trans-European network also takes on a fundamental role in developing economic and social cohesion.

5. It soon proved necessary to “step on the gas" to promote the establishment of the trans-European transport network, as its implementation suffered from slow economic growth, which reduced the availability of funds. The Commission’s 1993 White Paper on growth, competitiveness and employment consequently evoked the idea of drawing up a list of projects of Community interest together with a number of measures aiming at mobilising public and private actors.

6. Within this framework, the role of the Union was to eliminate the financial and administrative obstacles in the development of these major and costly priority projects, of which many cross-border projects, by encouraging private investors to

play a larger part in their financing. In other words, these projects were carried out through the encouragement of partnerships between all the interested parties: public authorities, network operators, users, financial institutions and industry. This approach included the development of an action plan for each project in a form which intended to give the political impetus necessary for speeding up its implementation and financing.

7. Based on the Commission proposals contained in its White Paper, the Brussels European Council of December 1993 adopted a series of important decisions to speed up the implementation of trans-European networks (transport, but also energy and telecommunication). One of these created a special group of representatives of the Heads of State or Government chaired by Mr Christophersen. The mandate of the "Christophersen Group" was to help the Council in discharging its task in the field of transport and energy network infrastructure. The prime objective of the Group was to identify priority projects which, in the view of national representatives, were of determining importance for the establishment of the trans-European networks for transport and energy.

8. As regards transport, at its meetings in Corfu in June 1994 and in Essen in December of the same year, the European Council endorsed a list of 14 priority transport projects based on the report drawn up by the "Christophersen Group". It invited the Member States concerned to take all the measures necessary to advance these projects by in particular speeding up the administrative, regulatory and legislative procedures.

9. Subsequently, on 23 July 1996, the European Parliament and the Council adopted Decision N° 1692/96/EC on Community guidelines for the development of the trans-European transport network[10], that included a much larger list of projects of common interest.

10. This Decision[11] set 2010 as its target date for completing the network. The guidelines were intended to encourage the Member States, and if necessary the Community, according to its budgetary resources, to carry out projects of common interest aimed at ensuring the consistency, interconnection and interoperability of the trans-European transport network as well as access to this network.

11. The guidelines put in a single reference framework the plans and criteria for each mode of transport, which has made it possible to identify projects of common interest likely to be eligible for the TENs budget or under financial structural instruments. Furthermore, the Decision incorporated within its Annex III the priority projects adopted by the Essen European Council. **In fact, now, the priority projects endorsed by the Essen European Council represent only a part of the many projects of common interest.**

[10] OJ L 228 of 9.9.1996, p. 1.

[11] The Decision was amended on 22 May 2001, in order to incorporate inland ports and intermodal terminals into the plans, as well as to modify the priority project n°8 as requested by the European Council of Dublin in December 1996.

2.2. THE NECESSITY OF REFORMULATING THE COMMUNITY GUIDELINES.

1. The past decade saw not only a worrying increase in traffic congestion in urban areas, but also a new phenomenon of congestion on the major arteries of the trans-European network, increasing the number of bottlenecks. Missing links in the infrastructure, and a lack of interoperability within specific transport modes and for intermodal transport systems, are all reasons aggravating this congestion of the network. All transport modes are affected: road transport, but also railway transport – the railway themselves estimate that, on the basis of existing technologies, 20% of the railways track represent bottlenecks. Also air traffic is increasingly affected by delays. In contrast, the peripheral regions still suffer from isolation due to a lack of connections with the centre of the continent, and also congestion on the central parts of the network. The peripheral countries of the European Union are thus directly affected by the deterioration of traffic conditions in transit countries.

2. Having to cross natural barriers such as mountain ranges and sea stretches is a particular brake on the movement of goods and people. Traditionally one thinks of the Alps and the Pyrenees, but the ice which covers the north of the Baltic Sea during the winter is another example of a natural barrier which affects maritime traffic in the Nordic and Baltic countries. The construction of adapted infrastructure to cross these areas or the putting into service of specially adapted equipment (ice-breakers) is indispensable. This will require colossal investments which will often require the commitment of several Members States and very good cooperation between national administrations.

3. The phenomenon of congestion or lack of connections for the peripheral regions affects the competitiveness of companies by increasing their costs. It also has a negative impact on the environment through extra fuel consumption, as well as on the citizens' well-being due to the many side effects of transport. According to the Commission, the external costs of congestion due to road traffic alone represent approximately 0.5% of the Gross Domestic Product (GDP) in the European Union.[12]

4. This assessment becomes even more alarming when one realises that transport demand will continue to increase strongly in the future. Therefore, if no measures are taken between now and 2010 to make more rational use of the advantages of each transport mode, heavy lorry traffic alone in the Union of 15 could increase by 50% compared to its level in 1998. This phenomenon affects the Member States as well as the acceding countries, where we note a progressive deterioration of the market share of rail, with a consequent increase in road transport of almost 20% between 1990 and 1998.

5. An effective transport policy is obviously not just limited to the construction of infrastructure on the trans-European transport network. It should be noted, however, that the saturation of certain major arteries routes as well as the lack of satisfactory connections with the peripheral regions are directly caused by delays in implementing the infrastructure of the Network. As the White Paper on the European

[12] White paper on the European Transport Policy

transport policy noted[13], six years after the adoption of Decision 1692/96/EC on the Community guidelines for development of the trans-European transport network, barely 20% of the projects planned for the year 2010 have been completed. The longest delays affect the cross-border and railway projects. Of the fourteen projects adopted by the Essen European Council in 1994, only three have been completed and two have even not been started yet.

6. The current plans of the trans-European network result essentially from the juxtaposition of national plans. After enlargement, this lack of common global vision at the scale of the continent will inevitably lead to a dispersal of efforts and great difficulties in ensuring coherence between the different initiatives to plan and implement the network, at European, national or even regional level.

7. Moreover, at the request of the Member States, more than half of the capital expenditure was devoted to roads. In the new context of sustainable development, the Gothenburg European Council of June 2001 asked that, in future, stress should be laid on the development of rail, maritime and river transport. The Commission's White Paper on transport policy for 2010 also placed the re-balancing between different modes of transport at the heart of a sustainable development strategy.

8. The rebalancing of transport modes also signifies a more vigorous promotion of intermodality. It is necessary to place each project on the trans-European network in a transport chain and to find the optimal combination of existing transport modes, with a view to improving the overall performance of the system while reducing the consequences on the environment. A road project can for example have overall a positive contribution to reduce the environmental impact of transport if it improves a connection with rail or inland waterways. Rather than consider a project in isolation, one must combine at the European level the specific qualities of each transport mode.

9. Consequently, a reformulation of the current guidelines had become essential. As indicated in the Transport White Paper, the unbalanced growth of traffic and the requirements of sustainable development are forcing us to rebalance transport modes, eliminate bottlenecks, and fill in the missing links. Such an effort calls for regulated competition within the whole transport sector, for a framework favourable for the financing of the infrastructure but also for better targeting of investments on the major routes of the trans-European network.

10. We must judiciously use the different transport modes, telematics to better organise journeys and traffic, connect, in all the areas, the relevant networks of national authorities and ultimately improve transport services combining different transport modes. We must integrate higher environmental standards into infrastructure projects. The territorial aspects of transport must be considered in order to guarantee a balanced and sustainable development of all the regions of Europe by a better distribution of traffic flows. The investments are considerable but so are the gains in terms of competitiveness, employment, territorial cohesion, and reduction of negative social and environmental externalities.

[13] COM (2001) 370 - http://europa.eu.int/comm/energy_transport/en/lb_en.html.

11. A first, limited, attempt at revising the guidelines of the trans-European network of transport, was proposed by the Commission on 2 October 2001[14]. It is necessary to point out that although the Commission's proposal received the Parliament's approval on the list of new priority projects presented in Annex III[15], it has not found yet any agreement of the Council. Nonetheless, at several European Council meetings Member States renewed their request for a revision of the guidelines for the trans-European network, including new priority projects.[16]

[14] COM (2001)544; OJ C 362 of 18.12.2001, p. 205.

[15] The new priority projects presented in Annex III of the proposal were: Galileo, a high-capacity rail link across the Pyrenees, a mixed rail line from Stuttgart to Vienna, Danube river improvement between Vilshofen and Straubing, the high-speed rail interoperability on the Iberian peninsula, and the Fehmarn belt.

[16] The following European Councils made the following statements:

Göteborg, "invites the European Parliament and the Council to adopt by 2003 revised guidelines for trans-European transport networks on the basis of a forthcoming Commission proposal, with a view to giving priority, where appropriate, to infrastructure investment for public transport and for railways, inland waterways, short sea shipping, intermodal operations and effective interconnection;"

Barcelona, "requests the Council and the European Parliament to adopt, by December 2002, the revision of the guidelines and the accompanying financial rules on Trans-European Transport Networks (TEN), including new priority projects identified by the Commission, with a view to improving transport conditions with a high level of safety throughout the European Union and to reducing bottlenecks in regions such as, among others, the Alps, the Pyrenees and the Baltic Sea."

Brussels, "invites the Council, in the light of the conclusions of the Barcelona European Council and following the report of the Van Miert High Level Group, to spell out conditions and directions needed in terms of "connectivity", especially in view of enlargement, so as to make better use of and improve existing infrastructure while completing (in the next programming period) its missing links, while reducing bottlenecks in regions such as the Alps, the Pyrenees, the Massif Central and the Baltic Sea, especially related to cross-border natural barriers, encouraging investment in basic infrastructures through available EU financing instruments and joint public-private initiatives;"

3. NEW INFRASTRUCTURE: AN ESSENTIAL CONTRIBUTION FOR ENLARGEMENT

3.1. INTEGRATE THE NETWORKS OF THE NEW MEMBER STATES

1. A reformulation of the current trans-European transport network guidelines is especially necessary since we are on the verge of the largest expansion of the European Union. Ten countries are expected to join the European Union in May 2004: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia. Romania and Bulgaria should join in 2007. This prospect emphasises the need for upgraded or new infrastructure on the corridors serving these countries in order to connect them effectively to the trans-European network of the 15 current Member States. There is also a need to improve the connections between these countries themselves. A new infrastructure network must therefore be developed East-West, and also North-South.

2. Adequate transport infrastructure is one of the conditions for the economic development of the acceding countries and their integration into an internal market on a continental scale, as well as for strengthening the accessibility of the peripheral regions towards the central regions. Borders will not be truly opened and people and goods will not be able to circulate freely and efficiently if the roads, railways, airports and ports of these countries are not modernised.

3. The accession negotiations revealed important needs regarding transport in the acceding countries. Approximately 20,000 km of roads and 30,000 km of railways, as well as ports and airports, will have to be built or modernised to achieve the criteria and the objectives of the Decision on the trans-European network guidelines applicable in the current Member States. The investments to be made in those countries can be estimated at about €100 billion, which is huge compared with their GDP.

4. The pan-European Conferences of the Ministers of Transport in Crete in 1994 and then in Helsinki in 1997 made it possible to identify a series of pan-European corridors crossing the Central and Eastern European countries and connecting with the network of the European Union. These corridors, whose purpose is to take up the major part of international traffic, made it possible to coordinate the interventions of the various authorities, including those of the Community that already actively support the Central and Eastern European countries through the PHARE and ISPA programmes (Instrument for structural policies for pre-accession).

3.2. INFRASTRUCTURE FOR ENLARGEMENT IS A MATTER FOR ALL

5. Raising the economies of the acceding countries to the level of those of the 15 Member States will still however require considerable investment efforts. Moreover, economic growth will itself generate unprecedented growth in the transport needs in these countries, and consequently for infrastructure as well. Since the cycle of development of an efficient transport network is relatively long, we understand that large-scale facilities must be planned and launched now in order to develop the future trans-European transport network of the broad-based Union. Furthermore we need to make up for investments that were not made for several decades because of the separation of Europe into two blocs.

6. The effects of enlargement on the trans-European transport network are not limited to those parts of it located in the future Member States. The integration of markets will be accelerated by enlargement and this will also probably lead to the generation of new traffic flows on the network of the current Member States. Some of the existing peripheral Member States will benefit from new intra-EU connections with central areas, for instance through the Baltic states or the Eastern Balkans. It is difficult to estimate today the magnitude of this phenomenon, which will depend on new territorial dynamics and the international division of labour. It is clear that the regions of the Union bordering the acceding countries will be strongly affected, as will certain major routes such as those crossing the Alps and the Pyrenees. It is therefore particularly important to keep the commitments of previous years and carry out the projects needed to complete the trans-European transport network in the current Union.

4. THE MANDATE GIVEN BY THE COMMISSION

4.1. THE COMPOSITION AND MANDATE OF THE GROUP

1. At the end of 2002, the Vice-President of the Commission, Loyola de Palacio, decided to create a High Level Group to assist the Commission in the revision of the guidelines for the trans-European network. She also wished to associate the future Member States from the outset of this large-scale exercise.

2. The Group was established under the presidency of Mr Karel van Miert, former Vice-President of the Commission with particular responsibility for transport, and comprised a representative designated by the Transport Ministers of each Member State, and, with observer status, a representative from the 12 countries whose accession to the European Union is envisaged in 2004 or 2007, and a representative of the European Investment Bank[17].

3. The primary objective of the Group was to identify, from proposals from each State, a restricted number of priority projects located on those major corridors that will carry important traffic volumes between the states of the enlarged Union. In accordance with the mandate of the Group, this list of projects should only include *"the most important infrastructure for international traffic, keeping in mind the general aims of cohesion of the European continent, modal rebalancing, interoperability and reduction of bottlenecks".* Moreover, each project should be evaluated regarding its *"conformity with the objectives of European transport policy, its Community value added and the sustainable character of its financing up to 2020".*

4.2. THE WORK PROGRAMME

4. The Group met ten times between December 2002 and June 2003. It developed a methodology and criteria for the selection of priority projects. It examined all the proposals for new projects submitted to it by the States, and the eleven unfinished projects among those adopted by the Essen European Council of 1994[18], as well as the six new projects identified by the Commission in its proposal of October 2001[19].

[17] See list of the members of the High Level Group in point 7 of the report.

[18] See Annex III to Decision 1692/96/EC.

[19] Proposal for a Decision of the European Parliament and the Council amending Decision 1692/96/EC on the Community guidelines for the development of the trans-European transport network; COM/2001/544, OJ 362 of 18/12/2001 p. 205. Proposal for a Council regulation of the European Parliament and amending Council Regulation (EC) 2236/95 determining the general rules for the granting of Community financial aid in the field of trans-European networks; COM/2001/545, OJ C 75 of 26/03/2002 p. 316.

5. For those projects that had been selected by the Essen European Council in 1994, the objective of the Group was, above all, to check the commitment of the States concerned to carry them out within a reasonable time-limit, and consequently examine the advisability of keeping them on a list of priority projects. The examination by the Group was also an occasion to update information on these projects and to identify the sections already built, in order to focus future efforts on the sections that are uncompleted. The prospect of enlargement also gave a new dimension to certain projects that had to be taken into account. Therefore some of the 'Essen projects' were extended towards the East to improve connections with the acceding countries.

6. The list of *priority projects* only represents a part of the numerous projects of the trans-European network. However their selection from a wide range of projects gives them a high profile. Receiving this 'European label' will make it possible to concentrate and coordinate the financial resources of the Community budget allocated to the trans-European networks, along with funds allocated by the states and/or regional or local authorities, and also attract private investors.

7. The definition of these priorities will also make it possible to channel the financial contributions of the cohesion and structural funds, and will be able to serve as a reference for the loan policy of the European Investment Bank. These projects display a particularly clear European interest insofar as they will facilitate exchanges between States of the enlarged Union; will improve the cohesion between countries, and will promote modal shift towards the railways and inland waterways.

8. The restricted list of priority projects established by the Group includes those large-scale projects for which all the states concerned were able to show sufficient political commitment, guaranteeing the start of work between now and 2010 and the completion of the infrastructure by 2020.

9. The Group also identified projects with an evident European interest, but where agreement on the timetable is currently lacking between the countries concerned or some other characteristics of the project remain undefined.

10. The Group hopes that this approach will give these projects the necessary high profile to facilitate coordination between the countries concerned and to carry out, where necessary with a financial intervention of the European Community, the required preliminary studies to mobilise potential investors.

11. The Group has identified some projects which contribute in particular to connections to third countries, as well as a series of projects which, although not meeting the selection criteria to be retained on a list of priority projects, are important at the national or regional level and which could, where appropriate, benefit from certain Community funds (Cohesion Fund and/or European Regional Development Fund).

12. Apart from the selection of a restricted number of priority projects, the Group also identified projects involving so-called "horizontal" priorities that contribute to improving the organisation and management of traffic. More precisely, this involves projects aiming to promote interoperability and traffic management systems for the various modes of transport.

13. In addition, the Group explored the means of facilitating and accelerating the implementation of the priorities of the trans-European network. Success in carrying out major projects of the trans-European transport network very often depends on the degree of coordination between the various authorities concerned. This is particularly the case for cross-border projects where the launch but also the implementation commonly suffer from the lack of a common approach.

14. In this context the Group has identified some measures which the Commission needs to examine in more detail with a view to reinforcing the financial part of projects of the trans-European network. Public private partnership and the coordination of different sources of investment are examples of approaches which merit deeper consideration at a technical level.

15. The Group also recommended a method, a procedure and a timetable for future updates of the list of priority projects. These updates involve the identification of new priority projects, but also the possible withdrawal from the list of projects failing to make any progress or projects whose profitability and feasibility are called into question.

5. THE NECESSITY OF A SELECTIVE APPROACH

5.1 GENERAL REMARKS

5.1.1. An insufficient and sometimes incoherent provision of infrastructure at the European level

1. Experience shows that the volume of overall traffic always, or almost always, increases more quickly than GDP and that interurban flows and, in particular, long distance flows, grow even faster. In addition, enlargement will accelerate this traffic growth, in particular for freight. At the same time, the provision of infrastructure does not keep pace because of, amongst other things, a lack of public financing and the current difficulty of mobilising private funds. This gap between transport needs and the supply of new infrastructure will lead to an impasse which will not be without negative consequences for the competitiveness of the economy of the Union.

2. The coherence of the trans-European network suffers from the actions of the past. The transport infrastructure networks in the various Member States were developed above all according to a national logic, giving priority to the development of radial routes serving major cities, thus affecting overall balance. Experience shows that it is the cross-border sections which are generally the last to be carried out on a given transport route. Furthermore, the Member States do not all show the same interest in the transport modes - alternatives to road - which sometimes leads to situations where canals or railway tunnel projects for freight are only built up to one side of the border.

3. In addition, the division of Europe after the Second World War led to underinvestment in the connections not only between the current Member States and the future Member States of Central and Eastern Europe, but also in those between the acceding countries themselves.

4. The policy of transferring a share of the growth of goods traffic by road towards railways, inland waterways, or the Motorways of the Sea will only happen if cross-border infrastructure projects and interoperability on a European scale see the light of day.

5. Infrastructure project management is becoming increasingly complex. Carrying out of major projects today takes from 10 to 15 years, or even longer in the case of the cross-border projects.

6. In addition, the implementation of cross-border projects is hindered by specific factors such as different political agendas, the lack of coordination of administrative procedures on either side of the border and the difficulty to agree on sufficient amount of public contribution to make projects bankable. The political decision-makers are sometimes inclined to sacrifice cross-border projects for the benefit of national projects.

7. It requires a long-term vision in order to avoid, as is often the case today, short-term decisions on financing infrastructure - according to the political priorities of the day. It also requires a Community vision, on the level of the enlarged Europe, for the planning of major infrastructure.

5.1.2. The foreseeable development of traffic

8. The integration of 12 new Members States between now and 2007 will greatly stimulate these countries' trade. It must be expected that, if Europe does not agree to make sufficient efforts for modal transfer and the construction of new infrastructure, certain sections of the current network will quickly arrive at complete gridlock.

9. It is still difficult to make forecasts, especially for 20 years hence. Nevertheless, the Commission's services launched a major study aiming to simulate growth scenarios for traffic in an enlarged Europe as well as identifying how the major flows were structured on a European scale.[20]

10. Although this study is not yet completed, the Group benefited from certain preliminary results. Even on the assumption that some of the proactive measures proposed in the White Paper on European transport policy were implemented, with an assumed growth of 60% of GDP and a moderate economic catch-up of eastern countries, the volume of land freight traffic would increase by 68% from 2000 to 2020 in the current Member States and by 94% in the future Member States.

Provisional results

Freight transport in billion t.km	*Current Member States*			*New Member States*		
	2000	***2020***	***%***	***2000***	***2020***	***%***
Road	848	1420	67%	114	268	135%
Rail	220	388	76%	167	273	63%
Inland waterways	145	226	56%	7	18	157%
Total	1213	2034	68%	288	559	94%

11. Without wishing to be too alarmist, the Group draws the attention of the Member States and the Community Institutions to the importance of taking, today, courageous decisions both on the common transport policy and on investment priorities for safeguarding the competitiveness of the European economy.

5.1.3. The constraint of financing

12. The estimated cost of the whole trans-European transport network agreed in 1996 in the guidelines and in 2002 in the Accession Treaties, alone, amounts to nearly €500 billion[21] for all the projects due initially to be completed by 2010, including €112 billion still to be invested for the priority projects agreed by the European Council of Essen. The work of the Group has shown that new additional needs for a time horizon of 2020, not yet identified in the guidelines, have now to be considered. Adding what needs to be completed to achieve past commitments and these new needs, we can estimate the total needs at nearly more than €600 billion until 2020.

[20] Study “Scenarios, traffic forecast and analysis of TEN corridors”, ordered by DG TREN. Figures exclude local traffic.

[21] 2003 prices, excluding traffic management and information systems and partly airports and ports.

13. The Member States, which invested on average 1.5% of the GDP in transport infrastructure during the 1980s, now invest less than 1%[22]. Acceding countries currently invest roughly 1.5% of their GDP and it seems to be quite unlikely that they could significantly increase this level without external support. Only a small part of these investments is actually devoted to infrastructure of the trans-European transport network, the lion's share being allocated by Member States to other national, regional or urban transport projects. Recent estimates[23] point out that overall investments in the trans-European transport network in the EU27 amount to less than €30 billion a year since 1996. With such a pace of investments, more than 20 years will be needed to complete the network.

5.1.4. The need for greater concentration, selectivity and coordination

14. The constraints relating to public finance inevitably require a high selectivity in identifying new priority projects of common interest. A stronger concentration of efforts must be sought on the basis of joint programming and maximising the profitability of these new infrastructure by ensuring coordinated development at European level. The effectiveness and the value added of Community action necessitates concentrating, in a selective manner, the financial support of the Community.

5.2. CRITERIA AND METHODS FOR EXAMINING THE PROJECTS

5.2.1. Take stock of progress and delays with existing priority projects

1. Although the Group could take stock of progress on a number of priority projects (see Chapter 6.1), it had to examine the reasons for delays encountered by those priority projects which will not be completed between now and 2010. Certain delays are inherent in infrastructure project management in general, such as:

   – the lack of well advanced studies when the decision to build the infrastructure is taken;

   – the existence of environmental constraints, connected for example with being in a NATURA 2000 area;

   – the legal risks, which arise from the 'NIMBY syndrome' ("not in my backyard"). Decisions taken by the Member States to build major infrastructure are increasingly frequently challenged in local courts.

2. It must also be remembered that it is the cross-border projects or the cross-border sections which in general show the biggest delays. The cross-border nature of these projects exposes them to additional causes of delay:

[22] Including transport infrastructure of the trans-European network and others, ECMT, “Investment in Transport Infrastructure 1985 – 1995”.

[23] Study TEN-Invest commissioned by DG TREN, excluding traffic management and information systems.

- firstly, sometimes there is the difficulty that Member States have to agree on a route, as in the case of the high-capacity rail crossing of the Pyrenees;

- secondly, the question of who is going to pay is particularly difficult to agree upon as the benefits are usually not in proportion to the costs incurred in each region or country crossed by the project (for instance in the case of the Brenner base tunnel of priority project No 1 of the Essen list);

- thirdly, unlike national projects, cross-border projects are likely be the focus of political decision-makers seeking advantage on the pretext that the other Member State is, or is likely to be, behind schedule;

- lastly cross-border projects suffer from having to undergo different procedures in the various Member States for prior authorisations necessary for construction of the infrastructure in question. Similarly, it is more difficult to set up a management contract for the cross-border sections.

3. The delays encountered by cross-border projects illustrate certain weaknesses of the intergovernmental method used up until now by the Member States:

   - Member States which are not concerned with the project route but which have on the other hand a direct interest in its construction as it links them to the network, are not invited to the bilateral meetings;

   - the Community is not represented at the "intergovernmental" meetings between Member States, although there is the question of common interest and the fact that the Community contributes a sometimes considerable financial share from the Cohesion Fund, from the ERDF or from the TEN budget line;

   - the delays in the construction timetables do not result in 'penalties' to the State in question, although these delays often cause a severe financial cost to another Member State which carried out its section on time, but which cannot make this section profitable in the absence of an extension of the infrastructure beyond its border.

5.2.2. The need to stick to strict criteria

4. An examination of all the priority projects selected by the Christophersen Group might give the impression that they do not have a perfect coherence. The method used and the rules of the game inherent in this type of exercise can explain this relative and occasional lack of coherence. Some of the Essen projects reflect a national planning desire which does not show any strong synergy with the remainder of the trans-European network. Others take the form of packages including many disparate projects. However, the priority projects have a role in completing major trans-European axes whose usefulness and European added value is undeniable at the level of the Community. The present Group wished to avoid the above-mentioned difficulties by following two principles :

- having a rigorous and clear methodology for choosing the priority projects;

- having in mind the concept of major trans-European axes - like that of pan-European corridor developed by the pan-European conferences on transport infrastructure among the countries of Central Europe and Eastern Europe – so as to keep in mind the need for the priority projects in an overall framework and hierarchy coherent with the trans-European network.

5. The Group arrived at a clear methodology and criteria to choose from among the candidate projects, those which can really play a key role from a European perspective.

5.2.2.1 A two stage method

6. The Group decided to work in two stages. In a first stage, the Group pre-selected the projects worthy of being examined in more detail, by eliminating those projects not meeting one of the following criteria:

   - Being on a main trans-European axis pertinent to the internal market of the enlarged Europe, taking in particular into account projects crossing natural barriers, solving congestion problems or corresponding to missing links.

   - Having a European dimension in particular by meeting a threshold of €500 million for infrastructure.

   - The existence of evidence showing potential economic viability, other socio-economic benefits (e.g. social, environmental), and firm commitments from the concerned Member States to carry out the required impact assessments with a view to completing the project within an agreed timeframe.

7. In a second stage, the Group selected the priority projects with respect to the three following qualitative criteria:

   - The European value added of the project, in terms of importance for facilitating exchanges between Member States, for instance improving interconnections and interoperability between national networks.

   - The strengthening of cohesion, either by better incorporating the future Member States into an enlarged Europe, or by connecting the main peripheral areas and the least developed regions to the rest of Europe.

   - The contribution to the sustainable development of transport while tackling the problems of safety and of environmental protection and by promoting modal transfer.

5.2.2.2 The pre-selection

8. The first pre-selection criterion refers, for the future Member States, to the pan-European corridors mentioned in Chapter 4 of this report. For the current Member States, the main trans-European axes which should have constituted the framework of a genuine core trans-European network were never formally identified and listed.

This is why, Member States were invited to indicate for each one of their proposals on which main trans-European axes the project in question was located. This approach made it possible to have very constructive and informative exchanges on the perception that the various members of the Group had of what these main trans-European axes were.

9. The second pre-selection criterion relating to the financial threshold had the role of ruling out the projects whose scale was obviously below that foreseen for this exercise.

10. Lastly, as a the third pre-selection criterion it was considered crucial to be able to rule out the projects which are not mature enough or to which the States are not ready to commit themselves.

5.2.2.3 The evaluation of the pre-selected projects

11. The first evaluation criterion relating to the European value added is without doubt the most important one. This criterion is measured either by the share of intra-Community traffic (i.e. concerning at least two Member States) in percentage terms of the total traffic on the sections concerned, or on the increases in net capacities on the route concerned, or by the number and length of networks which become interoperable.

12. The second evaluation criterion relating to the contribution of the project to cohesion directly follows the provisions of Article 154(2), of the EC Treaty. This criterion reflects population of an 'isolated' region served by the infrastructure in question, and in the number of hours saved for the peripheral regions, or the cost savings for the transportation of goods.

13. Lastly, the third evaluation criterion reflects one of the major concerns of the White Paper on transport policy to make transport more compatible with sustainable development. This objective has to measure itself by the number of passenger-kilometres or of tonnes-kilometres transferred towards more "sustainable" modes of transport, such as rail or waterways.

5.2.2.4 Comparisons with the approach of the Christophersen Group

14. For the record, we recall that the Christophersen Group devised a list of selection criteria as follows:

(i) projects had to be projects of common interest in accordance with the criteria which were meanwhile set in the Community guidelines for the development of a trans-European transport network;

(ii) they had to be of exceptional size, bearing in mind the type of project and the relative size of the Member States directly concerned;

(iii) they had to pass the economic viability test, including improvements of competitiveness and the technological performance of the Union;

(iv) they had to allow for the possibility of private financing;

(v) they were ought to be mature enough in order to be carried out quickly;

(vi) they had to avoid the public financing of infrastructure which would lead to distortions of competition contrary to the common interest;

(vii) and to respect Community legislation, in particular concerning environmental protection.

15. The Group took up most of these selection criteria, knowing that the other criteria had implicitly to be met whatever happened, and added up other criteria attempting to capture the greatest European value and reflecting new important policy objectives like sustainable development. The innovation of the Group consists in having introduced evaluation criteria beforehand, on which it will justify the inclusion or not of a project in the list of the priority projects. The evaluation criteria are not absolute instruments, but constitute above all a methodological reference to facilitate the work of the Group and to justify certain decisions.

16. It must be recalled that the Christophersen Group retained 14 priority projects from the 34 projects which had been submitted to it. For this exercise, the present Group had to examine more than one hundred projects and finally select only 19 in the list of the priority projects.

17. This is why the Group had to make use of a very selective approach, by retaining only those projects whose overall contribution to the objectives inherent in the three evaluation criteria is obviously higher than the average. The fact that a project is not adopted as a priority does not mean that it is not of interest for the Community.

18. Firstly, the list of the priority projects is intended to evolve over time. Secondly, for certain non-selected projects, the Group commits itself to recommending their being taken into account for other Community funds.

19. It is from this viewpoint that the Group decided on various lists of projects.

6. RECOMMENDATIONS OF THE GROUP

1. These recommendations go beyond a strict framework limited to physical infrastructure. Demand management, active policies on intermodality and investment targeted and coordinated on the major trans-European axes are only facets of the same problem, to ensure sustainable transport development at the level of the enlarged European Union.

2. Although a number of missing strategic links have to be built, more efficient use of the existing network is crucial. The potential of maritime transport on intra-Community routes still needs to be tapped by innovative cooperation between public authorities and the private sector to start up genuine ‘motorways of the sea’. The organisation of traffic to distribute railway capacities between freight and passenger trains, to manage the capacity of airports and of airspace, better use of rail signalling, and ultimately more integrated traffic management will also prove necessary.

3. Given the budget constraints and the change of the scale of the trans-European network after enlargement, a more coherent approach between European and national infrastructure planning will be needed. Identifying the main multimodal routes taking intra-Community traffic flows is a prerequisite to organise effective coordination of the various public authorities and industry and to target the efforts to promote a shift to rail and waterborne transport able to compete with roads mainly for long-distance services.

4. Undertaking the priority projects identified by the Group will require substantial public financing. It will also demand further efforts to adapt the legal and transport policy framework to allow both a higher participation of private capital and more efficient use of infrastructure overall.

5. The Group stresses that the implementation of these priorities must be monitored regularly at Community level and that a further revision between now and 2010 will be necessary.

6.1. CARRY OUT THE PRIORITY PROJECTS

6. The Group identified a set of new priorities, and other important projects, considered as crucial to facilitate transnational exchanges in a single internal market, and to promote intermodality leading to a 'rebalancing' of the territory of the enlarged Union.

7. The lessons of the past and of the delays to the Essen projects have to be learnt. The Group took first stock of the progress made as regards the current Essen projects (List 0).

8. After having considered 100 projects, 24 delegations agreed on a set of new priority projects which were grouped together synthetically in the report, depending on their belonging to a certain number of major traffic axes on the scale of the expanded Union. Belgium and Luxembourg did not approve the report because the upgrade of the rail link between Brussels and Luxembourg was not included in List 1. Greece also disagreed because it wanted to add the Ionian/Adriatic intermodal corridor in List 1 instead of List 3.

9. It was ensured that the new priorities in List 1 are clearly defined, have a high European value added, and are realistic as concerns financing and the possibility to start work on time. Important sections of six of the Essen projects have been integrated in these new priority projects.[24]

10. Projects identified in List 2 feature a particularly high European added value and, although for a longer-term time horizon, deserve special attention. Without prejudging the scope of Community financial instruments in the future, the Group has also identified a list of important projects for territorial cohesion contributing to the aims of economic and social cohesion (List 3).

11. It cannot be ruled out that other needs will appear between now and the next revision of the list of priority projects, nor, moreover, that it will be necessary to re-examine certain projects identified by this report (see Chapter 6.7).

12. It is advisable to make a distinction between these priorities and eligibility for Community funding. Eligibility is specific to each financial instrument and has to be considered on a case by case basis (see also Chapter 6.6). The numerous other projects not included in this report are not less important. Choices had to be made. Besides that, a certain number of other projects have simply neither the necessary scale, nor the strategic role for the Community, to develop transnational trade, to significantly contribute to territorial cohesion and to the concentration of traffic on the more environmentally friendly modes.

6.1.1. Priority projects in the process of completion (List 0)

13. Certain priority projects adopted by the European Councils of Essen and Dublin are in the process of completion. Their implementation is envisaged in the majority of cases before 2007. **The Group notes the progress achieved and recommends the**

[24] Former Essen Priority Projects N°1, 3, 4, 6, 8, 12 (see table 2 of 6.1.1)

continuation of work on these priority projects according to the agreed timetables.

14. The Group confirms their priority character. It notes in addition that certain important sections within these projects will not be finished before 2007 and that, consequently, **it is advisable to retain Community financing during the next Community budgetary perspective**. Table 1 below presents the projects which will be completely finished between now and 2007.

Table 1: Projects completely finished by 2007

Projects or sections of projects completed in 2007	*Date for start of operation*
PP2 High Speed Train Paris-Brussels-Cologne-Amsterdam-London [25]	2007
PP5 Betuwe line	2007
PP 9 Rail line Cork-Dublin-Belfast-Stranraer [26]	2001
PP 10 Malpensa airport (finished)	2001
PP11 Öresund fixed link (finished)	2000

15. Other projects are also on the way to completion. Numerous sections will be completed within the deadline initially envisaged, i.e. 2010. The progress achieved by the States concerned deserves to be noted (table 2).

Table 2: Projects of which several sections will be completed by 2010

Projects or sections completed before 2010	*Date for start of operation*
PP1 Berlin-Verona	
- Nürnberg-München	2006
- Kufstein-Innsbruck	2009
PP3 Southern TGV	
- Madrid-Barcelona	2005
- Barcelona-Figueres-Perpignan	2008
- Madrid-Vitoria-Hendaya	2010
PP 4 TGV East	
- Paris-Baudrecourt	2007
- Metz-Luxembourg	2007
- Saarbrücken-Mannheim	2007
PP 6 Lyon-Torino-Trieste	
- Torino-Venezia	2010
PP7 Greek Motorways	
- Via Egnatia	2006
- Pathe	2008
PP 8 Multimodal link Portugal/Spain rest of Europe	
- Rail line Coruña-Lisboa-Sines	2010
- Rail line Lisboa-Valladolid	2010
- Rail line Lisboa-Faro	2004
- Road Coruña-Lisboa	2003
- Road Lisboa-Valladolid	2010
- Road Seville-Lisboa	2001
PP12 Nordic triangle	
- Road and railway projects in Sweden [27]	
- Road link Helsinki-Turku	2010
- Rail line Kerava-Lahti	2006
PP13 UK/IRL/Benelux road link	2010
PP14 West Coast Main Line	2007

[25] Two main HST stations in the Netherlands, Rotterdam and Amsterdam need further financing beyond that foreseen in the project retained in the Essen List.

[26] New additional capacity enhancement of the line has been decided in 2003 and is included in List 1 as a separate project.

[27] Only some minor road and railway sections will remain to be completed between 2010 and 2015.

16. The Group observes, however, that, within the Essen projects, progress is unequal. **The sections located within the national networks have made notably more progress than the cross-border sections, which in general, except the Öresund bridge, have encountered major delays.** Consequently, essential sections of these projects will not be completed before 2010[28].

17. As regards the project N° 14 (West Coast Main Line), the Group welcomes the commitment of the UK to implement ERTMS before 2015.

6.1.2. Priority projects to start before 2010 (List 1)

18. On the basis of the proposals submitted by the Member States, the acceding countries and the Commission, the Group identified a series of projects having a very high European value added. **The countries concerned gave firm commitments to begin work on all the sections of each one of these projects at the latest in 2010 so that to make them operational at the latest in 2020.**

19. The Group considers that they constitute the priority projects for the period 2007-2020. They should consequently be identified as such in the future guidelines on the trans-European transport network, without however prejudging later revisions provided for in Chapter 6.6 of this report.

20. The majority of these projects aim to build new railway, river or road infrastructure. The geography of transport flows in Europe as well as the technological developments of the transport sector, in particular in the railways, require us to go beyond the traditional concept of infrastructure. Projects for the development of motorways of the sea, which will make it possible to cross or circumvent natural barriers such as the Alps, the Pyrenees and the Baltic Sea are therefore proposed. Technological projects aiming to improve the interoperability of the rail network, and the overall transport management such as Galileo, are also adopted.

21. The inclusion in this list of certain projects is accompanied by conditions to be fulfilled before a certain date. The Group considers that if these conditions are not met after a while, it will be advisable to transfer the projects concerned to List 2 (longer-term priority projects).

22. The Group recommends that the authorities of the countries concerned, as well as various Community Institutions, give, in particular in their investment and financing decisions, real priority to carrying out these projects in a coordinated framework.

23. These priority projects, and the corresponding sections, are indicated below (date of completion of sections between brackets).

1. Galileo (2008)

The Group considers this project as presenting a particularly high strategic interest as it will provide the European Union with an autonomous radionavigation system. The launching of a constellation of 30 satellites covering the world, supplemented with land transmitters allowing the supply of universal services, will provide an essential tool for many sectors and in first instance for the transport sector. It will improve the efficiency

[28] Some of these sections still requiring important work are included in List 1 because of their fundamental European interest.

and safety in all modes of transport, by constituting a solid technical base for positioning and the identification of all vehicles, trains, ships and aircrafts.

2. Eliminating the bottlenecks on the Rhine- Main- Danube [29]

- Rhin-Meuse (2019) with the lock of Lanaye as cross-border section
- Vilshofen – Straubing (2013)
- Wien – Bratislava (2015) cross-border section
- Palkovicovo-Mohacs (2014)
- Bottlenecks in Romania and Bulgaria (2011)

The Group observes that the Vilshofen-Straubing section constitutes a major bottleneck on the Rhine-Main-Danube line. It stresses that its upgrading should guarantee a draught of at least 2.50 metres during all seasons, in order to develop long-distance and reliable inland waterway transport, compatible with environment, from the North Sea to the Black Sea. However, the Group notes that the technical option taken by Germany for the Vilshofen-Straubing section does not ensure this level of navigability throughout the year.

3. Motorways of the Sea[30]

- Motorway of the Baltic Sea (linking the Baltic Sea Member States with central and western Member States)
- Motorway of the Sea of Western Europe (leading from the Iberian peninsula via the Atlantic Arc to the North Sea and the Irish Sea)
- Motorway of the Sea of South-East Europe (connecting the Adriatic Sea to the Ionian Sea and the Eastern Mediterranean to include Cyprus)
- Motorway of the Sea of South-West Europe (Western Mediterranean), connecting Spain, France, Italy, including Malta, and linking the Motorway of the Sea of the South-East Europe[31]

Proposals aiming at developing these motorways of the sea will have to be proposed to the Commission by at least two Member States and must respect certain conditions (see Chapter 6.2). For the Motorway of the Baltic Sea, a joint working group of the countries concerned has already agreed upon a number of transnational proposals (e.g.icebreaking, tracking and tracing of cargo). The Group also welcomes the Greek and Italian initiatives to prepare proposals fitting in the Motorway of the Sea of South-East Europe.

[29] A part of this project fits into pan-European Corridor VII.

[30] Projects to be addressed at a later stage to the Commission in order to be evaluated.

[31] Including towards the Black Sea

4. Mixed railway line Lyon-Trieste/Koper-Ljubljana-Budapest [32]

- Lyon-St Jean de Maurienne (2015)
- Mont-Cenis tunnel (2015/2017), cross-border section
- Bussoleno-Torino (2011)
- Venice-Trieste/Koper-Divaca (2015)
- Ljubljana-Budapest (2015)

As regards the first three sections, the Group classifies them in List 1 on condition that the tunnel under Mont-Cenis, the most critical cross-border section, is completed at a time horizon of 2015/2017. It invites the countries concerned to respect their commitments within the deadline agreed upon. The economics of these sections depend on a firm commitment of the countries concerned to promote a transport policy favourable to intermodality in the spirit of the Alpine Convention. The idea of new road capacities on the competing routes, even in the short and medium term, is not compatible with this project. A coherent approach as regards infrastructure charging is in addition necessary.

5. Mixed Railway line Berlin-Verona –Napoli/Milano-Bologna

- Halle/Leipzig-Nürnberg (2015)
- München-Kufstein (2015[33])
- Brenner tunnel (2015), cross-border section
- Verona-Napoli (2007)
- Milano-Bologna (2006)

The Group classifies this project in List 1 on the condition that the cross-border sections, in particular the Brenner tunnel, are completed at the time horizon of 2015. The Group invites the countries concerned to respect their commitments to carry out these sections within the agreed deadline. Like the previous project, the economics of the Brenner tunnel and its access links depend on a firm commitment of the countries concerned to promote a transport policy favourable to intermodality in the spirit of the Alpine Convention. The idea of new road capacities on the competing routes, even in the short and medium term, is not compatible with this project. A coherent approach as regards infrastructure charging is in addition necessary.

6. Mixed railway line Greek/Bulgarian border- Sofia –Budapest – Wien -Praha-Nürnberg [34]

- Greek/Bulgarian border–Kulata-Sofia-Vidin/Calafat-(Craoiva) (2015)[35]
- Curtici–Brasov–(towards Bucuresti and Constanta) (2010)
- Budapest-Wien (2010), cross-border section
- Brno-Praha-Nürnberg (2010), with Nürnberg-Praha as cross border section.

[32] Parts of this project are registered in pan-European Corridor V.

[33] Depending on the completion of the Brenner tunnel

[34] Some parts of this project are on pan-European Corridor IV.

[35] The section Vidin/Calafat to Craiova is subject to further discussion with the Commission.

The interoperability of this line on a major railway axis, including a branch connecting the Black Sea to the centre of Europe, has to be ensured by applying the Community technical specifications.

7. High Speed Railway lines, South-West

- Lisboa/Porto – Madrid (2011)
- Perpignan – Montpellier (2015)
- Montpellier - Nîmes (2010)
- Irún – Dax as the cross border section (2010)
- Dax - Bordeaux (2020)
- Bordeaux – Tours (2015)

The Group stresses the importance of the sections crossing the natural barrier of the Pyrenees, which acts as a brake on economic development (see also 6.1.3). The granting of a concession on the section between Figueres and Perpignan (in List 0), on the Mediterranean side, should be done as quickly as possible and be followed by the section between Perpignan and Nîmes as soon as possible. For the Atlantic side the Group recalls the commitments given at the European Council of Essen to develop a high-speed connection, which unfortunately will not be completed before 2020. It suggests ensuring mixed use (freight/passengers) of this railway corridor and increasing capacity for goods traffic in the short and medium term. With regard to the new connection between Lisboa/Porto and Madrid, the Group proposes classifying it in List 1 provided Spain and Portugal decide the route in time before the adoption of the revised TEN-T guidelines in particular for the cross border sections of the project.

8. Mixed railway line Gdansk-Warszawa-Brno/Zilina [36]

- Gdansk-Warszawa-Katowice (2015)
- Katowice-Brno-Breclav/Zilina-Nove Mesto n.V.(2010)

The Group considers that the implementation of this project, together with project n° 18, along a new north-south axis from the Baltic Sea, constitutes an opportunity for providing in the long term an alternative to the existing saturated north-south axes from the North Sea. The project includes access to the Port of Gdansk.

9. Mixed railway line Lyon/Genova –Basel – Duisburg - Rotterdam/Antwerp

- Lyon-Mulhouse-Mülheim (2018), with Mulhouse-Mülheim as cross-border section [37]
- Genova-Milano/Novara-Basel-Karlsruhe (2015)
- Frankfurt-Mannheim (2012)
- Duisburg-Emmerich (2009)
- "Iron Rhine" Rheidt – Antwerp (2010)

This project comprises the construction of new high-speed passenger lines, of new dedicated freight lines, and upgrades of existing lines. The construction of new high-speed lines will release capacity on the existing lines for freight. This project is proposed,

[36] This project forms part of pan-European Corridor VI.

[37] Including the so called “TGV Rhin-Rhone” minus the western branch. The section Dijon-Mülhouse (“East Branch”) included in the project will be completed in 2010.

with a view to, among others, establishing a dedicated rail freight corridor at a later stage. The good timing of the work requires close coordination of investments between all the countries concerned, including Switzerland (see Chapter 6.5).

10. Mixed railway line Paris - Strasbourg - Stuttgart –Wien –Bratislava

- Baudrecourt-Strasbourg-Stuttgart (2015) with the Kehl bridge as the cross-border section
- Stuttgart-Ulm (2012)
- München-Salzburg (2015), cross-border section
- Salzburg-Wien (2012)
- Wien-Bratislava (2010), cross-border section.

The cross-border parts of this project constitute the critical sections, in particular between France and Germany and between Germany and Austria. The Group recommends that the Member States concerned take all the measures necessary to ensure the coordination of investments and the respect of their commitments to complete work within the agreed time.

11. Interoperability of the high-speed rail network of the Iberian Peninsula

The Group proposes to place in List 1 the new high-speed lines (with European gauge) and the lines upgraded with dual gauge of the Iberian Peninsula. The Group sticks to the definition proposed by the Commission[38], with specifications described in the project fiche attached to this report. The project comprises the new high speed line between Vigo and Porto.

12. Multimodal links Ireland/UK/Continental Europe

- Strategic Road/Railway corridor linking Dublin with the North (Belfast-Larne) and South (Cork) (2010)
– Road/Railway corridor Hull-Liverpool (2015)

- Railway line Felixstowe-Nuneaton (2011)
– Railway line Crewe-Holyhead (2008)

The projects Felixstowe-Nuneaton and Crewe-Holyhead and on the road/railway corridors Hull-Liverpool, crossing the West Coast Main Line, will contribute particularly at improving the transport of freight between major British ports. In Ireland, the development of passengers and freight transport requires additional works compared to what was already achieved under Essen projects N° 9 and 13 (see List 0).

13. Rail/road bridge over the Strait of Messina (2015)

The project consists of a long mixed bridge- with a distance of 3.3 km between the two main piers - over the Strait of Messina which will connect the most populated island of the Mediterranean Sea (5 m inhabitants) to the rest of Europe. This link will constitute a landmark infrastructure for Europe with a a magnitude comparable with that of the Öresund bridge.

[38] In COM(2001)544

14. Fixed link rail/road across the Fehmarn Belt (2014)

The objective of the Fehmarn Belt is to create a fixed combined link for both railway and road and thus eliminate an important bottleneck for transport flows between Scandinavia and the Continent. The link will in particular benefit rail transport. An agreement between Germany and Denmark on the financing methods should be found in the near future so that the project could be carried out within the agreed time. The railway connections to the fixed link of the Fehmarn Belt, in Denmark from the Öresund, and in Germany from Hamburg, Hannover and Bremen needs to be considered as part of the extended project.

15. The Nordic Triangle

- Helsinki-Vaalimaa motorway (2015)
- Railway line Helsinki-Vainikkala(Russian border) (2014)

The layout of this project remains as it was when retained by the European Council of Essen. The principal sections which will be carried out between now and 2010 are however included in List 0. In Sweden some minor sections remain to be completed by 2015.

16. Multimodal connection Portugal/Spain with the rest of Europe

This project remains as it was when defined at the European Council of Dublin, except for the sections carried out before 2007 which are included in the List 0 and for the new section from Sines to Badajoz on the Spanish-Portuguese border.

17. Motorway Greek/Bulgarian border -Sofia-Nadlac (Budapest)/(Constanta) [39]

- Sofia-Kulata-Greek/Bulgarian border (2010), cross-border section
- Nadlac-Sibiu (branch towards Bucuresti and Constanta) (2007)

The project extends the Greek motorway “Pathe” (a priority project endorsed by the Essen European Council) to new Member States.

18. Motorway Gdansk –Katowice –Brno/Zilina –Wien [40]

- Gdansk-Katowice (2010)
- Katowice-Brno/Zilina (2010) cross-border section
- Brno-Wien (2009) cross-border section

The Group considers that the implementation of this project, together with project n° 8, along a new north-south axis from the Baltic Sea, constitutes an opportunity for providing in the long term an alternative to the existing saturated north-south axes from the North Sea. The project includes access to the Port of Gdansk.

[39] These two sections are part of pan-European Corridor IV.

[40] Road element of the pan-European Corridor VI.

6.1.3. Longer-term priority projects (List 2)

Other less mature projects also present a high European value added. The Group is fully aware that, due to their importance, these other projects could have appeared in List 1. This is particularly the case for the rail crossing of the Pyrenees already proposed by the Commission and accepted by the Parliament in the framework of the first revision of the Guidelines[41].

However, to its great regret, the Group was not able to obtain from all the countries concerned a commitment that construction would begin before 2010, once the alignment was precisely established, which is not yet always the case. Until an agreement is reached between the countries concerned on the alignment and/or the funding, and until the timescale for achieving these projects is confirmed, the Group recommends that they should be classified in a list of priority projects for the longer term.

The Group therefore recommends that the States concerned continue all the necessary studies, that the Commission supports them and proposes, if necessary, an adaptation of the guidelines to this end. It will be advisable to again examine these projects at the time of the preparation of the next revision (see Chapter 6.7). These longer-term priority projects are:

1. New high-capacity railway crossing of the Pyrenees

The Group draws the attention of the Member States concerned to the very rapid growth in traffic across the Pyrenees and to the fact that the development of new rail freight capacities is crucial given that land transport traffic amounts at 70 million tonnes in 1999 and will more than double by 2020. The current roads cannot absorb such an increase in traffic (+10% of yearly increase of road traffic).

In this context, taking account of the great importance of this project, an importance already identified by the Commission and recognised by the Parliament, the Group hopes that France and Spain will be able by common accord to reach an agreement in the near future permitting construction to begin before 2010, thus allowing this project to have the same status as the projects appearing in List 1.

The Group recalls that the Commission listed the improvement of the Pau-Canfranc line in its proposal to revise the Community guidelines for the development of the TEN-T as one of the stop-gap solutions while waiting for the construction of the high-capacity trans-Pyrenees line.

Given the impressive growth of the trans-Pyrenean freight traffic, the remote time horizon of such a huge project makes it necessary to increase, in a near future, the capacity on existing road connections through the Pyrenees so that the means of crossing them can be enhanced, while keeping in mind the necessity of constructing the high-capacity railway crossing as soon as possible.

[41] COM (2001) 544

2. Rail Baltica: Helsinki-Tallinn-Riga-Kaunas-Warszawa

As well as an agreement between the States concerned on the nature of work, the route and the interoperability standards, it will be advisable to ensure a good interconnection to the network of the remainder of the European Union (via the Polish network).

3. Dedicated freight railway line Gdansk-Bydgoszcz-Katowice-Zwardon

The Group recalls that Poland is currently one of the countries with the highest share of rail freight. However, given the current reform of the rail sector in Poland, the Group considers that the viability of this project can reasonably be assessed and envisaged after progress in implementing projects n°18 and n°8.

4. Inland waterway Seine-Scheldt

Given the fact that one of the concerned countries is not in the position to confirm a time horizon, the project is not classified in List 1. The Group believes that this project will allow substantial improvement of the connections between the three large waterway basins in France, in Belgium and in the Netherlands.

6.1.4. Other important projects for territorial cohesion (List 3)

The trans-European network contributes to the aim of economic and social cohesion. The economic catching-up of numerous regions, in particular in the future new Member States, will depend on good access to the major European axes, efficient interconnections, in particular good cross-border connections. Hence, the Group considered a range of important projects in this respect. Without prejudging the scope of Community financial instruments in the future, after 2006, only the most important projects could be selected by reference to the selection criteria developed by the Group. Also, projects on urban transport systems have not been retained, given their more local value; these projects are therefore not relevant in terms of trans-European dimension. The interest of the projects in this list is important in terms of facilitating exchanges between Member States, but mainly for territorial cohesion. The list is not exhaustive as the Group considered only projects initially thought to be possibly priority projects.

1. Accessibility and interconnections of networks

- Multimodal logistic centres in Slawkow (Poland) with connections to the Russian gauge rail network (2012)
- Railway line Bari–Durres-Sofia-Varna/Bourgas (Black Sea) (2020)[42]
- Railway line Napoli-Reggio Calabria – Palermo (2015)
- Road/Railway Corridor linking the West and Dublin (2010)
- Limassol port and road access (2015)
- Larnaka port and road access (2020)
- Ports of Valletta and Marsaxlokk (2012)
- Ionian/Adriatic intermodal Corridor (2015)
- Road Dover-Fishguard (2015), (except M25)

[42] Part of Corridor VIII

2. Cross-border connections

- Motorway Dresden/Nürnberg-Praha-Linz (2010)
- Railway line Praha/Linz (2010)
- Motorway Zilina - Bratislava- (Wien) (2012)
- Railway line Maribor-Graz (2015)
- Motorway (Ljubljana)-Maribor-Pince-Zamardi-(Budapest) (2012)[43]
- Road permeability through the Pyrenees (2010)[44]

[43] Parts of this project are registered in pan-European Corridor V.

[44] See comments on project N° 1 of List 2.

6.2. DEVELOP GENUINE MOTORWAYS OF THE SEA

1. Maritime transport represents more than 40% of the volume of intra-Community freight flows[45], i.e. almost on a par with road transport. But maritime transport could do more to remove lorries from the roads in congested areas. Maritime routes which better link countries isolated by natural barriers such as the Alps, the Pyrenees and the Baltic Sea, as well as island countries, should be as important as motorways or railways in the trans-European network.

6.2.1. An untapped potential

2. But a number of potential maritime routes have not taken off for many reasons such as, amongst others, the administrative burden at the customs, the lack of regularity and of punctuality and the absence of adequate facilities (logistic facilities, one-stop commercial shops, mobile equipment, infrastructure).

3. It is of the utmost importance to Europe that the most promising would-be links be supported by public aid during the start-up phase, as the White Paper on transport policy stresses it: *"These lines will not develop spontaneously. Based on proposals from the Member States, they will have to be ‘sign posted’, notably by granting European funds (from the Marco-Polo programme, Structural Funds) to encourage start-ups and give them their attractive commercial dimension*". While taking due consideration of the risks of distortion of competition, such maritime routes[46] should preferably connect ports located on the main trans-European axes, or at least significantly alleviate road traffic congestion on these axes.

4. Genuine motorways of the sea are therefore aimed at acting as a substitute for motorways on land, either to avoid saturated land corridors or to give access to countries separated from the rest of the European Union by seas. In addition to reducing the number of lorries on main roads, they could also in certain cases contribute to fostering the transport of passengers by sea since vessels can carry at the same time freight and passengers. The underlying concept thus differs from the broader one of short sea shipping which also includes coastal domestic connections and connections from mainland to islands areas[47].

6.2.2. Process proposed to launch projects

5. The Group identified in List 1 (see priority project n° 3) four maritime areas where projects could be launched. The type of vessels suited for this job should be most obviously roll-on-roll-off (roro) but load-on-load-off (lolo) could also be envisaged at a later stage, where appropriate, in connection with feedering dispatching schemes. A successful launch of new motorways of the sea, or ‘seaways’, would depend on a number of prerequisite or parallel actions, such as:

[45] White Paper on the European Transport Policy

[46] Including sea-river shipping.

[47] With the exception of the island States.

- concentrating freight on the maritime routes concerned in order to increase the potential economic viability of sea lines;
- convincing hauliers, shippers and forwarders of the benefits and merits of the maritime alternative;
- eliminating (systematic) customs checks and other administrative burdens as it is already the case at intra-Community crossings on European land motorways, or at least streamlining them, and developing electronic reporting for port authorities[48];
- providing for, where possible, appropriate facilities that should preferably be dedicated for this activity (ro-ro terminals, logistic equipment, parking places, facilities for lorry drivers) and direct access to ports (including open rail access);
- respecting competition rules;
- ensuring all year round navigability, especially in the Baltic Sea with ice-breakers.

6. One possible method for a pair of Member States could be:
   - to select their respective ports amongst the A category of the TEN-T on the basis of transparent criteria;
   - to agree on the sharing of the costs to be borne by public finance;
   - to organise a public tender for awarding a contract of public service;
   - to phase-out the operating aid within a predetermined timeframe.

7. But the Group notes that the most difficult step for Member States is to choose the ports suited for being part of a motorway of the sea. If the choice at national level proves to be too difficult, one alternative method could consist of proposing a global tender to both ports and maritime companies, leaving the choice of ports to candidate consortia.

8. Another (complementary) approach could be to finance or subsidise the accompanying actions described above while giving due consideration to avoid distorting competition and to be in compliance with state aid guidelines.

9. To launch projects in practice, the Group suggests that current and future Member States submit to the Commission proposals before 2007 in relation to the objective of creating motorways of the sea in at least one of these four maritime areas. **These projects could take the form of public-private partnerships schemes whereby financial aid from the Community and national budgets would be jointly granted through public tendering procedures.** To be eligible for Community funding, these projects should:
   - be proposed at least by two Member States;
   - concern the smallest possible number of ports (ideally two in each different Member States);
   - alleviate road traffic congestion on the main axes[49].

[48] In the field of electronic reporting a European wide system concerning all sea motorways should be developed (see Chapter 6.3)

[49] Or improve accessibility in the case of island States

10. The Group considers that **these projects should constitute priority projects, on an equal footing with land infrastructure**, and consequently they deserve a place in List 1 and a similar financing (see 6.1), even though they are not yet defined considering also that these projects maybe launched within shorter delays..

11. The Group stresses that such priority projects are not deemed to compete with the Marco Polo programme which follows a broader objective. Sea motorways should be primarily focused on complementing major land axes.

12. **On the basis of this general approach, the Group recommends to integrate as soon as possible in the TEN-T guidelines the required legal provisions to encompass Motorway of the Sea projects and allow a concrete Community support.**

6.3. BETTER MANAGE TRANSPORT

1. Infrastructures are not an end in themselves. They deliver their promises by offering high quality services only if efficiently managed, which requires, among other things, to design interoperable networks better adapted to market needs and integrated traffic management systems. The growth in transport over the last decades has led to the construction of more and more infrastructure. Such supply-driven policy can no longer be the only response to the problem of growing congestion. Building infrastructure has, furthermore, a considerable cost and, especially road, is far from being neutral in its effects on the environment, human health, the land take and the general well being of the population.

2. A high performance transport system should allow for the safe and regular provision of services, be they air, road, rail, or waterborne. To this end, the Member States of the enlarged Union must fix common objectives to optimise the use of transport infrastructure. In this respect the Commission has already underlined in its White Paper on a European Transport Policy the need to better manage and co-ordinate the different transport modes.

3. European transport suffers from an imbalance between transport modes, to the detriment of railways, more particularly in the rail freight transport, of maritime shipping and of inland waterways. In the railway sector, for example, between 1970 and 1998, the share of goods market carried by rail in Europe fell from 21% to 8.4%, even though the overall volume of goods transported rose spectacularly. International rail haulage enjoys an average speed of only 18 km/h, due in particular to the priority given to passenger trains, deterring shippers from using rail freight.

4. Even with the efforts to reverse this trend, road transport will grow substantially. Rather than building new road infrastructure, better management of transport can contribute to make this mode as efficient as possible in order to alleviate bottlenecks and environmental nuisances. In this respect, good progress has already been made in the deployment of efficient road traffic management systems, to be continued.

5. The growing imbalance between transport modes, to the detriment of railways (in particular for freight transport), maritime and inland waterways, needs to be addressed, including through better transport management. Hence, the Group stresses the need to build a genuine European rail network, fully interoperable and adapted to

customer needs by separating freight traffic and passenger traffic. Integrated management systems for air, river and maritime transport with the help of Community financial support, and removing airport capacity constraints play also a very important role.

6.3.1. Build a European rail network

6.3.1.1 Make national networks interoperable

6. The emergence of trans-European interoperable railway axes for specific market segments (e.g. high-speed and freight) should be seen as key to the success of international rail services. However, the huge diversity in signalling and in telecommunication systems constitutes a major obstacle to this goal, The current situation requires European standards for a new–generation of railway signalling and telecommunication systems to be implemented, such as the *European Rail Traffic Management System* which covers, on the one hand, the *European Train Control System* (the "signalling" part) and, on the other hand, the *GSM-Railways* (the "telecommunication" part). The Community has already adopted directives promoting technical specifications for interoperability.. These specifications for high-speed rail were adopted in 2002 and are starting to be implemented. As regards the conventional rail system, these specifications still need to be further developed by the future European Rail Agency. A coherent "*Trans-European deployment strategy*" should reconcile the different national deployment blueprints.

7. The Group is of the opinion that Community funding should support interoperability and help coordinate national approaches. Based on axes, an EU deployment plan should be elaborated in 2003 drawing on national plans. Grants would be determined on the expected effects of projects. Cost incurred by the infrastructure managers, should be given priority since investment in rolling stock equipment is in general not assigned to a specific axis.

6.3.1.2 Dedicate part of the rail network to freight

8. Major stumbling blocks to the development of European rail freight are inefficient use and technical and physical insufficiencies of the rail infrastructure. Incompatibility of slow and fast trains as well as technical and operational differences between national networks in combination with a low priority for freight trains in train path allocation and daily train path management limit the growth potential of rail freight services.

9. The Group considers that a freight-dedicated network (or with very strong priority for freight) on some major European axes in the transit countries is likely to significantly improve the quality and the effectiveness of services to an extent similar to that of the high speed train revolution. Such a network could be very efficient in terms of speed (more than 100 km/h) and of service quality (regularity), both for the traditional freight, for combined transport or for the transport of lorries by rail.

10. The Group welcomes the Commission position that such the emergence of such a dedicated network needs a very significant and encouraging subsidy rate of up to 50% of the overall costs.

11. A first step towards a more efficient European rail freight network will be to render it gradually interoperable. To that end Member States should first implement the

technical specifications for interoperability provided for in the above mentioned Community Directives (see 6.3.1.1).

12. National infrastructure managers will need to co-operate in a Community framework in order to make a better use of existing infrastructure. This mainly goes through a co-ordinated allocation of international and national train paths with a priority for international freight.

13. Last but not least, operation of the rail freight network must be redesigned to allow attractive and high-quality services at European level. A research study[50] on the attractiveness of the dedicated network shows that the traffic on the dedicated network can increase by about 25%, account for 85% of total traffic and result in time saving of 20 to 30%. Currently, the total rail freight network has a length of 140,000 km, but this survey stresses that only 22% of the network carries about 60% of the total traffic.

14. The Group recommends the creation of a permanent group gathering operators and national and European authorities. Its first mission would be to identify at the level of an enlarged European Union the rail network dedicated to freight. In a second stage, this group could evolve into the coordinating entities mentioned in Chapter 6.6.3.

6.3.2. Integrate air traffic management

15. Aviation is hampered by regular delays as a consequence of the limits of current air traffic management systems. Air transport suffers on the one hand from the fragmentation of the air traffic management services in Europe, with 29 national systems and 58 Air Traffic Control Centres developed to different standards with different systems and capabilities, and on the other hand, from the too slow implementation of new technologies.

16. The role of the Community is to ensure that the development of the future air traffic management systems is properly organised and managed at the European level to ensure that the various elements are available and implemented system-wide in line with traffic growth. The Community thus proposed solutions to these problems, through the Single Sky legislative package[51] to be adopted in 2003. The EU should achieve a ‘European system’ and not a collection of national systems, by setting up functional blocks of airspace and putting new concepts and technologies into practice.

17. To achieve the Single Sky, the integration of air traffic services would require reconfiguration of air space into a limited number of functional blocks. This opens the way to consolidation of service provision and rationalisation and infrastructure. This would imply the development by 2008 of interoperability requirements for the existing systems and a standardised ‘target’ architecture for the future European air traffic management system and the progressive implementation of this target architecture in the national systems by 2015. The Group thus shares the idea that Community financial grants for new and crucial interoperability components, such as

[50] EUFRANET, EU Framework Transport Research Programme IV

[51] COM(2001)123final/2 ; OJ C 103E, 30.4.2002, p. 1 and COM(2001)564final/2 ; OJ 103E, 30.4.2002, p. 26

for instance data processing systems or equipment, and where appropriate some ground control centres would help lead to an integrated European air traffic management system.

6.3.3. Manage river traffic

18. In order to help inland waterways' users, a pilot project called *River Information System* is currently developed in order to provide boats with:

    - Fairway information (geographical, hydrological, administrative information regarding the waterway);
    - Flash traffic information (affecting immediate navigation decisions in the actual traffic situation and geographical surroundings.);
    - Planning traffic information (voyage planning, lock and bridge planning, port and terminal planning);
    - Cargo and fleet management, tracking and tracing;
    - Information on calamity abatement;
    - Information on possible interfaces with other transport modes.

19. This project aims at minimising voyage incidents, injuries and fatalities in inland navigation and at preventing environmental hazard as well as polluting spills.

20. Up to now, Member States are implementing the system on a voluntary basis on the basis of commonly agreed standards and protocols. To ensure interoperability on Community inland waterways, the Group welcomes the intention of the Commission to propose a framework directive in a near future. It is indeed in the Community interest that Member States implement in a harmonised way on the trans-European inland waterway network, in priority on the Rhine-Danube axis.

6.3.4. Watch maritime traffic

21. European waters are at greater risk of major accidents, as confirmed by the accident statistics for the last twenty years. *Vessel traffic management and information systems* are needed to improve safety in Community waters, particularly in areas of high traffic density, of dangerous navigation or of ecological sensitivity. It would also make the transport chain more competitive, and enhance security of ports.

22. Some maritime zones in Europe are already covered by such systems run at a national or regional level. Exchanges of information, if any, between systems occur on a bilateral basis and the communication protocols have not yet been harmonised. To correct these weaknesses, the existing system should be integrated into a European *vessel traffic management and information system*. An EU Directive already determines the features of such a Community instrument: equipment tracking vessels by automatic identification systems, interoperability for exchanging information, identification of places of refuge and close surveillance of 'dangerous' ships.

23. Such an integrated system should comprise physical infrastructure, facilities for receiving vessels in places of refuge and telematic networks between Member States for exchanging maritime transport information. It should moreover resort to new technologies, such as automatic identification and tracking systems for vessels far out at sea.

24. With this objective in mind, the Community has already subsidised such systems through various financial instruments, particularly in peripheral regions such as Greece and Spain. In particular the Commission launched in January 2002 the *SafeSeaNet* project, with the objective of establishing an electronic platform for the exchange of maritime data between Member States.

25. More generally, the Group is of the view that the Community should aim through the TEN-T programme:

- to further develop infrastructure for managing maritime traffic, particularly in the zones most at risk;
- to make Member States' systems interoperable and to provide for regional vessel traffic management centres;
- to set up telematic networks for exchanging data on dangerous goods, interfacing local databases with the SafeSeaNet;
- to connect the Community database on maritime safety to other European databases (security, Schengen, customs, inland navigation, etc);
- to equip places of refuge with appropriate tools;
- to develop tools for risk analysis in connection with vessel traffic control.

26. But the improvement of the navigability and management of the maritime traffic would also hinge on the Galileo programme for developing an autonomous radionavigation system. With a future constellation of 30 satellites connected to land transmitters, Galileo will be an indispensable tool for, amongst others, developing sea motorways.

6.3.5. Remove airport capacity constraints

27. Given the expected growth in air transport the Group stresses that efforts will have to be undertaken to better manage the use of existing airport capacities. It therefore recommends to accordingly review existing rules on slots and charges and to proactively support the better functioning of rail/air intermodality.

28. The Group recognises that airports play a particular role in the European transport network. Their function as facilitators of economic growth and gateways to intra- and extra European markets for goods and passengers is vital in light of the enlargement and economic globalisation processes.

29. Currently the environmental, political, and physical restrictions on airports are such that major expansions of existing facilities, in particular the major hub airports, are difficult to implement. Therefore, there is a need for the development of additional new airport capacity in this and the next decade. Ideally such airports should have the potential to become major European connecting points.

6.4. IDENTIFY THE MAIN AXES

1. The Group noted that the trans-European network is identified in the Community guidelines and the Accession Treaties while the pan-European corridors were identified by the Crete and Helsinki pan-European Conferences.

2. The Group very rapidly agreed that an essential criteria to identify priority projects is that they should form part of one of the essential transnational axes relevant to the internal market; the criteria should take into account projects crossing natural barriers, solving congestion problems or filling in missing links.

3. The density of the existing trans-European network, made up as it is of all the national networks, and sometimes of the regional networks as well, does not however give a clear picture from a European perspective. The Community guidelines do not specify the multimodal routes between Member States which, due to geographic and economic factors, carry the heaviest traffic. Against this background, identifying priorities on the basis of a network reflecting the juxtaposition of the national networks has proved to be a delicate exercise, in particular in current Member States where no official corridors having a European dimension exist.

6.4.1. More coherent planning

4. Therefore, the Group considers that there is a need to proceed, as quickly as possible, with an exercise to identify major axes in order to facilitate the selection of trans-European network priorities in the course of future revisions. This work appears all the more urgent for several reasons:

   – It is necessary, when planning the network, to consider in parallel major infrastructure projects, the deployment of operating systems and the gradual elimination of bottlenecks, or even the management of demand, which is easier to do by axis than by taking the network as a whole.

   – An increase in intermodality, a condition of sustainable transport development, is possible only on routes with substantial long-distance traffic, these being the only ones where it is possible to compete with road transport. Concentrating this type of traffic on major axes will offer a better chance to rail freight, inland waterways, and maritime transport to be competitive[52].

   – Eliminating bottlenecks and completing missing links on the main European routes to stimulate transnational trade and providing access to every European region constitutes distinct problems with different solutions. Distinguishing these problems, and thereby clarifying responsibilities, will help differentiate between planning at European, national, and regional level, and between planning in the long and short term.

   – The coordination and follow-up of investments on the network at the level of the trans-European network has proven to be complex and is unlikely to work efficiently in the near future. However, it appears feasible to quickly set up mechanisms that provide for broad coordination and follow-up for each major axis (see chapter 6.6.3).

[52] See Chapter 6.2 on sea motorways and Chapter 6.3.2.1 on a dedicated rail freight network.

5. The Group notes that this recommendation goes in the direction of the Parliament's resolution on the White Paper which advocates giving priority in the framework of TEN-T to the development of East-West and North-South corridors[53].

6.4.2. Take into account the experience of the pan-European corridors

6. The only concrete experience in defining main European axes stems from the Ministerial pan-European Conferences in Crete (1994) and Helsinki (1997) which identified 10 pan-European corridors in Central and Eastern Countries.[54] This has proved to be a promising planning approach to coordinate investments as pan-European corridors are now widely used by the national administrations of Acceding Countries, and by the Commission itself, not only to program financial aid but also to maintain coordination at policy level.

7. Pan-European corridors form part of a different institutional framework (intergovernmental cooperation) from the trans-European network (Community framework). They have played an important role, in particular because in the early 90', there was no network clearly established like in western countries.

8. Today in the enlarged Union and the increased scope and complexity the trans-European network, the needs are different and require a different approach. The identification of trans-European axes aims at ultimately establishing a core network.

9. Many of the Member States have identified corridors on their territory when preparing national transport infrastructure plans The concept of a corridor is also increasingly used by rail operators and infrastructure managers (Magistrale Eco-fret, Belifret, etc.).

6.4.3. A task to be continued within the framework of the revision of the guidelines

10. The Group did not have the time to identify these main axes. The priorities recommended by the Group reflect, however, to a great extent some of the major transnational axes considered by the Group since it was the first criteria of the methodology to identify priority projects. The priority projects, on the basis of the proposals of the Member States, therefore make it possible to have a first idea of the likely mapping of such axes. (See Annex 4).

11. The Group requests the Commission to complete this work of identification of the main European axes which are crucial in enabling the efficient flow of the majority of goods and people within the enlarged Union, and to include them in the future guidelines.

[53] Resolution of the E.P. – in Item 43, the European Parliament asks "that the improvement and creation of south-north and East-West European corridors of large capacity in the rail and intermodal terminals sectors… be given priority under TEN-T". See also item 34.

[54] "The object of the corridors is to […] put in evidence the main transport relations in a pan-European context. They take the form of broad bands up to 100 or 200 kms wide. They have a multimodal character and do not prejude the different transport modes called upon to serve these relations (Pan European Ministerial Transport Conference, Crete, March 1994).

12. This work should rely on mapping traffic flows and a forward looking approach, while taking into account, the existing pan-European corridors. It requires an in-depth analysis of current and future traffic flows (goods and passengers) including modal split as well as the split between short and long distance transport. The group proposes to base this work on the following three main principles:

    - European axes should include land and maritime links and nodes expected to have great significance in terms of inter Member States trade. Improving the flows on these links will yield benefits not only to users at a national level but also at a European level, and facilitate exchanges between Member States.

    - European axes should take into account accessibility needs of the peripheral countries and be well interconnected with national, regional and third country networks.

    - European axes should include routes with proportionally high volumes of long-distance traffic, including long distance national traffic, since these are good targets for promoting modal rebalancing and could make it possible to improve the consistency with existing national corridors under development.

13. The Group stresses that, once these main axes have been identified, it will facilitate the future revision of the list of priority projects, but also make it possible to identify smaller projects, including projects submitted to the Group for consideration, which are nevertheless likely to improve the efficiency of these axes, as well as projects to improve the accessibility to, and interconnections with, these main axes and sea motorways.

6.5. DEVELOP LINKS WITH NEIGHBOURING COUNTRIES OF THE UNION

1. Good connections with third countries have an important role in encouraging trade between the European Community and its neighbours, and thus promoting economic development. Connections to and across Switzerland and the Western Balkans facilitate trade and mobility between the Member States. In the majority of the new Member States, such transit routes carry a large part of their foreign trade. In this context, Motorways of the Sea also have a role in creating linkages with regions outside the EU. Most of these continental connections also belong to the Pan-European Corridors as defined in the Helsinki Conference in 1997.

2. While recognising the vital role of these connections for the European Union in general, and for the countries of the periphery of the Union in particular, it must however be stressed that they involve a different logic to that of the priority projects of the trans-European transport network, which must firstly contribute to strengthen the internal market.

3. This however does not rule out the possibility that these connections, of which certain projects are identified below, could benefit from aid granted under Community financial structural instruments, for those sections located within the territory of the European Union, in particular in the new Member States, both peripheral and transit countries. Indeed, the sections in the new Member States, which are dependent on trade with third eastern countries, may also improve the transit conditions between them and the old Member States.

4. These projects could also be taken into account when negotiating transit or association agreements between the Community and the third countries concerned, bearing in mind that some of these agreements could contain a financial cooperation chapter allowing the support of feasibility studies or works on sections located outside the European Union..

5. Norway merits particular mention. Although a third country, not contributing directrly to the EU budget, it participates closely in the internal market of the European Union through the European Economic Area Agreement. This is why the connections to Norway are specified in List 1 (Nordic Triangle).

6.5.1. Switzerland: a particular case

6. The Group stresses the special situation of Switzerland. The territory of Switzerland is located in the middle of the Union in an area characterised by a very high traffic density. The agreement of 21 June 2002 between Switzerland and the European Community envisages new Alpine rail links (NLFA) in Switzerland, and improvements on the territory of the Union of the capacities of the northern and southern access routes to the NLFA to the UIC C' gauge. These access connections were naturally included in List 1, in view of the Community’s international commitments.

7. The construction of each of access tunnels to Switzerland will have to be taken into account in the implementation of the Community transport policy, in order to guarantee a coordinated vision of the development of the major traffic axes at the level of the European territory as a whole.

8. This investment policy is necessary to promote intermodality in this sensitive area. It requires close coordination of programming in the construction timetable of the tunnels and of the access routes. It requires a complete view of the flows crossing the Alps in particular after enlargement. The Group consequently recommends strengthening the systematic exchange of multilateral, detailed information on investments, for example within the framework of the joint committee, foreseen by the agreement between the EU and Switzerland.

6.5.2. The Western Balkans

9. The Balkans constitute another area of third countries located in the heart of Europe. Croatia has already submitted its application for membership of the Union in March 2003 and the strengthening of the connections with the whole area contributes to the stabilisation process. On the basis of the strategic plan established by the Commission for the development of the infrastructure in the Balkans[55], the Group identified a number connections with a high European interest, not only for the economic development and the stabilisation of the area, but also to give Member States in south-east Europe a better access to the central markets of the European Union.

10. These projects with a high European interest are above all on the *Danube*. During the war in the 1990's several bridges on the Danube in Serbia were destroyed, blocking navigation. Pontoon bridges have now been set up but they still hinder normal navigation. A construction plan for new bridges has to be set up very quickly in order to restore sufficient navigability on this part of the Danube. Other important projects are the *motorway Ljublana-Zagreb-Beograd-Nish-Skopje-Thessaloniki,* and the *motorway Budapest-Sarajevo-Ploce* to improve the access to the Adriatic Sea.

6.5.3. Eastern European countries (Russia, Belarus, Ukraine, Moldavia)

11. Several projects were identified by the Group as worth consideration to reinforce ties with Russia, Belarus and the Ukraine. The rail line (Helsinki)-Vainikkala-Saint Petersburg. Railway and road connections between the Baltic States and Russia/ Belarus, (Klaipeda-Vilnius-border with Belarus and Ventspils/Liepäja/Riga – border with Russia/Belarus; Tallin – Narva/Tartu – border with Russia). he motorway Zilina-Kosice (Ukraine); road and rail connections Berlin – Warsaw – Minsk-Moscow-Nishny Novgorod (pan-European Corridor II); road and rail connections Berlin/Dresden-Wrozlaw-Lvov-Kiev (pan-European Corridor III); road and rail connection between Budapest and Ukraine's border (pan-European Corridor V)Rail and road access to Kaliningrad. Connections to countries bordering the Black Sea.

[55] Report 'Transport and energy infrastructure in south-eastern Europe' available from http://europa.eu.int/comm/energy_transport/en/se_sum_en.html.

12. The Group recommends that the Commission assesses the EU interest in these cases, for instance within the framework of the EU-Russia Partnership and Co-operation Agreement (PCA) and in the context of EU's Northern Dimension and "Wider Europe" initiatives.

6.5.4. Mediterranean Countries

13. The European Union is on the point of enlarging with ten new Member States, of which two, Cyprus and Malta, are Mediterranean partners. There is therefore a pressing need to develop a Euro-Mediterranean-Transport Network which as much concerns North-South traffic as South-South regional traffic. In this context, special attention should be given to the connections to Turkey.

14. The Group welcomes, with interest, the Commission's Communication on this issue[56]. It notes the interest of the countries concerned to undertake, on the basis of the ongoing studies, an exercise aiming at planning such a network. This exercise will identify, in the context of the Euro-Mediterranean Conference "Infrastructure and Investments" under the Italian Presidency (December 2003), a number of transport infrastructure projects judged by all the Euro-Mediterranean partners as having major regional interest. These projects would rapidly benefit from feasibility studies in the framework of MEDA.

[56] COM (2003) … on the development of Euro-Mediterranean transport networks

6.6. FACILITATE THE IMPLEMENTATION OF THE NETWORK

6.6.1. Ensuring the necessary funding

1. The scarcity of public financing due to budgetary constraints led the Group to be selective in the establishment of priorities, in particular by spreading them over time (see Chapter 5). **It is nonetheless true that the priority projects of the trans-European network identified by the Group[57], even after great efforts at selectivity, involve investment estimated at €235 billion[58] up to 2020, this being double of that for the current projects in the Essen list.**

2. To this are added the investments which will be necessary for the longer-term projects, and other projects on the trans-European network important for the territorial cohesion as identified by this report. **However, all these priorities are only a part of the whole trans-European network.** Indeed, the Group stresses the needs of financing the construction of other elements of the trans-European network - not mentioned or specified in details in this report - of more modest size, e.g. access to the main axes, or necessary management systems for better use of the existing infrastructure. T**he cost of the whole trans-European transport network, including the projects which are not identified as priority projects in this report, is in the order of €600 billion.** In addition, the maintenance and the regeneration of existing infrastructure stock increasingly weighs on public accounts.

Cost of priority and important projects [59]

Billion €	***2004-2020***	***Of which 2004-2013***	***Of which 2014-2020***
List 0	80	80	0
List 1	142	125	17
List 2	13	3	10
List 3	22	20	2
Total	**257**	**228**	**29**

3. Figures of the above table are based on information provided by the members [and are subject of minor updates until the final publication of the report]. For simplification, the table assumes an equal spread of investments' needs over the construction periods. Due to lack of data, it excludes the cost of the horizontal priorities indicated in Chapter 6.2 and 6.3. Moreover, it should be stressed that the cost of the investments needs after 2014 does not take into account of the projects which may be added by that time.

[57] List 0, List 1 and List 2.

[58] These figures are affected by uncertainties inherent in estimating 'upstream' from the costs of major infrastructure projects. Experience suggests that they are underestimates.

[59] However, the budgetary period corresponding to the next financial perspectives is not fixed.

4. The question of the financing of the priority projects of the trans-European network, and more generally of all the transport infrastructure, consequently takes on crucial importance. The Group therefore welcomes with great interest the Commission Communication entitled *"develop the trans-European transport network: innovative financing"*[60] which takes stock of this subject. In the light of this Communication, the Group considers that measures have to be undertaken to attract more private capital in order to facilitate the carrying out of the priority projects. However, the Group stresses that at the end of the day either the tax payers or the users have to pay. It notes that the share paid by users is likely to increase in the near future as already observed in some countries in recent years.

5. Certain major infrastructures can be financed entirely by fees. Hence, the Group considers that the building of new airport capacities or significant increase of existing capacities can, as a general rule, be financed from future fees. In this respect, the Group is of the opinion that projects, such as the construction of a new airport in Berlin - while considering this latter project as having a high priority - should be done without financial aid from the Community, except for studies. The airports in the isolated and less developed regions constitute an exception and, under the structural financial instruments, should be able to benefit from aid from the Community.

6.6.1.1 Taking into account the constraint of public finance

6. Underinvestment in infrastructure characterises the past in current Member States as in the Acceding Countries. The Group considers that if this general tendency continues, it will hinder economic growth and sustainable development.

7. In addition to the significance of investment, the majority of the projects recommended by the Group present uncertainties regarding their *a posteriori* final cost and their future income. These risks, inherent in infrastructure projects, make profitability for private investors risky. Consequently, these projects cannot be carried out without at least partial public financing notably from Community financial support amongst other sources.

8. The Group stresses that the priority projects selected have strong socio-economic benefits by reducing costs (internal and external), improving the quality of transport and inducing spatial development. In addition, these projects present a particularly high European value added. They will facilitate transnational trade and will contribute to the sustainable development of transport at Community level by promoting intermodality. The Group emphasises that, unlike many sectors, investment projects in the transport sector will have a life of many decades, for the benefit of future generations.

9. **Since these projects improve the growth potential for the long term, strengthen the dynamics of the internal market, and contribute to sustainable development,**

[60] COM (2003)132

[60] Theory of endogeneous growth

they can be regarded as productive investments[61] with positive repercussions for the whole Union and its competitiveness.

10. The Group consequently recommends that the Member States take full account of these benefits when considering the necessary financing. In this respect, the Group notes, on the one hand the importance of these projects for the long term competitiveness of the Union, and the other hand, the current budgetary constraints on public finance. **The Group draws the attention of policy makers to the risk of major gaps over a long period of time between the investment needed to implement these priority projects and the current budgetary framework in which Member States and the Community have to operate.**

11. It should be noted however, that the annual investment necessary to carry out the projects in Lists 0, 1, 2 and 3 accounts for only 0.16% of the GDP of the enlarged Union, although this share may be higher for individual Member States. Nonetheless the individual priority projects are clearly defined, and therefore the related public expenditure can consequently be easily identified.

6.6.1.2 A strongly anchored principle of territoriality

12. It is the State and the regional authorities which bear the brunt of public financing and of the risks inherent in each project. Even in the case of projects co-financed by the Cohesion Fund, the States concerned remain liable for the risks of non-compliance with the project objectives and may have to reimburse the Community grants.

13. But the priority projects of the trans-European network take, by definition, transnational traffic and benefit in the first place the users of other Member States. For example, half of the traffic through the Pyrenees concerns transit flows across France. No less than 80% of the lorries using the Brenner tunnel are in transit through Austria. Transit in Germany will certainly increase. The accessibility and opening-up of certain peripheral regions are also dependent on effective connections on the territory of neighbouring transit Member States.

14. It is important to note that, exceptionally, countries take part in the financing of infrastructure projects in their neighbours. Luxembourg contributes up to €100 million in the financing of the High Speed Line between Metz and Luxembourg. The Netherlands contributes to the financing of the High Speed Train in Belgium.

15. In addition, in those countries where the internal political organisation gives regions specific powers, the increasingly active participation of certain regions can be observed in the financing of infrastructure, which allows a reduction of the contribution from the national budgets.

16. However, a decisive financial contribution remains in the majority of cases, and to a lesser extent in the countries eligible for the Cohesion Fund, at the cost of the national authorities which in addition have the responsibility for delivering the necessary administrative authorisations.

6.6.1.3 Community financial instruments to meet the challenge

17. **In general, taking into account the high stakes involved in providing a sustainable and balanced European transport system, the European value added of priority projects, and the current constraints on finance, the Group believes that substantial Community financial support is called for.**

18. **In particular, the Group considers that priority projects of exceptional importance for the single market, for example crossing natural barriers, should benefit from greater European support through the Community budget.**

19. The Community contributes to the financing of the trans-European transport network. Indeed, the Treaty confers on the Community the mandate not only to identify projects of common interest on the network, but also to give them financial support from the TEN budget or the Cohesion Fund. Council Regulation 2236/95[62], determines the general rules for the granting of Community financial aid in the field of the trans-European networks, for studies or for the carrying out work on projects of common interest.

20. This support is primarily in the form of direct subsidies, while the Regulation also makes it possible to grant loan guarantees, interest rebates, or even direct participation in venture capital funds. The Group considers that this range of possibilities should be fully implemented.

21. In parallel, the Community also takes part in the financing of these networks through structural financial instruments which concern the least developed countries and regions (Cohesion Fund and ERDF). With regard to connections inside the future Member States, the pre-adhesion structural instrument (ISPA) is made available for the development of the networks in these countries. On the whole, Community participation in the current European Union (all instruments combined but not including loans from the European Investment Bank) reaches approximately €20 billion for the period 2000-2006. By the 'leverage effect' that this aid is supposed to create, at best €100 billion could be levered over the period. **It is thus clear that the Community contribution covers only a (very) limited part of the financial needs and is largely insufficient to contribute effectively to the development of the networks.**

22. **The Group stresses the distinction between, on the one hand the priority nature of the projects identified in this report to meet the increase in intra-Community trade and mobility, and, on the other hand, eligibility for Community financing.** This report only retains a small number of projects of common interest: it concentrates on the identification of the strategic elements of the network. Certain projects of common interest should nonetheless remain eligible for Community financial instruments, such as the structural funds and the Cohesion Fund. Nevertheless, the classification in the lists of Chapter 6.1 does not prejudge, in any way, the possibility for the projects to be financed entirely by private investors.

23. On the other hand, a considerable number of projects of Lists 0, 1 and 2 will not be carried out in time without sufficient Community aid to mobilise and coordinate

[62] Amended by Regulation of the European Parliament and of the Council No 1655/99.

public and private capital. **This is, in particular, the case for the cross-border projects, and to a lesser extent for certain bottlenecks.**

24. The projects identified in List 3 are another case. Without prejudging the zoning (distribution) of future Community financial instruments such as the structural funds and the Cohesion Fund, the Group stresses that these projects are, above all, part of the logic of territorial cohesion, and that they play a decisive role for the economic integration of the countries or regions concerned by giving them access to the main axes. It is very probable that the budgetary capacity of most of the acceding Member States concerned, and the users' ability to pay charges are insufficient to finance them. Without a significant external financial contribution, in particular on the part of the Community, these projects could not be carried out within the desired time.

25. The timeframe for carrying out of the projects recommended by the Group is considerably longer than those of the budgetary perspectives for the Community. It is spread out over a period covering the perspectives fixed by Berlin and Copenhagen up to the end of 2006, those for the following period from which the preparation has just started, but also the following perspective.

€ Billion	*1993-1999*	*2000-2006* *EU 15*	*2000-2006* *EU 25*
TEN Budget	2.2	4.2	4.4
Cohesion Funds	7.6	9	12.8
ERDF *	5	6	6
ISPA	--	2.1	na
Total	14.8	21.3	23.2

** Estimate DG TREN of the share allocated to the TEN-T*

26. It is not the role of the Group to come to a conclusion about the share that the trans-European network policy should take with respect to the other Community policies within the next financial perspectives for the Community. Nor is it its role to anticipate the overall budget available at Community level.

27. **The Group emphasises that a sustainable transport policy in an enlarged Union is a prerequisite for European integration, both at the level of the citizens and at the level of the economic integration driven by the internal market and monetary union**. It is therefore important to stress that for the period 2004-2013 alone, the priority projects identified in Lists 0, 1 and 2 represent a total amount of investment of more than € 208 billion. **Without appropriate funding of the future financial instruments for the trans-European network, several of these priority projects could not be carried out in time or might even be abandoned.**

28. In this respect, the Group notes with interest the idea of the European Parliament [63] in its resolution on the White Paper on the common transport policy *"of creating within the framework of the financial perspectives a European Transport Fund, a financial instrument with an appropriate budget, applying to all the States of the Union, for all the modes of transport and for all the problems of the sector* ".

[63] Resolution of 12 February 2003, Draughtsman M.Juan de Dios Izquierdo Collado. Paragraph 82.

29. The European Investment Bank (EIB) plays an important role. It can borrow on the international markets at advantageous rates and can consequently grant loans at advantageous conditions to the projects of common interest. Since 1993, the EIB has approved loans for TEN-T projects with a total amount of €80 billion and has financed some €40 billion in public private partnerships.

30. **The Group welcomes with interest the EIB's readiness to create a new 'EIB TENs Investment Facility (TIF)' allowing the granting of long-term loans (35 years) covering up to 75% of the costs of TEN-T projects, up to a volume of €50 billion for the period 2004-2010. This facility will offer a special flexibility for maturity, grace periods, and repayment.**

31. In the framework of this facility, the EIB envisages giving priority to projects of the trans-European network contributing to regional development, cross border projects and intelligent transport systems. The Group welcomes with interest these priorities, in particular cross border projects.

32. Moreover, in the context of private finance and public-private partnerships for TENs, in addition to the existing Structured Finance Facility for higher-risk loans, the EIB could provide a special guarantee scheme for long-term investments,

33. Creating an infrastructure capital fund to provide equity and mezzanine finance with a view to boosting the equity of project companies (or other special project vehicles) and provide start-up and feasibility study finance could also be envisaged. The fund could be managed by the EIB and based on resources from the Commission, the EIB and the private sector. It would give priority to the priority projects identified in this report.

34. A 'Special Purpose Vehicle' (SPV) could buy TENs portfolio of loans from national financial institutions, securitise them and issue AAA bonds to the market. This would release new resources to be invested in TENs while ensuring capital relief for the originating financial institutions. The EIB Group could be involved in these transactions.

6.6.1.4 Greater efficiency for Community financial aid

35. Community resources are very limited, and therefore precious. We must seek the best possible management of these resources. Experience shows that, in their requests for subsidies, countries give priority to spreading them over a multiplicity of small projects. The Essen projects, although declared a priority by the Heads of State and of Government, received only 40% of the budget devoted to the trans-European network for the period 2000-2006 and slightly less than half of the budget available during the previous period. Since the projects[64] recommended by the Group present a high European value added, **the Group recommends that in future a more important share of the financial instruments available for the trans-European network be devoted to them.** This type of concentration should ideally include the structural financial instruments in the countries concerned.

[64] Including projects related to themes of Chapter 6.2 and 6.3

36. The coexistence of various financial instruments, each with their own logic, causes asymmetry in the intervention rates between the countries and regions eligible for the structural financial instruments and those eligible only for the budget of the trans-European network. Consequently, work on the corridors connecting the peripheral countries to transit countries encounters an excessive delay on the territory of the latter, being little encouraged to invest in infrastructure benefiting in the first instance their neighbours. The extra-territoriality of eligibility for the structural financial instruments or new adapted financial instruments could constitute in this respect a solution that it is advisable to examine in the case of cross-border sections of the projects on the major axes.

37. **Generally, the intervention rate of Community financing should be differentiated according to the benefits going to other countries, in particular the neighbouring countries**. Such modulation would not be contrary to the principle of territoriality of financing of infrastructure, and should benefit in the first instance the cross-border projects used by long distance transport.

38. Such cross-border connections are essential for exchanges between Member States and for the connectivity along the major trans-European axes. The "border effect" often results in lighter local traffic, which tends to reduce the profitability of the cross-border projects in comparison to those located in the middle of the national networks. As a result, the gap to be filled by public financing is greater.

39. However, in general, the national authorities show a clear reluctance to finance the cross-border sections, not only owing to the complexity of coordination between Member States to define and carry out a project, but also to budgetary arbitration to the profit of infrastructures benefiting the national priorities, without having considered the broader European interest. **It must be remembered that the majority of the cross-border sections identified in this report will only be carried out only after 2010, unlike the other sections.**

40. **The Group defends the idea that the Community could play a more active role in promoting the carrying out of cross-border connections,** and that a possible increase of the Community intervention rate under the TEN budget, as the Commission had already proposed in its proposal of 3 December 2001[65], should be carefully investigated. Contrary to what one might believe, the budgetary impact of such a development would not be exorbitant, the cost of the cross-border sections for the period 2007-2013 being somewhat lower than €15 billion.[66]

41. The Group therefore recommends the Council to reexamine the Commission proposal to amend Regulation (EC) 2236/95 on the granting of financial aid under the trans-European network, to raise this aid to 20% in the case of certain cross-border projects instead of current 10% - proposals that were approved by the European Parliament. Without prejudging the result of the codecision procedure, it is clear that this proposal may constitute a first practical step towards aid based on benefits to neighbouring countries.

[65] COM(2001)545 final.

[66] Including projects in cohesion countries and excluding sea motorways

6.6.1.5 The public-private partnership: better management of risks and costs

42. The capitalisation of the various financial markets in Europe amounts to several trillions of euros. In theory they could very easily absorb the financial needs for the completion of the trans-European transport network. The problem is not therefore the lack of private capital. The major difficulty is at the level of the division of the risk between private investors and public authorities. A clearer and more homogeneous regulatory framework in Europe would probably make it possible to encourage private investors to take a larger share of risks and to channel more private financing towards the construction of infrastructure.

43. Today, except in rare exceptions, the development of the main ports and the main airports can be self financed from the income generated by the infrastructure. However, this is not the case for land transport:

    - the railways, whose development was financed largely by private investors throughout the 19th century must compete with roads whose use is almost totally free;

    - inland waterways have suffered from a chronic lack of investment for almost two centuries;

    - heavy lorries only contribute a relatively small part of motorway tolls while the bulk of the construction costs of the infrastructure are caused by the technical and construction features that they require.

44. For land transport private investors cannot in general assure the total construction cost because of relatively - and artificially - low charges for use of the infrastructure. It is necessary therefore to make use of mixed financing.

45. These schemes[67], by means of concessions, make it possible for States to limit their financial aid to what is necessary to make up the difference between what is profitable from the point of view of society and what is financially profitable. In the case of large complex projects, in particular cross-border railway projects, these schemes are however extremely difficult and in any event, the potential contribution of the private sector is limited in view of the risks and of the very long term period of return. In any case, the Group stresses that both for railways and inland waterways, the potential of private capital is very low.

46. **Even if not providing an important share of private capital, public-private partnerships have however an essential virtue, which is to oblige greater transparency of costs and thus the public authorities to more strict management.** They oblige the States to clarify their long-term policy (regulation, infrastructure charging) and to commit themselves, contractually, to reduce the risks. A clear division of the risks between the public authorities and the private sector is

[67] The main purpose of Public Private Partnerships (PPP) is to provide public services with private sector participation and financing. When they are on a concession basis, the ownership of the infrastructure remains in the hands of the public sector, even though the concessionaire assumes its business at its own risk.

indeed essential. However those are of a very different nature (future risks inherent in the level of income[68], risks of slippage in the cost of a project at the time of its construction, exchange rate risks for the States outside the Eurozone). They are therefore particularly complex to evaluate.

47. The practice of risk assessment remains not very widespread in a sector which is traditionally in the public sphere. Decision-makers do not have the reflex to seek mixed financing solutions (public-private). This traditional stance consequently discourages the private investor. **The Group proposes that in future the major priority projects of the trans-European network are subject to an analysis of the various risks and of the private financing opportunities and suggests that the Commission examines further this issue together with the EIB.**

48. The spread of risk provides the key to successful public-private partnership. The guarantee mechanisms play an essential role in this respect. The Commission Communication on the development of the trans-European network puts forward the idea that the Community provides guarantees to concessionaires against the risk of non-completion or of delays of certain sections.[69] For instance, the company who will be awarded the concession contract to build and operate the rail line between Figueres and Perpignan would, by such a guarantee, cover the loss of revenues due to non completion of the section between Perpignan and Nîmes.

49. The Community could, as Article 103 of the EC Treaty permits, jointly grant with the Member States concerned and the European Investment Bank, loan guarantees for the financing of priority projects. These guarantees would reflect the interest and the confidence of the Union in an individual project.

50. To cover these guarantees, a 'Mutual Risk Fund' should be considered. Like insurance systems this would involve putting together the risks of a sufficient number of projects. This Mutual Risk Fund could be set up according to practices determined with the EIB and would be funded by the Member States concerned and the Community.

51. **The funding of this reserve would take account of the level of probability that the incurred limited risks materialise**. The contribution of the Community budget to this mutual fund would be financed from the budget heading TEN-T or possibly by contributions of other financial instruments, such as the structural funds and the Cohesion Funds. **The Group suggests that the Commission examines the feasibility of such new guarantee mechanisms and to assess the potential of such an approach within the framework of work on the new financial perspectives.**

52. Within the framework of the development of the motorways of the sea, the issue is not to attract private capital but to organise general interest services in compliance with competition rules. Public-private partnerships, of a much smaller scale and a different nature, are thus also necessary.

[68] In particular if priorities as regards transport policy change.

[69] The rules of monitoring of the public deficit, moreover, do not refer to the guarantees granted by States and regions.

53. Due to lack of time, the Group could not estimate the potential of private capital in financing the priority projects. On the basis of experience and forecasts made in national plans, the Group considers that, at best, between 10% and 30% of the overall amount of the priority project costs could be ensured by the private sector in the field of land transport. Of course, the share varies considerably from one project to another. It is advisable to adopt an approach on a case by case basis, to accurately measure the potential contribution of private investors. **The Group suggests that the Commission should define the framework for such an exercise.**

6.6.2. Adapt the political and legal framework

54. Public-Private Partnerships have to cope with important obstacles of a legal, economic and sometimes political nature. The Group considers it necessary to disseminate good practice and in the medium-term to update the existing legal framework in order to make them attractive for private investors in particular.

6.6.2.1 The laws related to concessions

55. The revision of the legal status of concessions has already started in a number of Member States. In the current state of Community law, concessions are not covered by the Directives on public contracts (except for the concessions which include work the making of which is subject to certain provisions of Directive 93/37). In its interpretative communication of 29 April 2000, the Commission nevertheless clarified the principles which arise from the provisions of the Treaty on fundamental freedoms, and in particular the obligations of competition and of equal treatment. The Court of Justice confirmed this interpretation, in particular in its Telaustria judgement[70].

56. On the occasion of the redrafting of the directives on public contracts[71], the Commission proposed opening new proceedings on the award of contracts, named "competitive dialogue". This procedure applies to the complex markets, and in particular when the judicial entity is not in a position to define the technical means which can meet its needs, or the legal and/or financial set up of a project. The competitive dialogue procedure allows bilateral dialogues with various candidates at an early stage. Once the awarding entity is in a position to identify the solutions likely to respond to its needs, the dialogue is closed. It is then followed of a phase of tendering and of evaluation of tenders. **The Group notes with interest such changes.**

6.6.2.2 Regulated competition of transport

57. The coherence of transport policies is of primary importance to mobilise private investors. The Group stresses therefore the importance that the application of transport policies at the level of States and the Community is coherent with this list of priorities, once adopted by the Council and Parliament. Uncoordinated infrastructure investments, not very competitive transport markets, unsuitable demand

[70] Case 324/98, Judgment of 7 December 2000.

[71] COM (2000) 275 final.

management, the lack of common standards, are factors which all directly affects the economics of the priority projects identified by the Group. The clarification of the interoperability standards, the definition of which is ongoing, applicable in the new Member States is in this respect very important.

58. The current sectoral reforms, in particular in rail transport have a key role. The opening of the rail freight market to competition, decided by the Council and Parliament, creates new market opportunities on a European scale These new rules, accompanied by a set of technical standards to ensure interoperability have still to be fully implemented. **The Group stresses that their application will improve the economics of the majority of the projects recommended in this report. The new infrastructures will not be used for empty wagons making empty return journeys as 'return loads' can be organised.**

6.6.2.3 Infrastructure Charging

59. **The Group stresses in particular the need for a stable common framework as regards infrastructure charging. Charging for an efficient use of infrastructure would make it possible to create a framework more favourable to investment, not least by allowing the infrastructure managers to cover all or part of their costs.**

60. The Group recalls that in this context the building and financing of Alpine tunnels, (and subsequently in the Pyrenees) in the proposed timeframe is only realistic if an appropriate framework allows cross-financing of new infrastructure from existing or new road tolls, or a more substantial Community intervention.

61. The Group observes that cross-financing is allowed in several Member States, as long as there is a clear functional relation, i.e. in respect of availability and quality, between the different infrastructure concerned. It notes that the European Council in Copenhagen in December 2002 has asked the Commission to present a new legislative instrument, amending Directive 1999/62 (the so-called "Eurovignette" Directive) and suggests as announced by the Commission, that such an instrument should specify the conditions of implementation of cross financing, bearing in mind the above.

6.6.3. Organise the coordination of investment

6.6.3.1 Coordination within the major European axes

62. The profitability of investment is closely linked to the sequence of putting into operation the various sections on the axis in question. Experience shows that the socio-economic profitability of major projects of the trans-European network is disappointing owing to delays in the work of other projects located on the same trans-European axes. Investments have therefore to be better synchronised along the main corridors.

63. **Closer coordination is therefore necessary between countries concerned with the same axis . For each major European axis (corridor), a coordination entity, in which the Community would take part, could be created for the duration of the priority projects located on the axis. Article 155 of the EC Treaty gives to the Commission the role of taking any useful initiatives to promote coordination**

between Member States. It would therefore be in the remit of the Commission to designate a personality, in agreement with the concerned Member States, to take charge of coordinating, stimulating cooperation, and ensuring the necessary follow-up, as well as to take measures for its functioning.

64. This is close to the idea of a ‘European Structure’, as mentioned by the Commission in its Communication entitled *"Developing the trans-European transport network"*. These entities could indeed, in the long term, evolve towards common structures in charge of promoting the projects to private and public investors, Member States directly interested in the completion of a priority project could acquire equity. Those which cannot or do not want to be directly involved in managing big projects could delegate such a task to these structures.

65. Without prejudging the future financial perspectives and the structural aid which will be available after 2006, the Group recommends that the Member States concerned prepare their transport planning and their transport programming for the next budgetary period now on the basis of the priorities identified by this report.

6.6.3.2 Transnational legal entities for major cross-border projects

66. Coordination between the various parties to a project (whether they are public or private entities) is essential, especially for the cross-border infrastructure. However, the setting up of a structure, by project, which has to manage it in the development phase and which has the responsibility for collecting the public and private capital is likely to prove particularly complex. The approval by the Council, on 8 October 2001, of the statute of the **European Company** (EC) already provides some possible solutions.

67. The European Company statute will indeed allow, from its application, in 2004, simplification and substantial economies of scale in the establishment of companies charged with managing cross-border projects. Within this framework of the ‘European Company’, (with a share capital authorised by the Member States, private companies, and the participation of the EIB), one could therefore envisage creating companies for major cross-border TEN-T projects, using for that, the structure or at least the spirit, of the joint undertaking Galileo.

6.6.4. Adapt the assessment methods to sustainable development

6.6.4.1 More homogeneous economic assessment methods

68. The socio-economic impact of a project constitutes the base of any infrastructure investment decision. The methods to calculate the costs and the benefits of infrastructure project constitute in this respect a valuable planning tool. The Group notes the great diversity of practices between Member States and between modes of transport. Not only methods vary greatly in their appraisal of the external effects, but also in criteria such as the discount rates affecting the decision-making directly. This diversity impedes clarity and the transparency of the appraisal in the case of cross-border projects. The harmonisation of these methods therefore appears desirable. **Should the Community become an important financial partner for the realisation of cross-border projects, it would be logical that the Commission proposes common evaluation methods.** Moreover, the Commission evaluates subsidy requests under the structural financial instruments, by harmonised methods

of estimating the costs and benefits. This approach constitutes a powerful vector of dissemination and of harmonisation of good practices as regards cost/benefit analysis.

69. The current practices show other limits, in particular with regard to railway infrastructures. The positive effects on the sustainable development of the railway infrastructures are felt only in the very long term and cannot be captured correctly by the traditional cost/benefits analysis. Moreover, certain Member States pay great attention to the time savings for passengers but on the other hand do not give sufficient attention to the added value in terms of new freight capacities. The current railway market is in the process of major change, in particular due to the opening of the market, forecasting traffic from past trends is no longer appropriate. Similarly the effects of transport infrastructure in all modes in terms of spatial development remain difficult to incorporate in a transparent way into the evaluation, leading to under-estimates but also to over-estimates of these effects. **The Group therefore recommends to the Commission to further support research in this area and to disseminate good practices.**

6.6.4.2 Taking sustainable development into account

70. The limiting of emission of greenhouse gases probably constitutes the greatest environmental challenge of current transport policy. The transport sector constitutes one of the main contributors among human activities to the production of these gases. The growth of emissions of carbon dioxide cannot be controlled without a strong political will to achieve a significant modal transfer towards rail and inland waterways. If this does not occur, it will be difficult to respect the commitments that the Union took under the Kyoto protocol, even with technological progress expected on the part of the motor industry in the coming decades. This is why the Group attached great importance to the criterion relating to sustainable development. **The priorities of the Group are directly in keeping with the aim set by the European Council of Göteborg to give priority to the infrastructure for intermodal transport, rail transport, maritime transport, and river transport.**

6.6.4.3 The environmental impact assessment procedures

71. The undertaking of priority projects has to be exemplary concerning the respect of the various Community directives for environmental protection, in particular Council Directive 85/337/EEC, of 27 June 1985, concerning the assessment of the effects of certain public and private projects on the environment[72] and Directive 92/43 of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.[73] **The Group did not ignore the fact that infrastructures can bring certain harmful effects to their immediate environment. It is advisable to mitigate them as much as possible at source from the design stage (safety, noise pollution, water pollution, etc).**

72. Often the legislation concerning environmental protection is said to be one of the causes of the delays too frequently met in the carrying out of major projects. Even if taking into account environment effects may contribute to lengthening the duration of

[72] OJ L 175 of 5.7.1985, p. 40.

[73] OJ L206 of 22.7.1992, p. 7

studies and of completing a project, the Group wishes to stress that this makes it possible to achieve infrastructure of better quality and more respectful, in the end, of sustainable development. It rests with the infrastructure promoters and with the political decision-makers to anticipate these long development deadlines and to start the studies of projects upstream. Too often, studies are not sufficiently advanced when the hour of the political decision arrives. In particular, the Group considers that some of the priority projects selected would have benefited from being at a more advanced stage with their studies to meet the needs of the work of the Group.

73. To avoid delays in a later planning stage, the network managers have to incorporate the environment aspect as far upstream as possible, in particular through the requirements of Directive 2001/42/EC on strategic environmental assessments. COREPER had already proposed to the Transport Council of 25 September 2002 to ask the Commission to develop, in agreement with the Member States, methods to implement strategic environmental assessment with the objective of assuring *inter alia* appropriate coordination, and 'avoiding a multiplication of the efforts, and of achieving simplification and acceleration of the procedures for the cross-border projects and the corridors'. **The Group subscribes to this request in order to quickly lead to a common methodology for all the priority projects - and other projects of the TEN-T network - for the application of this Directive.**

6.6.4.4 Facilitate these procedures by transnational commissions of enquiry

74. The Group examined the question of going beyond harmonising procedures related to environmental protection. The Group asks in particular that the Commission reflects on the possibility of allowing a **single public consultation procedure covering several Member States** and not only in the Member State promoting the project. A "transnational" commission of enquiry would thus be set up to receive the reactions of all interested parties within the Member States concerned.

75. Such a procedure would be a tool at the disposal of the Member States. **It would be optional, in the sense that it will be applicable only if the Member States concerned by the project specify their wish to use such a procedure beforehand.** Such a procedure could moreover concern any infrastructure project in general, whether it is for transport, energy or telecommunications, beyond those located on the TEN-T.

76. In addition, the procedure will have to take as a starting point the Espoo Convention of 1991 on the environmental impact statements in a cross-border context[74]. This convention defines the principles to be followed for taking into account the cross-border effects of projects in the impact statements, whether these projects are cross-border or not and for the exchanges of information between countries concerned. The procedure envisaged in the case in point would go further than this convention by envisaging a single impact statement and impact procedure in all the Member States concerned.

77. Such a procedure would offer several advantages. It would entail a **single enquiry in the various States concerned** rather than a juxtaposition of national procedures

[74] Available on the site of the UNECE at the following address: http://www.unece.org/env/eia/eia.htm.

which inevitably are not coordinated. It would establish **the drafting of a single impact statement** for the project. Indeed, it is urgent to take account of the effects, positive or negative, at the level, not of the State promoting the project, but of all the Member States concerned with the project in question. It would make it possible to organise a **consultation, complying with directive 2001/42/EC, of all those concerned in several Member States.**

6.7. SIMPLIFY THE FUTURE REVISIONS OF THE LISTS OF PRIORITY PROJECTS

6.7.1. A necessary periodic revision

1. The list of the priority projects is not set in stone. It must evolve over time by reflecting the reality of the needs and the level of advancement of the projects. Flexibility as regards the list of priority projects remains necessary. Should some projects not start the works before the agreed date for projects in List 1, their qualification as priority projects of the trans-European network should inevitably be reconsidered. Also there are projects of very high European importance, such as those in List 2, which may become ready to go forward if for instance a political agreement between the concerned countries can be found on the alignment and the calendar.

2. The Christophersen Group had already recommended that the list of the priority projects be revised periodically. Ten years have however passed since the work of the Christophersen Group. Experience shows that ten years is too long a period between revisions. Indeed, the Commission felt the need to up-date the Essen list by making new proposals.

6.7.2. The list of the priority projects evolves

3. The Group proposes that the list of the priority projects, and therefore the guidelines on the trans-European transport network, be revised after a certain time. The life span of the guidelines and most of the priority projects exceed, by far, the duration of the Community budgetary perspectives. The Group therefore, suggests preferably synchronising such a revision with the timing of the Community's budgetary perspectives.

4. To that end a group of representatives appointed by the Transport Ministers should be set up at the very latest by 2010[75]. The recommendations of such a group should be addressed to the Commission in time to prepare a proposal for revising the guidelines and the following budgetary perspectives. It should be noted that the co-decision procedure to adopt the Community guidelines, and consequently the priority projects, takes a certain time and must be carefully accounted for in planning the process.

5. Furthermore, twelve months should be given to such a group in order to perform a more thorough analyses. The six-month period granted to the present Group has been considered too short.

6. The Group suggests that the next exercise be preceded by an analysis of the socio-economic interest and financial viability of the individually submitted projects in order to allow the group to better understand the risks associated with the various projects. In particular, the EIB should ideally be in the position to deliver an informed opinion on the financial viability of the different projects.

[75] Assuming that the next budgetary perspectives cover a 7-year period.

7. To this end, it would be appropriate that the Commission invites Member States to submit their projects at least six months before the setting-up of the group, in order to allow the Commission and EIB services to examine the projects in detail, well ahead of the work of the group. If in doubt over economic, environmental, social or technical aspects of certain projects, the secretariat of the group should be able to call upon additional independent external expertise. As regards the work of the group itself, more and updated documentation on traffic analysis with maps representing the volume of flows along the various main axes should be made available on time.

6.7.3. The bottom-up approach is no longer enough

8. In view of the integration of the trans-European transport network, the bottom up approach is no longer sufficient on its own in order to determine the priority projects. No single Member State can claim to have an overall picture of transport needs on the scale of the enlarged Union.

9. Thus, the Group suggests setting up a European Transport Observatory in charge of carrying out, on a regular basis, a traffic inventory on the main axes and establishing European reference traffic forecasts. Such an Observatory would provide the tools needed by the entities proposed in Chapter 6.6. More importantly, it would assist the Commission in fulfilling its duty from the Treaty by making proposals for the choice of the priority projects and by sounding the alarm when delays to implement projects cause, or are likely to cause, a serious malfunctioning of the internal market.

7. LIST OF MEMBERS

Chairman : Mr Karel **VAN MIERT**

Former Vice-President of the Commission and Commissioner in charge of transport

Austria
Mr Gerold **ESTERMANN**
Director of « Gesamtverkehrsmanagement, Logistik und Telematik »,
Bundesministerium für Verkehr, Innovation
und Technologie

Belgium
Mr Luc **MARECHAL**
Chef de cabinet du Ministère de la mobilité et des transports

Denmark
Mr Thomas **EGEBO**
Permanent Secretary, Ministry of Transport

Deputy :
Mr Jørn **HOLDT**
Head of International Division, Ministry of Transport

Germany
Mr Ulrich **SCHÜLLER**
Director of Grundsatzabteilung, Bundesministerium für Verkehr,
Bau- und Wohnungswesen

Deputy :
Mr Jürgen **PAPAJEWSKI**
Regierungsdirektor**,** Bundesministerium für Verkehr,
Bau- und Wohnungswesen

Spain
D. Antonio **LOPEZ -CORRAL**
Director General de Programación Economica
Ministerio de Fomento

Finland
Mr Juhani **TERVALA**
Director of infrastructures, Ministry of Transport and Communication

Deputy :
Mr Juha **PARANTAINEN**

France	Mr Claude **MARTINAND** Vice Président du Conseil Général des Ponts et Chaussées, Ministère de l'équipement, des transports, du logement, du tourisme et de la mer CGPC
Greece	Mr Yiannis **ROUBATIS** Former spokesman of government and former Member of European Parliament Deputy : Mr Christos **DIONELIS,** Advisor to the Minister of Transport
Ireland	Mr Andrew **CULLEN,** Director General, Public Transport Planning and Investments, Department of Transport
Italy	Mr Ercole **INCALZA**, Cabinet advisor to M. Lunardi Ministero delle Infrastrutture e dei Trasporti
Luxembourg	Mr Paul **SCHMIT** Commissaire du gouvernement Secrétaire général du Ministère des Transports
Netherlands	Mrs Dr. Neelie **KROES** Former Minister of Transport Deputy Drs Roel **GANS,** MMC
Portugal	Exmo Senhor Dr Romeu **REIS** Director do Gabinete para os Assuntos Europeus e Relações Externas-GAERE
Sweden	Mr Jonas **BJELFVENSTAM** State Secretary, Ministry of Industry, Employment and Communications Deputy : Mr Ulf **LUNDIN** Director, Ministry of Industry, Employment and Communications

United Kingdom

Mr Willy **RICKETT**
Director General of Transport Strategy, Roads and Local Transport

Deputy :
Mr David **Mc MILLAN**
Mr John **STEVENS**

Observers appointed by acceding countries :

Bulgaria

Mr Dimitar **ZOEV**
Director ‘Transport Policy, Infrastructure and Construction’.
Directorate of the Ministry of Transport and Communications.

Czech Republic

Mr Antonin **TESARIK**
Deputy Minister, Ministry of Transport

Deputy :
Mr Karel **STEINER**
Director of Transport Policy, International Relations and
Environment Dept., Ministry of Transport

Mr Vratislav **INDRA,**
Government Counsellor, Ministry of Transport

Cyprus

Mr Symeon **MATSIS**
Permanent Secretary, Ministry of Communication and Works

Deputy :
Mr Iacovos **PAPADOPOULOS**
Director of Administration, Ministry of Communication and Works

Estonia

Mr Anti **MOPPEL**
Head of Department of Development & Logistics,
Ministry of Economic Affairs and Communication

Hungary

Mr Zoltan **KAZATSAY**
Deputy State Secretary, Ministry of Economy and Transport.

Latvia

Mr Vigo **LEGZDINS**
State Secretary, Ministry of Transport of Latvia

Lithuania

Mr Alminas **MACIULIS**
State Secretary of the Lithuanian Ministry of Transport and Communications

Deputy :
Mr Albertas **ARUNA**
Director of Transport Investment Directorate,
Ministry of Transport and Communications,

Malta

Dr Marc **BONELLO**
Chairman Malta Maritime Authority
Ministry of Transport and Communication

Poland

Mr Sergiusz **NAJAR**
Undersecretary of State, Ministry of Infrastructure

Romania

Mr Sergiu **SECHELARIU**
State Secretary Ministry of Transport

Deputy:
Mrs Virginia **TANASE**
Director General, Ministry of Public Works, Transport and Housing

Mr William **PADINA**
Director General, Ministry of Public Works, Transport and Housing

Slovakia

Mr Branislav **OPATERNY**
State Secretary of Ministry of Transport, Posts & Telecommunication of the Slovak Republic

Deputy :
Mr Rudolf **KORONTHALY**
Director of the European Integration Unit, Ministry of Transport, Posts & Telecommunication

Slovenia

Mr Boris **ZIVEC**
State Secretary for Transport Policy, Ministry of Transport

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European Investment Bank (EIB):

M. Ewald **NOWOTNY**
Vice-President

8. LIST OF MEETINGS

The High Level Group met in Brussels on the :

- 12 December, 2002[76]
- 10 January, 2003
- 28 January, 2003
- 14 February, 2003
- 7 March, 2003
- 31 March, 2003
- 9 April, 2003
- 30 April, 2003
- 12 – 13 May, 2003
- 20 June, 2003.

[76] Without the participation of acceding countries

COUNCIL OF
THE EUROPEAN UNION

Brussels, 29 January 2003

15917/02

POLGEN 84

COVER NOTE

from :	Presidency
to :	delegations
Subject :	**COPENHAGEN EUROPEAN COUNCIL 12 AND 13 DECEMBER 2002 PRESIDENCY CONCLUSIONS**

Delegations will find attached the revised version of the Presidency conclusions of the Copenhagen European Council (12 and 13 December 2002).

1. The European Council met in Copenhagen on 12 and 13 December 2002. The meeting was preceded by an exposé by the President of the European Parliament, Mr Pat Cox, followed by an exchange of views concerning the main items on the agenda.

2. The European Council heard a report by President Valéry Giscard d'Estaing on the progress of the Convention's proceedings. In the light of that report the European Council held an exchange of views on the development of the discussions. The Convention will present the result of its work in time for the European Council in June 2003.

I. Enlargement

3. The European Council in Copenhagen in 1993 launched an ambitious process to overcome the legacy of conflict and division in Europe. Today marks an unprecedented and historic milestone in completing this process with the conclusion of accession negotiations with Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia. The Union now looks forward to welcoming these States as members from 1 May 2004. This achievement testifies to the common determination of the peoples of Europe to come together in a Union that has become the driving force for peace, democracy, stability and prosperity on our continent. As fully fledged members of a Union based on solidarity, these States will play a full role in shaping the further development of the European project.

4. The Union endorses the result of these negotiations as set out in document 21000/02. The financial consequences of enlargement are set out in Annex I. The comprehensive and balanced outcome provides a solid basis for the smooth integration of ten new Member States, while safeguarding the effective functioning of the enlarged Union. The agreement reached will provide the acceding States with the necessary transitional arrangements to cope successfully with all obligations of membership. The result achieved in the accession negotiations ensures the continued functioning of the internal market as well as the various EU policies, without prejudging future reform.

5. Monitoring up to accession of the commitments undertaken will give further guidance to the acceding States in their efforts to assume responsibilities of membership and will give the necessary assurance to current Member States. The Commission will make the necessary proposals on the basis of the monitoring reports. Safeguard clauses provide for measures to deal with unforeseen developments that may arise during the first three years after accession. The European Council welcomes furthermore the commitment to continue the surveillance of progress with regard to economic, budgetary and structural policies in the candidate States within the existing economic policy coordination processes.

6. All efforts should now be directed at completing the drafting of the Accession Treaty so that it can be submitted to the Commission for its opinion and then to the European Parliament for its assent, and to the Council with a view to signing in Athens on 16 April 2003.

7. By successfully concluding the accession negotiations the Union has honoured its commitment that the ten acceding States will be able to participate in the 2004 European Parliament elections as members. The Accession Treaty will stipulate that Commissioners from the new Member States will join the current Commission as from the day of accession on 1 May 2004. After the nomination of a new President of the Commission by the European Council, the newly elected European Parliament would approve a new Commission that should take office on 1 November 2004. On the same date, the provisions contained in the Nice Treaty concerning the Commission and voting in the Council will enter into force. The necessary consultations with the European Parliament on these matters will be concluded by the end of January 2003. The above arrangements will guarantee the full participation of the new Member States in the institutional framework of the Union.

8. Finally, the new Member States will participate fully in the next Intergovernmental Conference. Without reform the Union will not fully reap the benefits of enlargement. The new Treaty will be signed after accession. This calendar shall be without prejudice to the timing of the conclusion of the IGC.

9. The current enlargement provides the basis for a Union with strong prospects for sustainable growth and an important role to play in consolidating stability, peace and democracy in Europe and beyond. In accordance with their national ratification procedures, the current and the acceding States are invited to ratify the Treaty in due time for it to enter into force on 1 May 2004.

Cyprus

10. In accordance with paragraph 3 above, as the accession negotiations have been completed with Cyprus, Cyprus will be admitted as a new Member State to the European Union. Nevertheless, the European Council confirms its strong preference for accession to the European Union by a united Cyprus. In this context it welcomes the commitment of the Greek Cypriots and the Turkish Cypriots to continue to negotiate with the objective of concluding a comprehensive settlement of the Cyprus problem by 28 February 2003 on the basis of the UNSG's proposals. The European Council believes that those proposals offer a unique opportunity to reach a settlement in the coming weeks and urges the leaders of the Greek Cypriot and Turkish Cypriot communities to seize this opportunity.

11. The Union recalls its willingness to accommodate the terms of a settlement in the Treaty of Accession in line with the principles on which the EU is founded. In case of a settlement, the Council, acting by unanimity on the basis of proposals by the Commission, shall decide upon adaptations of the terms concerning the accession of Cyprus to the EU with regard to the Turkish Cypriot community.

12. The European Council has decided that, in the absence of a settlement, the application of the acquis to the northern part of the island shall be suspended, until the Council decides unanimously otherwise, on the basis of a proposal by the Commission. Meanwhile, the Council invites the Commission, in consultation with the government of Cyprus, to consider ways of promoting economic development of the northern part of Cyprus and bringing it closer to the Union.

Bulgaria and Romania

13. The successful conclusion of accession negotiations with ten candidates lends new dynamism to the accession of Bulgaria and Romania as part of the same inclusive and irreversible enlargement process. The Union welcomes the important progress achieved by these countries, which is duly reflected in the advanced state of their accession negotiations.

14. The Union looks forward to consolidating the results achieved so far. Following the conclusions of the European Council in Brussels and depending on further progress in complying with the membership criteria, the objective is to welcome Bulgaria and Romania as members of the European Union in 2007. The Union confirms that accession negotiations with these countries will continue on the basis of the same principles that have guided the accession negotiations so far, and that each candidate country will be judged on its own merits.

15. The roadmaps put forward by the Commission provide Bulgaria and Romania with clearly identified objectives and give each country the possibility of setting the pace of its accession process. It is essential that Bulgaria and Romania seize this opportunity by stepping up their preparation, including fulfilling and implementing the commitments undertaken in the accession negotiations. In this context, the Union underlines the importance of judicial and administrative reform that will help bring forward Bulgaria and Romania's overall preparation for membership. This will ensure that the process will be successfully brought forward on the basis of the results reached so far. Future Presidencies and the Commission will make sure that the pace of accession negotiations on all remaining chapters, including chapters with financial implications, is maintained and matches the efforts of Bulgaria and Romania.

16. The Union underlines its resolve to assist Bulgaria and Romania in these efforts. The Union endorses the Commission's communication on roadmaps for Bulgaria and Romania, including the proposals for a significant increase in pre-accession assistance. The high level of funding to be made available should be used in a flexible way, targeting the priorities identified, including in key areas such as Justice and Home Affairs. Further guidance in their pre-accession work will be provided by the revised Accession Partnerships to be presented to them next year.

17. Furthermore, Bulgaria and Romania will participate in the next Intergovernmental Conference as observers.

Turkey

18. The European Council recalls its decision in 1999 in Helsinki that Turkey is a candidate State destined to join the Union on the basis of the same criteria as applied to the other candidate States. It strongly welcomes the important steps taken by Turkey towards meeting the Copenhagen criteria, in particular through the recent legislative packages and the subsequent implementation measures which cover a large number of key priorities specified in the Accession Partnership. The Union acknowledges the determination of the new Turkish government to take further steps on the path of reform and urges in particular the government to address swiftly all remaining shortcomings in the field of the political criteria, not only with regard to legislation but also in particular with regard to implementation. The Union recalls that, according to the political criteria decided in Copenhagen in 1993, membership requires that a candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.

19. The Union encourages Turkey to pursue energetically its reform process. If the European Council in December 2004, on the basis of a report and a recommendation from the Commission, decides that Turkey fulfils the Copenhagen political criteria, the European Union will open accession negotiations with Turkey without delay.

20. In order to assist Turkey towards EU membership, the accession strategy for Turkey shall be strengthened. The Commission is invited to submit a proposal for a revised Accession Partnership and to intensify the process of legislative scrutiny. In parallel, the EC-Turkey Customs Union should be extended and deepened. The Union will significantly increase its pre-accession financial assistance for Turkey. This assistance will from 2004 be financed under the budget heading "pre-accession expenditure".

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21. The European Union and the acceding States agreed on a joint declaration "One Europe" on the continuous, inclusive and irreversible nature of the enlargement process (see SN 369/02) which will be annexed to the final act of the Accession Treaty.

The enlarged Union and its neighbours

22. The enlargement will bring about new dynamics in the European integration. This presents an important opportunity to take forward relations with neighbouring countries based on shared political and economic values. The Union remains determined to avoid new dividing lines in Europe and to promote stability and prosperity within and beyond the new borders of the Union.

23. The European Council recalls the criteria defined at the Copenhagen European Council in June 1993 and reaffirms the European perspective of the countries of the Western Balkans in the Stabilisation and Association Process as stipulated by the European Council in Feira. The Council underlines its determination to support their efforts to move closer to the EU. The European Council welcomes the decision by the incoming Greek Presidency to organise a Summit on 21 June in Thessaloniki between EU Member States and countries of the Stabilisation and Association Process.

24. The enlargement will strengthen relations with Russia. The European Union also wishes to enhance its relations with Ukraine, Moldova, Belarus and the southern Mediterranean countries based on a long-term approach promoting democratic and economic reforms, sustainable developments and trade and is developing new initiatives for this purpose. The European Council welcomes the intention of the Commission and the Secretary-General/High Representative to bring forward proposals to that end.

25. The European Council encourages and supports the further development of cross-border and regional cooperation inter alia through enhancing transport infrastructure, including appropriate instruments, with and among neighbouring countries in order to develop the regions' potential to the full.

II. FUNCTIONING OF THE COUNCIL IN VIEW OF ENLARGEMENT

26. The European Council took note of an initial report from the Presidency on the Presidency of the Union requested at Seville.

III. EUROPEAN SECURITY AND DEFENCE POLICY

27. The European Council congratulated the Presidency and the Secretary-General/High Representative, Javier Solana, for their efforts which have enabled the comprehensive agreement reached with NATO on all outstanding permanent arrangements between the EU and NATO in full conformity with the principles agreed at previous meetings of the European Council and the decisions taken at the Nice European Council.

28. The European Council confirmed the Union's readiness to take over the military operation in FYROM as soon as possible in consultation with NATO, and invited the relevant bodies of the EU to finalise work on the overall approach to the operation, including development of military options and relevant plans.

29. The European Council also indicated the Union's willingness to lead a military operation in Bosnia following SFOR. It invited the Secretary-General/High Representative, Javier Solana, and the future Presidency to begin consultations to that end with the authorities in Bosnia and Herzegovina, the High Representative/EU Special Representative Lord Ashdown, NATO and other international players and to report to the Council in February. It requested the relevant EU bodies to make proposals on an overall approach, including the legal framework, by the same time.

30. The European Council has taken note of the declaration of the Council attached in Annex II.

IV. MIDDLE EAST/IRAQ

31. The European Council adopted the declarations in Annexes III and IV.

V. OTHER ITEMS

Maritime safety/marine pollution

32. The European Council expresses its regret and grave concerns with regard to the serious accident of the oil tanker PRESTIGE off the northwest coast of Spain. The ensuing damage to the marine and socio-economic environment and the threat to the livelihood of thousands of persons are intolerable. The European Union expresses its solidarity with the States, regions and populations that have been affected and its support and recognition of the efforts of the affected States, institutions and civil society towards the recovery of the polluted areas.

33. The European Council recalls its conclusions in Nice in December 2000 concerning the ERIKA measures and acknowledges the determined efforts in the European Community and the International Maritime Organisation (IMO) since the ERIKA accident to enhance maritime safety and pollution prevention. The Union is determined to take all necessary measures to avoid a repetition of similar catastrophes and welcomes the rapid responses by the Council and the Commission. The Union will also continue to play a leading role in international efforts in pursuit of this objective, in particular within the IMO. The conclusions of the Transport Council on 6 December 2002 and the Environment Council on 9 December 2002 should be implemented in all their aspects without delay.

34. The European Council welcomes the action undertaken by the Commission to confront the economic, social and environmental consequences derived from the wreck of the Prestige, in the framework of the present financial perspective and its intention to examine the need for further specific measures. Amongst these measures, questions relating to liability and the corresponding sanctions will also be examined.

On the basis of a report by the Commission, the European Council will address these issues at its forthcoming March meeting.

Alpine transit

35. According to the conclusions of the European Council in Laeken, the European Council requests the Council to adopt, before the end of this year, a regulation on the interim solution for the transit of heavy goods vehicles through Austria 2004-2006. The European Commission shall present a proposal for a new Eurovignette directive not later than the first half of 2003.

Melk Agreement

36. The European Council took note with satisfaction of the Melk Agreement between Austria and the Czech Republic and expects its comprehensive implementation.

Specific situations in agriculture in current Member States

37. The European Council has been asked by Portugal to take action pursuant to the conclusions of the Berlin European Council on 24 and 25 March 1999 on the specificity of Portuguese agriculture.

The European Council noted that Portugal considers that a specific problem, arising from the way the CAP currently applies to Portuguese agriculture, still exists. To this end the Commission is invited to present a report analysing the situation. The Commission is also invited to consider the situation in other parts of the Union where similar specific problems may exist.

Reports and communications for the European Council

38. The European Council took note of the report on reports and communications submitted to it (15530/02).

ANNEX I

BUDGETARY AND FINANCIAL ISSUES

The Union endorses the result of the negotiations which have determined expenditure requirements resulting from the accession of new Member States respecting the ceilings for enlargement-related expenditure set out for the years 2004-2006 by the European Council in Berlin.

The European Council invites the Commission to take into account this expenditure in its proposal to adjust the financial perspective, to be adopted by the European Parliament and the Council in accordance with paragraph 25 of the Interinstitutional Agreement of 6 May 1999 on budgetary discipline and improvement of the budgetary procedure.

Based on the accession of 10 new Member States by 1 May 2004, the maximum appropriations for commitments for agriculture, structural operations, internal policies and administration for the new Member States should be the amounts now determined as a result of the negotiations at this European Council, as set out in the following table:

Maximum enlargement-related appropriations for commitments (EUR mio. 1999 prices) 2004-2006 (for 10 new Member States)

	2004	**2005**	**2006**
Heading 1 Agriculture	1.897	3.747	4.147
Of which:			
1a - Common Agricultural Policy	327	2.032	2.322
1b - Rural development	1.570	1.715	1.825
Heading 2 Structural actions after capping	6.070	6.907	8.770
Of which:			
Structural Fund	3.453	4.755	5.948
Cohesion Fund	2.617	2.152	2.822
Heading 3 Internal policies and additional transitional expenditure	1.457	1.428	1.372
Of which:			
Existing policies	846	881	916
Transitional nuclear safety measures	125	125	125
Transitional institution building measures	200	120	60
Transitional Schengen measures	286	302	271
Heading 5 Administration	503	558	612
Total maximum appropriations for commitments (Headings 1, 2, 3 and 5)	9.927	12.640	14.901

This is without prejudice to the EU 25 ceiling for category 1a for 2007-13 set out in the Decision of the Representatives of the Governments of the Member States, meeting within the Council on 14 November 2002, concerning the conclusions of the European Council meeting in Brussels on 24 and 25 October 2002.

The European Council considers that appropriate adjustments to the EU 15 financial perspective ceilings for the period 2004-2006 to take account of the expenditure requirements relating to enlargement should not − for existing headings − exceed the above amounts.

In addition, a new temporary heading X for a special lump-sum cash-flow facility and for temporary budgetary compensation for the years 2004 to 2006 should be created within the Berlin ceilings for enlargement-related expenditure. The total amounts now determined as a result of negotiations are as follows:

Heading X (special cash-flow facility and temporary budgetary compensation) 2004-2006 (for 10 new Member States)			**(EUR mio. 1999 prices)**
	2004	**2005**	**2006**
Special cash-flow facility	1.011	744	644
Temporary budgetary compensation	262	429	296
Total	1.273	1.173	940

However, the corresponding ceiling for appropriations for payments for the enlarged Union for the years 2004-2006 should be unchanged compared to the corresponding ceiling set out in Table A of the Berlin conclusions. The European Council recalls paragraph 21 of the Interinstitutional Agreement of 6 May 1999 which sets out the need to maintain an appropriate relationship between commitments and payments.

In accordance with the Own Resources Decision of 29 September 2000, the new Member States will fully contribute to the financing of the EU expenditure as from the first day of accession, since the own resources acquis will apply to the new Member States as from accession.

Regarding the ring-fencing of expenditure, the European Council recalls paragraph 21 of the Interinstitutional Agreement of 6 May 1999.

The general effort towards budgetary discipline laid down by the European Council in Berlin should be continued in the period beginning in 2007.

ANNEX II

DECLARATION OF THE COUNCIL MEETING IN COPENHAGEN ON 12 DECEMBER 2002

The Council notes the following:

1. As things stand at present, the "Berlin plus" arrangements and the implementation thereof will apply only to those EU Member States which are also either NATO members or parties to the "Partnership for Peace", and which have consequently concluded bilateral security agreements with NATO.

2. Paragraph 1 above shall not affect the rights and obligations of EU States in their capacity as EU Members. Consequently, in the absence of any specific provision in the Treaty or in a Protocol annexed thereto (particular case of Denmark), all EU Member States will participate fully in defining and implementing the Union's CFSP, which shall cover all matters relating to the Union's security, including the progressive framing of a common defence policy.

3. The fact that, as things stand at present, Cyprus and Malta will not take part in EU military operations conducted using NATO assets once they have become members of the EU will not, within the limits of the EU Security Regulations, affect the right of their representatives to participate and vote in EU institutions and bodies, including COPS, with regard to decisions which do not concern the implementation of such operations.

   Likewise, their right to receive EU classified information, within the limits of the EU Security Regulations, shall not be affected, provided the EU classified information does not contain or refer to any classified NATO information.

ANNEX III

EUROPEAN COUNCIL DECLARATION ON THE MIDDLE EAST

Peace in the Middle East is an imperative. The European Council calls upon the Israeli and Palestinian people to break the endless cycle of violence. It reiterates its strong and unequivocal condemnation of all acts of terrorism. Suicide attacks do irreparable damage to the Palestinian cause. The European Union supports the efforts of those Palestinians seeking to take forward the reform process and to bring an end to the violence. It appeals to Israel to facilitate those efforts. While recognising Israel's legitimate security concerns the European Council calls upon Israel to stop excessive use of force and extra-judicial killings, which do not bring security to the Israeli population.

Violence and confrontation must give way to negotiations and compromise. The international community, including the parties, share a common vision of two States, Israel and an independent, viable, sovereign, and democratic Palestine, living side by side in peace and security on the basis of the 1967 borders. All efforts should now be directed at translating this vision into reality.

As a result the European Council attaches the highest priority to the adoption on 20 December this year by the Middle East Quartet of a joint road-map with clear timelines for the establishment of a Palestinian State by 2005. The implementation of the road-map must be based on parallel progress in the security, political and economic fields and should be closely monitored by the Quartet.

In this context, the European Council is alarmed at the continuing illegal settlement activities, which threaten to render the two-State solution physically impossible to implement. The expansion of settlements and related construction, as widely documented including by the European Union's Settlements Watch, violates international law, inflames an already volatile situation, and reinforces the fear of Palestinians that Israel is not genuinely committed to ending the occupation. It is an obstacle to peace. The European Council urges the Government of Israel to reverse its settlement policy and as a first step immediately apply a full and effective freeze on all settlement activities. It calls for an end to further land confiscation for the construction of the so-called security fence.

Decisive steps must be taken to reverse the sharply deteriorating humanitarian situation in the West Bank and Gaza, which is making life increasingly intolerable for ordinary Palestinians and fuelling extremism. Humanitarian access and the security of humanitarian personnel and their installations must be guaranteed.

With the aim of supporting the reforms in the Palestinian territories, the EU will continue its budgetary support to the Palestinian Authority with clear objectives and conditions. The EU calls on other international donors to join this commitment also with a view to coherent efforts for reconstruction. Israel for its part must resume the monthly transfers of Palestinian tax revenues.

The European Union is determined to continue the work with its partners in the Quartet to assist Israelis and Palestinians alike to move towards reconciliation, negotiations and a final, just and peaceful settlement to the conflict.

ANNEX IV

EUROPEAN COUNCIL DECLARATION ON IRAQ

The European Council underlines its full and unequivocal support for Security Council Resolution 1441 of 8 November 2002. The goal of the European Union remains the disarmament of Iraq's weapons of mass destruction in accordance with the relevant UN Security Council Resolutions. It is now up to Iraq to seize this final opportunity to comply with its international obligations.

The European Council notes Iraq's acceptance of Resolution 1441 and that it has, as required, submitted a declaration on its programmes to develop weapons of mass destruction and related products.

The EU will continue to give its full support to the efforts of the UN to ensure full and immediate compliance by Iraq with Resolution 1441. The role of the Security Council in maintaining international peace and security must be respected.

The European Council expresses its full support for the inspection operations of UNMOVIC and IAEA headed by Dr Blix and Dr El-Baradei. The European Council stresses that the weapons inspectors should be allowed to proceed with their important task without interference using the full range of tools available to them under Resolution 1441. The EU looks forward to their assessment of the Iraqi declaration.

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 21.5.2003
COM(2003) 283 final

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT

Public finances in EMU – 2003

{SEC (2003) 571 }

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT

Public finances in EMU – 2003[1].

The most difficult period for budgetary policies since the launch of the euro

2002 and the early part of 2003 has been a difficult period both in terms of actual budgetary developments and as regards the implementation of the EU framework for fiscal surveillance. The nominal deficit for the euro area as a whole increased from 1.6% of GDP in 2001 to 2.2% in 2002 and, according to the latest Commission forecast, it is projected to rise to 2.5% of GDP in 2003. This aggregate outcome is the result of striking contrasts in the performance across Member States. By the end of 2002, only six EU countries, including four euro area countries (accounting for some 18% of euro area output) had achieved budget positions (both in nominal and cyclically adjusted terms) that met the 'close to balance or in surplus' requirement of the Stability and Growth Pact, whereas two euro area countries (accounting for half of the euro area output) had deficits above the 3% of GDP reference value.

The Portuguese authorities succeeded in reducing the nominal deficit from 4.1% of GDP in 2001 to 2.8% in 2002, although very significant challenges remain if the deficit is to remain below 3% of GDP in 2003 as much of this improvement is due to one-off measures which have only led to a transitory improvement in the budget balance. A deficit of 3.6% of GDP in 2002 has resulted in Germany being placed in an excessive deficit position: while the authorities are taking measures aimed at reducing the cyclically-adjusted budget deficit, only a very limited improvement in nominal terms is expected in 2003 as growth conditions deteriorate. Despite clear evidence of budgetary slippage emerging in early 2002, the French authorities did not take corrective measures and a deficit of 3.1% of GDP occurred in 2002 resulting in the excessive deficit procedure being activated. An even higher deficit of 3. 7% of GDP is forecast by the Commission services for 2003 on the basis of current policies. Large deficits remain in Italy (2.3% of GDP in 2002 and in 2003) and by 2004 is projected to rise above the 3% of GDP reference value[2]: budgetary consolidation efforts in Italy continue to rely on one-off measures rather than on reforms of a structural nature needed to ensure a permanent improvement in the budget balance. Deficits have also re-emerged in 2002 in countries that already had reached balanced budget positions, notably Austria (0.6% of GDP), the Netherlands (1.1%) and the UK (1.3%).

Higher nominal deficits are only partly due to the economic cycle

At first sight, these developments compare relatively favourably with previous economic downturns when deficits reached much higher levels and debt ratios entered rapidly increasing trajectories. In addition, governments have not pursued fine-tuning policies and while fiscal policies were slightly looser, monetary conditions have eased thanks mainly to low real interest rates.

[1] See also the report by the Commission services on “Public Finances in EMU 2003”, SEC ……..

[2] European Commission Spring 2003 forecast, 2004 figures are based on the assumption of no policy change.

However, a closer consideration of underlying budgetary trends reveals that the deterioration in nominal deficits also results from high and rising cyclically-adjusted deficits in several countries. This indicates a discretionary loosening of the fiscal stance by some Member States over the past two years, brought about by a combination of unfunded tax cuts, discretionary expenditure increases and failures as regards budgetary execution. While the outcome of the euro area in 2002 was unchanged compared to 2001, it should be noted that the cyclically-adjusted budget balance for 2001 has recently been revised upwards to 2.1% of GDP from 1.5% of GDP, implying that the deterioration in the underlying budget balance in that year was considerably worse than earlier estimates showed: moreover, the cyclically-adjusted budget balance includes the impact of one-off budgetary measures which only have a transitory effect on budget positions. The deterioration has been particularly pronounced in Germany (where the CAB increased to 3.2% of GDP in 2002) and France (to 3.3%). In Italy, it remains high at 2.1% of GDP.

In a medium-term perspective, the latest updates of the stability and convergence programmes contain a target by most Member States to reach budget positions of 'close to balance or in surplus' by 2005 or 2006. However, it should be noted that the medium-term targets of Member States are based on growth assumptions, which in light of developments in recent months now appear to be optimistic. In countries where large cyclically adjusted deficits remain, the time frame for reaching the ‘close to balance or in surplus’ objective has been pushed back to 2006 or 2007: even this date will only be met if additional consolidation measures are undertaken.

Commission proposals to strengthen the co-ordination of budgetary policies

The deterioration in budget positions has placed considerable stress on the EU’s framework for fiscal surveillance and three Member States have been placed in excessive deficit positions. In response to these developments, and in line with a mandate from the Barcelona European Council conclusions, the Commission adopted a Communication on strengthening the co-ordination of budgetary policies.[3] It identified a number of shortcomings with the implementation of the SGP in the first four years of EMU and outlined a strategy based on Member States reassuming political ownership of the Pact. *Inter alia,* it called for more account to be taken of underlying economic conditions when assessing budgetary positions, an interpretation of compliance with SGP requirements that would (depending on country specific circumstances) cater for the budgetary impact of reforms that enhance growth and employment, increasing the emphasis placed on the sustainability of public finances and outstanding debt positions, and improving the implementation of the SGP including stricter and more timely recourse to the existing enforcement instruments. At the same time the Commission adopted proposals to improve the governance of budgetary statistics which provide the foundations for effective surveillance.

The European Council of March 2003 endorsed key conclusions of the ECOFIN Council

The Spring European Council of March 2003, endorsed a report of the (ECOFIN) Council which shared many of the Commission’s proposals on strengthening the co-ordination of budgetary policies. It confirmed that the achievement of a budget position of 'close to balance or in surplus' is in the economic self-interest of Member States both individually and collectively. In the short run, it provides room for the automatic stabilisers to operate freely and cushion the effect of economic shocks; in the medium-run it creates room for budgetary manoeuvre to either cut taxes or divert expenditures to more productive items such as

[3] Communication from the Commission “Strengthening the co-ordination of budgetary policies”, COM (2002)668 final of 27 November 2002.

investment and R&D; in the long-run, compliance will help Member States meet the budgetary costs of ageing population while securing adequate and accessible pensions and health care.

In addition to re-stating their commitment to the goal of the SGP, the Council agreed that compliance with the 'close to balance or in surplus’ requirement should be assessed in cyclically-adjusted terms with due account taken of one-off budgetary measures which only have a transitory impact on budget positions. For euro-area countries, agreement was reached that Member States with deficits should achieve an annual improvement in the cyclically-adjusted budget deficit of at least 0.5% of GDP until the 'close to balance or in surplus' requirement is reached. It underlined the need for automatic stabilisers to operate symmetrically over the economic cycle and the particular importance of avoiding a pro-cyclical loosening of fiscal policies in good times. The Council also confirmed the importance of running down public debt at a satisfactory pace towards the 60% of GDP reference value and that the existing provisions of the Treaty (i.e. the debt criterion of the excessive deficit procedure) can contribute to achieving this goal.

An opportunity to ensure consistent and transparent budgetary strategies

To ensure that the agreement of the European Council represents a real progress towards a consistent and transparent implementation of SGP, it is essential that the policy guidelines endorsed by the European Council, and the specific budgetary commitments given by Member States in their updated stability and convergence programme, are respected.

To this end, policies adopted at national level need to respect the budgetary goals agreed at EU level In doing so, budgetary consolidation strategies need to be designed in a way that tackle, and not exacerbate structural weaknesses leading to slow growth and missed employment opportunities. This requires careful design as regards the balance between measures on the revenue and expenditure side, and choices on the composition of public expenditures. Contrary to what is often argued, the existing framework for budgetary surveillance can simultaneously achieve a consistent approach that balances the need for budgetary consolidation, re-igniting the recovery and strengthening growth potential.

Significant advances have been made in the framework for budgetary surveillance

This year’s report on *Public finances in EMU –2003* highlights three areas where substantial progress has been made in the framework for budgetary surveillance over the past year: (i) the integration of candidate countries into the EU’s fiscal surveillance framework, (ii) an increased focus on the sustainability of public finances, and (iii), an improvement in the governance of budgetary statistics. These advances show that tangible progress can be made to the benefit of Member States and the EU as whole when there is a political will to do so. It also shows that framework for budgetary surveillance is capable of evolving in light of growing experience and new policy challenges.

Integrating acceding and candidate countries into the EU's fiscal surveillance framework

With ten countries set to join the EU in 2004, a major policy challenge is to prepare for their integration into the EU economic policy framework, in particular for budgetary surveillance. A key requirement has been to develop reliable government accounts and economic forecasts on a par with existing EU countries. At the same time, the EU surveillance of budgetary developments needs to develop so that appropriate account is taken of the important structural and institutional changes underway in accession countries. These are partly due to the completion of the transition from a command to a market economy and partly due to the additional effects which EU membership will entail (associated with the need to upgrade public infrastructure and the commitment to implement the *acquis communautaire*).

Clear strides have been taken in recent years, although budgetary data are still neither fully comparable across countries nor completely in line with EU definitions. Data reported by the candidate countries and forecasts prepared by the Commission services indicate that budgetary developments are closely mirroring those in the EU, with nominal and cyclically adjusted budget deficits in 2002 rising in most countries. Looking ahead to 2003 and 2004, the Commission forecast of Spring 2003 envisages an improvement in the budgetary balances of nine countries, with marked deficit reductions forecasted in Hungary, Slovakia and Turkey, and to a more limited extent in Malta. However, very limited improvements in budget balances are projected in the Czech Republic, Poland and Cyprus.

An important step to integrate the candidate countries into the existing surveillance process was completed in November 2002, when the second set of Pre-accession Economic Programmes (PEPs) submitted by candidate countries were examined. The annual programmes outline the medium-term policy framework, including public finance objectives and structural reform priorities, and moreover provide an opportunity for candidate countries to develop their institutional and analytical capacity. The 2002 updates revealed an improved effort to develop a consistent and credible medium-term macroeconomic framework, although further analytical capacity building is called for.

The sustainability of public finances received increased prominence in the assessment of sustainability and convergence programmes.

Progress has also been made as regards placing increased emphasis on the sustainability of public finances in the SGP as requested by the 2001 Stockholm European Council. For the second time, an assessment of the sustainability of public finances was carried out on the basis of budgetary targets and measures announced in the 2002 updates to stability and convergence programmes leading to firm policy conclusions by the Council. The policy conclusions, which are based on quantitative indicators and long-run budgetary projections prepared by the Economic Policy Committee and national authorities, are worrying.

Even assuming all Member States achieve the budget targets for 2006 set down in their stability or convergence programmes, there is a risk of unsustainable public finances emerging in about half of EU Member States, especially Belgium, Germany, Greece, Spain, France, Italy, Austria and Portugal. To ensure sustainable public finances, Member States with deficits first need to achieve and sustain the SGP goal of budget positions of 'close to balance or in surplus'. Furthermore, preliminary estimates by the Commission show that an additional permanent budgetary adjustment of between 1 and 2 percentage points of GDP is needed in Member States where the sustainability of public finances is a concern. To close this financing gap, governments should try to avoid raising taxes (especially on labour), and concentrate efforts on reducing (in terms of ratio to GDP) age-related expenditure by reforming of pension and health care systems and/or reducing non-age related primary spending while increasing employment rates and fostering growth.

Progress has been made on the governance of budgetary statistics

The quality of economic statistics is crucial to ensure an adequate understanding of the economic situation and effective policy making. Budgetary statistics are the foundation of the EU fiscal surveillance tools and their quality has improved considerably over the last decade. Government accounts are now more reliable, complete, transparent and detailed, and are published in a much more timely fashion than when the excessive deficit procedure was set up. However, some weaknesses remain: in several countries, data on government deficit and debt ratios are not yet as reliable as they should be and are subject to large revisions. Furthermore, the government accounts of several Member States are not fully transparent, and there have been problems in terms of their timely submission. These concerns are clearly amplified with the perspective of enlargement.

To address outstanding challenges, the (ECOFIN) Council recently agreed to implement a code of best practice.[4] From the Member States' side, this involves increasing the transparency of government accounts in particular for the lower government subsectors, the strict respect of deadlines, an overall increase in the data quality, but also a clarification of the independence statute of the national statistical offices as the main compilers of government data. The Commission (Eurostat) is aiming at reinforcing its ability to scrutinise the Member States' government accounts in more detail, and accelerating the decision making process for deciding upon the recording of government transactions. The new steps to compile quarterly budgetary statistics is a major challenge for statisticians, but also for economists, policy-makers and budgetary policy analysts that will need to interpret quarterly data with due care, since these will necessarily be more volatile and perhaps less transparent than annual data.

The Commission role in upgrading the analysis of economic and budgetary policies

In its Communication on strengthening the co-ordination of budgetary policies, the Commission committed itself to upgrading the analysis of economic and budgetary policies. To this end, a number of detailed studies are contained in the report *Public finances in EMU – 2003* as follows:

- firstly, the report examines the impact of budgetary consolidation on growth. It considers whether the assertion that budgetary consolidation has a negative impact on output is always valid, or whether fiscal consolidations in EMU under certain conditions can have a positive effect on output;

- secondly, and as part of the effort to focus on the quality of public finances, the report analyses public investment. It examines the reasons why public investment as share of GDP has fallen in recent decades and whether this is in part due the process of budgetary consolidation and the development of fiscal rules at EU level. It also analyses the link between public investment and productivity, and considers the merits and feasibility of developing specific provisions for public investment within the EU's framework for budgetary surveillance; and,

- a third chapter examines various aspects of the challenge facing national authorities in ensuring sound public finances. It reviews the experience of Member States in using expenditures rules as an instrument to better manage public finances and improve their quality. In addition, the chapter examines how the allocation of public finance functions

[4] Conclusions of the 2485th Council meeting, Economic and Financial Affairs, Brussels 18 February 2003.

across different levels of governments influences the capacity of Member States to fulfil their budgetary commitments at EU level. This analysis is a good example of the role of the Commission in undertaking comparative cross-country analyses that enable Member States to learn from the experiences and best practices of other countries.

Is fiscal consolidation always contractionary?

While there is a broad consensus among both academics and policy-makers on the need for fiscal discipline to ensure the smooth functioning of EMU and provide conditions conducive to growth and employment creation, concerns have been expressed that budgetary consolidation could have a negative effect on output in the short run. This issue is relevant given the need for several Member States to reduce large cyclically-adjusted budget deficits, especially against the current background of slow economic growth.

An empirical analysis of the experiences of EU Member States, however, demonstrates that roughly half of the episodes of fiscal consolidation undertaken in the past three decades have been accompanied by an acceleration in economic growth. These findings appear to be consistent with theories that identify a positive impact of budgetary consolidation on consumer expectations of lower taxes in the future inducing them to raise their consumption plans, and/or on business expectations of higher profitability enabling them to raise investment. Confidence factors may play a more prominent role in the future in light of large unfunded pension liabilities.

Simulations using the QUEST model confirm that if appropriately designed, budgetary consolidation can contribute significantly to the goal of Lisbon strategy in terms of raising output and employment in the medium-term. Budgetary consolidation have a slight contractionary effect on output in the short run, depending on the composition of the budgetary adjustment. However, budgetary consolidation has a positive impact on output in the medium-run if it takes place in the form of expenditure retrenchment rather than tax increases. Moreover, the effect of budgetary consolidation on output could be reinforced, and even positive, in the short-run if fiscal consolidation is combined with structural reform of factor and product markets and accompanied with an accommodating monetary stance. Indeed, budgetary consolidation often acts as a catalyst for structural reforms.

Public investment

Public investment as a share of GDP has fallen in most industrialised countries in recent decades. It has been claimed that the budgetary requirements of the Treaty and SGP result in public investment expenditures being at excessively low levels, and that a sustained growth in public investment expenditures would improve the EU's growth potential. However, an analysis shows that the decline in public investment rates is a long-run tendency that started already in the 1970's, and affected all industrialised countries and not just EU Member States. Declining levels of public investment as a share of GDP have been attributed to factors such as increased levels of economic development (with developed countries already having a high stock of physical capital and the emphasis switching towards investment in human capital[5]) and the changing boundaries between public and private investment (in part linked to the process of privatisation). Some of the decline in public investment levels appears to be related to efforts to consolidate public finances, which was necessary irrespective of EMU. A careful analysis of the data, however, fails to show any clear-cut link between change in investment

[5] Communication from the Commission *'Investing efficiently in education and training: an imperative for Europe*", COM(2002)779

ratios and the provisions of the EU's framework for fiscal surveillance. Indeed public investment expenditures in many Member States have stopped falling after the beginning of monetary union.

Public investment can make an important contribution to meet the output and employment goals of the Lisbon strategy. However, in considering the links between public investment and growth, it is important to focus on net as opposed to gross investment levels (i.e. taking account of the depreciation of the existing capital stock) and also the interaction between trends in public and private investment level. Existing studies reveal that public investment has a positive impact on output and productivity, although the results are not very strong. This is explained by the fact that only a fraction of public investment expenditures are devoted to projects which aim at directly raising productivity (e.g. investment in transport infrastructure), whereas a significant proportion of public investment is devoted to projects that pursue other objectives such as environmental protection or redistribution across regions, which have an indirect contribution to productivity .

The important role of public investment is recognised in the existing framework for budgetary surveillance: for example, Member States are required to specify planned public investment levels in their annual updates to stability and convergence programmes and the BEPGs frequently recommend that an increased share of public expenditures be devoted to productive items. In brief, the budget balance requirements of Treaty and SGP are compatible with a high share of public spending being devoted to public investment. The recent Commission Communication on strengthening the co-ordination of budgetary polices sought to cater for the budgetary impact of large investment projects while at the same time respecting the commitment to sound and sustainable public finances[6].

Several calls have been made to introduce a so-called golden rule into the SGP, which would allow governments to borrow to finance investment. However, there are strong theoretical and practical arguments against its introduction, especially in a framework of multilateral surveillance such as the SGP. First, a golden rule based on a national accounts system could lead to a bias in expenditure decisions in favour of physical capital and against spending on human capital (education, training) or other productive items (health care, R&D) which also contribute to growth and employment. Secondly, if applied to gross investment, depending on the specific design and implementation of the reform, the adoption of a golden rule into the SGP framework may imply substantially higher deficits, thus compromising the objective of sustainability of public finances. Finally, the relevant concept for the application of the golden rule would be net investment. However, it is not always possible to compute reliable, comparable and timely data on this type of investment.

There is a growing practice of financing public purpose investment projects through public-private partnerships (PPPs). A large share of the PPPs in the EU finance infrastructure and supplement public investment.[7] The main implication for public finances of choosing PPPs as opposed to traditional public investment is in fact that of converting up-front fixed expenditures into a stream of future obligations. This practice has a sound microeconomic rationale in that it can lead to increased efficiency without compromising public objectives. It is important however to avoid recourse to PPPs where this is solely motivated by a desire to bypass budgetary constraints. by putting capital spending outside government budgets. This

[6] The Council has shown some flexibility in interpreting compliance with the "close to balance or in surplus" requirement to reflect significant planned increases in public investment programmes.

[7] Also see Communication from the Commission "*Developing the trans-European transport network: innovative funding solutions : interoperatibility of electronic toll collection systems*", COM(2003)132 of 24 April 2003.

could lead to PPP projects which entail higher overall costs, which would not be in line with the objective of sustainable public finances. Efforts are also required to ensure transparency in national accounts.

Efforts at national level to meet EU budgetary requirements: expenditure rules and fiscal relations across different levels of governments

Many Member States in recent years have introduced expenditure rules as a means to improve the management of their public finances, mostly in the form of *ex-ante* targets rather than binding legal obligations. National expenditure rules can enable Member States to meet the budget balance requirements of the Treaty and SGP by helping them to better control expenditure items that are subject to overruns. The specific design and the strength of the enforcement mechanisms are key to their effectiveness. Depending on their design, they can also contribute to other policy objectives such as avoiding a pro-cyclical loosening of fiscal policy in good times, and improving the quality of the composition of public spending.

There is a great deal of variety in the design of expenditure rules across EU Member States, as regards the the types of expenditure covered by a rule, the time frame involved and the robustness of surveillance and enforcement mechanisms. Preliminary empirical analysis indicates that the existing expenditure rules have not had a visible impact on trends in public spending. However, judging compliance with expenditure rules is difficult as in many cases they cover several years and are subject to revisions. In some countries, expenditure rules are not ambitious enough and adherence with them is easily reached: in other cases, the rule has been adjusted or abandoned if it is perceived as being too ambitious. Overall, even a relatively weak expenditure rule can provide useful guidance and signals to actors involved in the budgetary process.

The Treaty and SGP requirements are defined in terms of the budget balance of the general government (i.e. central and local/state governments and social security), although the specific budget targets in stability and convergence programmes are set by the central government. The challenge in meeting EU budgetary requirements is therefore affected by the way in which Member States allocate fiscal functions (both revenues and expenditures) across different levels of government. This is especially the case in federal countries and the Member States where local authorities have considerable budgetary autonomy. The contribution of sub-central authorities to the overall budget position is changing in a number of countries in light of efforts to devolve certain public functions to regional/local authorities.

The direct contribution of lower levels of government to the general government deficit is generally limited since all Member States apply restrictions to local government borrowing: the exception is Germany, where net borrowing by local and state governments accounts for nearly half of the general government budget deficit in 2002. However, it should be borne in mind that *de facto* central government often have to bear the cost of financing difficulties that emerge at sub-central level. To help comply with the EU's fiscal rules, the federal Member States and Italy and Spain have recently introduced arrangements that aim at co-ordinating the budgetary position across levels of government (usually referred to as national stability pacts). More experience with the implementation of these arrangements is needed before conclusions can be drawn on their effectiveness in contributing to the objectives of the EU fiscal framework. *A priori*, a strong legal base and enforcement mechanism would be expected to contribute to the credibility and effectiveness of the arrangements.

The process of decentralising responsibility for some policies raises a second issue in the context of EMU, namely the operation of automatic stabilisers. Experience shows that in general systems are designed to shield sub-national governments from cyclical variations. However, empirical evidence for the US and Germany suggests some degree of pro-cyclical behaviour at the level of the States. Further research would be useful to analyse the possible interaction between fiscal decentralisation and automatic stabilisation and to identify the best practices to reconcile the process of decentralisation with ensuring sound and sustainable public finances

18/2004 - 11 February 2004

New decision of Eurostat on deficit and debt

Treatment of public-private partnerships

Eurostat, the Statistical Office of the European Communities, has taken a decision on the accounting treatment in national accounts of contracts undertaken by government units in the framework of partnerships with non-government units. The decision specifies the impact on government deficit/surplus and debt. It results from work undertaken in 2003 in cooperation with experts from European countries and different international bodies.

The decision is in line with the European System of Accounts (ESA95), and is consistent with the opinion of the Committee on Monetary, Financial and Balance of Payments Statistics (CMFB), as described in the annex.

Eurostat recommends that the assets involved in a public-private partnership should be classified as non-government assets, and therefore recorded off balance sheet for government, if both of the following conditions are met:

1. the private partner bears the construction risk, and
2. the private partner bears at least one of either availability or demand risk.

If the construction risk is borne by government, or if the private partner bears only the construction risk and no other risks, the assets are classified as government assets. This has important consequences for government finances, both for the deficit and the debt. The initial capital expenditure relating to the assets will be recorded as government fixed capital formation, with a negative impact on government deficit/surplus. As a counterpart of this government expenditure, government debt will increase in the form of an “imputed loan” from the partner, which is part of the “Maastricht debt” concept. The regular payments made by government to the partner will have an impact on government deficit/surplus only for the part relating to purchases of services and “imputed interest”.

Why is Eurostat taking this decision now?

Public partnerships with private units have been observed for a long time in EU Member States. Such arrangements take various forms, including concessions which normally do not raise difficulties as regards their treatment in national accounts. Recently however, new kinds of arrangements have been made in a few Member States, and a significant increase in these arrangements is expected for various reasons such as efforts to increase efficiency of public expenditure and to improve the quality of public services. Moreover, the European Growth Initiative, approved by the European Council in December 2003, sets as one of its objectives to promote the use of such partnerships, notably in order to develop growth-related infrastructures.

As the Statistical Authority of the Commission, Eurostat does not examine the motives, rationale and efficiency of these partnerships, but has to provide clear guidance on their treatment in national accounts, as regards their impact on data for the general government sector. Furthermore, an important part of Eurostat’s mission is to ensure homogeneity of government statistics in all Member States, including the 10 Acceding Countries, under ESA95, such that deficit and debt figures are fully comparable.

Which partnerships does this decision cover?

The decision will apply to long-term contracts in areas of activity where government normally has a strong involvement. These contracts often (but not always) correspond to what is referred to as “Public-private partnerships”, concluded with one or several partners, directly or through a special entity set up on purpose, and possessing expertise in the content of the contract over its lifetime. An important feature is that the contract mentions both the output of some specifically-designed assets, needing an initial capital expenditure, and the delivery of agreed services, requiring the use of these assets and according to given quality and volume standards. This decision applies only in cases where government is the main purchaser of the services supplied by the partner, whether the demand originates directly from government itself or from third party users (as seen notably for health and education services, and the use of some transport infrastructures).

What is the key issue relating to public-private partnerships as regards their treatment in national accounts?

The key issue is the advance classification of the assets involved in the partnership contract - either as government assets or recorded in the balance sheet of the partner. In national accounts, the assets involved in a public-private partnership can be considered as non-government assets only if there is strong evidence that the partner is bearing most of the risk attached to the specific partnership. Therefore, this analysis of risks borne by the contractual parties is the core element of the assessment of a partnership project, as regards classification of the assets involved in the contract, in order to ensure the correct accounting of the impact on the government deficit of public-private partnerships.

However, this assessment does not consider risks that are not closely related to the asset and can be fully separated from the main contract, as is the case where part of the contract might be periodically renegotiated, and subject to performance and penalty payments that do not significantly depend on the condition of the main assets.

What is the Eurostat analysis of risk in partnerships?

Many risks may be observed in practice in such arrangements. The wording used may be in addition diverse and confusing. This is why, for the purpose of this decision, Eurostat has selected three main categories of “generic” risks. Therefore, “bearing a risk” for one party means that this party bears the majority of the risk.

A first category is “construction risk” covering notably events like late delivery, non-respect of specified standards, additional costs, technical deficiency, and external negative effects. Government’s obligation to start making regular payments to a partner without taking into account the effective state of the assets would be evidence that government bears the majority of the construction risks.

A second category is “availability risk” where the responsibility of the partner is quite obvious. It may not be in a position to deliver the volume that was contractually agreed or to meet safety or public certification standards relating to the provision of services to final users, as specified in the contract. It also applies where the partner does not meet the required quality standards relating to the delivery of the service, as stated in the contract, and resulting from an evident lack of “performance” of the partner. Government will be assumed not to bear such risk if it is entitled to reduce significantly (as a kind of penalty) its periodic payments, like any “normal customer” could require in a commercial contract. Government payments must depend on the effective degree of availability supplied by the partner during a given period of time. Application of the penalties where the partner is defaulting on its service obligations should be automatic and should also have a significant effect on the partner’s revenue/profit, and must not be purely "cosmetic" or symbolic.

A third category is “demand risk” covering variability of demand (higher or lower than expected when the contract was signed) irrespective of the behaviour (management) of the private partner. This risk should only cover a shift of demand not resulting from inadequate or low quality of the services provided by the partner or any action that changes the quantity/quality of services provided. Instead, it should result from other factors, such as the business cycle, new market trends, direct competition or technological obsolescence. Government will be assumed to bear the risk where it is obliged to ensure a given level of payment to the partner independently of the effective level of demand expressed by the final user, rendering irrelevant the fluctuations in level of demand on the partner’s profitability. However, this statement does not apply where the shift in demand results from an obvious government action, such as decisions of units of general government (and thus not just the unit(s) directly involved in the contract) that represent a significant policy change, or the development of directly competing infrastructure built under government mandate.

How will the decision be implemented in practice?

The analysis of the risks in such partnerships will be carried out in all Member States and Acceding Countries (as this decision is applicable for the next notification on 1 March 2004), under the responsibility of the National Statistical Offices.

Eurostat is of the opinion that information about such risks can easily be obtained by statisticians and that the burden of the different risks is generally identifiable in the contracts. Eurostat is also of the opinion that the assessment of risk according to the process described above would allow for a straightforward classification of the assets either “on” or “off” government balance sheet in most cases.

However, it may happen in some cases that the risk analysis, as mentioned above, might not give clear conclusions (for instance if at least for two categories the share in risk may be estimated as balanced or based on very fragile hypotheses). In these cases, some additional elements in a partnership contract should also be taken into consideration. Apart from an analysis of the nature of the partners (notably in specific cases where the partner is a public corporation), the importance of government financing, the effect of government guarantees or provisions relating to the final allocation of the assets could be in some cases appropriate supplementary criteria.

In this respect, if the assets remain the property of the partner at the end of the project, and if they still have a significant economic value, then it is normally classified on the partner's balance sheet. This also includes contracts where government has merely an option to buy the asset at the current market value. On the other hand, if government has a firm obligation to acquire the assets at the end of the contract at a pre-determined price that does not reflect the economic value of the assets at that time (such as expected on the basis of conservative hypothesis at the time the contract was signed), or has paid for the right to acquire the assets throughout the contract through regular payments that were higher than they would have been without that right, then there can be a reason to record the assets as government assets if the other tests do not give a clear answer.

Finally, Eurostat considers that this decision is not in contradiction with the usual business approach to such issues. In any case, specific and complex borderline cases should be closely examined according to the agreed procedure, including at a first stage the assistance of Eurostat.

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CMFB opinion
on the treatment in national accounts of assets related to “public-private partnerships” contracts

The CMFB Chairman, with the assistance of the Executive Body, invited the CMFB Members on 23 December 2003 to give an opinion on the above-mentioned subject. Fourteen (14) national statistical institutes and thirteen (13) national central banks from the Member States returned the questionnaire. A total of twenty-seven (27) national institutions thus participated in the consultation. The ECB also provided a reply.

The result of the consultation was the following:

On the question: *Do you agree that PPP assets should be considered as non-government assets if there is strong evidence that the non-government partner bears most of the risk, according to the assessment of risks proposed in the guidance note?*

Twenty-six **(26)** national institutions responded **Yes**, among which three **(3)** asked for minor corrections to the numerical examples and three **(3)** requested clarifications on some parts of the guidance note. One **(1)** national institution answered **No**.

Accordingly, the CMFB endorses the guidance note of 23 December 2003 relating to the classification of assets in the context of "Public-Private Partnerships". The CMFB recommends that the suggested clarifications should be incorporated in a revised version of the ESA 95 Manual on Government Debt and Deficit, in so far as they do not change the substance.

In addition to this opinion, a document summarising the replies and all the original answers from the CMFB Members have been transmitted to Eurostat and will be kept in the records of the CMFB secretariat.

Jean CORDIER
CMFB Chairman

(Signed)

Paris, 30 January 2004

SPEECH/05/698

Charlie McCREEVY

European Commissioner for Internal Market and Services

Public-Private Partnerships – Options to ensure effective competition

Check Against Delivery
Seul le texte prononcé fait foi
Es gilt das gesprochene Wort

PPP Global Summit – The 6th Annual Government-Industry Forum on Public Private-Partnership

Copenhagen, 17 November 2005

Introduction

Ladies and Gentlemen,

It is a pleasure to be here with you today, to talk about PPPs – Public-Private Partnerships. From my point of view the timing of this conference could not be better: Two days ago, the Commission adopted a Communication on PPPs and Community Law on Public Procurement and Concessions. This Communication sets out the Commission's views on future policy to make public authorities choose their private partners for PPPs on a more competitive basis than is done today.

Now is an opportunity to inform you of the main content of this Communication which will be the subject of a press conference in Brussels later this morning.

Background

As far as I am concerned, in the field of public procurement there is enormous untapped potential across Europe, not least in some of the Member States that are struggling most with their public sector deficits.

Improved public procurement practices and procedures and more effective and timely enforcement of existing rules are, I hope, going to have a major role to play in coming years in terms of contributing to the resolution of public sector financing problems that will inevitably become more acute as demographics shift in a direction that makes higher State dependency levels inevitable.

I am currently giving thought to how – aside from planned legislative and communication initiatives – we might be able to “get more bang for our buck” on the public procurement side – by, for example, speedier and more rigorous enforcement procedures. I am also looking to ensure we are applying the appropriate resources in the public procurement enforcement and policy areas where significant further added value may be had.

Public Private Partnerships have, as you know, been developed in several areas of the public sector and are widely used within the EU, in particular in transport, public health, public safety, waste management and water distribution. In times of tight public budgets their importance for the European Economy can hardly be underestimated.

For new Member states whose economies are not well developed, value for money in public procurement is key – especially for key infrastructure projects that are vital for sustained economic development.

But in the more advanced economies, maintaining a state of the art infrastructure is also key to sustaining competitive advantage.

For Germany alone, between now and 2010, investment of the order of 700 billion is needed for maintenance and renovation of the transport infrastructure and for municipal construction. The contribution PPPs can make in this context becomes apparent when we consider that in the UK up to 20% of public financing is provided by PPPs.

Value for money in the context of PPPs can obviously best be achieved if private partners are chosen on the basis of fair competition. Widescale public consultation – launched by a Green Paper adopted by the Commission in April 2004 – showed, however, that fair competition is not guaranteed throughout the Community at present.

The reported reasons for the dissatisfaction of stakeholders with the status quo are manifold and certainly not limited to areas where the European Community has the final say. Some issues raised in this context – and certainly not the least important ones – do, however, concern my area of responsibility. Stakeholders participating in the discussion argued that the regulatory framework at EU level governing the choice of private partners for PPPs is incomplete or lacks clarity.

I can give you concrete examples of the issues at stake.

Concessions

Take the case of a public authority in a Member State looking for a company to maintain and operate a motorway. In practice, the company doing this job is usually interested in the right to exploit the service provided – in the case of motorways we are talking about the revenues from the tolls levied for using the motorway – rather than in direct payment from the contracting authority to the private party. As you know, such contracts where the contractor bears much of the operational and financial risk inherent in the management and use of the facility are called "concessions".

At present, a public authority is obliged only to apply the broad principles of the EC Treaty, specifically, transparency, non discrimination and proportionality when awarding a service concession – whether for operating a road, a prison, a waste management facility, or a hospital. These general principles leave, however, many questions open when it comes to awarding service concessions. Similarly, the award of works concessions, granted for building infrastructure or other public facilities, is basically governed by the EC Treaty principles. Only a few detailed provisions of secondary Community legislation exist for works concessions.

I wasn't surprised that in the course of the PPP Green Paper consultation many stakeholders complained about the lack of legal certainty as regards the rules applicable to the choice of private parties for concessions.

Respondents highlighted major difficulties faced when disputing the legality of allegedly discriminatory award decisions before national courts on the basis of general EC Treaty principles. They argued, with good justification, that these principles are not detailed enough to effectively assist parties discriminated against. Thus, to obtain legal certainty in this area in particular, practitioners have asked for a clear, self contained set of rules which govern the award of PPP concessions.

Other respondents highlighted the need for a clearer line to be drawn between concessions and other public contracts. A potential lack of clarity is unacceptable as under current law quite different legal rules apply depending on whether a PPP is a concession or a public contract: As I said, the award of concessions is mainly governed by EC Treaty principles. In contrast, public contracts are subject to the detailed rules of the public procurement directives.

The uncertainty as to what set of rules apply to the award of a given PPP can clearly become an obstacle to effective competition in the area of concessions. This can limit the potential for private project financing in times of tight public budgets. The estimated investment to upgrade the infrastructure within the ten new Member States to the standard of infrastructure in the EU 15 is about 500 billion euros. So it is hardly surprising that in the consultation these new Member States in particular expressed their interest in a stable and clearer Community framework for the award of concessions. In the absence of Community rules, some of them have launched national legislative procedures on this issue.

The fact that this has simply added to the existing patchwork quilt of applicable rules is not particularly helpful in terms of developing a coherent framework in the context of an integrated internal market in this area.

So it is clear – and has been confirmed by the PPP consultation that a legislative initiative at EC level is required. This should provide a stable legal framework for the establishment of PPPs.

I intend, however, to intervene and propose legislative measures in this area only when I am absolutely certain that this will be the best way to achieve our policy objectives. We will thus look more closely into the costs and benefits of such binding initiatives as well as alternative measures to address the problems at stake. Based on the results of this Impact Assessment – probably at the end of next year – we will decide whether or not the balance between benefits and costs justifies a legislative initiative on the award of concessions.

Institutionalised PPPs

I will give you another practical example of the problems we are facing in the context of PPPs and public procurement law.

In one particular case, a municipality decided to establish a public company to take care of a waste management scheme which had been performed up to then by the municipality's own departments. This public company obtained the contract without a competitive tendering procedure. At that stage of the procedure this direct award appeared to be legitimate: it could be argued that the municipality wanted to do the job through its wholly owned public company quasi in-house – thus as if its own departments did the job.

However, this “outsourcing” to the public company was not the end of the story. A few months after the establishment of the public company and the direct award of the task of waste management to that public company, a private undertaking bought 49% of the shares of this initially 100% public company. This private undertaking thus became responsible for waste management operations within the geographical area of the municipality.

Is this type of procedure, which does not involve a competitive award procedure, the magic formula for outsourcing public tasks? I don't think so. I believe this way of organising the performance of services of general interest does not conform to EC law and I am content that the European Court of Justice shared our view – I am in fact describing one case of the municipality of Mödling in Austria, which was decided by the European Court of Justice just a few days ago.

Against this background, one question to emerge from consultation on the PPP Green Paper was whether and how the Commission could clarify the application of EC public procurement rules to the described outsourcing of public tasks, which involves the creation of public service undertakings held jointly by both a public and a private partner. These arrangements are referred to as "Institutionalised PPPs".

A clear majority of stakeholders participating in the PPP Green Paper consultation are not satisfied with the current practice of creating Institutionalised PPPs. It is too cosy an arrangement. The consultation indicated, however, that legislation is not the preferred way of moving forward in this area. There appears to be a general view that the Commission should provide clarity by means of a non-legislative interpretative document and they want this as a matter of urgency.

They have signalled to the Commission that public authorities are reluctant to enter into innovative PPPs involving the establishment of mixed capital companies, in order to avoid the risk of establishing companies which might turn out to be non-compliant with EC law later on. Those of you who are familiar with the legislative process at EC level will understand that a relatively quick response to the problems at hand could be provided by an interpretative document of this kind rather than by way of fully-fledged legislation. In most Member States the establishment of public-private entities to perform services of general economic interest is a rather new and innovative concept. A non-binding initiative in this area should provide the required guidance without stifling innovation but would also leave space for a legislative initiative further down the road.

Some final remarks

To conclude, consultation on the PPP Green Paper has highlighted various problems in applying EC public procurement law to the choice of private partners for PPPs. Many of these problems result from uncertainty about what rules are applicable. We are aware that such uncertainties might be an obstacle to the development of the PPPs we need for the private financing of infrastructure and services of general interest. There is, however, no one size fits all solution to the problems in question. A legislative initiative is likely to be necessary for the award of concessions, while non-binding guidance might be sufficient to clarify what rules apply in other areas, such as the establishment of Institutionalised PPPs.

Ladies and Gentlemen, developing or clarifying EC rules in this area is obviously not a goal in itself. The prime objective of any Community initiative in this area is to provide the public and the private side with legal certainty to facilitate a framework within which PPPs can work most efficiently.

I have little doubt that as economic pressures intensify and as pressures on Member State governments intensify in terms of containing their spiralling public sector deficits and delivering value for money to the taxpayer, public pressure for efficient and innovative solutions towards the procurement of public services will also intensify. It is a very unusual citizen who likes paying taxes. But there can be no citizen who enjoys paying a huge chunk of his hard earned money every month to a government that fails to use it efficiently or to deliver the best services and infrastructure at the most economical cost. That’s why good public procurement policy is important – economically and politically. That’s why too I am determined to make progress in this area. I am not satisfied with the status quo. I have had my spotlight more intensely on other areas of my portfolio over the past year but now I intend shining it a little more intensely on public procurement - not least on fast, vigorous, and effective enforcement of the powers we already have. Maybe I will tread on a few toes in the process. But as I said last week in a different context, I didn’t come to Brussels to tiptoe around in my slippers.

Thank you very much for your attention and may I wish you success with the rest of the conference.

IP/05/1440

Brussels, 17 November 2005

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

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

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

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

Institutionalised PPPs

Many respondents to the PPP Green Paper asked how EU rules should apply to the choice of private partners in "institutionalised PPPs" (IPPPs), which are public-service undertakings held jointly by both a public and a private partner. Overall, it appears at present that an Interpretative Communication would be better suited to this demand than fully-fledged legislation. This Interpretative Communication should be published during 2006.

Concessions

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

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

Background

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

The full text of the proposals is available at:
http://europa.eu.int/comm/internal_market/publicprocurement/ppp_en.htm

Services
of General Interest

Important legal notice

English

EUROPA > European Commission > Secretariat-General > Services of General Interest

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SERVICES OF GENERAL INTEREST

White Paper   Report on public consultation   Green Paper

NEW!

WHITE PAPER ON SERVICES OF GENERAL INTEREST

On 12 May 2004, the Commission has adopted a White Paper on services of general interest. The White Paper draws conclusions from the debate on the Green Paper of 21 May 2003.

WHITE PAPER cs da de et el en es fr it lv lt hu mt nl pl pt sl sk fi sv

PUBLIC CONSULTATION ON THE GREEN PAPER OF 21 MAY 2003

The Commission invites all interested parties to comment on the questions set out in this Green Paper. Replies and any additional comments can be sent by mail to the following address:

European Commission
Green Paper on Services of General Interest Consultation
BREY 7/342
B-1049 Brussels

Comments should be sent to the Commission by **15 September 2003** at the latest. Replies and comments should mention the number of the questions they are referring to. For the information of interested parties, the Secretariat-General of the Commission will put contributions received electronically, together with the sender's contact data, on this Website provided the senders concerned have explicitly agreed to their publication.

Basing itself *inter alia* on the contributions received, the Commission intends to draw conclusions in the autumn and, where appropriate, submit concrete initiatives as a follow-up.

Report on the public consultation on the Green Paper

REPORT es da de el en fr it nl pt fi sv

Green Paper on Services of General Interest

Green Paper es da de el en fr it nl pt fi sv

Secretariat-general of the Commission | President José Manuel Barroso | Top

Last update on : 29th-Aug-2005

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 12.5.2004
COM(2004) 374 final

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

White Paper on services of general interest

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ANNEX

1. INTRODUCTION

In recent years, the role of the European Union in shaping the future of services of general interest[1] has been at the centre of the debate on the European model of society. Recognising the crucial importance of well-functioning, accessible, affordable and high-quality services of general interest for the quality of life of European citizens, the environment and the competitiveness of European enterprises, the European Commission adopted a Green Paper on services of general interest,[2] which launched a broad public consultation on how best to promote the provision of high-quality services of general interest in the European Union. The Green Paper invited comments on the overall role of the European Union in defining the public service objectives pursued by services of general interest and on the way these services are organised, financed and evaluated.

The debate launched by the Green Paper met with considerable interest and was welcomed by many interested parties. The Commission received close to 300 contributions from a wide variety of respondents, including many of the Member States[3]. Commission staff have prepared a Report on the public consultation which analyses the contributions submitted and provides background material to the present White Paper[4].

In line with the request made by the European Parliament in its Resolution on the Green Paper of 14 January 2004[5], the Commission draws its conclusions from the debate in the present White Paper.

The European Economic and Social Committee[6] and the Committee of the Regions[7] have also discussed the issues raised by the Green Paper and given their views.

In addition, services of general interest were also the subject of intense debate within the Convention on the future of Europe.

Finally, the Court of Justice has also examined various questions related to services of general economic interest, in particular with regard to their financing, and handed down a landmark decision on public service compensation[8].

The debate has revealed considerable differences of views and perspectives. Nevertheless, a consensus seems to have emerged on the need to ensure the harmonious combination of market mechanisms and public service missions.

[1] See definition of terms in Annex 1

[2] COM(2003) 270, 21.5.2003

[3] The full text of the contributions is available on the Commission's website at: http://europa.eu.int/comm/secretariat_general/service_general_interest/comments/public_en.htm

[4] Report on the public consultation on the Green Paper on services of general interest, Commission Staff Working Paper, SEC(2004) 326, 15.03.2004, available at: http://europa.eu.int/comm/secretariat_general/service_general_interest

[5] European Parliament Resolution on the Green Paper on services of general interest, 14.01.2004, (T5-0018/2004)

[6] Opinion on the Green Paper on services of general interest, CESE 1607/2003, 11.12.2003

[7] Opinion of the Committee of the Regions of 20 November 2003 on the Green Paper on services of general interest, CdR 149/2003 final

[8] Judgment of 24 July 2003 in the case C-280/00 Altmark Trans

Services of general interest and the context in which they are provided, including the European Union itself, are constantly evolving and will continue to evolve. By submitting this White Paper, the Commission does not intend to conclude the debate that has developed at European level. Its aim is to make a contribution to the ongoing discussion and to take it further by defining the Union's role and a framework that allows these services to function properly.

The White Paper sets out the Commission's approach in developing a positive role for the European Union in fostering the development of high-quality services of general interest and presents the main elements of a strategy aimed at ensuring that all citizens and enterprises in the Union have access to high-quality and affordable services. The document focuses on just some of the key issues of the debate as it would be impossible to address all the issues raised during the public consultation. More specific issues will be addressed in the context of the relevant policies.

2. A SHARED RESPONSIBILITY OF PUBLIC AUTHORITY IN THE UNION

The public discussion on the Green Paper has shown that there is broad agreement on the importance of high-quality services of general interest for European societies. The division of tasks and powers between the Union and the Member States leads to a shared responsibility of the Union and the public authorities in the Member States but detailed definition of services to be provided and delivery of those services remain the responsibility of the Member States..

2.1. An essential component of the European model

The debate on the Green Paper has strongly confirmed the importance of services of general interest as one of the pillars of the European model of society. In spite of sometimes substantial differences in the views and perspectives of the various participants in the debate, the consultation has shown a broad consensus on the need to ensure the provision of high-quality and affordable services of general interest to all citizens and enterprises in the European Union. It has also confirmed the existence of a common concept of services of general interest in the Union. This concept reflects Community values and goals and is based on a set of common elements, including: universal service, continuity, quality of service, affordability, as well as user and consumer protection.

In the Union, services of general interest remain essential for ensuring social and territorial cohesion and for the competitiveness of the European economy. Citizens and businesses rightly expect to have access to affordable high-quality services of general interest throughout the European Union. For the citizens of the Union, this access is an essential component of European citizenship and necessary in order to allow them to fully enjoy their fundamental rights. For enterprises, the availability of high-quality services of general interest is an indispensable prerequisite for a competitive business environment. The provision of high quality, accessible and affordable services of general interest meeting the needs of consumers and enterprises is therefore an important element contributing to reach the strategic goal of the Union "to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion[9]".

As the Commission highlighted in the Green Paper, services of general interest have helped to achieve the Union's objectives in a large number of Community policies. At the same time, Community policies have significantly contributed to improving the quality, choice and efficiency of a number of services of general interest.

In line with the principles set out in Article 16 of the Treaty[10] and in Article 36 of the Charter of Fundamental Rights,[11] the Commission is committed to taking full account of the specific role of services of general interest in the policies and activities falling within its sphere of competence. It will aim to ensure that the European Union continues to make a positive contribution to the development of services of general interest as part of the European model, while respecting the diversity of traditions, structures and situations that exists in the Member States. In line with the principles of better regulation[12], the prior assessment of the impact of major initiatives[13] as well as the regular evaluation of the relevant Community policies will assist in achieving this objective.

At this crucial point in the development of the Union, particular attention will have to be paid to developments in the new Member States and to their specific needs resulting in particular from the transformation of their economies during the last two decades.

2.2. A responsibility for public authorities

While the provision of services of general interest can be organised in cooperation with the private sector or be entrusted to private or public undertakings, the definition of public service obligations and missions remains a task for the public authorities at the relevant level. The relevant public authorities are also responsible for market regulation and for ensuring that operators accomplish the public service missions entrusted to them.

It was stressed in the consultation on the Green Paper that within the framework of a competitive internal market the relevant public authorities must retain the powers to ensure that defined public policy objectives are effectively being achieved and that democratic choices are respected, including with regard to the level of quality and the resulting costs. It is necessary for the relevant public authorities to have adequate instruments and expertise at their disposal. The existing sector-specific Community

[9] Lisbon European Council of 23 and 24 March 2000, Presidency conclusions, paragraph 5. See http://europa.eu.int/comm/lisbon_strategy/intro_en.html for detail

[10] Article 16 reads: "*Without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions*"

[11] Article 36 reads: "*The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union*"

[12] European Governance: Better lawmaking, Communication from the Commission, COM(2002) 275 final, 5.6.2002

[13] Commission Communication on Impact Assessment, COM(2002) 276, 5.6.2002

rules provide for specific legal instruments and powers that allow the authorities of the Member States to enforce public policy objectives. Above all, Member States should pay attention to the increasingly complex tasks of the regulatory authorities and provide them with all necessary instruments and resources.

2.3. A shared responsibility of the Union and its Member States

In its Green Paper, the Commission already stated that the Treaty provides the Community with a whole range of means to ensure that users have access to high-quality and affordable services of general interest in the European Union. Nevertheless, it is primarily for the relevant national, regional and local authorities to define, organise, finance and monitor services of general interest.

This shared responsibility is the concept underlying the provision of Article 16 of the EC Treaty that confers responsibility upon the Community and the Member States to ensure, each within their respective powers, that their policies enable operators of services of general economic interest to fulfil their missions. The right of the Member States to assign specific public service obligations to economic operators and to ensure compliance is also implicitly recognised in Article 86(2) of the EC Treaty[14].

In the debate on the Green Paper there was broad agreement that it was not necessary to bestow the Community with additional powers in the area of services of general interest. In principle, the Commission agrees with this analysis. It is of the opinion that the powers currently conferred on the Community with regard to services of general interest are appropriate and sufficient in order to ensure that well-functioning services can be maintained and developed throughout the Union.

At the same time, the Commission welcomes the amendment of the provisions of the current Article 16 EC Treaty as proposed by the European Convention in Article III-6 of the draft Constitutional Treaty. Article III-6 reads:

"Without prejudice to Articles III-55, III-56 and III-136, and given the place occupied by services of general economic interest as services to which all in the Union attribute value as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Constitution, shall take care that such services operate on the basis of principles and conditions, in particular economic and financial, which enable them to fulfil their missions. European laws shall define these principles and conditions."

Once the Constitutional Treaty has entered into force, this provision will provide an additional legal basis for Community action in the field of services of general economic interest, within the powers of the Union and within the scope of application of the Constitution.

[14] Article 86 (2) provides: "*Undertakings entrusted with the operation of services of general economic interest ... shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community*"

3. Guiding principles of the Commission's approach

The Commission's approach is based on a number of principles which are reflected in the Community's sectoral policies and can be clarified on the basis of the results of the debate on the Green Paper:

3.1. Enabling public authorities to operate close to the citizens

In the consultation it was highlighted that services of general interest should be organised and regulated as closely as possible to the citizens and that the principle of subsidiarity must be strictly respected.

The Commission respects the essential role of the Member States and of regional and local authorities in the area of services of general interest. This role is reflected in the Community's policies on services of general interest, which are based on various degrees of action and the use of different instruments in line with the principle of subsidiarity.

As in the past, the Commission intends, whenever required, to make proposals for sector-specific regulation only in areas that, like the large network industries, have a clear Europe-wide dimension and present a strong case for defining a European concept of general interest. Such Community regulation defines, as a general rule, only a regulatory framework that can be implemented and specified by the Member States, taking into account country-specific situations.

3.2. Achieving public service objectives within competitive open markets

On the basis of the consultation, the Commission remains of the view that the objectives of an open and competitive internal market and of developing high-quality, accessible and affordable services of general interest are compatible. Indeed, the creation of an internal market has significantly contributed to an improvement in efficiency, making a number of services of general interest more affordable. In addition, it has led to an increase in choice of services offered, as it is particularly visible in the telecommunications and transport sectors[15].

However, in certain situations, the achievement of a national public policy objective may need to be co-ordinated with certain Community objectives. At the level of the Treaty, these situations are addressed by Article 86(2), which provides that services of general economic interest are not subject to the application of Treaty rules to the extent that this is necessary to allow them to fulfil their general interest mission. This means that, under the EC Treaty and subject to the conditions set out in Article 86(2), the effective performance of a general interest task prevails, in case of tension, over the application of Treaty rules[16]. Thus, missions are protected rather than the way they are fulfilled. The Treaty provision therefore allows the reconciliation of the pursuit and achievement of public policy objectives with the competitive objectives

[15] A detailed assessment will be provided in the forthcoming Commission staff working document "Evolution of the performance of network industries providing services of general interest – Report 2004"

[16] The application of Article 86(2) is explained in detail in the Commission Communication on Services of general interest in Europe, OJ C 17, 19.1.2001, p. 4

of the European Union as a whole, in particular the need to ensure a level playing field for all providers and the best use of public money.

3.3. *Ensuring cohesion and universal access*

The access of all citizens and enterprises to affordable high-quality services of general interest throughout the territory of the Member States is essential for the promotion of social and territorial cohesion in the European Union, including the reduction of handicaps caused by the lack of accessibility of the outermost regions. The Commission is committed to promoting and improving an effective universal access to services of general interest across all its policies.

In this context, universal service is a key concept the Community has developed in order to ensure effective accessibility of essential services[17]. It establishes the right of everyone to access certain services considered as essential and imposes obligations on service providers to offer defined services according to specified conditions, including complete territorial coverage and at an affordable price. Universal service is a dynamic and flexible concept and has proven to be an effective safety net provision for those who could otherwise not buy essential services for themselves. It can be redefined periodically in order to be adapted to the social, economic and technological environment. The concept allows common principles to be defined at Community level and the implementation of these principles to be left to the Member States, thus making it possible to take account of specific situations in each country, in line with the principle of subsidiarity.

In the framework of its structural policies the Community helps to prevent vulnerable social groups or regions from being excluded from access to essential services[18]. The structural funds can be used to co-finance investments in network infrastructures, subject to certain criteria[19]. In addition, the Commission's policy in the area of trans-European networks is improving access to transport, energy and communications networks in the more remote areas and will assist in linking the new Member States with the infrastructure of the Fifteen, thus maintaining a high level of quality, security and safety. In its European Growth Initiative, the Commission has set out an ambitious programme for the implementation of priority cross-border projects in the area of transport, energy and broadband communications networks[20].

3.4. *Maintaining a high level of quality, security and safety*

The public consultation highlighted that it was crucial to ensure high levels of quality, security and safety. The Commission agrees that all citizens and users should be provided with services of general interest of a high quality. Also, the physical safety of consumers and users, of all persons involved in the production and provision of these services, and of the general public must be guaranteed, including

[17] See Green Paper on services of general interest, COM(2003) 270, 21.5.2003, paragraphs 50 to 54

[18] A new partnership for cohesion, Third report on economic and social cohesion, COM(2004) 107, 18.2.2004

[19] See for instance, Commission Staff Working Paper : Guidelines on Criteria and Modalities of Implementation of Structural Funds in Support of Electronic Communications, SEC(2003) 895

[20] Communication from the Commission, A European Initiative for Growth, Investing in Networks and Knowledge for Growth and Jobs, Final Report to the European Council, 11.11.2003, COM(2003) 690 final

the protection against possible threats such as terrorist attacks and environmental catastrophes. Furthermore, the security of service provision, and in particular the security of supply, constitutes an essential requirement which needs to be reflected when defining service missions. The conditions under which services are supplied also have to provide operators with sufficient incentives to maintain adequate levels of long-term investment. Quality and security of supply entail an economic cost to society which should be sufficiently and transparently balanced against expected benefits.

In line with the Union's policy on sustainable development, due consideration has to be taken also of the role of services of general interest for the protection of the environment and of the specific characteristics of services of general interest directly related to the environmental field, such as the water and waste sectors.

The Commission takes full account of these requirements and will ensure that Community policies contribute to and facilitate maintaining quality, safety and security standards. It will monitor progress in particular in its regular evaluations and sectoral reports.

3.5. Ensuring consumer and user rights

The consultation on the Green Paper has shown that there is broad agreement that the provision of services of general interest must be organised in such a way that a high level of consumer and user rights is ensured. The Commission intends to base its policies on the principles identified in the Green Paper and in the Commission Communication on services of general interest in Europe of September 2000[21].

These include in particular the access to services, including to cross-border services, throughout the territory of the Union and for all groups of the population, affordability of services, including special schemes for persons with low income, physical safety, security and reliability, continuity, high quality, choice, transparency and access to information from providers and regulators.

The implementation of these principles generally requires the existence of independent regulators with clearly defined powers and duties. These include powers of sanction (means to monitor the transposition and enforcement of universal service provisions) and should include provisions for the representation and active participation of consumers and users in the definition and the evaluation of services, the availability of appropriate redress and compensation mechanisms and the existence of an evolutionary clause allowing requirements to be adapted in accordance with changing user and consumer needs and concerns, and with changes in the economic and technological environment. Regulators should also monitor market developments and provide data for evaluation purposes.

3.6. Monitoring and evaluating the performance

On the basis of the public consultation, the Commission remains convinced that systematic evaluation and monitoring is a vital instrument for maintaining and developing high-quality, accessible, affordable and efficient services of general

[21] COM(2000) 580, 20.9.2000, OJ C 17, 19.1.2001. See in particular paragraphs 8 to 13

interest in the European Union. The Commission recognises the particular responsibility of the Community institutions, with the help of data provided at national level, in the evaluation of services that are subject to a sector-specific regulatory framework established by the Community. However, an evaluation at Community level could be also considered in other areas if it can be established in specific cases that such an evaluation would create added value.

In line with the prevailing view expressed in the public consultation, the Commission considers that any evaluation should be multi-dimensional and cover all relevant legal, economic, social and environmental aspects. In any case, any evaluation will have to take due account of the specific characteristics of the sector evaluated and of the different situations that exist in the different Member States and their regions. It should be based on the periodic provision of comparable data by Member States and/or national regulators.

3.7. Respecting diversity of services and situations

The consultation has also highlighted the differences between various services of general interest and the different needs and preferences of users and consumers resulting from different economic, social, geographical or cultural situations. In addition, it was stressed that the personal nature of many social and health services leads to requirements that are significantly different from those in the network industries. As regards broadcasting, the importance of public service broadcasting for the democratic, social and cultural needs of each society must be taken into consideration[22]. The Commission supports these views.

Any Community policy in the area of services of general interest must take due account of the diversity that characterises different services of general interest and the situations in which they are provided. However, this does not mean that it is not necessary to ensure the consistency of the Community's approach across different sectors or that the development of common concepts that can be applied in several sectors cannot be useful.

In this context, it should be noted that the Commission proposal for a Directive on services in the Internal Market[23] only covers services that correspond to an economic activity. It does not cover non-economic services of general interest but only services of general economic interest. Furthermore, in this proposal, certain activities which may be considered by Member States as services of general economic interest are excluded from the scope of the proposal such as transport or are subject to derogations from the country of origin principle, such as postal services and electricity, gas and water distribution services. More important, the proposal does neither require the Member States to open up services of general economic interest to competition nor does it interfere with the way they are financed or organised.

3.8. Increasing transparency

The principle of transparency is a key concept for the development and implementation of public policies regarding services of general interest. It ensures

[22] See also the Protocol on the system of public broadcasting in the Member States annexed to the EC Treaty by the Treaty of Amsterdam

[23] COM(2004) 2, 13.1.2004

that public authorities can exercise their responsibilities and that democratic choices can be made and are respected. The principle should apply to all aspects of the delivery process and cover the definition of public service missions, the organisation, financing and regulation of services, as well as their production and evaluation, including complaint-handling mechanisms.

The application of Community law has already contributed to improving the transparency of the provision of services of general interest in the Union. The Commission is committed to working towards further increasing the transparency of service provision in all its policies relating to services of general interest. Member States should also guarantee full transparency in the implementation of Community legislation and in other relevant national provisions.

3.9. Providing legal certainty

In the consultation on the Green Paper the point was made that in certain areas the application of Community rules to services of general interest was not sufficiently clear. The application of state aid rules to the financing of services of general interest and the rules on procurement and service concessions were frequently highlighted specifically. Also, the situation of social and health services was mentioned.

The Commission is aware that the application of Community law to services of general interest might raise complex issues. It will therefore make a continuous effort to improve legal certainty regarding the application of Community law to the provision of services of general interest, without prejudice to the case law of the European Court of Justice and the Court of First Instance. As set out below, it has already accomplished the modernisation of the existing public procurement rules and launched initiatives in the area of state aid and with regard to public-private partnerships[24].

4. NEW ORIENTATIONS FOR A COHERENT POLICY

4.1. Respecting diversity in a coherent framework

One of the key questions raised by the Green Paper concerned the need for a framework directive on services of general interest. The views expressed on the subject in the public consultation remained divided, a number of Member States and the European Parliament being sceptical on the issue. As a result, it remained doubtful whether a framework directive would be the most appropriate way forward at this stage. Furthermore, in the consultation, the added value of a horizontal framework as compared to the sector-specific approach followed so far has not been demonstrated.

The Commission therefore considers appropriate not to proceed to submitting a proposal at this point in time but to re-examine the issue at a later stage. As part of this examination, the Commission would subject any legislative proposals to a prior

[24] See sections 4.2 and 4.3 below

extended impact assessment of its economic, social and environmental implications [25].

As regards the calendar for such re-examination account may also be taken of the fact that the future entry into force of the Constitutional Treaty and of the proposed Article III-6 of the Constitution will bring another possible legal basis that would complement those already existing. The Commission considers appropriate to re-examine the issue once the Constitutional Treaty is in force.

For the time being, the Commission will, as a general rule, pursue and develop its sectoral approach by proposing, where necessary and appropriate, sector-specific rules that allow account to be taken of the specific requirements and situations in each sector. However, without prejudice to existing sector-specific Community rules, a horizontal approach will be considered with regard to a number of specific issues, such as consumers' interests, the monitoring and evaluation of services of general interest, the application of state aid rules to financial compensation or the use of structural funds for the support of services of general interest.

While the need for a framework instrument was an issue of considerable controversy, the necessity of ensuring the consistency and coherence of Community measures in the area of services of general interest was widely recognised in the public consultation. At the same time, it was stressed that it was essential for Community policies to respect and take account of the different characteristics of different services and of the diverse realities in the Member States.

The Commission will step up its efforts to ensure full consistency of the Community's policies in the area of services of general interest and will look at full coherence of its sectoral policies with regard to its general approach during the forthcoming reviews of the sectors concerned[26].

In addition, the Commission will review the situation of services of general interest in the European Union and the need for any horizontal measures in 2005. It intends to submit a report on its findings to the European Parliament, to the Council, to the European Economic and Social Committee and to the Committee of the Regions before the end of 2005.

The Commission

- **will re-examine the feasibility of and the need for a framework law for services of general interest on the entry into force of the Constitutional Treaty,**
- **will launch a review of the situation of services of general interest and submit a report before the end of 2005.**

The Member States

- **should pursue the modernisation of services of general interest at their level in order to ensure that all citizens have access to quality services adapted to their needs and requirements.**

[25] Commission Communication on Impact assessment, COM(2002) 276 final, 5.6.2002

[26] See Annex 2

4.2. Clarifying and simplifying the legal framework for the compensation of public service obligations

There are in particular two areas – financing and awarding of contracts - where the Member States' discretion to define and design the missions of services of general interest usually interact with Community law. The present section deals with financing. The issue of public procurement will be addressed in section 4.3.

The principle of the Member States' autonomy to make policy choices regarding services of general economic interest equally applies with regard to financing the latter. Indeed, Member States enjoy a wide margin of discretion when deciding whether and in what way to finance the provision of services of general economic interest. The financing mechanisms applied by Member States include direct financial support through the State budget, special or exclusive rights, contributions by market participants, tariff averaging and solidarity-based financing. As a general rule, Member States can choose which financing mechanism is used. In the absence of Community harmonisation, the main limit to this discretion is the requirement that such financing mechanism must not distort competition within the common market. It is for the Commission, as the guardian of the Treaty, to ensure that this rule is respected to the benefit of taxpayers and the economy at large.

However, the practical application of this rule is at times a complex matter. It has not always been clear, for example, under what conditions compensation for services of general economic interest would actually constitute state aid. Likewise, once the existence of state aid was established there might have been some uncertainty as to the conditions under which such aid could be considered compatible with the common market. And finally, the obligation under the Treaty to formally inform the Commission about plans to grant or alter aid creates an administrative burden which may be out of proportion for relatively modest amounts of aid.

The public consultation has confirmed the demand for greater legal certainty and predictability when it comes to the application of the state aid rules to public service compensation. This call was particularly strong at local level, concerning local services. It is true that the Court of Justice has recently set out a number of conditions under which compensation for services of general economic interest does not constitute state aid[27]. But the need for increased legal certainty remains and it is for the Commission to bring about such certainty to the greatest extent possible. Therefore, the Commission proposes a number of initiatives.

The first proposed measure is a Commission decision that considers relatively small-scale public funding to undertakings entrusted with the operation of services of general economic interest to be compatible with the common market under certain conditions. Likewise, such funding should also be exempt from the obligation of prior notification, as long as it is proportionate to the actual costs of the services, and certain thresholds are not exceeded. The Commission proposes the same for funding of services of general economic interest provided by hospitals and social housing, irrespective of the amounts involved.

[27] Judgment of 24 July 2003 in the case C-280/00 Altmark Trans and judgment of 24 November 2003 in joined cases C-34/01 to 38/01 Enirisorse SpA

In essence, the Commission hereby seeks to exempt compensation to local providers of services of general economic interest from the obligation of prior notification. Once the thresholds are set in the light of the results of the currently ongoing consultation process, legal certainty for relatively small-scale public funding will be significantly increased.

In addition, the Commission also proposes to increase legal certainty for compensation for services of general economic interest which exceeds the above-mentioned thresholds – and thus will have to be notified to the Commission - by means of a Community framework that sets out the criteria for assessment of such compensation for services of general economic interest.

Furthermore, the Commission intends to amend Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings. The amendment will specify that the directive is applicable to public service compensations, whatever the legal qualification of these under Article 87 of the Treaty. Both the Commission decision and the Community framework will not be applicable to the transport sector[28].

Finally, the Commission plans to further clarify the conditions under which compensation can constitute state aid following the recent case law of the Court of Justice. As requested in a number of comments received in the public consultation on the Green Paper, this will also include a further clarification of the distinction between economic and non-economic activities[29].

Taken together, those measures that are elaborated on the basis of extensive consultations with interested parties are likely to ensure legal certainty and predictability for both operators and authorities to the greatest extent possible. The Commission will, moreover, continue its pragmatic approach when assessing compensation for public service obligations in order to ensure that high-quality, accessible and affordable services of general interest continue to be provided close to the citizens while respecting common basic rules.

[28] The decision may be applicable to certain maritime links to islands, on which annual traffic does not exceed a defined threshold

[29] For more detail see the Commission Communication on services of general interest in Europe, OJ C 17, 19.1.2001, p. 4 (paragraphs 28 to 30) and the Green Paper on services of general interest, COM(2003) 270, 21.5.2003, paragraphs 43 to 45

The Commission

- **will adopt a Decision on the application of Article 86 of the Treaty to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest by July 2005,**
- **will adopt a Community framework for state aid in the form of public service compensation by July 2005,**
- **will adopt an amendment of Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings by July 2005,**
- **will further clarify under which conditions public service compensations may constitute state aid within the meaning of Article 87 (1) by July 2005.**

The Member States

- **should assist the Commission in applying the new legal framework, in particular by clearly defining public service obligations and by applying transparent rules on compensation.**

4.3. Providing a clear and transparent framework for the selection of undertakings entrusted with a service of general interest

In principle, Member States have a wide margin to decide how to organise services of general interest. In the absence of Community harmonisation, the relevant public authorities in the Member States are in principle free to decide whether to provide a service of general interest themselves or whether to entrust its provision to another (public or private) entity[30]. However, providers of services of general economic interest, including in-house service providers, are undertakings and therefore subject to the competition rules of the Treaty[31]. In practice, Member States increasingly use public-private schemes, including design-build-finance-operate contracts, concessions and the creation of mixed-economy companies to ensure the delivery of infrastructure projects or services of general interest.

In the public consultation, calls were made for clarity on a number of questions relating to the Community rules applicable to such schemes, and in particular on the scope and substance of the Community rules that public authorities may have to respect when they entrust a public service mission to another entity.

In order to clarify the rules applicable, the Community has undertaken an effort of simplification and clarification of the public procurement directives[32]. The new directives, adopted by the European Parliament and the Council last March, are due to be transposed by all Member States by January 2006 and should make it easier, for

[30] As regards local inland transport, the Commission has proposed legislation that would require Member States to use public service concessions. Cf. Amended proposal for a Regulation of the European Parliament and of the Council on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway, OJ C 151 E, 25.6.2002, p. 146

[31] For detail see Green Paper on services of general interest, COM(2003) 270, 21.5.2003, paragraphs 79 to 83

[32] Directive 2004/18 of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17 of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30.4.2004, p. 1 and p. 114

all awarding authorities concerned, to comply with their obligations of transparency under the EC Treaty.

Furthermore, in order to establish whether Community legislation should be proposed in particular on the transparent award of service concessions by public authorities, and other forms of cooperation between the public and the private sector, the Commission has recently adopted a Green Paper on public-private partnerships in the European Union[33]. This Green Paper launches a broad consultation on the procurement aspects of public-private partnerships.

The Commission

- **will conduct a public consultation on the Green Paper on the procurement aspects of public-private partnerships ,**
- **will submit, where appropriate, on the basis of the results of the public consultation, proposals before the end of 2004.**

The Member States

- **should ensure that the national frameworks for the award of public service contracts are based on transparent and non-discriminatory rules.**

4.4. Recognising fully the general interest in social and health services

The Green Paper on services of general interest raised a considerable interest from interested parties in the area of social services, including health services, long term care, social security, employment services, and social housing. Social services of general interest have a specific role to play as an integral part of the European model of society. Based on the principle of solidarity, social and health services of general interest are person-centred and ensure that citizens can effectively enjoy their fundamental rights and a high level of social protection, and they strengthen social and territorial cohesion. Their provision, development and modernisation is fully in line with the achievement of the objectives set at the Lisbon European Council of March 2000, and in particular with the goal of achieving a positive link between economic, social and employment policies. The public consultation has shown that providers of social services are ready to engage in a modernisation process in order to better respond to changing needs of European citizens. However, they also expressed a need for greater clarity and predictability necessary to ensure a smooth evolution of social services, including health services.

While in principle the definition of the missions and objectives of social and health services is a competence of the Member States, Community rules may have an impact on the instruments for their delivery and financing. A clear recognition of the distinction between missions and instruments should help to create more clarity with a view to the modernisation of these services in a context of evolving user needs while preserving their specific nature in terms of the particular requirements of, amongst others, solidarity, voluntary service and the inclusion of vulnerable groups of people. Clarifying this distinction will in particular assist Member States which use market-based systems to deliver social and health services to anticipate the possible impact of EU competition law on them. It will of course remain a matter of

[33] Green Paper on public-private partnerships and on Community law on public contracts and concessions, COM(2004) 327, 30.4.2004

political choice for Member States whether to use such systems or to provide services directly via tax funded state agencies.

The Commission is of the view that it is useful to develop a systematic approach in order to identify and recognise the specific characteristics of social and health services of general interest and to clarify the framework in which they operate and can be modernised. This approach will be set out in a Communication on social services of general interest, including health services, to be adopted in the course of 2005.

This Communication will take stock of the Community policies that are related to the provision of social and health services of general interest. It will also describe the ways social and health services are organised and function in the Member States. This description will be prepared in close co-operation with the Member States[34] and with organisations from civil society.

The Communication would also set out, in line with the Commission's general principles on evaluation, a mechanism for a regular assessment and evaluation of the national frameworks for the provision of social services of general interest. The existing open methods of coordination in the field of social inclusion and social protection could be used to this effect. The Commission has recently proposed an open method of coordination in the field of health care and long term care which would usefully contribute to the exchange of best practices in the field of health services and support the reforms undertaken in the field[35].

The Commission is currently also working on the follow-up to the high-level reflection process on patient mobility and health care developments and has adopted a Communication in April 2004[36] which recalls the principles of the case law of the European Court of Justice and sets out a range of initiatives on subjects such as sharing spare capacity and cooperating on cross-border care identifying and networking European centres of reference and coordinating assessment of new health technologies. The accompanying Decision establishes a new High Level Group to facilitate cooperation among Member States in this area.

The Commission

- **will submit a Communication on social and health services of general interest in the course of 2005.**
- **will facilitate cooperation among Member States on health services and medical care in order to contribute to ensuring a high level of health protection throughout the Union.**

Member States

- **should improve cooperation on health services and medical care in order to ensure a high level of health protection throughout the Union.**

[34] In particular with the Social Protection Committee and the newly established « High level group on health services and medical care »

[35] Communication of the Commission on Modernising social protection for the development of high-quality, accessible and sustainable health care and long-term care: support fro the national strategies using the "open method of coordination", COM(2004) 304, 20.4.2004

[36] Communication from the Commission, Follow-up to the high-level reflection process on patient mobility and health care developments in the European Union, COM(2004) 301, 20.4.2004

4.5. Assessing the results and evaluating performance

The public consultation has confirmed the Commission's view that the evaluation of performance at Community as well as at national level is crucial for ensuring the development of high-quality, accessible and affordable services of general interest in a constantly evolving environment. Moreover, there was broad agreement among contributors that such evaluation should be based not only on criteria of economic efficiency but also on broader social, economic and environmental criteria.

In recent years, the Commission has indeed increased its evaluation efforts in the area of services of general interest. With regard to network industries, the Commission's evaluation strategy covers both sectoral and horizontal evaluations on a regular basis and involves the other European Union institutions and bodies as well as interested parties[37]. Given that the Commission started to perform horizontal evaluations in 2001, and will submit in 2004 its first horizontal evaluation report that is fully based on the methodology presented in 2002, it appears appropriate to gather more experience with this process before reflecting on additional evaluation mechanisms.

At the same time, there is room for improving the involvement of all parties concerned. The Commission will therefore consider how to amend the current methodology and procedures so as to ensure that all interested parties, including public authorities, consumers, users, providers and employees, are fully involved. It will also examine the need for any amendments with regard to assessing the impact of liberalisation on citizens, enterprises and employees.

Better integration should be considered between the current evaluation efforts specifically focusing on services of general interest and the Commission's more wide-ranging reporting tools. This would ensure a broader and more comprehensive approach to evaluating services of general interest and could thus generate genuine added value without increasing reporting requirements and statistics for the Community, Member States, undertakings and indeed citizens themselves.

In this context the link between, on the one hand, the above-mentioned sectoral and horizontal evaluations and, on the other, the "Implementation Package" – consisting of the Broad Economic Policy Guidelines Implementation Report, the Joint Employment Report and the Implementation Report on the Internal Market Strategy and submitted together with the Report to the Spring European Council is important and should be maintained.

In addition, the evaluation of services of general interest could usefully be integrated into the analysis made regularly by the Commission of several Community policies. This could be relevant in particular in the area of social and health services.

On the basis of its experience with the application of its amended methodology, the Commission will review its evaluation mechanisms, including their scope, when evaluating its approach in 2006 as provided for in its Communication of 18 June 2002. This review will also look into the need for additional measures aiming at

[37] For details see Communication from the Commission: A Methodological Note for the Horizontal Evaluation of Services of General Economic Interest, COM(2002)331 final, 18.6.2002

improving the availability and quality of data, the exchange of information and best practices, and the participation of interested parties.

The Commission

- **will submit its first horizontal evaluation on services of general interest on the basis of its evaluation methodology in 2004,**
- **will review its evaluation mechanisms for services of general interest in 2006.**

Member States

- **should assist the Commission in the development and application of evaluation mechanisms,**
- **should consider the development of evaluation instruments at national, regional and local level, where appropriate.**

4.6. Reviewing sectoral policies

Currently, sector-specific regulation at Community level covers essentially the big network industries such as telecommunications, postal services, transport and energy, which have a clear trans-European dimension. In the Commission's view, the public consultation has confirmed this approach. As far as the water sector is concerned, the Commission will publish before the end of the year the results of the assessment it has undertaken[38].

The public consultation has confirmed the relevance and importance of the set of obligations on which current sector-specific Community legislation is based and which are set out in the Green Paper (universal service, continuity, quality of service, affordability, user and consumer protection, safety and security, access and interconnectivity). Where appropriate, on the basis of the sectoral reviews foreseen, the Commission will propose to adapt these obligations.

Concerning media pluralism, the public consultation highlighted that, in the light of the differences that exist across the Member States, the issue should be left to the Member States at this point in time. The Commission concurs and concludes that at present it would not be appropriate to submit a Community initiative on pluralism. At the same time, the Commission will continue to closely monitor the situation.

As regards the institutional framework for regulation, the need for closer co-operation between the Commission and the national regulatory authorities was frequently highlighted. The Commission intends to encourage the creation and development of close co-operation between regulators in the framework of the existing networks of regulatory authorities[39]. Where appropriate, the Commission will make proposals with a view to strengthening the legal framework for this co-operation.

The Commission will take account of the positions set out above as well as any other results of the public consultation on the Green Paper in the reviews that are foreseen for the different sectors.

[38] Internal market strategy, Priorities 2003 - 2006, COM(2003)238, 7.5.2003

[39] See points 53 – 59 of the Annex to the Green Paper on services of general interest for details

The Commission

- **will encourage the co-operation of national regulatory authorities on the basis of networks of regulators,**
- **will take into account the results of the public consultation on the Green Paper in the reviews already foreseen for the different sectors, in particular:**
  - **the review of the scope of universal service in electronic communications by July 2005**
  - **the review of the electronic communications package by July 2006**
  - **the review of the postal services directive by the end of 2006**
  - **the review of the internal market for electricity by 1 January 2006**
  - **the review of the internal market for gas by 1 January 2006**
  - **the review of the "Television without frontiers" directive at the beginning of 2005**
  - **the assessment of the water sector by the end of 2004.**

(For more details see the non-exhaustive table in the Annex).

Member States

- **should ensure that existing sector-specific legislation is fully transposed and applied,**
- **should provide national regulatory authorities with all necessary instruments and resources.**
- **should assist the Commission in encouraging closer co-operation within the framework of networks of regulators.**

4.7. Reflecting our internal policies in our international trade policy

As the Commission has pointed out in the Green Paper, the Community commitments made in the context of the World Trade Organisation (WTO) or in the context of bilateral agreements, have been fully consistent with the internal market rules applying to these services and have not, to date, led to problems for the organisation, provision and financing of services of general interest in practice. The same applies to new commitments being offered in the framework of present negotiations.

The public consultation has shown that there is widespread desire to ensure the continued consistency between the internal Community regulatory framework and the obligations accepted by the Community and its Member States in the framework of international trade arrangements, in particular the WTO. There is a strong expectation that international trade agreements should not go beyond the positions agreed within the European Union.

In driving the Community's trade policy, the Commission is fully committed to ensure such consistency and counts on the support of the Member States and the European Parliament in this respect. To that effect, the Commission will continue to make full use of the institutional framework provided for by the Treaty (Articles 133 and 300) and to involve the European Parliament in the formulation of trade policy no matter its limited powers under that framework, while looking forward to the desired improvement of those powers under the draft Constitutional Treaty. The Commission will also continue to maintain a regular dialogue with civil society and to ensure the maximum degree of transparency in trade negotiations, of which the publication of the Community's initial offer in the present GATS negotiations is an example.

The Commission

- **will continue to ensure that the positions taken by the Community in international trade negotiations are fully consistent with the EU's internal regulatory framework regarding services of general interest.**

The Member States

- **should work with the Commission in order to ensure that internal policy positions are fully reflected in our trade policy.**

4.8. Promoting services of general interest in development co-operation

In the consultation on the Green Paper, the essential importance of basic services of general interest for the development of the poorest countries was widely recognised. It was highlighted that the absence of investment was a major obstacle to improving these services in the poorest countries. In line with the recommendations set out in the Commission Communication on the reform of state-owned enterprises in developing countries[40] the Commission intends to continue to assist in the creation of a sound regulatory and institutional framework in the developing countries as a key prerequisite for the promotion of investment in and access to finance for basic services of general interest.

The EU Initiatives on Water and Energy, launched at the World Summit on Sustainable Development have the objective to contribute to the achievement of the Millennium Development Goals through the provision of modern and affordable services to the poor. The initiatives involve Member States and stakeholders from civil society and the private sector, and is developed through a continued dialogue, based on the key principle of ownership, with partners in Africa and other regions, to initiate activities at national and regional levels. Both the Water and the Energy Initiative aim at institutional capacity building, cross-sectoral planning and market development, by means of targeted technical co-operation and an extended cooperation with financial institutions.

The Commission

- **will assist developing countries in creating a sound regulatory and institutional framework as a key prerequisite for the promotion of investment in and access to finance for basic services of general interest.**

[40] The Reform of State-Owned Enterprises in Developing Countries with focus on public utilities: The Need to Assess All the Options, Communication from the Commission, COM(2003) 326, 3.6.2003

ANNEX 1 Definition of Terms[41]

Terminological differences, semantic confusion and different traditions in the Member States have led to many misunderstandings in the discussion at European level. In the Member States different terms and definitions are used in the context of services of general interest, thus reflecting different historical, economic, cultural and political developments. Community terminology tries to take account of these differences.

Services of general interest

The term «*services of general interest*» cannot be found in the Treaty itself. It is derived in Community practice from the term «services of general economic interest», which is used in the Treaty. It is broader than the term «services of general economic interest» and covers both market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations.

Services of general economic interest

The term «*services of general economic interest*» is used in Articles 16 and 86(2) of the Treaty. It is not defined in the Treaty or in secondary legislation. However, in Community practice there is broad agreement that the term refers to services of an economic nature which the Member States or the Community subject to specific public service obligations by virtue of a general interest criterion. The concept of services of general economic interest thus covers in particular certain services provided by the big network industries such as transport, postal services, energy and communications. However, the term also extends to any other economic activity subject to public service obligations.

Like the Green Paper, the White Paper focuses mainly, but not exclusively, on issues related to «services of general economic interest», as the Treaty itself focuses mainly on economic activities. The term «services of general interest» is used in the White Paper only where the text also refers to non-economic services or where it is not necessary to specify the economic or non-economic nature of the services concerned.

Public service

The terms «service of general interest» and «service of general economic interest» must not be confused with the term «*public service*». This term is less precise. It can have different meanings and can therefore lead to confusion. The term sometimes refers to the fact that a service is offered to the general public, it sometimes highlights that a service has been assigned a specific role in the public interest, and it sometimes refers to the ownership or status of the entity providing the service[42]. Therefore, this term will not be used in the White Paper.

[41] These definitions are based on the definitions used in the Green Paper on services of general interest, COM(2003)270, 21.5.2004

[42] There is often confusion between the term «public service» and the term «public sector». The term «public sector» covers all public administrations together with all enterprises controlled by public authorities

Public service obligations

The term «*public service obligations*» is used in the White Paper. It refers to specific requirements that are imposed by public authorities on the provider of the service in order to ensure that certain public interest objectives are met, for instance, in the matter of air, rail and road transport and energy. These obligations can be applied at Community, national or regional level.

Public undertaking

The term «*public undertaking*» is normally also used to define the ownership of the service provider. The Treaty provides for strict neutrality. It is irrelevant under Community law whether providers of services of general interest are public or private; they are subject to the same rights and obligations.

ANNEX 2: Main Results of the Public Consultation [43]

1. Importance of Services of general interest

- There is a broad consensus on the essential importance of services of general interest for European societies. It is also generally accepted that these services should be provided in a way that puts users first.

- No agreement exists concerning the relationship between services of general interest and market principles.

2. The role of the European Union

- While views differ on the need to amend the Treaty, there is broad agreement that the Community should not be given additional powers in the area of services of general interest.

- The responsibilities of the Community and the Member States seem to be clear. However, there are calls for the clarification of Community rules in some areas.

- Broad agreement exists that sector-specific regulation must not be extended to all services. However, for some services (water, waste, local public transport) diverging views are expressed as to whether a specific regulatory framework is desirable at Community level. The need to take account of specificities of sectors such as health is highlighted.

- There is a large consensus that there is no need for the creation of European regulatory authorities at this stage. Networks of national regulators co-ordinated at European level seem to be the preferred option.

3. Sector-specific legislation and general legal framework

- The views on the need for a general legislative framework remain divided. However, there is agreement on the continued need for sector-specific legislation.

- Many contributions highlight the benefits of existing sectoral policies. Others point out that liberalisation has had negative social and economic consequences.

4. Services of general economic interest and non-economic services

- Many contributors feel that the distinction is important. However, a number of contributions call for other criteria beyond the economic – non-economic distinction in order to create more legal certainty.

- While there is some interest in further clarification of the situation of organisations providing social services under Community law and in protecting non-economic services of general interest as part of the European social model, there is broad agreement that the Community should not be given additional powers in the area of non-economic services.

[43] The following points are based on the Commission Staff Working Paper, Report on the public consultation on the Green Paper on services of general interest, SEC (2004) 326, 15.3.2004

5. A common set of obligations

- Views are divided on the need and feasibility of establishing a common set of obligations at Community level. While some contributions stress the need to establish public service obligations sector-by-sector, other comments argue that a common concept is appropriate and necessary.

- There seems to be a broad consensus that regulation at Community level should establish principles and objectives, while Member States should be able to implement and specify the rules in line with the specific situations and needs existing at national and regional level.

- There is no agreement on the effective implementation of requirements in Community legislation or on the impact of these requirements on social and territorial cohesion. It is suggested that it is too early to form an opinion and that a more detailed assessment is necessary.

- Different views exist regarding the need to introduce additional obligations at Community level and the need to extend existing requirements to other services of general interest.

6. Sector-specific obligations

- There seems to be little support for the introduction at Community level of additional sector-specific obligations at this stage. However, it is suggested that the situation should be closely monitored with regard to the different sectors, in particular with regard to security of supply. There are also some calls for an improvement of access and interconnectivity in some sectors.

- No agreement exists with regard to the opening of the water sector at Community level.

- There is broad agreement that no specific Community measures should be taken on media pluralism at this stage and that the protection of pluralism should be left to the Member States.

7. Definition of obligations and choice of organisation

- Some contributions highlight problems resulting from the application, as perceived by respondents, of Community law, in particular in the areas of procurement and state aid. There is a call for clarification of the rules on concessions and public-private partnerships. Some comments also refer to situations where an obstacle to the completion of the internal market is created at national level.

- The comments largely agree that further harmonisation of public service obligations at Community level is not desirable.

- Many contributions express an interest in a flexible and non-bureaucratic exchange of best practice and benchmarking as regards the organisation of services of general interest.

8. Financing of services of general interest

- There is a firm call for clarification and simplification of the rules applying to the financing of services of general interest, in particular as regards state aid. The recent judgment of the ECJ in the Altmark case is seen as positive but not as sufficient.

- There is also a broad consensus that Member States must remain free to determine the most appropriate way of financing a service of general interest, provided competition is not unduly distorted.

9. The evaluation of services of general interest

- While there are different views on the ***overall*** importance of evaluation, there is a broad consensus that evaluation should be comprehensive and take account of political, social, economic and environmental criteria.

- No agreement exists as to the range of services to be subject to an evaluation or as regards the necessary procedural and institutional arrangements.

10. The international dimension

- There is a clear request to ensure that the positions taken by the Community in international trade negotiations are fully consistent with the EU's internal regulatory framework.

- A number of comments also call for more information and transparency as regards international trade negotiations.

- The crucial importance of basic essential services for the development of the poorest countries is widely recognised. Access to finance and the attraction of foreign investment are identified as the main problem.

ANNEX 3: OVERVIEW OF IMPORTANT SECTORAL REVIEWS

Electronic communications

- Review of the *e*Europe action plan by June 2004
- Review of the provisions on Cable TV networks of Commission Directive 2002/77/EC by the end of 2004
- Review of the scope of universal service under the Universal Service Directive 2002/22/EC by July 2005
- Review of the electronic communications package by July 2006

Postal Services

- Report on the application of the postal directive before the end of 2004, and then every two years
- Report by the end of 2006 based on a prospective study on the impact on universal service of full accomplishment of the internal postal market in 2009. Proposal confirming, if appropriate, the date of 2009 for full accomplishment of the internal postal market or determining any other step in the light of the study's conclusions

Electricity

- Annual Reports on the application of Directive 2003/54/EC, including every second year a report on public service obligations
- Detailed progress report on the creation of the internal market for electricity by 1 January 2006. Proposals to EP and Council, where appropriate, to guarantee high public service standards
- Report on the implementation of Regulation 1228/2003 on network access for crossborder exchanges in electricity by July 2006
- Proposals to EP and Council, where appropriate, to ensure full and effective independence of distribution system operators before 1 July 2007. When necessary, these proposals will also address issues of market dominance, market concentration and predatory or anti-competitive behaviour

Gas

- Annual Reports on the application of Directive 2003/55/EC, including every second year a report on public service obligations
- Detailed progress report on the creation of the internal market for gas by 1 January 2006. Proposals to EP and Council, where appropriate, to guarantee high public service standards
- Proposals to EP and Council, where appropriate, to ensure full and effective independence of distribution system operators before 1 July 2007. When necessary, these proposals will also address issues of market dominance, market concentration and predatory or anti-competitive behaviour

Water

- Presentation by the Commission of the results of its assessment of the water sector by the end of 2004

Transport

- 2004: Adoption by EP and Council of the second railways package currently in conciliation
- Adoption by EP and Council of the third railways package before the end of 2004
- Adoption by EP and Council of the proposed regulation on public service requirements and the award of public service contracts in passenger transport by rail, road, and inland waterway before the end of 2004

Broadcasting

- Report on the application of the “Television without frontiers” directive, if appropriate, accompanied by legislative proposals at the beginning of 2005

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15.3.2004
SEC(2004) 326

COMMISSION STAFF WORKING PAPER

REPORT ON THE PUBLIC CONSULTATION ON THE GREEN PAPER ON SERVICES OF GENERAL INTEREST

COMMISSION STAFF WORKING PAPER

REPORT ON THE PUBLIC CONSULTATION ON THE GREEN PAPER ON SERVICES OF GENERAL INTEREST

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1. INTRODUCTION

On 21 May 2003, the Commission adopted a Green Paper on services of general interest.[1] In publishing this Green Paper, the Commission's aim was to stimulate a discussion on the promotion of the provision of high-quality public services in the European Union. The Green Paper therefore launched a broad public consultation on the overall role of the Union in defining the objectives of general interest pursued by those services and on the way they are organised, financed and evaluated. Thus, for the first time, the Commission initiated a full open review of its policies relating to services of general interest.

In line with the Commission's general principles and standards for the consultation of interested parties,[2] this report describes the consultation procedure and analyses the 281 contributions received in the public consultation.

The objective of the report is to reflect the wide range and diversity of ideas, opinions and suggestions made in the contributions received. Without claiming to be exhaustive, the report tries to identify, as objectively as possible, the main trends, views and concerns arising from the contributions. In order to ensure full transparency, the report is complemented by the publication on the Internet of the full text of the contributions received. This allows interested parties to examine the responses to the consultation in full detail.[3] Specific comments will also be taken into account in any Commission initiatives following from the Green Paper process.

The report is structured as follows: This introduction (1.) is followed by a short description of the consultation procedure (2.). A third section sets out some general observations on the contributions received. A fourth section summarises the positions set out in the comments. The structure of this section is based on the topics addressed by the questions put forward in the Green Paper. These questions are annexed to the report. A further Annex contains an alphabetic list of all contributors to the public consultation.

The document draws on a preliminary analysis of the contributions received which was prepared by a network of correspondents in all interested Directorates-General and Services of the Commission.

It should be noted that the purpose of this document is to report on the public consultation. It does not aim to draw political conclusions from the consultation process as such. Such conclusions are drawn in the follow-up to the Green Paper process, that the Commission will present in line with the request made by the European Parliament,[4] for which this report provides background material.

[1] COM(2003) 270, 21.5.2003

[2] Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, Communication form the Commission, COM(2002) 704, 11.12.2002

[3] http://europa.eu.int/comm/secretariat_general/services_general_interest/comments/public_en.htm

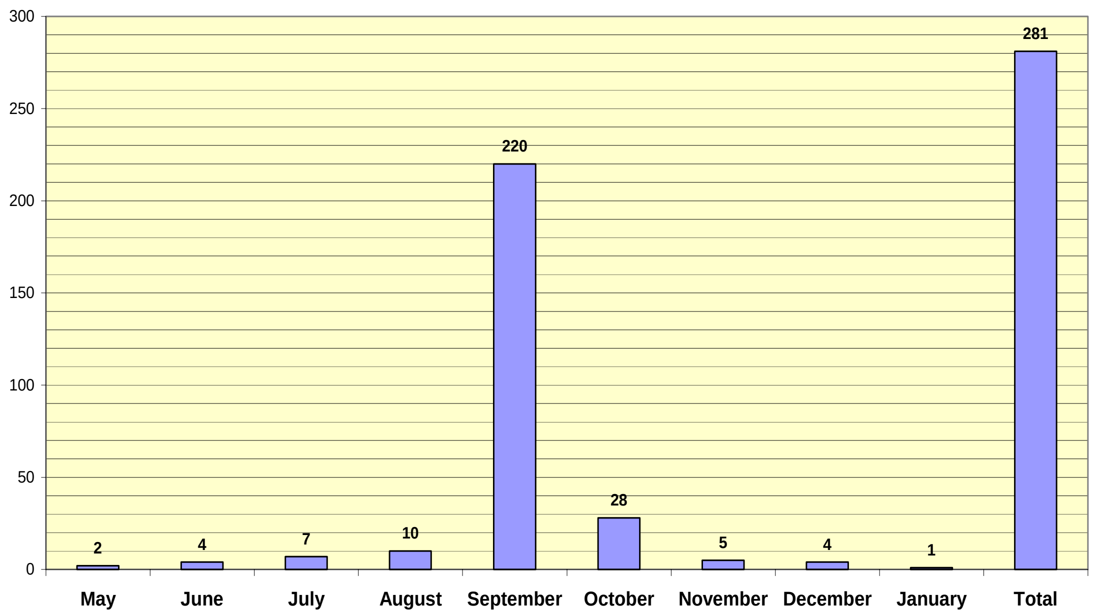
[4] European Parliament Resolution on the Green Paper on services of general interest, 14.01.2004 (T5-0018/2004)

2. THE CONSULTATION PROCEDURE

In order to structure the debate, the Green Paper of 21 May 2003 submitted thirty questions for public consultation[5] and invited all interested parties to submit any comments by 15 September 2003. This meant that the official consultation period was almost four months in length and considerably exceeded the minimum duration of eight weeks that the Commission established as a minimum standard for this type of consultation.[6]

Nevertheless, given the complexity of the issues addressed by the Green Paper, the Commission received a number of requests for an extension of the deadline for comments. Although the Commission did not agree to a formal extension of the consultation period, it informed interested parties that comments received after the deadline would also, as far as possible, be taken into account. In practice, the majority of comments received were sent towards the end of the consultation period or after the official consultation deadline. This report takes account of all comments received until the end of January 2004.

Monthly total of contributions to the Green Paper on Services of General Interest
May 2003 - January 2004



In order to facilitate the consultation, the Green Paper was made available, together with a number of relevant background documents, in eleven languages on a website created specifically for this purpose.[7]

Comments could be submitted in all Community languages, either by mail or e-mail to a dedicated mailbox. Respondents were invited to mention, where applicable, the numbers of the questions they were referring to in their responses.

[5] Cf. Annex 1

[6] Cf. COM(2002) 704, 11.12.2002

[7] http://europa.eu.int/comm/secretariat_general/services_general_interest/index_en.htm

For the information of interested parties, the Commission has placed the contributions received on the Green Paper website, provided the senders concerned explicitly agreed to their publication.[8] In practice, almost all contributors agreed to their responses being published on the Commission's website. Only 8 respondents did not agree to the publication of their comments. Most of them explicitly refused to give their agreement to a publication, while some did not reply to the Commission's repeated requests. In addition, one author of a contribution explicitly requested that his identity not be disclosed. This contribution was placed on the website as an anonymous comment.

In parallel to the public consultation, the Council had an exchange of views on the Green Paper in different Working Groups. The European Parliament,[9] the European Economic and Social Committee[10] and the Committee of the Regions[11] have also examined the Green Paper and given their views.

In addition, the Economic and Monetary Affairs Committee of the European Parliament held a public conference "A positive perspective for the future of services of general interest in Europe" on 11 June 2003.[12] The Belgian and French governments organised a seminar in Paris on 21 November 2003 with experts from current and new Member States on national experiences in the field of services of general interest.

The Commission has actively followed the work in these different forums. In addition, the Commission had numerous bilateral and multilateral meetings with interested parties on the issues covered by the Green Paper.

While all this work and all the information received is taken into account in the preparation of the follow-up, this report focuses only on the analysis of the written contributions received in response to the public consultation on the Green Paper.

3. Some General Observations on the Comments Received

3.1. A varied response reflecting a broad spectrum of interests and views

In total, 281 contributions were received in response to the Green Paper. They represent a broad spectrum of different organisations and views and reflect the diversity of structures, traditions and interests that characterise services of general interest in the European Union. However, while the Green Paper touches upon a wide number of issues, not all contributions address each issue raised in the Green Paper.

3.1.1. Contributions from all over Europe, many from Belgium, France, Germany, Austria

The Commission received responses from organisations from all current Member States except for Luxembourg. Contributions were also sent by organisations from

[8] Cf. footnote 3

[9] Cf. footnote 4

[10] Opinion on the Green Paper on Services of General Interest, CESE 1607/2003, 11.12.2003

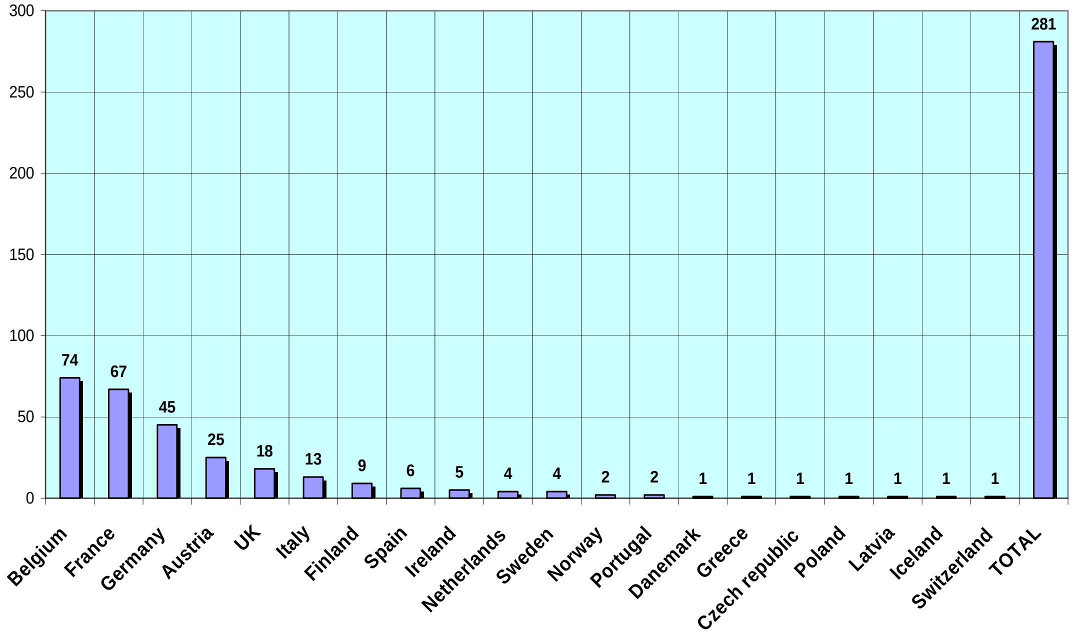
[11] Opinion of the Committee of the Regions of 20 November 2003 on the Green Paper on services of general interest, CdR 149/2003 final

[12] http://www.europarl.eu.int/hearings/20030611/econ/default.htm

three new Member States: Poland, Latvia and the Czech Republic. In addition, contributions were received from organisations in Switzerland, Norway and Iceland. The weak participation of organisations from the new Member States is regrettable. However, it should not be interpreted as an indication that services of general interest are not a highly important issue for these countries.

The distribution of the comments according to their geographical origin is as follows[13]:

Total of contributions to the Green Paper on Services of General Interest according their origin



The strong representation of organisations from Belgium, France, Germany and Austria is to be noted. It reflects the considerable interest taken in the subject in these countries. The high number of contributions of Belgian origin can in part be explained by the fact that many European organisations have their headquarters in Belgium.

3.1.2. *Contributions from a broad range of categories of respondents*

A broad variety of types of organisations have replied to the public consultation:

- national governments,
- a national Parliament,
- local and regional authorities and their associations,
- providers of local services,
- providers of social and health services, and social organisations,
- providers in network industries (transport, postal services, telecommunications, electricity, gas),

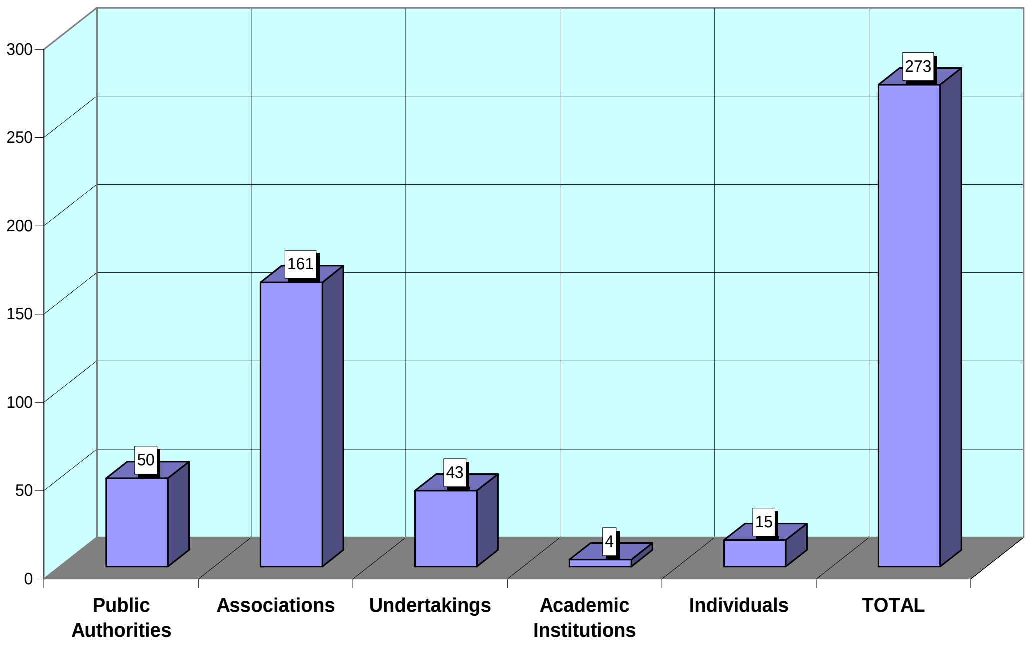
[13] Seat or principal residence of the contributor. The high number of contributions of Belgian origin can in part be explained by the fact that many European organisations have their office in Belgium. However, it is sometimes difficult to distinguish between European organisations and organisations of a more limited scope.

- a provider of financial services,
- companies and organisations from the media sector,
- trade unions and associations of trade unions,
- user and consumer organisations and agencies,
- churches,
- industry associations,
- political parties,
- academic organisations.

Comments were also received from private individuals, one of them submitting a recent doctoral dissertation on public services as a contribution.

Many of the contributions are very substantial and some are accompanied by additional background material. The breadth and the depth of the contributions received lead the Commission to believe that the different aspects and arguments relevant to the debate are well covered by the responses.

Contributions to the Green Paper on Services of General Interest published on the Website



3.2. The Green Paper was well received in general, but some remain sceptical

The public debate launched by the Green Paper was welcomed in general. The issues raised and the questions submitted were found to be relevant. Only exceptionally was the Commission’s intention to launch an open debate doubted, or the questions criticised. Some comments stated that the presentation by the Green Paper of the results of liberalisation in the network industries was too positive and did not sufficiently reflect the problems arising from market opening. A few comments claimed the Green Paper had too strong an internal market and competition focus.

The inclusion of economic as well as non-economic services of general interest in the scope of the Green Paper was widely approved. However, it was noted that the main focus of the document was on the big network industries. Also, the differences between economic and non-economic services, as well as between social services and health services, on the one hand, and network industries, on the other, are highlighted. It is stressed that any Community policy has to take due account of these differences. One organisation notes with satisfaction that the private insurance sector is not dealt with in the Green Paper.

4. THE MAIN RESULTS OF THE PUBLIC CONSULTATION

4.1. Consensus on the importance of services of general interest, but from different perspectives

Many contributions started with a statement on the role of services of general interest in general or of specific services that contributors take a specific interest in. The contributions agree that services of general interest are of essential importance for citizens and businesses in Europe and that well-functioning services of general interest are crucial for Europe's societies and economies. Some contributions also stress the importance of these services for democracy. There is also a broad consensus that services of general interest should be provided in a way that best serves the interest of users.

However, while some contributions plead for a stronger protection of services of general interest against market mechanisms and for the recognition of a separate role for these services, others stress the beneficial impact that market opening can have on the delivery of services. It is pointed out that these services should be treated as an exception to market principles.

Table 1: Importance of Services of general interest

- **There is a broad consensus on the essential importance of services of general interest for European societies. It is also generally accepted that these services should be provided in a way that puts users first.**

- **No agreement exists concerning the relationship between services of general interest and market principles.**

4.2. The role of the Union in the area of services of general interest

4.2.1. Some calls for the inclusion of an objective in the Treaty, but no additional powers

There is no consensus on the need for an amendment of the Treaty. Some comments call for the inclusion of services of general interest in the objectives of the Treaty in order to clarify the role of these services. Some contributions also welcome the amendment of Article 16 of the EC Treaty in Article III-6 of the Convention text. In some comments it is suggested that Articles 16 or 86 should be amended so as to allow for wider exemptions for services of general interest from the application of competition and internal market rules. It is also proposed that a legal base be introduced in the Treaty that would allow the European Union to legislate in the area of non-economic services. One contribution proposes extending Article 86(3) to recommendations.

Conversely, a number of comments argue that the current Treaty framework is appropriate, if properly implemented, and that there is no need for a Treaty amendment. It is argued that the recognition of services of general interest in Articles

16 and 86 is sufficient and delivers satisfactory results. It is stressed that a “social market economy” is already mentioned as an objective in Article I-3 of the Convention text and that any insertion of an additional objective on services of general interest is superfluous. It is also argued that the last sentence of Article III-6 of the Convention draft Constitutional Treaty providing a legal basis for legislation on services of general economic interest should be deleted. This provision is seen as unnecessary and as incompatible with the principle of subsidiarity.

Despite these differences, the contributions largely agree that there is no need to confer additional powers in the area of services of general interest to the Union. Many of the comments suggesting Treaty amendments stress that these amendments must not lead to an extension of the powers of the Community. It is highlighted that any amendments should strengthen subsidiarity and the freedom of Member States to define, organise and finance services of general interest at national, regional or local level. However, some contributions are not opposed or are even favourable to the idea of giving additional legal powers to the Community in the area of services of general interest.

4.2.2. *An interest in clarification of Community rules*

The contributions do not suggest that there is confusion about the responsibilities of Member State and Community levels. However, there is some interest in clarification of the application of Community rules to services of general interest in general, including the application of the concept of “effect on trade between Member States” and the distinction between economic and non-economic services. It is suggested that this clarification could be made in a framework directive or in a communication. Other contributions do not see the need for any clarification and fear that a clarification would be counter-productive.

In addition, there are strong calls from different categories of respondents to clarify the application of competition rules, and in particular state aid rules, to the provision of services of general interest. These are dealt with in section 4.8. below.

4.2.3. *No need to extend sector-specific regulation in general, but debate on some cases*

Many contributions state that the creation of specific regulatory frameworks for other sectors than the large network industries is not necessary. It is explicitly mentioned that no Community framework should be established for social services, for social protection and for public service television and radio. Moreover, specificities of sectors such as health should be recognised and taken into account in any wider discussion of services of general interest.

No agreement exists concerning water, waste and local public transport services. While some contributions call for the creation of a specific regulatory framework for these services, other comments, in particular from the local level, explicitly object to the establishment of a Community regulatory framework or call for an exemption of these services from the application of internal market and competition rules.

Health services, social assistance, education, banking and insurance services, and electronic commerce are also mentioned. One contribution from the financial services industry argues that “post-market” financial services should be regulated as services of general interest at Community level.

4.2.4. *No need for a European Regulator for now*

As regards the institutional framework, there is a broad consensus that it would not be appropriate to establish European regulatory authorities at this stage. It is stressed that services should be regulated as close as possible to the markets and that a European regulator could not take sufficient account of specific situations in the Member States. It is also highlighted that the creation of European regulators would not be in line with recent developments in Community law, such as the adoption of the electronic communications package and the modernisation of the application of competition rules. Only a few comments suggest that the establishment of a European regulator may be feasible in areas such as financial services or energy. Some contributions also suggest the creation of European observatories in areas such as the evaluation of services of general interest. It is also proposed that the subject merits further study.

A vast majority of contributions agree that for the network industries the creation and development of European networks of regulators is the most appropriate form of co-operation. A number of comments suggest that co-operation in the existing networks should be reinforced and that the Commission should be given a stronger co-ordination role. It is also proposed that the Council should regularly monitor the situation in different sectors.

The need to increase transparency requirements and to harmonise information obligations for regulated undertakings is mentioned.

The importance of respecting the principle of subsidiarity and the need to maintain the distinction between the big network industries and local services in any regulatory framework is also highlighted. It is also stressed that regulation should involve all parties concerned and that it has to be based on democratic decisions.

Furthermore, it is suggested that the principle established in the field of electronic communications according to which ex ante regulation is only necessary where competition law remedies are not sufficient should be extended to other services.

Table 2: The role of the European Union

- **While different views are taken on the need to amend the Treaty, there is broad agreement that the Community should not be given additional powers in the area of services of general interest.**

- **The responsibilities of the Community and Member States levels seem to be clear. However, there are calls for the clarification of Community rules in some areas.**

- **A broad agreement exists that sector-specific regulation must not be extended to all services. However, for some services (water, waste, local public transport) diverging views are expressed as towhether a specific regulatory framework is desirable at Community level. The need to take account of specificities of sectors such as health is highlighted.**

- **There is a large consensus that there is no need for the creation of European regulatory authorities at this stage. Networks of national regulators co-ordinated at European level seem to be the preferred option.**

4.3. Sector-specific legislation and general legal framework

4.3.1. The need for a framework instrument remains controversial

The views on the need for a general legal framework for services of general interest have not converged during the debate so far and remain divided. Both views, in favour and against, are strongly expressed by many contributors.

4.3.1.1 Comments in favour

Many comments are favourable to the introduction of a general legal framework. Some of the contributors supporting the establishment of a framework instrument see it as a tool to promote consistency and to clarify and consolidate the rules applicable to services of general interest and the respective responsibilities of the Community and the Member States. It is suggested that the framework should cover issues, such as the definition of general principles regarding the provision of services of general interest (access, universal service, transparency, affordability, non-discrimination, continuity, etc.), the funding of these services, their organisation and regulation, their evaluation, and the role of the Member States, including the regional and local levels, and the Community. It is also suggested that the framework should include provisions on cost calculation and rules on granting special or exclusive rights for the provision of a service of general interest. The added value of such a framework is seen in increasing consistency and legal certainty and in strengthening the principle of subsidiarity. Also the political and symbolic value of such an instrument is highlighted as a key element of the European social model. It is stressed that a framework instrument would give the European Union a pro-active role in the area of services of general interest.

Many contributors expect from a framework instrument that, in addition to clarification and consolidation of the current principles, it will restrict the application of competition and internal market rules to services of general interest and thus lead to a different balance between market and public service principles. It is proposed that a framework directive should lay down exemptions from internal market and competition law.

Some of the comments suggest that a framework instrument should cover only services of general economic interest, others are of the view that all services of general interest should be covered. It is also proposed that a framework directive should only apply to services that are not subject to a specific regulatory framework at Community level.

With regard to the instrument to be chosen, most contributions in favour of a framework instrument would support a legally binding instrument, in particular a directive. However, some contributions suggest the use of non-binding instruments ("soft law"), such as a Commission communication or a recommendation. It is also proposed that different instruments, binding and non-binding, could be used depending on the issue to be addressed. One organisation suggests establishing a "soft law" framework first and proposing legislation later.

Some comments suggest that a framework instrument should be based on Article III-6 of the draft Constitutional Treaty prepared by the Convention.

A number of comments stress that a framework directive must not lead to increased powers at Community level. One contribution states that it is broadly in favour of a framework instrument, provided consumer rights are protected.

No contribution suggests that a general framework could replace existing sector-specific legislation but a number of comments suggest that a framework directive must not affect the sector-specific legislation in place. One organisation, generally in favour of a framework instrument, states that following the decision of the Court in the "Altmark" case there is no longer any urgent need for a framework instrument.

4.3.1.2. Comments against

Many comments are opposed to the introduction of a general framework on the basis of a legislative instrument. It is argued that the current legislation based on a sector-specific approach has proven to be successful and that there is no need for a general framework. Articles 16 and 86(2) of the Treaty were sufficient. The different characteristics of the services covered would only allow for very general provisions that had to be complemented by sector-specific rules. A framework directive would be too abstract and too philosophical. The interaction between a framework instrument and the existing sector-specific regulation would be unclear and could lead to more legal uncertainty. The regulatory framework would become more complicated and less transparent. A framework directive could result in additional burdens and costs. It is pointed out that different sectors are at different stages of liberalisation, which will make it difficult to establish a general framework. There was a risk of conflict between the establishment of a framework directive and the sectoral legislative agendas. It is also feared that a framework directive would be tantamount to a step backward in the most liberalised sectors. Political compromises reached on sector-specific legislation could be put in danger. One comment argues that there is no legal base for a framework directive. It is also argued that a framework directive would deviate from the Lisbon strategy.

Some comments state that broadcasting should not be covered by a framework directive. For the electronic communications sector it is argued that a framework directive would undermine the flexibility provided by the current sectoral regulation which ensures a move towards the full application of general competition law. It is also argued that the electronic communications legislative framework is exhaustive, thus not leaving any room for the application of a framework directive. Comments from industry also cast doubts on the compatibility of the general considerations in the Green Paper on universal service, quality of service and evaluation with developments in the telecommunications sector.

It is suggested that clarification may be necessary regarding health and social services, e.g. in the form of a communication. One contribution proposes the establishment of a specific directive for complementary health insurance.

4.3.2. A few inconsistencies and diverging views on the impact of existing regulation

As regards the existing sector-specific regulation, many contributions point out that no inconsistencies have been experienced. It is stressed that the existing differences between rules for individual sectors reflect different situations in different sectors. A point that is frequently made is that different degrees of market opening in Member States and uneven implementation of Community law create problems.

With regard to transport, the point is made that differences in the regulation of different transport sectors can create difficulties. The liberalisation of road transport led to problems in the railway sector. It is also suggested that the legislation for maritime transport does not take account of certain specific contexts.

It is also argued that various pieces of Community data protection legislation are not fully coherent.

It is mentioned that universal service obligations exist only for some services and that the objectives for different services of general interest are not identical.

As regards Directive 93/38/EEC, it is suggested that the impact of the directive on the sectors covered (energy, water, transport) is different due to the differences of these sectors.

It is stated that, in some cases, a more technology-neutral approach could have avoided inconsistencies. For example, the distance-selling directive applies to value added services provided via voice telephony and the e-commerce directive applies to value-added services offered on the Internet.

The positive impact of the Community's existing sectoral policies is stressed in a number of contributions. One contribution argues that sector-specific regulation has worked well but has created a feeling of legal uncertainty and confusion. Others point to remaining monopolistic structures, the creation of oligopolies and price increases and suggest that there are also other negative social and economic consequences of the Community's liberalisation policies. It is mentioned that for consumers comparisons of different service offerings are sometimes difficult because of a lack transparency. The uncertainty relating to the calculation of the cost of providing a universal service is stressed.

Table 3: Sector-specific legislation and general legal framework

- **The views on the need for a general legislative framework remain divided. However, there is an agreement on the continued need for sector-specific legislation.**

- **Many contributions highlight the benefits of existing sectoral policies. Others point out that liberalisation had negative social and economic consequences.**

4.4. The distinction between economic and non-economic services

4.4.1. The importance of the distinction and its dynamic character are widely recognised

In general, contributors consider the distinction made in Community law between economic and non-economic services to be important and relevant. Only a few contributions argue that this distinction is outdated or unnecessary and no longer appropriate. A number of comments stress that the distinction is not clear and call for greater legal certainty. It is highlighted that some sectors provide both economic and non-economic services. Some comments underline that the Member States should have a role in deciding on the nature of a service. Also, the importance of the nature of downstream activities for the qualification of upstream activities is highlighted.

The fact that the borderline between economic and non-economic activities is dynamic and evolving over time is widely accepted. Consequently, many contributors agree that a definitive list of activities that are to be considered non-economic cannot be established. However, some comments suggest that a list of examples could be useful to clarify the distinction. A number of comments call for the establishment of a list of abstract criteria that could be used to determine whether a service is of an economic or a non-economic nature. A communication is suggested as the appropriate instrument. It is also proposed that the distinction could be clarified in a framework directive. Others are of the view that the development of the distinction should be left to the Court.

A few comments propose the establishment of a negative list of all services that are not subject to competition and internal market rules. This list should include services such as public local transport, water supply, waste water, waste management, social services, health services, education, culture, and services provided by not-for-profit organisations. Other comments stress that services such as waste water and health are of an economic nature.

4.4.2. Calls for a wider definition of non-economic services

A number of comments, in particular from the social sector, from the local and regional levels and from trade unions, suggest that the market-based distinction between economic and non-economic services is too narrow. It is proposed that broader criteria, such as social and environmental objectives, participation of volunteers or lack of profit-orientation, should be used to establish whether a service is of an economic nature or not. Some comments argue that the activities of not-for-profit organisations or of organisations that re-invest all profits in public service activities should be considered to be non-economic. It is also suggested in comments from the local level that most universal public services are of a non-economic nature.

However, other comments, in particular from industry, stress that the current functional definition based on the nature of the activity is appropriate and should be maintained. The existence of a potential market for a given activity should be the sole criterion. The status of an organisation must not be taken into account.

4.4.3. An interest in clarification of the situation of organisations providing social services

A number of replies, including many from the social and health sector, suggest that it would be useful if the situation of non-for-profit organisations and of organisations performing largely social functions was further clarified. Reference is made to legislative as well as to non-legislative instruments. It is suggested that the specific role of providers of social services should be explicitly recognised. The importance is highlighted of ensuring that the provision of social services by not-for-profit organisations remains possible in the future. Other contributions however, also from the social sector, insist on the need to focus on the nature of the services and not on the nature of the provider.

One industry association opposes any further clarification of the status of these organisations, arguing that the status of an organisation is irrelevant under Community law and that it is only the nature of the service provided that was important.

4.4.4. *Non-economic services: broad rejection of additional Community powers, but also calls for their protection as part of the European social model*

There is a broad agreement among contributors that the Community should not be given additional powers in the area of non-economic services. The Member States should be responsible for these services, in line with the principle of subsidiarity. Many comments suggest that the role of the Community should be limited to facilitating the exchange of experience and good practices, and benchmarking. The method of open co-ordination is mentioned as an appropriate instrument.

However, some comments request that the Community should protect non-economic services of general interest as part of the European social model. A few comments refer to the establishment of common basic standards at Community level. Some contributions propose that non-economic services should be covered by a framework directive.[14] It is stressed that consumer rights must be protected regarding non-economic services as well.

It is also suggested that the Community should take better account of non-economic services in its policies, e.g. regarding cohesion, social inclusion, and health.

Table 4: Services of general economic interest and non-economic services

- **Many contributors feel that the distinction is important. However, a number of contributions call for other criteria beyond the distinction economic – non-economic in order to create more legal certainty.**

- **While there is some interest in further clarification of the situation of organisations providing social services under Community law and in protecting non-economic services of general interest as part of the European social model, there is a broad agreement that the Community should not be given additional powers in the area of non-economic services.**

4.5. A Common Set of Obligations

4.5.1. *Diverging views on the utility of a common set of public service obligations*

The differences in the views regarding the need for a general Community framework are also reflected in the responses concerning a common set of public service obligations. A number of contributions explicitly contest the possibility or the need to establish a common set of obligations at Community level. Public service obligations should reflect the specific characteristics of the different sectors and should be established sector-by-sector. A common set of obligations would be too general and create an unnecessary administrative burden. It is argued that there is no convincing case for a common set of obligations and that the concepts of universal service and affordability, for instance, do not even fit all sectors of the network industries, such as the railways. The electronic communications reform package is cited as an example of successful sector-specific regulation. It is also stated that common elements exist but that these elements have to find a different expression for each sector and that for a common concept it is difficult to go beyond very general statements.

[14] See 4.2.1.1. above

A number of other contributions argue that the definition of a common set of obligations is appropriate and necessary. Many of those contributions argue for an extension of the common set of obligations. They generally establish a link with their support for a framework directive where this common set of obligations could be promoted. One contribution focuses on the concept of universal service as being the most relevant from a consumer's perspective.It is also suggested that a common concept is only possible for the large network industries. One contribution suggests referring to public service “missions“ rather than to public service “obligations”, as the former is a more comprehensive and more positive term.

4.5.2. Some suggestions for the scope of public service obligations

A number of contributions state that in addition to the requirements mentioned in the Green Paper no further obligations should be introduced. It is argued that additional requirements would increase the costs of providing the service and that the importance of public service obligations for achieving cohesion objectives is overstated. The Community should allow for some degree of regulatory competition between Member States. The proper transposition and application of the existing requirements should be given priority.

Other contributions suggest additional elements. The principle of adaptability of services of general interest is mentioned as a separate item in several contributions. Also, the principles of sustainable development and environmental protection are mentioned repeatedly. Other elements that are suggested include access, transparency, democratic control and evaluation, social cohesion, solidarity, consumer participation, infrastructure provision, country planning, non-distortion of competition, employment, user and employee participation, gender aspects, data protection and privacy, payment options, redress and complaint mechanisms, incentives for investment and quality improvements, neutrality of ownership, fair pricing, efficiency, accountability, security and safety, pluralism, interconnectivity, competitive tendering, diversity and choice, territorial coverage, education and training, and subsidiarity. The principle of cost-recovery (for the water sector) and the “polluter pays”-principle are also mentioned.

4.5.3. Scepticism as regards the extension of requirements to other services

Many contributions do not, at this stage, see any need for an extension of the requirements defined in Community sector-specific regulation and detailed in the Green Paper to other services of general interest. In this context, some contributions highlight the specific characteristics of broadcasting and of health and social services. A number of contributions stress that an extension could only be considered on a case-by-case basis and after careful assessment. The use of non-binding guidelines and the open method of co-operation is also considered.

However, some contributions are favourable to the extension of the common set of obligations to all or at least some other services of general interest. Banking and financial services, water and sewage services, town cleaning, Internet access, accommodation and social services are specifically mentioned. It is also argued that the requirements should be extended to all sectors that have been liberalised. It is also suggested that the public service obligations set out in the Green Paper should be extended to the distribution of medicines and to emergency services in general.

One contribution proposes including the provision of geographical information. It is also proposed that universal service should be introduced in the railways sector.

Conversely, some contributions stress that these requirements should not be extended to the water sector. With regard to gas, it is stressed that the concept of universal service cannot be applied to this sector. It is also highlighted that the concept of affordability is not suitable for the energy sector.

As regards non-economic services, the view prevails that the set of requirements applying to the network industries should not cover these services. It is stressed that these services should remain under the responsibility of local and regional authorities. However, there are also some contributions that promote an extension of such requirements or general principles to all or at least some non-economic services of general interest.

4.5.4. No detailed regulation at Community level

There is broad agreement that Community regulation should be confined to establishing principles and objectives and that Member States should have the power to implement these principles in line with the specific needs and characteristics that exist at national or regional level. The need to respect the principle of subsidiarity is highlighted in several contributions. In particular, it is argued that the organisation, financing and control of services of general interest should be left to the Member States. A number of contributions argue that a Community regulatory framework should be established only for sectors that are liberalised at Community level. Along the same lines, it is stated that Community regulation should remain limited to the network industries. The specific responsibility of the Community for the functioning of the internal market and for undistorted competition is underlined. It is stressed that, as a general rule, regulation should remain as closely as possible to the citizen. However, it is also recognised that with the completion of the internal market the need for regulation at Community level may increase.

Some contributions are in favour of an increase in regulation at Community level. The Community should facilitate the harmonisation of public service requirements in the Union. It should take on the responsibility for ensuring social and territorial cohesion. It is highlighted that the Community should strengthen the guarantees established at national level with regard to services of general interest. It is also argued that all aspects relating to human dignity should be regulated at Community level.

Several contributions also call for clarification of the respective roles of the Community and national levels.

4.5.5. Call for an assessment of implementation and impact on cohesion

There is no agreement regarding the effective implementation of public service requirements set out in Community law and their impact on social and territorial cohesion. A number of contributions argue that the requirements have not yet been effectively implemented and that cohesion goals have not yet been achieved. In particular, there is criticism that the existing requirements are too focused on the introduction of competition and have not improved access to services. Other respondents claim that requirements have been properly implemented and that the cohesion objectives have been attained. However, a significant number of contributions considers that it is too early to form an opinion and that a more detailed assessment of the implementation of public service obligations and their implementation is necessary. It is suggested that Community regulation has had an uneven impact and that the actual record varies from one Member State to another.

Several contributions refer to specific problems. It is argued that the current requirements fail to address problems resulting from obscure tariff practices and from concentration and bankruptcy of providers in the telecommunications sector. It is stated that in the gas and electricity sectors problems of price increases and security of supply have occurred. It is claimed that energy liberalisation had a negative impact on employment, on the electricity grids, on the development of renewable energy sources, on energy savings measures and on a coherent Community energy policy. It is also stressed that post offices were closed. It is claimed that where Community law defines only minimum standards or Member States have a wide margin for the application of requirements, implementation has led to distortions of competition and to a “race to the bottom” in which operators facing high standards in their home market have a competitive disadvantage. With regard to universal service, it is maintained that the current Community provisions do not provide sufficient financial incentive for providers to ensure universal service. There is criticism that the concept of affordability is not specified at Community level and that the concept is translated into a mere cost-orientation of tariffs without taking other (social) parameters into account. It is argued that the Community provisions on sea transport security are not properly applied. Inconsistency in the regulation of data protection in different Community law instruments is also referred to. The importance of taking account of the specific needs of the outermost regions is highlighted.

Table 5: A common set of obligations

- **Views are divided on the need and feasibility of establishing a common set of obligations at Community level. While some contributions stress the need to establish public service obligations sector-by-sector, other comments argue that a common concept is appropriate and necessary.**

- **There seems to be a broad consensus that regulation at Community level should establish principles and objectives, while Member States should be able to implement and specify the rules in line with the specific situations and needs existing at national and regional level.**

- **There is no agreement on the effective implementation of requirements in Community legislation or on the impact of these requirements on social and territorial cohesion. It is suggested that it is too early to form an opinion and that a more detailed assessment is necessary.**

- **Different views exist regarding the need to introduce additional obligations at Community level and regarding the need to extend existing requirements to other services of general interest.**

4.6. Sector-specific obligations

4.6.1. In general, no need for additional sector-specific obligations, but some proposals

Many comments do not see a need at this stage for introducing additional sector-specific public service obligations.

As regards supply security the energy sector is identified as the sector for which the issue is most relevant. However, it is also argued that other network industries or all infrastructure-based services could raise security of supply concerns. Telecommunications, postal services, transport, water, heating, broadcasting services and the supply of medicines are specifically mentioned. It is suggested that in the future security of supply could also become relevant for health, education, social and cultural services. Conversely, it is argued that the concept of security of supply does not fit for health and social services. Some contributions express the concern that liberalisation could have a negative effect on the security of supply. The need to ensure long-term investment in infrastructure-based services is highlighted as a key issue. It is also argued that security of supply should become an integral part of the universal service concept. Also, the interdependency of the security of supply of different services of general interest is underlined. For the electricity sector, it is maintained that supply security must be complemented by the aspects of continuity of production and the smooth functioning of the grid. However, there is broad agreement that currently no additional initiatives are required at Community level. One contribution stresses that security of supply should best be ensured closest to the citizen. It is argued that Community measures must not lead to a centrally defined energy mix. The need to continuously assess the situation of different sectors with regard to supply security is mentioned. Some contributions call for additional Community measures in the field of supply security. One contribution mentions that the issue is not appropriately addressed in the Water Framework Directive.

As regards access and interconnectivity, the view also seems to prevail that no specific Community initiatives have to be taken at this stage. For the telecommunications sector, the debate focuses on clarifying some issues related to the implementation of the current framework and some expressed views in favour of the extension of universal service to broadband and mobile telephony. However, it is also argued that access needs to be improved in general. Trans-European networks should be developed. It is argued that border regions deserve particular attention. Some contributions stress the need to ensure and improve access and interconnectivity in the railway sector. The need to improve trans-border trade in gas and water and trans-border interconnectivity in the electricity sector is also highlighted. Measures should be taken to prevent conflicts in cases where a public operator from one Member State acquires control over a private operator from another Member State. The interoperability of transport networks and the integration of transport systems should be stimulated.

No agreement exists with regard to water. While the view is taken that access to water networks should be opened, other contributions argue that the concepts of access and interconnectivity cannot apply to the water sector.

Furthermore, one contribution suggests encouraging the harmonisation of tariffs across the Union. It is also suggested that obligations relating to crisis or emergency situations should be developed. One contribution proposes additional measures ensuring user and employee safety, technical safety as well as sustainable development and environment protection. It is suggested that cost-covering prices be introduced for water supply and a specific framework for waste. The establishment of an annual minimum investment standard is also proposed.

4.6.2. Little support for a Community initiative on media pluralism at this stage

The crucial importance of protecting media pluralism is widely recognised and the inclusion of Article 11(2) of the Charter of Fundamental Rights in the draft Constitutional Treaty established by the Convention is welcomed in several contributions. Some comments stress the importance of public broadcasters, other contributions underline the importance of private broadcasting for pluralism. The link between cultural diversity and media pluralism is highlighted. Some contributors are of the view that it would be better not to place a debate on media pluralism in the context of a discussion on services of general interest. One comment suggests that the issue should be addressed in more detail in a separate consultation.

On the substance, there is broad agreement that at this stage measures should not be taken at Community level and that the protection of the pluralism of the media should be left to the Member States. It is argued that media markets are essentially national in nature and that the diversity of situations in the different Member States could best be addressed at national level. Several contributions suggest that the aspect of pluralism is more strongly taken into account in the application of Community competition and state aid rules.

There are also some comments that call for an initiative at Community level. It is argued that pluralism is not always ensured by Member States. Several comments are in favour of a legislative measure such as a Directive. In particular, it is suggested that the issue of pluralism be addressed in the forthcoming revision of the Television without Frontiers Directive. It is proposed that a legal base should be created to implement Article 11(2) of the Charter. It is also suggested that an independent observatory be created for media pluralism.

Table 6: Sector-specific obligations

- **There seems to be little support for the introduction at Community level of additional sector-specific obligations at this stage. However, it is suggested that the situation should be closely monitored with regard to the different sectors, in particular with regard to security of supply. There are also some calls for an improvement of access and interconnectivity in some sectors.**

- **No agreement exists with regard to the opening of the water sector at Community level.**

- **There is broad agreement that no specific Community measures should be taken on media pluralism at this stage and that the protection of pluralism should be left to the Member States.**

4.7. Definition of Obligations and Choice of Organisation

4.7.1. Some concerns, in particular with regard to procurement and state aid

A number of comments stress that the application of Community law has led to problems with regard to the organisation of services of general interest and the definition of public service obligations. In this context, some contributions refer to negative consequences of Community liberalisation policies. It is suggested that the Member States' freedom to organise services of general interest should be explicitly recognised. However, the main concerns appear to result from the application, as perceived by respondents, of the Community rules with regard to public procurement, concessions and state aid. It is argued that the rules on tendering and state aid for services of general interest are unclear. Some contributions, coming in particular from the public sector mention that public procurement rules are too rigid and may impose an excessive burden on administration. Other contributions, in particular from the private sector, argue that award procedures for public services are not yet fully competitive and transparent, and that this creates an obstacel to the internal market. Many contributions ask for clarification, in particular as regards the "in-house" concept or the rules on concessions and public-private-partnerships. It is proposed that the procurement directives be revised so as to allow public authorities to take better account of issues such as environmental and social concerns. One contribution claims that in practice all cases requiring state notification cause problems because they prolong procedures. In addition, a number of specific issues and cases are mentioned. These include:

- the ECJ judgment in case C-519/99 of March 2002 concerning second homes in Austria,
- the prohibition by the ECJ of reduced entrance fees for museums in favour of the local population,
- the suspension of a system of aid to social housing in Sweden pending a state aid decision by the Commission,
- the refusal of an authorisation by a regional administration for a subsidy in favour of a local abattoir because of concerns with regard to its compatibility with Community state aid rules,
- the restrictions on the freedom of choice of organisation contained in the Commission proposal for a regulation on public services obligations in local public transport,
- the degradation of international rail services as a consequence of Community legislation,
- the obstruction to efficient provision of services through the envisaged reform of Regulation 1191/69,
- the restrictions resulting from the energy directives of the freedom of the Member States to organise their electricity sectors,
- the use of volunteers by social organisations, which could be considered a problem under the competition rules,
- the abolition in Austria of tax advantages for the purchase of goods manufactured by handicapped persons for reasons of distortion of competition,
- Community pre-accession funding which in practice was not available for projects involving private companies,
- the absence of Community legislation defining a level playing field for private and public companies.

Conversely, there are also many comments that stress that the application of Community law has not led to undue restriction of the organisation of services of general interest and the definition of public service obligations at national level.

4.7.2. *Some examples for obstacles to the internal market created at national level*

Some comments also mention situations where an obstacle to the completion of the internal market is created at national level. These examples include:

- contract award procedures that are not competitive and transparent,
- concerns of private broadcasters regarding a possible non-compliance by Member States with their obligation to define precisely the public service mission of public service broadcasters,
- tax discrimination in favour of public undertakings in a Member State,
- the obstacle to the export of waste from private households,
- the restrictive interpretation by national authorities of the concept of recovery in the area of waste management,
- access to the insurance and credit sectors,
- the distortion of competition through national compensation schemes for public service obligations,
- the limitation of the scope of economic activities of local authorities in national legislation,
- the bottlenecks created in the transport of goods by the priority given to passenger rail transport in one Member State,
- the distortion of competition through differences in the taxation systems of the different Member States,
- the implications of the introduction of environmental requirements for the transmission and transport of electricity.

4.7.3. *No support for further harmonisation of public service obligations*

There is broad agreement among contributors that in general any further harmonisation of public service obligations is not desirable. The importance of the principle of subsidiarity is frequently stressed in this context.

Only a few comments argue in favour of further harmonisation. One contribution supports progressive further harmonisation on the basis of regular evaluation reports. The areas of emergency services and geographical information are specifically mentioned. One contribution argues that the Community should establish maximum levels for public service obligations in order to prevent distortions of competition. Furthermore, it is proposed that the taxation of services of general interest in the Member States should be harmonised. Private broadcastersalso suggested that the Commission should publish a list of definitions of public service missions for broadcasters in the Member States.

4.7.4. *A broad interest in a flexible exchange of best practice regarding the organisation of services*

There is a strong interest in an exchange of best practice and in benchmarking concerning the organisation of services. It is stressed that the diverse forms of organisation to be found in the Member States suggest that much can be gained from comparisons. However, it is underlined that the creation of an additional burden and the duplication of processes must be avoided. Many contributions stress that new processes should not be institutionalised and refer to the possibility of using existing forums and procedures. Several contributions mention the application of the Open Method of Co-ordination. It is also suggested that the place for an exchange of best practice would be an observatory for the evaluation of services of general interest. Many contributions call for the involvement of all interested parties in the process. Some comments highlight the need to take due account of regional and sectoral differences. It is stressed that the process must not lead to the establishment of standards.

Only a few comments oppose an enhanced exchange of practice on the basis that additional comparisons are not necessary. Some contributions are reluctant in particular to support benchmarking in the area.

Table 7: Definition of obligations and choice of organisation

- **Some contributions highlight problems resulting from the application, as perceived by respondents, of Community law, in particular in the areas of procurement and state aid. There is a call for clarification of the rules on concessions and public-private-partnerships. Some comments also refer to situations where an obstacle to the completion of the internal market is created at national level.**

- **The comments largely agree that further harmonisation of public service obligations at Community level is not desirable.**

- **Many contributions express an interest in a flexible and non-bureaucratic exchange of best practice and benchmarking as regards the organisation of services of general interest.**

4.8. Financing

4.8.1. A widespread request to clarify the rules on financing

A perceived legal uncertainty regarding the rules applying to the financing of services of general interest, and in particular the application of state aid rules, is a key issue in the comments received. Many contributions from all categoreis of respondents request clarification of these rules. The need for clarification is highlighted by a range of different categories of respondents. The call for more legal certainty is made for services of general interest in general but it is particularly strong at the local level and concerning local services. Some contributions also refer to the burden of state aid procedures and call for simplification. Many contributions explicitly comment on the ECJ judgment in the Altmark case, which is seen as positive but not as sufficient to ensure legal clarity. It is expected that the conditions set out by the Court will be clarified and specified. Clarification of the methods of cost calculation (transparency, parameters) and of the nature of public service obligations that are compensated is referred to specifically.

Whilst the call for more legal certainty is widespread, no specific views seem to prevail on the instrument to be chosen. Some comments propose the adoption of a block exemption or advocate the approach proposed by the Commission in its Report to the Laeken European Council. Others are in favour of different instruments, such as an amendment of the Treaty, “a legal framework”, “guidelines”, “derogations”, or “a negative list”. There are also a number of comments that explicitly call for a non-legislative clarification of the state aid rules. A number of contributions seem to confuse the issue of a framework directive with the issue of clarifying the state aid rules. Many organisations in favour of a framework directive expect the directive to set out the conditions under which services of general interest can be financed. A number of them refer explicitly to state aid and competition and possible exemptions as issues that should be covered in a framework directive.

Some comments, in particular from industry associations, stress the need for continued strict application of competition and state aid rules. According to these comments, the existing framework is sufficient and no additional clarification is necessary. These contributions seem to suggest that clarification would imply more lenient application of the rules. As regards the broadcasting sector, several contributions call for full application of the transparency directive. One contribution calls on the Commission to ensure equal, non-discriminatory and transparent discounts for airport fees.

While some contributions state that problems regarding the application of state aid rules have not occurred, other contributions mention cases where the application of state aid rules as perceived by respondents has led to problems. In addition to the examples mentioned under 4.7.1, these cases include:

- the creation of a municipal funding association in a Member State,
- the operation of a public ferry service in a sparsely populated region,
- the envisaged revision of Regulation 1107/70, which could lead to an additional administrative burden,
- territorial coverage in the areas of mobile telephony and broadband services,
- restrictions resulting from structural separation (unbundling) and obligations to tender.

4.8.2. *A call in support of the freedom of Member States to determine the mode of financing*

There is broad agreement that the Member States freedom to determine the mode of financing of a service of general interest must be preserved. It appears from a number of contributions that in practice there is no single ideal financing mode that would suit all situations and services. It is argued that Member States are in the best position to choose the appropriate mode of financing taking into account the diversity of situations and services. The flexibility of Member States must be preserved. However, it is stressed that the choices made must not distort competition. The need for a Community legislative instrument on concessions and public-private partnerships should be examined.

It is also highlighted that Community rules must not impede tariff averaging for services in the Member States. There is also mention that the direct financing of public broadcasting through the state budget would be unconstitutional in one Member State. It is noted that an obligation to tender restricts the freedom of choice of public authorities and it is requested not to impose at Community level public tendering for all services that require financial support. However, the view is also taken that compensation should in general be based on a tendering procedure. Furthermore, it is stressed that the Community should not introduce a general principle of affordability for all services. Several contributions call for the principle of cost recovery to be fully applied in the water sector.

With regard to solidarity-based financing, there is broad agreement that clarification at Community level is not required at this stage. Most contributions argue that this area should be left to the Member States for reasons of subsidiarity. However, it is also stressed that solidarity-based financing schemes in the Member States must not prevent the opening of insurance markets as set out in Community directives. Only a few comments suggest that further clarification at Community level is desirable, in particular with a view to increasing the possibilities of solidarity-based financing. The possibility of an evaluation of good practices at Community level is also mentioned.

Furthermore, it is suggested that the Community should develop co-financing instruments.

4.8.3. Different views on cream-skimming

There are different views expressed in the comments on cream-skimming. A number of comments argue that the problem is widespread, especially in liberalised sectors. It is stressed that cream-skimming always leads to results that are inefficient and against the general interest. The transport sector is specifically mentioned in a number of contributions. However, other comments, in particular from industry, take the view that cream-skimming is essentially not a problem in practice. It is argued that the problem cannot occur in fully liberalised sectors. One contribution states that cream-skimming cannot per se be seen as negative.

Other comments argue that cream-skimming can have negative effects in particular in cases of tariff averaging and internal cross-subsidisation between profitable and loss-making services. Problems that can arise in less populated regions are also referred to. It is argued that where selective market entry occurs, the provision of universal service must be carefully monitored.

Table 8: Financing of services of general interest

- **There is a firm call for clarification and simplification of the rules applying to the financing of services of general interest, in particular as regards state aid. The recent judgment of the ECJ in the Altmark case is seen as positive but not as sufficient.**

- **There is also a broad consensus that Member States must remain free to determine the most appropriate way of financing a service of general interest, provided competition is not unduly distorted.**

4.9. Evaluation

Regarding the evaluation of services of general interest, it is to be noted that different contributions attach a different degree of importance to the subject. Whilst for some contributors evaluation is a very important or even an essential issue, others seem to attach little or no importance to the question.

4.9.1. Diverging views on the scope of evaluation at Community level

A number of comments state that the evaluation currently performed at Community level, on a sectoral basis for different network industries and horizontally in the framework of the Cardiff process, is sufficient. Some comments argue that evaluation at Community level should be limited to services for which a specific Community legislative framework exists, which have a trans-border dimension or to which the Method of Open Co-ordination is applied. Other comments, however, suggest that all services of general interest or all services of general economic interest should be evaluated at Community level.

A number of contributors stress that the evaluation is primarily a task for the authority that has defined and organised a service of general interest. Evaluation should be performed in general by national, regional and local authorities. In particular, local services should be evaluated by local administrations. Broadcasters underline that broadcasting should not be evaluated at Community level. It is stressed that an evaluation at Community level is only meaningful if the situations in the Member States are sufficiently similar.

It is also suggested that the performance of a service of general interest in the Member States is evaluated before proposals for market opening are made at Community level.

4.9.2. *Diverging views on procedural and institutional arrangements*

Some comments suggest that common principles or criteria should be established at Community level but that the evaluation should be left to the relevant authorities in the Member States. Other contributors are of the opinion that the Commission should perform evaluations at Community level. A number of comments, however, doubt that the Commission is in a position to evaluate the performance of services of general interest objectively and support the idea of the creation of an independent European observatory for the evaluation of services of general interest. There are some proposals for this observatory to be attached to the European Parliament. The idea of a European network of evaluation bodies is also suggested.

While many contributions suggest that a horizontal evaluation of services of general interest is desirable, it is also argued that only a sectoral evaluation is useful.

It is proposed that Community provisions on evaluation should be set out in a framework directive.

4.9.3. *Evaluation should be multi-dimensional*

The is broad agreement among contributors that, where services of general interest are evaluated, this evaluation should not only be based on criteria of short-term economic efficiency and competition but also on broader political, social, economic and environmental criteria. The Commission Communication of 2002 on an evaluation methodology[15] is seen as appropriate in some contributions, whereas other comments suggest that a broader and more comprehensive approach is required.

A number of contributions suggest that the performance of services of general interest should be evaluated in particular against the public service obligations imposed on the provider.

[15] COM(2002) 321

4.9.4. *Other comments*

As regards user involvement, user surveys and the involvement of consumer organisations are frequently referred to as the most appropriate instruments. Appropriate complaint mechanisms are also mentioned. Various cases of users and citizens committees involved in evaluation processes are highlighted as good practice. Eurobarometers are referred to as useful instruments by some, while others believe that they are not an appropriate tool.

Several comments stress the need for a pluralistic evaluation. It is proposed that social partners should also be involved in the evaluation process.

The need to discuss the results of the evaluation with all stakeholders is also mentioned.

A number of comments suggest that the relevant data are already largely available. Others stress the need to impose information obligations on the providers of services of general interest. Some contributors, in particular from the industry, are opposed to binding obligations. It is stressed that the burden for operators should not be increased. It is also suggested that EUROSTAT could have a role in providing the necessary data.

The need to create common data standards or common indicators at Community level is stressed in some comments. However, the difficulty of establishing useful indicator systems is also mentioned.

For health and social services, it is argued that evaluation standards do not yet exist and that the criteria applied for the evaluation of the network industries cannot be applied in the health and social sectors. Any standards established would need to respect the values of the European social model, such as health objectives of universality, equity and solidarity.

Table 9: The evaluation of services of general interest

- **While there are different views on the overall importance of evaluation, there is a broad consensus that evaluation should be comprehensive and take account of political, social, economic and environmental criteria.**

- **No agreement exists as to the range of services to be subject to an evaluation or as regards the necessary procedural and institutional arrangements.**

4.10. The international dimension

4.10.1. *Trade Policy: a call for consistency and more transparency*

Concerning trade policy, the need to ensure the consistency between the internal EU regulatory framework and any international obligations is forcefully highlighted. International trade agreements should not go beyond what has been discussed and agreed within the European Union. Conversely, it is also stressed that the internal framework must comply with WTO obligations.

As regards negotiations in the WTO framework, a number of organisations call for an improvement of the information flow and for more transparency regarding the development of the negotiations.

Some comments from industry underline that EU industries expect the Community to negotiate further market opening in the framework of the WTO negotiations in order to create new business opportunities for EU companies. Other comments suggest that the Community should not accept any further market opening within the WTO framework before the effects of the liberalisation processes already underway have been evaluated. It is also proposed that additional commitments should be made conditional upon an effective liberalisation in third countries.

A number of comments highlight the need to protect public services in international trade negotiations and to guarantee that the EU and the Member States maintain the capacity to define a regulatory and institutional framework ensuring that providers of services of general interest effectively fulfil the public service missions entrusted to them. The non-discriminatory regulation of services of general interest and the imposition of public service obligations should remain possible. Some comments go further and suggest reviewing the GATS agreement in order to improve the protection of services of general interest.

More specifically, representatives of the local and regional levels argue that international trade agreements must not interfere with decisions of local and regional authorities regarding services of general interest. International trade negotiations should strengthen local democracy and local self-administration. They must not lead to the liberalisation of public services provided by local authorities.

Several comments suggest that an exception for all services of general interest should be negotiated within the WTO framework. It is also proposed that non-economic services should not be covered. Other contributions maintain that certain services, such as water, waste water, health, education and social services should be exempted from WTO obligations. However, it is also argued that the inclusion of water supply and distribution in the scope of the GATS would have little impact, as governments remained free to decide how to organise water supply and distribution under their jurisdiction.

As regards broadcasting and audio-visual services, the view is expressed that these services should remain excluded from the scope of the GATS and could better be dealt with in a separate international convention on cultural diversity. Conversely, it is argued that cultural services should not be isolated from other services.

A number of contributions make the point that the Community approach on services of general interest in the context of international trade negotiations should be further clarified. It is also pointed out that the WTO terminology and the terminology used in Community internal legislation are not identical. It is proposed that a definition of public services be included in a framework directive that could also be used in the WTO context.

Further comments refer to the need to ensure that in international trade negotiations investors in newly privatised undertakings are protected against sudden shifts of government policies and the specific requirements of certain services of general interest sectors, such as postal services, electronic communications, public transport or public health, are taken into account.

4.10.2. Development Co-operation Policy: basic public services are essential

The comments widely recognise the essential importance of basic services of general interest for the development of the poorest countries. However, while several contributions welcome the inclusion of development co-operation in the scope of the Green Paper, there is also the view that the Green Paper should not have covered this matter since it would have been better to deal with it in a separate debate.

A number of comments point out that the needs of the citizens of the poorest countries and their specific living conditions should serve as the starting point for defining a development strategy. Some contributions refer to the need for close co-operation with the local decision-makers in the developing countries and for the involvement of users in the management of services. The possibility of transferring know-how from EU industries to developing countries is highlighted. Some contributions however warn that solutions from EU Member States may not be adapted to the specific situations in developing countries. Europe should promote its model of society and the same principles should apply to services of general interest in the European Union and in developing countries. However, it is also suggested that standards cannot always be the same and must be adjusted to the specific requirements of these countries.

Access to finance and the attraction of private foreign investment are identified as the main problem. In this context, the importance of market opening, the creation of a stable political, economic and regulatory environment, regional integration and the need to protect investment are mentioned. The need to strengthen the private sector in developing countries is highlighted but a number of comments warn that privatisation should not be forced as it may not always be the most appropriate solution. EU trade policy should not counteract the development of services of general interest in developing countries. Many contributions stress that Public-Private Partnerships are a particularly useful instrument and should be facilitated and encouraged. The support of multi-donor initiatives, such as the Public Private Infrastructure Advisory Facility (PPIAF), are mentioned as a means to encourage private sector investment.

The particular importance of some sectors, such as water, energy, public transport, and geographical data is highlighted. Contributions from the broadcasting sector suggest that an international instrument could assist in supporting pluralism in developing countries.

A number of comments mention that co-ordination and co-operation within the European Union should be improved. Some suggest that more financial support should be given or that the provision of services of general interest should be improved in the developing countries. It is also suggested that financing should be better targeted. Several comments mention the need to review the relevant procedures of the European Union. There is also reference to the need for a reform of the Common Agricultural Policy in order to allow the developing countries to compete.

Several contributions suggest including provisions on development co-operation in a framework directive.

The Commission Communication of 3 June 2003 on the reform of public utilities in developing countries is mentioned as providing a good basis for further discussion.[16]

Table 10: The international dimension

- **There is a clear request to ensure that the positions taken by the Community in international trade negotiations are fully consistent with the EU's internal regulatory framework.**

- **A number of comments also call for more information and transparency as regards international trade negotiations.**

- **The crucial importance of basic essential services for the development of the poorest countries is widely recognised. Access to finance and the attraction of foreign investment are identified as the main problem.**

[16] The Reform of State-Owned Enterprises in Developing Countries with focus on public utilities: The Need to Assess All the Options, Communication from the Commission, COM(2003) 326, 3.6.2003

ANNEX 1: SUMMARY TABLE OF ALL QUESTIONS SUBMITTED FOR DISCUSSION

What kind of subsidiarity?

(1) Should the development of high-quality services of general interest be included in the objectives of the Community? Should the Community be given additional legal powers in the area of services of general economic and non-economic interest?

(2) Is there a need for clarifying how responsibilities are shared between the Community level and administrations in the Member States? Is there a need for clarifying the concept of services without effect on trade between Member States? If so, how should this be done?

(3) Are there services (other than the large network industries) for which a Community regulatory framework should be established?

(4) Should the institutional framework be improved? How could this be done? What should be the respective roles of competition and regulatory authorities? Is there a case for a European regulator for each regulated industry or for Europe-wide structured networks of national regulators?

Sector-specific legislation and general legal framework

(5) Is a general Community framework for services of general interest desirable? What would be its added value compared to existing sectoral legislation? Which sectors and which issues and rights should be covered? Which instrument should be used (e.g. directive, regulation, recommendation, communication, guidelines, inter-institutional agreement)?

(6) What has been the impact of sector-specific regulation so far? Has it led to any incoherence?

Economic and non-economic services

(7) Is it necessary to further specify the criteria used to determine whether a service is of an economic or a non-economic nature? Should the situation of non-for-profit organisations and of organisations performing largely social functions be further clarified?

(8) What should be the Community's role regarding non-economic services of general interest?

A common set of obligations

(9) Are there other requirements that should be included in a common concept of services of general interest? How effective are the existing requirements in terms of achieving the objectives of social and territorial cohesion?

(10) Should all or some of these requirements be extended to services to which they currently do not apply?

(11) What aspects of the regulation of these requirements should be dealt with at Community level and which aspects left to the Member States?

(12) Have these requirements been effectively implemented in the areas where they apply?

(13) Should some or all of these requirements also be applied to services of general interest of a non-economic nature?

Sector-specific Obligations

(14) Which types of services of general interest could give rise to security of supply concerns? Should the Community take additional measures?

(15) Should additional measures be taken at Community level to improve network access and interconnectivity? In which areas? What measures should be envisaged, in particular with regard to cross-border services?

(16) Which other sector-specific public service obligations should be taken into consideration?

(17) Should the possibility to take concrete measures in order to protect pluralism be re-considered at Community level? What measures could be envisaged?

Definition of Obligations and Choice of Organisation

(18) Are you aware of any cases in which Community rules have unduly restricted the way services of general interest are organised or public service obligations are defined at national, regional or local level? Are you aware of any cases in which the way services of general interest are organised or public service obligations are defined at national, regional or local level constitutes a disproportionate obstacle to the completion of the internal market?

(19) Should service-specific public service obligations be harmonised further at Community level? For which services?

(20) Should there be an enhanced exchange of best practice and benchmarking on questions concerning the organisation of services of general interest across the Union? Who should be involved and which sectors should be addressed?

Financing

(21) Are you aware of any cases in which Community law, and in particular the application of State aid rules, has impeded the financing of services of general interest or led to inefficient choices?

(22) Should a specific way of financing be preferred from the point of view of transparency, accountability, efficiency, redistributive effects or competition? If so, should the Community take appropriate measures?

(23) Are there sectors and/or circumstances in which market entry in the form of «cream-skimming» may be inefficient and contrary to the public interest?

(24) Should the consequences and criteria of solidarity-based financing be clarified at Community level?

Evaluation

(25) How should the evaluation of the performance of services of general interest be organised at Community level? Which institutional arrangements should be chosen?

(26) Which aspects should be covered by Community evaluation processes? What should be the criteria for Community evaluations? Which services of general interest should be included in an evaluation at Community level?

(27) How could citizens be involved in the evaluation? Are there examples of good practice?

(28) How can we improve the quality of data for evaluations? In particular, to what extent should operators be compelled to release data?

Trade Policy

(29) Is there any specific development at European Community internal level that deserves particular attention when dealing with services of general interest in international trade negotiations? Please specify.

Development Co-operation

(30) How can the Community best support and promote investment in the essential services needed in developing countries in the framework of its development co-operation policy?

ANNEX 2: LIST OF CONTRIBUTORS[17]

1 ACFCI - ASSEMBLÉE DES CHAMBRES FRANÇAISES DE COMMERCE ET D'INDUSTRIE

2 AFEC - ASSOCIATION FRANÇAISE D'ÉTUDE DE LA CONCURRENCE

3 AK WASSER IM BUNDESVERBAND BUERGERINITIATIVEN UMWELTSCHUTZ E.V. - BBU

4 AMERICAN CHAMBER OF COMMERCE TO THE EUROPEAN UNION

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6 AMT DER WIENER LANDESREGIERUNG

7 ARBEITERWOHLFAHRT AWO BUNDESVERBAND

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11 ASSEMBLÉE NATIONALE DÉLÉGATION PR L'U.E.

12 ASSOCIACION PAÑOLA DE ABASTECIMIENTOS DE AGUA Y SANEAMIENTO - AEAS - AGA

13 ASSOCIATION DES MAIRES DE GRANDES VILLES DE FRANCE

14 ASSOCIATION DES UTILISATEURS DE TRANSPORTS DE FRET

15 ASSOCIATION EUROPÉENNE DES ELUS DE MONTAGNE - AEM

16 ASSOCIATION EUROPÉENNE DES RADIOS - AER

17 ASSOCIATION FRANÇAISE EUROPARTENAIRES

18 ASSOCIATION INTERNATIONALE DES TECHNICIENS, EXPERTS ET CHERCHEURS AITEC

19 ASSOCIATION OF COMMERCIAL TELEVISION IN EUROPE ACT

20 ASSOCIATION OF EUROPEAN BORDER REGIONS AEBR

21 ASSOCIATION OF EUROPEAN CHAMBERS OF COMMERCE AND INDUSTRY - EUROCHAMBRES

[17] This list includes all contributors who have authorised the publication of their comments

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24 ASSOCIAZIONE INDIPENDENTE DI CONSUMATORI ALTROCONSUMO

25 ASSONIME ASSOCIAZIONE ITALIANA TRA LE SOCIETÀ PER AZIONi

26 AVIS DU FORUM EUROPÉEN DE L'ÉNERGIE ET DES TRANSPORTS SUR LE LIVRE VERT

27 BÄCHLE RICHARD

28 BARBIER MAXIME

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30 BEREICH WASSERWIRTSCHAFT - BGW

31 BERLINGERIO GIANNA ELIZA

32 BNP PARISBAS

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35 BUNDESSEKTION AHS DER ÔSTERREICHISCHEN GEWERKSCHAFT

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39 BUNDESVERBAND INFORMATIONSWIRTSCHAFT TELEKOMMUNIKATION UND NEUE MEDIEN

40 BUNDESVEREINIGUNG DER KOMMUNALEN SPITZENVERBÄNDE

41 BÜROGEMEINSCHAFT DER BADEN-WÜRTTEMBBERGISCHEN, BAYERISCHEN UND SÄCHSISCHEN KOMMUNEN

42 CAISSES NATIONALES FRANÇAISES EN CHARGE DE L'ASSURANCE MALADIE OBLIGATOIRE

43 CARITAS ÖSTERREICH

44 CARITAS VLAANDEREN

45 CBI CONFEDERATION OF BRITISH BUSINESS

46 CEDAG

47 CENTRALE GENERALE DES SERVICES PUBLICS - CGSP

48 CENTRE EUROPÉEN DES ENTREPRISES À PARTICIPATION PUBLIC ET DES ENTREPRISES D’INTÉRÊT ÉCONOMIQUE GÉNÉRAL

49 CENTRE INTERNATIONAL DE RECHERCHES ET D'INFORMATION SUR L'ECONOMIE PUBLIQUE, SOCIALE ET COOPÉRATIVE - CIRIEC

50 CHAMBRE DE COMMERCE ET D'INDUSRIE DE PARIS - CCIP

51 CHARTERED SOCIETY OF PHYSIOTHERAPY

52 CHRISTELIJKE CENTRALE VAN DE OPENBARE DIENSTEN - TRADE UNION OF PUBLIC SERVICE WORKERS - CCOD - CCSP

53 CITTADINANZATTIVA

54 COALITION FOR FAIR COMPETITION IN THE SERVICES MARKET

55 COLLÈGE INTERMUTUALISTE NATIONAL - CIN

56 COMITÉ EUROPÉEN DES ASSURANCES - CEA

57 COMITÉE EUROPÉEN DE LIAISON SUR LES SERVICES D'INTÉRÊT GÉNÉRAL

58 COMMISSION FOR COMMUNICATIONS REGULATION

59 COMMUNAUTÉ URBAINE DE DUNKERQUE

60 COMMUNITY OF EUROPEAN RAILWAYS - CER

61 CONFÉDÉRATION DES ORGANISATIONS FAMILIALES DE L'UNION EUROPÉENNE

62 CONFÉDÉRATION EUROPÉENNE DES DISTRIBUTEURS D'ENERGIE PUBLICS COMMUNAUX - CEDEC

63 CONFÉDÉRATION EUROPÉENNE DES SYNDICATS INDÉPENDANTS

64 CONFÉDÉRATION GÉNÉRALE DU TRAVAIL - CGT

65 CONFÉDÉRATION GÉNÉRALE DU TRAVAIL FORCE OUVRIÈRE

66 CONFEDERATION OF UNIONS FOR ACADEMIC PROFESSIONALS IN FINLAND - AKAVA

67 CONFÉDÉRATION SYNDICALE DES FAMILLES – CSF

68 CONFEDERAZIONE COOPERATIVE ITALIANE

69 CONFÉRENCE DES RÉGIONS PÉRIPHÉRIQUES MARITIMES D'EUROPE

70 CONFÉRENCE DES RÉGIONS ULTRAPÉRIPHÉRIQUES

71 CONFÉRENCE DES VILLES DE L'ARC ATLANTIQUE

72 CONSEIL NATIONAL DE L'INFORMATION GÉOGRAPHIQUE - CNIG

73 CONSEIL NATIONAL DES ASSCOCIATIONS FAMILIALES LAÏQUES

74 CONSOMMATION, LOGEMENT ET CADRE DE VIE - CLCV

75 CONSUMERS' ASSOCIATION

76 CONVENTION OF SCOTTISH LOCAL AUTHORITIES - COSLA

77 COORDINAMENTO TECNICO REGIONI FORMAZIONE PROFESSIONALE E LAVORO - REGIONE CALABRIA

78 COUNCIL OF EUROPEAN MUNICIPALITIES AND REGIONS - CEMR

79 COURIVAUD HENRI

80 DAUDIER CORINNE

81 DEUTSCHE BAHN AG - DB AG

82 DEUTSCHE SOZIALVERSICHERUNG EUROPAVERTRETUNG

83 DEUTSCHE TELEKOM

84 DEUTSCHER BUND VERBANDLICHER WASERWIRTSCHAFT

85 DEUTSCHER FÜHRUNGSKRÂFTEVERBAND

86 DEUTSCHER GEWERKSCHAFTSBUND

87 DEUTSCHER KULTURRAT

88 DEUTSCHER VEREIN FÜR ÖFFENTLICHE UND PRIVATE FÜRSORGE

89 DR PALMER - STAATSMINISTERIUM BADEN-WÜRTTEMBERG

90 ECOLO

91 EDF

92 EMBASSY OF ICELAND

93 EMPOYERS´ CONFEDERATION OF SERVICE INDUSTRIES

94 EPSU - EUROCITIES & CEMR

95 EU-REPRÄSENTANZ DES PARITÄTISCHEN WOHLFAHRTSVERBANDES - GESAMTVERBAND E.V.

96 EUROCADRES - COUNCIL OF EUROPEAN PROFESSIONAL AND MANAGERIAL STAFF

97 EUROCITIES

98 EUROGAS

99 EUROPEAN ASSOCIATION OF PARITARIAN INSTITUTIONS - AEIP

100 EUROPEAN ASSOCIATION OF PHARMACEUTICAL FULL-LINE WHOLESALERS

101 EUROPEAN ASSOCIATION OF SERVICE PROVIDERS FOR PERSONS WITH DISABILITIES - EASPD

102 EUROPEAN BROADCASTING UNION – EBU - UER

103 EUROPEAN COMMUNITY OF CONSUMER CO-OPERATIVES - EUROCOOP

104 EUROPEAN COMPETITIVE TELECOMMUNICATONS ASSOCIATION - ECTA

105 EUROPEAN CONSTRUCTION INDUSTRY FEDERATION - FIEC

106 EUROPEAN CONSUMERS' ORGANISATION

107 EUROPEAN EMERGENCY NUMBER ASSOCIATION - EENA

108 EUROPEAN EXPRESS ASSOCIATION - EEA

109 EUROPEAN FEDERATION FOR DIACONIA - EURODIACONIA

110 EUROPEAN FEDERATION OF WASTE MANAGEMENT AND ENVIRONMENTAL SERVICES

111 EUROPEAN FEDERATIONOF PUBLIC SERVICE UNIONS – EPSU

112 EUROPEAN FIRST CONSULTING - EFC

113 EUROPEAN HEALTH MANAGEMENT ASSOCIATION

114 EUROPEAN INDUSTRY ASSOCIATION UNICE

115 EUROPEAN LIAISON COMMITTEE FOR SOCIAL HOUSING - CECODHAS

116 EUROPEAN METROPOLITAN TRANSPORT AUTHORITIES - EMTA

117 EUROPEAN NEWSPAPER PUBLISHER'S ASSOCIATION

118 EUROPEAN ORGANISATION OF THE FINNISH TRADE UNIONS IN THE PUBLIC SECTORS - FIPSU

119 EUROPEAN PASSENGERS' FEDERATION (EPD) - BOND VAN TREIN-, TRAM- EN BUSGEBREUIKERS (BTTB) VZW

120 EUROPEAN ROUND TABLE OF CHARITABLE SOCIAL WELFARE ASSOCIATIONS - ETWELFARE

121 EUROPEAN SOCIAL ACTION NETWORK - ESAN

122 EUROPEAN SOCIAL, ORGANIOSATIONAL AND SCIENCE CONSULTANCY - ESOSC

123 EUROPEAN TELECOMMUNICATIONS NETWORK OPERATORS - ETNO

124 EUROPEAN TRADE UNION CONFEDERATION - TUC

125 EUROPEAN TRANSPORT WORKERS' FEDERATION

126 EUROPEAN UNION OF CHRISTIAN DEMOCRATIC WORKERS - EUCDW

127 EUROPEAN UNION OF NATIONAL ASSOCIATIONS OF WATER SUPPLIERS AND WASTE WATER SERVICES

128 EUROPEAN VOLUNTEER CENTRE - EVC

129 EURO-SCHULEN-ORGANISATION

130 EVANGELISCHE KIRCHE IN DEUTSCHLANDKOMMISSARIATES - DW-EKD

131 FÉDÉRATION DES CENTRES SOCIAUX ET SOCIOCULTUREL DE FRANCE

132 FÉDÉRATION EUROPÉENNE DES SYNDICATS DES MINES, DE LA CHIMIE ET DE L'ENERGIE

133 FÉDÉRATION EUROPÉENNE DU PERSONNEL DES SERVICES PUBLICS – EUROFEDOP

134 FÉDÉRATION FRANÇAISE DES ENTREPRISES GESIONNAIRES DE SERVICES AUX EQUIPEMENTS À L'ÉNERGIE ET À L'ENVIRONNEMENT - FG3E

135 FÉDÉRATION NATIONALE DE LA MUTUALITÉ FRANÇAISE - FNMF

136 FÉDÉRATION NATIONALE DES COLLECTIVITÉS CONCÉDANTES ET RÉGIES - FNCCR

137 FÉDÉRATION NATIONALE DES MINES ET DE L'ENERGIE CGT

138 FÉDÉRATION NATIONALE DES SOCIÉTÉS COOPÉRATIVES D'HLM - FÉDÉRATION NATIONALE DES SOCIÉTÉS COOPERATIVES D'HABITATIONS À LOYES MODÉRÉS - FNSCHLM

139 FÉDÉRATION NATIONALE DES SOCIÉTÉS D'ECONOMIE MIXTE

140 FEDERATION OF CATHOLIC FAMILY ASSOCIATIONS IN EUROPE FCFAE

141 FEDERATION OF EUROPEAN DIRECT MARKETING - FEDMA

142 FEDERAZIONE ITALIANA PER LA CASA - FEDERCASA

143 FEDERAZIONE NAZIONALE LAVORATORI ENERGIA

144 FERPA

145 FINLANDS KOMMUNFÖRBUND

146 FINNISH CONSUMER AGENCY & OMBUDSMAN

147 FINNISH CONSUMERS' ASSOCIATION

148 FINNISH MINISTRY OF TRADE AND INDUSTRY

149 FORUM DE DELPHES

150 FRANCE TÉLÉCOM

151 FREE AND FAIR POST INITIATIVE - FFPI

152 GAZ DE FRANCE

153 GEW RHEINENERGIE AG

154 GEWERKSCHAFT ÖFFENTLICHER DIENST - GÖD

155 GRAHN SVEN

156 GROUPEMENT DES AUTHORITÉS RESPONSABLES DU TRANSPORT - GART

157 HILSCHER MARIE-ANNA

158 HOHEREN KOMMUNALVERBÄNDE - HKV

159 INDECOSA CGT

160 INITIATIVE POUR DES SERVICES D'UTILITÉ PUBLIQUE EN EUROPE - ISUPE

161 INSTITUT BELGE DES SERVICES POSTAUX ET DES TÉLÉCOMMUNICATIONS

162 INSTITUT FÜR SOZIALDIENSTE

163 INTERNATIONAL COMMUNICATIONS ROUND TABLE ICRT - BELGIUM

164 INTERNATIONAL DEPARTMENT OF THE AUSTRIAN MEDICAL CHAMBER

165 INTERNATIONAL FEDERATION OF INDUSTRIAL ENERGY CONSUMERS

166 IRISH CONGRESS OF TRADE UNIONS

167 ISTITUTO DI ECONOMIA E POLITICA DELL’ENERGIA E DELL’AMBIENTE), UNIVERSITÀ BOCCONI,IEFE

168 KAY BROSE

169 LA POSTE

170 LA RATP

171 LANDES HAUPTSTADT STUTTGART

172 LEIPZIGER VERKEHRSBETRIEBE (LVB) GMBH

173 LIGUE DES DROITS DE L'HOMME ET DE LA FÉDÉRATION INTERNATIONALE DES LIGUES DES DROITS DE L'HOMME FIDH

174 LOCAL GOVERNMENT INTERNATIONAL BUREAU

175 LONDON'S EUROPEAN OFFICE

176 MAJOR METROPOLISES GROUP OF PUBLIC TRANSPORT UNDERTAKINGS

177 MASSIP DANIELLE

178 MEDEF

179 MEDIASET SPA

180 MINISTERIO DOS NEGOCIOS ESTRANGEIROS

181 MINISTRY OF ECONOMIC AND BUSINESS AFFAIRS

182 MINISTRY OF ECONOMY AND FINANCE OF THE HELLENIQUE REPUBLIC

183 MINISTRY OF FOREIGN AFFAIRS

184 MOUVEMENT INTERNATIONAL ATD QUART MONDE

185 MOUVEMENT OUVRIER CHRÉTIEN FLAMAND ACW

186 MUTUELLE GÉNÉRALE DE L'EDUCATION NATIONALE - MGEN

187 MYNARD JACQUES

188 NATIONAL CONSUMER COUNCIL

189 NETHERLANDS IINSTITUTE FOR CARE AND WELFARE

190 NORWEGIAN CONSUMER COUNCIL

191 OBERÖSTERREICHISCHER GEMEINDEBUND

192 OFFICE OF GAZ AND ELECTRICITY MARKETS

193 OFFICE OF WATER SERVICES - OFWAT

194 ÖSTERREICHISCHE APOTHEKERKAMMER

195 ÖSTERREICHISCHE GEWERKSCHAFTSBUND

196 ÖSTERREICHISCHE LEHRERINNEN INITIATIVE - ÖLI-UGÖD

197 ÖSTERREICHISCHER GEMEINDEBUND

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201 PERFORMING ARTS EMPLOYERS ASSOCIATIONS LEAGUE EUROPE - PEARLE

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209 POSTEUROP HEADQUARTERS

210 PUBLIC UTILITIES COMMISSION OF LATVIA

211 RED CROSS/ EU OFFICE

212 REGIONE AUTONOMA FRIULI -VENEZIA GIULIASERVIZIO PER LA PROMOZIONE DELL'INTEGRAZIONE EUROPEA

213 REPRESENTATION PERMANENTE DE L' IRLANDE AUPRES DE L'U.E.

214 REPRESENTATION PERMANENTE DE LA BELGIQUE AUPRES DE L'U.E.

215 REPRÉSENTATION PERMANENTE DE LA FRANCE AUPRES DE L'U.E.

216 ROYAL COLLEGE OF NURSING

217 ROYAL MINISTRY OF TRADE AND INDUSTRY

218 ROYAL NATIONAL INSTITUTE OF THE BLIND - RNIB - NOLAN QUIGLEY

219 RWE AKTIENGESELLSCHAFT

220 S.N.C.F.

221 SABART GILLES

222 SEA PORTS ORGANISATION ESPO

223 SEEBOHM RICHARD

224 SIEMENS-BETRIEBSKRANKENKASSE SV

225 SMO NEUROLOGISCHE REHABILITATION - DR. PETER GIRARDI

226 SOCIAL PROTECTION COMMITTEE - SPC

227 SPD BERLIN

228 SPDE - VÉOLIA - ONDEO SERVICES - SAUR - SOGEDO - ALTEAU - SEFO - SAEDE

229 STÄNDIGE VERTRETUNG DEUTSCHLAND - EU, ABT. WIRTSCHAFT

230 STIB - MIVB

231 STRATHCLYDE PASSENGER TRANSPORT - SPT

232 SUEZ

233 SWEDISH FEDERATION OF COUNTY COUNCILS (SFCC) AND THE SWEDISH ASSOCIATION OF LOCAL AUTHORITIES - SALA

234 TELECOM ITALIA

235 TELEFONICA S.A.

236 THE INSTITUTE OF DIRECTORS

237 UK ASSOCIATION OF ELECTRICITY PRODUCERS

238 UMWELT DACHVERBAND

239 UNABHÄNGIGE BILDUNGSGEWERKSCHAFT

240 UNI-EUROPA

241 UNION DES TRANSPORTS PUBLICS UTP

242 UNION EUROPÉENNE DE L'HOSPITALISATION PRIVÉE

243 UNION INTERNATIONALE DU TRANSPORT PUBLIC - UITP - EUROTEAM

244 UNION NATIONALE DES ASSOCIATIONS FAMILIALES

245 UNION NATIONALE DES SERVICES PUBLICS - UNSPIC

246 UNION OF EMPLOYER'S ASSOCIATION

247 UNION OF PROFESSIONAL ENGINEERS IN FINLAND

248 UNION OF SERVICE AND COMMUNICATION EMPLOYEES - SEKO

249 UNION OF THE ELECTRICITY INDUSTRY EURELECTRIC

250 UNION SOCIALE POUR L'HABITAT

251 UNIVERSIDAD COMPLUTENSE MADRID - JUAN DE LA CRUZ FERRER

252 USINE D'ELECTRICITÉ DE METZ

253 VEOLIA ENVIRONNEMENT

254 VERBAND DER ELEKTRIZITÄTSWIRTSCHAFT

255 VERBAND DER INDUSTRIELLEN ENERGIE- UND KRAFTWIRTSCHAFT E.V. - VIK

256 VERBAND DER PPRIVATKRANKENSANSTALTEN ÖSTERREICHS - UEHP

257 VERBAND DER VERBUNDUNTERNEHMEN UND REGIONALEN ENERGIEVERSORGER IN DEUTSCHLAND - VRE - E.V.

258 VERBAND DEUTSCHER VERKEHRSUNTERNEHMEN - VDV

259 VERBAND KOMMUNALER UNTERNEHMEN E.V. - VKU

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273 ZENTRALVERBAND DES DEUTSCHEN HANDWERKS

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 21.5.2003
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GREEN PAPER

ON SERVICES OF GENERAL INTEREST

(Presented by the Commission)

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INTRODUCTION

1. The European Union is at a turning point in its history. It is preparing itself for an unprecedented wave of enlargement and, at the same time, within the context of the Convention, for a redefinition of its tasks and how its institutions operate under a new constitutional Treaty. It has also launched a development strategy based on the synergy between economic and social reforms with the added dimensions of sustainability and the environment.

2. In this context, *services of general interest* play an increasing role. They are a part of the values shared by all European societies and form an essential element of the European model of society. Their role is essential for increasing quality of life for all citizens and for overcoming social exclusion and isolation. Given their weight in the economy and their importance for the production of other goods and services, the efficiency and quality of these services is a factor for competitiveness and greater cohesion, in particular in terms of attracting investment in less-favoured regions. The efficient and non-discriminatory provision of services of general interest is also a condition for the smooth functioning of the Single Market and for further economic intergration in the European Union. Furthermore, these services are a pillar of European citizenship, forming some of the rights enjoyed by European citizens and providing an opportunity for dialogue with public authorities within the context of good governance.

3. In the perspective of the accession of the new Member States, the guarantee of efficient and high-quality services of general interest and in particular the development of the network industries and their interconnection are essential to facilitate integration, to increase citizens' well-being and to help individuals to make effective use of their fundamental rights. Also, several new Member States have over the last decade gone through the transition towards a market economy and their citizens must be assured as to the importance the Union attaches to everyone's access to services of general interest.

4. Services of general interest are at the core of the political debate. Indeed, they touch on the central question of the role public authorities play in a market economy, in ensuring, on the one hand, the smooth functioning of the market and compliance with the rules of the game by all actors and, on the other hand, safeguarding the general interest, in particular the satisfaction of citizens' essential needs and the preservation of public goods where the market fails.

5. In the early years of the Communities, the objective of economic integration led to concentrating efforts on the removal of barriers to trade between Member States. In particular, since the second half of the 1980s a number of sectors in which mainly, or at least also, services of general economic interest are provided,have gradually been opened up to competition. This has been the case with telecommunications, postal services, transport and energy. Liberalisation stimulated the modernisation, interconnection and integration of these sectors. It increased the number of competitors and led to price reductions, especially in those sectors and countries that liberalised earlier. Although there is as yet insufficient evidence to assess the long-term impact of the opening to competition of services of general interest, there is, based on the available information, no evidence supporting the thesis that liberalisation has had a negative impact on their overall performance, at least as far

as affordability and the provision of universal service are concerned. The Community has always promoted "controlled" liberalisation, i.e. gradual opening-up of the market accompanied by measures to protect the general interest, in particular through the concept of universal service to guarantee access for everyone, whatever the economic, social or geographical situation, to a service of a specified quality at an affordable price. In this context, it has given special attention to ensuring adequate standards for cross-border services that cannot be adequately regulated only at national level.

6. Initial fears that market opening would have a negative impact on employment levels or on the provision of services of general economic interest have so far proved unfounded. Market opening has generally made services more affordable. For consumers in the lowest income brackets, for example, the percentage of personal income needed to buy a standard basket of telephone calls or a standard volume of electricity consumption has fallen in most Member States between 1996 and 2002. The impact of market opening on net employment has also been broadly positive. Job losses, particularly amongst former monopolies, have been more than compensated for by the creation of new jobs thanks to market growth. Overall, the liberalisation of the network industries is estimated to have led to the creation of nearly one million jobs across the European Union[1].

7. In spite of these results, certain misapprehensions have been expressed after the first steps towards liberalisation. The Commission has repeatedly tried to clarify the relevant Community policies. In a first horizontal communication of 1996,[2] it explained the interplay for the citizens' benefit between Community measures in the areas of competition and free circulation and public service tasks. This communication also suggests adding the promotion of services of general interest to the objectives of the Treaty. It was updated in 2000[3] with a view to increasing the legal certainty for operators as regards the application of competition and internal market rules to their activities. In 2001, these two communications were complemented by a Report to the Laeken European Council[4]. This report responds to concerns with regard to the economic viability of operators entrusted with public service tasks. It highlights the guarantees offered by Article 86 (2) of the Treaty,[5] Community action and the responsibility of the Member States, in particular as regards the definition of public service obligations. In addition, the Commission has made efforts to better assess the performance of the industries providing services of general interest by carrying out sectoral and horizontal evaluations.

8. In the meantime, the debate has evolved and its emphasis has shifted. The Treaty of Amsterdam recognises the place of services of general economic interest among the

[1] The Internal Market – Ten Years without Frontiers, SEC(2002) 1417, 7.1.2003

[2] «Services of general interest in Europe», OJ C 281, 26.9.1996, p.3

[3] «Services of general interest in Europe», OJ C 17, 19.1.2001, p.4

[4] COM(2001) 598 final, 17.10.2001

[5] Article 86 (2) provides: «*Undertakings entrusted with the operation of services of general economic interest ... shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community*»

shared values of the Union[6]. It also assigns the Community and the Member States, «each within their respective powers», responsibility for the smooth functioning of these services. In the "Protocol on the system of public broadcasting" it highlights that public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism. In addition, the Union recognises and secures citizens' right of access to services of general economic interest in the Charter of Fundamental Rights[7]. These new provisions are important elements in the development of the process of European integration: from the economic sphere towards broader issues relating to the European model of society, to the concept of European citizenship and to the relations between every individual in the Union and the public authorities. They also raise the question of the means for their effective implementation. The Commission believes that these questions deserve a broader and more structured debate. Naturally, this debate will take into account and be inspired by work in progress – regarding, for example, the Union's values and objectives, the question of competencies or the principles of subsidiarity and proportionality - within the European Convention and in the forthcoming intergovernmental conference.

9. The uncertainties and concerns of citizens remain in evidence and require a response. The European Parliament suggested the Commission should present a proposal for a framework directive on services of general interest and the Council also asked the Commission to look into this question[8].

10. The reality of services of general interest which include services of both general economic and non-economic interest, is complex and constantly evolving. It covers a broad range of different types of activities, from certain activities in the big network industries (energy, postal services, transport, and telecommunications) to health, education and social services, of different dimensions, from European or even global to purely local, and of different natures, market or non-market. The organisation of these services varies according to cultural traditions, the history and geographical conditions of each Member State and the characteristics of the activity concerned, in particular technological development.

11. The European Union respects this diversity and the roles of national, regional and local authorities in ensuring the well-being of their citizens and in guaranteeing democratic choices regarding, among other things, the level of service quality. This diversity explains the various degrees of Community action and the use of different instruments. The Union also has its own role to play as part of its exclusive

[6] The Treaty provides in its Article 16 : «*Without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions*»

[7] Article 36 of the Charter provides: «*The Union recognises and respects access to services of general economic interest as provided for in national law and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union*»

[8] See also the Presidency conclusions of the Barcelona European Council, 15 and 16 March 2002, para. 42 and of the Brussels European Council, 20 and 21 March 2003, para. 26

competencies. Moreover, throughout the European Union services of general interest raise a number of questions and issues that are common to different services and different competent authorities.

12. The debate that this Green Paper intends to launch raises questions with regard to

- the scope of possible Community action that implements the Treaty in full respect of the principle of subsidiarity,
- the principles that could be included in a possible framework directive or another general instrument concerning services of general interest and the added value of such an instrument,
- the definition of good governance in the area of organisation, regulation, financing and evaluation of services of general interest in order to ensure greater competitiveness of the economy and efficient and equitable access of all persons to high-quality services that are satisfying their needs,
- any measures that could contribute to increasing legal certainty and to ensuring a coherent and harmonious link between the objective of maintaining high-quality services of general interest and rigorous application of competition and internal market rules.

13. The Green Paper consists of five main parts plus an introduction and an operational conclusion. The first part outlines the background, the second part discusses the scope of Community action in the area of services of general interest, the third part provides a number of elements for a possible common concept of services of general economic interest, on the basis of existing sector-specific legislation, the fourth part looks at issues related to the way services of general interest are organised, financed and evaluated, and the fifth part addresses the international dimension of services of general interest. The Green Paper is accompanied by an annex which sets out public service obligations in more detail, as derived from existing sector-specific legislation and the policy instruments available to ensure compliance with these obligations.

14. The Green Paper raises a number of questions on which the Commission seeks comments from interested parties. A summary table of all the questions is attached to this document.

1. BACKGROUND

1.1. Definitions and terminology

15. Terminological differences, semantic confusion and different traditions in the Member States have led to many misunderstandings in the discussion at European level. In the Member States different terms and definitions are used in the context of services of general interest, thus reflecting different historical, economic, cultural and political developments. Community terminology tries to take account of these differences.

16. The term «*services of general interest*» cannot be found in the Treaty itself. It is derived in Community practice from the term «services of general economic interest», which is used in the Treaty. It is broader than the term «services of general

economic interest» and covers both market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations.

17. The term «*services of general economic interest*» is used in Articles 16 and 86(2) of the Treaty. It is not defined in the Treaty or in secondary legislation. However, in Community practice there is broad agreement that the term refers to services of an economic nature which the Member States or the Community subject to specific public service obligations by virtue of a general interest criterion. The concept of services of general economic interest thus covers in particular certain services provided by the big network industries such as transport, postal services, energy and communications. However, the term also extends to any other economic activity subject to public service obligations.

18. The Green Paper focuses mainly, but not exclusively, on issues related to «services of general economic interest», as the Treaty itself focuses mainly on economic activities. The term «services of general interest» is used in the Green Paper only where the text also refers to non-economic services or where it is not necessary to specify the economic or non-economic nature of the services concerned.

19. The terms «service of general interest» and «service of general economic interest» must not be confused with the term «*public service*». This term is less precise. It can have different meanings and can therefore lead to confusion. The term sometimes refers to the fact that a service is offered to the general public, it sometimes highlights that a service has been assigned a specific role in the public interest, and it sometimes refers to the ownership or status of the entity providing the service[9] Therefore, this term will not be used in this Green Paper.

20. The term «*public service obligations*» is used in this Green Paper. It refers to specific requirements that are imposed by public authorities on the provider of the service in order to ensure that certain public interest objectives are met, for instance, in the matter of air, rail and road transport and energy. These obligations can be applied at Community, national or regional level.

21. The term «*public undertaking*» is normally also used to define the ownership of the service provider. The Treaty provides for strict neutrality. It is irrelevant under Community law whether providers of services of general interest are public or private; they are subject to the same rights and obligations.

1.2. An evolving and crucial role for public authorities

22. The market usually ensures optimum allocation of resources for the benefit of society at large. However, some services of general interest are not fully satisfied by markets alone because their market price is too high for consumers with low purchasing power or because the cost of providing these services could not be covered by market price. Therefore, it has always been the core responsibility of public authorities to ensure that such basic collective and qualitative needs are satisfied and that services

[9] There is often confusion between the term «public service» and the term «public sector». The term «public sector» covers all public administrations together with all enterprises controlled by public authorities

of general interest are preserved wherever market forces cannot achieve this. To date, the crucial importance of this responsibility has not changed.

23. However, what has changed is the way in which public authorities fulfil their obligations towards the citizens. Indeed, the role of public authorities in the context of services of general interest is constantly adapting to economic, technological and social developments. In Europe, a number of services of general interest have traditionally been provided by public authorities themselves. Nowadays, public authorities increasingly entrust the provision of such services to public or private undertakings or to public-private partnerships (PPPs)[10] and limit themselves to defining public objectives, monitoring, regulating and, where necessary, financing those services.

24. This development should not mean that public authorities renounce their responsibility to ensure that objectives of general interest are implemented. By means of appropriate regulatory instruments public authorities should have the capability to shape national, regional or local policies in the area of services of general interest and to ensure their implementation. However, this development from self-provision towards the provision through separate entities has made the organisation, the cost and financing of these services more transparent. This is reflected in a broader debate and in stronger democratic control of the ways in which services of general interest are provided and financed. This increased transparency also reduces the possibility to use financing mechanisms to limit competition on these markets.

25. In the European Union, the creation of the internal market has accelerated this process. At the same time, the changing role of public authorities regarding the provision of services of general interest has also influenced the development of Community policies.

26. The process of European integration has never called into question the primary responsibility or the capability of public authorities for making the necessary political choices regarding the regulation of market activities. The Commission intends to reaffirm this responsibility by stimulating a European debate on the political choices to be made concerning services of general interest at European level. The results of this debate will form the basis for future Community policies in this field.

2. THE SCOPE OF COMMUNITY ACTION

27. As regards the scope of Community action, three main issues are addressed in this section:

[10] The Commission intends to publish a Green Paper on public procurement and Public-Private-Partnerships in the second semester of 2003. In its Communication “Developing the trans-European transport network: innovative funding solutions and interoperability of electronic toll collection systems”, COM(2003) 132final, 23.4.2003, the Commission examined PPPs in the light of the need to find funding solutions for the development of the transport network

- How, in the light of the principle of subsidiarity, should responsibilities in the area of services of general interest be shared between the Community and the Member States, including regional and local administrations?

- Should Community action be based on an essentially sector-specific approach or should a general framework be created?

- How is the scope of Community action affected by the distinction between economic and non-economic services?

2.1. What kind of subsidiarity?

28. In the area of services of general interest the division of tasks and powers between the Community and the Member States is complex and sometimes leads to misapprehension and frustration on the part of consumers, users and operators.

29. The Treaty does not mention the functioning of services of general interest as a Community objective and does not assign specific positive powers to the Community in the area of services of general interest. To date, except for a sector-specific reference in the title on transport,[11] these services are referred to in two provisions of the Treaty:

- Article 16 confers responsibility upon the Community and the Member States to ensure, each within their respective sphere of competencies, that their policies enable services of general economic interest to fulfil their missions. It spells out a principle of the Treaty although it does not provide the Community with specific means of action.

- Article 86(2) implicitly recognises the right of the Member States to assign specific public service obligations to economic operators. It sets out a fundamental principle ensuring that services of general economic interest can continue to be provided and developed in the common market. Providers of services of general interest are exempted from application of the Treaty rules only to the extent that this is strictly necessary to allow them to fulfil their general interest mission. Therefore, in the event of conflict, the fulfilment of a public service mission can effectively prevail over the application of Community rules, including internal market and competition rules, subject to the conditions foreseen in Article 86 (2)[12]. Thus, the Treaty protects the effective performance of a general interest task but not necessarily the provider as such.

30. Furthermore, according to the Charter of Fundamental Rights of the European Union, the Union recognises and respects access to services of general economic interest, in order to promote the social and territorial cohesion of the Union.[13]

31. It is primarily for the competent national, regional and local authorities to define, organise, finance and monitor services of general interest. The Community for its

[11] See Article 73 of the Treaty

[12] In its Communcation on Services of general interest in Europe of 2000 the Commission explained the three principles that underlie the application of this provisions, i.e. the principles of neutrality, freedom to define and proportionality

[13] See Article 36 of the Charter of Fundamental Rights

part has competencies in areas that are also relevant for services of general interest, such as: the internal market, competition and State aid, free movement, social policy, transport, environment, health, consumer policy, trans-European networks, industry, economic and social cohesion, research, trade and development co-operation, and taxation. The competencies and responsibilities conferred by the Treaty provide the Community with a whole range of means of action to ensure that every person in the European Union has access to high-quality services of general interest.

Services of general interest linked to the function of welfare and social protection are clearly a matter of national, regional and local responsibilities. Nevertheless, there is a recognised role for the Community in promoting co-operation and co-ordination in these areas. A particular concern for the Commission is promoting the co-operation by Member States in matters related to the modernisation of social protection systems.

32. Three categories of services of general interest can be distinguished as regards the need and intensity of Community action and the role of the Member States:

(1) Services of general economic interest provided by large network industries

Since the 1980s the Community has pursued the gradual opening of the markets for large network industries such as telecommunications, postal services, electricity, gas and transport in which services of general economic interest can be provided. At the same time, the Community has adopted a comprehensive regulatory framework for these services which specifies public service obligations at European level and includes aspects such as universal service, consumer and user rights and health and safety concerns. These industries have a clear Community-wide dimension and present a strong case for developing a concept of European general interest. This is also recognised in Title XV of the Treaty, which gives the Community specific responsibility for trans-European networks in the areas of transport, telecommunications and energy infrastructure, with the dual objective of improving the smooth functioning of the internal market and strengthening social and economic cohesion.

(2) Other services of general economic interest

Other services of general economic interest, such as waste management, water supply or public service broadcasting, are not subject to a comprehensive regulatory regime at Community level. In general, the provision and organisation of these services are subject to internal market, competition and State aid rules provided that these services can affect trade between Member States. In addition, specific Community rules, such as environmental legislation, may apply to certain aspects of the provision of these services.

For the disposal of waste (e.g. landfill), for example, provisions in Community waste legislation establish the "principle of proximity"[14]. According to this principle, waste should be disposed of as near as possible to the place it was generated.

[14] See in particular Council Directive 75/442/EEC on waste, OJ L 194, 25.7.1975, p. 47, and Council Regulation (EEC) 259/93 on shipment of waste, OJ L 30, 6.2.1993, p. 1

As regards television broadcasting, the regulatory regime is co-ordinated at Community level by the "Television without Frontiers Directive",[15] in particular in respect of events of major importance for society, promotion of European works and independent production, advertising and protection of minors. Because of the importance of public service broadcasting for the democratic, social and cultural needs of each society a specific Protocol on the systems of public broadcasting in the Member States has been annexed to the Amsterdam Treaty. In its communication on "Principles and guidelines for the Community's audio-visual policy in the digital age"[16], the Commission sets out regulatory principles concerning public service broadcasting. The Commission has further explained its approach in a Communication of 17 October 2001 on the application of the state aid rules to public service broadcasting[17]. It takes into account in particular the fact that the audio-visual landscape in the European Community is characterised by a dual system comprising public and private broadcasters.

(3) Non-economic services and services without effect on trade

Services of general interest of a non-economic nature and services without effect on trade between Member States are not subject to specific Community rules, nor are they covered by the internal market, competition and State aid rules of the Treaty. However, they are covered by those Community rules that also apply to non-economic activities and to activities that have no effect on intra-Community trade, such as the basic principle of non-discrimination.

33. Thus, the Community has developed a policy on services of general interest based on various degrees of action and on the use of different instruments. However, on the one hand, the creation of a sector-specific framework at Community level does not in itself guarantee that every individual has access to efficient and high-quality services throughout the European Union. It is up to the competent authorities in the Member States to specify and complement the Community rules on public service obligations and to monitor their implementation. On the other hand, the Commission can take specific direct measures to enforce Community rules in the areas of competition and State aid. This could give the impression of an imbalance in Community action that could ultimately affect its credibility.

34. Community legislation on network industries has taken account of the importance of public administrations of the Member States in the implementation of legislation in the area of services of general interest by requiring the creation of independent regulatory authorities. Community legislation leaves the detailed institutional

[15] Council Directive 89/552/EEC of 9 October 1989 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 298, 17.10.1989, p.23

[16] COM(1999) 657, 14.12.1999

[17] OJ C 320, 15.11.2001, p. 5. In this Communication, the Commission recognises the particular role of public service broadcasting in the promotion of democratic, social and cultural needs of each society, as acknowledged by the Protocol to the Amsterdam Treaty. Member States are competent for the definition and choice of funding of the public service and are free to define as public service remit a braod programme spectrum that may include, for instance, entertainment and sports events. The Commission retains a duty to check for abusive practices and absence of overcompensation according to the specific criteria laid down in the Communication

arrangements regarding the regulatory authority to the discretion of Member States. It can thus be an existing body or the Ministry responsible for the sector, a solution adopted by a limited number of Member States. This solution has proven to be problematic in terms of the independence of the national regulatory authority in some instances where Member States also retain ownership or control over companies active in the sector concerned. The importance and ongoing, complex and evolving nature of the regulatory tasks involved often requires the expertise and independence of a sector-specific regulatory body[18]. Such a regulator is important to complement the action of competition authorities in terms of objectives, sectoral expertise, and timing and continuity of the intervention. In particular, specific regulatory bodies have a major role to play to ensure the provision of services of general interest, to put in place the conditions for fair competition, to prevent disruptions of service or supply, and to ensure an adequate level of consumer protection. Nearly all Member States have set up such a body for the sectors concerned. However, even where a sector-specific regulatory authority exists, the government – i.e. the competent Ministry – often retains responsibility for certain regulatory decisions.

35. Furthermore, Community legislation and practice encourages co-operation and exchanges of best practice among regulatory authorities in the Member States and between them and the Commission. Whilst the creation of national regulatory authorities is to a large extent a reality, the creation of European regulators for services of general interest or the deepening of co-operation between regulators of each Member State (e.g. structured networks) has not yet been widely discussed and could raise questions. Among the objectives are the necessity to obtain a degree of consistency of national regulatory approaches to avoid distortions stemming from different approaches that could have an impact on the good functioning of the internal market as well as the need to improve the operation of these services.

36. The following questions are submitted for discussion:

(1) Should the development of high-quality services of general interest be included in the objectives of the Community? Should the Community be given additional legal powers in the area of services of general economic and non-economic interest?

(2) Is there a need for clarifying how responsibilities are shared between the Community level and administrations in the Member States? Is there a need for clarifying the concept of services without effect on trade between Member States? If so, how should this be done?

(3) Are there services (other than the large network industries mentioned in para. 32) for which a Community regulatory framework should be established?

(4) Should the institutional framework be improved? How could this be done? What should be the respective roles of competition and regulatory authorities? Is there a case for a European regulator for each regulated industry or for Europe-wide structured networks of national regulators?

[18] A definition of a sector-specific regulatory authority is contained in Commission Decision 2002/627/EC of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services, OJ L 200/38, 30.7.2002: «*For the purpose of this Decision: 'relevant national regulatory authority' means the public authority established in each Member State to oversee the day-to-day interpretation and application of the provisions of the Directives relating to electronic communications networks and services as defined in the Framework Directive*»

2.2. Sector-specific legislation and general legal framework

37. Up to now, the Community has adopted legislation on services of general interest on a sectoral basis. Thus, a comprehensive body of sector-specific legislation has been developed for different network industries such as electronic communications, postal services, gas and electricity, and transport, in which services of general economic interest can be provided. In the light of the experience gained, the question was raised whether a common European framework should be developed in order to ensure coherent implementation of the principles underlying Article 16 of the Treaty at Community level. In this context, the Commission made a commitment to the Laeken European Council to find the best instrument to ensure the development of high-quality services of general interest in the European Union, in strict coherence with all Community policies.

38. A general instrument could set out, clarify and consolidate the objectives and principles common to all or several types of services of general interest in fields of Community competence. Such an instrument could provide the basis for further sectoral legislation, which could implement the objectives set out in the framework instrument, thus simplifying and consolidating the internal market in this field.

39. Consolidation of the Community "*acquis*" could be based on common elements of existing sector-specific legislation and would help to ensure overall consistency of approach across different services of general interest sectors. It could also have important symbolic value in that it would clearly demonstrate the Community's approach as well as the existence of a Community concept of services of general interest. Furthermore, consolidation could help the new Member States to develop their regulatory strategies in this area.

40. However, such an approach would also have its limitations in that a framework instrument setting out common objectives and principles would be general in nature, as it would have to be based on the common denominator of different services with very different characteristics. If current levels of protection were to be maintained, it would still have to be complemented by sector-specific legislation laying down more detailed provisions which take into account the specific characteristics of different services of general interest. Moreover, Article 16 does not provide a legal base for the adoption of a specific instrument. Other Treaty provisions could serve as a legal basis, depending on the content of the instrument. For example, Article 95 could be used, but a framework instrument based on this provision would have to be limited to services of general *economic* interest having an effect on intra-Community trade. This would mean that many important sectors would be excluded from the scope of the instrument because of their non-economic nature or because of their limited effect on trade. If Community legislation such sectors is considered desirable, an amendment of the Treaty might be the best way of providing an appropriate legal basis.

41. As regards its legal form, consolidation of common objectives and principles could be set out in a legislative instrument (i.e. in a directive or in a regulation) or in a non-legislative instrument (recommendation, communication, guidelines, inter-institutional agreement). Apart from their different legal effects, the various

instruments also differ from the point of view of the degree of involvement of the different Community institutions in the adoption procedure[19].

42. The following questions are submitted for discussion:

(5) Is a general Community framework for services of general interest desirable? What would be its added value compared to existing sectoral legislation? Which sectors and which issues and rights should be covered? Which instrument should be used (e.g. directive, regulation, recommendation, communication, guidelines, inter-institutional agreement)?

(6) What has been the impact of sector-specific regulation so far? Has it led to any incoherence?

2.3. ECONOMIC AND NON-ECONOMIC SERVICES

43. The distinction between services of an economic nature and services of a non-economic nature is important because they are not subject to the same rules of the Treaty. For instance, provisions such as the principle of non-discrimination and the principle of free movement of persons apply with regard to the access to all kind of services. The public procurement rules apply to the goods, services or works acquired by public entities with a view to providing both services of economic and non-economic nature. However, the freedom to provide services, the right of establishment, the competition and State aid rules of the Treaty only apply to economic activities. Also, Article 16 of the Treaty and Article 36 of the Charter of Fundamental Rights refer only to services of general *economic* interest.

44. As regards the distinction between services of an economic nature and services of a non-economic nature, any activity consisting in offering goods and services on a given market is an economic activity[20]. Thus, economic and non-economic services can co-exist within the same sector and sometimes even be provided by the same organisation. Furthermore, while there may be no market for the provision of particular services to the public, there may nevertheless be an upstream market where undertakings contract with the public authorities to provide these services. The internal market, competition and state aid rules apply to such upstream markets.

45. The range of services that can be provided on a given market is subject to technological, economic and societal change and has evolved over time. As a consequence, the distinction between economic and non-economic activities has been dynamic and evolving, and in recent decades more and more activities have become of economic relevance. For an increasing number of services, this distinction has become blurred. In its Communication of 2000, the Commission set out a number of examples of non-economic activities[21]. These examples concern in particular matters which are intrinsically prerogatives of the State, services such as

[19] In this context it should be noted that the Union's legal instruments are the subject of discussions within the European Convention. Indeed, Articles 24 to 28 of the Preliminary Draft Constitutional Treaty set out the proposed range of legal instruments

[20] Judgment of the Court of Justice in joint cases C-180-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451

[21] OJ C 17, 19.1.2001, p. 4 (Nos 28-30)

national education and compulsory basic social security schemes, and a number of activities conducted by organisations performing largely social functions, which are not meant to engage in industrial or commercial activity. Given that the distinction is not static in time, the Commission stressed in its Report to the Laeken European Council that it would neither be feasible nor desirable to provide a definitive *a priori* list of all services of general interest that are to be considered «non-economic»[22].

46. Although the evolving and dynamic character of this distinction has not created problems in Commission practice so far, it has raised concerns, in particular among providers of non-economic services who ask for more legal certainty regarding their regulatory environment.

47. Furthermore, the future of non-economic services of general interest, whether they are related to prerogatives of the State or linked to such sensitive sectors as culture, education, health or social services, raises issues on a European scale, such as the content of the European model of society. The active role of charities, voluntary organisations and humanitarian organisations explains in part the importance that European citizens attach to these issues.

48. The following questions are submitted for discussion:

(7) Is it necessary to further specify the criteria used to determine whether a service is of an economic or a non-economic nature? Should the situation of non-for-profit organisations and of organisations performing largely social functions be further clarified?

(8) What should be the Community's role regarding non-economic services of general interest?

3. TOWARDS A COMMUNITY CONCEPT OF SERVICES OF GENERAL INTEREST?

49. It is probably neither desirable nor possible to develop a single comprehensive European definition of the content of services of general interest. However, existing Community legislation on services of general economic interest contains a number of common elements that can be drawn on to define a useful Community concept of services of general economic interest. These elements include in particular: universal service, continuity, quality of service, affordability, as well as user and consumer protection. These common elements identify Community values and goals. They have been transposed into obligations in the respective legislations and aim to ensure objectives such as economic efficiency, social or territorial cohesion and safety and security for all citizens. They can also be complemented by more specific obligations depending on the characteristics of the sector concerned. Developed in particular for certain network industries they could also be relevant for social services.

[22] COM(2001)598, 17.10.2001 (No 30)

3.1. A common set of obligations

3.1.1 Universal service

50. The concept of universal service refers to a set of general interest requirements ensuring that certain services are made available at a specified quality to all consumers and users throughout the territory of a Member State, independently of geographical location, and, in the light of specific national conditions, at an affordable price[23]. It has been developed specifically for some of the network industries (e.g. telecommunications, electricity, and postal services). The concept establishes the right for every citizen to access certain services considered as essential and imposes obligations on industries to provide a defined service at specified conditions, including complete territorial coverage. In a liberalised market environment, a universal service obligation guarantees that everybody has access to the service at an affordable price and that the service quality is maintained and, where necessary, improved.

51. Universal service is a dynamic concept. It ensures that general interest requirements can take account of political, social, economic and technological developments and it allows these requirements, where necessary, to be regularly adjusted to the citizens' evolving needs.

52. It is also a flexible concept that is fully compatible with the principle of subsidiarity. Where the basic principles of universal service are defined at Community level, the implementation of these principles can be left to the Member States, thus allowing different traditions and specific national or regional circumstances to be taken into account. Furthermore, the concept of universal service can apply to different market structures and can therefore be used to regulate services in different stages of liberalisation and market opening.

53. During the last two decades, the concept of universal service has developed into a major and indispensable pillar of the Community's policy on services of general economic interest. It has allowed public interest requirements to be addressed in various domains, such as economic efficiency, technological progress, environmental protection, transparency and accountability, consumer rights and specific measures regarding disability, age or education. The concept has also contributed to reducing the levels of disparity in living conditions and opportunities in the Member States.

54. Implementation of the principle of universal service is a complex and demanding task for national regulators which in many cases have only been recently created and whose experience is therefore necessarily still limited. At Community level, rights of access to services are defined in different directives, but the Community institutions alone cannot ensure that these rights are fully granted in practice. There is a risk that these rights as set out in Community legislation remain theoretical, even where they are formally transposed in national legislation.

[23] Cf. Article 3(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108, 24.4.2002, p. 51

3.1.2 Continuity

55. A number of services of general interest are characterised by a continuity requirement, i.e. the provider of the service is obliged to ensure that the service is provided without interruption. As regards some services, uninterrupted provision may already be in the commercial interest of the provider and it might therefore not be necessary to impose a legal continuity requirement on the operator. At national level, the continuity requirement needs to be reconciled with the employees' right to strike and with the requirement to respect the rule of law.

56. The requirement of ensuring a continuous service is not consistently addressed in sector-specific Community legislation. In some cases, sector-specific Community legislation explicitly sets out a continuity obligation[24]. In other cases, sector-specific regulation does not contain a continuity requirement, but it explicitly authorises Member States to impose such an obligation on service providers[25].

3.1.3 Quality of service

57. The definition, monitoring and enforcement of quality requirements by public authorities have become key elements in the regulation of services of general interest.

58. In the sectors that have been liberalised the Community did not rely on market forces alone to maintain and develop the quality of services. Whilst in general it is for the Member States to define quality levels for services of general interest, in some cases, quality standards are defined in Community legislation. They include, for instance, safety regulations, the correctness and transparency of billing, territorial coverage, and protection against disconnection. In other cases, Member States are authorised or required to set quality standards. Furthermore, in some cases Member States are required to monitor and enforce compliance with quality standards and to ensure publication of information on quality standards and actual performance by operators. The most developed regulation of quality at Community level can be found in the legislation on postal services and on electronic communications services.

59. In addition, the Commission has developed non-regulatory measures to promote quality in services of general economic interest – including financial instruments, voluntary European standards, and exchanges of good practice. For instance, in the

[24] For instance, Article 3(1) of the postal directive (97/67/EC) obliges Member States to "*ensure the permanent provision of a postal service*." Cf. Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ L 15 , 21.1.1998, p. 14

[25] Article 3(2) of the electricity directive provides that "*Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including ... regularity... of supplies... . Such obligations must be clearly defined, transparent, non-discriminatory and verifiable; they, and any revision thereof, shall be published and notified to the Commission by Member States without delay.*" Cf. Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJ L 27, 30.1.1997, p. 20

electricity and gas sectors, the Community promotes voluntary co-operation between regulators.

3.1.4. *Affordability*

60. The concept of affordability was developed in the context of the regulation of telecommunications services. Subsequently, it was also introduced into the regulation of postal services.[26] It requires a service of general economic interest to be offered at an affordable price in order to be accessible for everybody. Application of the principle of affordability helps to achieve economic and social cohesion within the Member States.

61. The sector-specific legislation in place does not specify the criteria for determining affordable prices. These criteria must be defined by the Member States. Relevant criteria could be linked, for example, to the penetration rate or to the price of a basket of basic services related to the disposable income of specific categories of customers. Particular attention should be paid to the needs and capacities of vulnerable and marginalised groups. Finally, once an affordable level has been set, the Member States should ensure that this level is effectively offered, by putting in place a price control mechanism (price cap, geographical averaging) and/or by distributing subsidies to the persons concerned.

3.1.5. *User and consumer protection*

62. In services of general interest, horizontal consumer protection rules apply as they do in other sectors of the economy. In addition, because of the particular economic and social importance of these services, specific measures have been adopted in sectoral Community legislation to address the specific concerns and needs of consumers and businesses, including their right to have access to high-quality international services[27]. Consumer and user rights are set out in sector-specific legislation on electronic communications, postal services, energy (electricity, gas), transport and broadcasting. The Commission's consumer policy strategy 2002-2006[28] has identified services of general interest as one of the policy areas where action is needed to ensure a high common level of consumer protection.

63. The Commission Communication on services of general interest of September 2000[29] sets out a number of principles that can help to define consumers' and users' requirements for those services. These principles include good quality of service, high levels of health protection and physical safety of services, transparency (e.g. on tariffs, contracts, choice and financing of providers), choice of service, choice of supplier, effective competition between suppliers, existence of regulatory bodies, availability of redress mechanisms, representation and active participation of consumers and users in the definition and evaluation of services and choice of forms of payment. The Communication highlighted that a guarantee of universal access, continuity, high quality and affordability constitute key elements of a consumer

[26] In the context of the proposed amendment of the electricity and gas directive the broader concept of "reasonable pricing" is being dicussed

[27] For example, in air transport, this includes measures against over-booking and a compensation scheme for denied boarding

[28] COM(2002) 208; OJ C 137, 8.6.2002, p. 2

[29] OJ C 17, 19.1.2001, p. 4

policy in the area of services of general economic interest. It also stressed the need to address citizens' concerns that are of a wider nature, such as a high level of environment protection, specific needs of certain categories of the population, such as the handicapped and those on low incomes and complete territorial coverage of essential services in remote or inaccessible areas.

64. The following questions are submitted for discussion:

(9) Are there other requirements that should be included in a common concept of services of general interest? How effective are the existing requirements in terms of achieving the objectives of social and territorial cohesion?

(10) Should all or some of these requirements be extended to services to which they currently do not apply?

(11) What aspects of the regulation of these requirements should be dealt with at Community level and which aspects left to the Member States?

(12) Have these requirements been effectively implemented in the areas where they apply?

(13) Should some or all of these requirements also be applied to services of general interest of a non-economic nature?

3.2. Further specific obligations

65. A number of sector-specific related obligations that are in the general interest could add to a common set of public service obligations. These obligations include safety and security, security of supply, network access and interconnectivity, and media pluralism.

66. Safety and Security

In a world that is rapidly and dramatically changing, citizens in the European Union need to feel, and be, safe and secure. This is becoming increasingly important following a number of events. In particular after 11 September 2001, safety and security has even come on stage as a priority for Europe as a whole. Various other events have recently underlined this concern.[30] One of the basics of the European model of society is therefore security and safety.

Safety and security refer to a common set of objectives that exist in almost all Member States. Notably, the idea is to prevent prejudices to or attacks against society. They can take on different forms. Typically, these objectives have been pursued in Europe by means of services of general interest. Traditionally they have been carried out under the umbrella of the State and without always pursuing commercial objectives.

Lately, the Commission is committed to increasing the level of security as well as adopting a more European approach in certain fields, for instance in transport and

[30] Sinking of the Petrol vessel "Prestige" and the recent SARS

energy. It is worth mentioning the Commission’s Communication on “*the repercussions of the terrorist attacks in the United States or the air transport industry*”[31], its proposals after the various major maritime accidents along the European coasts[32] or the recent nuclear package towards a Community approach to nuclear safety[33]. These texts underline various objectives to be pursued by Europe as a whole. Major impetus has been given and the levels of safety and security should thus be increased. The reasons for this new approach are widespread and various. For example, problems usually exceed national frontiers, international conventions and rules do not usually have binding force, and Member States are sometimes confronted with the limitations imposed by Community rules.

67. *Security of supply*

A high level of service quality implies that a sustainable provision of the services is ensured in the long term. In general, the development of the internal market has generated a considerable increase in the level of security of supply of products and services, to the extent that the markets concerned are functioning competitively. However, in some cases of services of general interest public intervention may be necessary to improve the security of supply, in particular in order address the risk of long-term underinvestment in infrastructure and to guarantee the availability of sufficient capacity.

68. In the energy sector, the issue of supply security has been the subject of a broad public debate at Community level on the basis of a Green Paper the Commission published in 2001[34]. The Green Paper aims to initiate a debate with a view to defining a long-term strategy for energy supply security that is geared to ensuring the uninterrupted physical availability of energy products on the market, at a price which is affordable for consumers and users, while taking account of both environmental concerns and sustainable development. The Commission reported on the results of the public debate in a communication in June 2002[35]. On the basis of this consultation, the Commission concluded in its Report that it was necessary to increase the co-ordination of measures ensuring security of supply in the field of energy. As a follow-up, the Commission submitted, in September 2002, two proposals for directives, which will help to improve the security of supply of petroleum products and natural gas in the European Union[36].

[31] Dated 10.10.2003

[32] In addition to the most recent proposals following the Prestige accident, see also the proposals put forward by the European Commission after the sinking of the Erika vessel in 1999: COM (2000) 142 and COM (2000) 802

[33] Adopted on the 6 November 2002. See in particular the Communication on nuclear safety (COM 2002) 605 final

[34] Towards a European strategy for the security of Energy supply, Green Paper, COM(2000)769, 29.11.2000

[35] Final Report on the Green Paper "Towards a European strategy for the security of Energy supply", COM(2002)321, 29.6.2002

[36] Proposal for a Directive of the European Parliament and of the Council concerning the alignment of measures with regard to security of supply for petroleum products, OJ C 331 E, 31.12.2002, p. 249; and Proposal for a Directive of the European Parliament and of the Council concerning measures to safeguard security of natural gas supply, OJ C 331 E, 31.12.2002, p. 262

69. Some services of general interest outside the energy sector may also give rise to supply security concerns Yet Community secondary legislation generally does not address the issue. It may therefore be useful to consider whether there are other sectors in which the issue of supply security should be raised specifically. However, any assessment should take into account that specific additional measures aimed at increasing the security of supply usually entail an additional economic cost and could reduce competition. Any action proposed to increase security of supply therefore needs to ensure that the ensuing cost is not greater than the expected benefits[37].

70. *Network access and interconnectivity*

Where there is effective competition, market mechanisms may ensure the provision of affordable services of an adequate quality, thus greatly reducing the need for regulatory intervention. Where services of general economic interest are provided on the basis of networks with universal coverage, the incumbent undertaking enjoys a substantial competitive advantage, mainly due to substantial sunk costs involved in establishing and maintaining alternative networks. In cases where competitors can only operate as service providers, access to the incumbent network is indispensable for market entry.However, even in sectors where competitors do have the right to deploy their own network infrastructure network access may be necessary for competitors to be able to compete with the incumbent on downstream markets. If third party access to existing networks at fair and non-discriminatory conditions was not possible, *de facto* monopolies or at least the incentive for the incumbent to discriminate in the access terms, thus distorting competition downstream, would be maintained. Therefore, in order to meet competition policy and internal market objectives, thereby offering customers more choice, higher quality and lower prices, sector-specific Community legislation for the sectors liberalised at Community level harmonises and regulates the access to network infrastructures.

71. The Community has adopted different regulatory strategies for different network industries and services of general interest. This is because these industries are indeed different and at different stages of the liberalisation process. They differ notably in their profitability, their production structure, their capital intensity, their methods of service delivery, and their demand structure. In some sectors, the incumbent operator can remain vertically integrated, but must grant network access to allow market entry by competitors. In telecommunications, public operators have an obligation to negotiate interconnection their networks. In addition, competitors have the right to use the incumbent’s infrastructure. This is also the current system in electricity and gas. In the postal sector, new entrants have established networks for the distribution of parcels without requesting access to the incumbent’s infrastructure. Where an obligation to grant access exists, the pricing of access has proven to be the crucial regulatory issue.

72. Experience shows that there is probably no single ideal approach to the regulation of network access. Choices must take account of the characteristics of each industry. For this reason, the Community has so far pursued a sector-specific approach in regulating access in the network industries. However, consideration could be given to

[37] Cf. Commission Staff Working Paper, Security of supply, The current situation at European Union level, SEC(2002)243, 28.2.2002

whether useful lessons could be learned from a cross-sectoral comparison of regulatory strategies and techniques.

73. *Media pluralism*

Measures to ensure media pluralism typically limit maximum holdings in media companies and prevent cumulative control or participation in several media companies at the same time. Their aim is to protect the freedom of expression and to ensure that the media reflect a spectrum of views and opinions that characterise a democratic society.

74. It should first be noted that the protection of media pluralism is primarily a task for the Member States. At present, secondary Community legislation does not contain any provisions directly aiming to safeguard the pluralism of the media. However, Community law allows the application of national safeguards with regard to media pluralism. The purpose of existing Community law instruments is to ensure a certain economic balance between market operators: these instruments, therefore affect the media sector as an area of economic activity and not – or at least only very indirectly - as a means of delivering information to the citizen. Back in December 1992, the Commission published a Green Paper[38] designed to launch public debate on the need for Community action in this field. The debate did not allow clear operational conclusions to be drawn and no formal initiative was taken by the Commission. Ten years later, given the progressing concentration of the media sector and the proliferation of electronic media, the protection of media pluralism remains an important issue[39]. Views are sought as to whether the Commission should re-examine the need for Community action in this field in more detail.

75. The following questions are submitted for discussion:

(14) Which types of services of general interest could give rise to security of supply concerns? Should the Community take additional measures?

(15) Should additional measures be taken at Community level to improve network access and interconnectivity? In which areas? What measures should be envisaged, in particular with regard to cross-border services?

(16) Which other sector-specific public service obligations should be taken into consideration?

(17) Should the possibility to take concrete measures in order to protect pluralism be re-considered at Community level? What measures could be envisaged?

[38] Pluralism and Media Concentration in the Internal Market, An Assessment of the need for Community action, Commission Green Paper, COM(92)480, 23.12.1992

[39] See also the specific Protocol on the system of public broadcasting in the Member States annexed to the EC Treaty by the Treaty of Amsterdam

4. GOOD GOVERNANCE: ORGANISATION, FINANCING AND EVALUATION

76. As regards the intervention of public authorities in the Member States in the provision of services of general interest, three aspects can be highlighted to provide greater clarity:

- definition and enforcement of obligations and choice of organisation,
- financing of services of general interest,
- evaluation of services of general interest.

4.1. Definition of obligations and choice of organisation

77. As stated above, the national, regional and local authorities of each Member State are in principle free to define what they consider to be a service of general interest. This freedom to define also includes the freedom to impose obligations on the providers of such services, provided that these obligations are in conformity with Community rules. In the absence of specific Community legislation, it is therefore in principle for the Member States to define requirements such as universal service obligations, territorial coverage requirements, quality and safety standards, user and consumer rights, and environmental requirements.

78. Only in the case of the big network industries has the Community harmonised provisions on public service obligations and defined common requirements in specific Community legislation. This is the case, for instance, in the electronic communications and postal sectors. However, where such harmonised obligations exist, Member States are also responsible for their specification and implementation in line with the specific characteristics of the sector. In general, sector-specific harmonisation of public service obligations does not prevent Member States from imposing more far-reaching or additional obligations compatible with Community law, unless otherwise provided for in the harmonisation measures[40]. In electronic communications, such additional obligations cannot be financed from within the sector.

79. Also, as regards the organisation of the provision of a service of general economic interest, Member States are free to decide how the service is operated, provided, however, that Community rules are observed. In any event the degree of market opening and competition in a certain service of general economic interest will be decided by the relevant Community rules on the internal market and on competition. As far as the participation of the state in the provision of services of general interest is concerned, it is for the public authorities to decide whether they provide these services directly through their own administration or whether they entrust the service to a third party (public or private entity)[41].

[40] For instance, the postal directive obliges Member States to ensure a minimum of five daily deliveries to end users per week. Member States could impose a higher number of deliveries or specify the delivery requirement further

[41] As regards local inland transport, the Commission has proposed legislation that would require Member States to use public service concessions. Cf. Amended proposal for a Regulation of the European Parliament and of the Council on action by Member States concerning public

80. However, providers of services of general economic interest, including in-house service providers, are undertakings and therefore subject to the competition provisions of the Treaty. Decisions to award special or exclusive rights to in-house service providers, or to favour them in other ways, , can amount to an infringement of the Treaty, despite the partial protection offered by Article 86. Case law shows that this is true, in particular, where the public service requirements to be fulfilled by the service provider are not properly specified;[42] where the service provider is manifestly unable to meet the demand;[43] or where there is an alternative way of fulfilling the requirements that would have a less detrimental effect on competition[44].

81. Where a public authority of a Member State chooses to entrust the provision of a service of general interest to a third party, selection of the provider must respect certain rules and principles in order to ensure a level playing field for all providers, public or private, that are potentially capable of providing that service. This will ensure that these services are provided under the economically most advantageous conditions available on the market. Within the framework of these rules and principles, public authorities remain free to define the characteristics of the service to be provided, including any conditions regarding the quality of the service, in order to pursue its public policy objectives. Two situations can be distinguished:

- If the act by which public authorities entrust the provision of a service of general economic interest to a third party is a public service or works contract, as defined by the procurement directives or a works concession, as defined by Directive 93/37/EEC,[45] it must comply with the procedural requirements defined by the relevant procurement directive, provided it reaches or exceeds a threshold defined in the relevant directive and is not excluded from its scope.

- If the act by which public authorities entrust a third party with the provision of a service of general economic interest is not covered by the procurement directives, such act must nevertheless comply with the principles that derive directly from the EC Treaty, and in particular the provisions relating to the freedom to provide services and the freedom of establishment. This is the case for instance of public contracts or work concessions falling below the thresholds, of service concessions (i.e. contracts stipulating that the consideration for the service provider consists, at least in part, in the right to exploit the service) or of unilateral acts assigning the right to provide a service of general economic interest. These rules and principles include equal treatment, transparency, proportionality, mutual recognition and the protection of the rights of individuals[46].

82. In the area of environmental services, in particular as concerns waste management, public authorities may grant exclusive rights to organisations created by producers for the recycling of certain wastes. Such organisations are subject to the competition

service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway, OJ C 151 E, 25.6.2002, p. 246

[42] See the Court's judgment in *Silver Line Reisebüro* (C-66/86, judgment of 11.4.89)

[43] See the Court's judgment in *Höfner* (C-41/90, judgment of 23.4.91)

[44] See the Court's judgment in *Vlaamse Televisie Maatschappij* (T-266/97, judgment of 8.7.99)

[45] Independently of the definition used in national law

[46] Cf. the Commission Interpretative Communication on Concessions under Community Law, OJ C 121, 29.4.2000, p. 2

rules. They are often created in the context of innovative approaches to ensure prevention and recycling of waste, e.g. the application of «producer responsibility». This involves the attribution of financial responsibility for waste management to the producers of the products at the origin of the waste.

83. Thus, public authorities in each Member State retain considerable freedom to define and enforce public service obligations and to organise the provision of services of general interest. On the one hand, this allows Member States to define policies that take into account specific national, regional or local circumstances. For example, remote or sparsely populated areas may have to be treated differently from central or densely populated areas. On the other hand, the absence of specific legislation can lead to legal uncertainty and and market distortions[47]. At European level, different forms of co-operation between national regulators have developed in an attempt to improve consistency of policies across Member States, but a European regulatory authority does not exist for any service[48]. A broader process of exchange of best practice and experience involving not only regulators but also other interested parties could also be useful. The Commission believes that a broad debate is necessary on these points.

84. The following questions are submitted for discussion:

(18) Are you aware of any cases in which Community rules have unduly restricted the way services of general interest are organised or public service obligations are defined at national, regional or local level? Are you aware of any cases in which the way services of general interest are organised or public service obligations are defined at national, regional or local level constitutes a disproportionate obstacle to the completion of the internal market?

(19) Should service-specific public service obligations be harmonised in more detail at Community level? For which services?

(20) Should there be an enhanced exchange of best practice and benchmarking on questions concerning the organisation of services of general interest across the Union? Who should be involved and which sectors should be addressed?

[47] For instance, in the water sector the absence of specific, relevant regulation has led to very different industry structures across Member States. Cf. WRC/Ecologic, Study on the Application of the Competition Rules to the Water Sector in the European Community, December 2002, available at:
http://europa.eu.int/comm/competition/publications/studies/water_sector_report.pdf
However, while commercial aspects are addressed, the Water Framework Directive 2000/60/EC, OJ L 327, 22.12.2000, p. 1, sets out some transparency rules for water services. Article 9 of the Directive deals with pricing policies and requires Member States in particular to take account of the principle of recovery of costs, including environmental and resource costs, and of the polluter pays principle

[48] See Annex for more detail

4.2. FINANCING OF SERVICES OF GENERAL INTEREST

85. Many services of general interest cannot be viably provided on the basis of market mechanisms alone and specific arrangements are necessary in order to ensure the financial equilibrium of the provider. For instance, universal access or full geographical coverage may not be offered by the market itself. Currently, it is for the Member States to ensure the financing of services of general interest and to calculate the extra cost of the provision of such services. In some cases, the Community may contribute by way of co-financing to the funding of specific projects, e.g. through its structural funds or its TEN programmes.

86. Depending on historical traditions and the specific characteristics of the services concerned, Member States apply different mechanisms in order to ensure the financial equilibrium of providers of services of general interest. The financing mechanisms applied by the Member States include:

- Direct financial support through the State budget (e.g. subsidies or other financial advantages such as tax reductions).

- Special or exclusive rights (e.g. a legal monopoly).

- Contributions by market participants (e.g. a universal service fund).

- Tariff averaging (e.g. a uniform country-wide tariff in spite of considerable differences in the cost of provision of the service).

- Solidarity-based financing (e.g. social security contributions).

87. Whilst different forms of financing continue to co-exist, a clear trend has developed in recent decades: Member States have increasingly withdrawn exclusive rights for the provision of services of general interest and opened markets to new entrants. This has made it necessary to resort to other forms of financial support, such as the creation of specific funds financed by market participants or direct public funding through the budget, the least distorting way of funding[49]. These forms of financing have made the cost of providing services of general interest and the underlying political choices more transparent and fed the political debate on these services.

88. As a general rule, Member States can choose which system they apply to finance their services of general interest. They have only to ensure that the mechanism chosen does not distort unduly the functioning of the internal market. In particular, Member States can grant public service compensations which are necessary for the functioning of the service of general economic interest. State aid rules only prohibit over-compensation. In order to increase legal certainty and transparency in the application of state aid rules to services of general interest the Commission announced in its Report to the Laeken European Council its intention to establish a Community framework for state aid granted for services of general eonomic interest, and then, if and to the extent justified by the experiencegained with the application of this framework, adopt a block exemption regulation in the area of services of general

[49] See Liberalisation of Network Industries, Economic implications and main policy issues, European Economy No. 4, 1999

economic interest. Work on guidelines on the application of state aid rules to services of general economic interest is currently underway[50].

89. In some cases, sector-specific legislation lays down specific rules for the financing of the extra cost of public service obligations. For *electronic communications*, sector-specific regulation requires Member States to withdraw all special or exclusive rights, but it provides for the possibility of creating a fund to cover the extra cost of providing a universal service on the basis of contributions from market participants[51]. As regards the *postal service*, the postal directive allows a defined postal monopoly to be maintained and a universal service fund to be created for the purposes of financing the postal service[52]. In *air transport*, Member States can grant a temporary exclusive licence on the basis of an open tender in order to ensure a regular service on certain routes for which the market does not offer an adequate service[53]. In *public transport*, the Community has laid down rules for the calculation of compensation[54].

90. Internal market, competition and State aid rules aim to ensure that any financial support granted to providers of services of general economic interest does not distort competition and the functioning of the internal market. Also, the sector-specific legislation in place seeks only to ensure that the financing mechanisms put in place by the Member States are least distortive of competition and facilitate market entry. As a consequence, Community legislation allows in particular for selective market entry.

91. Other relevant criteria for selecting a financing mechanism, such as its efficiency or its redistributive effects, are currently not taken into account in Community legislation. Neither have the effects of the selected mechanism on the long-term investment of providers of services and infrastructure and on security of supply been specifically considered.

92. At this stage, the Commission considers it appropriate to launch a debate on whether these criteria could lead to the conclusion that specific financing mechanisms should be preferred and whether the Community should take measures in favour of specific financing mechanisms.

93. The following questions are submitted for discussion:

[50] Report on the state-of-play in the work on the guidelines for state aid and services of general economic interest, 13.12.2002

[51] Article 13 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108, 24.4.2002, p. 51

[52] Articles 7 and 9(4) of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ L 15 , 21.1.1998, p.14, as amended by EP and Council Directive 2002/39/EC, OJ L 176, 5.7.2002, p. 21

[53] Article 4 of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, OJ L 240, 24.8.1992, p. 8

[54] Council Regulation (EEC) No 1169/69 of 26 June 1969 on action by the Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, OJ L 156, 28.6.1969, p. 1 as last amended by Council Regulation (EEC) 1893/91, OJ L 169, 29.6.1991, p. 1

(21) Are you aware of any cases in which Community law, and in particular the application of State aid rules, has impeded the financing of services of general interest or led to inefficient choices?

(22) Should a specific way of financing be preferred from the point of view of transparency, accountability, efficiency, redistributive effects or competition? If so, should the Community take appropriate measures?

(23) Are there sectors and/or circumstances in which market entry in the form of «cream-skimming» may be inefficient and contrary to the public interest?

(24) Should the consequences and criteria of solidarity-based financing be clarified at Community level?

4.3. Evaluation of services of general interest

94. The changing regulatory and technological environment as well as the growing impact of Community policies on services of general interest has highlighted the need for a proper evaluation of the performance of these services at Community as well as at national level. The evaluation of these services of general interest is important because of the significance of these services for the economy as a whole and for everyone's quality of life. It is necessary in order to monitor whether the general interest tasks assigned by public authorities to the providers of such services are effectively achieved. A comprehensive evaluation increases transparency and provides the basis for better policy choices and an informed democratic debate. It allows to assess both the economic efficiency of a service and the effective achievement of other public policy objectives pursued by public authorities. At Community level the evaluation of services of general economic interest is essential to ensure that objectives of social and terrotorial cohesion and of environment protection are attained. Performance evaluation can also assist in exchanging best practices across borders and between economic sectors. It is a central element of good European governance[55].

95. In recent years, the Commission has increased its evaluation efforts in the area of services of general interest and developed an evaluation strategy that is based on three strands of assessments:[56]

- The Commission conducts regular evaluations of the network industries that have been liberalised at Community level (sectoral evaluation).

- In addition, the Commission started in 2001 to perform an annual cross-sectoral evaluation of the network industries (horizontal evaluation).

[55] Commission White Paper on European Governance, COM(2001)428, 25.7.2001; Report to the Laeken European Council, COM(2001)598, 17.10.2001

[56] Report to the Laeken European Council, COM(2001)598, 17.10.2001; Communication from the Commission: A Methodological Note for the Horizontal Evaluation of Services of General Economic Interest, COM(2002)331 final, 18.6.2002

- Thirdly, the Commission carries out regular consumer satisfaction surveys in the area of services of general economic interest (e.g. Eurobarometer opinion polls and qualitative surveys).

96. The evaluation of services of general interest is a complex task. A comprehensive evaluation must be multidisciplinary and multidimensional and include political, economic, social and environmental aspects, including externalities. It should also take account of the interests and views of all interested parties. It is important to know what users and consumers (including vulnerable and marginalised groups), social partners and other parties consider a good performance for these services and their expectations for the future. For these reasons, this Green Paper aims at opening a discussion on the criteria that, in the view of interested parties, should be used for evaluation purposes. In the context of its horizontal evaluation, the Commission has submitted a methodology for the evaluation of services of general interest[57]. It has stressed the need to gradually develop and improve its regular horizontal evaluations over the coming years. The huge disparity in data availability and data quality is a main stumbling block for a comprehensive evaluation and ways to improve data quality and availability should be examined[58].

97. At Community level, the Commission produces evaluation reports on the performance of network industries providing services of general economic interest. It submits its results to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and to all interested parties, with a view to informing the widest possible audience. However, the Commission's resources available for evaluation are limited, and the Commission cannot present a consolidated view representing all the, often diverging, views of the different interested parties. It should therefore be discussed how the evaluation should be performed at Community level and how responsibilities should be shared.

98. Furthermore, performance evaluation at Community level is currently limited essentially to the network industries covered by sector-specific Community legislation. Other sectors are not included in the Commission's evaluation strategy. It could be considered whether there is a need to extend Community evaluation beyond its current scope without infringing the principle of subsidiarity.

99. The following questions are submitted for discussion:

(25) How should the evaluation of the performance of services of general interest be organised at Community level? Which institutional arrangements should be chosen?

(26) Which aspects should be covered by Community evaluation processes? What should be the criteria for Community evaluations? Which services of general interest should be included in an evaluation at Community level?

(27) How could citizens be involved in the evaluation? Are there examples of good practice?

(28) How can we improve the quality of data for evaluations? In particular, to what extent should operators be compelled to release data?

[57] Communication from the Commission: A Methodological Note for the Horizontal Evaluation of Services of General Economic Interest, COM(2002)331 final, 18.6.2002

[58] See Annex for detail

5. SERVICES OF GENERAL INTEREST AND THE CHALLENGE OF GLOBALISATION

5.1. Trade policy

100. International trade agreements, within the framework of the World Trade Organisation (WTO) and often at a bilateral level, include provisions with regard to services that are not provided in the exercise of governmental authority (i.e. that are supplied on a commercial basis or in competition with one or more service suppliers). Such provisions concern the exchange of services and the conditions under which service suppliers can operate in foreign markets. Under the General Agreement on Trade in Services (GATS) each member freely determines the service sectors that it is prepared to open to foreign service providers (the so-called "bottom-up-approach") and under what conditions. Furthermore, the GATS explicitly recognises the WTO members' sovereign right to regulate economic and non-economic activities within their terrotory in pursuance of public policy objectives. With regard to the services covered by these agreements, each contracting party maintains the right to determine the specific obligations that can be imposed on the operators. Members fully retain the possibility of excluding from its GATS commitments sectors where it believes an opening to competition could threaten for example the availability, quality and affordability of such services. Thus, members can maintain the service as a (public or private) monopoly. The negotiations in the WTO framework has no direct or indirect influence on the decisions of Member States to privatise certain undertakings.

101. In this context, the European Community has freely decided to undertake binding commitments in respect of certain services of general interest already open to competition within the internal market. Through these commitments, foreign services suppliers are granted market access to the European Community under the same, or sometimes more restrictive, conditions as any European service supplier. Commitments undertaken in the WTO multilateral context (GATS commitments) or in a bilateral context have so far had no impact on the way in which services of general interest are regulated in Community law. They have also had no impact on the way in which they are financed. Indeed, the most far-reaching obligations in this respect have been assumed at bilateral level and are limited to territorial extension of the Community State aid regime.

102. Further negotiations in the areas of liberalisation of trade in services, as well as on disciplines on subsidies related to trade in services, are under way within the context of the Doha Development Agenda. The European Community is also negotiating bilateral trade agreements in the services sector. In this context, as in the past, the European Community approaches services of general interest with a view to ensuring full coherence with the level of liberalisation and with the regulation that applies within the internal market.

103. The following question is submitted for discussion:

(29) Is there any specific development at European Community internal level that deserves particular attention when dealing with services of general interest in international trade negotiations? Please specify.

5.2. Development and co-operation policy

104. The main objective of the European Community's development policy is the reduction of poverty in the developing countries. Ensuring access to a minimum level of services of general interest is an essential prerequisite for achieving this goal, since services of general interest not only satisfy some of the basic human needs, they also provide an indispensable platform for developing the economy of the poorest countries.

105. Private investment in services of general interest can help to improve the provision of essential services in these countries. However, market opening and privatisation in developing countries can also give rise to legitimate concerns about governance and regulation. Therefore, any reform should take account of the need for an adequate regulatory and institutional framework and be based on a comprehensive assessment of its impact on economic growth, employment, service delivery, equitable access, environmental conditions and the national budget.

106. The following question is submitted for discussion:

(30) How can the Community best support and promote investment in the essential services needed in developing countries in the framework of its development co-operation policy?

6. Operational Conclusion

107. The Commission invites all interested parties to comment on the questions set out in this Green Paper. Replies and any additional comments can be sent by mail to the following address:

European Commission
Green Paper on Services of General Interest Consultation
BREY 7/342
B-1049 Brussels

or by email to the following address:

SGI-Consultation@cec.eu.int

Comments should be sent to the Commission by **15 September 2003** at the latest. Replies and comments should mention the number of the questions they are referring to. For the information of interested parties, the Secretariat-General of the Commission will put contributions received electronically, together with the sender's contact data, on the Green Paper website

http://europa.eu.int/comm/secretariat_general/services_general_interest/

provided the senders concerned have explicitly agreed to their publication.

108. Basing itself *inter alia* on the contributions received, the Commission intends to draw conclusions in the autumn and, where appropriate, submit concrete initiatives as a follow-up.

Summary Table of All Questions submitted for Discussion

What kind of subsidiarity?

(1) Should the development of high-quality services of general interest be included in the objectives of the Community? Should the Community be given additional legal powers in the area of services of general economic and non-economic interest?

(2) Is there a need for clarifying how responsibilities are shared between the Community level and administrations in the Member States? Is there a need for clarifying the concept of services without effect on trade between Member States? If so, how should this be done?

(3) Are there services (other than the large network industries mentioned in para. 32) for which a Community regulatory framework should be established?

(4) Should the institutional framework be improved? How could this be done? What should be the respective roles of competition and regulatory authorities? Is there a case for a European regulator for each regulated industry or for Europe-wide structured networks of national regulators?

Sector-specific legislation and general legal framework

(5) Is a general Community framework for services of general interest desirable? What would be its added value compared to existing sectoral legislation? Which sectors and which issues and rights should be covered? Which instrument should be used (e.g. directive, regulation, recommendation, communication, guidelines, inter-institutional agreement)?

(6) What has been the impact of sector-specific regulation so far? Has it led to any incoherence?

Economic and non-economic services

(7) Is it necessary to further specify the criteria used to determine whether a service is of an economic or a non-economic nature? Should the situation of non-for-profit organisations and of organisations performing largely social functions be further clarified?

(8) What should be the Community's role regarding non-economic services of general interest?

A common set of obligations

(9) Are there other requirements that should be included in a common concept of services of general interest? How effective are the existing requirements effective in terms of achieving the objectives of social and territorial cohesion?

(10) Should all or some of these requirements be extended to services to which they currently do not apply?

(11) What aspects of the regulation of these requirements should be dealt with at Community level and which aspects left to the Member States?

(12) Have these requirements been effectively implemented in the areas where they apply?

(13) Should some or all of these requirements also be applied to services of general interest of a non-economic nature?

Sector-specific Obligations

(14) Which types of services of general interest could give rise to security of supply concerns? Should the Community take additional measures?

(15) Should additional measures be taken at Community level to improve network access and interconnectivity? In which areas? What measures should be envisaged, in particular with regard to cross-border services?

(16) Which other sector-specific public service obligations should be taken into consideration?

(17) Should the possibility to take concrete measures in order to protect pluralism be re-considered at Community level? What measures could be envisaged?

Definition of Obligations and Choice of Organisation

(18) Are you aware of any cases in which Community rules have unduly restricted the way services of general interest are organised or public service obligations are defined at national, regional or local level? Are you aware of any cases in which the way services of general interest are organised or public service obligations are defined at national, regional or local level constitutes a disproportionate obstacle to the completion of the internal market?

(19) Should service-specific public service obligations be harmonised further at Community level? For which services?

(20) Should there be an enhanced exchange of best practice and benchmarking on questions concerning the organisation of services of general interest across the Union? Who should be involved and which sectors should be addressed?

Financing

(21) Are you aware of any cases in which Community law, and in particular the application of State aid rules, has impeded the financing of services of general interest or led to inefficient choices?

(22) Should a specific way of financing be preferred from the point of view of transparency, accountability, efficiency, redistributive effects or competition? If so, should the Community take appropriate measures?

(23) Are there sectors and/or circumstances in which market entry in the form of «cream-skimming» may be inefficient and contrary to the public interest?

(24) Should the consequences and criteria of solidarity-based financing be clarified at Community level?

Evaluation

(25) How should the evaluation of the performance of services of general interest be organised at Community level? Which institutional arrangements should be chosen?

(26) Which aspects should be covered by Community evaluation processes? What should be the criteria for Community evaluations? Which services of general interest should be included in an evaluation at Community level?

(27) How could citizens be involved in the evaluation? Are there examples of good practice?

(28) How can we improve the quality of data for evaluations? In particular, to what extent should operators be compelled to release data?

Trade Policy

(29) Is there any specific development at European Community internal level that deserves particular attention when dealing with services of general interest in international trade negotiations? Please specify.

Development Co-operation

(30) How can the Community best support and promote investment in the essential services needed in developing countries in the framework of its development co-operation policy?

ANNEX
Public service obligations and instruments of Community policy in the area of services of general economic interest

This Annex examines, in more detail, a set of public service obligations that can be derived from existing sector-specific Community legislation and that can characterise a Community concept of services of general economic interest (Section I). It also discusses, in more detail, the policy instruments available in order to ensure that these public service obligations are complied with and that the public interest objectives pursued with these obligations are effectively achieved (Section II).

I. PUBLIC SERVICE OBLIGATIONS IN COMMUNITY LEGISLATION

1. Existing Community legislation on services of general economic interest is sector-specific. However, it contains a number of common elements that can be drawn on to define a Community concept of services of general economic interest. These elements include in particular: universal service, continuity, quality of service, affordability, as well as user and consumer protection (see point 1 below). These common elements identify Community values and objectives. They have been transposed into obligations in the pertinent legislations. They can also be complemented by more specific obligations depending on the characteristics of the sector concerned (see point 2 below).

1. A common set of obligations

1.1 Universal service

2. The concept of universal service refers to a set of general interest requirements ensuring that certain services are made available at a specified quality to all consumers and users throughout the territory of a Member State, independently of geographical location, and, in the light of specific national conditions, at an affordable price[1]. It has been developed specifically for some of the network industries (e.g. telecommunications, electricity, postal services). The concept establishes the right of everyone to access certain services considered as essential and imposes obligations on industries to provide a defined service at specified conditions, including complete territorial coverage. In a liberalised environment a universal service obligation guarantees that all persons within the European Union have access to the service at an affordable price and that the service quality is maintained and, where necessary, improved.

3. Universal service is a dynamic concept. It ensures that general interest requirements can take account of political, social, economic, and technological developments and it allows, where necessary, for regular adjustment of these requirements to the evolving needs of users and consumers.

[1] Cf. Article 3(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108, 24.4.2002, p. 51

4. It is also a flexible concept that is fully compatible with the principle of subsidiarity. Where the basic principles of universal service are defined at Community level, the implementation of these principles can be left to the Member States, thus allowing account to be taken of different traditions and specific national or regional circumstances. Furthermore, the concept of universal service can apply to different market structures and can therefore be used to regulate services in different stages of market opening.

5. The concept of universal service refers to the content of the service and its method of provision. The content of the service is defined in a dynamic way. Its definition covers the scope of the services, and their characteristics in term of price (which should be affordable) and quality (which should be satisfactory). As regards the method of provision, a Member State does not have to intervene or take additional measures if it finds that the provision of universal service is ensured by the mere functioning of the market, i.e. affordable commercial offers are available for everyone. However, if Member States find that the market alone does not ensure the provision of universal service, Community law allows Member States to designate one or more universal service providers and possibly compensate the net cost of providing universal service in order to minimise market distortion.

6. Existing sector-specific directives defining universal service contain a number of common elements: a set of universal service requirements, principles on the selection of the universal service provider, rules on the compensation of the cost of provision of universal service, the right of Member States to introduce additional requirements, plus rules on an independent regulator[2].

7. Existing secondary legislation is based on the following principles. If Member States find that market mechanisms alone are not sufficient to provide a universal service, they should intervene to ensure that it is provided. Any intervention should be objective, transparent, non-discriminatory and proportionate. It should entail no distortion of competition, in the sense that it must not create discrimination between undertakings active on the same relevant market, and it should minimise market distortion, in the sense that the service should be provided in the most cost-effective manner and any compensation should be recovered by contributions that are spread as broadly as possible. These principles will ensure that public intervention is transparent and efficient, thereby increasing the rule of law (democratic dimension) and overall welfare (economic dimension).

8. Furthermore, in order to ensure the effectiveness of universal service, the rules on universal service should be complemented by a number of user and consumer rights. These include physical access regardless of disability or age, transparency and full information on tariffs, terms and conditions of contracts, quality performance indicators and customer satisfaction indexes, complaint handling and dispute settlement mechanisms.

[2] Cf. Directive 2002/22/EC, OJ L 108, 24.4.2002, p. 51; Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ L 15 , 21.1.1998, p. 14; Amended Proposal for a Directive of the European Parliament and of the Council amending Directives 92/96/EC and 98/30/EC concerning rules for the internal markets in electricity and natural gas, OJ C 227 E, 24.9.2002, p. 393

9. Universal service requirements may entail a substantial cost. When considering whether such obligations should be maintained or extended, it is therefore important to consider the alternative uses to which the resources concerned could be put.

10. During the last two decades, the concept of universal service has developed into a major and indispensable pillar of the Community's policy on services of general economic interest. It has allowed public interest requirements to be addressed regarding in particular economic efficiency, technological progress, environmental protection, transparency and accountability, consumer and user rights, and specific measures regarding disability, age or education. Also, the concept has proven to be fully in line with the principle of subsidiarity. Furthermore, application of the concept can be based on extended participation of interested parties (e.g. industry, small and medium-sized enterprises, consumers, and other representative social groups). This process may include periodic evaluation of subsequent developments.

1.2 Continuity

11. A number of services of general interest are characterised by a continuity requirement, i.e. the provider of the service is obliged to ensure that the service is provided without interruption. Continuity is sometimes not seen as an independent requirement, but defined as part of a universal service obligation. As regards some services, uninterrupted provision may already be in the commercial interest of the provider and it might therefore not be necessary to impose a legal continuity requirement on the operator. At national level, the continuity requirement obviously needs to be reconciled with employees' right to strike and with the requirement to respect the rule of law.

12. The requirement of ensuring a continuous service is not consistently addressed in sector-specific Community legislation. In some cases, sector-specific Community legislation explicitly sets out a continuity obligation. For instance, Article3 (1) of the postal directive (97/67/EC) obliges Member States to «*ensure the permanent provision of a postal service*»[3]. In other cases, sector-specific regulation does not contain a continuity requirement, but it explicitly authorises Member States to impose such an obligation on service providers. Art. 3(2) of the electricity directive[4] provides that «*Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including ... regularity... of supplies... . Such obligations must be clearly defined, transparent, non-discriminatory and verifiable; they, and any revision thereof, shall be published and notified to the Commission by Member States without delay...*».

1.3. Quality of service

13. The definition, monitoring and enforcement of quality requirements by public authorities has become a key element in the regulation of services of general interest. Achieving a socially acceptable level of service quality often justifies public service

[3] Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ L 15 , 21.1.1998, p. 14

[4] Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, *OJ L 27, 30.1.1997, p. 20*

obligations. In some cases, quality is seen as being so important that it is the rationale behind the provision of the public service obligation and it is the subject of close supervision and regulation. In areas in which the provision of a service is entrusted to a third party, the establishment of quality standards by public authorities is often indispensable in order to ensure that public policy objectives are met. Also where services are provided by public administrations the definition and monitoring of quality requirements may help to increase transparency and accountability. There is, however, no agreement on a general definition of quality, except that user and consumer protection and safety should be part of it. Environmental protection and sustainable development are also being taken increasingly into account when defining service quality criteria. Qualitative objectives will vary across sectors, depending on their characteristics.

14. In the sectors which were opened to competition at Community level, the Community did not rely on market forces alone to maintain and develop the quality of services. In some cases, quality standards are defined in Community legislation. They include, for instance, safety regulations, the correctness and transparency of billing, territorial coverage, and protection against disconnection. In other cases, Member States are authorised or required to set quality standards. In some cases, Member States are also required to monitor and enforce compliance with quality standards and to ensure the publication of information on quality standards and actual performance of operators. The most developed regulation of quality at Community level can be found in the legislation on postal services and on electronic communications services.

15. In addition, the Commission has developed non-regulatory measures to promote quality in services of general economic interest – including financial instruments, voluntary European standards, and exchange of good practice. For instance, in the electricity and gas sectors, the Community promotes voluntary co-operation between regulators.

16. In discussing the question of quality of service, it is important to bear in mind that there is a trade-off between the quality and the cost of a service. It would be inefficient, for example, for a public authority to impose a costly obligation to provide a very high quality of service when consumers and users would prefer a lower but satisfactory quality at a lower price. Furthermore, the imposition of quality standards might be unnecessary in markets where there is effective competition, provided that consumers and users are able to make an informed choice between competing service providers. This emphasises the role for regulators in ensuring that adequate and accurate information is available to users and consumers.

1.4 Affordability

17. The concept of affordability was developed within the regulation of telecommunications services. Subsequently, it was also introduced into the regulation of postal services. It requires a service of general economic interest to be offered at an affordable price in order to be accessible for all persons. Application of the principle of affordability helps to achieve economic and social cohesion in the European Union.

18. Affordability should not be confused with, and does not necessarily equate to, cost orientation. Indeed, the best the market could offer is a price oriented towards cost.

But if this cost is not judged to be affordable, the State may choose to step in ensure that everybody has affordable access. In some cases, affordability can imply that a service is offered free to everyone or to specific groups of persons. Member States may, in the light of national conditions, require that designated undertakings provide tariff options or packages to persons that depart from those provided under normal commercial conditions, in particular to ensure that those on low incomes or with special social needs are not prevented from accessing or using a service[5]. The concept of affordability appears to be narrower than the concept of "reasonable prices" that is currently discussed in the context of the proposed amendment of the internal market directives for gas and electricity. While affordability is a criterion that takes account mainly of the customer perspective, the principle of "reasonable pricing" suggests to take account also of other elements.

19. The sector-specific legislation in place does not specify the criteria for determining affordable prices, leaving it to the Member States to verify whether prices are affordable. Some of the criteria for determining affordability must be defined by the Member States. These criteria could be linked, for example, to the penetration rate or to the price of a basket of basic services related to the disposable income of specific categories of customers. Finally, once the affordable level has been set, the Member States should ensure that this level is effectively offered, by putting in place a price control mechanism («price cap», geographical averaging) and/or by distributing subsidies to the consumers and users concerned.

20. Therefore, it might be considered whether this concept should be developed further at Community level. Furthermore, it could be discussed whether the concept should be extended to other services of general economic interest.

1.5 User and consumer protection

21. EU consumer policy is an integral part of the political approach underpinning the European model of society. Its overarching aim is to ensure that the internal market delivers progressively better outcomes for consumers and that market failures to the detriment of consumers are remedied. This includes ensuring the market transparency and the fairness of commercial practices. In services of general interest, horizontal user and consumer protection rules apply as they do in other sectors of the economy. In addition, because of the particular economic and social importance of these services, specific measures have been adopted in sectoral Community legislation to address the specific concerns and needs of consumers and businesses. Consumer and user rights are set out in sector-specific legislation on electronic communications, postal services, energy (electricity, gas), transport and broadcasting.

22. The Commission Communication of September 2000[6] sets out a number of principles that can help to define the requirements of citizens for services of general economic interest. These principles include good quality of service, high levels of health protection and physical safety of services, transparency (e.g. on tariffs, contracts, choice and financing of providers), choice of service, choice of supplier, effective competition between suppliers, existence of regulatory bodies, availability

[5] See Article 9(2) of Directive 2002/22/EC

[6] OJ C 17, 19.1.2001, p. 4

of redress mechanisms, representation and active participation of users and consumers in the definition of services, and choice of forms of payment.

23. The Communication highlighted that a guarantee of universal access, continuity, high quality and affordability form key elements of a consumer policy in the area of services of general economic interest. It also stressed the need to address citizens' concerns that are of a wider nature, such as a high level of environment protection; specific needs of certain categories of the population, such as the handicapped and those on low incomes; and complete territorial coverage of essential services in remote or inaccessible areas.

24. In addition, services of general interest should be covered by the following user/consumer rights and principles:

- *Transparency and full information*: This must include clear and comparable information on tariffs; terms and conditions of contracts; complaint handling; and dispute settlement mechanisms.

- *Health and Safety*: This includes the need to guarantee the highest level possible of health protection and the physical safety of services.

- *Independent regulation*: Regulatory bodies that are independent of industry, with adequate resources, powers of sanction, and clear duties with regard to the protection of user and consumer interests.

- *Representation and active participation*: Provisions should be made to allow for the systematic consultation of consumer representatives to give consumers a voice in decision making.

- *Redress*: Fast and affordable complaint-handling systems and alternative dispute resolution mechanisms.

25. On the basis of the user and consumer protection principles that were identified in the Communication, a set of rights for users and consumers as regards a service of general interest could be based on the following principles:

- access (complete geographical coverage, including cross-border access, access for persons with reduced mobility and for the disabled);

- affordability (including special schemes for low income people);

- safety (safe and reliable service, high level of public health);

- quality (including reliability and continuity of services and compensation mechanisms in case of shortfalls);

- choice (widest possible choice of services and, where appropriate, choice of supplier and effective competition between suppliers, right of switching suppliers);

- full transparency and information from providers (e.g. on tariffs, bills, terms and conditions of contracts);

- right of access to the information collected by regulators (data on service quality, choice and financing of providers, complaint handling);

- security and reliability (continuous and reliable services, including protection against disconnection);

- fairness (fair and genuine competition);

- independent regulation (with adequate powers of sanction, clear duties);

- representation and active participation of consumers and users (in the definition of services, choice of forms of payment);

- redress (availability of complaint handling and dispute settlement mechanisms, compensation schemes);

- evolutionary clause (user/consumer rights are evolutionary, in accordance with changing user/consumer concerns and changes in the environment: economy, law, technology);

- equal access and treatment for users and consumers when using cross-border services within Member States.

2. Further specific obligations

2.1. Security of supply

26. The need to ensure continuous and sustainable provision of services of general economic interest calls for security of supply. In general, the development of the internal market has generated a considerable increase in the level of security of supply of products and services, to the extent that the markets concerned are functioning competitively.

27. In the energy sector, in particular, the issue of supply security has been the subject of a broad public debate at Community level, based on a Green Paper that the Commission published in 2001[7]. The Green Paper aims to initiate a debate with a view to defining a long-term strategy for energy supply security that is geared to ensuring the uninterrupted physical availability of energy products on the market, at a price which is affordable for consumers and users, while taking account of both environmental concerns and sustainable development. The Commission reported on the results of the public debate in a communication in June 2002[8]. On the basis of the consultation, the Commission concluded in its Report that it was necessary to improve the co-ordination of measures to ensure security of supply in the field of energy. As a follow-up, the Commission submitted, in September 2002, two

[7] Towards a European strategy for the security of Energy supply, Green Paper, COM(2000) 769, 29.11.2000

[8] Final Report on the Green Paper «Towards a European strategy for the security of Energy supply», COM(2002) 321, 29.6.2002

proposals for directives which will help to improve the security of supply of petroleum products and of natural gas in the European Union[9].

28. Some services of general interest outside the energy sector may also give rise to supply security concerns, e.g. because of the risk of long-term underinvestment in infrastructure or capacity. Yet, Community secondary legislation generally does not address the issue. In the telecommunications sector the Commission has proposed a comprehensive strategy to ensure the security of electronic communications networks[10]. It may be useful to consider whether there are other sectors in which the issue of supply security should be raised specifically. However, any assessment should take into account that specific additional measures aimed at increasing the security of supply usually entail an additional economic cost. For any action proposed to increase security of supply therefore needs to ensure that the ensuing cost is not greater than the expected benefits[11].

2.2. Network access and interconnectivity

29. In cases of natural monopolies with significant sunk costs, increasing returns of scale and decreasing average cost, market entry is particularly difficult. Such services are typically provided by means of stable and long-life technologies. In such cases, the mere application of common rules (e.g. competition or public procurement rules) may prove insufficient and thus needs to be complemented by more intense and continuous sector-specific oversight (regulation), the minimum scope of which is in many cases specified in Community legislation.

30. A number of the industries concerned are network industries in which fair access – in particular for new entrants - to existing networks, e.g. electricity grids, telecommunication networks or rails, will often be a prerequisite to operating successfully in downstream markets[12]. The Community has addressed the issue of access in four main ways:

(1) Retaining a vertically integrated incumbent with an exclusive right to operate services. This was the standard form of organisation of these industries at the time the Community came into being. In most network industries it has now been prohibited through specific Community legislation. It is currently not forbidden for water; for bus/metro/light rail; and for residual parts of the electricity, gas and postal industries. In bus/metro/light rail there are no plans for public authorities to be obliged to separate the operation of infrastructure from the provision of passenger services, and public authorities will be able to continue to grant exclusive rights to operators, provided such rights are awarded following competition.

[9] Proposal for a Directive of the EP and of the Council concerning the alignment of measures with regard to security of supply for petroleum products, OJ C 331 E , 31.12.2002, p. 249; proposal for a Directive of the EP and of the Council concerning measures to safeguard security of natural gas supply, OJ C 331 E , 31.12.2002, p. 262

[10] COM(2001) 298

[11] Cf. Commission Staff Working Paper, Security of supply, The current situation at European Union level, SEC(2002) 243, 28.2.2002

[12] Furthermore, many markets of services of general interest were only recently opened to competition and the incumbent providers often maintain a dominant position in their national market for a certain period of time. A certain degree of regulatory oversight and control is thus necessary to avoid abuse of market power

(2) Retaining a vertically integrated incumbent, which must open its infrastructure to competitors. Community law obliges incumbents to give competitors access to the local loop in the telecommunications sector, to the electricity grid and to gas pipelines (both at transmission and distribution level) in energy markets, and to national rail networks for international services.

(3) Enabling vertically integrated competitors to create their own duplicate infrastructure. This approach has been applied in telecommunications, postal services, aviation [and broadcasting][13].

(4) Separating the functions of operator and infrastructure manager. This is the approach chosen so far for access to the electricity network and in rail[14]. The Commission has now also proposed the same for gas and this proposal has been endorsed by the Energy Council.

31. There is clearly no single ideal approach to the regulation of network industries. Choices depend on the characteristics of each industry. The table below shows how Community regulation approaches access regulation differently according to the specificities of the industries concerned and the stage of the liberalisation process.

	Electricity and gas	**National rail**	**Bus/metro /light rail**	**Air**	**Telecoms (fixed line)**	**Telecoms (mobile telephony)**	**Post**
Do competitors create competing infrastructure networks?	Minimal in practice	No	In a few places	Yes	Yes, but limited to to certain MS	Yes	Yes
Can infrastructure managers also be operators?	No (new Directives will require legal separation)	No (independent allocation and charging function required by Community law)	Yes	Yes	Yes	Yes	Yes
Is there Community secondary legislation preventing Member States awarding a single operator an exclusive right?	Yes (non-households by 2004, all customers by 2007)	Yes (freight) No (domestic passen-ger)	No (exception: internat-ional bus services)	Yes, except on certain routes where public service obligations are	Yes	Yes	Yes/NO (weight/price limit applies)

[13] In other sectors this is not a technically or economically attractive option

[14] The infrastructure manager and operator can be part of the same legal entity, but the process of allocating capacity on the network and charging for its use have to be performed by a body which is legally, organisationally and managerially independendent of any railway undertaking (Cf. Directive No 2001/14/EC, OJ L 75, 15.3.2001, p. 29)

				imposed			
If there are exclusive rights, how are operators usually selected?	Historical operator	Historical operator (Commission wants change)	Historical operator (Commission wants change)	By open competition	n.a.	n.a.	Historical operator
If there are no exclusive rights, are there capacity limits to the volume of services provided by operators?	Yes, in the case of congested networks	Yes	n.a.	Yes	No	Yes	No
If so, how is capacity allocated?	unbundled transmission system operator with rules on congestion management for electricity	Independent infrastructure manager/allocation body	n.a.	Grandfather rights; informal market mechanisms; slot coordinators	n.a.	Beauty contests Spectrum auctions Administrative allocation	n.a.
What do infrastructure managers charge?	Cost recovery	Incremental cost (narrow definition) + State subsidy	No third party access	Cost recovery	Cost according to national methodology plus mark-up	Service providers charged on a "retail minus basis" (retail price minus a certain profit margin)	For cross-border services, charges must be cost-related
Do public authorities get involved in new infrastructure development?	Normally regulated	Regulated and subsidised	Regulated and subsidised	Commercially driven	Commercially driven	Commercially driven	Commercially driven outside the reserved area

32. In cases of low sunk costs, the degree of public intervention can be lower. Short-term contracts can be awarded to a single provider and quality evaluation by the customers will be taken into account for assessing the provider's performance.

33. Implementation of each of the above-mentioned approaches may be constrained by the public procurement directives or the general rules of the Treaty. The transparent and non-discriminatory selection (whether by tender procedure or not) of the single provider – who will benefit from exclusive/special rights - ensures that the highest quality is delivered at the lowest net extra cost.

2.3 Requirements aiming to ensure media pluralism

34. Since the mid-1980s Member states have introduced legislation regarding media ownership. The legislation put in place typically limits maximum holdings in media companies and prevents cumulative control or participation in several media companies at the same time. The objective of these legislative measures is to protect freedom of expression and to ensure that the media reflect a spectrum of views and opinions that characterise a democratic society.

35. Whilst the protection of media pluralism is primarily a task for the Member States, it is for the Community to take due account of this objective within the framework of its policies. Currently, secondary Community legislation does not contain any provisions directly aiming to safeguard the pluralism of the media. However, Community law allows the application of national safeguards with regard to media pluralism. This is highlighted, for example, in Art. 21(3) of the Merger Regulation, which explicitly provides for the possibility of applying national measures protecting the plurality of the media alongside Community merger rules or in Article 8 of the Framework Directive on electronic communications[15] which provides that national regulatory authorities may contribute to media pluralism.

36. Back in December 1992, the Commission published a Green Paper[16] designed to launch a public debate on the need for Community action in this field. The options considered in the Commission Green Paper included taking no action, proposing a recommendation to enhance transparency and proposing Community legislation harmonising national restrictions on media ownership. The debate did not allow clear operational conclusions to be drawn and no formal specific initiative was taken by the Commission.

37. Ten years later, given the progressing concentration of the media sector and the proliferation of electronic media, the protection of media pluralism remains an issue, including within the context of the Amsterdam Protocol on public broadcasting[17]. Views are sought as to whether the Commission should re-examine the need for Community action in this field in more detail.

II. POLICY INSTRUMENTS

1. Organisation of regulatory intervention

1.1. Community regulation and National Regulatory Authorities (NRA)

38. Community and Member States' primary and secondary legislation contains the basic rules applicable to markets of services of general interest. However, in order to ensure that the objectives of regulation are achieved it would be insufficient to rely

[15] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33

[16] Pluralism and Media Concentration in the Internal Market, An Assessment of the need for Community action, Commission Green Paper, COM(92) 480, 23.12.1992

[17] Cf. the Protocol on the system of public broadcasting in the Member States annexed to the EC Treaty by the Treaty of Amsterdam

exclusively on the application and usual mechanism of enforcement of legislation. Furthermore, Community legislation may oblige Member States to designate one or several «national regulatory authorities» to be responsible for carrying out these regulatory tasks. Such provisions exist for electronic communications, postal services, railway and aviation. For electricity and gas, the Commission suggested, in its proposal of March 2001 and its amended proposals of June 2002, an obligation on Member States to «*designate one or more competent bodies as national regulatory authorities*». As regards the services that are not covered by a comprehensive regulatory regime at Community level, some Member States , such as the United Kingdom, have decided to create a regulatory authority in the field of water (OFWAT).

39. The detailed institutional arrangements regarding the national regulatory authority required in the relevant Community legislation are left to the discretion of Member States. It can thus be an existing body or the ministry responsible for the sector, an approach adopted by a number of Member States. However, this approach has proven to be problematic in terms of the independence of the national regulatory authority in some instances where Member States also retain ownership or control over companies active in the sector concerned. The communications framework directive requires in such cases «*effective structural separation of the regulatory function from activities associated with ownership or control*». The designation of a Ministry as the predominant regulatory authority in charge of all regulatory decisions remains the exception. The importance as well as ongoing and complex nature of the regulatory tasks involved often requires the expertise and independence of a sector-specific regulatory body[18]. Nearly all Member States have set up such a body for the sectors concerned, including electricity and gas, for which current Community legislation does not yet require the designation of a national regulatory authority.

40. It should, however, be noted that even where a sector-specific regulatory authority exists, the government – i.e. the competent Ministry – often retains responsibility for certain regulatory decisions. A situation where the sector-specific regulator is responsible for all regulatory issues is currently the exception. Such regulators are most prevalent in communications and, to a lesser extent, in energy or post, whilst in aviation and railways responsibilities are usually shared between the ministry and the civil aviation or railway agencies. In the water sector, OFWAT in the UK has the power to regulate prices and the level of service to be provided, whilst the water agencies in France could be considered as environmental regulators, given that they collect environmental charges.

41. The key characteristic of a sector-specific regulator is its independence from market operators in the sector concerned. This requirement is essential to avoid conflicts of

[18] A definition of a sector-specific regulatory authority is contained in Commission Decision 2002/627/EC of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services, OJ L 200/38, 30.7.2002: «*For the purpose of this Decision: 'relevant national regulatory authority' means the public authority established in each Member State to oversee the day-to-day interpretation and applications of the provisions of the Directives relating to electronic communications networks and services as defined in the Framework Directive*»

interest and to ensure the impartiality of the regulator[19] and is therefore stipulated in Community legislation whenever the designation of a national regulatory authority is mandatory. More specific rules are in place in Member States to ensure this independence, e.g. regulator staff are not permitted to hold shares of companies in the sector.

42. Sector-specific regulators also have a high degree of independence from the government. In most cases, the government appoints the Head and the members of the regulatory authority and determines its general policy objectives[20]. However, regulatory authorities are normally not subject to instructions from the government on individual decisions; furthermore, members of the authority could be specifically required to have a good knowledge of the rules applicable to the sector. This increases the impartiality of the regulator and enhances the continuity of regulatory approaches. Some regulatory authorities finance their budgets through autonomous sources of income, as opposed to the general budget administered by the government, which enhances their independence.

43. It is important to note that independence does not mean lack of accountability for performance. Regulators usually have to report regularly to government and/or parliament and, most importantly, the parties concerned can appeal against their decisions in court. On the other hand, appeal possibilities must be proportional. If decisions of the regulator become mired in years of controversy before they become effective, the objective of regulation will not be achieved. Therefore, in a number of cases appeals against decisions of the regulator have no suspensive effect.

44. Before taking decisions, regulators need to consult with interested parties and the public, in order to ensure that all relevant aspects are taken into account. Equally important, regulators are required to consult and co-ordinate their work with other public authorities, such as competition authorities and consumer protection bodies, to ensure compatibility and consistency of decisions taken.

45. In order to carry out their tasks effectively, regulators often rely on information which only regulated undertakings can provide. Therefore, regulators usually have the power to require from undertakings, within a time limit, any information necessary for the task in question. In the case of commercially sensitive information, regulators have to respect the rules on business confidentiality. In order to regulate network access tariffs, for instance, the regulator needs to have reliable and comprehensive information on the costs incurred by the network operators.

46. The powers and responsibilities of regulators in the Member States vary between sectors and in the legislation of the Member States, including the division of tasks between the sector regulator and the competent ministry. This division of tasks is largely influenced by national legal and administrative traditions prevailing in the Member States. Some core responsibilities are, however, shared by nearly all regulators of the sectors concerned. Regulation of the terms and conditions of access to existing networks and regulation of retail prices, in order to exclude abuses of

[19] Cf. ECJ, Case C-202/88, France v Commission [1991] ECR I-1223, para 51, 52; Case C-91/94, Thierry Tranchant [1995] ECR I-3911, para. 18, 19

[20] In some cases, such as in electronic communications, overall policy goals and objectives of the «national regulatory authority» are specified in Community legislation

dominant positions in the market, are probably the most prominent examples. In this respect regulators supplement the activities of competition authorities: whilst the latter apply general competition law to a specific sector by taking measures ex-post, i.e. after the abuse has taken place, a regulator typically intervenes ex-ante by setting rules intended to reduce the risk of the occurrence of abuses from the outset[21].

47. Usually, the legislative act in question defines the obligations related to the provision of universal service. However, regulators often play an important role in further defining and implementing such rules. For instance, where a universal service provider receives compensation for providing the service, the general rules of the cost calculation and the financing mechanism are usually defined by Parliament or the competent Ministry. The implementation of these rules is left to the regulator.

48. An important element of the universal service concept is affordability of prices for final users and consumers. Where necessary to achieve this objective, price regulation measures are applied by regulators. Since the market should in principle determine the price, such regulation usually takes the form of maximum prices, which exist in many Member States, for instance for electricity. Price regulation may, however also take the form of minimum prices, in order to prevent predatory behaviour by dominant players (e.g. in communications).

49. Particularly important from a consumer or user perspective is the role regulators often play in developing and implementing binding standards of security and quality of service. These are important in terms of meeting expectations with regard, inter alia, to access choice, transparency (including on price), affordability, quality, safety, security and reliability. Adequate redress mechanisms for consumers and users are essential where operators fail to meet standards in this respect.

50. Licensing is an important tool to ensure compliance with binding standards. If a market operator does not meet the standards set by the regulator – and specified in the licence granted to market operators – regulators can withdraw the licence. Other means to ensure compliance with rules include the imposition of penalties.

51. Consumers and users must have the possibility to file complaints, for instance, in the event of non-compliance of an operator with the kind of standards outlined above. Such complaints are usually handled by the regulator and in many cases legislation obliges regulators to take a decision rapidly (i.e. within a certain time limit).

52. Some regulatory authorities are also active in systematically providing market information to consumers,[22] whilst in most cases this task is carried out by consumer

[21] It should be noted that the responsibilities of competition and regulatory authorities usually overlap to an extent. Inappropriate pricing may be incompatible with the rules set by the regulator and at the same time constitute an abuse of dominant position within the meaning of competition law. It is important, therefore, that the respective roles of regulators and competition authorities are clear in practice. In general, it can be said that the regulator applies sector-specific rules, which will often obviate the need for intervention by the competition authority. On the other hand, it is for the competition authority to intervene when the regulator does not have the power to ensure that horizontal competition rules are respected or fails to take action

[22] For instance, the energy regulator in the UK and Denmark; in communications, Community legislation stipulates that regulators must encourage the provision of information to consumers

organisations. Apart from the above-mentioned core responsibilities of regulators, many Member States entrust them with further tasks, for instance, in energy the implementation of social and environmental policy[23] and long-term planing on security of electricity and gas supply[24]. These additional tasks are usually determined by specific national circumstances. The reason for transferring such tasks to the regulators is in many cases their technical expertise and knowledge of the sector.

1.2 Institutional co-operation arrangements at Community level

53. Sector-specific regulators are set up by Member States and regulate the national market of the sector concerned. However, national markets form part of the internal Community market and regulatory decisions taken by national regulators often impact on cross-border transactions. Therefore, a degree of consistency of national regulatory approaches is necessary to avoid distortions stemming from different approaches that could have an impact on the smooth functioning of the internal market. In railways and communications, Community legislation contains a provision obliging regulators expressly to co-ordinate their decision-making principles[25].

54. Currently, a number of organisational arrangements aimed at encouraging regulatory consistency exist for the sectors concerned.

European associations have been established for a number of sectors, which bring together regulators from the Member States and often third countries. Examples include:

- The Council of European Energy Regulators (*CEER*) acts as a focal point for contacts between regulators and the European Commission's Directorate-General for Energy and Transport. It maintains close working relations with regulatory authorities in North America and EU candidate countries. The work of the CEER has focused on issues linked to cross-border transactions and it plays an active part in the Florence Regulatory Process and the Madrid Regulatory Process (see below).

- The European Committee for Postal Regulation (*CERP*) is composed of representatives from the CEPT (European Conference of Postal and Telecommunications Administrations) countries' postal regulatory authorities, including EU and candidate countries, EFTA and others like Albania or the Russian Federation. The CERP discusses regulatory and operational postal issues and facilitates contacts with the relevant bodies, in order to develop a common approach that can lead, where appropriate, to proposals and recommendations.

- The Joint Aviation Authorities (*JAAs*) is the umbrella organisation for national civil aviation agencies. It has developed common safety, regulatory standards and

in order to enable customer choice (Articles 21 and 22 of the universal service directive (2002/22/EC))

[23] For instance, in the UK and Sweden

[24] For instance, in Belgium

[25] Article 31 of Directive EC/2001/14 and Art. 7(2) of the Communications Framework Directive

procedures for most areas of civil aviation. These standards are non-binding, unless transformed into either EU or national legislation.

55. A unique form of co-ordination and co-operation between national regulators exists in the field of electricity and gas. In order to build consensus between all parties on issues relating to cross-border transactions in the gas and electricity sectors, two regulatory forums, the *Madrid Forum* and the *Florence Forum*, were created. These forums, which are chaired by the Commission, bring together the national energy regulators and high-level representatives of the Member States, industry and consumers. The decisions taken by the forums are not formally binding, but they are taken with the understanding that national regulators will implement them at the national level[26]. The limits of the two forums have, however, increasingly become apparent, in particular when it comes to taking decisions on controversial issues. Therefore, in March 2001 the Commission proposed a regulation on cross-border exchanges of electricity providing for a comitology procedure on issues which have been discussed within the context of the Florence Forum.

56. European groups of regulators

Recently a new organisational form of involvement of national regulators at Community level has developed in the form of European groups of regulators which aim to reinforce and formalise the role of sector-specific regulatory authorities at EU level. Unlike Comitology committees, such groups must be composed of the national regulators in the sector concerned. This concept was, for instance, discussed in detail in the «Lamfalussy report» on the future legislative and regulatory process for the European securities market, with a view to developing a new and more effective form of regulation. As regards services of general economic interest, a «European group of regulators» was recently created by Commission decision[27] for electronic communications. Its aims are: (a) to advise and assist the Commission in consolidating the internal market for electronic communications networks and services; (b) to provide an interface between national regulatory authorities and the Commission; and (c) to assist in ensuring consistent application of the regulatory framework in all Member States.

57. For electricity and gas, the Commission has suggested in its amended proposals for the completion of the internal energy market, in response to a proposal made by the European Parliament, that such a group of electricity and gas regulators should be set up.

58. Comitology

In most of the sectors concerned, Community legislation provides for Comitology procedures to define the details of implementation of the rules contained in the basic Community legislation. The common pattern under such procedures is that the Commission adopts decisions after consultation of either an advisory or a regulatory committee made up of representatives of Member States. Issues dealt with are often

[26] For more detail on the Florence and Madrid Forum see http://europa.eu.int/comm/energy/en/elec_single_market/florence/index_en.html; http://europa.eu.int/comm/energy/en/gas_single_market/madrid.html

[27] OJ L 200, 30.7.2002, p. 38

those which are particularly relevant for cross-border transactions, such as, for instance, quality standards for cross-border postal services or railway interoperability. Comitology Committees exist for communications, postal services, railways and aviation. It should be noted that it is for the Member States to determine how they are represented in these Committees and, therefore, participation of the sector-specific regulatory authority is not guaranteed. However, in practice, in most cases where regulators exist they are kept involved in the procedure by Member States. For electricity, the Commission proposes in its proposals to complete the internal energy market a comitology procedure for issues relevant to the cross-border transmission of electricity.

1.3 Is there a need for European regulators?

59. A European regulatory authority does not exist at the moment for any of the sectors concerned. However, the idea of setting up such a body at European level has been discussed for certain sectors for some time, in particular in communications[28]. In aviation, for example, the Council decided recently, on the basis of a Commission proposal, to set up a European Aviation Safety Agency (EASA). This agency will assist the Commission in adopting common standards on air transport safety and environmental protection issues under a comitology procedure. It will also be responsible for the airworthiness and environmental certification of aeronautical products designed or used in the Member States. This task has until now been carried out by the national aviation authorities. In this (limited) respect the new agency could be considered a European regulator. In railways, the Commission proposed, in its 2nd railway package of January 2002 setting up a European Railway Agency. This agency would not, however, have a direct regulatory role. That said, in certain areas the Agency would have an advisory role which is comparable to the role of the «European group of regulators» in communications.

2. Financing of services of general interest

60. While for a significant number of services of general economic interest market mechanisms alone may ensure their viability, some services of general interest need specific financing schemes in order to maintain a financial equilibrium.

61. In general, Community law does not impose a specific form of financing of services of general interest and it is for the Member States to decide how these services are financed. Yet, whatever financing scheme is applied, this scheme must comply with the competition and State aid rules as well as with the internal market rules of the Treaty. In any event, the Treaty allows providers of services of general economic interest to be compensated for the extra cost of fulfilling a public service mission. Any compensation that exceeds what is necessary to discharge the public service task is, as a matter of principle, not compatible with the Treaty.

62. Financing schemes can take different forms, such as direct financing through the State budget, contributions made by market participants, the granting of special or

[28] See the two independent studies undertaken for the Commission: Eurostrategies/Cullen International, *The possible added value of a European Regulatory Authority for telecommunications*, Dec. 1999; Nera & Denton Hall, *Issues associated with the creation of a European Regulatory authority for telecommunications*, March 1997

exclusive rights, tariff averaging or, in the case of non-market social services, solidarity-based financing.

(a) *Direct compensation through a Member State's budget*

One form of providing financial support to services of general interest consists in direct compensation through a Member State's budget. This compensation can take the form of direct payments to the provider of the service or of other financial advantages, such as tax exemptions, that reduce the Member State's budget revenues. In some cases, direct compensation by a Member State can be complemented by Community funding based on the principle of co-financing, e.g. through structural funds.

Direct compensation shares the burden of financing a public service task among all tax payers. This form of financing does not create a barrier to entry. It is subject to parliamentary control in the Member States as part of the budgetary procedure.

(b) *Contributions by market participants*

Member States may also decide that the net costs of the provision of a service of general interest should be recovered from those the service is provided to by means of levies on undertakings. This possibility is explicitly provided for in Community legislation on telecommunications and on postal services.

In this case, Member States should ensure that that the method of allocation among undertakings is based on objective and non-discriminatory criteria and is in accordance with the principle of proportionality. This principle should not prevent Member States from exempting new entrants that have not yet achieved any significant market presence. Any funding mechanism should ensure that market participants only contribute to the financing of universal service and not to other activities which are not directly linked to the provision of the universal service obligations. The mechanism should in all cases comply with the principles of Community law, especially, in the case of sharing mechanisms, the principles of non-discrimination and proportionality.

The net cost of universal service obligations may be shared between all or certain specified classes of undertakings. National regulatory authorities should satisfy themselves that those undertakings benefiting from funding provide sufficiently detailed information on the specific costs requiring such funding in order to justify their request. There are incentives for designated operators to raise the assessed net cost of public service obligations. Therefore, Member States should ensure effective transparency and control of amounts charged to finance universal service obligations.

In addition, Directive 2002/22/EC on universal service in electronic communications provides that Member States' schemes for the costing and financing of universal service obligations must be communicated to the Commission for verification of compatibility with the Treaty. Furthermore, recital 21 of this directive provides that "any funding mechanism should ensure that consumers and users in one Member State do not contribute to universal service costs in another Member State, for example when making calls from one Member State to another."

(c) *Special and exclusive rights*

In some cases, Member States grant special or exclusive rights in order to ensure the financial viability of a provider of a service of general economic interest. The granting of such rights is not *per se* incompatible with the Treaty. The Court of Justice ruled[29] that Article 86(2) of the Treaty «*permits the Member States to confer on undertakings to which they entrust the operation of services of general economic interest exclusive rights which may hinder the application of the rules of the Treaty on competition insofar as restrictions on competition, or even the exclusion of all competition, by other economic operators are necessary to ensure the performance of the particular tasks assigned to the undertakings possessed of the exclusive rights*». However, Member States must ensure that such rights are compatible with internal market rules and do not amount to abuse of a dominant position within the meaning of Article 82 by the operator concerned. Generally speaking, exclusive or special rights may limit competition on certain markets only insofar as they are necessary for performing the particular public service task.

In addition, Member States' freedom to grant special or exclusive rights to providers of services of general interest can also be restricted in sector-specific Community legislation[30].

(d) *Tariff averaging*

For some services, such as certain telecommunications or postal services, Member States require that a universal service is provided at a uniform tariff throughout the whole territory of the Member State. In these cases the tariff is based on an average of the cost of providing the services, which can be differ appreciably, e.g. depending on whether the services are provided in a densely populated area or in a remote rural area. In general, and subject to control of abuse by the Commission, tariff averaging is compatible with Community law provided it is imposed by a Member State for reasons of territorial and social cohesion and it meets the conditions set out in Article 86(2) of the Treaty[31] .

(e) *Solidarity-based financing and compulsory membership*

Because of its importance this form of financing is mentioned here, although it only concerns support for services of general interest of a non-economic nature. Basic social security systems in the Member States are generally based on schemes that pursue a social objective and embody the principle of solidarity. They are intended to provide cover for all persons to whom they apply against risks such as sickness, old age, death and invalidity, regardless of their financial status and their state of health at the time of affiliation. The principle of solidarity, for instance, in health insurance schemes, can be embodied in the fact that the scheme is financed by contributions

[29] ECJ Case 320/91, judgment of 17 May 1993, Corbeau, [1993] I-2533 (point 14)

[30] Cf. Article 2(1) of Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services, OJ . L 249, 17.9.2002, p. 21; Article 7(1) of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ L 15, 21.1.1998, p. 14

[31] ECJ Case 320/91, judgment of 19 May 1993, Corbeau, [1993] ECR I-2533 (point 15)

proportional to the occupational income of the persons making them, whereas the benefits are based on the needs of thosewho receive them. In this case, solidarity entails the redistribution of income between those who are better off and those who, in view of their resources and state of health, would be deprived of the necessary social cover. It also mitigates market failures associated with health insurance linked to economies of scale, risk selction an moral hazard. In old-age insurance schemes, solidarity can be embodied in the fact that the contributions paid by active workers serve to finance the pensions of retired workers. It is also reflected by the grant of pension rights where no contributions have been made and of pension rights that are not proportional to the contributions paid. Finally, there can be solidarity between the various social security schemes, in that those in surplus contribute to the financing of those with structural financial difficulties. Such social security schemes are based on a system of compulsory contribution, which is indispensable for application of the principle of solidarity and the financial equilibrium of those schemes. Furthermore, the management of such schemes is generally subject to comprehensive control by the State.

According to the case law of the Court of Justice, organisations entrusted with the provision of such activities that are based on the principle of national solidarity and are entirely non-profit-making fulfil an exclusively social function. These organisations do not engage in an economic activity and are not to be considered undertakings within the meaning of Community law[32]. Nevertheless, it could be considered whether the criteria and the consequences of solidarity-based financing of social security schemes should be clarified at Community level.

63. Internal market, competition and State aid rules aim to ensure that financial support granted to services of general interest does not distort competition and the functioning of the internal market. Also, the sector-specific legislation in place seeks only to ensure that the financing mechanisms put in place by the Member States are least distortive of competition and facilitate market entry. Other relevant criteria for choosing a financing mechanism, such as efficiency, accountability or its redistributive effects, are not taken into account. At this stage, the Commission considers it appropriate to launch a debate on whether these criteria could lead to the conclusion that specific financing mechanisms should be preferred and whether the Community should take measures in favour of specific financing mechanisms.

3. Evaluation of services of general interest

64. Evaluating services of general interest is intrinsically linked to evaluating the performance of the industries providing these services. This performance rests on delivering quantitative and qualitative benefits to users and consumers, and consequently on increasing their satisfaction. Evaluating the performance of these sectors to ensure that objectives of economic, social and territorial cohesion and environment protection are attained is an essential task at Community level. From a purely economic perspective, the evaluation of services of general interest is important because the sectors providing these services account for a substantial part of EU GDP and prices in these industries have an influence on costs in other sectors.

[32] ECJ joint Cases 159/91 and 160/91, judgment of 17 February 1993, Poucet and Pistre, [1993] ECR I-637 (points 18, 19); Case C-218/00, judgment of 22 January 2002 Cisal di Battistello Venanzio & C. Sas ./. INAIL [2002] ECR I-691 (point 44)

Evaluating network industries providing services of general economic interest at this particular time is also justified by the fact that these sectors are currently undergoing major structural reforms due to regulatory, technological, social and economic changes. Nevertheless, the evaluation of performance should be undertaken in all industries providing services of general interest, whether they are subject to structural changes or not. Evaluation is also essential because the information it provides is an important input for broad-based political discussions and informed regulation of the sectors. Finally, evaluation is justified in terms of good governance. Evaluation provides evidence, judgment and information for policy conception, adaptation and accountability. For all these reasons, the Commission considers that it is important to assess services of general interest and has defined a strategy in this respect.

3.1 A three pillar-approach

65. As already stated in the 2000 Communication on services of general interest in Europe, "*the Community involvement with services of general interest goes beyond developing the Single Market, including providing for instruments to ensure standards of quality, the co-ordination of regulators and the evaluation of operations. (...) Such contributions are meant to enhance, and by no means replace, the national, regional and local roles in their respective fields"*[33]. Guided by these principles, the European Commission carries out regular evaluations of the performance of industries providing services of general economic interest. This evaluation is based on three pillars.

66. The Commission has made «horizontal assessments» part of its strategy for efficient evaluation of services of general economic interest. In December 2001, the Commission presented a first horizontal assessment[34] annexed to the «Report on the functioning of product and capital markets»[35]. It provided a baseline for future horizontal monitoring and regular evaluation of these services, as requested by the Council. In line with the Council's invitation to present a methodology for the evaluation of services of general interest, the Communication «A Methodological Note for the Horizontal Evaluation of Services of General Economic Interest"[36] defined a methodology to be applied by the Commission in future horizontal evaluations. The Commission will produce annual reports presenting the results of the horizontal evaluation of services of general economic interest. The reports will consist of three main parts: an analysis of structural changes and market performance, the results of the ongoing consumer consultation process, and a cross-sectoral review of horizontal topics. Initially, horizontal evaluations will cover the sectors, in the Member States, of air transport, local and regional public transport, electricity, gas, postal services, railway transport, and telecommunications.

[33] COM(2000) 580, p. 23-24

[34] Market performance of network industries providing services of general interest: a first horizontal assessment, SEC(2001) 1998

[35] COM(2001) 736 final

[36] COM(2002) 331 final

67. Alongside horizontal assessments, the European Commission pursues sectoral assessments of industries providing services of general economic interest[37]. Indeed, the economic, technical, and regulatory frameworks differ across industries, so that some issues are industry-specific and cannot be fully addressed in horizontal assessments. In addition, these sectoral assessments are suitable instruments for monitoring the transposition of directives and effective application of the rules as transposed into national law, as well as for obtaining a comparison of sectoral regulation. This gives the Commission a basis for guiding the Member States on future regulation and for discussing best sectoral practices. It also provides a clear picture of possible failures to comply with EU laws.

68. Evaluation of the performance of services of general interest would not be comprehensive if it failed to take into account the opinion of the various interested parties (all users/consumers, operators, regulators, social partners, public authorities, etc.) concerned in these services. The views of interested parties are taken into account in the assessment by the Commission and provide guidance for future policy action. Specifically, consumer satisfaction with regard to services of general interest is surveyed by Eurobarometer opinion polls and qualitative surveys[38].

3.2 Scope of the evaluation

69. In the current environment of structural and regulatory change, the evaluation process should take four questions into consideration.

(a) Do the structural changes occurring in the industries providing services of general interest lead to benefits to users and consumers in terms of lower prices and better services?

Liberalising industries providing services of general economic interest should foster competition and therefore increase choice, and should force companies to rationalise production and to offer better and innovative services at lower prices. These multiple benefits should increase welfare, provided appropriate measures are taken to safeguard consumer and user rights. However, the benefits of market opening can only be transmitted to users and consumers if appropriate regulation and competitive conditions are in place. The evaluation of services of general economic interest is important to detect evidence of possible shortcomings in the transmission of these benefits and their possible capture by certain economic operators. This objective is consistent with the Commission’s general initiative to improve governance and the quality of regulation in the European Union.

(b) How are access and quality evolving with regard to the provision of services of general interest?

Market performance includes the quality and the affordability of the service provided. With market opening, there is a potential risk that a competitive environment could put pressures on prices at the expense of the quality of these services or at the cost of an unequal distribution of benefits among users and

[37] See the examples from the telecommunications, postal, energy and transport sectors in the Commission Report on services of general interest, COM(2001) 598, 17.10.2001, p. 15

[38] http://europa.eu.int/comm/consumers/cons_int/serv_gen/cons_satisf/index_en.html

consumers. Therefore, the evaluation should take particular account of the interaction between different infrastructure networks, as well as the objectives of both economic efficiency, consumer and user protection and economic, social and territorial cohesion. In this context, an essential aspect to be considered is the degree of accessibility to networks. For instance, in energy and transport, it is useful to assess the degree of interconnection between different networks, and in particular their geographical link between the most developed areas and the less favoured regions.

(c) How is employment affected by changes in the sectors providing services of general interest?

Industries providing services of general interest have traditionally been run by the public sector and are major employers. The introduction of competition raises the fear of substantial employment adjustment costs. These fears represent a main source of resistance to the structural changes. For this reason, it is important to assess the extent to which these costs occur. The aim of the assessment is to appraise both direct and indirect effects on employment. Therefore, it is particularly important to broaden the scope of the analysis and to assess long-term impacts on the economy as a whole, alongside the short-term effects in the industries providing the services.

(d) How are these developments perceived by users/consumers?

The last issue to be dealt with is how developments in the performance of these sectors are perceived in practice. A mismatch may indeed arise between the developments observed and their perception by the public. As users and consumers should be the ultimate beneficiaries of the services provided by these industries, it is crucial to canvas their opinion. It should nevertheless be borne in mind that the beneficiaries are a multiplicity of actors ranging from private households to companies with differences in revenues, size and other characteristics. Therefore, different groups should be considered separately in any evaluation.

3.3 Issues

70. One of the main stumbling blocks for a comprehensive evaluation is the huge disparity in data availability. By providing guidance, the European Commission has played an important role in streamlining and standardising data collection. Since 2000, the Commission has published a list of structural indicators,[39] some of which are related to industries providing services of general interest. The Communication on a Methodology to evaluate services of general interest contains in its annex a list of indicators, some of which are currently unavailable, that provide an ideal map for evaluation. This list could be the basis for discussion with potential data providers to improve data collection. Alongside a lack of resources of national regulatory or statistical bodies and remaining differences in methodologies that make comparisons difficult, one increasing difficulty is that the process of market opening itself can affect the availability and quality of data. On the one hand, the introduction of competition has in some cases led to more comprehensive data gathering and

[39] See COM(2002) 551, 16.10.2002 and Commission Staff Working Paper in support of the Report from the Commission to the Spring European Council in Brussels – Progress on the Lisbon Strategy (COM(2003) 5), SEC(2003) 25/2, 7.3.2003

evaluation than existed before the emergence of private sector operators. On the other hand, some Member States are having difficulty where private companies refuse to disclose strategic information on the grounds that it is market sensitive, though it is not always apparent that this is the case. One issue for discussion is to strike the balance between the need to obtain data for evaluation and policy-making and the right of companies to treat this information as confidential.

71. In addition, the evaluation needs to reach the right balance between economic and social policy considerations, especially as regards service quality provision and social and territorial cohesion. This is an issue on which the existing legal framework relating to services of general interest provides only partial guidance.

72. To grasp these issues, the Commission has developed an evaluation strategy and provides the necessary input for the debate. So far, its role has included carrying out horizontal evaluations across countries and sectors, plus the task of ensuring more co-ordination between national regulators to make the conditions of competition and regulation more similar across Member States. However, the Commission cannot encompass, summarise and present a consolidated view representing all the often diverging views of the different interested parties on the performance of services of general interest. This means that there is a need for a broad debate on how to evaluate and on who should carry out this task. In addition, the evaluation carried out by the Commission at Community level does not preclude supplementary evaluations at other levels (in accordance with the principle of subsidiarity) or by other bodies. The question of whether an evaluator at Community level should be independent from the Commission and/or the Member States remains open to debate.

73. As suggested in the European Parliament's resolution,[40] public participation could be greatly expanded. The Parliament proposes to *«organise the debate within the various existing forums (Economic and Social Committee, Committee of the Regions, consultative bodies, associations involved in services of general interest initiatives and consumer associations)».* The results of this debate should be taken into account and provide guidance for the evaluations, and the evaluations should themselves be the subject of debate. Such a broad social debate on the performance of services of general interest is welcome, provided that the interests of all interested parties are well balanced and properly represented. Within the current institutional framework, it remains unclear what the respective roles should be of the different institutions and organisations in the evaluation of services of general interest and how the debate should be structured and organised.

[40] European Parliament report on the Commission Communication on «Services of general interest in Europe», COM(2000) 580 C5-0399/2001 – 2001/2157/COS; Final A5/0361/2001. Rapporteur: Werner Langen. 17.10.2001

4. The international dimension: trade policy

4.1 Liberalisation of trade in services of general interest within the context of the World Trade Organisation (WTO)

74. The Community and its Member States are parties to the General Agreement on Trade in Services (*GATS*),[41] which is the main multilateral set of disciplines on trade in services, where WTO members have undertaken binding commitments to open up, subject to listed limitations, specific services sectors to competition from foreign providers.

4.1.1 Services of general interest are not excluded as such from the GATS

75. The term «services of general interest» cannot be found in the GATS. GATS disciplines apply to all committed services with two exceptions:

- in the air transport sector, traffic rights and all services directly related to the exercise of traffic rights, and

- for all sectors, services provided to the public in the exercise of governmental authority, which means any service that is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

It may be added that the supply of services to public entities through procurement – including services of general interest – is not currently subject to the GATS core obligations (most-favoured-nation, national treatment, market access, possible additional commitments). However, the Community has undertaken to grant most-favoured-nation and national treatment vis-à-vis the contracting parties of the Agreement on Government Procurement (GPA), also negotiated within the WTO framework.

4.1.2 The GATS provides for general and security exceptions, which to a large extent correspond to the exceptions of the EC Treaty

76. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in the GATS can be construed to prevent the adoption or enforcement by any Member of measures necessary to protect public morals or to maintain public order, to protect human, animal or plant life or health, to secure compliance with laws or regulations relating to the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts, the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts, and safety (Article XIV of the GATS).

77. In addition, nothing in the GATS can be construed to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security

[41] See the Commission publication «GATS. A guide for business» and the WTO publication «GATS. Facts and fiction». The text of the GATS is published in OJ L 336, 23.12.1994, p. 190

interests or to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests (Article XIV bis of the GATS). The GATS preamble also provides for the right of Members to regulate the supply of services in order to meet national policy objectives.

4.1.3 The liberalisation of trade in services of general interest depends on commitments undertaken by WTO Members

78. For those services of general interest that are not excluded from the scope of the GATS, the degree of openness that countries offer is not set automatically and must be the subject of negotiations. Whereas some GATS disciplines – such as the Most Favoured Nation obligation and transparency – apply across the board to all services sectors covered by the GATS, the provisions concerning specific commitments - market access, national treatment and possible additional commitments - apply only insofar as countries have made a commitment in a given sector. The degree of sectoral coverage of Members varies greatly, and no Member has made commitments in all services sectors. Once undertaken, commitments can still be withdrawn or modified under specific conditions. The specific procedure is set out in Article XXI of the GATS.

4.1.4 The GATS does not require privatisation, nor deregulation of services of general interest. It is up to WTO Members to decide on these issues in the exercise of their sovereign rights

79. There is no single model of services of general interest within the WTO membership. The concept varies according to the different sectors and national traditions and legal conditions in the Members concerned. The GATS leaves it entirely for Members to decide whether they provide services of general interest themselves, directly or indirectly (through public undertakings), or whether they entrust their provision to a third party. Thus, services of general interest can be and are carried out either by public or by private undertakings, or jointly.

80. The objective of the GATS is to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalisation. It is not to deregulate services, many of which are closely regulated for very good reasons. In addition, in terms of general exceptions, the GATS does not prevent the adoption or enforcement of measures necessary to protect *inter alia* public morals, public order, and human, animal or plant life and health.

81. It must be observed, however, that whenever WTO Members, in the exercise of their sovereign rights, have undertaken commitments in a given services sector, they are obliged to administer their services regulation for that sector in a transparent and predictable manner. In this context, GATS calls upon WTO Members to develop disciplines for certain specific measures that affect trade in services (qualification requirements and procedures, technical standards and licensing requirements). Such GATS disciplines should ensure that those specific measures are based on objective and transparent criteria and that they do not unnecessarily hamper trade in services having regard to the need to ensure the quality of the service. So far, only disciplines for the accountancy sector have been agreed, but they have not yet entered into force.

82. WTO Members can in any case, in the exercise of their sovereign rights, undertake commitments additional to market access and national treatment, under which they accept that they will abide by specific regulatory obligations. In this context, it has to be noted that about 75 WTO Members have agreed to certain common regulatory principles applicable to the telecommunications sector by subscribing to a «reference paper» which contains rules on, among other things, competition, interconnection, licensing, regulator's independence.

4.1.5 The GATS agreement does not preclude the imposition of public service obligations

83. GATS allows WTO Members to impose public service obligations in a liberalisation context. In their commitments, WTO Members can grant full market access and national treatment to foreign service providers, and at the same time impose on them the same public service obligations that apply to domestic service providers. Even when they go further and subscribe to common regulatory principles, as some have done through the telecommunications «reference paper», they can at the same time keep their right to define the kind of public (universal) service obligation they wish to maintain.

4.1.6 Subsidisation of services of general interest is not forbidden by the GATS

84. At present, the GATS only envisages negotiations with a view to developing the necessary disciplines to avoid trade-distortive effects of subsidies (Article XV of the GATS). In the absence of these multilateral disciplines, all subsidies are allowed, although subject to the national treatment principle, since subsidies are measures that affect trade in services. Accordingly, for those services where a WTO Member has undertaken market access commitments, a country that wants to limit access to subsidies to domestic service suppliers must specify this in the schedule of commitments as a national treatment limitation.

85. A WTO Member that has undertaken commitments in respect of services of general interest is therefore free to decide whether and to what extent domestic subsidies are granted to foreign service suppliers that enjoy market access to those services. Such decision will have to be transcribed in a national treatment commitment.

4.1.7 Community commitments in respect of services of general interest are undertaken in coherence with the internal market rules applying to these services

86. In the Uruguay Round, the Community has undertaken binding commitments for certain services of general interest (e.g. telecommunications, privately funded education, environmental, health and social and transport services). These commitments took into account the situation in the internal market, were limited to certain activities specifically listed and were subject to a number of specific limitations.

87. The specific commitments undertaken at the Uruguay Round have never gone beyond granting to foreign services suppliers the market access and national treatment that Community services suppliers enjoyed within the internal market in sectors open to competition. The rules of the internal market are also fully respected by the Community commitment to subscribe to the «reference paper» in the telecommunications sector. None of these commitments has constrained the internal policy regarding the organisation of these sectors. Member States also maintain the

right, even in areas where specific commitments have been undertaken, to impose public service obligations which are also applied to foreign private providers (for example, on universal service, quality standards or consumer/user protection)[42]. As regards the financing of services of general interest for which market access commitments were undertaken, the Community has reserved the possibility, by way of a horizontal limitation, of providing or subsidising services within the public sector.

88. As far as the current WTO negotiations in services are concerned, the Community has addressed requests[43] to other WTO Members for liberalisation in most services sectors: professional and other business services, telecommunications services, postal and courier services, construction services, distribution services, environmental services, financial services, news agency services, tourism services, transport services and energy services. No requests have been made on health services or audio-visual services to any country, and on education services only the US received a request limited to privately funded higher education services. Through these requests, the Community does not seek to dismantle services of general interest, nor to privatise State-owned companies in third countries. It is also recognised that liberalisation of trade in services may, in many cases, have to be underpinned by an institutional and regulatory framework to ensure competition and to help improve access to such services for the poor. In this respect, the requests in no way undermine or reduce host governments' ability to regulate pricing, availability and affordability of services of general interest as they choose. Indeed, the Community is simply asking that Community service suppliers be granted market access to compete with domestic services suppliers under the same conditions.

89. Likewise, the Community offers will not affect the provision of services of general interest within the Community, or the right of the Community to regulate its services sector and to design its own regulatory frameworks. In this context, the offer presented by the European Community and its Member States to the WTO on 29 April 2003,[44]while being comprehensive, do not propose any new commitments for health and education services. For other services of general interest (e.g. telecommunications services, postal and courier services, environmental services and transport services), the offer does not go beyond the state of liberalisation within the internal market and preserve the possibility of imposing universal service obligations.

90. As regards the financing of services of general interest, it is proposed that horizontal limitations be maintained in respect of subsidies in order to preserve the sustainability of the public sector. For the subsidies negotiations provided for by Article XV of the GATS, which are not very advanced, the Community will in any case take internal developments in respect of services of general interest into full consideration.

[42] In addition, the Community and the Member States may apply the exceptions of the GATS

[43] See http://europa.eu.int/comm/trade: «GATS: Pascal Lamy responds to Trade Union concerns on public services, Brussels, 7 June 2002» and «Summary Of The EC's Initial Requests To Third Countries In The GATS Negotiations, Brussels, 1 July 2002»

[44] See in http://europa.eu.int/comm/trade.

4.2 Liberalisation of trade in services of general interest in a plurilateral and bilateral context

91. In a bilateral context,[45] a number of agreements contain provisions for the liberalisation of services between the Community and the relevant trading partner. They normally cover all trade in services, with a few exceptions relating to audio-visual, maritime cabotage and air traffic rights. No specific exception for services of general interest is provided for in these agreements, except in cases where public utilities enjoy monopolies or exclusive rights.

92. The degree of liberalisation of trade in services varies from one agreement to another. The commitments undertaken by the Parties determine therefore the degree of liberalisation envisaged for services of general interest. While the number of sectors under consideration and the level of ambition for the liberalisation of services are different under GATS and bilateral agreements, the position of the Community is essentially the same in both contexts. In all circumstances, commitments undertaken by the Community in a bilateral context will also be consistent with the Community internal market.

93. In respect of subsidies, some bilateral agreements (the EEA and the Europe agreements) contain provisions that are based on the Community State aid regime. The Community monitors their implementation to ensure coherence with the Community regime. The other bilateral agreements entered into by the Community do not cover subsidies in the services sectors or, if they do, their provisions are not very stringent.

[45] See http://europa.eu.int/comm/trade/bilateral/index_en.htm

EUROPEAN COMMISSION

GREEN PAPER

PUBLIC PROCUREMENT
IN THE EUROPEAN UNION:

EXPLORING THE WAY FORWARD

GREEN PAPER

PUBLIC PROCUREMENT
IN THE EUROPEAN UNION:

EXPLORING THE WAY FORWARD

Communication adopted by the Commission on 27th November 1996
on the proposal of Mr. MONTI

Summary

1. An effective public procurement policy is fundamental to the success of the single market in achieving its objectives: to generate sustainable, long-term growth and create jobs, to foster the development of businesses capable of exploiting the opportunities generated by the single market and competitive in global markets, and to provide tax-payers and users of public services with best value for money. Every year, European contracting authorities buy goods and services worth some 720 billion Ecus, representing close to 2 000 Ecus per citizen of the Union. Because of the economic importance of public procurement, making purchasing efficient can lead to significant savings for public authorities, and, consequently, for tax-payers. Such considerations are particularly important for fiscal deficit reduction policies, imposed by the Maastricht convergence criteria. A policy of more openness in public procurement also leads, of course, to many other, perhaps less obvious benefits. Fair, transparent and non-discriminatory award procedures, together with the possibility for suppliers to have recourse to national courts to assert their rights, limit the risks of fraud and corruption in administration.

2. The main objectives of the Union's public procurement policy are: the creation of the conditions of competition necessary for the non-discriminatory award of public contracts, the rational allocation of public money through the choice of the best offer presented, suppliers' access to a truly single market with significant business opportunities, and the reinforcement of competition among European enterprises.

3. As far as impact is concerned, very encouraging results are already there with regard to the transparency of the contract award procedures. However, two major problems remain: on the one hand, insufficient and incomplete implementation by Member States of the public procurement Directives; on the other hand, a relatively limited economic impact to date, since effects on price convergence, public sector import penetration and the increase in the number of bidders have not so far matched expectations.

4. To improve the situation regarding these two problems, the Commission is presenting a Green Paper intended to provide a framework for a wide-ranging debate on public procurement in the European Union. This develops the Commission's initial thinking on a number of fundamental issues. Interested parties (Council, the European Parliament, Economic and Social Committee, Committee of the Regions, trade associations, contracting authorities and entities, suppliers and consumers) are invited to present their views. in writing no later than 31st. March 1997. On the basis of written contributions, the Commission will determine whether or not to organise a hearing with interested parties, and will draft a Communication on public procurement.

5. The issues addressed in the Green paper are:

- the objectives of the Union's public procurement policy and its impact to date,

- the implementation in national law and effective application of the Community legislation,

- how market access can be facilitated by information and training and also through the development of electronic procurement,

- how public procurement policy can be combined with other Community policies, in particular the policies on small and medium-sized enterprises (SMEs), on standardisation, on Trans-European Networks (TENs), on the Cohesion and the Structural Funds, on contracts awarded by the European institutions or financed by Community funds, in the social field, on the environment and on the defence sector, and, finally,

- access to other countries' procurement markets.

To assist the reader, a brief summary is provided at the beginning and a short list of key issues for debate at the end of each chapter.

6. A complete legislative framework has been set in place for public procurement. A period of stability in this framework is desirable and it is not therefore intended to make any fundamental changes. This does not of course mean the Commission will renounce its right of initiative. As regards the legal framework, it is important to redouble efforts with regard to both the implementation of the Directives by Member States and the application of the rules by contracting authorities and entities. This Green Paper contains a list of problems to do with the application of the Directives and puts forward possible solutions to be debated with interested parties (see chapter 3).

7. Now that the legislative framework is in place, entities and suppliers must exploit the opportunities it offers and must maximise benefits. Yet many contracting entities appear to lack detailed knowledge of their legal obligations; suppliers, particularly SMEs, frequently seem unaware of the market opportunities that exist. This is where the opportunities offered by training and information must be fully exploited. Looking to the future, the development of electronic tendering will play a key role in increasing transparency and access to public procurement (see chapter 4).

8. Public procurement policy has positive repercussions on other Community policies (see chapter 5).

- Making market access more transparent allows SMEs to unlock new potential markets, although these firms still face a number of difficulties in participating effectively in public procurement. The Green Paper presents measures which might be capable of improving the situation.

- In the field of standardisation, the Commission intends to step up efforts, in co-operation with business, to ensure that the standards institutions draw up European standards for use in contract documents, thereby facilitating the effective opening-up of public procurement.

- The commitment of public and private capital required for Trans-European Networks is encouraged with contract award procedures laid down by the Directives that guarantee an acceptable return for investors.

- Correct application of the Community rules also helps to allocate Community resources (from the Structural and Regional Funds, community-financed contracts or contracts awarded by Community institutions) more efficiently.

- Public procurement rules can contribute to a better achievement of social and environment policy objectives.

- In this Green Paper, the Commission confirms that it is open to any initiative aimed at stimulating competition in defence procurement, with a view to ensuring a European identity in security and defence policy and at the same time strengthening the competitiveness of our industry.

9. The entry into force of the new Government Procurement Agreement (GPA) of the World Trade Organisation, opens up a considerable number of markets in third countries to businesses in the Union. Globalisation of public procurement is well on the way. European enterprises must take up the challenge with determination. Faced with increasingly relentless international competition, success will depend on innovation and on an international vision of what is at stake. The Green Paper invites all interested parties to provide information on all of the problems they face in these markets. In this context of market opening, it is important to help associated Eastern and Central European countries, as well as those of the Mediterranean Basin, to develop best practice in awarding public contracts.

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1. INTRODUCTION

1.1 An effective public procurement policy is fundamental to the success of the single market as a whole. Every year, the European Union's public authorities spend about 720 billion ECU buying goods and services: this represents 11% of EU Gross Domestic Product. With the completion of the Community's legal framework for public procurement, it is essential to launch thinking and discussions on how best to achieve its full potential: discussions in which the Member States, the European Parliament, and, crucially, the contracting authorities and suppliers themselves are invited to take part.

1.2 The European Union has already made considerable progress in its public procurement policy. The legislative framework for open and competitive public procurement is in place and is now being implemented by Member States. The parties involved in public procurement are gradually adapting to the new situation. This policy framework will continue to be an incentive for major change in traditional purchasing practices in the Member States, thus contributing to an environment favourable to economic development in Europe as a whole. Public procurement is already more open to competition than ever before. Wider access to public procurement in other countries, including those outside the Union, is already generating significant new market opportunities.

1.3 If our public procurement policy represents new opportunities, it also presents a formidable challenge. New rules necessarily involve major efforts to adapt traditional ways of working. For a contracting entity this means having to deal with new companies, often from another Member State right from the outset. For a supplier, it means: increased exposure to competition; the need to test new markets and the crucial requirement to remain internationally competitive. For the Governments of the Member States too, the challenge is real. As the major purchasers, they must follow the rules; they are also responsible for the transparency of the system; and they have to implement the Directives into their national legislation in accordance with their political commitments.

1.4 Now is the time to look at what we have achieved and what is still to be done. The process of transformation is already under way. It is the adoption of the Community Directives and their implementation, even if only partial, and the action of the Commission to protect the rights to which they give rise, which have put into place the essential elements of efficient purchasing. However, it is a difficult and sometimes painful process, particularly where relationships based on habit, special links and national preferences once reigned. Long-standing purchasing traditions that bred inefficiency are being progressively abandoned. Some contracting entities have already been able to demonstrate that, by applying the Community rules, they are getting the best value for money. Procurement markets of other Member States are beginning to open up; competition is intensifying and our industry is becoming better and better prepared to face challenges at international level. Yet more remains to be done if our public procurement policy is to achieve its full potential.

1.5 Of course, the primary responsibility for the success of this process lies with the contracting entities and suppliers, whatever their size. But the Commission and the Member States themselves have a major role to play;. They must work together to create the conditions in which competitive procurement can take place and our enterprises can flourish. The potential in economic growth and, ultimately, employment will go largely unexploited if barriers to cross-border transactions in goods and services are not removed. The smooth functioning of the internal market in procurement is, therefore, of relevance in the context of the evolving debate on a European Confidence Pact for Employment.

1.6 This Green Paper is intended to provide a framework for a wide-ranging debate. The chapters that follow set out the background against which the Commission is developing its initial thinking on a number of issues central to the Community's present and future public procurement policy. These issues include the effective implementation into national law and application of legislation; how market access can be facilitated by information and training and by the development of electronic procurement; how the correct application of public procurement law can be pursued while implementing other Community policies, in particular with regard to policy on small and medium-sized enterprises (SMEs), Trans-European Networks (TENs), standardisation, the Cohesion Fund and the Structural Funds and contracts awarded by the European institutions or using Community resources, on social policy, consumer policy and environment policy; and, finally, on access to other countries' procurement markets. To assist the reader, a brief summary is provided at the beginning of each chapter and a short list of key issues for debate at the end.

1.7 The Commission invites all interested parties (Council, the European Parliament, Economic and Social Committee, Committee of the Regions, trade associations, contracting entities, suppliers and consumers) to present their views. Responses to all or part of the Green Paper should be made in writing no later than 31st. March 1997.

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At the end of this written consultation phase, the Commission will decide whether or not to hold a hearing in Brussels with interested parties.

1.8 The Commission will draw up a special communication on public procurement on the basis of the contributions to the Green paper and the analysis and reflection stimulated by the communication on the impact and effectiveness of the Internal market[1]. That communication, which will include a plan of action, should set out what needs to be done to bolster the effectiveness of the legal framework and more fully achieve the objectives of the Community's public procurement policy.

[1] Document COM(96) 520.

2. THE BACKGROUND TO THE DEBATE

The objective of the Union's public procurement policy is to achieve fair and open competition for public contracts, thereby allowing suppliers to gain the full benefits of the single market and contracting authorities to choose from a more competitive and wider range of bids. The basic Community legal framework needed to meet these objectives has now been established: it strikes a fair balance between legal certainty and operational flexibility. The results already achieved on the transparency front are highly encouraging. As far as the economic impact of the rules is concerned, however, the data available are less favourable and show that problems still remain in terms of the practical effectiveness of the legislation, even if certain positive signs are beginning to emerge.

I. The objectives of the Union's public procurement policy

2.1 The foundations of the Community's open procurement rules are to be found in the EC Treaty, particularly in those provisions which guarantee the free movement of goods, services and capital, establish fundamental principles (equality of treatment, transparency and mutual recognition) and prohibit discrimination on grounds of nationality. To render these basic Treaty provisions more effective, detailed secondary legislation (in the form of directives) was required. These cover the award of public works, supplies and service contracts (the traditional sectors) by public authorities and by entities operating in the water, energy, transport and telecommunications sectors (utilities) and also provide means of redress for suppliers (for details, see Annex 1).

2.2 Before the present Community legal framework was in place, procurement tended to be focused on the market of each Member State. There was at times a high degree of protection for domestic suppliers and a large proportion of public sector contracts were usually awarded to domestic suppliers with little regard to value-for-money criteria. Under these conditions, there was little incentive for a domestic supplier to the public sector to improve its competitiveness. As a result, past purchasing policies all too frequently failed to take sufficient account of commercial considerations, with the result that the taxpayer and consumer were, probably unknowingly, left to bear the consequences in inefficiency and extra costs.

2.3 The primary objectives of the Union's public procurement policy, set within this context, have remained unchanged: to create the necessary competitive conditions in which public contracts are awarded without discrimination and value for taxpayers' money is achieved through the choice of the best bid submitted; to give suppliers access to a single market with major sales opportunities; and to ensure that the competitiveness of the European supplier base is strengthened. Developing an effective European public procurement policy is essential if the single market is to deliver long-term sustainable growth and job creation; a European supplier base that can exploit the opportunities of the largest integrated domestic market in the world and continue to compete successfully in global markets; and better public services at lower costs to the taxpayer and the utility customer. Public authorities and public utilities in the EU spend some ECU 720 billion per year on goods and services, which in 1994 was 11,5% GNP of the 15 Member States or, in other words, the totality of the Belgian, Danish and Spanish economies, i.e. nearly ECU 2 000 per EU citizen. The extent of European public procurement means that buying goods and services by effective purchasing systems can make significant savings for governments and thus for taxpayers. Such considerations are all the more relevant in view of the strong pressure to cut budget deficits in line with the Maastricht convergence criteria.

2.4 There are, of course, many other, perhaps less obvious, benefits of a more open procurement policy. Fair, non-discriminatory and transparent procurement procedures render perpetration of fraud and corruption in public administration more difficult. Whilst transparent procedures are not sufficient in themselves to eradicate fraud and corruption, an effective and dissuasive system of monitoring, procedural checks and proportional penalties helps to protect against breaches of public trust. In addition, it should be noted that, where Community funds are involved, instruments establishing standards of protection are already in existence[2] to deal with the problem of fraud and corruption,. These could provide a useful source of reflection for an in-depth discussion.

II. The impact so far

2.5 The Cecchini report on the cost of non-Europe[3] estimated that savings of around ECU 22 billion could result from greater transparency and an increased openness of public contracts. There is as yet no hard evidence that savings on this scale have been made. The same is true about price convergence or greater intra-community trade flows in public contracts for sensitive sectors. In co-operation with EUROSTAT, methods of investigation have been drawn up to assess in a comparable and harmonised way the importance and structures of public contracts in the various Member States. Two Member States (Portugal[4] and Greece[5]) have already volunteered to test these methods which quantify the significance of public contracts in these two countries by collecting different types of information (amount and number of contracts awarded by public entities, type of award procedure, products bought, features of firms who have won contracts, etc.,...). A similar exercise is planned for Germany before the end of the year.

2.6 The Commission presented a communication on the impact and efficiency of the legislation on the Internal Market (“1996 Review”)[6]. One theme is the liberalisation of public procurement contracts. It discusses whether certain of the expected benefits have been obtained in this sector by analysing in particular the effects of legislation on demand and supply, import penetration, price evolution and estimates of economies realised. The results show that public procurement markets in Europe are developing significantly even if public procurement policy has not yielded all the benefits, particularly because Member States have failed to incorporate the Directives into national law.

[2] See, for Community administrative penalties, Regulation concerning the protection of financial interests n° 2988/95, OJ n° L312, 8.12.1995, p. 1; regarding criminal penalties see the Convention on the protection of the European Communities financial interests (against fraud), 2607.95, OJ N° C316, 27.11.1995, p. 48 and the first additional protocol (regarding corruption), 27.9.1996, OJ n° C313, 23.10.1996, p. 1.

[3] “The cost of non-Europe in Public Sector Procurement” WS Atkins Management Consultants, 1987.

[4] Instituto Nacional de Estatistica, Portugal, March 1995.

[5] National Statistical Service of Greece, February 1995.

[6] See footnote 1. above.

2.7 The most visible effect of the Directives has thus undoubtedly been a major increase in the transparency of contract award procedures. The number of tenders advertised in the Supplement to the Official Journal (and in its electronic version, Tenders Electronic Daily) has steadily increased. The total number of procurement notices rose from 12.000 in 1987 to nearly 95.000 in 1995. Projections for the next two years suggest further increases to nearly 200.000. These figures are themselves a useful indicator of the effects of the public procurement Directives on the transparency of public contracts award procedures. Moreover, an enquiry of 1.600 suppliers has shown increased response rates to new business opportunities (90% for local markets and 70% for markets beyond the frontier). Nevertheless, it must be added that of the some 110.000 entities and contracting authorities to which the Directives apply, about 85%, especially local authorities, do not comply with their advertising and transparency requirements.

2.8 Firms supplying equipment to the public transport, telecommunications, electrical and health service sectors - all with important public sector clients - have undergone considerable structural change due to different factors, among which the rules on public contract award procedures can be assumed to have played a part. Joint ventures and mergers have taken place, allowing research and development efforts to be pooled. The overall result is, without doubt, a more efficient European industry, better placed to take advantage of the economies of scale offered by the single market and better prepared to compete at the global level.

2.9 Despite these few encouraging signs, there is still a major problem of non-compliance. Some Member States have not incorporated the Directives into national law. Only three Member States have fully incorporated all texts. Need one emphasise that the Commission has initiated 39 infringement procedures against the Member States concerned for failure to incorporate the Directives into national law ? This is a problem connected with ensuring greater compliance with the legislation which is discussed in the next chapter.

2.10 Moreover, it seems that in a number of sectors, contracting entities are not seeing the benefits which justify the efforts necessary to fulfil the obligations imposed by the Directives and are also detecting reluctance on the part of would-be suppliers (particularly those from other Member States) to bid for their contracts. This may be an indication of the existence of a time-lag for economic operators to adapt behaviour to take account of new rules and respond to new market opportunities. No doubt, certain economic operators have responded to observed or perceived competitive threats in a defensive manner rather than by expansionist strategies to build up presence and market share in other Member States.

2.11 Finally, the share of imports for public contracts in Europe remains modest : for direct cross-frontier business, they have risen from 1.4% in 1987 to 3% in 1995; and for purchases made through importers or local subsidiaries, they have increased from 4% in 1987 to 7% in 1995.

III. Questions

1. Do you have any other economic statistics which would be useful for assessing the impact of the Directives and their effects on employment?

2. Why are economic operators reluctant to tender for contracts in other Member States ?

3. APPLICATION OF PUBLIC PROCUREMENT LAW CURRENT STATE OF PLAY AND TRENDS

A legislative framework has been set in place for public procurement. The Commission recognises the need for a period of stability and does not therefore intend to make any fundamental changes to the framework. Neither does it renounce its right of initiative, of course and it is prepared to take or to propose the most appropriate measures wherever this should prove necessary.

The Commission stresses that efforts have to be stepped up with regard to both implementation and application of the legal framework, in order to achieve a level-playing - field for operators seeking public contracts throughout the Union.

In carrying out its task of monitoring the application of Community law, the Commission has found a number of problems to do with both implementation of the Directives into national law and actual application of the rules by contracting authorities and contracting entities. These are initial observations that the Commission will incorporate into the detailed examination of the application of the existing rules which it is required to carry out in accordance with the Directives.

For enforcement of the law on public procurement to be successful, speedy and effective means of redress must function satisfactorily at both Community and national level. The ways in which remedies operate do not always fulfil these conditions. With the Remedies Directives in place, most of the problems should now be tackled at national level. Encouraging the practice of attestation and making the conciliation procedure more accessible are also fundamental issues to be tackled.

I. Introduction

3.1 A Union-wide legislative framework for public procurement is now in place (see Annex 1). At this stage, the Commission recognises the need for a period of stability, as the framework has not yet produced its full effects. This stability should give all interested parties time to adapt to the new procurement rules and practices. Therefore, without prejudice to its right to initiate legislation, the Commission does not envisage any fundamental modification of the existing regime and confirms its determination to pursue its action in this area in accordance with the principles already established as far as the method chosen and the substance of the rules are concerned. Clearly, should new developments raise problems in specific areas or reveal shortcomings in the legislation, the Commission would not hesitate to take the most appropriate measures to ensure that European purchasers continue to benefit from an open and competitive supply and that suppliers continue to have genuine access to public procurement contracts while strengthening their competitiveness. Liberalisation is now taking place in the telecommunications and other utilities sectors. With regard to the application of the public procurement Directives, the Commission will check whether this liberalisation leads to the establishment of conditions of effective competition in the sector. If this should be the case, it will consider how best to respond to the situation. It should also be noted that most of the Directives require the Commission to review the application of the rules. It will have to carry out a detailed examination of their application in the near future. The debate prompted by this Green Paper should provide useful input for that exercise.

3.2 Community Directives must be implemented into national law. Their application - whether by national, regional or local administrations or by contracting entities in the utilities sectors - must not jeopardise the overall objective of establishing a level-playing-field in public procurement throughout the Union. The perception that not everybody is playing according to the same set of rules can be a major disincentive to opening up public procurement.

II. Directives must be implemented into national law

3.3 The Directives are an essential instrument for our public procurement system. They make it possible to boost economic efficiency and enable the internal market to function properly. The state of Member States' implementation of internal market legislation is regularly published by the Commission and discussed with Member States, including at ministerial level. The Commission has frequently expressed its continuing concern that the current level of implementation of public procurement Directives is inadequate (Table 1). Public procurement is one of the internal market areas where there are the most problems both in terms of communication of the implementing measures and in terms of the quality of implementation. The Services Directive, the consolidated Supplies Directive and the consolidated Utilities Directive are particular problem areas.

3.4 Even though most of the provisions of the Directives have "direct effect" in legal terms, failure to implement and/or faulty implementation prevent European citizens and businesses from taking full advantage of the internal market in public procurement. Thus, for example, major disparities can be observed between, on the one hand, the share of Community Gross National Product accounted for by some of the Member States which have not correctly implemented the Directives and, on the other, the number of notices published in these countries as a proportion of the total number of notices published in the Community. In other words, the number of notices published in these Member States appears low in comparison with their economic importance. The Commission therefore again calls on Member States to ensure that public procurement legislation is, first of all, implemented into national law. The lack of any implementing measures can provide contracting authorities and contracting entities with a ready-made excuse for not applying the rules.

3.5 As a next step, it is essential that Member States draft their national implementing provisions with the utmost care if the quality of implementation is to be sufficiently high to ensure that the objectives of the Community legislation are fully achieved. Faulty implementation can, in certain cases, weaken the rights which the Directives create for the benefit of operators and place the bodies which have to apply the rules in a situation where Community and national legislation are in conflict and consequently cause them to apply the Community rules in force incorrectly. Such a situation is just as serious as non-implementation, because it has the same effect in practice. Therefore, whatever the method used for incorporating the provisions of the Directives into national law, Member States must be sure to eliminate any contradiction between pre-existing national rules and the principles and provisions of Community law, so that operators will interpret and apply them properly. The Commission also calls on Member States to ensure that, wherever possible, the national legislative frameworks into which the Directives are incorporated are made clearer, for example by limiting references to other instruments and endeavouring to group together all the relevant provisions in a single text. This would facilitate application of the rules by purchasing entities and access to contracts for interested firms.

3.6 The Commission is aware of the fact that Community instruments are complex. Their complexity can perhaps explain some of the difficulties in implementation and, above all, in their application. But, this is a direct consequence of the fact that the questions to be solved in order to achieve the objectives pursued, are themselves complex. In implementing the Directives, the Commission is willing to afford the Member States, on request, all the necessary assistance to facilitate the understanding and simplification of the existing texts.

3.7 In any event, according to the information at the Commission's disposal, in some cases, the adoption of implementing measures, for which drafts were prepared in good time, has been delayed for no apparent reason. In other cases, Member States have refused to implement certain provisions of Community law. The Commission doubts whether such situations are justified and would, at the very least, be interested to ascertain any other reasons which might account for the difficulties encountered.

3.8 The Court of Justice of the European Communities has given judgement in several cases concerning the protection of individuals' rights under Community law when Member States are in breach of their obligations, particularly where the implementation of directives into national law is concerned. In *Francovich*[7], the Court established the principle of the liability of the State for damage caused to individuals by the non-implementation of a directive, the provisions of which grant rights to the individual, even though such rights may not have direct effect. In *Brasserie du Pêcheur-Factortame*[8], the Court went even further, recognising that under certain conditions, State liability may be incurred in respect of damage caused by any breach of Community law, regardless of the State body whose action or omission is responsible for the breach. It is thus probable that individuals will avail themselves of this case law before national judges in order to obtain compensation for damage suffered, including loss of profit, and thereby enjoy effective protection of their rights.

[7] Judgement of 19.11.1991 in Joined Cases C-6/90 and C-9/90 [1991] ECR I-5403.

[8] Judgement of 5.03.1996 in Joined Cases C-46/93 and C-48/93 [1996] ECR I-1029. See also the Judgement of 26.03.1996 in Case C-392/93 *British Telecom* [1996] ECR I - 1631

III. The law on public procurement must be correctly applied

3.9 While it is essential that the proper legislative framework should be in place through faithful implementation of the Directives into national law, it is equally important that the rules should be correctly applied by contracting authorities and contracting entities.

3.10 In carrying out the task conferred on it by Article 155 of the EC Treaty of ensuring that Community law is complied with, the Commission has identified a number of cases where application of the rules by purchasing entities has caused problems. Without claiming to be exhaustive, the following points group together some exemplary cases of incorrect application of Community law.

A Issues linked to incorrect application of the Directives

(a) Basic definitions in the Directives

3.11 The first type of problem encountered has to do with the correct interpretation of the scope of the different concepts used in the Directives. For example, in *Beentjes*[9] the Court of Justice defined more precisely what is meant by the term "contracting authority" used in the Directives, stressing the need to interpret the concept in functional terms. Experience has also shown how difficult it is to circumscribe the notion of "contracting entity" as used in the Utilities Directive, since it refers both to the subjective character of entities and to the activity carried on in one of the utilities sectors. The Directive specifies a large number of special cases where purchasing bodies, although covered by the notion of contracting entity are not subject to the rules of this Directive.

3.12 It has also proven difficult in several cases to establish precisely what constitutes a "public procurement contract". The Directives define public procurement contracts in fairly broad terms in order to bring within the scope of the Community rules all kinds of contracts for consideration concluded in writing between a contracting authority and a contracting firm. Despite this broad definition, certain contracting authorities have endeavoured to evade application of the Directives.

3.13 Similar points can also be made with regard to other concepts used in the Directives, and in particular that of a "work", for which some guidance is given in the text itself, but which can be given different interpretations in certain cases. For other concepts, such as that of "supplies" or "services", the Commission notes that some purchasers try to take advantage of the flexibility of the definitions in order to evade application of the Directives by artificially splitting up different contracts that do in fact form a whole.

3.14 The fairly general nature of these concepts is a necessary consequence of the fact that they have to be applied in a wide variety of national situations and legal systems; the Community legislator had to strive to take account of this variety. Care must therefore be taken to ensure that the concepts concerned are interpreted in a way which is consistent with the intentions of the legislator and enables his objectives to be achieved.

[9] Judgement of 20.09.1988 in Case 31/87 [1988] ECR 4635.

(b) Excessive use of negotiated procedures

3.15 A second type of problem has to do with the choice of contract award procedures, and more specifically the use of negotiated procedures. Under the "traditional" Supplies, Works and Services Directives, the negotiated procedure - particularly where there is no prior publication of a notice - is an exceptional means of awarding contracts that may be used only in exhaustive list of cases. The Court of Justice has stated (in *Commission* v *Italy*[10]) that the provisions governing the negotiated procedure must be interpreted strictly and that the burden of proving the actual existence of exceptional circumstances justifying the derogation lies on the person seeking to rely on those circumstances. But a number of infringement proceedings brought by the Commission and judgements handed down by the Court bear witness to the fact that contracting authorities use the procedure much more than they should under the existing strict rules, in particular by claiming extreme urgency where there is none or where the urgency has arisen owing to factors for which they are responsible, or by wrongly claiming that there is only one supplier or contractor capable of performing the contract.

3.16 In cases where it is allowed, the negotiated procedure appears to enable an economically more efficient outcome to be arrived at than a traditional call for competition, thus proving to be a rational method of reducing public purchasers' costs while achieving the objectives pursued. The fact remains, however, that the procedure is less favourable to the goal of market transparency.

(c) Unsatisfactory quality of notifications

3.17 A third type of problem concerns the advertising of contracts. Some of the particulars specified in the model notices annexed to the Directives are missing from a large number of contract notices published in the Official Journal. Cross-checks on published notices have also revealed that the obligation to publish prior information notices and contract award notices is still widely ignored.

3.18 However, transparency, which is a necessary precondition for opening up public procurement, requires contract notices to be complete. Failure to advertise contracts rules out effective competition and the resulting benefits. Each type of notice laid down by the Directives follows a specific line of reasoning. The prior information notices (or periodic information notices in the Utilities Directive) are intended to enable firms, and particularly SMEs, to ascertain purchasers' procurement requirements sufficiently early and to organise themselves accordingly so that they can submit better tenders. The purpose of tender notices proper is to give economic operators all the information they need in order to decide whether and how to bid for a particular contract. Contract award notices enable firms which have taken part in the tendering procedure to check that their rights have not been infringed and provide useful information for analysing market trends in different sectors.

[10] Judgement of 10.03.1987 in Case 199/85 [1987] ECR 1039.

(d) Excessive use of accelerated procedures and imposition of deadlines that are too short

3.19 A fourth type of difficulty relates to the shortening of deadlines through the use of accelerated procedures. Scrutiny of notices published in the "S" Supplement to the Official Journal in pursuance of Directive 92/50/EEC has revealed that a large proportion of the contracts concerned are awarded by accelerated procedure and that, in consequence, the periods allowed for submitting requests to participate and tenders are shortened substantially. Since these periods are thus reduced to minima of 15 days and 10 days respectively, it becomes extremely difficult for firms from other Member States to bid for such contracts. Unlike the Utilities Directive, the "traditional" Directives allow the accelerated form of restricted and negotiated procedures to be used only in cases where urgency renders the normal deadlines impracticable. This means that accelerated procedures should be exceptional. In the light of the above findings, it would appear that they are not regarded as such by contracting authorities.

3.20 A similar but more serious problem arises in the fairly frequent case where purchasing entities set deadlines for participation in contract award procedures that are shorter than the minimum periods laid down by the Directives. Clearly, such behaviour, which is in breach of the applicable rules, considerably restricts or even completely prevents genuine competition between all interested suppliers.

(e) Selection and award criteria

3.21 A fifth type of problem has to do with the criteria applied by contracting authorities in contract award procedures when checking the suitability of candidates (selection criteria) and awarding contracts (award criteria).

3.22 In a number of cases the Commission has challenged, and the Court of Justice has found incompatible with Community law (*Transporoute*[11]), the practice adopted by some contracting authorities of laying down criteria for the technical capacity of candidates other than those listed exhaustively in the Directives. It has also been found that the suitability of candidates has in some award procedures been tested on the basis of clauses that cannot be regarded as selection criteria.

3.23 Furthermore, although the Court has made it perfectly clear that selection and contract award are quite separate phases and therefore that the rules and criteria used in the two phases should not be confused (*Beentjes*[12]), experience shows that many contracting authorities continue to take account, when awarding the contract, of factors that are covered by the selection criteria. This can lead, in certain cases, to the contract not being awarded on the basis of the best tender for that particular contract but to the candidate with the most experience or financial strength. Similar problems arise where purchasers, sometimes relying on national rules which are not compatible with Community law, use award criteria based on factors which are not provided for in the Directives and are therefore unacceptable. Cases where the award criteria are based fairly loosely on regional, social or environmental considerations provide ample illustration of this problem.[13]

[11] Judgement of 10.02.1982 in Case 76/81 [1982] ECR 471.

[12] See footnote 9.

[13] The issues are further discussed in Chapter 5.

B Issues linked to situations which do not fall within the scope of the Directives

3.24 Community law on public procurement is based on a set of rules and principles, in particular the principles of non-discrimination, equality of treatment, transparency and mutual recognition. As the Court has emphasised (*Commission* v *Italy*[14]), the Directives are designed only to ensure the effective attainment of these principles, but it is clear that, given their nature, the principles must apply in all situations where public procurement and similar contracts are involved, and in particular contracts which are not covered by the Directives. Some situations which are particularly significant are mentioned below by way of example.

(a) Concessions or similar contracts

3.25 For the completion and/or management of large infrastructures as well as for the supply of certain services, contracting authorities have recourse more and more frequently to legal mechanisms such as concessions or similar contracts or other awards of special or exclusive rights. This is, in many cases, the result of budgetary constraints to which the contracting authorities are subject and it also meets their concerns to ensure better management of the services. Many projects relating to trans-European networks are an illustration of this.[15] At all events, many complaints received by the Commission concern concessions, similar contracts or other awards of special or exclusive rights.

3.26 Contracting authorities appear to consider that Community law is not applicable to the award of these contracts or rights and, in many cases, they do not implement the measures necessary to ensure transparency and open competition. On the contrary, in this type of situation, contracting authorities must respect the provisions of the EC Treaty, in particular the rules governing free movement of goods and services as well as fundamental principles such as non-discrimination, equality of treatment, transparency and mutual recognition. Moreover, by virtue of the Works Directive, Member States are also bound by the rules relating to publicity when awarding works concessions. The Commission considers that this lack of respect for these fundamental principles of the Treaty is far from satisfactory as it obstructs the proper functioning of the internal market. It does not allow contracts (or rights) in which important economic interests are at stake to be opened up to competition.

3.27 At a later stage and with a view to reinforcing the opening up the award of these contracts to even more competition, consideration could be given to the adoption of rules governing procedures for the competitive award of exclusive rights to provide public services through a system of concessions. The aim of introducing such rules would be to afford new public or private operators easier access to contracts for public services and to instil in existing operators an enterprise culture which is closer to the concerns of users, while still allowing exclusive rights to be granted where these are necessary for maintaining a service in the general economic interest. Such an approach would enable Member States to choose for their citizens operators of public services who are the most efficient in terms of both cost-effectiveness and quality of service. In the case of inland transport services, the Commission has already presented this approach in its Green Paper entitled "Citizens' network."[16]

[14] See footnote 10.

[15] See also Chapter 5, point III.

[16] COM(95) 601 fin - 29.11.95

(b) Public procurement contracts below the thresholds laid down in the Directives

3.28 The procedures provided for by the Community Directives apply exclusively to public procurement contracts whose estimated value exceeds the specified thresholds. Some contracting authorities consider that, for procurement contracts below these thresholds, no Community provision applies, with the consequence that these procurement contracts are sometimes awarded without being put out to tender. Such contracts are often of considerable importance, particularly for small and medium-sized enterprises. As in the case of the granting of concessions and similar rights, these contracts must be awarded in accordance with the provisions of the EC Treaty concerning the free movement of goods and services as well as its underlying fundamental principles of non-discrimination, equality of treatment and transparency.

(c) Changes to rules in the course of individual procedures

3.29 In several cases brought to the Commission's attention, contracting authorities or contracting entities have, when awarding public contracts whose value exceeds the thresholds laid down in the Directives, engaged in behaviour or taken decisions incompatible with Community law, even if the rule or prohibition to be complied with is not expressly laid down in the Directives. This is the case, for example, where substantial amendments are made to the tender specifications in the course of the procedure. One contracting authority thus changed the site of the work to be performed while continuing with the award procedure. In another case, the authority cancelled a large proportion of the works initially planned. Another case revealed changes to the financing terms. The Commission maintained that these changes were substantial and should entail the cancellation of the procedure under way and launching of a new procedure through publication of a new contract notice. Certain cases have revealed a different problem, namely negotiation with one or more candidates in open or restricted procedures. The Commission held that such negotiation was not allowed as it was contrary to the principle of equal treatment and its interpretations have been confirmed by the Court of Justice.[17] The same considerations as those developed above in connection with concessions and contracts below the thresholds apply here since, even if these situations are not regulated by the Directives, they are nevertheless subject to the general principles of Community law.

C Preliminary conclusions

3.30 The examples cited above demonstrate that the application of the Community legal framework in the Member States still lacks consistency. It therefore appears that there is a clear need for further explanation and elucidation of the applicable rules. To this end, the Commission considers it timely to intervene to clarify some of the points mentioned earlier either by means of interpretative communications and/or through guidelines or even through other appropriate means or new rules.

[17] See judgements of 22.06.1993 in Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3385 and 25.04.1996 in Case C-87/94 *Commission* v *Belgium* (not yet published).

3.31 This situation is clearly unsatisfactory, since the efforts to ensure that the Directives are completely and correctly implemented into national law would come to nothing if they were not properly applied in practice. The Commission is determined to tackle these problems actively. The remainder of this Green Paper (and particularly this and the following chapters) sets out a number of options envisaged for achieving more effective application of the public procurement rules. It is important for the Commission to ascertain whether the sectors concerned think that these options are likely to provide satisfactory solutions to the problems mentioned or whether other solutions can be envisaged.

IV. Monitoring application of the law on public procurement

3.32 If we are to remedy the problems that have arisen in connection with the implementation and application of Community law and therefore achieve the objectives we are pursuing, all the authorities concerned must play their part and take the most appropriate initiatives, starting with systems for monitoring the behaviour of contracting authorities and entities, to act swiftly in order to restore compliance with the law. Such systems and powers already exist at Community and national level, but they need to be strengthened.

3.33 Member States and the European Commission must shoulder their responsibilities. Member States must ensure that obligations deriving from Community legislation are fulfilled, inter alia, through appropriate systems of control and sanctions (penalties), which are both effective in practice and have a deterrent value (Article 5 of the EC Treaty). The Commission, for its part, is required by Article 155 of the EC Treaty to ensure that Member States respect and fulfil these obligations, taking into account not only the letter of the law, but also the objectives the legislation is intended to achieve. Enforcement measures must improve compliance and build confidence among suppliers in the satisfactory operation of the system.

A The Remedies Directives

3.34 It is clear that the reactions of suppliers provide the best and most immediate way of ensuring that contracting entities practise open and competitive tendering. They are best placed to see whether the procurement rules are being followed and they can, where necessary, quickly draw purchasing entities' attention to breaches they have committed. Sometimes, breaches are immediately corrected when the contracting entity is made aware of them. When they are not corrected, however, formal remedies can be used, including action through the courts.

3.35 With the Remedies Directives in place, economic operators in every Member State have the possibility of lodging before a national court or tribunal (or body whose decisions are subject to judicial review) a complaint for violation by purchasing entities of the rules laid down in the Directives. The Remedies Directives require the bodies in question to be empowered to grant interim relief (by suspension of the contract procedure, for example), to deliver judgements on the compatibility of procurement procedures with the rules and, where appropriate, to set aside or ensure the setting-aside of decisions taken unlawfully, to require the offending terms to be removed from calls for tender and to award damages. The extent of the remedies available to suppliers should make them the most effective means of protecting the rights of firms bidding for contracts.

3.36 Suppliers need to be given full information about their rights under the Remedies Directives with regard to other Member States' procedures. The Commission will publish guides to make economic operators aware of what can be done when potential infringements in other Member States are identified, including the procedures that are available; how they can be used and the possible rights to compensation they may enjoy. Mention should also be made here of the possibilities offered by the recent case-law of the Court of Justice on the damage suffered by individuals as a result of breaches of Community law committed by Member States (see point 3.8 above).

B Appropriate sanctions

3.37 In the establishment of the legal framework on public procurement by national authorities, an essential element is the introduction of appropriate sanctions. In its communication to the Council and Parliament on the role of sanctions[18], the Commission has already highlighted public procurement as a sector where the possibility of introducing a common system of penalties might be considered with a view to upholding the integrity of the law, and where discrepancies between the sanctions applied by different Member States in cases of infringements of Community law could hamper the effectiveness of this policy. The Council, for its part, in its resolution of 29th June 1995 on the issue of penalties in Community law[19], has also recognised the importance of this issue. It has encouraged the Commission to ensure efficient implementation of Community legislation, including sanctions. If necessary, this could involve provisions relating to sanctions in future Commission proposals. Moreover, it has asked Member States to give positive support to Community action in this field.

3.38 The Commission is concerned that, in practice, the application of the Remedies Directives may vary considerably between Member States, and sometimes even within a Member State. It has also been made aware of the considerable differences which exist between Member States, particularly as regards the requirement for complainants to provide proof of an infringement in order to receive damages, as well as the amount of damages awarded. In some cases, courts and tribunals have awarded successful complainants only a purely symbolic amount; in others complainants have been awarded only the costs of putting together their bid (these costs can be substantial but in no way provide full compensation for losing a contract). The Commission invites Member States and other interested parties to comment on the effectiveness of existing remedies in Member States and on any discrepancies that may exist between the sanctions applied. In addition to the obligation to provide for full compensation for damages suffered, the Commission would also welcome reactions to the desirability of the award consisting of liquidated damages of a sufficiently dissuasive sum, exceeding the damage suffered.

[18] COM(95) 162 final, 3.5.1995.

[19] OJ No C 188, 22.7.1995, p. 1.

C Complaints

(a) At Community level

3.39 The Commission, as guardian of the Treaty, investigates complaints it receives from firms which consider that they have been harmed and seeks to resolve the problems raised. Many such cases have been settled as a result of the Commission's intervention and without referral to the Court of Justice. However, when the Commission finds itself in the situation where it must pursue a case, experience has demonstrated that the infringement procedure provided for under Article 169 of the EC Treaty is not capable of ensuring rapid and effective redress. Whilst the Commission is committed to speeding up its internal procedures, the different stages in the procedure leading to a Court judgement (involving, in the first instance, a letter of formal notice to the Member State authorities concerned and, in the second, a reasoned opinion) can last up to three years and, in some cases, even longer. This particularly arises when the requisite information cannot be obtained in time. In public procurement such lengthy procedures may often be ineffective.

3.40 As indicated in its opinion on the Intergovernmental Conference "Reinforcing political union and preparing for enlargement", the Commission considers that the means used to ensure the application of Community law should be made more effective, in particular as far as the internal market is concerned. The Commission has also taken the view that the role of the Court of Justice should be reinforced, especially in relation to compliance with its judgements.

3.41 Some commentators have pointed to a number of avenues that could be explored with a view to achieving these objectives. One possibility would be to confer on the Commission more effective investigative powers than it has at present, since they considerably limit the effectiveness and promptness of its action in the public procurement field. The system based on Regulation (EEC) No 17/62 in the competition field could provide a useful example of this approach. In the same way, some observers have considered extending the supervision procedures and measures provided by the Regulation (Euratom, EC) 2185/96[20] for the protection of the financial interests of the European Communities to public procurement in general. These provisions are, in fact, applied to the award of public contracts involving Community financing, for example, in the case of trans-European networks (TENs), the Structural and Cohesion Funds or contracts with third countries (see Chapter 5).

(b) At national level

3.42 The Commission has neither the resources, nor the information, to identify and resolve each and every breach of Community rules throughout the EU. From a practical point of view, the vast majority of individual problems encountered by economic operators should be tackled at national level. It goes without saying, however, that the Commission will not hesitate to intervene where appropriate to maintain the integrity of Community public procurement law. The Commission also confirms its determination to play its full role in enforcement, in particular in the pursuit of cases where there are important economic interests and/or legal issues at stake.

[20] OJ of 15.11.1996

3.43 The emphasis the Commission wishes to place on the full and effective application of public procurement rules at national level has already been recognised by some Member States. Sweden, for example, has entrusted the supervision of its contracting entities to an independent authority. Experience suggests that not only does this authority handle particular complaints, its very existence may even prevent behaviour giving rise to complaints, thereby reducing the potential burden on national courts and tribunals as well as on the Community institutions. With a view to monitoring application of the rules more effectively at national level, it could be worthwhile for other Member States to set up a similar body.

3.44 In order to be effective (and recognised as such) an authority such as this would need to be genuinely independent and have the power to require contracting entities to correct procedural errors. However, the standard by which its potential contribution should be evaluated should not, in the first place, be the detection of errors but the achievement of better procurement. Such authorities could play a key role in improving procurement systems: they could provide useful advice to contracting entities, check procurement practices to promote efficiency and ensure that mandatory reporting requirements were in place to enable Member States to supply any necessary statistical data to the Commission. Moreover, it might be useful to exchange information regularly among similar bodies. In this way, a permanent administrative network could evolve between Member States. The creation of authorities of this kind cannot undermine the current distribution of powers between the Commission, as guardian of the Treaty, and the national courts, responsible inter alia under the Remedies Directives for protecting the rights of businesses. Any dispute that might arise between the Commission and these authorities would have to be settled by the Court of Justice, which ensures, in accordance with Article 164 of the EC Treaty, that Community law is interpreted uniformly and applied correctly.

3.45 The Commission invites Member States to consider the establishment or appointment of such an independent authority. The Commission believes that, in some cases, existing bodies could be used for that purpose. Indeed the tasks of such an authority could form part of the functions of a Member State's national court of auditors or of an equivalent authority with genuine and unquestionable independence. The Commission will pay particular attention to the reactions of all interested parties to the concept of national independent authorities for public procurement. It invites any Member State(s) to run a pilot project to test how feasible the application of the concept might be.

D Other means for settlement of disputes

(a) Attestation

3.46 Among the measures under consideration with a view to ensuring that the existing rules are applied more effectively, the Commission considers that greater advantage should be taken of the attestation and conciliation procedures, which have already been established under the Remedies for Utilities Directive but have so far not been used.

3.47 Those contracting entities which apply best procurement practice and set up sound procedures internally are most likely to reap maximum benefits from the Community procurement regime now in force. It is for this reason that the Remedies for Utilities Directive provides for the creation of an attestation procedure under which contracting entities can undergo independent attestation of procurement procedures to check that they are in compliance with the Directive and geared to a rational use of public money. Such attestation, rather like a financial audit, is undertaken by an objectively independent body qualified and authorised to carry out this function. There is no comparable provision in the Remedies Directive applicable to the "traditional" sectors.

3.48 In order to be awarded a certificate of good procurement practice, contracting entities must demonstrate they have procedures in place which, on the basis of past experience, appear to work and to be in conformity with the rules. While an examination of the past procurement record does not, in itself, offer an absolute guarantee as to future procurement, it does afford the contracting entity a degree of confidence that its procedures are sound. The publication of the attestation in the Official Journal could help to give would-be suppliers confidence that it is worth the trouble of tendering because the attested entity has a proven record of competitive and open public procurement. Utilities that accept and meet the prescribed standards could enjoy the advantages of greater choice of suppliers and more competitive bids and so obtain best value for money.

3.49 In conformity with the mandate given by the Commission to the European standardisation bodies CEN and CENELEC, a European standard for attestation was approved in June 1995[21]. Member States must now make appropriate arrangements to ensure that attestators are appointed and can begin work. The Commission is keen to see utilities seek attestation. Moreover, in view of the benefits of attestation procedures the Commission also believes that similar arrangements could usefully be extended to contracting entities outside the utilities sectors and it would welcome a debate on this issue. Similarly, the Commission intends, as a priority, to apply the attestation arrangements to contracting entities awarding contracts involving the Community Funds (see Chapter 5 below).

(b) Conciliation

3.50 Settling disputes amicably is always to be preferred. In this regard the Remedies for Utilities Directive makes provision for a "conciliation" procedure, whereby suppliers and contracting entities may agree to discuss and settle any disputes that arise between them about the correct application of Community law by using independent conciliators. However, in their three years of operation, these procedures have not so far been used. This may in part be due to a lack of information among suppliers and contracting entities on how the procedure works. The Commission would welcome a debate involving Member States, experienced conciliators, contracting entities and industry on how to improve the conciliation procedure and ensure that it is more accessible and operational.

[21] Standard EN 45503 : 1996, published by CEN/CENELEC on 24.1.1996

V. Questions

1. Do you have views on the effectiveness of Member States' implementation of the Directives? What, in your opinion, are the reasons for the difficulties encountered by Member States in this area ?

2. Do you agree with the list of problems to do with application of Community legislation as presented? Should attention be given to other types of erroneous application of Directives? Do you think that there are other reasons for the problems than those mentioned in the text?

3. What, in your view, are the points on which interpretative communications or guidelines would be useful in order to explain and elucidate the applicable rules?

4. How effective are existing remedies in the Member States? Have you found discrepancies between the remedies and sanctions applied within and between Member States that are liable to affect the smooth operation of the internal market in this area? If so, should action be taken?

5. Would liquidated damages exceeding the actual loss suffered be useful?

6. Do you think that, in order to be able more effectively and more swiftly to carry out its task of monitoring compliance with Community law, the Commission should be given more effective investigative powers than it has at present, along the lines of those conferred on it by Regulation No 17/62 in the competition field?

7. Could the establishment of an independent supervisory authority in each Member State improve procurement systems and aid effective enforcement of the rules? Should the Commission establish systems of co-operation at Community level between such independent authorities, calculated to promote a uniform application of the rules for awarding public contracts and fairer access for all to public procurement?

8. Do you agree that attestation should be promoted as an effective means of achieving sound public procurement procedures ? Should attestation be extended to contracting entities outside the utilities sectors? If so, how could this best be achieved (for example, could it be on a voluntary basis)?

9. What is your opinion on the reasons why the conciliation procedure provided for in the Remedies for the Utilities Directive has not yet been used?

4. IMPROVING ACCESS TO PUBLIC PROCUREMENT MONITORING, INFORMATION, TRAINING, ELECTRONIC TENDERING

Now that the regulatory framework is in place, entities and suppliers must exploit the opportunities it offers and maximise benefits. Through monitoring, information has to be collected for evaluation of the economic impact of the regime and to allow suppliers to analyse the specific public procurement demand in the whole of the Union. Monitoring is also necessary in order to enable the Commission to check application of the rules consistently. Information and training can contribute decisively to optimally ensuring effective, value- for- money public procurement. Yet many contracting entities appear to lack detailed knowledge of their legal obligations; suppliers, particularly SMEs, frequently seem unaware of the market opportunities that exist. This is where the opportunities offered by training and information must be fully exploited. Training stimulates the adjustment of old ways of thinking and acting towards a culture that promotes transparency and openness in the choice of suppliers and procurement to the highest commercial standards. Information is the driving-force for efficient public procurement and by improving its quality, it will be made easier for both contracting entities and suppliers to exploit the opportunities offered. Looking into the future, electronic tendering will play a key role in further enhancing transparency and access to public procurement.

I. Monitoring public procurement

4.1 The supervision of correct application of the existing legal framework has to be complemented by permanent monitoring of public procurement practice. A full understanding of the economic realities underlying the award of public contracts is necessary. The relatively homogeneous EU regulatory regime covers increasingly heterogeneous contracts. Services procurement in particular needs to be monitored because it has only recently become subject to the Community rules. Such monitoring could involve, for example, obtaining regular information on the classification of contracts in accordance with Annexes IA and IB to Directive 92/50/EEC and on the behaviour of contracting authorities in this area. To allow monitoring of the economic impact of the Union's public procurement regime, analysis of competition and prices paid by the entities is needed, together with a sound understanding of the size and the structure of the demand side and the information needs of the supply side. On this basis it will be possible to consider to what extent the current regime is meeting the needs of contracting entities and economic operators.

4.2 The Commission intends to design a framework for the monitoring of the economic impact of public procurement and is currently studying ways of optimising the use of data collected from various sources (Tenders Electronic Daily - TED, EUROSTAT). The monitoring exercise should eventually permit the development of price indicators for a representative basket of goods purchased by entities subject to the Community rules. As previously stated, it is only by securing the best and most competitive supplier that contracting entities will be able to provide the best service to the public.

4.3 The Commission reaffirms its commitment to ensuring day-to-day compliance with the Community's Directives in accordance with the principles enshrined in the Treaty. The economic monitoring should also allow the market analysis of particular procurement sectors in all Member States. On this basis the Commission will be able systematically to identify problem areas and to carry out its role of supervision in a more coherent manner, rather than simply reacting to individual complaints. Databases (including Tenders Electronic Daily) are valuable instruments for the collection, analysis and dissemination of information and can perform a useful function in monitoring compliance with the law. A system of periodic controls to identify consistent cases of non-publication of tenders has also been set up. However, the sheer volume of public procurement transactions (and the number and range of public entities) makes detailed monitoring by the Commission alone an impossible task. This is especially true in determining whether public entities publish information about all relevant tenders. Against this background, the Commission would be interested in receiving suggestions on improving the monitoring of public contract award procedures, both at Community and at national level. It would also like to receive reactions to the question of whether the Commission should look again at the operation of a European Observatory. This observatory was created within the framework of the Advisory Committee on Public Procurement to monitor the application of the public procurement rules by Member States' contracting authorities, but has not, so far, been fully operational, despite the fact that it is in no way intended to develop into a technical assistance department or an agency. The idea of introducing cross-checking procedures could also be usefully exploited in this context.

II. Information

4.4 Information related not only to the legal framework and the data available on public procurement contracts, but also to observed irregularities and malfunctioning, is the key to ensuring optimally effective and honest value-for-money procurement.

(a) Improved readability of the legal framework

4.5 Improvements in transparency and the dissemination of information are crucial to support efforts to improve procurement practice. The Commission has already taken a number of steps to improve both the quality and quantity of information about the rights of suppliers and the obligations of procurement entities under EU rules. Although all EU public procurement directives have been brought together and published in a single volume, the rules themselves would be easier to understand if each Directive were consolidated in such a way as to group together all the provisions applicable to public procurement in a particular sector. For public supply contracts, public works contracts and contracts in the utilities sectors (water, energy, transport and telecommunications), the adoption by the Council of Directives 93/36/EEC, 93/37/EEC and 93/38/EEC has brought about a formal consolidation. But such a formal consolidation may not be possible each time a procurement Directive is amended. Where it is not, other means could be envisaged.

4.6 To facilitate understanding of the public procurement rules, the Commission is committed to publishing a number of Vademecums (interpretative communications) which will explain and clarify questions on the application of the Directives. These Vademecums will update those first published in 1987 (on the Works and Supplies Directives) and provide equivalent texts in respect of the Services and Utilities Directives. The Commission reaffirms that it will also make available written guides on national remedies procedures and the means by which suppliers can pursue their rights.

(b) Dissemination of notifications

4.7 Providing information to clarify the legal framework is important. Equally important is ensuring the availability of information and data for suppliers to be able to bid for contracts. Good and easily available data is vital in exploiting procurement opportunities. Now, over 130 000 procurement notices are published each year in the EC Official Journal and it is no easy task for suppliers to identify out of this mass, the specific calls for tender in which they have an interest. The Commission is aware that there are problems disseminating this amount of information in a transparent way by means of the paper copy of the Supplement of the Official Journal. The possibility of ultimately shifting the publication system away from the paper version is under consideration.

4.8 The Commission has already carried out a market survey of subscribers to the Supplement to the Official Journal and TED in order to find out what improvements can be made to the information and to its presentation. This survey has shown that only a small number of subscribers prefer the current publication to any other possible alternatives. The majority would prefer to find the information on the World Wide Web or on a CD-ROM with search facilities. Selective subscriptions to the Supplement may also be possible so that users would receive information only on contracts which are of particular interest to them. Whilst it is expected that such improvements will make public contracts more accessible to businesses, we must go further and improve access to information in step with each and every advance in technology.

4.9 Today, problems with the quality of tender notices are also frequent. Although several Directives require the nature of the procurement to be described using a code from the CPA (Classification of Products by Activity) or the CPC (Central Product Classification), only a few entities use these nomenclatures. This is costly for the European taxpayer. The Commission has developed the Common Procurement Vocabulary (CPV) as a list of codes based on the CPA but geared to the specific needs of the procurement process. The CPV has recently been published in a revised version[22] together with a recommendation[23] to encourage its use by entities, in order to allow definition of the nature of the procurement in CPV terms by those responsible for procurement. Extending the use of the CPV to all entities and contracting authorities could improve the transparency of public procurement in the Union and allow significant savings for the taxpayer because the publication process, including translation into all 11 languages, could by made easier. The Commission seeks comments from the interested parties on whether, in this context, use of

[22] OJ S 169 of 3.9.96

[23] OJ L 222 of 3.9.96

the CPV should be made obligatory. An alternative solution would be to levy a charge on those entities which have not used the CPV and the standardised electronic forms to identify the nature of their procurement, proportional to the extra costs of processing these notices.

III. Training

4.10 Changing traditional procurement practices will only succeed if there is a change in management ethos away from closed relationships with national suppliers to a transparent and truly commercial environment where doors are open to other bidders and value for money is the primary motivation. Training on procurement rules and best practice may well be the best and least costly way to achieve such a change. Yet for some governments, this is sometimes depicted as a costly luxury, the first to suffer cuts in times of budgetary stringency. New procurement techniques, such as electronic notification and electronic tendering, will not deliver greater efficiency and lower costs unless procurement officers know how to use them.

4.11 Welcome changes are visible. Current discussions on improving Europe's competitiveness increasingly focus on the importance of continuing education and the application of knowledge. For procurement, this must result in still greater efforts to provide systematic and rigorous training for officials in order to give them the tools that effective procurement demands.

4.12 However pressing the need, we cannot expect those, whose practices are traditional, to change overnight. To nurture an optimal procurement policy demands a real awareness of what procurement of the highest commercial standard actually entails. The Commission believes that steps must now be taken to stimulate the training of procurement officers in the new and evolving skills they need and to help them to better understand the new role they are called upon to play. If we are to bring about real change, however, a programme needs to be developed which spreads training throughout the Community; a programme that focuses on best procurement practice and which is not simply a one-off event. The application of information technology in procurement and the exchange of information on best practice could be covered. The elaboration of such a programme would involve many players: the Commission, Member States, national sectoral associations, businesses, universities and other interested parties.

IV. Electronic tendering

4.13 Our current procurement regime is based on the use of traditional administrative practices and means of communication: it is mainly a paper-based system of notification, dissemination and tendering. Now, thanks to progress in data processing and telecommunications, we do not need to proceed as we have in the past. It is time to take our procurement policy into the future; to benefit from the opportunities offered by today's advances in information technology. In the short term, new information technologies are helping us to introduce electronic notification of tender notices and the dissemination of information to suppliers. In the longer term, the use of computer systems and telecommunications will revolutionise the way in which contracts are awarded. An "electronic marketplace" could be developed in which suppliers could list products and prices in electronic catalogues, and contracting entities could compare prices and conditions and order electronically the best value item that meets their needs. We all stand to benefit; electronic procurement will be more transparent, more open to dialogue with suppliers, and far more efficient than any present paper-based system.

4.14 The European Union cannot afford to fall behind in this area. The recommendations of the Bangemann Group report[24] to the European Council identified public procurement as one of the ten top-priority applications for the use of information technology in the public sector. The report suggested that at least 10% of all contracting entities should have electronic tendering procedures in place within the next two to three years. Clearly, two years later, major efforts are needed at all levels to meet that target. At the G7 Summit Conference on the Information Society held in 1995, the participants called on the private sector to seize the initiative and committed themselves to encourage the private-sector development of information networks and the provision of new information-related services.

(a) Current state of play

4.15 The notification and dissemination of tender notices is the most appropriate point at which to apply information technology to public procurement. Under our Directives, contracting entities are under the obligation to publish notices about their calls for tender in the Supplement of the EU Official Journal. This supplement already runs to more than 300 pages per daily issue and the expectation is of continued expansion in the year ahead. Not surprisingly, suppliers find it difficult to identify the tender opportunities which interest them. The system must, quite simply, be made more efficient and more simple to use.

4.16 Considerable progress has already been made. The TED database was introduced a decade ago and has been updated recently by the development of more user-friendly software, the application of the Common Procurement Vocabulary (CPV) and the provision of access to the INTERNET. Further improvements are now under way.[25]

(b) Electronic notification

4.17 With today's technology, opportunities abound for increasing transparency, cutting operating costs and reducing delays. To this end, the Commission has embarked upon an ambitious programme known under the acronym SIMAP (“Système d’information pour les marchés publics”) which builds on the experience of TED. SIMAP covers a range of different projects. Its most immediate aim is to increase the capacity of the current publication system so as to cope adequately with the growing number of notices which need to be published. SIMAP will eventually make it possible to provide better tender information more quickly - a change which is both urgently needed (given the rapid growth in published tenders), and vital if we are to improve the transparency of contract award

[24] Europe and the Global Information Society: Recommendations presented to the European Council at Corfu, Brussels, 26.5.1994.

[25] See also points 4.7 to 4.9.

procedures in Europe. SIMAP offers the prospect of improved monitoring, market analysis and the exchange of a variety of other useful information so as to make it easier for suppliers to identify sales opportunities.

4.18 Under SIMAP a number of pilot projects have already been launched involving a limited number of contracting entities and information providers. They focus on the electronic communication of procurement notices between contracting entities and the Official Journal and TED, and on facilitating on-line access to information for suppliers. If these pilots are successful - and the first signs are encouraging - they could eventually be developed into an operational system of electronic notification and dissemination of information to which all interested parties in the Union would have access (using a Community-wide electronic bulletin board system on procurement).

4.19 Using such a system, contracting entities would have the means for transmitting their notices electronically rather than in paper form. A key question will be how the shift from paper to electronic transmission can be achieved. The latest modifications to the legislative texts already propose changes to permit the electronic transmission of notices. Initially, and for a period of several years, the paper-based and electronic systems will co-exist. We shall need to decide whether such a change could be achieved on a voluntary basis or whether it would be advisable to legally oblige contracting entities to transmit notices in electronic form and, whether such an obligation should be introduced first in a limited way at central government and utilities level, before extending it to other contracting authorities. Such electronic transmission of notices could also make it possible to shorten the time needed for disseminating the information and perhaps, ultimately, the deadlines for bidding. The Commission invites comments on this issue.

(c) Electronic dissemination

4.20 It is clear that, with the steady rise in the number of notices published and the improvements in technology for electronic publishing, the paper version of the OJ/S will in time be superseded by electronic versions. The market survey of subscribers has confirmed that the majority would prefer to find the information over the World Wide Web and many would be interested in a CD-ROM. A CD-ROM is already being developed and further improvements to the TED database such as the development of INTERNET access will doubtless attract more interest.

4.21 There are currently around 13,000 subscribers to the Official Journal Supplement. This can only be a small part of the number of suppliers potentially interested. The electronic or on-line versions must be designed to attract new subscribers, as well as to replace the paper version for existing subscribers, for whom it is becoming increasingly difficult to use.

4.22 Once these replacement systems are in place and accepted by subscribers, the obligation to publish the OJ supplement on paper could be modified to refer to electronic means, so that the paper version could be phased out as demand falls.

4.23 As a result of the findings of the market survey, the Commission is considering the possibility of printing short summaries of notices in a much slimmer OJ supplement and giving full information only in a database, also available as a CD-ROM or via the INTERNET. It is also considering the possibility of producing only the database version or of providing the information only through third parties under licence.

4.24 The Commission would be interested in reactions to or comments upon these various options from all the interested parties, Member States, contracting entities and suppliers.

(d) Fully electronic tendering system

4.25 The opportunities offered by technology are wider than the relatively straightforward electronic transmission and dissemination of notices. In the longer term, the way forward for electronic procurement will undoubtedly be a fully electronic tendering system. This could include the extension of electronic procurement to meet existing mandatory requirements under the Directives (such as the obligation to publish) but, far more dramatically, to cover every other part of the procurement process. A full electronic tendering system could cover the exchange of tender documents and tenders as well as information exchange during the life of the contract (including invoices and payments). However, unlike the publication of notices, such applications would fall outside the Commission's direct area of responsibility; it would be a matter for the commercial judgement of contracting entities and economic operators. The Commission will, of course, be closely associated with these developments: they will certainly significantly affect the EU regulatory framework for public procurement; and there are real dangers that incompatible national systems could create major new internal (and external) trade barriers.

4.26 Our regime must be responsive and ready to meet the challenge posed by a constantly changing public procurement environment. No specific provisions in the public procurement directives deal with the use of information technology. Our existing rules will, whenever possible, be interpreted in such a way as to allow and to accommodate the new developments. Although the Commission starts from a presumption that no amendments to the legal framework on public procurement will be proposed, it is not excluded that those stemming from changes of a technical nature which do not overturn the essential principles of the regime may call for specific legal proposals. Electronic procurement could be one such area.

(e) Experience outside the European Union[26]

4.27 How developments in information technology will be integrated in procurement in the coming years is uncertain, but important pointers are available. The US Administration has licensed information on tender notices to a dozen private companies which have developed so-called value-added networks (or VANs). These networks offer high-quality information about procurement possibilities in the US and abroad. Similar private sector involvement can be found in Canada. Because of the commercial value of procurement

[26] See also Chapter 6.

data, the private sector may be interested, for example, in their dissemination in Europe, even if multilingualism in the EU might retard the process. The Commission would welcome expressions of interest from private sector operators. Consideration must be given as to how the availability of information about potential suppliers of goods and services can be improved and how industry can be stimulated to provide the infrastructure for electronic trading with contracting entities. This requires much thought from all interested parties, in particular to find ways of co-operating to develop the necessary tools and services.

4.28 Electronic procurement is a global phenomenon. Our major trading partners have all embarked on ambitious programmes to develop integrated electronic access to their procurement information and to expand electronic tendering for their acquisitions. As with many new and exciting developments, there are opportunities as well as threats. The opportunities include the greater availability of information on public contracts: sophisticated software programmes can now give suppliers the information they need at the push of a button - irrespective of their geographic location. The threat is that national policies and interests could prove to be too great for governments. This could result in technically incompatible systems - making it more difficult to communicate; and consequently we may not be able to reap the expected benefits of electronic tendering. With the Commission's support, the Government Procurement Committee of the World Trade Organisation (WTO) - which deals with matters relating to the Government Procurement Agreement (GPA) - has already begun to discuss the application of information technologies in public procurement. Industry is also inviting us to examine the possibility of establishing a system of public purchasing using electronic means of communication, compatible between the European Union and the United States. These discussions within the GPA Committee also aim to reach a consensus on compatible systems in all GPA signatory countries. The key issues of internationally acceptable standards and technical procedures will therefore be tackled.

(f) Conclusion

4.29 Having considered reactions to this Green Paper, the Commission will publish a strategy paper on electronic procurement which will take account of reflections on electronic commerce and the information society. Its aim will be to prepare, with the help of Member States, an action plan setting out the way electronic procurement could develop over the next five years.

V. Questions

1. Is sufficient attention given to monitoring the application of the procurement rules as a way of preventing problems or detecting possible breaches? Are there suggestions to improve Community and Member State monitoring systems? Do you see merit in cross-border monitoring, for example by developing the concept of the European Observatory to look at rates of compliance in the public procurement market?

2. Positive incentives to stimulate efficient follow-up procedures in this sector are vital. Are there incentives (cross-checking, publication of results achieved, awards etc.) that could be applied at national level?

3. Are you satisfied with the information provided by the Commission or Member States on public procurement issues? Would a regular information bulletin reporting on public procurement developments and stimulating the exchange of views and experience at the European level be useful?

4. What other sources of information are available? What sort of statistical information would meet information and transparency requirements?

5. Regulations are now in place to protect the Community's financial interests. These contain provisions obliging Member States to communicate cases involving fraud or other irregularity to the Commission on a regular basis. These obligations already apply to public procurement dossiers, where there is Community financing. Could this information system be extended to public procurement in general?

6. Are there any training initiatives in your Member State? (Please give details.) Is sufficient attention being paid to training in relation to the application of information technology in public procurement?

7. Is a Community-wide programme needed to stimulate training and spread best procurement practice? What form should it take and what should be its duration? How can Member States, the procurement profession, academics and business play their full part in such a programme?

8. What improvements to the Official Journal Supplement or to the Tenders Electronic Daily database are needed?

9. Does electronic notification and tendering offer opportunities to make procurement more efficient and more accessible to suppliers? Can they contribute to the opening-up of public procurement?

10. How can increased electronic transmission of notices by contracting entities best be encouraged (voluntarily or as a legal obligation)? What incentives can be provided to encourage such transmission?

11. What elements would you regard as essential to exploit the wider potential of electronic tendering in public procurement? What role should be played by the Commission, the Member States, contracting entities, suppliers and software writers ?

12. Is the private sector interested in providing procurement information services in the Union?

13. Should discussions aimed at reaching consensus with our major trading partners on the technical compatibility of electronic tendering systems be given high priority?

5. PUBLIC PROCUREMENT AND OTHER COMMUNITY POLICIES

Public procurement policy has positive spin-off effects on other Community policies. Although SMEs firms still face a number of difficulties in effectively winning contracts, more transparent market access, for example, allows these firms to unlock new potential markets. In this chapter, the Commission presents measures that could improve the situation.

In the field of standards, the Commission intends to step up efforts, in agreement with business, to ensure that the standards institutions draw up European standards for use in contract documents, thereby contributing to the effective opening-up of public procurement.

The massive capital commitment required for Trans-European Networks is encouraged with contract award procedures laid down by the Directives that guarantee an acceptable return for investors. The Commission is prepared to clarify the legislative framework should this prove necessary in order to build partnerships between the public and private sectors for these projects.

Correct application of the Community rules also helps to allocate Community resources from the Structural and Regional Funds in the most efficient way. With this objective, the Commission is proposing a number of measures to improve compliance with these rules in procedures for the award of contracts part-financed by these Funds. The Green Paper deals with contracts awarded by the Community institutions or by non-Member countries who benefit from Community resources.

Public procurement rules can contribute to the achievement of social and environment policy objectives. A description of the possibilities offered by the Directives in these areas is given in this chapter. In the light of the outcome of the debate initiated by the Green Paper, the Commission will consider how better account can be taken of social and environmental aspects in the application of the rules.

Lastly, the Commission would welcome any initiative aimed at stimulating competition in defence procurement, with a view to conferring a European identity on security and defence policy and at the same time strengthening the competitiveness of our industry.

I. SMEs

5.1 Most of our larger companies now have considerable experience in bidding for public contracts in other countries. They are usually well placed to obtain information about particular calls for tender and sufficiently experienced in order to participate in them. They often continue to submit tenders through their local subsidiaries or via consortia in which the lead company is from the same Member State as the purchasing entity. The number of contracts won directly by firms based in other Member States remains small. This also holds true for small and medium-sized enterprises (SMEs), which face greater difficulties on account of their size. Although a survey of SMEs undertaken in 1994 by the Euro Info

Centres[27] identified firms which had won contracts in other Member States, these are only isolated cases that cannot be used to establish a general trend.

5.2 And yet SMEs should win a larger share of public contracts given their importance in the European economy: they account for over 65% of turnover generated by the private sector in the European Union. Wider SME participation in public procurement would lead to the creation of a core of SMEs capable of seizing opportunities offered by open public procurement not only within the European Union but also in countries covered by the GATT Agreement on Government Procurement (see Chapter 6) and would also in the long run enable SMEs to make a greater contribution to growth, competitiveness and employment. The basic objectives of an internal market in procurement (widening the choice of value-for-money suppliers for procurement entities and increasing the competitiveness of EU industry) will not be met unless SMEs can also secure genuine access to Europe's markets.

5.3 Work carried out on the basis of various communications or resolutions on the subject of SMEs and the internal market[28] has identified a long list of obstacles encountered by SMEs during contract awards, both upstream and downstream of the award procedure.

5.4 When planning their business activities, SMEs thus already encounter difficulties in organising themselves in order to bid effectively for the contracts of interest to them. This is because they find it difficult to adjust their activities to market demand; they lack practical information on contracts put out to tender in their sector; they lack the trained staff and technical assistance necessary to cope with prequalification procedures, particularly in the utilities sectors, and where appropriate, to prepare bids; they have problems in meeting quality certification requirements; and they are often too small in comparison with the contracts covered by the Directives and put up for competition at Community level. The problem of size is compounded by the difficulty in setting up effective and advantageous forms of partnership between SMEs.

[27] Survey on the impact of the internal market on business, involving more than 140 small and medium-sized companies in 12 Member States. See Commission press release IP (95) 364, 10.4.1995.

[28] See, for example, the Commission communications; of 7.5.1990 on promoting SME participation in public procurement in the Community (COM (90) 166); of 1.6.1992 on SME participation in public procurement in the Community (SEC (92) 722); of 3.6.1992 on measures relating to the industries supplying utilities sectors in the structurally disadvantaged regions of the Community (SEC (92) 1052); of 18.11.1992 on the problem of the time taken to make payments in commercial transactions (SEC (92) 2214); of 22.12.1993 on making the most of the internal market: Strategic programme (COM (93) 632); and of 3.6.1994 on the implementation of an integrated programme in support of SMEs (COM (94) 207); the Council resolutions of 22.11.1993 on strengthening the competitiveness of enterprises, in particular small and medium-sized enterprises and craft enterprises, and developing employment in the Community (OJ No C 326/1) and of 22.4.1996 on the coordination of Community activities in favour of small and medium-sized enterprises and the craft sector (OJ No C 130/1); and Parliament's resolution of 21.4.1993 on the Commission communications "Towards a European market in subcontracting" and "SME participation in public procurement in the Community" (OJ No C 150/71).

5.5 SMEs also have to contend with a number of problems in the contract award phase. For example, it is difficult for them to gain rapid access to the information necessary for preparing bids, especially for identifying and interpreting tender notices potentially of interest to them, the subject-matter of the contract, the regulations applicable (including national rules) and the standards and technical specifications to be complied with. In particular, a recent study[29] has shown that late transmission of contract documents by contracting authorities is a real barrier to participation by SMEs, since in many instances (over 50% of the cases studied) it prevents them from submitting a valid bid before the deadline expires. The costs of submitting tenders and the securing of financial guarantees at competitive rates are also substantial obstacles for these firms.

5.6 Even when performing contracts they have won, SMEs face special difficulties: in meeting the requirements of performance bonds they have accepted when contracts were concluded; in securing payment for their works or supplies on time; in settling any disputes quickly and cheaply; and in obtaining adequate protection as subcontractors.

5.7 Action has already been taken to tackle these problems at Community level. As far as the availability of information is concerned, some Community sponsored networks (including a core group of Euro Info Centres specialised in public procurement) have already developed information and market support services, in co-operation with private consultants. These networks, together with a number of local, sectoral or national services, provide information on contract opportunities even below the thresholds of the Directives - as well as additional information about the procurement plans of specific contracting authorities. Moreover, the new design of tender notices published daily in the Official Journal certainly facilitates the task of SMEs, which have access to it, in obtaining sufficient information on procurement opportunities, particularly in other Member States.

5.8 The Commission has also adopted a number of measures aimed at providing information and technical assistance to SMEs in disadvantaged regions in breaking into European procurement markets. These include PRISMA[30] (Preparation of Regional Industry for the Internal Market), which ran until 1994, and the newly launched SMEs[31] and INTERREG II[32] initiatives, which also cover the promotion of partnerships between SMEs in different Member States and specialised training.

5.9 The Commission believes that other initiatives should be taken. It would welcome comments on the options for action envisaged in this area and described below.

5.10 As far as general information is concerned, it could prove useful to draft a practical guide for SMEs, explaining how they can prepare for participation in public procurement, and to draw up interpretative documents on some aspects of the Directives that concern

[29] Euro Info Centre Aarhus County, Analysis of irregularities occurring in tender notices published in the Official Journal of the European Communities 1990-1993. Study presented to the Commission in 1996.

[30] PRISMA (91/C 33/05), OJ No C 33/9 of 8.2.1991.

[31] SMEs Initiative (94/C 180/03), OJ No C 180/10 of 1.7.1994.

[32] INTERREG II (94/C 180/13), OJ No C 180/60 of 1.7.1994..

these types of business more particularly, such as the splitting of contracts into lots, the publication of prior information notices, and the problem of the time limits for distributing documentation on contracts.

5.11 As regards information on specific contracts, consideration could be given to adapting TED to the specific requirements of SMEs. Another possibility would be to take advantage of the increasing popularity of the INTERNET and World Wide Web to provide access to such information for a much wider audience. There are few technical obstacles to such developments, but there may be a need for co-ordination at a European level if such initiatives are to succeed. It could also be useful to press for greater transparency on the part of contracting authorities by encouraging them to use wherever possible the Common Procurement Vocabulary (CPV) and standard forms for procedural documents, which would facilitate electronic data interchange.[33]

5.12 As far as preparing for contract award procedures is concerned, the opening-up and simplification of contracting authorities' practices through the training of procurement officers, the exchange of officials and the exchange of information on good procurement practice could only make it easier for SMEs to bid for contracts.

5.13 Given their size, it would be easier for SMEs to take part effectively in an ever more global market if frameworks were established for co-operation between them. It could therefore be worth looking into the question of whether the European Economic Interest Grouping (EEIG) is suitable for promoting co-operation between SMEs, particularly for cross-border public procurement.

5.14 An aspect which is extremely important for SMEs, but is not dealt with directly by the Directives, is subcontracting. The Commission has been called upon to "pursue, in concert with the Member States, its general role of instigating, initiating and co-ordinating measures aimed at creating a propitious environment for subcontracting"[34]. To that end, action could be taken in this area, for example to improve the existing network of databases on subcontracting and to encourage the establishment of approved codes of practice and standard contractual clauses. In order to gauge the economic importance of sub-contracting, pilot studies have been carried out in 10 Member States using as a basis the common methodology developed by EUROSTAT. These studies were carried out on sub-contracting enterprises or those ordering in three economic sectors (cars, electronics, textiles/clothing) and the results will be published before the end of 1996.

5.15 Another aspect which closely concerns SMEs is payment periods. On this topic the Commission, after carrying out wide-ranging consultations, adopted a recommendation[35] in which it calls on Member States to ensure that their contracting authorities are disciplined in the matter of payment. The recommendation thus provides, for example, for a time limit by which payments should be made and for the payment of interest in the event of late

[33] See in this connection the arguments developed in Chapter 4.

[34] See Council resolution of 26th September 1989 on the development of subcontracting in the Community (OJ No C 254/1 of 7.10.1989).

[35] Commission recommendation on payment periods in commercial transactions (OJ No L 127/19 of 10.6.1995 and OJ No C 144/3 of 10.6.1995).

payment. Member States are to submit reports by the end of 1997 on the action they have taken to implement the recommendation; the Commission would be interested in having at this stage the reactions of the parties concerned on this matter.

5.16 On a more general note, the Commission takes the view that the effective access of SMEs to public procurement could be achieved through a set of concrete measures based on a thorough analysis of these firms' practical needs and opportunities, and in particular through the development of networks of support services which would provide them with the necessary information, technical assistance and suitable training. Following the consultations launched by this Green Paper, the Commission intends to present a communication on the measures it proposes in this area.

II. Standardisation

5.17 Standards and technical specifications describing the characteristics of the works, supplies or services covered by contracts play a crucial role in our efforts to open up public procurement. The use of national standards can significantly restrict access to contracts for non-national suppliers. With this in mind, the Directives provide that contracting authorities define technical specifications with reference to European standards or technical approvals, without prejudice to mandatory national technical rules, in so far as these are compatible with Community law. This was a problem the Directives sought to resolve by requiring contracting entities to refer to European standards where they exist. Under Commission mandates issued within the framework of the 1985 Council resolution on a new approach to standards and technical harmonisation,[36] the European standardisation bodies (CEN, CENELEC, ETSI) have developed many European standards which are then implemented into national standards. In addition mandates in support of public procurement have been issued on a number of occasions. This effort must be stepped up since certain markets are to this day still *in practice* closed off, chiefly owing to insufficient standardisation work. Together with industry, the Commission is currently determining where further mandates are needed. The Commission would welcome comments from interested parties on the general issue of standardisation and technical specifications in public procurement and on the identification of areas where the absence of European standards poses problems for the opening-up of public procurement.

III. Trans-European Networks (TENs) and transport in particular

5.18 The Maastricht Treaty committed the European Union to promoting the creation of a web of Trans-European Networks (TENs) in the transport, energy and telecommunications sectors. Successfully developing TENs will contribute to the optimal use of the opportunities offered by the single market; investing in TENs is an investment in our future. This policy is crucial to the overall competitiveness of the EU economy and, both directly and indirectly, to the creation of employment. Several key projects are already under way, including the Øresund road and rail link between Denmark and

[36] Resolution of 7.4.85, OJ C 136/1 of 4.6.1985.

Sweden, upgrading Malpensa airport for Milan and the rail link between Cork and Stranraer. However, progress on other priority TENs has been slow.

5.19 Against a background of ever tighter government budgets, the European Council has emphasised the importance of private finance in the Union's efforts to increase investment in TENs infrastructures. Investment projects are increasingly unlikely to be funded only by grants from local or national governments. They demand a massive financial commitment. There is therefore a need to find fresh ways of raising capital. Many private sector organisations have made it clear that they are increasingly ready to invest substantially in TENs projects and are willing to do so on a risk-financing basis. But a number of obstacles still have to be overcome.

5.20 The Commission's report to the Madrid European Council (December 1995) outlined ways of overcoming obstacles to the private financing of Trans-European Network projects. Apart from the problem of how to ensure an acceptable rate of return for projects, the report also referred to the problem of non-commercial risks arising due to changes in public policy. The Commission is presently looking into this issue. The private sector has also expressed concern about the application of EU public procurement rules; in some circles, it has been claimed that the Directives may inhibit private sector involvement.

5.21 The ultimate objective of the Community's public procurement directives is to achieve fair and open competition for procurement contracts in the internal market. Their aim is to facilitate and not to obstruct private sector involvement in projects. The Commission believes that the Community public procurement rules can facilitate private sector participation in Trans-European Networks, without any need, at this stage, to amend the existing legal framework. Should clarification of the framework prove necessary, the Commission is prepared to tackle the different questions arising with the parties concerned to ensure that partnership between the public and private sectors is in no way inhibited. As announced in its report to the Madrid European Council, the Commission has also set up a TENs Help Desk to provide a one-stop shop to answer enquiries from private sector TENs participants.

5.22 To date, industry has identified three principal concerns which, while not being exclusively concerned with TENs projects, are certainly of considerable importance in that particular area. These concern the pre-tendering phase, concessions to consortia and use of the negotiated procedure.[37]

(a) The pre-tendering phase

5.23 The private sector has indicated its reluctance to engage in pre-tender discussions or studies without an assurance that it will not be excluded from the subsequent tendering procedures, fearing a potential infringement of the principle of equal treatment. The Commission recognises that, in view of the complexity of most of the projects - some of which may require solutions never attempted before - a technical dialogue before the calls for tender between the awarding authority and private parties involved may be necessary. If, through the introduction of specific safeguards - affecting matters of substance as well

[37] See discussion in Chapter 3.

as procedure - contracting authorities refrain from requesting or accepting information that would have the effect of restricting competition, the principle of equal treatment will not be violated.

(b) The award of concessions to consortia

5.24 As previously stated (see Chapter 3), the award of a public works concession is the usual way of enabling the private sector to participate on a risk basis in the building and operation of infrastructure projects in partnership with the public sector. The Commission notes that, in line with the applicable Community rules, it is essential that consortia, participating on a risk basis, can bid for concessions knowing they will be able to award contracts to their associates within the consortium in respect of the necessary supplies, works or services. The provisions of the public works Directive applying to the award of works concessions for the construction of public transport infrastructures permit the winning consortium to do so.

(c) The use of the negotiated procedure

5.25 Complex works and services contracts may in some cases justify the use of the negotiated procedure. Under the Utilities Directive, contracting entities already have a free choice between three procedures (i.e. open, restricted or negotiated procedures) involving a prior call for competition. In the traditional sectors, however, as has already been mentioned (see Chapter 3), the negotiated procedure may be used only in certain well-defined circumstances that are listed exhaustively in the Directives. For example, the public services Directive allows an award by negotiated procedure where a service is complex and cannot be specified with sufficient precision, particularly in the field of intellectual services. The public works Directive allows the use of the competitive negotiated procedure in exceptional cases where, for instance, the nature of the works or the attendant risks do not permit prior, overall pricing.

IV. Procurement involving Union funds

(a) Structural and Cohesion Funds

5.26 The Structural and Cohesion Funds have contributed over ECU 50 billion to public authority investments in the Member States during the past two years. Through other financial instruments (including European Investment Bank loans and grants from other Community sources) the Union has provided a further contribution of over ECU 34 billion. Moreover, by means of financing from the Funds, the Union expects to spend ECU 57 billion over the next two years. It is undeniable that Member States must have confidence amongst themselves that each and every one of them respects the rules; that the best value for money is being achieved in the expenditure of European taxpayers' money and that the risk of fraud is minimised. Our rules on public procurement and on the protection of the financial interests of the Community have a central role to play in this, it being understood that there can be no discrimination in their application, whether it is a question of contracts financed from national resources or contracts qualifying for support from the Structural and Cohesion Funds.

5.27 The present system of control is based on the 1989 Commission communication to the Council.[38] It clarifies the obligation on Member States to ensure, systematically, that the public procurement rules have been respected and to confirm that for each and every request to the Commission for payment of funds the rules have been honoured. However, very few Member States have put into place a systematic and thorough mechanism for monitoring compliance with the public procurement rules. The Commission, for its part, can release the funds only upon explicit confirmation of that compliance. If the rules have not been followed (for example, if tenders have not been correctly advertised) funding can be suspended, and then, if necessary, withdrawn and infringement procedures started**.** In the case of the Cohesion Fund, and large ERDF projects an *ex ante* verification is systematically made as part of the examination of applications for part-financing.

5.28 The Commission must increasingly rely on Member States to fulfil their obligations, especially since the volume of individual projects is steadily growing. The problem has become more acute and needs resolution. Indeed, following the reform of the Structural Funds, the management of funds (particularly the choice of and follow-up to funded projects), has been devolved to each Member State. Greater authority over fund management goes hand in hand with greater responsibility to control compliance with procurement rules. Improving the current system of control at the Member State level is therefore vital. It is appropriate to recall that an important discussion is taking place as part of SEM 2000 on the need for greater transparency and rigour in the use of the Structural Funds. In this context, concrete proposals will be submitted to the Dublin European Council, directed at clarifying certain criteria and also at promoting co-operation and dialogue between Member States and the Commission in the framework of partnership, and in the interest of the beneficiaries. The conditions for the application of financial adjustments in cases of fraud and irregularity are also tackled, including net correction in the extreme case where a Member State persists in failing to meet its audit obligations. Work will continue in 1997. At the same time, one should recall and underline the rules of transparency, under which there is an obligation to communicate established cases of irregularity or fraud to the Commission.

5.29 Although ultimately, responsibility for improving procedures rests with the Member States, the Commission will use its best offices to ensure that improved systems of control are introduced as soon as possible. Any solution must go beyond identifying particular problems in specific projects. Our goal must be to create a regime that adds value. Accountability, performance and results must become bywords in Structural Fund management. The likely benefits are clear: considerable savings at all levels; more effective spending of limited resources; a healthier employment situation in the regions concerned; more confidence from our citizens that EU money is well spent; and projects that work for their users. To demonstrate proper regard for the use of public money and to win public support, the Commission believes that Member States should publicise the fact that value-for-money has been achieved in any particular project.

[38] COM (88) 2510 and OJ No C 22 of 28.1.1989.

5.30 Improvements to the regime itself could be made by introducing relatively small changes in procedures. One such change would be the introduction, for each project, of a statement signed by the responsible national official that the Union's public procurement rules have been complied with. Such a statement of personal accountability has been used in other areas and in some third countries, most notably in the United States; it has proved to be one of the most effective ways of securing the best price and preventing fraud. More widely, thought could be given to developing a code of good conduct to which national officials could commit themselves. Clearly, the feasibility of such measures would have to be looked into in the light of the different systems of staff regulations for civil servants in Member States.

5.31 The idea of individual accountability is inspired by the notion of prevention. Our policy in handling Structural Funds must anticipate - prevention is better than cure. The application of the system of attestation (see Chapter 3) to contracting entities receiving EU funds could significantly improve the situation and provide assurances that recipients have mechanisms in place that are capable of securing value-for-money equal to best commercial practice. It is our common interest that EU funds are spent effectively. Certifying by means of attestation that an effective procurement system is in place calls for only a small effort from public authorities in return for the benefit of saving considerable sums of EU money.

5.32 A more far-reaching proposal could be the use of the independent authorities referred to in Chapter 3 to promote compliance with public procurement rules in respect of European Union funds. Without prejudice to the Commission's competence, such bodies could play a key role not only in monitoring public authorities' behaviour, but also in advising them. These functions could also be the responsibility of a Member State's national court of auditors or an equivalent independent authority.

5.33 Implementing proposals will not solve each and every problem. A transformation of public procurement that involves funds of the Union - permanently and structurally - will only be achieved if such specific solutions are accompanied by a process of ongoing change in close partnership with the Member States. It may be necessary to formalise such initiatives (for example to establish accountability) in order for real and lasting change to be achieved. This is also in keeping with the spirit and objectives of the “good sound management” exercise (SEM 2000) carried out by the Commission and the personal representatives of Member States, following on from the impetus given by the Madrid European Council in 1995. The conclusions of this group confirm the need to be concerned about rigour and transparency in making good use of appropriations and about sharing responsibilities, and will be presented to the Dublin European Council in December 1996.

5.34 With an improved system of checks in place at national level, the Commission, for its part, could concentrate on an *ex post* verification of projects (for example in close co-operation with the independent body designated in each Member State). The Commission could also be invited to carry out an audit of the checking systems established in each country. The Commission will, in addition, seek to improve information flows between the Commission and the Member States on projects, especially through the use of modern information technologies.

(b) Public procurement by the European institutions or financed by non Member countries benefiting from Community resources

5.35 When awarding contracts for their own operational requirements or for the purposes of implementing the different policies for which the Community is responsible, the European institutions are required by Article 56 of the Financial Regulation to follow the same rules as those applicable to national contracting entities under the Directives on public procurement. Furthermore, only contracts awarded by the Council and the Commission are covered by the provisions of the GPA of the World Trade Organisation (see Chapter 6). The exceptions to the obligations laid down by these instruments concern: (a) in the case of the GPA, contracts concluded in connection with food aid; (b) in the case of the obligations deriving from Article 56 of the Financial Regulation[39], the same derogations as those laid down in the Directives plus, in accordance with Title IX of the Financial Regulation, contracts awarded in the context of external aid financed from the Community budget, with the exception of public service contracts awarded for the Commission's own requirements, to which the normal rules apply. Clearly, although they fall outside the scope of the Directives, all of these contracts, which are financed from Community resources (general budget, EAGGF and under EDF) and under Community programmes (e.g. PHARE, TACIS, MEDA, etc.), are still subject to specific rules and the fundamental principles governing the award of contracts, in particular transparency and equality of treatment.

5.36 These wide-ranging general obligations have been spelt out in greater detail by recent amendments to the Financial Regulation and will be clarified further still by other amendments which the Commission intends to propose with a view to circumscribing the above mentioned derogations in order to ensure that they are interpreted restrictively. The Commission's action forms part of its efforts to improve financial management, as provided for in the guidelines of the SEM 2000 operation.

5.37 The aim of this legislative framework is, by encouraging competitive tendering, to enable more efficient use to be made of the Community's general budget and of funds for development co-operation. The departments concerned must therefore endeavour to apply it as comprehensively as possible. The Commission wishes to ascertain whether the measures taken are sufficient to ensure fair access to contracts awarded both by the European institutions and by other bodies or third countries under Community programmes and using Community funds. In this connection, third countries in receipt of financial aid from the Community budget should also be invited to commit themselves to meeting certain obligations, particularly as regards on-the-spot checking for irregularities, recovering sums misappropriated and penalising irregular dealings.

[39] Financial Regulation of 21.12.1977 applicable to the general budget of the European Communities, as last amended by Council Regulation (ECSC, EC, Euratom) No 2335/95 of 18.09.1995 (OJ No L 240 of 7.10.1995).

V. Procurement and social aspects

5.38 The European Union's social policy contributes to promoting a high level of employment and social protection (Article 2 of the EC Treaty), the free movement of workers, equality of opportunity between men and women, stronger economic and social cohesion, better living and working conditions, a high level of health protection, high standards of education and training and the integration of the disabled and other disadvantaged groups into society.

5.39 Contracting authorities and contracting entities may be called upon to implement various aspects of social policy when awarding their contracts, as public procurement is a tool that can be used to influence significantly the behaviour of economic operators. As examples of the pursuit of social policy objectives, one can mention legal obligations relating to employment protection and working conditions binding in the locality where a works contract is being performed or so-called "positive action". The latter occurs where public procurement is used as a means of achieving the desired objective, for example by providing a captive market for a disabled workshop which could not reasonably expect to compete on equal terms with normal commercial enterprises enjoying normal levels of productivity.

5.40 The legal framework created by the Treaty and the Directives continues to apply in these situations. For this reason, since the entry into force of the public procurement directives, questions have constantly arisen as to whether and to what extent social objectives can or should be pursued, given the specific limitations imposed by the public procurement directives in order to prevent their whole purpose being frustrated.

5.41 Provisions which have been included in all the Directives offer an initial possibility for pursuing social objectives by allowing contractors or suppliers to be excluded where they have been convicted of an offence concerning their professional conduct or have been found guilty of grave professional misconduct. These rules clearly also apply where the offence or misconduct involves an infringement of legislation designed to promote social objectives. In these cases, then, the provisions in question indirectly allow contracting authorities to pursue such objectives by excluding from contract award procedures candidates who have failed to comply with such legislation.

5.42 Another possibility is to require successful tenderers to comply with social obligations when performing contracts awarded to them, for example obligations aimed at promoting the employment of women or the protection of certain disadvantaged groups. Checking of compliance with such conditions should take place outside the contract award procedure (see the judgement of the Court in *Beentjes*, cited earlier, and the Commission communication on public procurement: regional and social aspects[40]). Clearly, contract performance conditions are allowed only where they do not result in direct or indirect discrimination against tenderers from other Member States. Sufficient transparency must also be ensured by mentioning the conditions in the contract notices or contract documents.

[40] Commission communication of 22.9.1989, COM(89) 400 final, OJ No C 311of 12.12.1989.

5.43 On the other hand, the Directives do not currently allow social considerations to be taken into account when it comes to checking the suitability of candidates or tenderers on the basis of the selection criteria, which relate to their financial and economic standing or their technical capability, nor when it comes to awarding contracts on the basis of the award criteria, which must relate to the economic qualities required of the supplies, works or services covered by the contract. As against this, however, it should be added that, in the case of contracts falling below the thresholds for application of the Directives, purchasers may include social preferences in the award criteria, provided that they are extended without discrimination to all Community nationals with the same characteristics.

5.44 The question that arises here is, first, whether the possibilities offered by public procurement law for pursuing Community and national social-policy objectives in respect of the different groups concerned need to be clarified by means of an interpretative communication and, second, whether these possibilities are sufficient to satisfy needs or whether other measures need to be taken in order to achieve these objectives in applying the Community rules on public procurement, while safeguarding fair competition.

VI. Procurement and the environment

5.45 Environmental protection policy has become one of the most important Community policies, following the amendments made to the EC Treaty first by the Single Act and then by the Maastricht Treaty. Over 200 legislative instruments have been adopted, concerning inter alia action to combat air, water and soil pollution, waste management, product safety standards, environmental impact assessment, and the protection of nature. Article 130r of the EC Treaty also provides that environmental protection requirements must be integrated into the definition and implementation of other Community policies. Several Member States have, for their part, developed extremely advanced environmental protection policies.

5.46 In this specific sector, Member States (and their public authorities) have, increasingly, started to integrate environmental considerations into their public procurement practices. Because of its size, public procurement can have an enormous impact on certain business activities; it can even give a major push to the commercial development of certain products. The Danish Government has recently adopted an 'Action plan for a sustainable environmental/’green’ policy for public procurement'. Other Member States are also examining what steps can be taken to promote procurement of green products and services. In addition, the OECD recently adopted a Recommendation on improving the environmental performance of government,[41] which urges member countries, and in particular their governments, to establish and implement policies for the procurement of environmentally friendly goods and services.

5.47 The application of the public procurement directives does indeed leave scope for public authorities to promote environmental protection. It would undoubtedly be desirable in this connection to clarify the possibilities offered by the general provisions of existing

[41] OECD Council Recommendation C(596)39/Final, 20.2.1996.

legislation for taking environmental concerns into account and, at the same time, to define more precisely the limits to these possibilities.

5.48 First, as with social objectives, environmental protection can be achieved through specific rules for the infringement of which a supplier or contractor can be convicted of an offence concerning his professional conduct or found guilty of grave professional misconduct. In such cases, the Directives allow contracting authorities and contracting entities to exclude from contract award procedures any supplier or contractor who has been found guilty of breaching such rules.

5.49 Second, environmental protection considerations can be incorporated into the technical requirements relating to the characteristics of the works, supplies or services covered by contracts, namely the technical specifications which purchasers must indicate in the general contract documents and with which tenderers must comply, in accordance with the Directives. Efforts should be made to develop European standards or common technical specifications which incorporate and promote environmental concerns while avoiding the negative implications for the single market that would result from establishing criteria that are over-specific. An example of such a specification could be a European eco-label, complying with Community law. In any event, purchasing entities can already encourage firms to adopt a more active approach towards the environment by ceasing to reject tenders for goods that incorporate reconditioned components or recycled materials despite the fact that their technical characteristics satisfy the requirements laid down in the contract documents.

5.50 Third, the Directives allow, under certain conditions, environmental protection objectives to be included among the criteria for selecting candidates. These criteria are designed to test candidates' economic, financial and technical capacity and may therefore include environmental concerns depending on the expertise required for specific contracts.

5.51 Fourth, during the contract award phase environmental factors could play a part in identifying the most economically advantageous tender, but only in cases where reference to such factors makes it possible to gauge an economic advantage which is specific to the works, supplies or services covered by the contract and directly benefits the contracting authority or contracting entity. In the case of contracts falling below the thresholds for application of the Directives, environmental preferences may be used as an award criterion provided that they are non-discriminatory and open to all tenderers in the Community on the basis of the mutual recognition principle.

5.52 Fifth, purchasing entities can pursue environmental protection objectives through performance conditions imposed contractually on successful tenderers. In other words, a contracting entity can require the supplier whose tender has been selected to perform the contract in accordance with certain constraints aimed at protecting the environment. Clearly, such performance conditions should not be discriminatory or in any way disturb the smooth functioning of the single market. The conditions should also be mentioned in tender notices or contract documents to ensure that bidders are sufficiently aware of their existence. Lastly, verification of the successful tenderer's ability to perform the contract in accordance with the conditions should take place outside the contract award procedure.

5.53 Within the limits of the possibilities set out above, the Commission would be most interested to receive information on the experience of Member States or individual contracting entities in taking environmental objectives into consideration in their purchasing. The Commission, in its proposed Decision on the review of the 5th.Action programme for the environment, has already indicated that further action could be needed to take better account of environmental considerations in the application of Community public procurement rules, while safeguarding fair competition.

VII. Defence procurement

5.54 In 1990 the total defence procurement expenditure by EU defence ministries amounted to ECU 65-70 billion. Whilst a large part (around one third) of such purchases is already covered by the public procurement directives, the benefits of open procurement in this sector are still to be fully exploited. A 1992 study carried out for the Commission on the costs of non-Europe in defence procurement, including contracts for military equipment, suggested that major savings (ranging from ECU 5 billion to ECU 11 billion on the basis of 1990 figures, according to the different possible scenarios) can be achieved in this area. The Commission welcomes any move to introduce more competition into defence procurement. This will result not only in direct economic savings, but also in economies of scale from longer production runs and, ultimately, in a more competitive European defence industry. As a contribution to the debate the Commission recently issued a communication entitled "The challenges facing the European defence-related industry - A contribution for action at European level"[42]. Since the defence-related industry depends almost exclusively on public purchases, public procurement is extensively dealt with in this communication. Nevertheless, as a competitive European defence industry is also an essential precondition for conferring a European identity on security and defence policy, the special nature of the sector has to be taken into account. This could prompt some adjustments to the procedures laid down in the public procurement directives. Neither should initiatives taken by the Western European Union (WEU) and other similar organisations working in the defence co-operation field be overlooked.

VIII. Procurement and consumer policy

5.55. The implementation of an effective procurement policy, which improves market access and transparency in an increasingly integrated Single Market can bring significant benefits to consumers, providing them with better quality and more economically efficient services and infrastructures. In this context, it would seem important to take greater account of consumer policy in Union procurement policy. Promoting more transparency and dialogue with consumer organisations would be particularly welcome.

[42] Commission communication of 24th January 1996, COM (96) 10 final.

IX. Questions

1. For general information purposes, do you think that it would be useful to compile a practical guide explaining to SMEs how to prepare themselves for taking part in public procurement, and for interpretative notices to be drawn up on aspects of the application of the Directives which are of special interest to SMEs? On what topics, in your view, should these documents particularly focus?

2. Given that some Community-sponsored networks already supply additional information on procurement, particularly to SMEs, should their role be reinforced? If so, how?

3. What is your opinion on the options under consideration for improving the information available to SMEs about specific contracts (adaptation of TED, using the INTERNET, the CPV and standard forms)? Do you think that there are other avenues which should be explored?

4. Is the EEIG (European Economic Interest Grouping) an appropriate instrument for promoting co-operation between SMEs, especially in cross-border public procurement?

5. Do you think that, to promote greater SME participation in public procurement, other action should be taken at Community level, particularly on the issues of subcontracting and payment periods? If so, what type of action? For example, should one consider the fixing of mandatory payment periods, after which interest on late payment and, if need be, damages and interest would be due?

6. What are, in your view, the most appropriate ways of developing networks of SME support services? What type of services in particular should be provided by these networks?

7. In your opinion, to what extent has the standardisation policy pursued by the European standards bodies (CEN, CENELEC, ETSI) on the basis of Commission mandates been successful in eliminating obstacles to the opening-up of public procurement?

8. Which product sectors should be given priority in determining further mandates for European standards?

9. A number of anxieties expressed by the private sector have been dealt with in the part of this Chapter concerned with TENs. Has the clarification of the relevant provisions been sufficient to dispel these anxieties or should further written guidance be given on the application of the Directives to public tendering for TENs or other major projects (for example, through an interpretative communication)?

10. Do you know of any other issues related to tendering procedures for contracts that need clarification or resolution to facilitate private participation in TENs or other public/private partnerships?

11. Do you agree that, as an incentive to the effective management of the Structural Funds, wider publicity should be given by Member States and contracting entities to the fact that value for money has been achieved in procurements for EU co-financed projects?

12. Would it be useful to require the persons responsible to sign a personal statement that, in respect of a particular project, value for money has been obtained and that the public procurement rules have been followed?

13. Are there any other ways of increasing the effectiveness of the public procurement rules when structural funds are utilised ?

14. Do you think that contracting entities receiving funds from the Union should be encouraged to undergo attestation to ensure that an effective procurement system is in place?

15. Do you think that it could be useful and efficient if an independent national authority, co-operating closely with the Commission, were to assist contracting authorities when their procurements are financed from Community funds?

16. Do you think that the rules governing contracts awarded by the Community institutions and contracts awarded by other bodies or third countries under Community programmes and using Community resources are adequate to ensure fair access to these contracts for all interested parties?

17. In your opinion, do the possibilities offered by public procurement law for pursuing Community and national social policy objectives need to be clarified, for example by means of an interpretative communication?

18. Do you think that these possibilities are sufficient to satisfy needs? If not, what other measures do you think could be taken in order to ensure that social policy objectives are more effectively achieved in the application of the Community rules on public procurement, while safeguarding fair competition?

19. In your opinion, are obligations relating to health and safety at the workplace taken sufficiently into account during the preparation of tender notices and contract documents? What improvements can you suggest?

20. What has been your experience with the promotion of "green" products and services procurement under the Directives? Is there a need for the Commission to clarify the possibilities for incorporating environmental protection concerns in the application of the public procurement directives (e.g. by means of a Commission communication)?

21. Do you think that the possibilities offered are sufficient to attain the objectives pursued? If not, what measures do you think could be taken in order to ensure that environmental protection objectives are more effectively achieved in the application of the Community rules on public procurement, while safeguarding fair competition? Should the eco-label be included among the technical specifications mentioned in the general contract documents, or should application for registration under the Environmental Management and Audit Scheme figure among the selection criteria?

22. Given the absence of competition in the military equipment sector, should this not be governed by a system of public procurement as desired by some Member States?

6. PROCUREMENT OUTSIDE THE UNION

With a new World Trade Organisation Government Procurement Agreement (GPA) in place, globalisation of public procurement is certain to grow. Our industry must reply positively and effectively to this challenge; world-wide competition will be intensifying and success will hinge on innovation and international thinking to meet the challenge. Further market opening must be actively pursued; a constructive, ongoing dialogue with our industry is critical to identify new market opportunities and to help set objectives for any future negotiations. To this end, the Commission invites Member States and industry to provide information on any problems particular markets might pose and to suggest possible solutions, in particular where market opening agreements are under negotiation.

The preparation of the associated countries of Central and Eastern Europe for accession to the Union remains a major priority. The Commission's White Paper provides guidelines on the full range of single market policies, including public procurement. The Commission and the Member States have already made considerable efforts in helping to lay the foundations for an effective public procurement system. These efforts must be intensified. Training on best procurement practice and ready access to sound legal advice are paramount.

Similarly, in line with the Commission’s attempts to improve links with countries in the Mediterranean basin and as is provided for in the agreements concluded with Turkey, Morocco and Tunisia, the Commission will also look at ways of assisting in the development of competitive public procurement practices there.

I. Access to world procurement markets - Getting a fair deal for Europe

6.1 Increased liberalisation of EU markets must, to the greatest extent possible, be mirrored throughout the world in order to maximise the benefits to our industry of competitive tendering. The EU has been instrumental in achieving large-scale procurement liberalisation with its major trading partners, through the first-generation GATT Agreement on Government Procurement of 1979, the European Economic Area (EEA), the Europe Agreements, and more recently through a new WTO Government Procurement Agreement (GPA), concluded alongside the Uruguay Round.

6.2 The new GPA came into force on 1st January 1996. In addition to the European Union, the contracting parties are the US, Canada, Japan, Israel, South Korea, Norway and Switzerland. Aruba and Liechtenstein recently joined the agreement, and Singapore is in the process of acceding. The agreement's coverage includes contracts awarded by lower levels of government (such as individual states in federal countries, provinces and cities) as well as by entities operating in a number of utilities sectors (such as electricity, urban transport, water, ports and airports). Whereas the 1979 GPA was limited to public supply contracts, public works and public service contracts now fall within the scope of the new GPA. Significantly, suppliers will also have the right to challenge the award of contracts where they feel that they have been discriminated against. The Commission estimates overall that the new GPA will open to international competition public contracts worth around ECU 450 billion every year. That represents approximately a tenfold increase in the value of contracts opened to bidding under the 1979 GPA.

6.3 Many discriminatory provisions which kept EU business out of huge procurement markets in third countries were removed at the beginning of this year. New business opportunities have been created for industries as diverse as banking and heavy engineering. In the US, most discriminatory "Buy American" provisions, some dating from the 1930s, have been removed by the Federal Government as well as by 39 of the 50 state governments (including California, New York, Texas, Illinois and Florida). As a result, market opportunities worth around ECU 100 billion per annum will be available to EU business. The GPA also represents major progress on opening up procurement markets in south-east Asia. Japan for example agreed to cover the award of contracts by its 47 prefectures which are responsible for the bulk of procurement expenditure, particularly in the area of construction and civil engineering. In South Korea, which will apply the GPA from 1997, EU business will be able to bid for contracts throughout the public sector without the compulsory technology transfer, buy-back or local content arrangements that applied in the past.

6.4 But we cannot stand still. Despite major progress achieved to date, not all restrictions on tendering opportunities have been removed; certain important restrictions have remained in place in the countries which are signatories to the GPA (in which case, the Community has followed the principle of reciprocity). Moreover, the GPA, which is for the time being a plurilateral agreement, is intended to become a multilateral agreement, which means that a large number of countries have yet to accede. As the European market is generally open for suppliers from third countries, it is in the interest of European business that the Community should seek, in negotiations with third countries, to agree on market-access arrangements which achieve full reciprocal liberalisation of procurement.

6.5 Further opening-up of public procurement world-wide will therefore remain our key target. Results will be sought from the multilateral process in the WTO, by completing the coverage of existing parties to the GPA and by enlarging its membership. Future applicants for membership of the WTO such as China and Taiwan should, as a matter of principle, join the GPA, if necessary after a transitional period. (Indeed, Taiwan has already tabled an offer to join.) The Commission already strongly encourages present WTO members to accede to the GPA, particularly those with observer status under the Agreement. The multilateral approach through the WTO remains the key forum for our efforts. A parallel negotiation should be initiated in order to reach an agreement on transparency, opening up and systems of remedies in public procurement. The end objective remains national treatment and the effective application of the most favoured nation clause for all the public contracts and all Members of the WTO. To further this process, the European Union also proposes an advance revision of the GPA of 1994, which would include the extension of the Agreement, the abolition of discriminatory measures and practices and its simplification and improvement. Bilateral negotiations are, nonetheless, still needed. The Commission is therefore already in negotiation with Switzerland and South Korea. In a similar vein, the Commission is looking at gaining market access for EU suppliers in the countries of the Mediterranean Basin. Further to the Barcelona Declaration which aims to establish a Free Trade Area between the Community and the Mediterranean countries in time for the beginning of the next century, an Association Agreement covered by Article XXIV of the GPA has been reached with Israel. This agreement has been completed by two specific agreements on public procurement. These, which are not yet ratified, aim to broaden offers made on a reciprocal basis under the GPA and to open the telecommunication procurement markets of both parties. A Customs Union Agreement with Turkey has also been concluded which makes provision for future access to public procurement on a reciprocal basis. A similar approach has been taken in two Interim Association agreements concluded with Morocco and Tunisia.

6.6 European industry already has much detailed knowledge of local difficulties in tendering in third countries. As indicated in its Communication on a market access strategy[43], the Commission must, if this strategy is to be effective, have first-hand up-to-date knowledge of the problems that suppliers face in third country markets so that it can remove those barriers which are most harmful to European interests. It would be helpful to have details of the experience industry has. The new interactive data base, accessible on the INTERNET, makes it possible for industry to inform the Commission directly about its market access problems. This will enable the Commission to evaluate the problems and to examine and decide upon what action should be taken to resolve them. On the other hand, in order to identify problems of access and to help set objectives for future negotiations with third countries, the Commission has launched a major multi-country study on public procurement regimes in 19 countries in Asia, the Middle East and Latin America. The results of the study will be available shortly. The contribution of European industry to this study would be most welcome.

6.7 However, compiling and analysing information is only half the battle. Agreements are only useful if they can be made to work in practice. The Commission will therefore take steps to ensure that the GPA is made to work effectively. It will draw on its network of delegations in third countries to assist it in this task. The Commission also invites Member States to provide assistance where necessary to ensure that its suppliers are treated fairly. When necessary and appropriate, the Commission will not hesitate to use the consultation procedures provided under the GPA. If these consultations fail to resolve the issue, the Community may make use of the WTO dispute settlement procedures.

6.8 But competition is not a one way street. The Community and the Member States can help in creating the right conditions, but European industry must itself be prepared to fight strong competition for public sector contracts inside the Union from third country suppliers who now benefit from the GPA. Suppliers should, in time, seek to maximise the commercial opportunities the Agreement offers to increase their exports to third countries, and increase their share of third country procurement markets. Those who adapt to change and seek to find new markets will generally be the most successful. Those who are complacent and wait are most at risk.

[43] doc. COM(96) 53 final

II. Laying the foundations for open procurement in Central and Eastern European Countries and in the Mediterranean countries

6.9 Following the entry into force of the Europe Agreements, which are covered by Article XXIV of the GPA, suppliers from Hungary, Poland, the Czech Republic, Slovakia, Bulgaria, Romania, Slovenia (and shortly the Baltic States) have access to public tenders in the EU. At the end of a ten-year transitional period, suppliers based in the EU will also have access to public tenders in the associated countries. It is, therefore, vital that suppliers in the associated countries take up the challenge of participating in contract award procedures in the EU. They must also begin to make advances in competitiveness that will enable them to compete effectively with EU companies in domestic tender procedures following the transitional period. Similarly, in line with the Commission's attempts to improve links with countries in the Mediterranean Basin and as is provided in the agreements concluded with Turkey, Morocco and Tunisia, the Commission will also look at ways of assisting in the development of competitive public procurement practices there.

6.10 One of the major challenges facing the Union is to help the countries of Central and Eastern Europe (CEECs) to prepare themselves for EU membership. A key element in the pre-accession phase is the alignment by the CEECs of their legislation with Community legislation governing the single market. At the request of the Essen European Council, the Commission set out the basis of its strategy in the White Paper on the preparation of the associated countries of Central and Eastern Europe for integration into the internal market of the Union.[44] Presented to the Cannes European Council in June 1995, the White Paper gives guidance on the legislative measures that the countries concerned need to put in place in order to set up the necessary regulatory structure by the time of their accession to the EU. The White Paper makes it clear that, in the area of public procurement, the right administrative procedures must be established by law in order to foster competitive tendering for public contracts and to encourage competition between suppliers for those contracts.

6.11 However, open and competitive public procurement procedures are a relatively new phenomenon for most suppliers and contracting entities in the CEECs. Aligning domestic legislation with that of the internal market will not in itself bring about the changes that are necessary for suppliers and contracting entities to establish an efficient procurement system. The legislative framework that is being put in place will be reinforced by relevant and targeted technical assistance. Procurement officials need to be given the appropriate training to be able to define the goods and services that they are seeking to buy as effectively as possible, based on a thorough understanding of the economic and financial implications. Training will also help in improving the administrative and managerial skills that are needed to run an efficient procurement and contract management system. Suppliers too must adapt themselves to the culture of providing the goods and services that their public clients require, and improve their ability to prepare and submit competitive tenders.

[44] COM (95) 163 of 3.and 10.05.95.

6.12 The European Union is already supporting the CEECs in their first efforts to lay the foundations for efficient and open procurement. Valuable assistance, especially in the drafting of laws and the setting-up of administrative frameworks, is being delivered through PHARE and the mostly PHARE-financed SIGMA programme[45], which operates under the auspices of the OECD. The Commission has also established a new multi-country facility called the Technical Assistance Information Exchange Office. The Office will be a focal point for enquiries for help and advice from the Commission. It will also be a 'one-stop shop' where information on technical assistance relating to the internal market can be delivered and exchanged.

III. Questions

1. How effective in terms of market opening has the Government Procurement Agreement been? Is there a need for further initiatives?
2. From a business perspective, which countries (or group of countries) and which business sectors should be given the highest priority in future market opening initiatives?
3. Do you believe that a set of common principles (such as transparency and non-discrimination) would be enough to ensure that real market opening is achieved in future in developing countries?
4. Are there any other barriers (regulatory or non-regulatory) preventing successful participation in third countries' procurement that fall outside the scope of the GPA?
5. Would it be useful to set up an advisory group of industry representatives to assist the Commission on matters relating to access to procurement in third countries?
6. What additional steps could be taken by the Community or by the Member States to help suppliers enforce their rights under the GPA and ensure that other contracting parties play by the rules?
7. Do you believe that the Community should give priority to helping the CEECs to develop public procurement skills? If so, what would be the most effective means of providing training for the CEECs?
8. Would the procurement profession be ready to take an active role in providing assistance and lending expertise to the CEECs? Have you already been involved in any training programme? If so, what conclusions would you draw from your experience for future programmes?
9. Given that the Commission is looking at ways of assisting in the development of public procurement practice in the Mediterranean Basin, what initiatives do you think appear appropriate in this matter?

[45] Support for Governance and Management in Central and Eastern European Countries.

Annex I

The first Community procurement Directives, on public works (71/305) and public supplies (77/62) made a positive, but limited, contribution to more competitive procurement. The scope of these Directives was restricted. Major portions of public procurement, such as procurement in the water, energy, transport and telecommunications sectors and contracts for services, were not covered by these rules. Moreover, there was no harmonisation of remedies procedures, so that suppliers excluded from contracts in violation of the Directives often had no means of challenging doubtful procurement decisions or seeking compensation. The rules also left open too many loopholes for procurement entities to avoid open procedures on grounds that were not objectively justified. Subsequently changes have been made to the EU procurement rules to respond to public and political reaction to past improprieties and perceived weaknesses in the system.

The EU legal framework for public procurement was completed between 1987 and 1993 as part of the 1985 Internal Market White Paper programme. The public supplies and public works Directives were updated, in 1988 and 1989 respectively, and then consolidated in 1993 (as Directives 93/36 and 93/37). Procurement of service contracts was included in the EU's open procurement regime by Directive 92/50, in force since 1st July 1993. A Directive on supplies and works procurement by utilities in the water, energy, transport and telecommunications sectors, covering both public undertakings and undertakings to which Member States have granted special or exclusive rights, was adopted by the Council in 1990 (Directive 90/531/EEC). A consolidated version of the Utilities Directive, including service contracts, was adopted in June 1993 (Directive 93/38), superseding Directive 90/531 with effect from its entry into force on 1st July 1994 (1st January 1997 for Spain and 1st January 1998 for Greece and Portugal). Two specific Directives on remedies exist, one for the 'traditional' procurement sectors (89/665, as amended by the Services Directive 92/50) and one for the utilities sectors (92/13). The Remedies Directives require Member States to ensure that administrative or legal remedies are available to suppliers in the event of non-compliance with the substantive rules on open procurement.

The Directives require Member States to ensure that award procedures for contracts over specific thresholds are transparent and competitive. The Directives include rules covering the publication of tenders; the procedures for awarding contracts which must be followed (for example, technical specifications must normally refer to European standards where they exist or, in the absence of European standards, to national standards referring to international standards); and the selection and award criteria which may be used. The thresholds defining which contracts fall under the Directives' rules are set at ECU 200 000 for supplies and service contracts (ECU 400 000 for contracts awarded in the utilities sectors and approximately ECU 130 000 for contracts falling within the scope of the application of the agreement on public contracts of the World Trade Organisation) and ECU 5 million for works contracts. These thresholds are defined with a view to ensuring the competitive procurement rules apply to contracts likely to interest suppliers from other Member States while allowing administrative and procedural costs on smaller contracts to be kept to a minimum.

STATUS OF IMPLEMENTATION OF THE PUBLIC PROCUREMENT DIRECTIVES 26/06/96

DIRECTIVES	B	DK	D	GR	E	F	IRL	I	L	NL	P	UK	AT	FI	SE
89/440/EEC Works (18.7.1989) In force since 19.7.1990 GR, E, P: 1.3.1992 AT, FI, SE: 1.1.1994 replaced by **93/37/EEC**	▨							▨			▨				
88/295/EEC Supplies (2.3.1988) In force since 1.1.1989 GR, E, P: 1.3.1992 AT, FI, SE: 1.1.1994											▨				
89/665/EEC Remedies (21.12.1989) In force since 21.12.1991 AT, FI, SE: 1.1.1994			▨	▨	▨						▨				
90/531/EEC Utilities (17.9.1990) In force since 1.1.1993 E: 1.1.1996 GR, P: 1.1.1998 AT, FI, SE: 1.1.1994			▨	**D**	■						**D**	▨			
92/13/EEC Remedies for Utilities (25.2.1992) In force since 1.1.1993 AT, FI, SE: 1.7.1994 E: 30.6.1995 GR, P: 30.6.1997			▨	**D**	■	▨	▨	▨			**D**	▨	■		
92/50/EEC Services (18.6.1992) In force since 1.7.1993 AT, FI, SE: 1.7.1994	■		■	■		■							■		
93/36/EEC Supplies (14.6.1993) In force since 14.6.1994 AT, FI, SE: 1.7.1994	■		■			■		■			▨		■		
93/38/EEC Utilities (14.6.1993) In force since 1.7.1994 AT, FI, SE: 1.7.1994 E: 1.1.1997 GR, P: 1.1.1998			■	**D**	**D**	■					**D**	■	■		

Key:

■	**National implementing measures not communicated or only partly communicated**
▨	National implementing measures communicated and checked; infringement proceedings for non-compliance under way
	National implementing measures communicated
D	Derogation granted to Member State

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 11.03.1998
COM(1998) 143 final

COMMUNICATION FROM THE COMMISSION

PUBLIC PROCUREMENT IN THE EUROPEAN UNION

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1 INTRODUCTION

Optimising the functioning of the internal market is of vital importance for the European Union. The Commission's *Single Market Action Plan*[1], which was endorsed by the Amsterdam European Council and the European Parliament, is intended to ensure that the single market fulfils its potential. As part of the Action Plan, the Commission published, in November 1997, the first edition of the *Scoreboard*[2] containing detailed indicators on the state of implementation and application of single market legislation.

The Scoreboard confirmed that public procurement is one of the key areas of the single market where results do not yet meet expectations. This is particularly significant because of the economic importance of public procurement markets: they represent more than ECU 720 billion or about 11% of the Union's GDP, equivalent to half of the GDP of the Federal Republic of Germany.

Existing policy aims to open up national public procurement markets to competition from other Member States, offering competitive suppliers significant opportunities. Today these opportunities extend to the EEA countries and Europe's major trading partners, the USA, Canada and Japan. As regards the EEA, this extension results from the integration of the Community "acquis" in public procurement in the Agreement on the EEA and, in consequence, in the legislation of the EFTA countries signing it. The agreement guarantees access of these countries' suppliers to the Community market in the same way as Community firms are guaranteed access to the markets of the EFTA countries. Existing policy seeks to encourage transparent and competitive purchasing behaviour in order to deliver the best value for money. Community-wide competition for public contracts will lead to an efficient allocation of resources and thus enhance the quality of public services, improve economic growth, competitiveness and job creation. Efficient procurement is particularly important on the eve of the single currency and in the prevailing climate of stability and budgetary restraint necessary for such fundamental change to occur and develop under satisfactory conditions. A good public procurement policy, by preventing inefficient public spending and by providing a major means of avoiding corruption, can give taxpayers confidence that their money is being spent correctly and thus reinforce public trust in government. While the fight against corruption is not the primary objective of public procurement, improvements in public procurement procedures can make a useful contribution[3]. Accordingly, proposals in this communication aimed at enhancing transparency and clarity, such as publication of tendering information or the designation of independent authorities in each Member State, will help create a system which minimises opportunities for corruption.

[1] CSE (97) 1 final, 4.6.1997.

[2] Single Market Scoreboard, No 1, November 1997, SEC 97/2196.

[3] See Commission Communication to the Council and the European Parliament on *A Union Policy against Corruption (COM(97)0192 – C4-0273/97).*

The legal framework composed of the principles and rules enshrined in the Treaty and developed in detail by six Directives, was completed nearly four years ago, the first Directives dating back more than twenty years. However, several Member States have failed to implement all the Directives. As the November 1997 Scoreboard shows, public procurement is one of the areas where the deficit in transposition is greatest, with only 55.6%[4] of the Directives correctly implemented in all Member States. Moreover, the Commission's communication on the *Impact and Effectiveness of the Single Market*[5] makes it clear that the economic results so far achieved fall short of expectations. The level of import penetration in the public sector (that is, the sum of direct and indirect imports by public purchasers) may have risen from 6% in 1987 to 10% today. It can be observed, however, that specific sectors remain closed because of the use of standards and certification and qualification systems. Moreover, there is no clear evidence of price convergence between Member States over the same period.

Concerned by Member States' failure to implement the Directives and by the disappointing economic results, the Commission launched its Green Paper on *Public Procurement in the European Union: Exploring the Way forward*[6], published in November 1996. The high level of response to the Green Paper is gratifying. Nearly 300 contributions have been received from a wide range of key players and the Commission thanks all - institutions, Member States, suppliers and purchasers, representative organisations on the demand and the supply sides and other interested parties - for their valuable contribution. Discussions in the Council, in the European Parliament and in the Advisory Committees for public procurement have been extremely productive and helpful.

The Commission has carefully analysed all of the contributions received. The measures proposed by the Commission in the present communication take them fully into account, recognise that procurement policy needs to be reinvigorated in order to reap the full benefits of the regime and define the direction that public procurement policy in the European Union will take over the next five years.

The conclusions the Commission draws from the debate are twofold. First, the Union must take action to ensure the public procurement regime in place delivers the economic benefits it has promised. Secondly, it must adapt existing instruments to the changing economic environment. Achieving this will require enormous effort from all those involved: the Commission, the Member States and the private sector. While the aims of the internal market policy have remained the same since the adoption of the Treaty of Rome, Europe has gone through immense changes since the adoption of the first public procurement Directives in the 1970s. These are the information revolution, the change of attitude to the State's role in the economy combined with the introduction of budgetary restraint – privatisation, liberalisation of utilities, public-private partnerships – and the increase of cross-border trade in goods and services brought about by the internal market. Together, they have resulted in a highly competitive commercial environment and an increased public awareness of the need to fight corruption and prevent misuse of public finance.

[4] See Annex I.

[5] COM (96) 520 final, 30.10.1996.

[6] COM (96) 583 final, 27.11.1996.

The main theme emerging from the Green Paper debate is the need to simplify the legal framework and adapt it to the new electronic age while maintaining the stability of its basic structure and avoiding unnecessary changes involving further legislative work at Community and national level.

The Community's response and the measures proposed in this communication contain the following main elements:

- The Commission recognises that a stable legal framework is crucial to the smooth operation of public procurement markets and to maintaining market players' confidence in the efficiency of the system. However, the current legal framework does not exist for its own sake but in order to attain the benefits of the single market in the area of public procurement. Rules, policy and enforcement should follow reality rather than the other way round. In the light of the momentous changes, which have occurred since the publication of the first Directives in the seventies, the Commission recognises the need to re-orient its policy and streamline its rules.

- The Commission acknowledges the complexity of the current legal framework and the rigidity of its procedures. It intends, therefore, to simplify the former and make the latter more flexible. Simplification, in this context implies, on the one hand, the clarification of existing rules and, on the other hand, their amendment. In order to preserve the stability of the framework, priority will be given to clarification of existing rules to resolve the most complex issues. Where clarification is not sufficient or where it is felt that the current framework is not flexible enough to take account of new practices or market reality, the Commission intends to propose amendments through a legislative package.

- The use of information and communication technologies (ICT) in public procurement will determine our ability to adapt in the future and maintain a competitive European industry. Fully-fledged electronic procurement will allow the procurement process to take place much more rapidly and significantly reduce transaction costs over the entire lifecycle of the goods or services purchased.

- Simply laying down and enforcing legal rules cannot on its own guarantee economic benefits. Other measures aimed at improving market access are equally important and necessary:

  - It is of the utmost importance, if one seeks to achieve efficient purchasing, to give the different operators involved in a given public procurement a training, which makes real professionals of them. This training should not focus on the legal provisions as such but on how to use them in an effective way in day-to-day procurement and on how to develop new ways of working in a changing market environment.

  - The relatively low response from suppliers to the enormous volume of contract opportunities needs to be addressed through raising awareness of what is at stake, improving transparency of, and access to, information on contract opportunities, general market monitoring and other useful information.

- Specific action in favour of the participation of SMEs has been sought by the European Parliament. Measures will be taken in connection with the general problems of supplier participation.

In the process of ensuring a single market for procurement, Member States and European industry have a key role to play. Governments, by enforcing the legal framework and by setting a good example themselves, will help to build confidence in the openness of their procurement markets. European industry, for its part, should actively seek out new market opportunities and when it encounters difficulties, should be more courageous in defending its rights. Public procurement is too fundamental for the European economy to be left in the hands of a limited number of specialists: only the establishment of a real partnership between the Community, the Member States and industry will bring about the benefits that are to be expected.

2 ADAPTING THE REGULATORY FRAMEWORK TO MARKET CHANGES

2.1 The ground rules: simplification and flexible response to market developments

2.1.1 Objective

It is evident from the debate launched by the Commission's Green Paper that the existing legal framework[7] and procedures need to be simplified. The Commission endorses the call for simplification, which is in line with one of the strategic targets of its Single Market Action Plan, namely that of strengthening the existing legal framework by simplifying and improving national and Community rules (Strategic Target 1, Action 4).

The Commission is in any event under the obligation to re-examine the application of the Directives within the deadlines laid down therein, as Parliament pointed out in its opinion on the Green Paper. This communication is therefore a response both to Parliament's request and to the obligation laid down in the Directives.

"Simplification" means in this context both the clarification of provisions which are obscure or complex and adjustment of the rules in force where the problems to be addressed cannot be resolved through interpretation of the provisions.

The Commission takes the view that certain important issues cannot be dealt with through mere interpretative documents and that the legislation needs to be amended. Such amendment will not be tantamount to over-regulation but will endeavour on the contrary to make the rules and procedures clearer and more flexible. Amendments will be precisely targeted so as to preserve the structure and foundations of the legal framework.

These amendments are in line with measures announced in the Single Market Action Plan, in which the Commission stressed the need to remedy weaknesses in the existing legal framework for public procurement in order to ensure that the single market functions properly in this area (Strategic Target 1, Action 5).

2.1.2 Presentation of a legislative package

Although the Commission is convinced of the need to adjust some aspects of the existing legal framework, it would stress that, three years after expiry of the deadline for transposing the last of the Directives adopted in the public procurement field, the

[7] Directives 93/36/EEC, 93/37/EEC and 92/50/EEC on public supplies, public works and public services (the "traditional" Directives) as amended by directive 97/52/EC; Directive 93/38/EEC on procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (the "Utilities Directive"); Directives 89/665/EEC and 92/13/EEC on review procedures (the "Remedies Directives").

requisite national legislation is still not fully in place in all Member States. Many of the contributions prompted by the Green Paper, and in particular Parliament's opinion, deplore this state of affairs and call on the Commission to act as a matter of urgency.

The Commission invites the Member States to demonstrate their political commitment to putting an end to delays in transposition at the earliest possible opportunity. Since the transposition and correct application of the Directives is a precondition for the proper implementation of public procurement policy, the Commission reaffirms its determination to take all the necessary steps to ensure that Member States fulfil their obligations. It is proposing a set of measures to that end (see point 2.2 below).

The Commission intends to table a set of amendments to the existing legal framework concerning the following aspects:

- Submission of proposals to exclude from the field of application of Directive 93/38/EEC, the sectors or services to which it currently applies (water, energy, transport and telecommunications) that operate, in each of the Member States, under conditions of effective competition.
- introduction of more flexible procedures, namely a competitive negotiated procedure and framework contracts, in response to the criticism sometimes levelled at the system that procedures are excessively rigid and formalistic and, where complied with strictly, can lead to malfunctioning in the award of contracts;
- adoption of rules to take account of certain trends, such as concessions and other forms of partnership between the public and private sectors and privatisation, to ensure that their proper functioning is compatible with that of the single market;
- fully electronic procurement (see point 3.2 below).

These measures will be tabled by the Commission in a legislative package designed to make certain adjustments to the existing legal framework in areas where interpretation of the rules to take account of changing circumstances would not be sufficient to solve the problems.

2.1.2.1 Adjustment of the scope of Directive 93/38/EEC in line with changes in the sectors it covers

Following the liberalisation of some of the sectors covered by Directive 93/38/EEC, it is necessary to examine the degree of openness to competition of the liberalised sectors with a view to deciding whether the constraints the directive impose on contracting entities are still justified. They were introduced because of the lack of competition resulting from the State's decision to grant a monopoly or a privileged position to an operator. In return for this preferential treatment by the State, the operators concerned had to comply with certain advertising and procedural requirements when awarding contracts. If a sector is found to be effectively open to competition, the constraints imposed by the directive should be removed.

The Commission was the prime mover in the process of liberalisation in the sectors covered by Directive 93/38/EEC (see 3. Report on the implementation of the telecommunication regulation package[8]). It must now take account of the changes that have occurred and the new factors that are emerging on the market, by excluding from the scope of the Directive entities operating under real competitive conditions in the same way as private entities which base their decisions on purely economic criteria.

The Commission intends, before the end of 1998, to submit proposals to exclude from the field of application of Directive 93/38/EEC sectors or services to which it applies (water, energy, transport and telecommunications) which operate, in each of the Member States under conditions of real competition.

In the immediate future, the Commission is resolved, in the light of the jurisprudence of the Court of Justice, to use the possibilities provided by Article 8 of Directive 93/38/EEC to exempt services in the telecommunications sector operating in a fully competitive environment. Accordingly, the Commission invites the contracting entities to notify the services that they consider excluded from the scope of the Directive.

In its evaluation of the real operation of competition, the Commission will take particular account of the degree of transposition and implementation of the relevant Community legal framework.

2.1.2.2 Facilitating dialogue

Many contributions confirmed the Commission's finding that, especially in the case of particularly complex contracts in areas that are constantly changing, such as high technology, purchasers are well aware of their needs but do not know in advance what is the best technical solution for satisfying those needs. Discussion of the contract and dialogue between purchasers and suppliers are therefore necessary in such cases. But the standard procedures laid down by the "traditional" Directives leave very little scope for discussion during the award of contracts and are therefore regarded as lacking in flexibility in situations of this type.

The Commission will therefore propose amendments to the existing texts of the Directives with a view to making procedures more flexible and allowing dialogue in the course of such procedures and not just in exceptional circumstances. It will propose a new standard procedure, the "competitive dialogue", which would operate alongside open and restricted procedures and would replace the existing negotiated procedure with prior publication of a notice. The conditions and the rules under which contracting authorities would be allowed to use this new procedure and the details of the procedure itself will have to be spelt out and will be based *inter alia* on the principles of transparency and equal treatment. The only remaining exceptional procedure would then be a "direct-agreement procedure", the conditions for the application of which must be construed strictly, in line with the case law of the Court of Justice.

[8] COM (98) 80, 19.2.1998

This is an initiative which does not aim to introduce new regulatory constraints: on the contrary, it is clearly designed to achieve the procedural simplification and flexibility called for by all interested parties who took part in the Green Paper debate, whether from the institutional sphere or the private sector. It will give operators more room for manoeuvre, which will not fail to yield beneficial effects in terms of the quality and efficiency of procurement.

2.1.2.3 The role of framework purchasing

On markets, which are constantly changing, such as the markets for information technology products and services, it is not economically justifiable for public purchasers to be tied to fixed prices and conditions. Public purchasers therefore increasingly feel the need to manage their procurement on a long-term basis. The essential features of contracts of this nature should consequently offer the necessary flexibility. The question of the compatibility of such flexibility with the traditional Directives was raised in many of the contributions.

With a view to simplifying procedures and clarifying the situation, the Commission will propose amendments to the existing instruments, which would permit more extensive use of flexible contracts allowing product developments and price changes to be taken into account. Long-term contracts may, however, pose a threat to competition in that they could cause positions to become entrenched and certain firms to be shut out. It is essential therefore that precise rules be laid down for the use of these procedures. Without anticipating the direction that will be taken by discussions on this issue, the Commission takes the view that objective and transparent information should be published on framework contracts. Once candidates had come forward, lists of potential contractors could be drawn up. To ensure that these contracts are not walled off, lists should either be valid only for a limited period or be kept permanently open to new firms.

2.1.2.4 Treatment of concessions and other forms of public-private partnership

The concept of public-private partnership encompasses the different ways in which private capital can take part in the financing and operation of infrastructures and public services. The role, which the public authorities still play in such partnerships, varies greatly according to the situation concerned. The Commission has no intention of intervening in Member States' decisions as to whether these infrastructures and services are to be financed and operated by the public or the private sector, since such decisions are their responsibility. However, if it is to be fully in tune with reality, the Commission has a duty to devise a legal framework, which allows the development of these forms of partnership, while guaranteeing compliance with the competition rules and the fundamental Treaty principles.

At present, only works concessions are subject to specific rules laid down in a Directive; service concessions, public service contracts or other partnerships involving the provision of services are not covered[9]. Treaty rules and principles such as equal treatment and non-discrimination are of course applicable, but cannot always be readily implemented in specific cases. A legal framework therefore needs to be devised for these arrangements in order to clarify and simplify the conditions in which they may operate, thereby ensuring greater legal certainty.

In the interests of simplification and clarification, the Commission envisages the following action to establish uniform principles for all types of concession.

In the first stage, the Commission will draw up an interpretative document explaining and spelling out the rules and principles that it considers, on the basis of the cases it has had to deal with, should apply to concessions. In this context, the Commission wil! also be examining other forms of public-private partnership in order to determine whether and to what extent the public procurement rules can constitute an appropriate legal framework for ensuring compliance with the Treaty rules without hindering the development of these forms of co-operation. This rethink could lead to clarification or even adjustment of existing instruments. In the same way, the Commission intends to tackle some urgent interpretation problems that have arisen in connection with Trans-European Networks (TENs). It has already announced to the high-level group chaired by Mr Kinnock and to other bodies its intention to publish an explanatory guide providing concrete solutions to certain questions arising in this area in the light of the existing legal framework.

In a second stage, the Commission envisages proposing amendments to the Directives in order to cover all forms of concessions, that are not yet subject to regulation. The aim would be to guarantee that partners were chosen after Community-wide competition ensured by prior publication of a notice and minimum procedural rules, which, in the interests of flexibility, allow ample scope for, dialogue between the parties involved while upholding the principle of equal treatment. To respond to the legitimate concerns voiced by certain operators, the amendments would include provisions allowing the chosen consortium to award contracts to its partners, provided that the existence of such contracts is announced during the award procedure.

One aspect of the public-private partnership issue is the trend towards privatisation in which the public authorities transfer to the private sector responsibility for tasks that they previously carried out themselves. The process can take many different forms, ranging from a simple transfer of assets to more complex arrangements. These could combine transfer of ownership from a public body to the private sector and the establishment of a contractual relationship (purchase of goods or services, concessions, etc.) between that body and the privatised entity in question.

[9] Except for the public tendering procedures in cases where for reasons which are in the public interest, Member States restrict access to intra-Community air routes or to the ground handling markets at Community airports.

The option of whether or not to carry out such privatisation falls entirely within the competence of Member States. The Commission ought nevertheless to ensure the removal of all the obstacles that could unduly hinder this type of transaction.

It is clear that the rules and principles of the Treaty, particularly Articles 34, 52, 59 and 67 on free movement of goods, the right of establishment, freedom to provide services and free movement of capital have a valid application as regards the transfer of assets to private purchasers.

The Commission will look into the problems arising in this area from the standpoint of the public procurement Directives and, in the interests of clarity, publish an interpretative document on the topic.

2.1.3 Clarification and consolidation

As stressed in the introduction to this communication, the Commission is convinced of the importance of a stable legal framework in providing a favourable environment for businesses. The framework must, however, also be transparent. The Commission will therefore endeavour, wherever possible, to avoid constantly amending legislation and to solve problems that arise through interpreting the law in a manner that takes account of changing circumstances and in the light of the principles developed by the Court, the only institution which has the power to give an authentic interpretation of Community law.

The Commission therefore undertakes to shoulder its responsibilities by clearly stating its position on the complex questions which have arisen in relation to the application of Community law and which were mentioned in responses to the Green Paper.[10]

[10] The Commission proposes to clarify the following particular topics in an interpretative document:

- definitions of such basic concepts as "body governed by public law", "work", "special or exclusive rights", "contracting authority" and "contracting entity" and the borderline between works contracts and service contracts;
- service contracts covered by the Directive, in particular the situation of financial services and R&D services;
- "in-house" contracts, i.e. contracts awarded within the public administration, for example between a central and local administration or between an administration and a company wholly owned by it;
- the "technical dialogue" whereby a contracting authority enters into technical discussions with potential bidders when determining its needs, before the contract award procedure is initiated, while observing the principle of equal treatment and safeguarding competition;
- the methods to be used for calculating whether or not a contract exceeds the thresholds for application of the Directives;
- an operational distinction between selection criteria and award criteria;
- identification of "abnormally low tenders" within the meaning of the Directives;
- definition of the concept of "irregular", "unacceptable" and "inappropriate" tenders within the meaning of the Directives;
- the conditions in which "variants" may be used;

The Commission also intends to adopt interpretative communications, particularly in the following areas:

- the Treaty rules applicable to contracts not covered by the directives and the relevant principles clarified by the jurisprudence of the Court of Justice, such as, for example, the principles of equality of treatment, non-discrimination, transparency, mutual recognition and proportionality and the principles applicable to the stage following contract award;

Bringing the Commission's position on these problems to the attention of all parties will enhance legal certainty, and this will in turn help to create a favourable climate that will encourage firms to be more active in bidding for contracts.

The view is also taken in many quarters that the "traditional" Directives (on supplies, works and services) should be consolidated in order to iron out inconsistencies and make them easier to understand.

The Commission intends ultimately, once the work on interpretation and adjustment of the existing legislation is complete, to combine the three "traditional" Directives into a single instrument. The consolidation exercise would be strictly confined to incorporating the adjustments and clarifications made since the Directives were adopted and eliminating any inconsistencies.

It should not be forgotten, however, that if consolidation of the Community Directives is genuinely to result in greater clarity of the rules applicable in the field of public procurement, it must be backed up by consolidation and clarification of the relevant national rules.

2.2 Improving the implementation of public procurement policy: a joint responsibility for the Member States, the Commission and economic operators

2.2.1 *Objective*

If the single market is to function properly, the ground rules must be applied and observed uniformly in all Member States; this is far from being the case at present, a fact which is highlighted by various surveys and many of the contributions.

For this purpose, Member States must shoulder their responsibilities for ensuring compliance with the existing rules, and it is up to economic operators to use the instruments (particularly the means of redress) available to them to make the single market work in the field of public procurement. This allocation of responsibilities is in line with the principle of subsidiarity and in tune with the idea of the partnership between the Community institutions, the Member States and economic operators, which is necessary for the successful liberalisation of public procurement.

The Commission recognises the need to continue streamlining infringement proceedings under Article 169 of the Treaty and its own internal procedures. However, it must also

- the conditions under which environmental criteria can be taken into account in public procurement (the use of "eco-labels", "eco-audit" systems, taking into account of production and working methods and the correct use of standards at different levels will be dealt with, inter alia).
- the conditions under which social criteria can be taken into account in public procurement.

establish better co-operation with Member States, for, in view of the large number of cases concerning public procurement, it is necessary that the citizen can quickly obtain satisfaction as regards to the difficulties he encounters.

This is why, in pursuance of the subsidiarity principle, the Commission is encouraging Member States to set up or to designate independent authorities, which would deal with the vast majority of disputes in the public procurement field. The Commission would thus concentrate on cases having a Community-wide impact or raising major questions of interpretation. The objective pursued is to deal with problems at the appropriate level.

The Commission is also concerned with fighting irregularities affecting public procurements under two aspects i.e.

- Corruption occurring during the procedure for awarding the contract.
- Irregularities occurring during the execution of the contract once awarded.

This is particularly true for the contracts either awarded by the Commission (direct expenditure) or financed by the Commission (indirect expenditure) where the Communities' financial interests are at stake.

2.2.2 Improving checks at the Community level

Infringement proceedings under Article 169 of the Treaty are the main weapon in the Commission's arsenal for enforcing Community law. But the Article 169 procedure cannot on its own guarantee the rapid and effective settlement of disputes which is necessary in public procurement: by the time the dispute is settled, contracts have more often than not already been awarded, or even performed.

The European Parliament proposes strengthening the Commission's powers to conduct investigations and impose penalties in this area, along the lines of the powers it exercises in the competition field, so that it can enforce the legal framework effectively. The Amsterdam European Council has also requested the Commission to make proposals to it for the setting up of an efficient mechanism for combating serious infringements of Community law in the field of free movement of goods.

The Commission will consider whether it is opportune to provide, if necessary, such a mechanism for dealing with infringements of the public procurement rules. It could also consider having recourse, in appropriate cases, to Article 90, paragraph 3, of the EC Treaty.

The Commission is determined to speed up its own procedures for dealing with infringement cases.

However, these efforts also require the co-operation of Member States, which should respond to the Commission's requests within the specified time limits. More generally, the Commission is firmly resolved, in all cases where it proves necessary, to use the procedure available under Article 171 of the EC Treaty, under which the Commission can request the Court of Justice to impose penalty payments on Member States which fail to comply with a Decision establishing a breach of the public procurement rules.

Another shortcoming pointed up by certain contributions resides in the fact that the Commission does not act systematically against infringements of the public procurement rules but haphazardly, as and when it receives complaints.

In response to this criticism, the Commission undertakes to follow an approach, which will be less reactive and more proactive. It will therefore first seek to prevent infringements by reinforcing co-operation with Member States e.g. when they prepare for major events or when they plan large infrastructure projects having particular public procurement relevance. In the second place, the Commission will pay special attention to particularly serious infringements brought to its knowledge by whatever means, including the media; in such cases it will take the initiative in launching proceedings under Article 169. Finally, when a specific case brought to its attention raises a general problem of application, it will check the situation in all Member States and initiate proceedings against all similar infringements.

2.2.3 *Independent authorities*

In its Green Paper, the Commission invited the Member States to designate independent authorities specialised in public procurement.

The Commission is not proposing that new institutions are set up from scratch, but rather that already existing bodies, such as audit offices or competition authorities, be used for the purpose. Without trying to evade its responsibilities as the guardian of Community law, the Commission takes the view that it cannot set itself up as a kind of "super enforcement authority" for settling all disputes in the public procurement field. Neither does it have enough human and material resources to solve all the problems arising. The aim of devolving the handling of disputes to national authorities is to relieve the Commission of some of the caseload of disputes currently submitted to it. This would enable it to concentrate on its rule-making tasks and on those cases which have a Community-wide impact or raise major questions of interpretation, while complainants would be able to find solutions to their disputes at national level.

The Commission therefore encourages Member States to set up or designate independent authorities with the task of identifying problems of interpretation and discussing the treatment of individual cases. These authorities would serve as contact points for the rapid, informal solution of problems encountered in gaining access to contracts, and could co-operate with each other and with the Commission, in the latter case *inter alia* with a view to producing reliable statistics.

These positive effects will be further enhanced following the pilot project for co-ordination and co-operation between these authorities suggested by Denmark and soon to be implemented.[11] Under this project, a supplier facing a problem with a procurement procedure in another Member State can contact the independent authority in that country. However, he can also address himself to the authority in his own country, which would then contact the authority in the Member State concerned. These contacts should enable a rapid, informal and adequate solution to be found. This could contribute to the creation of a genuinely open European procurement market without obliging suppliers to go to court.

2.2.4 Market monitoring

An effective public procurement policy is feasible only if all the parties involved (purchasers, suppliers and public authorities) have sufficient information on the real operation of the market and on the - particularly economic - impact of the policies pursued.

Very little information is currently available. What does exist is too patchy to serve as a tool for assessing the effectiveness of current policy and the economic benefits for the main players. Member States and contracting entities currently supply the statistics required by the Directives and the Agreement on Government Procurement (GPA) very late, if at all. The amount and complexity of the information required goes some way towards explaining this situation.

The Commission will propose that these statistical requirements be scaled down to the minimum strictly necessary for effectively monitoring the market. It will ensure that statistical reporting obligations are complied with.

In future, an alternative solution for obtaining these statistical data could be based on contract award notices within the SIMAP system. The necessary information could be gathered from these notices if the format was adjusted and notices actually published. The possibility of requiring price information only on a confidential basis, enabling the Commission to aggregate the data, could be considered.

The Commission insists on compliance with the obligation to publish contract award notices (CANs) and will use all necessary means at its disposal in order to enforce it. If the obligation were complied with, it could consider abolishing the requirement to supply statistical data.

Within the SIMAP system a market analysis tool will be developed to present market information in a user-friendly manner. Suppliers and purchasers could use this

[11] The pilot project suggested by the Danish Government is supported by the Commission. It is the first concrete project following up ideas developed in the Action Plan for the Single Market under Strategic Target 1, Action 2 (establish a framework for enforcement and problem solving) and follows the logic of the so-called observatory, launched via the Advisory Committee for Public Procurement in 1994.

information to gain a better understanding of the markets they are working in. Such a system would significantly improve transparency of procurement markets.

In order to pursue the series of statistical surveys in the Member States, which have so far been carried out, by the national statistical offices in Greece, Portugal and Germany, the Commission invites other Member States to volunteer for such a study.

Bringing together all the information available, the Commission will define indicators to measure market trends and the impact of public procurement policy over time.

Alongside these planned actions, the Commission will if necessary carry out additional economic studies.

2.2.5 Attestation: a guarantee of non-discriminatory procurement

Bearing in mind that prevention is better than cure, the EU set up an attestation system for purchasers. Nevertheless, as can be seen from the contributions to the Green Paper debate, if the system is to be used, it must confer certain benefits on the entity undergoing attestation.

Among these benefits, the Commission is thinking in particular of exemption from certain constraints currently imposed by the Directives, which could be seen as an excessive burden for an entity that had agreed to undergo attestation.

Nevertheless, even if an entity were exempted from certain requirements, the basic principles, such as transparency, non-discrimination and equal treatment of all suppliers, would still apply.

2.2.6 Fighting corruption

The Commission in its Communication on Corruption[12] highlights the importance of public procurement for an effective Union-wide policy to the fight against corruption.

The Commission will explore the possibility of obliging public procurement entities to enter into anti-corruption pledges and a corresponding obligation on tenderers to agree that they will not use bribery to obtain a contract.

[12] See Commission Communication to the Council and the European Parliament on *A Union Policy against Corruption (COM(97)0192 – C4-0273/97).*

The need for a blacklisting system has been raised within the European Union on at least two fronts. Firstly, the Commission's Communication on Corruption mentioned above commits the Commission to working on a scheme of blacklisting applicable to areas where Community finances are at risk. Similarly, the European Council in June 1997 adopted an *Action Plan for Combating Organised Crime*[13]. This contains a recommendation that Member States and the Commission provide for the possibility of exclusion from public tender procedures of an applicant who has committed or is under investigation or prosecution for having committed an offence connected with organised crime.

The Commission will explore how a blacklisting system could be used as an anti-corruption tool.

2.2.7 Contracts awarded by the Commission

The Commission has been criticised by other Community institutions (the Council (internal market) and the Economic and Social Committee) and by economic operators with regard not only to its own contract award procedures but also to the contracts it finances (on the latter, see point 4.6.3 below).

Other shortcomings, such as excessive delays in paying contractors and failure to publish indicative and contract award notices, as required by the Directives, have also been mentioned.

The Commission is nevertheless convinced that considerable progress has been achieved in recent years, particularly in the wake of the SEM 200 (Sound and Efficient Management 200) programme, which is aimed at rationalising its procurement and managing it on a more professional basis.

As regards the fight against corruption and financial irregularities concerning contracts to be awarded by the Commission, its communication on "Sound Financial Management and Administration Improving Action against Incompetence, Financial Irregularities, Fraud and Corruption"[14] of November 1997 explicitly deals with public procurement and announces a number of measures to be taken to improve its procedures for awarding contracts. In particular, it has improved its internal administrative procedures concerning public procurement and established an internal early warning system.

The Commission reaffirms its commitment to observing the same rules as national authorities. The contract award procedures of the Community institutions already provide for the application of the Council public procurement directives on works, supplies and services. The Commission proposes to add a reference to the multilateral agreement on public procurement concluded within the framework of the WTO. It undertakes to be

[13] OJC 251 of 15.8.97, page 1.

[14] SEC(97) 8198 18/11/97.

more careful in complying with the Directives and to tighten its payment discipline. The Commission has undertaken to include in all its contracts involving identifiable deliverables, a clause obliging payment within 60 days of receipt of the claim with interest in case of delay. For contracts falling below the thresholds laid down in the Directives, it will likewise observe the principles of transparency, non-discrimination and equal treatment.

The Commission intends to explore the different possible methods of re-enforcing monitoring of observance of the principles and rules applicable to the award of public contracts, including the designation of an independent authority accessible to goods and services providers. This authority could exercise monitoring responsibilities and other functions, especially those of conciliation and assistance.

In the interests of transparency, Commission departments will make more extensive use of new IT systems, in particular the Internet. They will thus offer access to much more information than is currently available via the Official Journal and the TED database, thereby making it possible, among other things, to consult tender specifications on the Internet and even print them direct, so that interested suppliers can obtain these documents forthwith.

3 DEVELOPING A FAVOURABLE ENVIRONMENT FOR BUSINESSES, AND IN PARTICULAR SMEs

3.1 Training, information and measures helping SMEs

3.1.1 Objective

The opening-up of public procurement markets to competition is a significant supply-side operation. Eliminating red tape is of enormous economic importance, creating business opportunities for competitive European suppliers from nearly all economic sectors.

The weakness of the impact of the Community regime is due in particular to the low response rate of suppliers. This is confirmed by the findings on public procurement published in the "*The Single Market Review*"[15]. Moreover, a recent supplier survey revealed that an average of only 10% of suppliers answer calls for tenders. In this connection, many contributions to the Green Paper, and in particular that of the European Parliament, highlight the disappointing record of SMEs and their specific problems.

An efficient public procurement policy needs to increase supplier participation. The Commission therefore proposes a set of measures addressing the various aspects of the problem: Making markets more transparent through better information; Increasing confidence in contract procedures by training focused on professionalism and best practice; Specific action to help SMEs overcome obstacles to selling to the public sector; Promoting mutual recognition of qualification procedures by contracting entities, thus reducing the costs to suppliers of entry to public procurement.

3.1.2 Information

The information given on public procurement is a key element in creating a business friendly environment. Indeed, low supplier participation may indicate that information on potential public procurement markets must be extended and made more accessible.

The Commission will therefore exchange the present system of publication for an Internet based solution. This will allow free and easy access to information essential to potential contractors, including purchaser profiles (see point 3.2) and market monitoring information (see point 2.2.4). Commission and Member States need to work together to make information on the legal framework in the different Member States and on administrative procedures available. The Commission will also draw up interpretative texts (see point 2.1.3).

[15] The Single Market Review, Subseries III: Dismantling of Barriers, Volume 2: Public Procurement (OPOCE 1996).

3.1.3 Training and commercial practices ("best practice")

A higher degree of professionalism among both purchasers and suppliers could significantly improve the environment in which public procurement takes place. Adequate training is therefore of the utmost importance in the opening up of markets, and there is wide support for a Community initiative for this purpose. Given the wide field to be covered, the diversity of administrative cultures and training programmes, a training policy will only be effective with the participation of Member States and economic and training actors at national, regional and local levels. The Commission, for its part, will develop a framework for implementing an effective public procurement training policy in the Union. This policy will also take into account measures to integrate environmental, social and consumer protection objectives.

The Commission, on the basis of contributions from Member States and other interested parties, will complete a stocktaking of existing training needs, best practices, actions and current programmes in this field.

The Commission will examine the results of the stocktaking exercise with a view to developing guidelines on a public procurement training policy. This policy will make full use of the possibilities offered by information technology.

3.1.4 Measures in favour of SMEs

SMEs have the potential to supply that additional competition, flexibility and capacity for innovation essential to the successful opening up of public procurement markets. Every effort to make public procurement more accessible for businesses should start off from the point of view of the SME. While the Community regime has enabled SMEs to enjoy some success in breaking into regional and national procurement markets, however, experience of direct participation in cross-border contracts has remained disappointing.

Replies to the Green Paper suggest many reasons for this failure. SMEs face obstacles at every stage of the procurement procedure. SMEs must surmount many problems, such as lack of information about potential contracts, inability to draw up business plans, mismatch between the size of the enterprise and the large size of many contracts, anxiety about currency fluctuations, and the need to meet standards, certification and qualification requirements. Other problems, such as delays in payment, may arise in the post award stage.

The Commission will adopt a comprehensive and concerted approach in a communication on SMEs and public procurement. This strategy will, in particular, develop the possibilities of improving access to information, crucial for SME, by consistent application of information and communications technology.

This approach will be based particularly on an information policy based on electronic communication, high quality services provided by European-scale networks focused on SMEs, on better mutual recognition of qualification systems, on clarification of general provisions generally applicable to below thresholds, on promoting co-operation between SMEs and on the conditions for SMEs participation in large-scale projects.[16]

3.1.5 *Qualification of suppliers*

Purchasers must be given the confidence to deal with new and previously unknown suppliers. Several Member States have set up nation-wide qualification systems, while in other Member States individual contracting entities have created their own qualification system.

The Commission sees an important role for qualification systems, provided they do not result in additional barriers for suppliers. The principle of mutual recognition applies in this area: a supplier which has been qualified in one Member State should also be able to use this qualification in others, without having to be qualified again or at least without having to go through the full qualification procedure in other Member States. The Commission will use all the means available to it, in particular the powers conferred on it by Article 169, to ensure that the principle of mutual recognition is respected and that qualification systems are used to open up markets rather than to create new barriers.

In order to make different national qualification systems in the construction industry more comparable, the Commission has given a mandate to the standardisation bodies CEN and CENELEC to develop a European standard for qualification of construction enterprises for contracts covered by Directive 93/37/EEC. This standard, which the Commission awaits, will ensure a balance between the legitimate requirements of contracting authorities to have certain information at their disposal and the wish of suppliers to see administrative requirements limited to a strict minimum.

The Commission will also consider in which other areas a similar process of harmonisation of qualification systems can be undertaken.

3.2 Towards efficient electronic procurement

3.2.1 *Preparing the EU to meet the exciting new challenge of electronic commerce*

One of the most exciting and challenging developments for the future of public procurement is the emergence of the new Information and Communication Technologies (ICTs). These technologies allow the current procedures to run more smoothly and could

[16] See also points 2.1.3, 3.1.2., 3.1.3., 3.1.5., 3.2. of this communication and OJ C 285 of 20.9.1997, p. 17. For the European Economic Interest Grouping (E.E.I.G.).

enable a more efficient purchasing process, reducing the need for detailed regulation. They also offer the best possibility yet to ensure meaningful participation of SMEs in the procurement process. The Commission and the Member States are co-ordinating their efforts in this regard within the SIMAP project, which has been funded through the Commission's IDA project[17].

On 12th December 1997, the Commission proposed a second phase of the IDA programme to the EP and the Council. In this second phase, the Commission proposes to enhance and extend the SIMAP-project to comprise the entire procurement process.

The Commission will ensure that the tools and systems developed through its SIMAP Information System will be compatible with and not duplicate tools already developed by the private sector The Commission will furthermore ensure that all the requirements of the Member States are taken into account in the SIMAP framework.

The SIMAP system for electronic creation and submission of procurement notices has been tested through pilot projects with a limited number of purchasers and suppliers throughout the Community and the EEA and will now be made available to all contracting entities.

The Commission will provide the possibility to all contracting entities to electronically prepare and submit their notices for publication through procurement transparency system operated by the EU institutions. Several options, including electronic mail and the Internet, will be provided.

The software developed through Simap has been found to result in substantial savings for the EU taxpayer and deliver better information to suppliers through more consistently accurate notices. However, costs to the taxpayer will remain unacceptably high so long as contracting entities continue to submit poor-quality notices, which do not comply with the legal obligations imposed by the Directives. Finally several comments stress the high costs of TED and the difficulties of using the paper OJ "S" series on account of the increasing number of notices published.

The Commission will consider incentives to encourage contracting entities to use these electronic means of submission. Currently a notice must be published within twelve days of being sent. Where electronic mail and the Internet are used to provide instant publication the Commission intends to propose to reduce the overall length of the procedure, for example from 52 to 40-45 days (in an open procedure).

The Commission will continue to publish notices without cost to the procuring entity only when it submits a notice which complies with the

[17] Interchange of Data between Administrations

formal requirements of the Directives, includes a reference to the CPV and follows standard forms or model notices. In other cases the costs of ensuring notices meet those requirements will be recovered from the contracting entity concerned.

The Commission has decided to discontinue the publication of the paper version of the Supplement to the Official Journal from July 1998. It will be replaced by the CD-ROM version already being available. Moreover, the TED database will be made available to all users for free over the Internet.

For ease of use suppliers should be able to find all notices in one single location. In order to prepare a bid, however, suppliers need more information than that provided in the notice. They need in particular the tender documents themselves. The new ICTs, and in particular the emergence of the Internet, offer important new opportunities in this regard. Another basic characteristic of this development will be to make it easier than at present to publish tender notices in all the Community languages.

The Commission will encourage the publication of all tender documents, in particular in open procedures, on the Internet. It invites contracting entities who already have a site ("homepage") on the Internet, to make tender documents available on a "purchaser profile" on their homepage. In order to promote the establishment of such purchaser profiles the Commission will make model software available over its SIMAP homepage.

3.2.2 The way ahead: pan-European electronic procurement

Although the Commission has a clear role in the collection and dissemination of public procurement notices, the development of fully-fledged electronic procurement systems is not its direct responsibility.

The Commission calls for the active participation of interested purchasers and suppliers, companies active in the ICT sector and others, including Euro Info Centers, in order to stimulate the development of a pan-European electronic procurement environment in which a substantial number, for example 25%, of all procurement transactions takes place electronically by the year 2003.

Member States also have a very important role to play in promoting electronic procurement. The highest potential for savings will probably exist for relatively small purchases of readily available, "off-the-shelf" products. Such purchases often remain below the threshold values laid down in the Directives.

The Commission will seek a commitment from the Member States to ensure mutual compatibility and interoperability of electronic procurement systems which they set up for below threshold purchases. To facilitate such compatibility it will publish any necessary specifications on the SIMAP homepage.

Pilot projects will be identified which use electronic mail, electronic data interchange and Internet technology to conduct procurement activities. These projects will, of course, need to respect the principles of non-discrimination and transparency. Specific attention will be given to the use of electronic catalogues, virtual procurement networks and the promotion of best practice through procurement clubs.

The Commission will come forward with recommendations for further measures to be taken in modifying the legal regime, developing standards or specifications or establishing a regulatory framework. The Commission will ensure that the requirements of electronic procurement are taken into account in any proposals for standards or legislation on digital signatures.

The Commission recognises that electronic procurement needs to be seen in the context of globalisation. It will increasingly play an important role in opening-up markets outside the EU (see also point 4.4). Bilateral contacts have already started with some of our major trading partners.

The Commission will seek agreement with its international partners in the WTO in order to simplify and harmonise the exchange of information on both public procurement opportunities and statistics in the electronic procurement context.

3.2.3 Measures proposed

The majority of comments received highlighted the need to allow the widespread use of Information and Communication Technologies (ICT). Recent amendments to the Directives already allow the use of electronic mail in some procurement procedures. Further changes are needed, however, to allow its use e-mail for all exchanges of information specified in the Directives (see also point 2.1.2).

The Commission will propose amendments to the Directives to put electronic means of exchanging information on an equal footing with other means.

The hardly predictable development of electronic procurement makes it difficult to modify the Directives to reflect the latest state of the art. The Commission intends to encourage electronic procurement through pilot projects, before proposing major changes to the regime. These pilots may need waivers from certain provisions in the Directives for the duration of a pilot. Where pilots demonstrate their value, formal changes of the Directives can, be contemplated to allow for their general and more permanent application. Obviously the underlying principles (non-discrimination/equal treatment, transparency etc.) should not be jeopardised by such waivers and should at all times be guaranteed.

The Commission will allow as soon as possible the running of pilot projects in order to test specific electronic procurement procedures. To this effect it will also take the necessary legislative initiatives to allow such projects to take place as soon as possible while respecting the principles of the public procurement regime. The details of these initiatives will be determined after discussions with all interested parties, including in particular the Member States who should allow similar projects to take place for below-threshold purchases. The Commission will continue to take an active part in related discussions which are currently taking place in the WTO committees on modifying the Government Procurement Agreement (see point 4.6.2).

4 COMPLEMENTING AND ACHIEVING SYNERGY WITH OTHER COMMUNITY POLICIES

4.1 Objective

The Communities' public procurement policy integrates Member States' procurement markets into the single market putting in place a market economy with free competition. The decision in favour of "best value for money" principle is more and more heard in the area of defence procurement. Budgetary pressure and the need for a serious restructuring of the supply side in this sector have fostered a debate on how to extend the principles of competitive procurement to defence procurement.

The best value for money objective in public procurement does not exclude taking environmental, social and consumer protection considerations into account. Nor does it require changing the present rules. It is, however, necessary to lay down clear guidelines to purchasers on how they how environmental and social criteria can be taken into account in their contract award procedures, while complying with Community law, particularly as regards transparency and non-discrimination and the public procurement rules. Such guidelines are necessary if European suppliers are to be placed on an equal footing.

Public procurement contracts in third countries are of significant interest for European firms, especially when it comes to infrastructure projects. Opening these market opportunities for our European suppliers is therefore an integral part of the Communities' public procurement policy. In order to allow European firms to win procurement contracts outside the Union and the European Economic Area, the same objectives as followed for inside the Union need to be pursued vis à vis our trading partners.

4.2 Defence

In its recent communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions entitled *Implementing European Union Strategy on Defence-related Industries*[18], the Commission announced measures in defence procurement, following the appropriate procedures in accordance with Article M of the Treaty on European Union, to lay down binding principles, rules and mechanisms for transparency and non-discrimination in procurement, taking the current Community public procurement rules as a model.

The rules that will apply to procurement of defence equipment will contribute substantially to the creation of a competitive defence technological and industrial base.

[18] COM(97) 583 final, 4.12.1997.

The framework should make provision for competitive tendering whenever feasible.

Furthermore, it must favour the maintenance and development of the fundamental industrial capabilities and key technologies at European level. In addition, the rules must guarantee security of supply, while enabling a progressive elimination of over-capacity.

To this end, taking into account the need to build broad support in this matter, it is necessary to establish an appropriate set of principles, rules and mechanisms on procurement by the defence sector. In order to take into account the specificity of the defence sector, and in particular the need for confidentiality and security of supplies, an appropriate level of flexibility should be envisaged where necessary.

For this purpose, materials for the defence sector could be divided into three categories:

- Products intended for the armed forces but not for military use, and therefore covered neither by Article 223 EC nor by Article 2 of Directive 93/36/EEC (markets declared secret, protection of vital interests, national security, etc.). As these products are already subject to the Community public procurement rules, the Commission will specify, where appropriate and in the most suitable form, the conditions for the application of these rules;

- Products intended for the armed forces and for military use, but not constituting "highly sensitive defence equipment". The Commission could work out a fairly flexible set of rules, while respecting the principles of transparency and non-discrimination, inspired by the existing Community public procurement rules;

- Highly sensitive equipment covered by the scope of Article 223 EC. These products could be exempted from the rules referred to above, when safety or the protection of vital national interests of the country in question so requires. A notification mechanism for this purpose should be provided in order to ensure a degree of control and transparency.

4.3 Protection of the environment

The environment is becoming an increasingly important component of any modern economic policy. The Amsterdam Treaty fully recognises this by raising environmental objectives to one of the Union's priorities. As confirmed by the contributions received, more and more public purchasers wish to buy products and services, which are environmentally friendly. Several Member States are already pursuing an active policy. OECD has adopted a recommendation on "Greening Public Procurement"[19]. For its part, the Commission is implementing a plan for environmental protection in its administration, and, in particular, it's purchasing.

[19] Recommendation of the Council on Improving the Environmental Performance of Governments, adopted 20.2.1996.

The Commission re-emphasises that Community law, and the public procurement directives in particular, offer many possibilities of taking environmental protection into account in public purchasing. The Commission recalls the existing possibilities below.

- In general, any administration which so wishes can, in defining the goods or services which it intends to purchase, choose the products and services which correspond with its pre-occupations for the protection of the environment. The measures taken must, of course, comply with the rules and principles of the Treaty, particularly that of non-discrimination.

- The rules of the public procurement directives allow, in certain instances, the exclusion of candidates who are in breach of national environmental legislation.

- Purchasing organisations can draw up technical specifications concerning the characteristics of works, supplies and services, which are the object of public procurement, which take account of environmental values. They can from now on encourage the development of a positive approach by companies to the environment, in accepting tenders offering products, which meet the requirements, defined in the specifications.

- The directives allow the inclusion of the objective of protection of the environment in the criteria of selection of candidates in so far as these criteria are aimed at testing their economic, financial and technical capacity.

- As regards the award of contracts, environmental elements can serve to identify "the most economically advantageous offer", in cases where these elements imply an economic advantage for the purchasing entity, attributable to the product or service which is the object of the procurement. In evaluating tenders, a purchasing organisation can, for example, take account of costs of maintenance, treatment of waste or re-cycling.

- A contracting authority can require the supplier, whose tender has been accepted, that the deliverable, which is the object of the contract, be provided with due regard to certain constraints aimed at safeguarding the environment. These conditions of execution must be known in advance by all the tenderers.

In general, the Commission reiterates that the object of public procurement remains essentially economic and that it is of the utmost importance to determine, for each procurement, the environmental factors linked to the goods and services required, which can, in consequence, be taken into consideration in a contract award procedure.

The possibilities offered by the existing regime, which have just been spelled out above, will be developed and clarified in a specific interpretative document in order to enable the optimum consideration of environmental protection in public procurement (see point 2.1.3). In this exercise, the Commission will, in particular examine how far it is possible to refer in technical specifications to the European eco-label or even to national eco-labels. In the same way, it will analyse the question of whether purchasing entities can require suppliers to have an eco-audit system, such as EMAS or ISO standard 14001.

The Commission cannot, however, propose solutions in an interpretative document, which go beyond the existing public procurement regime. These would require amendments to the legislation.

In order to promote those practices which give the best results and respect the principles stated above concerning the integration of environmental aspects in public procurement, the Commission undertakes, with interested Member States and the private sector to develop initiatives which would make it easier to define environmental concerns in the tender documents in a balanced manner.

4.4 Public procurement and social aspects

Social policy is of the greatest importance for the European Union. It aims, among other things, at promoting a high level of employment and social protection. Furthermore, the Amsterdam Treaty lays down as a priority the elimination of inequality and the promotion of equality between men and women in all the policies and activities of the European Union and requires it to combat every type of discrimination.

The Commission has already indicated in its Green Paper the conditions under which social criteria can play a role in contract award procedures, particularly the possibility of including the obligation to comply with existing social legislation, especially Community social legislation and, where appropriate, that emerging from the International Labour Organisation (ILO).

There is a range of possibilities for public administration to take the pursuit of social objectives into consideration in their purchasing:

- The rules of the public procurement directives allow the exclusion of candidates who breach national social legislation, including those relevant to the promotion of equality of opportunities.

- A second possibility is to lay down as a condition of execution of public contracts, compliance with obligations of a social character, aimed for example at promoting the employment of women or encouraging the protection of certain disadvantaged groups. Of course, only those conditions of execution are authorised which do not discriminate, directly or indirectly, against tenderers from other Member States. Moreover, indicating these conditions in the tender notice or the specification must ensure sufficient transparency.

Contracting authorities and entities can therefore be called upon to implement the various aspects of social policy in awarding contracts, public purchases in practice constituting a significant means of influencing the behaviour of economic operators. One can cite, as an example of this situation, legal obligations to protect employment and working conditions, which must be enforced on the site where a public works contract is being carried out. Yet again, there are the so-called "positive actions", that is the use of a public contract as a means of achieving the objective sought, for example, establishing a captive market for a sheltered workshop, which could not reasonably be expected to stand up to competition from classic commercial companies with a normal level of productivity.

As in the case of the environment, the Commission intends to clarify the principles, which can be applied to allow social factors to be taken into account.

It re-iterates that public contracts can be a means of influencing the actions of economic operators, providing the limits laid down by Community law are respected. In this context the Commission encourages the Member States to use their procurement powers to pursue the social objectives mentioned above. The Commission will act similarly in its own procurement activity.

4.5 Consumer protection

The improvement of market access and transparency through the implementation of an effective procurement policy will bring significant benefit to consumers, including better quality and more economically efficient services and infrastructures. It is therefore necessary to take greater account of consumer policy in the Union's procurement policy, especially with regard to the promotion of transparency and dialogue with consumer organisations.

4.6 International aspects

4.6.1 Opening up third-country public procurement markets for European companies

The Government Procurement Agreement (GPA), which was last amended in 1994, lays down disciplines between a limited number of countries including the world's major trading blocks. These disciplines cover the traditional national treatment and most favoured nation principles but also contain precise requirements with regard to procurement procedures, akin to those in the Directives. Thus the GPA affects the regulatory regimes of the adhering countries, including the EU, in a far-reaching manner.

The Commission will continue to take all steps necessary to ensure that the legal instruments creating opportunities for EU companies are effectively complied with.

On the multilateral front, it will seek to further open up third country public procurement world wide, with a view to eliminating those barriers to trade, which are harmful to European interests. The EU's final objective is to obtain multilateral adherence to a code on procurement though its inclusion in the WTO single undertaking. The work undertaken in the WTO, such as the review of the GPA, the negotiations on public procurement of services within the GATS and the working group on transparency rules in government procurement, should help to achieve this objective. In addition, there are ongoing processes in other fora, such as the OECD or Uncitral.

On the bilateral front, the Commission will continue its efforts to open-up third country markets by concluding bilateral agreements as an alternative or as a complement to its multilateral policy.

Electronic procurement is becoming increasingly widespread and will be one of the main aspects of our external policy in procurement. It is already one of the key aspects, which are being discussed at multilateral level, in particular in the WTO's GPA and Transparency Groups. The use of ICTs can indeed play a major role in achieving real and meaningful transparency of procurement world-wide. But the Commission sees its task at the multilateral level first and foremost as ensuring that the EU's international commitments are consistent with its internal policy on electronic procurement so that the development of the latter is not hindered. In addition, it will, as indicated in point 3.2 above, pursue these matters bilaterally with its major trading partners.

The Commission intends to actively participate in these fora in order to create the right conditions to allow European Industry to enhance competitiveness and maximise commercial opportunities.

It is also the Commission's intention to ensure that rules and practices at international level with respect to the use of information technology in the field of public procurement are consistent with its own internal policy on the matter.

4.6.2 Integrating neighbouring economies into the Union's public procurement policy

In some situations our relations in the field of public procurement with third countries go beyond the trade and even the regulatory aspects. This relates in particular to the Central and Eastern European Countries (involved in the pre-accession process) and the Mediterranean Countries. Market opening is not the main objective in this context, but rather a tool to improve the economic situation of these countries. With regard to the CEECs, the adoption of the *acquis communautaire* is also part of the AEU's current policy. Asymmetric liberalisation and the development of comprehensive technical assistance programmes should remain the basis of the AEU's future policy in this area, in particular with respect to the Mediterranean countries.

The Commission is preparing "Road Maps" adapted to the specific situation of each of the candidates for accession which will set out priorities and actions in order to help them in their efforts to take over the *acquis*. The Commission will address this issue in a communication on the single market and the Mediterranean area further to the Barcelona Declaration, which aims at establishing a Free Trade Area.

4.6.3 Ensuring efficiency in the award of contracts financed by the EU within the context of external aid

The Commission is concerned about achieving economy and efficiency in the management of the Community's financial resources. In this respect, the responsibility of the Commission includes not only contracts awarded by the Commission itself (see point 2.2.6 above), but also contracts financed by EU funds in the context of external aid.

On the one hand, it is justified in insisting on ensuring a certain European visibility when awarding contracts financed by the EU funds in the context of the external aid. On the other hand, the Commission believes that countries receiving EU funds need to achieve economy and efficiency in their public sector operations, and should also respect the principles of transparency and accountability in public administration.

To achieve these objectives, it is necessary to apply best practice and best management principles based on competitive procurement in the award procedures. Economic benefits for the recipient countries arise from the use of sound procurement policies and practices (such as value for money, improved competitiveness of local industry, increased efficiency in public administration, more foreign investment etc.).

Joining the WTO Agreement on Government Procurement, which forms a legal basis for open and competitive public procurement on an international basis, would be a desirable objective in this respect. The Commission is nevertheless aware that it will be difficult for most of the countries receiving EU funds to join this agreement or even adopt national procurement rules based on competitive tendering at this stage, since these countries may be economies in transition, developing countries or even least developed countries.

As a result, the Commission will continue to see to it that contracts financed from Community resources in the framework of external aid are awarded in a competitive manner by the recipient countries by respecting the relevant EU rules governing this matter, as well as those established within the framework of bilateral or regional agreements concluded by the European Union. In this regard, the Commission has already presented proposals in order to harmonise the different rules and procedures presently used for awarding certain contracts financed by the EU resources.

In order to improve the protection of the financial interests of the Community, the Commission has improved the legal framework regarding Structural Funds by adopting Regulation no. 2064/97[20], which will also enable better control of public procurement contracts awarded by national authorities but co-financed on the Communities' budget, which will help in fighting corruption and avoiding irregularities.

[20] JO L No.290 of 23.10.1997.

ANNEX

STATUS OF IMPLEMENTATION OF THE PUBLIC PROCUREMENT DIRECTIVES

DIRECTIVES	BE	DK	DE	GR	ES	FR	IRL	IT	LU	NL	PT	UK	AUT	FI	SE
89/440/EEC Works (18.7.1989) In force since 19.7.1990 GR, E, P : 1.3.1992 AT, FI, SE : 1.1.1994 replaced by **93/37/EEC**	▥				■			▥			▥				▥
88/295/EEC Supplies (2.3.1988) In force since 1.1.1989 GR, E, P: 1.3.1992 AT, FI, SE: 1.1.1994											▥				
89/665/EEC Remedies (21.12.1989) In force since 21.12.1991 AT, FI, SE: 1.1.1994			▥		▥						▥		▥		▥
90/531/EEC Utilities (17.9.1990) In force since 1.1.1993 E: 1.1.1996 GR, P: 1.1.1998 AT, FI, SE: 1.1.1994			▥	■	■						■				▥
92/13/EEC Remedies for Utilities (25.2.1992) In force since 1.1.1993 AT, FI, SE: 1.7.1994 E: 30.6.1995 GR, P: 30.6.1997			▥	■	■	▥		▥			■	▥	■		▥
92/50/EEC Services (18.6.1992) In force since 1.7.1993 AT, FI, SE: 1.7.1994	▥			■		■		▥			▥		■		▥
93/36/EEC Supplies (14.6.1993) In force since 14.6.1994 AT, FI, SE: 1.7.1994	▥				▥			■			▥		■		▥
93/38/EEC Utilities (14.6.1993) In force since 1.7.1994 AT, FI, SE: 1.7.1994 E: 1.1.1997 GR, P: 1.1.1998				■	■	■					■		■		▥

Key:

■	**National implementing measures not communicated or only partly communicated**
▥	**National implementing measures communicated and checked; infringement proceedings for non-compliance under way**
	National implementing measures communicated

ANNEX 2

TIME TABLE

PRINCIPAL MEASURES TO BE ADOPTED	ADOPTION BY THE COMMISSION
Legislative package making some adjustments to the legal framework as regards Directive 93/38/EEC, competitive dialogue procedure, framework contracts, concessions. (See point 2.1.2.)	1998
Implementation of Article 8 of Directive 93/38/EEC	Immediately
Communications and interpretative documents (2.1.3.)	2. semester 1998 to 2. semester 1999
Communication on concessions and problems associated with trans-european networks (TENs) (2.1.2.4.) Reflection and discussion on questions connected with various forms of public-private partnership (2.1.2.4.)	2. quarter 1998
Consolidation of the classic directives (2.1.3.)	2001
Improvement of procedures of supervision at Community level (2.2.2.)	Immediately
Launching of measures to encourage the setting up or designation of independent authorities (2.2.3.)	Immediately
Improvement of the Commission's contracting procedures (not requiring legal changes) (2.2.7.)	Immediately
Developing a policy for public procurement training (3.1.3.)	2. semester 1998
Communication on SMEs and public procurement (3.1.4.)	2. semester 1998
Support for pilot operations on electronic tendering (3.2.2.)	2. semester 1998
Establishment of an appropriate set of principles, rules and mechanisms on procurement by the defence sector (4.2)	1998

Important legal notice

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Public procurement in the European Union: communication

1) OBJECTIVE

To make the public procurement system work better.

2) COMMUNITY MEASURE

Commission communication of 11 March 1998: Public procurement in the European Union.

3) CONTENTS

Public procurement is one of the areas of the single market where the results of the liberalisation drive have not yet measured up to expectations. This communication suggests ways and means of improving contract award procedures, while taking account of the reactions received in response to the publication in 1996 of the Green Paper *Public procurement in the European Union: Exploring the way forward*.

The communication stresses that more efficient public procurement will not only lead to an improvement in the quality of public services, economic growth, competitiveness and job creation, but will also contribute to the fight against corruption in the European Union.

As the discussion launched by the Green Paper has shown, it is essential to simplify the legal framework and adapt it to the electronic age, while maintaining the stability of the basic structure and avoiding unnecessary changes which would involve more legislative work. The measures proposed in the communication are chiefly geared to these objectives. The communication also contains proposals aimed at stepping up compliance with the existing rules, encouraging more suppliers to respond to invitations to tender and strengthening synergy with other Community policies.

Simplifying the legal framework means both clarifying provisions which are obscure or complex and adjusting the rules in force where the problems to be addressed cannot be solved through interpretation of the provisions. The aim is to make contract award rules and procedures clearer and more flexible. The proposed legislative package comprises the following measures:

- submission of proposals to exclude from the scope of Directive

93/38/EEC the sectors or services to which it at present applies (water, energy, transport and telecommunications) and which operate, in each of the Member States, under conditions of effective competition;
- introduction of more flexible award procedures, namely the competitive dialogue, which will replace the existing negotiated procedure with prior publication of a notice, and flexible long-term contracts (framework contracts);
- establishment of a legal framework covering the involvement of private capital in the financing and operation of infrastructures and public services (public-private partnership);
- clarification and consolidation of the existing rules.

Action by the Community to make public procurement work better should not be confined to new legislative initiatives; ensuring that the existing rules are properly applied and enforced is equally important. With that aim in view, the communication proposes the following measures:

- improving checks and enforcement procedures at Community level. The Commission will make more pro-active and systematic use of its powers under EC Treaty Articles 169 (infringement proceedings) and 171 (requesting the Court of Justice to impose penalty payments) where Member States fail to comply with the rules. It will also look into the desirability of setting in place special machinery for dealing with serious infringements in the public procurement field;
- designating independent authorities responsible for handling disputes in the public procurement field at national level;
- improving information on the way in which public procurement operates in practice. The Commission will endeavour to ensure that the obligation to publish contract award notices is complied with and will propose that statistical requirements be scaled down, in order to facilitate the provision of information by public authorities. It will also carry out of its own initiative a number of economic studies that are necessary in order to gain a better understanding of the way in which public procurement operates;
- enhancing the attestation system for suppliers by conferring certain benefits on entities that have agreed to undergo attestation;
- fighting corruption through measures such as a blacklisting system and excluding from public tender procedures applicants who have links with organised crime;
- ensuring that the public procurement rules are observed in the case of contracts concluded by the Commission itself and contracts financed by the Community in the context of external aid and the structural funds.

The success of the Community's public procurement policy depends first and foremost on the extent to which suppliers bid for contracts. So far, too few suppliers have been responding to calls for tenders. The communication therefore proposes a set of measures designed to boost the rate of supplier participation, especially among small and medium-sized enterprises (SMEs):

- making markets more transparent through better information;
- boosting the reliability of contract award procedures through training focused on professionalism and best practice;
- taking action to make public procurement more accessible to SMEs;
- providing for mutual recognition of national supplier qualification systems, so that a supplier who has obtained qualification in one Member State can use that qualification in other Member States without having to demonstrate his suitability over again.

Increased use of the new information and communication technologies in public procurement could allow the current procedures to run more smoothly, efficiently, systematically and rapidly. It could also lead to substantial savings for European taxpayers. The Commission and the Member States are already coordinating their efforts in this area within the SIMAP (information system for public procurement) project. In its pilot phase, the project has already enabled a limited number of purchasers and suppliers to create and transmit contract notices electronically. The Commission intends to extend and develop this project in order to cover the entire public purchasing process; it also plans to replace the hard-copy version of the "S" Supplement to the Official Journal with a CD-ROM version, to make the TED (Tenders Electronic Daily) database accessible free of charge to Internet users and to encourage awarding entities to publish more comprehensive information concerning their tenders on the Internet.

One of the first steps to be taken is to amend the Directives and technical standards in order to put electronic means of exchanging public procurement information on an equal footing with other means. The Commission will also ensure that the requirements of electronic procurement are taken into account in any proposals for standards or Community legislation on digital signatures.

The introduction of electronic procurement systems does not depend on the Commission alone, but also on the Member States and individual suppliers and purchasers, especially for purchases worth less than the thresholds laid down in the Community Directives. The Member States should therefore be urged to encourage the compatibility and interoperability of electronic procurement systems.

With a view to enhancing synergy with other Community policies and making contract award procedures more transparent, contracting entities need to be given clear guidelines on how they can take environmental, social and consumer protection criteria into account. The Commission also announces measures to make defence procurement more transparent and less discriminatory.

The communication repeatedly stresses the need to coordinate Community action in the public procurement field with non-member countries. On the multilateral front - in particular within the context of the Government Procurement Agreement (GPA) - but also in bilateral relations, the Commission will strive for more open public procurement in non-member countries. The ultimate objective of these efforts is adoption of a multilateral code on public procurement under the auspices of the World Trade Organisation (WTO).

4) DEADLINE FOR IMPLEMENTATION OF THE LEGISLATION IN THE MEMBER STATES

Not applicable.

5) DATE OF ENTRY INTO FORCE (if different from above)

6) REFERENCES

Commission communication COM(1998) 143 final
Not published in the Official Journal

7) FOLLOW-UP WORK

8) COMMISSION IMPLEMENTING MEASURES

Communication - Official Journal C 121, 29.04.2000
Commission interpretative communication on concessions under Community law.